

THE POWER OF EXAMPLE

WHITHER THE BIDEN
DEATH PENALTY PROMISE?

ABOLISH
the
DEATH
PENALTY

STOP
STATE VIOLENCE

AMNESTY
INTERNATIONAL



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The Amnesty International logo, which is a stylized figure of a person with arms raised, enclosed within a circle.

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ABBREVIATIONS

ACHR	American Convention on Human Rights
ADAA	Anti-Drug Abuse Act
AEDPA	Antiterrorism and Effective Death Penalty Act
BOP	Federal Bureau of Prisons
CERD	Committee for the Elimination of Racial Discrimination
DOJ	Department of Justice
DPIC	Death Penalty Information Center
ECOSOC	Economic and Social Council
FDPA	Federal Death Penalty Act
IACHR	Inter-American Commission on Human Rights
ACHR	American Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
MCA	Military Commissions Act
OAS	Organization of American States
UDHR	Universal Declaration of Human Rights
UN	United Nations

EXECUTIVE SUMMARY

“ IN STRIKING DOWN CAPITAL PUNISHMENT, THIS COURT DOES NOT MALIGN OUR SYSTEM OF GOVERNMENT. ON THE CONTRARY, IT PAYS HOMAGE TO IT... IN RECOGNIZING THE HUMANITY OF OUR FELLOW HUMAN BEINGS, WE PAY OURSELVES THE HIGHEST TRIBUTE”

Furman v. Georgia, United States Supreme Court, 29 June 1972, Justice Thurgood Marshall concurring

On 29 June 1972, the US Supreme Court issued a landmark decision, *Furman v. Georgia*, overturning the country's death penalty laws. As states rushed to revise their capital statutes, here was a golden opportunity for the elected branches of the federal government to provide principled human right leadership, and to work for a permanent end to judicial killing across the United States of America (USA). Such leadership never came. Presidents from Richard Nixon to Donald Trump offered an unbroken 50-year thread of support for the death penalty even as they proclaimed the USA to be a, if not the, champion of human rights in the world.

Half a century and more than 1,500 executions later, the USA has a President who campaigned for office on an abolitionist platform. President Joe Biden promised that if elected he would work for abolition of the federal death penalty and encourage the same at the state level. However, except for a temporary moratorium on federal executions, in the eighteen months since he entered the White House as President, little progress on his abolitionist pledge has been visible. What is more, his administration's defense of the sentences of all of those currently on federal death row – opposing relief and moving them closer to execution – is cause for concern. Time is of the essence, and it is passing.

Amnesty International opposes the death penalty in all cases without exception regardless of the nature or circumstances of the crime; questions of guilt, innocence, or other aspects of the case; or the method used by the state to carry out the execution. The organization does not seek to minimize the seriousness of violent crime or to downplay its consequences on individuals, their families, and the wider community. The death penalty is a punishment, however, that is a symptom of violence not a solution to it, and one which expands the grief and suffering of the relatives and loved ones of murder victims to those of the condemned. It should have no place in any justice system anywhere. While international human rights law places an expectation on governments to ensure abolition of the death penalty within a reasonable timeframe, pending abolition that same body of law requires adherence to stringent safeguards in any application of capital punishment.

Amnesty International submits that the 50th anniversary of *Furman* is an opportune moment for the US administration and members of Congress to be reminded that the world is waiting for the USA to do what almost 100 countries have achieved during this past half century – total abolition of the death penalty.¹ Abolition of the federal death penalty would be consistent with US obligations under international human rights law. It would bolster the position of those states in the USA that have already got rid of the death penalty or are moving towards doing so. It would set a positive example to individual state governments that continue to use this cruel, unnecessary, and flawed policy, as well as to the diminishing list of retentionist countries.

The US Government plumed a new low between July 2020 and January 2021 when it carried out 13 federal executions after none for 17 years. Shortly before the first of these, a US Supreme Court Justice warned that the cases of those lined up for federal execution promised to illustrate the sort of inequities that beset the death penalty at state level, and which called into question the constitutionality of the entire system. He was right. Among the cases of the 12 men and one woman put to death by the federal government were compelling examples of arbitrariness, racial discrimination, prosecutorial misconduct, mental disability, intellectual disability, inadequate legal representation, and the failure of the authorities to prioritize rehabilitation even in the case of teenaged offenders (18 and 19 at the time of the crime). The administration's drive to get as many individuals as it could to the death chamber before it left office – even in the face of a global pandemic that hindered defence lawyers representing their death row clients – generated serious doubts as to whether there was ever, in any of the cases, a genuine prospect of executive clemency as international law demands.

¹ By the end of 1971, 13 countries had abolished the death penalty in law. Today, that number has risen to 110 – more than half the world's countries. More than two-thirds of countries in the world (144) are abolitionist in law or practice.

This episode was a brutal wake-up call about what can happen if the fate of individuals on death row is handed to an executive with an appetite for seeing death sentences through to their lethal conclusion, and it led to a new interest in US Congress for abolition of the federal death penalty. However, as the execution spree fades from the memory, the political will necessary to pass legislation for abolition is at risk of dissipating too.

This report, then, stems from Amnesty International's concern that the clock is running on the Biden pledge with little to show for it. It is not a study of the federal death penalty as such or an examination of the cases of the more than 40 individuals currently on federal death row, or of those federal defendants facing death penalty trials. The report revisits the six-month federal execution spree in a bid to jog the collective governmental memory of that shameful episode and to reboot the political commitment to abolition. It also seeks to remind the US authorities of their general and specific obligations under international human rights law in relation to the death penalty, including as provided in the International Covenant on Civil and Political Rights (ICCPR).

For decades, UN treaty monitoring bodies have conducted their reviews of the USA's human rights record. Time after time, these expert bodies have called on the USA to halt executions and work for abolition. Time after time their calls have been rejected. So too at regional level. The USA has become something of a rogue outlier on the death penalty at the Inter-American Commission on Human Rights, which the USA has routinely ignored when this expert body has called for stays of execution or commutation of death sentences. So it was during the federal execution spree too. Among the issues that have come up in UN and regional human rights bodies time and time again has been the question of racial and other discrimination in the application of the death penalty in the USA. The only conclusion that can be drawn from the refusal of the US authorities to respond appropriately is that in the end they care little about the fact that executions cement such injustices into permanence.

In terms of numbers of death sentences and executions, the federal death penalty has been a small part of the national picture since the *Furman* ruling and the *Gregg v. Georgia* decision four years later in which the Supreme Court upheld new state capital laws. From 1988 (when the federal death penalty was reinstated) to June 2022, federal cases accounted for 86 death sentences and 16 executions, compared to more than 5,500 death sentences and more than 1,400 executions at state level in the same period. Nevertheless, as far as international law is concerned an execution in the USA, whether conducted at state or federal level, is a US execution.

Under international law, the federal government may not point to the fact that an action incompatible with the country's international obligations was carried out by another branch or level of government to seek to absolve the state party (the USA) of responsibility for the violation. Moreover, in addition to its own use of the death penalty, and the profoundly negative human rights example it has set, the federal government has promoted, facilitated and defended its use by states. All too often it has been silent, hiding behind the federal structure to wash its hands of the death penalty at the state level. It has fended off criticism of the death penalty on the international stage and filed briefs in the US Supreme Court in support of state authorities defending aspects of their capital justice system. In some cases, it has even added an expansionary twist to the reach of the death penalty by seeking it where the state is unwilling or unable to.

Amnesty International is calling on President Biden to commute all federal death sentences. They include the death sentence of Billie Allen, whose case features in the report. Nineteen at the time of the crime in 1997, he has spent more than half of his life on federal death row.

Again, the USA's international law obligations include ending the death penalty in law within a reasonable timeframe. Half a century after *Furman*, and 30 years after the USA ratified the ICCPR, this timeline has already been far exceeded, still with no nationwide end to judicial killing in sight. President Biden has held out the promise to change that. He, his administration, and members of Congress must redouble their efforts now.

KEY RECOMMENDATIONS

TO THE PRESIDENT OF THE USA:

- Immediately commute all existing federal death sentences.
- Support a public information campaign about abolition aimed at demonstrating the facts about arbitrariness, racial bias and impact, errors and other realities of capital justice; the requirements of international human rights law; and the national and global trends towards abolition.

TO THE US CONGRESS:

- Immediately work with the White House to promptly enact legislation to abolish the federal death penalty.

TO THE US DEPARTMENT OF JUSTICE:

- Maintain the moratorium on executions until abolition of the federal death penalty is signed into law and all federal death sentences have been commuted.
- Support commutation of every current federal sentence of death.
- Work actively to vacate every current federal death sentence rather than oppose relief.
- Instruct all US attorneys that the government will no longer authorize pursuit of death sentences in federal prosecutions and ensure motions are filed in all pending federal capital prosecutions to request that the court allow withdrawal of any active Notices of Intent to Seek the Death Penalty.
- Actively oppose the death penalty in any litigation in any case in which the federal government is involved at state or federal level that touches directly or indirectly on this punishment and make clear in any such legal materials that the US government is committed to abolition.

TO THE US STATE DEPARTMENT:

- Ensure implementation of outstanding recommendations to the USA made by UN and regional human rights monitoring bodies, including on the death penalty.
- Vote in favor of UN General Assembly resolutions on a moratorium on the use of the death penalty and support other international initiatives in favor of abolition.

1.0 THE POWER OF EXAMPLE

“LEADERSHIP ON HUMAN RIGHTS GOES FAR BEYOND MERELY REMINDING OTHER COUNTRIES OF THEIR OBLIGATIONS AND COMMITMENTS, POINTING OUT FAILURES, AND REGISTERING OUR DISPLEASURE. IT INVOLVES LEADING BY EXAMPLE, ACKNOWLEDGING OUR SHORTCOMINGS, AND STRIVING TO LIVE UP TO OUR HIGHEST IDEALS AND PRINCIPLES”

US Secretary of State Anthony Blinken, March 2021²

On 10 December 1948, the world adopted the Universal Declaration of Human Rights (UDHR) as “a common standard of achievement for all peoples and all nations” and pledged to take “progressive measures” to secure “universal and effective recognition and observance” of the rights therein, including the rights to life and to freedom from torture and other cruel, inhuman, or degrading treatment or punishment. On that same day, Carlos Romero Ochoa was led into California’s gas chamber and killed with cyanide gas.³ That was the last of 13 federal executions in the USA conducted over a period of six years in the 1940s (see Chart 3 below).

