



Death Penalty: Determine If Capital Punishment Has Outlived Its Use

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So far this year, the federal government has executed eight people.¹ One despite pleas for leniency from the victims' mother and grandmother.² Another despite the prisoner's dementia and questions of competency.³ And another despite the fact that he was a teenager at the time of the crime, something the federal government had not done in almost seventy years.⁴ The list goes on, and in January, the federal government plans to execute a woman, again something it has not done in almost seventy years.⁵ The federal government scheduled Lisa Montgomery's execution despite her debilitating mental health problems and despite a lifetime of abuse, including repeated gang rapes arranged by her mother so young Lisa could "earn her keep."⁶ All in all, the federal government will execute at least twice as many people in 2020 than it did in the preceding half century,⁷ with more executions scheduled before Inauguration Day.⁸ Undoubtedly, capital offenses are horrible, but it is hard to see what good comes from executions. The Biden administration should determine if capital punishment has outlived its use.

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¹ See, *Outcomes of Death Warrants in 2020*, DEATH PENALTY INFO. CTR. (DPIC) (last visited on Nov. 7, 2020).

² Andrew DeMillo, *Victims' Relatives Most Vocal Opponents of Man's Execution*, AP NEWS (July 13, 3030).

³ Michael Balsamo & Jessica Gresko, *US Executes 2nd Man in a Week; Lawyers Said He had Dementia*, AP NEWS (July 16, 3030).

⁴ See DPIC, *supra* note 1 (Christopher Vialva); see also Jason Chein, *Insight: Adolescent Brain Immaturity Makes Pending Execution Inappropriate*, BLOOMBERG L. (Sept. 17, 2020).

⁵ See *U.S. Government Sets Two More Execution Dates, Seeking to Put to Death the First Woman and the Youngest Offender in More Than Six Decades*, DPIC NEWS (Oct. 19, 2020).

⁶ See *The Case of Lisa Montgomery*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (last visited on Oct. 31, 2020).

⁷ See DPIC, *supra* note 1; see also *Capital Punishment*, FED. BUREAU OF PRISONS (last visited on Nov. 16, 2020).

⁸ *Id.*

Although the American death penalty is predominantly under the control of state actors,⁹ the President of the United States does have the authority to limit or eliminate the use of the federal death penalty and to set an example that could significantly impact state death penalty practices. Thus, the future, and at a minimum the near future, of the American death penalty could be significantly affected by the actions of the incoming administration. Through executive action, the Biden administration should: (1) immediately put in place a moratorium on federal executions; (2) order a robust study of federal and state death sentencing practices; (3) deauthorize all pending federal death penalty cases pending the results of the study; (4) order the Food and Drug Administration (FDA) to halt importation and interstate transportation of execution drugs and investigate how the drugs are obtained, handled, and used; (5) work with Congress to pass a habeas corpus reform bill; and (6) commute the unjust federal death sentences.

Prosecution policies have historically been decided by the attorney general, and decisions about a moratorium would be the attorney general's to make. President Biden should nominate the right attorney general to implement the moratorium, oversee the nationwide study, and halt all ongoing federal capital prosecutions. The Biden administration, United States Attorneys, and other executive branch actors could try to persuade states to follow suit. Ideally, the American death penalty would be put on hold until the study is complete because anyone put to death during that process, if the death penalty is suffering from systemic defects, will have no recourse.

The federal government did something like a nationwide study in 1990, and the report was turned in to the Chairman of the Committee on the Judiciary, the Honorable Joseph R. Biden, Jr.¹⁰ But the study focused only on the role race played in death sentencing, and it reviewed existing studies rather than conducting its own. The commission found that race influenced death sentencing. Although racial bias may be its greatest evil, the American death penalty has other flaws identified in state specific studies which likely would resonate with a majority of the American people.¹¹ A new, independent, and comprehensive study is needed, and it should include, for example: Does the death penalty serve a legitimate penological purpose given the widespread availability of life without parole as an alternative? What are the financial costs of maintaining a death penalty system and could the resources currently sustaining capital punishment be used more effectively if diverted to other areas of needed criminal justice system reform? What roles do race, gender, socioeconomic status, and mental health play in determining who is sentenced to death?¹²

⁹ States are responsible for more than 99 percent of American executions and more than 97 percent of the people on death row. See *Execution Database*, DPIC (last visited on Nov. 16, 2020); see also *Death Row Overview*, DPIC (last visited on Nov. 16, 2020).

¹⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-90-57, DEATH PENALTY SENTENCING (1990).

¹¹ See, e.g., N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (Jan. 2007); ILLINOIS COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (Apr. 2002).

¹² President Obama ordered a study, but it never materialized. See *Exclusive: Obama Calls the Death Penalty "Deeply Troubling."* MARSHALL PROJECT (Oct. 23, 2015).