On Human Rights Day, 10 December 2020, US government carried out the ninth of 13 federal executions in six months. Eighteen at the time of the crime, Brandon Bernard had spent half of his life on death row before being killed by lethal injection in the federal death chamber in Indiana. In contrast to a federal administration fixated on execution, a change of mind was evident among those who had voted for death two decades earlier. Five of the nine surviving jurors from Brandon Bernard’s trial now supported commutation of his death sentence. And the federal prosecutor who had argued on appeal for his sentence to be upheld said she no longer supported his execution. “Like a lot of people”, she said, “I didn’t think about the day when the government would take Brandon out of his prison cell and kill him.”⁴

President Joe Biden marked Human Rights Day 2021 by recalling “the moral leadership and service of Eleanor Roosevelt as the first Chairperson of the Commission on Human Rights” during drafting of the UDHR and stating that today the USA “remains steadfast in our commitment to advancing the human rights of all people – and to leading not by the example of our power but by the power of our example.”⁵ He could have recalled that Eleanor Roosevelt had shown exemplary leadership when she had suggested removing the reference to the death penalty from a preliminary draft of the UDHR because of moves afoot in various countries to abolish it.⁶

**TODAY, WITH
110 COUNTRIES
ABOLITIONIST IN
LAW, THE WORLD IS
STILL WAITING FOR
AN END TO THE DEATH
PENALTY IN THE USA.**

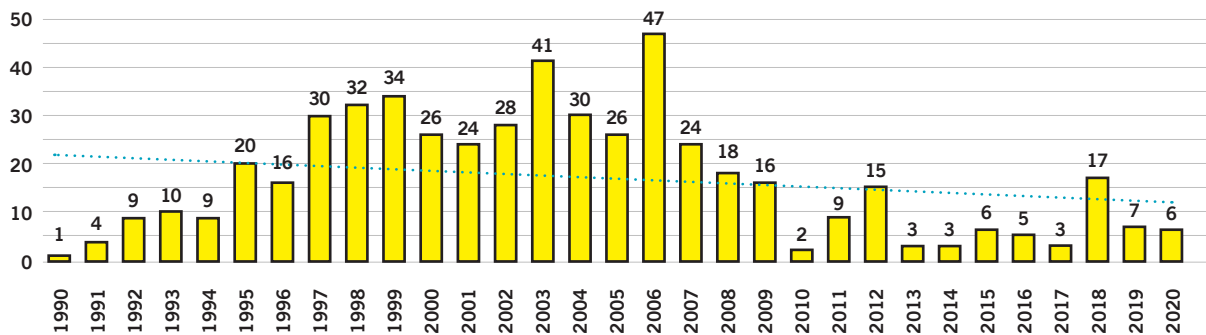
³ *Madera Tribune*, “Slayer executed after delays”, 10 December 1948.

⁴ *USA Today*, “I helped put an 18-year-old Black teen on federal death row. I now think he should live”, 7 December 2020.

⁵ *Proclamation 10321 – Human Rights Day and Human Rights Week, 2021*, 9 December 2021.

⁶ *She proposed this change at the second meeting of the Commission on Human Rights on 11 June 1947.*

CHART 1: NOTICES OF INTENT TO SEEK THE DEATH PENALTY FILED IN FEDERAL COURT BY US GOVERNMENT, 1990-2020



(Source: AI chart using data from the Federal Death Penalty Resource Counsel)

The example set by successive US governments on the death penalty since the 1972 US Supreme Court ruling in the case of *Furman v. Georgia*, which overturned the country's death penalty laws, utterly failed the test of human rights leadership described by the US Secretary of State in March 2021 (above). Yet in the USA its reintroduction and use at state and federal level have been defended by president after president, despite mounting evidence of the arbitrariness, discrimination and errors associated with it. As the line of presidential support for the death penalty continued unbroken after Furman, presidents from Richard Nixon to Donald Trump promoted the USA as a, if not *the*, global human rights champion.

COUNTRY AFTER COUNTRY AROUND THE WORLD HAS TURNED AGAINST THE DEATH PENALTY

Yet in the USA its reintroduction and use at state and federal level have been defended by president after president, despite mounting evidence of the arbitrariness, discrimination and errors associated with it. As the line of presidential support for the death penalty continued unbroken after Furman, presidents from Richard Nixon to Donald Trump promoted the USA as a, if not *the*, global human rights champion.

DEATH AND THE PRESIDENTS SINCE FURMAN

In 1970, **President Richard Nixon** expressed pride “that our country played an important role in the founding of the United Nations” and was continuously working “to advance the cause of human rights.”⁷ He nevertheless responded to the US Supreme Court’s *Furman v. Georgia* ruling by expressing the hope that it would not apply to federal capital statutes.⁸ When it was clear that it did, he pushed for restoration of the federal death penalty.⁹

Nixon’s successor, Gerald Ford, said the USA had “come to respect and rely on the Universal Declaration of Human Rights as a fundamental statement of principles reaffirming faith in the dignity and worth of the human person.”¹⁰ Six months later, he expressed strong support for reintroduction of the federal death penalty for “sabotage, murder, espionage, and treason”,¹¹ and welcomed the US Supreme Court’s *Gregg v. Georgia* ruling in July 1976 upholding new state capital laws.¹²

As Georgia’s Governor, Jimmy Carter had signed into law its statute reinstating the death penalty, approved in the *Gregg* ruling. Inaugurated as President in 1977, three days after the first post-*Furman v. Georgia* execution, he signed the ICCPR later that year, proposing a broad reservation to protect the death penalty.¹³

President Ronald Reagan asserted that “we’re proud to be champions of freedom and human rights the world over” and that “the American people cannot close their eyes to abuses of human rights and injustice... even on our own shores.”¹⁴ He nevertheless made reinstatement of the federal death penalty an administration goal, greatly politicizing it by equating opposition to the death penalty with being soft on crime.¹⁵ He lauded the death penalty’s reintroduction in states “more than 40 of which have acted to adopt appropriate death penalty procedures since the *Furman v. Georgia* decision.”¹⁶ The federal death penalty was reinstated under the 1988 Anti-Drug Abuse Act (ADAA).

President George H. W. Bush ratified the ICCPR on 5 June 1992, saying this underscored the USA’s commitment to human rights “at home and abroad.” However, US ratification included a “reservation” to protect the death penalty from international legal constraint, including the ban on the execution of those under 18 at the time of the crime. After taking office, President Bush called on mayors to “urge your State legislatures to approve the [death] penalty for the killing of local law enforcement officers.”¹⁷ His Attorney General made recommendations to state criminal justice systems, including giving juries the option of the death penalty for the killing of a law enforcement officer, those who killed during other serious crimes and those who killed in prison.¹⁸ Among the advisers for this effort was the US Attorney for the Southern District of Alabama, Jeff Sessions. He and the then US Attorney General, William Barr, would become Attorneys General in the Trump administration three decades later and work to resume federal executions.

⁷ Proclamation 3996 – United Nations Day, 1970, 10 July 1970.

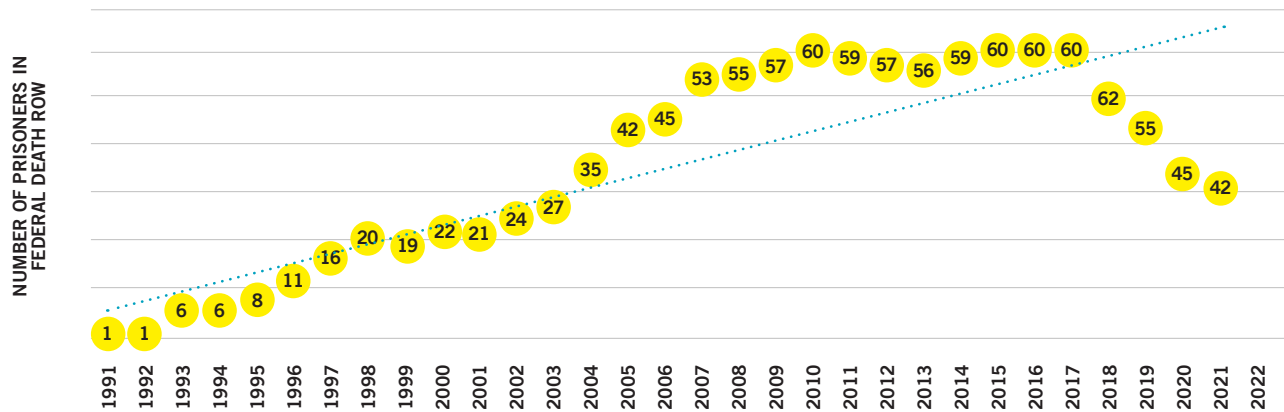
⁸ Radio Address about the State of the Union message on law enforcement and drug abuse prevention, 10 March 1973.

⁹ See, for example, Radio Address about the State of the Union message on law enforcement and drug abuse prevention, 10 March 1973.

¹⁰ Proclamation 4408 – Bill of Rights Day, Human Rights Day and Week, 1975, 5 November 1975.

¹¹ Remarks in Anaheim at the Annual Convention of the California Peace Officers Association, 24 May 1976.