The Biden administration should also immediately begin investigating how states are using pharmaceuticals to execute people. It does not take a nationwide study to understand that states are inept at carrying out lethal injections. Indeed, lethal injection was intended to be more humane than earlier methods, but of all execution methods currently in use, it carries the greatest risk of a botched execution.¹³ For example, Joseph Wood “gulped like a fish on land” for ninety minutes when Arizona executed him.¹⁴ The late Senator and Prisoner of War John McCain described it as “torture.”¹⁵ Executions should not involve torture. The FDA should investigate how states and the federal government are obtaining, handling, and using lethal injection drugs and how they have done so in the past.

For years, the FDA has been interested in how states are carrying out executions.¹⁶ In 2011, the FDA caught on that states were importing unapproved execution drugs (thus illegally importing them), and the Drug Enforcement Agency began inspecting prisons to determine the legitimacy of their execution drugs.¹⁷ It went to prisons in Georgia, Tennessee, Kentucky, South Carolina, and Alabama, and the DEA confiscated unapproved execution drugs.¹⁸ Then in 2015, the agency impounded shipments of drugs heading to Texas and Arizona.¹⁹ The Trump administration has since stopped the FDA from interfering with states importing execution drugs, and Texas has sued the FDA to get its impounded drugs back.²⁰ The Biden administration should reverse course and reclaim the FDA’s power to oversee the handling of execution drugs. The FDA should heavily regulate lethal injection drugs and seek to prevent their importation and travel through interstate commerce. Moreover, it could deauthorize drugs and try to make their use illegal, so torturous executions like that of Mr. Wood are not repeated.

Additionally, the Biden administration should work with Congress to pass a habeas corpus reform bill. Federal habeas corpus historically has been one of the primary ways that persons sentenced to death in state courts obtained review by federal courts of their convictions and sentences. Currently, the federal habeas corpus statute, as a result of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), requires death row prisoners to navigate a maze of procedural obstacles, and the federal courts, including the Supreme Court of the United States, have interpreted the statute to demand near unquestioned deference to state court decisions.²¹ As a result, death row prisoners rarely have their convictions or sentences overturned even when there has

¹³ Interview by Steve Inskeep with Austin Sarat, *Death Penalty Expert on Why Lethal Injection Is So Problematic*, NPR (July 25, 2014).

¹⁴ Burgess Everett, *McCain: Arizona Execution ‘Torture’*, POLITICO (July 25, 2014).

¹⁵ *Id.*

¹⁶ Charlie Savage, *Justice Dept. Stops F.D.A. From Regulating Death-Penalty Drugs*, N.Y. TIMES (May 14, 2019).

¹⁷ Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015).

¹⁸ *Id.*

¹⁹ See Savage, *supra* note 16.

²⁰ *Id.*

²¹ See Eve Brensike Primus, *Litigating Federal Habeas Corpus Cases: One Equitable Gateway at a Time*, ACS ISSUE BRIEF 4–7 (July 2018).

been clear constitutional error.²² People should not be put to death if the trials contained constitutional error, and the fealty given to state court decisions is at odds with the original intentions behind the statute.

Responding to fears that AEDPA would undercut meaningful federal habeas review, President Clinton insisted in his presidential signing statement that “[f]ederal courts will interpret these provisions to preserve independent review of [f]ederal legal claims and the bedrock constitutional principle of an independent judiciary.”²³ Similarly, then-Senators Orin Hatch and Joe Biden, both of whom supported the bill, said explicitly that constitutional error would be enough to warrant relief.²⁴ But the Supreme Court has tortured the statutory language and explicitly said that constitutional error, even clear constitutional error, is not enough. Rather, a federal court’s hands are tied unless the underlying state court decision was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”²⁵ Congress did not intend to limit the availability of federal review to cases involving an “extreme malfunction,” and President Biden should work with Congress to repeal the more onerous provisions of AEDPA and restore a death sentenced inmate’s access to meaningful review by the federal courts.

After halting executions and death sentences, conducting a nationwide study, investigating lethal injection drugs, and working with Congress to pass habeas reform, the Biden administration should turn its attention to the clemency power. Outside of cases of impeachment, the president has unchecked power to commute sentences for offenses against the United States.²⁶ With the stroke of a pen, President Biden could commute every death sentence imposed by the federal government. Such an aggressive executive approach is typically reserved for the politically courageous.²⁷ But depending on what the study of the federal death penalty uncovers, it may be justified. At a minimum, President Biden should commute all federal death sentences demonstrated by the study to have been the result of any detected systemic defects.

²² See, e.g., David Dow & Jeffrey Newberry, *Reversal Rates in Capital Cases in Texas, 2000–2020*, 68 UCLA L. REV. DISC. 2, 12 (2020) (finding of the 151 capital habeas cases out of Texas from 2000 to 2019, only one person was ultimately successful).

²³ President Clinton’s Statement on the Signing of the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 29, 1996).

²⁴ Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1)*, 60 WASH. & LEE L. REV. 677, 694–96 (2003).

²⁵ *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

²⁶ U. S. CONST. art. II, § 2, cl. 1.

²⁷ See Statement by Illinois Governor George H. Ryan on Commuting All 157 of the State’s Death Sentences, Jan. 11, 2003.