CHART 2: FEDERAL DEATH ROW, 1991-2022



(Source: AI chart using data from the Federal Capital Habeas Project)

President Bush lost the 1992 election to **Arkansas Governor Bill Clinton**, who had made his support for the death penalty clear. In January 1992, candidate Clinton had flown back from the campaign trail in New Hampshire to be in Arkansas for the execution of Ricky Rector, a man with a severe mental disability.¹⁹ As President, in his first term he signed into law the Federal Death Penalty Act (FDPA) which made nearly 60 federal crimes punishable by death, an expansionist list that one Senator described as showing “our mad rush to appear tough on crime.”²⁰ President Clinton also backed hastening execution: “In death penalty cases, it normally takes eight years to exhaust the appeals; it’s ridiculous.”²¹ Signing the Antiterrorism and Effective Death Penalty Act (AEDPA) into law in April 1996, he said: “criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences.”²² Later that same year, he proclaimed “America’s global leadership on behalf of human rights”²³ and portrayed his administration as a champion of human rights. The UN Human Rights Committee condemned the expansion of the federal death penalty,²⁴ while the UN expert on the death penalty said that the AEDPA undermined fair trial standards guaranteed under international law.²⁵

¹² The President’s news conference, 9 July 1976.

¹³ “The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.” In the end, ratification did not come until 1992, with a similarly broad reservation. Jimmy Carter has since expressed regret at his role in helping to reinstate the death penalty and called for abolition.

¹⁴ Remarks on Signing the Bill of Rights Day and the Human Rights Day and Week Proclamation, 10 December 1985.

¹⁵ For example, “[T]he liberals, like their flagship, the ACLU [American Civil Liberties Union], often seem to concern themselves with the rights of criminals and forget about the rights of the citizens those criminals prey upon. But now they want to get elected, and so they claim they’re tough on crime. Well, I’ve examined that record, and we’ve all got to go out and tell the American people: When they say they’re tough on crime, don’t you believe it.” Remarks at a Republican Party Fundraiser in Chicago, Illinois, 30 September 1988.

¹⁶ 1988 Legislative and Administrative Message: A Union of Individuals, 25 January 1988. *Public Papers of the Presidents of the United States, Ronald Reagan, Book 1 (January 1 – July 1, 1988)*, page 96-97.

¹⁷ Remarks to the United States Conference of Mayors, 26 January 1990.

¹⁸ Memorandum to the President, from William P. Barr, Attorney General, Re: Recommendations for State Criminal Justice Systems, 28 July 1992, accompanying: *Combating Violent Crime: 24 recommendations to strengthen criminal justice*.

George W. Bush, who entered the White House with his record on executions as Governor of Texas well known, promised to be a president who would speak for “greater justice and compassion.”²⁶ However, his support for the death penalty remained undimmed. Within the first six months of his presidency, the USA had conducted its first federal execution in 38 years and another two within a year of that. In his second inaugural address, he promised that “America’s belief in human dignity will guide our policies.”²⁷ Yet federal death row continued to grow, more than doubling during his time in office, and his administration set three executions for 8, 10 and 12 May 2006 (later stayed when the prisoners filed a legal challenge to the federal execution procedures). After the attacks of 11 September 2001, the Bush administration quickly put the death penalty on the table in a November 2001 presidential order authorizing trials by military commission, and later obtained congressional approval for the Military Commissions Act (MCA) of 2006 under which it pursued the death penalty in unfair military commission proceedings at Guantánamo.

President Barack Obama declared that US leadership in the world was “essential” for promoting the “dignity and human rights of all peoples” and that the question was “never whether American should lead, but how we lead.”²⁸ While his administration was a less ardent proponent of the death penalty than its immediate predecessors, it took no decisive action against it. Indeed, it took steps in late 2010 towards scheduling an execution, but in the end no federal executions took place during the eight Obama years. Hopes that the administration would engage with states on a national moratorium after a “botched” lethal injection in Oklahoma in 2014 came to nothing after Attorney General Eric Holder left office. His successor told senators that she supported the death penalty as an “effective penalty”.²⁹ The administration pursued death sentences in federal court, as well as at Guantánamo under the revised MCA of 2009.

There were 60 people on federal death row when **Donald Trump** took office as president in 2017. Thirteen federal executions occurred in the final six months of his presidency. The day after the last of these executions, President Trump declared the USA to be “a shining example of human rights for the world.”³⁰

¹⁹ *The Atlantic*, “The Time Bill Clinton and I Killed a Man” 28 May 2015: “State law did not require the governor’s presence, but politics did: Clinton wanted to raise his national profile and reverse the Democratic Party’s soft-on-crime image.”

²⁰ *Senate Durenberger, Congressional Record – Senate*, 17 November 1993.

²¹ *Interview with Larry King*, 5 June 1995.

²² *Remarks on signing the Antiterrorism and Effective Death Penalty Act of 1996*, 24 April 1996.

²³ *Proclamation 6964 - Human Rights Day, Bill of Rights Day, and Human Rights Week*, 10 December 1996, and *Remarks on Signing the Human Rights Proclamation*, 10 December 1996.

²⁴ *Report of the Human Rights Committee, United States of America, UN Doc. A/50/40*, 3 October 1995, para. 281.

²⁵ *Report of 1997 mission to the USA of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68/Add.3*, 22 January 1998, para. 147.

²⁶ *President George W. Bush, Inaugural address, West Front of the Capitol, Washington, DC*, 20 January 2001.

²⁷ *President George W. Bush, Inaugural address, West Front of the Capital, Washington, DC*, 20 January 2005.

²⁸ *Statement on the 2015 National Security Strategy*, 6 February 2015.

²⁹ *Loretta E. Lynch, Confirmation hearing before the Committee on the Judiciary, US Senate*, 28 and 29 January 2015.

³⁰ *Proclamation 10136 – National Sanctity of Human Life Day*, 2021, 17 January 2021.

President Donald Trump's stance on the death penalty demonstrated its susceptibility to politicization. After coming to office in January 2017, he took to voicing his opinion on individual cases, including in public comments that flouted the presumption of innocence.

**"SHOULD
GET DEATH
PENALTY!"**

– he tweeted on 1 November 2017, the day after a driver of a truck left eight people dead and another dozen injured on a cycle path in Manhattan. In September 2018, the Trump administration filed notice of its intent to seek the death penalty in the case. By early June 2022, this notice had not been withdrawn by the Biden administration.

IN 2018, ATTORNEY GENERAL SESSIONS ISSUED A MEMORANDUM TO FEDERAL PROSECUTORS ENCOURAGING THEM TO PURSUE THE DEATH PENALTY FOR DRUG-RELATED CAPITAL CRIMES.

President Trump spoke admiringly of China's death penalty in relation to drugs: "China has much tougher laws than we do in this country on drugs, so they don't have a big drug problem in China. They have a thing called the death penalty."³² He also continued his sporadic case commentary. Responding to a mass shooting in a synagogue in Pittsburgh on 27 October 2018, for example, he said: "I think one thing we should do is, we should stiffen up our laws in terms of the death penalty. When people do this, they should get the death penalty, and they shouldn't have to wait years and years."³³ On 26 August 2019, the government filed notice of its intent to seek the death penalty against the defendant. As of early June 2022, this notice had not been withdrawn and the prosecution was continuing as a capital one.

³¹ *Attorney General Sessions issues memo to US Attorneys on the use of capital punishment in drug-related prosecutions, 21 March 2018, justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related*

³² *Remarks in a meeting with Vice Premier Liu He of China, 22 February 2019, and remarks on declaring a national emergency concerning the southern border of the United States, 15 February 2019.*

³³ *Remarks on the shooting in Pittsburgh, Pennsylvania, at Joint Base Andrews, Maryland, 27 October 2018.*

Following mass shootings in El Paso, Texas, and Dayton, Ohio, in August 2019, President Trump tweeted: “Today I am also directing the Department of Justice to propose legislation ensuring that those who commit hate crimes and mass murders face the DEATH PENALTY – and that this capital punishment be delivered quickly decisively and without years of needless delay.”³⁴

The defendant was charged with capital murder under Texas state law for the El Paso shootings.³⁵ He is also facing federal charges with the possibility of the death penalty. In early 2022, the prosecution filed a proposed schedule with a July-August 2022 timeline for pre-trial “constitutional motions relating to capital punishment.” However, it noted that it had “not yet qualified this matter as a Death Penalty case and no inference should be made from this filing as to whether when, or even if, such a qualification may be made.”³⁶ No further decision had been announced by early June 2022.

William Barr succeeded Jeff Sessions as US Attorney General in the Trump administration in early 2019. On 25 July 2019, the administration informed the US District Court for the District of Columbia (DC) overseeing the lethal injection protocol litigation that the government had adopted a revised addendum to the execution protocol of the Federal Bureau of Prisons (BOP) that “provides for pentobarbital sodium as the lethal agent.”³⁷ The BOP had “secured the active pharmaceutical ingredients (API) for pentobarbital from a domestic bulk manufacturer. Additionally, BOP has secured a compounding pharmacy...to convert the API into an injectable solution.”³⁸ The very same day, the Attorney General announced execution dates for five men on federal death row in what would be the first federal executions since March 2003.³⁹ While the government was ultimately enjoined from carrying out these executions for six months, the simultaneous release of a new protocol and setting of execution dates curtailed the likelihood of successful legal challenges to the changed protocol, under “the exceedingly high bar” required to obtain a stay of execution, whatever the issue.⁴⁰

³⁴ *Twitter, 5 August 2019, 17:10:05.*

³⁵ *The gunman in the Dayton shootings had been shot and killed by police during the attack.*

³⁶ *US District Court for the Western District of Texas, USA v. Crusius, Government’s amended proposed scheduling order, 15 February 2022.*

³⁷ *US District Court for the District of Columbia (DC), Roane v. Barr, Notice of adoption of revised protocol, 25 July 2019.*

³⁸ *District Court for DC, Declaration of Raul Campos, In the matter of the Federal Bureau of Prisons Execution Protocol Cases, 12 November 2019.*

³⁹ *US Department of Justice, “Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse”, 25 July 2019, [justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse](https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse)*

⁴⁰ *US Supreme Court, Barr v. Lee, on application for stay or vacatur, 14 July 2020.*

On 14 July 2020, over the dissents of four justices, the US Supreme Court gave the green light to the federal government to resume executions under its new protocol. It said that single-dose pentobarbital had “become a mainstay of state executions” and had been “used to carry out over 100 executions” at state level “without incident.”⁴¹

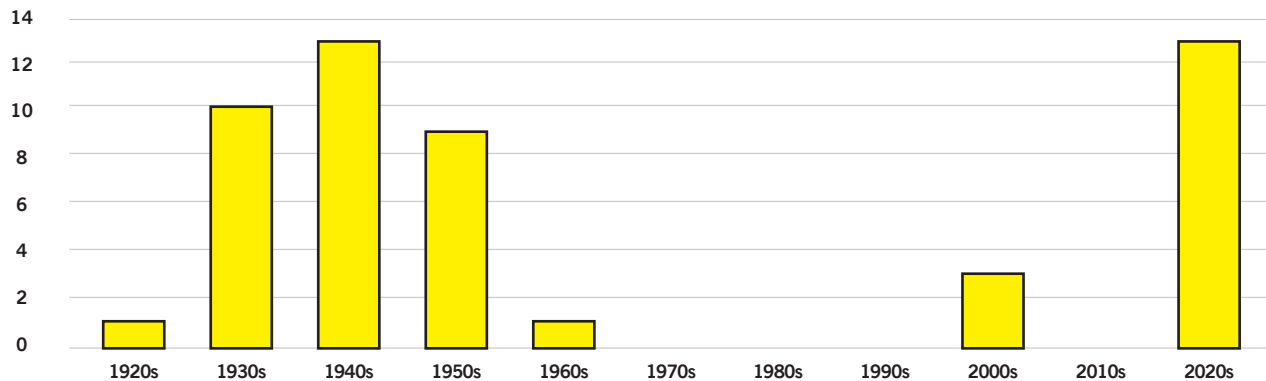
THIRTEEN FEDERAL EXECUTIONS TOOK PLACE IN THE NEXT SIX MONTHS.

THE FAILURE OF HUMAN RIGHTS LEADERSHIP HAD COME HOME TO ROOST.

Twelve of the 13 death sentences were handed down under Presidents Bill Clinton and George W. Bush, with the 13th under President George H. W. Bush. These death sentences were imposed under the ADAA and FDPA, signed into law by Presidents Reagan and Clinton respectively, and defended by the administrations of Presidents Clinton, George W. Bush, Barack Obama and Donald Trump.

CHART 3: FEDERAL EXECUTIONS SINCE 1920

All post-Furman federal executions have occurred since 2000



(Source: AI chart using data from Federal Bureau of Prisons)

⁴¹ US Supreme Court, *Barr v. Lee*, On application for stay or vacatur, 14 July 2020.

1.1 WHITHER THE BIDEN PROMISE?

IN A BREAK WITH THE PAST, HIS OWN INCLUDED, JOE BIDEN CAMPAIGNED FOR THE PRESIDENCY IN 2020 ON THE PLEDGE THAT IF ELECTED HE WOULD “WORK TO PASS LEGISLATION TO ELIMINATE THE DEATH PENALTY AT THE FEDERAL LEVEL AND INCENTIVIZE STATES TO FOLLOW THE FEDERAL GOVERNMENT’S EXAMPLE.” HIS ADMINISTRATION HAS CONFIRMED THIS COMMITMENT TO THE UN.⁴²

In its 1992 report recommending ratification of the ICCPR, the Senate Committee on Foreign Relations, with then Senator Joe Biden among its members, stressed that this human rights treaty was “part of the international community’s early efforts to give the full force of international law to the principles of human rights embodied in the Universal Declaration of Human Rights.”⁴³ As President, he has said that from the UDHR have “sprung transformational human rights treaties and a global commitment to advance equality and dignity for all as the foundation of freedom, peace, and justice. As a world, we have yet to achieve this goal, and we must continue our efforts to bend the arc of history closer to justice and the shared values that the UDHR enshrines.”⁴⁴

Several states of the USA are well ahead of the federal government on the abolitionist curve. They include Virginia, where, on 24 March 2021, Governor Ralph Northam signed a bill to abolish the death penalty in his state.⁴⁵ “This is a major change”, said the Governor, “because our Commonwealth has a long history with capital punishment. Over our 400-year history, Virginia has executed more than 1,300 people, more than any other state... Virginia’s history, we have much to be proud of, but not the history of capital punishment.”

⁴² For example, see *Committee on the Elimination of Racial Discrimination (CERD), Combined 10th to 12th reports submitted by the USA under article 9 of the Convention, 8 June 2021, UN Doc. CERD/C/USA/10-12, para. 116.*

⁴³ *ICCPR, Report from Senator Clairborne Pell, Chair of the Senate Committee on Foreign Relations, 24 March 1992.*

⁴⁴ *Proclamation 10321, 9 December 2021, (previously cited).*

⁴⁵ *Governor Northam Signs Law Repealing Death Penalty in Virginia*, governor.virginia.gov/newsroom/all-releases/2021/march/headline-894006-en.html.

⁴⁶ *Alaska (1957), Colorado (2020), Connecticut (2012), Delaware (2016), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1847), Minnesota (1911), New Hampshire (2019), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1972), Virginia (2021), Washington (2018), West Virginia (1965) and Wisconsin (1853).* Source: *Death Penalty Information Center, deathpenaltyinfo.org/state-and-federal-info/state-by-state*

⁴⁷ *California (2019), Oregon (2011) and Pennsylvania (2015).*

IN THE PAST DECADE AND A HALF, 11 STATES IN THE USA HAVE ABOLISHED THE DEATH PENALTY AND THE ANNUAL NUMBERS OF DEATH SENTENCES AND EXECUTIONS ACROSS THE COUNTRY HAVE FALLEN.

Today, 23 states are abolitionist.⁴⁶ In three other states, moratoriums on executions remain in force.⁴⁷ But the “continuing long-term erosion of capital punishment across most of the country” is being countered by “extreme conduct by a dwindling number of outlier jurisdictions to continue to pursue death sentences and executions.”⁴⁸ The 13 federal executions in the final six months of the Trump administration placed the federal government firmly in the outlier group; the Biden pledge promised to move it into the abolitionist camp.

As Senator, Joe Biden helped to draft the 1988 ADAA which reinstated the federal death penalty after *Furman v. Georgia*.⁴⁹ He was instrumental in the passage of the 1994 Violent Crime Control and Law Enforcement Act which incorporated the FDPA, massively expanding the federal death penalty.⁵⁰ He was on the Senate Foreign Relations Committee when it approved ratification of the ICCPR with a reservation aimed at protecting the death penalty from international legal constraint. He voted for the AEDPA,⁵¹ although voicing concern about the risk of executing individuals who had been wrongfully convicted.⁵²

It appears that President Biden is still troubled by wrongful convictions in death penalty cases.⁵³ He would be in the company of many who have turned against the death penalty, whether for moral or pragmatic reasons, after observing its ineffectiveness, cruelty, errors and inequities. When signing Virginia’s abolitionist bill into law in March 2021, for example, Governor Northam spoke for many when he stated: “as I have learned more about how the death penalty is applied in this country, I can say the death penalty is fundamentally flawed.”

THE PRESIDENT AND HIS ADMINISTRATION CANNOT BE THE ONLY AGENTS OF CHANGE.

The USA's retention of the death penalty implicates all jurisdictions and branches of government. The obligations of states parties to the ICCPR (and those under other treaties) “are binding on every State Party as a whole.” Moreover, “[a]ll branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.”⁵⁴

⁴⁶ Death Penalty Information Center, *The death penalty in 2021: Year End Report*, 16 December 2021, deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report

⁴⁹ Senator Joe Biden, AEDPA debate, Senate floor, 7 June 1995: “in 1988, we passed a bill which I had authored with several others called the Death Penalty for Drug Kingpins Act. It was the first constitutional Federal death penalty to go on the books after 1972 when the Supreme Court invalidated the death penalty. I helped write that bill, much to the dismay of many of my liberal friends who could not understand why.”

⁵⁰ In the Senate on 14 May 1992, he said of the crime bill: “I’ll let you all decide whether or not this is weak... It provides 53 death penalty offences... We do everything but hang people for jaywalking in this bill.” On 24 August 1994, he responded to accusations from a fellow Senator that the Democrats were soft on crime and had diluted the bill: “My friend says this bill is a product of the Democrats ‘bowing to the liberal wing of the Democratic Party.’ Let me define the liberal wing of the Democratic Party. The liberal wing of the Democratic Party is now for 60 new death penalties. That is what is in this bill.”

⁵¹ In AEDPA debates, after the Oklahoma City bombing, Senator Biden said: “the constant argument put forward is, we have to do this because once we find the person who did this awful thing in Oklahoma and they are convicted and sentenced to death, the death penalty must be carried out swiftly. I might add... the Biden crime bill, is the only reason there is a death penalty.”

In relation to the role played by the judicial branch, the decisions of the US Supreme Court regarding the federal executions generated widespread concern, including among some of its Justices. At the end of the spree, Justice Sonia Sotomayor accused the Court of time and again having dismissed “credible claims for relief” without providing the opportunity for “proper briefing” and usually without “any public explanation.”⁵⁵

The example set by the administration and the US Supreme Court’s hostility towards “last-minute intervention” by federal courts, including but not limited to challenges to execution protocols,⁵⁶ would have been noted by the diminishing number of states which are the main drivers of the USA’s attachment to judicial killing. They include Alabama, where Matthew Reeves was executed on 27 January 2022. In 2020, the US Court of Appeals for the 11th Circuit had ruled that his trial lawyers’ failure to present evidence of his intellectual disability had been “deficient” and that the absence of this “powerful” mitigating evidence was “sufficient to undermine confidence in the outcome.” In 2021, the US Supreme Court overturned this without providing Reeves an opportunity to submit legal briefs on the matter or provide oral argument. Three justices dissented; two of them noted that the decision “continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution”, citing what had happened during the federal execution spree, among other things.⁵⁷

On 7 January 2022, a US District Court judge issued an injunction blocking Matthew Reeves’ execution by any method other than nitrogen hypoxia. Alabama had granted those on death row a one-off opportunity to choose this new method, instead of the default method, lethal injection. Matthew Reeves did not fill in the election form; his lawyers said he would have chosen hypoxia. The federal judge agreed that because of his cognitive deficits, Matthew Reeves was unable to read and understand the form without assistance and the failure of officials to provide such assistance constituted discrimination on grounds of disability. The judge ruled it would not harm the state to delay the execution until it had developed its nitrogen hypoxia protocol, which at that stage was said to be a matter of months away. On 26 January, a three-judge panel of the 11th Circuit upheld the injunction, noting among other things, expert evidence that Matthew Reeves’s “language competency was that of someone between the ages of 4 and 10”, well below what was required to be able to understand the execution form. At the 11th hour, however, the Supreme Court voted 5-4 to vacate the injunction. Dissenting, three justices noted that four judges on two courts – “after extensive record development, briefing, and argument” – had decided that the execution should be blocked. Yet, the Supreme Court had “disregard[ed] the well-supported findings” made by the lower courts.⁵⁸

⁵² *Congressional Record*, 7 June 1995: “although the death penalty should be applied swiftly and with certainty, the worst thing in the world would be for it to be applied wrongly... Mistakes do happen. Innocent people are convicted and sentenced to die.”

⁵³ “Since 1973, over 160 individuals in this country have been sentenced to death and were later exonerated. Because we can’t ensure that we get these cases right every time, we must eliminate the death penalty.” twitter.com/JoeBiden/status/1154500277124251648.

⁵⁴ UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para 4.

⁵⁵ *US v. Higgs*, 15 January 2021, Justice Sotomayor dissenting.

⁵⁶ *Barr v. Lee*, 14 July 2021.

⁵⁷ *Dunn v. Reeves*, Justices Sotomayor and Kagan dissenting (citing *US v. Higgs* among others): “In essence, the Court turns ‘deference’ [to state court decisions] into a rule that federal habeas relief is never available to those facing execution.” That the federal government itself allowed the execution of two men who had strong intellectual disability claims to go forward during the federal execution spree was presumably also not lost on the states. See Amnesty International Urgent Action, 13 January 2022, www.amnesty.org/en/documents/amr51/5147/2022/en/

The White House continues to take a hands-off stance to imminent executions at the state level (see Chapter 4). President Biden should recall the plea from multiple UN experts to fulfil not just his commitment on the federal death penalty, but his promise to lead states in the same direction:

“THERE IS NO TIME TO LOSE WITH THOUSANDS OF INDIVIDUALS ON STATE DEATH ROWS ACROSS THE COUNTRY AND SEVERAL EXECUTIONS SCHEDULED AT STATE LEVEL IN 2021.”⁵⁹

Another year has passed since this call. Matthew Reeves is one of more than a dozen individuals who have been put to death at state level since President Biden took office.⁶⁰ Familiar racial patterns persist. Of the 15 men executed between 20 January 2021 and 9 June 2022, 13 were for crimes involving white victims. Eight of those executed were white, six were Black and one was Native American.⁶¹

The fact that the judiciary may have upheld capital laws or declines to block an execution does not absolve the elected branches of their human rights responsibilities, not least in the presence of a judicial philosophy of deference to those branches.

IT IS TIME FOR THE LEGISLATURE AND EXECUTIVE TO MEET THEIR HUMAN RIGHTS OBLIGATIONS. FOR TOO LONG, THEY HAVE FAILED TO OFFER THE NECESSARY LEADERSHIP.⁶²

Despite the failure of Congress and many state legislatures to address the flaws and human rights violations associated with the death penalty, on the international stage in an increasingly abolitionist world, US authorities have sought to justify resorting to the death penalty under the rubric of democracy.⁶³

⁵⁸ *Hamm v. Reeves*, 27 January 2022, Justice Kagan, joined by Justices Breyer and Sotomayor, dissenting.

⁵⁹ Office of the UN High Commissioner for Human Rights, “UN experts call for President Biden to end death penalty”, ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26876

⁶⁰ In Alabama, Arizona, Mississippi, Missouri and Oklahoma.

⁶¹ In this report, Black and African American are used interchangeably as are Hispanic and Latino, depending on the context, or when quoted, or used as a datapoint.

⁶² In his *Furman* dissent in 1972, Justice Powell wrote: “Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness... But impatience with the slowness, or even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers.” In his concurrence in *Baze v. Rees*, 16 April 2008, Justice Stevens said that retention of the death penalty was the product of “habit and inattention” on the part of legislatures, not of the necessary deliberation and evaluation.

⁶³ In 1994 the Clinton administration told the UN that “the majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country”, (Initial report of the USA to the UN Human Rights Committee, UN Doc. CCPR/C/81/Add.4, para. 139). In 2013, the Obama administration rejected the call of CERD for a moratorium on executions: “the use of the death penalty is a decision left to democratically elected governments at the federal and state levels”, (CERD, Periodic Report of the USA, June 2013, para. 70).

Six of the 13 executions under President Trump took place between the 2020 presidential election and President Biden taking office, with the dates for four of these six set by the administration after the election. This was the first time in 132 years that the federal government had conducted any executions in the “lame duck” period. While an execution conducted at any time is incompatible with human rights principles,

THESE SIX EXECUTIONS IN 59 DAYS ILLUSTRATED THE HOLLOWNESS OF THE JUSTIFICATION THAT EXECUTIONS IN THE USA REFLECT THE “WILL OF THE PEOPLE”.

PRESIDENT TRUMP HAD, AFTER ALL, LOST THE ELECTION TO AN OPPONENT RUNNING ON AN ABOLITIONIST PLATFORM.

With three federal executions looming in the final week of the Trump presidency, Congresswoman Ayanna Pressley and Senator Richard Durbin announced that they would be reintroducing the Federal Death Penalty Prohibition Act of 2021, bicameral legislation to abolish the federal death penalty and require the re-sentencing of those on federal death row. The Biden administration has yet to throw its weight behind such legislation.

The immediate threat of more federal executions was lifted on 1 July 2021 when the US Attorney General announced a moratorium pending “a review of the Justice Department’s policies and procedures.”⁶⁴ By late 2021, the Department of Justice had withdrawn the government’s notice of intent to seek the death penalty in some dozen cases around the country.⁶⁵ A new notice filed under the Biden administration in February 2021 was withdrawn in April 2022 and the trial proceeded as a non-capital case.⁶⁶ These are welcome steps. They are, however, small ones. Other notices were still in place in June 2022 and the death penalty was being considered in new cases⁶⁷ and in resentencing proceedings.⁶⁸ The administration is still defending the death penalty in individual cases pending trial, resentencing and on appeal, raising questions about its resolve on the Biden pledge. And the review ordered by the Attorney General remains a narrow one. Despite deep concerns expressed by both President Biden and Attorney General Garland about racial disparities and other chronic problems in the administration of the death penalty, the authorized review examines none of them, but revisits only the new, expediting procedures put in place at the end of the prior administration.

⁶⁴ US Department of Justice, “Attorney General Merrick B. Garland imposes a moratorium on federal executions”, 1 July 2021, [justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review](https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-imposes-moratorium-federal-executions-orders-review)

⁶⁵ Houston Chronicle, “Merrick Garland withdrew the death penalty in 12 cases. Does this signal a trend?”, 27 December 2021, [houstonchronicle.com/news/houston-texas/houston/article/AG-Merrick-Garland-death-penalty-backtrack-16732101.php](https://www.houstonchronicle.com/news/houston-texas/houston/article/AG-Merrick-Garland-death-penalty-backtrack-16732101.php)

⁶⁶ US District Court for the Western District of Kentucky, *USA v. Silvers*, Notice of Intent to Seek the Death Penalty, 25 February 2021, and Judicial order on withdrawal of notice, 29 April 2022.

⁶⁷ For example, US District Court for the Southern District of Indiana, *USA v. Meehan*, Minute Order, (At indictment, federal defendant advised of “the possibility the Government may seek a death sentence”) 24 January 2022.

⁶⁸ Penalty phase retrials were pending in two federal capital cases, involving two men tried in Oklahoma in 2005 (*USA v. Rodriguez*) and North Dakota on 2006 (*USA v. Barrett*), but whose death sentences were overturned on appeal in 2021 due to inadequate legal representation.

In one of the cases raising questions about the Biden pledge, that of the man convicted of the 2013 Boston Marathon bombing, the thread of president-to-president support remains unbroken. The Obama administration decided to pursue the death penalty in the case, obtaining it in 2015. This sentence was then defended under the Trump administration. In July 2020, the US Court of Appeals for the First Circuit vacated the death sentence, finding that the trial judge had failed to meet the standard for assessing whether potential jurors could set aside prejudicial pretrial publicity about the case.

IT STRESSED, “JUST TO BE CRYSTAL CLEAR”, THE “MANY LIFE SENTENCES” STILL IN PLACE MEANT THAT THE DEFENDANT “WILL REMAIN CONFINED TO PRISON FOR THE REST OF HIS LIFE, WITH THE ONLY QUESTION REMAINING BEING WHETHER THE GOVERNMENT WILL END HIS LIFE BY EXECUTING HIM.”⁶⁹

President Trump tweeted: “Rarely has anybody deserved the death penalty more... The Federal Government must again seek the Death Penalty in a do-over of that chapter of the original trial. Our Country cannot let the appellate decision stand. Also, it is ridiculous that this process is taking so long!”⁷⁰

His administration petitioned the Supreme Court to take the case and “put this landmark case back on track toward its just conclusion”.⁷¹ The administration filed its brief “well in advance of the due date” and, after the President lost the election, opposed defence requests for additional time, arguing that “the Nation” had a “strong interest in this Court’s hearing and deciding this case this Term”.⁷² The administration waived the 14-day waiting period for distribution of its petition.⁷³ The Court agreed to take the case soon after President Biden took office. That administration then filed a brief urging reinstatement of the death sentence.⁷⁴ In March 2022, the Supreme Court did just that, over the dissent of three justices.⁷⁵

Uncertainty about where the Biden abolitionist pledge is going was voiced during oral argument on this case in October 2021 when US Supreme Court Justice Amy Barrett pointed out to the US Deputy Solicitor General that “the government has declared a moratorium on executions, but you’re here defending his death sentences.”

JUSTICE BARRETT SAID THAT SHE WAS “WONDERING WHAT THE GOVERNMENT’S END GAME IS HERE.”⁷⁶ **SO ARE MANY OTHERS.**

⁶⁹ US Court of Appeals for the Third Circuit, *USA v. Tsarnaev*, 31 July 2020.

⁷⁰ Twitter, 2 August 2020, 19:48:20 and 19:48:23.

⁷¹ US Supreme Court, *USA v. Tsarnaev*, Petition for a Writ of Certiorari, 6 October 2020.

⁷² Re: *USA v. Tsarnaev*, Letter to Clerk of US Supreme Court, from Jeffrey B. Wall, Acting Solicitor General, 23 November 2020.

⁷³ Re: *USA v. Tsarnaev*, Letter to Clerk of US Supreme Court, from Jeffrey B. Wall, Acting Solicitor General, 18 December 2020.

⁷⁴ US Supreme Court, *USA v. Tsarnaev*, Brief for the United States, June 2021.

⁷⁵ US Supreme Court, *United States v. Tsarnaev*, 4 March 2022. Justices Breyer, Kagan and Sotomayor dissented.

⁷⁶ *USA v. Tsarnaev*, oral argument, 13 October 2021. The Deputy Solicitor General said: “the administration continues to believe the jury imposed a sound verdict and that the Court of Appeals was wrong to upset that verdict. If the verdict were to be reinstated eventually, which will require some further proceedings on remand, there would then be a round of collateral review, some time for reviewing any clemency petitions. Within that time, the Attorney General presumably can review the matters that are currently under review, such as the current execution protocol.”

2.0 'THIS IS NOT JUSTICE'

☒ AFTER WAITING ALMOST TWO DECADES TO RESUME FEDERAL EXECUTIONS, THE GOVERNMENT SHOULD HAVE PROCEEDED WITH SOME MEASURE OF RESTRAINT TO ENSURE IT DID SO LAWFULLY. WHEN IT DID NOT, THIS COURT SHOULD HAVE. IT HAS NOT”

US Supreme Court Justice Sonia Sotomayor, 15 January 2021⁷⁷

⁷⁷ *US v. Higgs, 15 January 2021, Justice Sotomayor dissenting (“This is not justice”).*

The backdrop to the resumption of federal executions was public concern and debate about the role of race in law enforcement and criminal justice, as well as the looming 2020 presidential election, with the incumbent running on “law and order”.⁷⁸ The White House failed to resist the temptation to politicize the federal executions and ignored the ever-present concerns about racial discrimination in the application of the death penalty.

The day after the first of the 13 executions, that of Daniel Lee (see Section 2.1), President Trump sought to portray candidate Biden’s position against the death penalty as political expediency, of his merely having “joined the rest of the radical Democrats running for president in opposing it.” President Trump himself exploited Daniel Lee’s execution for electoral gain, while making no reference to the arbitrariness or government misconduct which marked out the death sentence implemented in the Lee case.⁷⁹ “Joe Biden would have let this animal live”, went the President’s campaign press release, referring to the “evil monster” executed a few hours earlier.⁸⁰

SUCH LANGUAGE SERVES AS A REMINDER OF HOW THE DEATH PENALTY “TREATS MEMBERS OF THE HUMAN RACE AS NONHUMANS, AS OBJECTS TO BE TOYED WITH AND DISCARDED.”⁸¹

⁷⁸ For example, remarks made at a “Great American comeback” rally in Jacksonville, Florida, 24 September 2020: “[This election is] about law and order... they said, ‘Oh, don’t say ‘law and order. That’s too tough a term’... I said, ‘No, no, it’s about law and order.’”

⁷⁹ Throughout the case prior to this, the government acknowledged that Lee’s co-defendant was the more culpable actor, both in terms of the crime in question and his previous history. The government misconduct stemmed from an argument made at the sentencing that Lee was responsible for a prior murder which documents after the fact disproved (see Section 2.1).

⁸⁰ Campaign press release, “President Trump ensured total justice for the victims of an evil killer”, 15 July 2020.

⁸¹ US Supreme Court, *Gregg v. Georgia*, 2 July 1976, Justice Brennan dissenting.

⁸² Deposition of Brad Weinsheimer, *In the matter of the Federal Bureau of Prisons Execution Protocol Cases*, 29 January 2020.

⁸³ Deposition of Brad Weinsheimer, 29 January 2020, (previously cited).

⁸⁴ US Department of Justice, “Executions Scheduled for Four Federal Inmates Convicted of Murdering Children”, 15 June 2020, [justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children](https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children)

The Trump administration chose which of those on federal death row it would execute and in which order. The final decision was taken by Attorney General Barr, from a list drawn up in “late spring or early summer of 2019” by the BOP, with assistance from the Criminal Division of the Department of Justice, of 14 individuals who had “exhausted their appellate and post-conviction remedies.”⁸²

The Department of Justice announcement in 2019 of the first federal execution dates stressed that each of the five men was “convicted of murdering children”, which it has indicated was the reason for scheduling those individuals first.⁸³ It reiterated this aspect of the cases a year later.⁸⁴ The same line was repeated by the US Supreme Court itself, despite its irrelevance to the question before it – namely, whether to give the federal government the go-ahead to use its new one-drug execution method.⁸⁵

The five executions announced in the 25 July 2019 news release were stayed. On 15 June 2020, however, the Justice Department announced execution dates for four men on federal death row, all of whom were white. First in line was Daniel Lee. He had long since abandoned the white supremacist beliefs alleged by the government's trial evidence. Yet as the national debate about systemic racism continued, in the lead-up to the execution, the administration emphasized Lee's connection to white supremacy (without qualification) and then exploited it afterwards to bolster President Trump's anti-racist credentials. Pressed for a categorical statement that he denounced white supremacy and the groups that espoused it, the White House responded: "This President had advocated for the death penalty for a white supremacist, the first federal execution in 17 years."⁸⁶

On the one hand the administration was willing to exploit Daniel Lee's involvement in a white supremacist organization for its own ends, while on the other it perpetuated the failure of the federal government to address the long-standing and compelling statistical and other evidence of racial discrimination in the application of the death penalty.⁸⁷

RACE WAS NOT A CONSIDERATION IN SETTING THE EXECUTIONS, ACCORDING TO THE DEPARTMENT OF JUSTICE.⁸⁸ NEVERTHELESS, WHETHER BY DESIGN OR HAPPENSTANCE, FIVE OF THE FIRST SIX FEDERAL EXECUTIONS WERE OF WHITE MEN (CONVICTED OF KILLING WHITE VICTIMS), ENSURING THAT THE NATIONAL DEBATE ABOUT RACISM REMAINED SOMEWHAT PARTITIONED OFF FROM THE ISSUE OF FEDERAL EXECUTIONS RESUMING.

In total, six of the 13 federal executions were of white individuals, five men and one woman, convicted of the murder of white victims. One was of a Native American man convicted of the murder of two Native American people. The other six executions were of Black men, four convicted of murders involving Black victims, and two involving white victims.⁸⁹

⁸⁵ *Barr v. Lee*, 14 July 2020: "The plaintiffs are all federal prisoners who have been sentenced to death for murdering children."

⁸⁶ White House press briefing by Press Secretary Kayleigh McEnany, 1 October 2020.

⁸⁷ For example, in its *Concluding observations on the USA*, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 29, the UN Human Rights Committee said that the Bush administration did not seem to "fully acknowledge" the disproportionate imposition of the death penalty on minorities and low-income individuals. And on 10 March 2010, the Obama administration was accused by a federal judge of a "dismissive attitude" to the "disturbing statistics regarding the disproportionate number of minorities being prosecuted for capital offenses and sentenced to death" (*US District Court, Eastern District of Louisiana, US v. Johnson, Order and Reasons*). The administration had responded to lawyers' motion for discovery to support a claim that the prosecution in a capital case in Louisiana had been influenced by race by stating that it was merely "a variant of a claim that has become perfunctory in modern federal capital cases" and should be denied. The judge denied the motion, but stated that he did "not doubt that conscious or, more insidiously, unconscious racism can influence decision-making, from an initial arrest by police through a final decision by a jury", noting "with dismay the dismissive attitude of the government with regard to this issue."

⁸⁸ Deposition of Brad Weinsheimer, 29 January 2020, (previously cited).

⁸⁹ Twenty-one white people have been executed in the USA since 1972 for crimes involving solely Black victims. By the end of May 2022, 14 times as many Black people (300) had been executed for crimes involving solely white victims.

In the case of the latter two Black federal defendants jointly convicted of the murder of two white people committed when the defendants were 18 and 19 years old, lawyers for one of them urged a federal judge to recognize the role of the now discredited “superpredator” myth on the decision by the Clinton administration to seek the death penalty in the case. With one of the two already executed, and the second scheduled for execution, the government protested that the lawyers were “accusing the prosecution of racism”,⁹⁰ to which the defense lawyers responded:

“That defensive response misses the point. The reality is that everyone in this society is influenced by racial bias – that’s the heavy hand of the past and the present that rests on everyone’s shoulder, including the writers of this document... [T]he sad truth of the matter is, that in the late 90s unconscious racial bias expressed itself through the superpredator myth. Now that we all can recognize that the superpredator myth influenced a lot of bad decisions during that era, everyone has a responsibility to do what they can to ameliorate the negative impact of such decisions.”⁹¹

The Department of Justice’s 2019 news release announcing resumption had also said that “we owe it to the victims and their families to carry forward the sentence.”⁹² In litigation opposing delays to its execution schedule, the Trump administration repeatedly pointed to the “overwhelming interest” of victims’ family members in having the executions carried out.⁹³ It did so even in cases where victims’ relatives opposed the execution.⁹⁴ In at least two of the cases – those of Daniel Lee and Lezmond Mitchell – family members of the murder victims made vigorous efforts to have the death sentences reduced to life imprisonment.⁹⁵ In Lezmond Mitchell’s case, they included the grandson and cousin of the two victims. He had initially supported the death sentence, but now believed “that to take another person’s life because he made a mistake is not forgiving. It is revenge.”⁹⁶

⁹⁰ US District Court for the Western District of Texas, *USA v. Bernard*, Government’s consolidated response to Bernard’s motion to modify sentence under 18 USC § 3582(c)(1) and motion to stay or modify execution date, 8 December 2020.

⁹¹ US District Court for the Western District of Texas, *USA v. Bernard*, Reply in support of motion to modify sentence under 18 USC § 3582(c)(1), 8 December 2020.

⁹² Office of Public Affairs, US Department of Justice, “Federal government to resume capital punishment after nearly two decade lapse”, 25 July 2019, [justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse](https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse).

⁹³ US District Court for DC, *Montgomery v. Barr*, Defendants’ response in opposition to motion for Temporary Restraining Order and preliminary injunction, 14 November 2020. *Barr v. Purkey*, Application for a stay or vacatur of the injunction issued by the United States District Court for the District of Columbia, In the US Supreme Court, July 2020: “the last-minute injunction is intensely disruptive to BOP’s preparations for the execution... including picking up grieving family members of the victims and other witnesses at the airport and preparing to transport them to the execution facility.”

⁹⁴ For example, US Supreme Court, *Mitchell v. USA*, Response in opposition to emergency application for stay of execution, August 2020: “any further delay would disserve the interests of the government, the victims’ families, and the public.”

⁹⁵ A federal judge accused the administration of “pervasive indifference” towards the interests of family members and granted a motion for a preliminary injunction given the setting of execution dates during the Covid-19 pandemic, with all the health risks that posed, including for travel; US District Court for the Southern District of Indiana, *Peterson et al. v. Barr et al.* Order granting plaintiffs’ motion for preliminary injunction, 10 July 2020. The Court of Appeals for the Seventh Circuit overturned the order after the government appealed.

⁹⁶ In re Lezmond Charles Mitchell. Memorandum in support of petition for clemency and for commutation of death sentence. Before the President of the United States and the US Pardon Attorney, July 2020.

In Daniel Lee’s case, at least two relatives of the murder victims had written to President Trump asking him to commute the death sentence. One wrote:

“Losing family members from such a hateful act can propel a person to deeply consider the meaning of life and our purpose and responsibilities as human beings, our faith and what we want the final statement in the legal file of [our relatives’] lives to be. Do we want it to be another death?”

She also expressed “the compassion and heartache I continue to feel for Daniel’s mom... I am certain this has taken a massive toll on her life and heart.”⁹⁷ Another relative urged President Trump, “[i]nstead of continuing the string of violence, please let justice be served by reducing Daniel Lee’s sentence to life without parole instead of the death penalty.”⁹⁸

What neither the Department of Justice nor the Supreme Court acknowledged, as the trial judge in Daniel Lee’s case had emphasized to the Department five years earlier and an appeals judge recalled two days before the execution, was that the evidence at trial showed that, while Daniel Lee had participated in the murder of the two adults, he “would have no part in the killing of [the eight-year-old child] so [co-defendant] Kehoe [who received a life sentence] killed the child himself.”⁹⁹

In her September 2019 letter, the child victim’s cousin noted that Lee’s co-defendant had been “the one who murdered my eight-year-old cousin” and said that it had been “very upsetting to read Senator Tom Cotton’s tweet the day the execution date was announced... I’ve seen people speaking about what we want, calling for this execution in our name, when they have never spoken to us. I find that very disturbing.”

THE TRUMP ADMINISTRATION’S RELENTLESS PURSUIT OF EXECUTION, AND THE US SUPREME COURT’S ENABLING OF THIS CONVEYOR BELT OF DEATH, LEFT NUMEROUS LEGAL CLAIMS UNRESOLVED AND REPEATEDLY IMPLICATED THE USA’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS.

The following does not seek to provide an exhaustive account of the cases examined or the multiple legal questions raised during the execution spree. It does, however, focus on aspects of these cases that illustrate such concerns.

⁹⁷ Letter to President Donald J. Trump, dated 7 September 2019.

⁹⁸ Letter to President Donald J. Trump, dated 6 September 2019.

⁹⁹ Letter re *United States v. Daniel Lewis Lee, to Eric Holder, US Attorney General and Christopher Thyer, US Attorney for the Eastern District of Arkansas, from G. Thomas Eisele, 7 November 2014 and US Court of Appeals for the Eighth Circuit, Lee v. USA, 12 July 2020, Judge Kelly dissenting.*

2.1 ARBITRARINESS: “THE ANTITHESIS OF THE RULE OF LAW”

ARBITRARINESS IN APPLICATION OF THIS IRREVOCABLE PUNISHMENT IS AN ISSUE THAT HAS NEVER GONE AWAY. WITH ONLY TWO JUSTICES IN *FURMAN V. GEORGIA* FINDING THE DEATH PENALTY UNCONSTITUTIONAL *PER SE*, IT WAS JUDICIAL DISQUIET ABOUT ARBITRARINESS AROUND WHICH THE RULING COALESCED.

In his concurrence, for example, Justice William Brennan wrote “the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.” In *Gregg v. Georgia* four years later, however, clearing the way for a resumption of executions under revised state laws, the US Supreme Court decided that “the concerns expressed in *Furman v. Georgia* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute...”

The experiment has long since failed. Justice Blackmun, who had dissented from *Furman v. Georgia* and concurred in *Gregg v. Georgia*, wrote in 1994 that “the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake” and that he would no longer “coddle the delusion” that it could be fixed.¹⁰⁰

Justice Blackmun’s successor wrote in 2015 that: “Despite the *Gregg* Court’s hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily.”¹⁰¹ Pointing out that “the arbitrary imposition of punishment is the antithesis of the rule of law”, Justice Stephen Breyer noted that “after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years [,] I see discrepancies for which I can find no rational explanations.” In July 2021, joined by Justice Ruth Bader Ginsburg as the US government prepared to conduct its first execution in 17 years, Justice Breyer noted that “the resumption of federal executions promises to provide examples that illustrate the difficulties of administering the death penalty consistent with the Constitution”, lending further weight to his call to the Court to revisit the constitutionality of the death penalty.¹⁰²

¹⁰⁰ US Supreme Court, *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

¹⁰¹ US Supreme Court, *Glossip v. Gross*, 29 June 2015, Justice Breyer dissenting.

¹⁰² *Barr v. Lee*, 14 July 2020, Justice Breyer, joined by Justice Ginsburg, dissenting.

Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. The notion of arbitrariness under the ICCPR does not just mean against the law, but must include “elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”¹⁰³

Arbitrariness in application of the death penalty in the USA comes in many forms. Corey Johnson, for example, was executed on 14 January 2021, less than a week before a new president took office on a pledge that he would work for abolition of the death penalty. Today, two of Corey Johnson’s co-defendants, convicted and sentenced to death at the same trial, are protected by a moratorium and stand to have their death sentences overturned if the Biden administration meets its abolitionist promise or by executive clemency if that were to come first. This, of course, is not a reason against commutation, but it is another grim reminder of the absence of justice and constant presence of cruelty in the application of the death penalty.

DANIEL LEWIS LEE

The first federal execution in 17 years was that of Daniel Lee, convicted in 1999. His lawyer described what unfolded in the federal death chamber in the early hours of 14 July 2020:

***“At 2am on July 14, while the country was sleeping, the Supreme Court issued a 5-4 decision vacating the injunction that had been in place against the first federal execution in 17 years. Within minutes, the Department of Justice moved to re-set Danny Lee’s execution – for 4am, summoning media and witnesses back to the prison in the very middle of the night. When it was brought to the government’s attention that a court stay still remained in place, the DOJ [Department of Justice] first maintained that that stay presented no legal impediment to executing Danny Lee, but then filed an ‘emergency’ motion to lift the stay.*”**

***“Over the four hours it took for this reckless and relentless government to pursue these ends, Daniel Lewis Lee remained strapped to a gurney: a mere 31 minutes after a court of appeals lifted the last impediment to his execution at the federal government’s urging, while multiple motions remained pending, and without notice to counsel, he was executed.*”**

“It is shameful that the government saw fit to carry out this execution during a pandemic. It is shameful that the government saw fit to carry out this execution when counsel for Danny Lee could not be present with him, and when the judges in his case and even the family of his victims urged against it. And it is beyond shameful that the government, in the end, carried out this execution in haste, in the middle of the night, while the country was sleeping. We hope that upon awakening, the country will be as outraged as we are.”¹⁰⁴

¹⁰³ Human Rights Committee, General Comment 36, Article 6: Right to life, 3 September 2019, UN Doc. CCPR/C/GC/36, para. 12.

¹⁰⁴ Ruth Friedman, attorney for Daniel Lee and Director, Federal Capital Habeas Project, 14 July 2020.

¹⁰⁵ US District Court for the Eastern District of Arkansas, USA v. Lee, Motion pursuant to 28 USC §2255 to vacate conviction and sentence, 26 June 2006.

¹⁰⁶ Barr v. Lee, 14 July 2021, Justice Breyer, joined by Justice Ginsburg, dissenting.

Fourteen years earlier, Daniel Lee's lawyers had argued that "this is a case that should leave any observer uneasy as to whether or not the criminal justice system worked... Everything about this case is disturbing; every corner turned raises new questions."¹⁰⁵ The controversies persisted to the end. Dissenting from the US Supreme Court's decision to allow the execution to go ahead, Justices Breyer and Ginsburg reiterated that "the death penalty is often imposed arbitrarily" and here was a case where the condemned man's co-defendant "was sentenced to life imprisonment despite committing the same crime."¹⁰⁶

Daniel Lee was one of two defendants against whom the Clinton administration sought the death penalty for the murder of a woman, her husband and her eight-year-old daughter in Arkansas in January 1996. Daniel Lee and his co-defendant Chevie Kehoe were brought to trial jointly in 1999 and both were convicted. Their sentencing phases were conducted separately. The sentencing for Lee's co-defendant was held first. The jury sentenced him to life without the possibility of release. The same jury then sentenced Lee to death.

The US District Court judge who oversaw the trial wrote: "Danny Lee is unquestionably less culpable than Chevie Kehoe in relation to the crimes alleged and proven in this case."¹⁰⁷ In 2014, another judge on the District Court to whom the case had by then been assigned, wrote:

"Even though the evidence established that Kehoe was the more culpable of the two defendants, the jury sentenced him to life imprisonment and Lee to death. The penalty phase as to Kehoe was conducted before the penalty phase as to Lee, and before the jury returned a verdict during the penalty phase of the Kehoe case, the government announced in camera that if the jury sentenced Kehoe to life imprisonment, it would not seek the

death penalty for Lee. Nevertheless, after the jury returned a sentence of life imprisonment for Kehoe, the United States Attorney for the Eastern District of Arkansas was unable to obtain permission from the Attorney General to withdraw the request for the death penalty as to Lee."¹⁰⁸

Daniel Lee's lawyer sought to subpoena US Attorney General Janet Reno and Deputy Attorney General Eric Holder to learn what drove the decision to continue to seek the death penalty even after the life verdict for Kehoe was returned.¹⁰⁹ The trial judge denied a government motion to quash the subpoenas, but the US Court of Appeals for the Eighth Circuit overturned this. The trial judge ruled that Daniel Lee was entitled to a new sentencing, in part because the Department of Justice had failed to follow its own internal protocol for seeking the death penalty. The government appealed and the Eighth Circuit reinstated the death sentence. On post-conviction review, the trial judge stated:

"While much has been said about the DOJ's disregard for its own protocol for making death decisions, little has been said about the fact that DOJ exercised its prosecutorial discretion in disregard of the recommendation of the local US Attorney and her assistants involved in the case (including lead counsel), the case agents, and even the victims' family that a death sentence should not be pursued against Lee if the jury spared Kehoe's life... In the eyes of this Court, the DOJ's insistence on continuing to seek the death penalty as to Lee, under the circumstances, casts a pall over this case... While this Court may agree... that Deputy Attorney General Holder's decision to require the Government to continue to seek the death penalty against Lee was unreasonable, unfair, and possibly even an abuse of prosecutorial discretion, the question is whether that decision violated the Constitution. The Court concludes that it did not."¹¹⁰

¹⁰⁷ US District Court for the Eastern District of Arkansas, *USA v. Lee*, Memorandum Opinion, 28 August 2008.

¹⁰⁸ US District Court for the Eastern District of Arkansas, *USA v. Lee*, Memorandum Opinion, 18 March 2014.

¹⁰⁹ The Department of Justice's death penalty protocol required the prosecutor to request withdrawal of the death notice from the Attorney General's Review Committee on Capital Cases. Because Attorney General Reno was unavailable at the time, Deputy Attorney General Holder convened the meeting at which it was determined that the notice would not be withdrawn.

¹¹⁰ *USA v. Lee*, Memorandum Opinion, In the US District Court for the Eastern District of Arkansas, 28 August 2008.

While this court decided that the Deputy Attorney General’s decision did not violate the Constitution, because of the broad discretion given to prosecutors in US law, Amnesty International considers that it did amount to a breach of international standards on the role of prosecutors and ultimately was responsible for perpetuating the arbitrariness that defined this case.¹¹¹ The lack of transparency about why the Deputy Attorney General made this decision when the prosecution had previously promised to withdraw the death penalty against Lee if his co-defendant did not receive it is troubling.

AS DANIEL LEE’S EXECUTION APPROACHED IN JULY 2020, A JUDGE ON THE EIGHTH CIRCUIT WROTE THAT “LEE’S CASE UNDERSCORES HOW THE DEATH PENALTY CONTINUES TO BE ARBITRARILY APPLIED. EVERYONE AGREES THAT KEHOE WAS FAR MORE CULPABLE THAN LEE, YET KEHOE WAS SENTENCED TO LIFE IN PRISON WHILE LEE WAS SENTENCED TO DEATH.”¹¹²

The sister of one of the victims wrote to President Trump in September 2019 to explain the family’s opposition to the execution, saying it was incomprehensible “why the two men got drastically different sentences”, but “whatever

the reason, it was not fair or just for Daniel Lee to be sentenced to death, and none of the reasons I come up with make me feel any better.”¹¹³

The trial judge speculated that what may have “influenced the jury’s ultimate decision” was the evidence introduced by the government of Lee’s involvement in a murder in Oklahoma when he was 17 years old. If so, it was influence based on improper evidence and argument. The prosecution, in both its opening and closing argument, told the jury that Lee “has an earlier murder under his belt.” Evidence later came to light that the judge in the Oklahoma case against the teenaged Lee had found that the crime of murder was “not established by evidence” and had recommended dismissal of those charges and substituting with one of robbery. In 2019, the US District Court found that if this information had been disclosed, “the outcome at sentencing would have been different.”¹¹⁴ However, the judge denied relief under the constraints of the AEDPA.¹¹⁵

The case of Daniel Lee, according to the federal court judge who oversaw the trial, in a letter to the US Attorney General in 2014, “illustrates that the most carefully crafted capital punishment regime in the hands of the humans who must carry it out can never be completely free of arbitrariness.”¹¹⁶ After the execution, US Supreme Court Justices Breyer and Ginsburg said the case “revealed the inherent arbitrariness of the death penalty.”¹¹⁷

¹¹¹ UN Guidelines on the Role of Prosecutors (1990), para. 12: “Prosecutors shall... respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.” Every capital defendant must be given all due process guarantees under Article 14 of the ICCPR, with governments also “bearing in mind” international instruments such as the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors and Strengthening of the UN Safeguards, as agreed by Economic and Social Council (ECOSOC) Resolution 1996/15.

¹¹² US Court of Appeals for the Eighth Circuit, *Lee v. USA*, Amended judgment, 12 July 2020, Judge Kelly dissenting.

¹¹³ Letter to President Donald J. Trump, dated 6 September 2019.

¹¹⁴ US District Court for the Eastern District of Arkansas, *USA v. Lee*, Opinion and order, 26 February 2019.

¹¹⁵ A second federal judge, this time in Indiana, agreed, and granted Lee a stay of execution because of this very evidence and the way in which the jury had been seriously misled. *Lee v. Warden*, In the US District Court for the Southern District of Indiana, 5 December 2019. The appellate Court overturned the stay.

¹¹⁶ Letter re *United States v. Daniel Lewis Lee*, to Eric Holder, Attorney General of the United States and Christopher Thyer, United States Attorney for the Eastern District of Arkansas, from G. Thomas Eisele, 7 November 2014.

¹¹⁷ *Barr v. Purkey*, On application for stay or vacatur, 16 July 2020, Justice Breyer, joined by Justice Ginsburg, dissenting.

LEZMOND CHARLES MITCHELL

Lezmond Mitchell was convicted in 2003 of the 28 October 2001 murder of a woman and her nine-year-old granddaughter during a carjacking in Arizona. He was sentenced in 2003 to life imprisonment for the two murder counts and to death for carjacking resulting in death. The crime was committed when Lezmond Mitchell, who had no criminal record, had just turned 20 and his co-defendant was 16 (and therefore ineligible for the death penalty under the federal statute). Both defendants were Navajo, as were the victims, and the crime occurred on the Navajo Nation's reservation.¹¹⁸

The murders alone did not make Lezmond Mitchell eligible for the death penalty because the FDPA included the “tribal option”, which allows Native American tribes to decide whether the death penalty should apply to federal prosecutions of crimes committed against Native American people on tribal lands. The Navajo Nation decided that it categorically should not (as did all but one of the other tribes). Lobbying for the tribal option in Congress in 1994, an Assistant Attorney General in the Navajo Department of Justice explained: “the death penalty is counter to the cultural beliefs and traditions of the Navajo people who value life and place great emphasis on the restoration of harmony through restitution and individual attention.”¹¹⁹

However, the US government charged Lezmond Mitchell with carjacking resulting in death. Carjacking is considered a “crime of nationwide applicability” with federal jurisdiction deriving through the notion of interstate commerce (cars are manufactured and used in interstate commerce). Consequently, the tribal option was not applicable to the carjacking charge and Lezmond Mitchell was punishable by death. In 2014, the Chief Justice of the Supreme Court of the Navajo Nation wrote that “the Department of Justice relied on a technicality to bypass us. Instead of respecting the opt-in provisions, the Department of Justice sought death against Mr Mitchell not for murder, but for carjacking resulting in death. The difference was in name only.”¹²⁰

Tribal nations are recognized by the federal government as “domestic dependent nations” with “inherent powers of self-government.” It was the clear intent of the Navajo Nation to opt out of the death penalty.¹²¹ The Inter-American Commission on Human Rights (IACHR) issued a report on the merits of Lezmond Mitchell's case in 2020. It concluded that:

“the application of the carjacking count with the sole purpose of seeking the death penalty contravenes, in practice, the raison d’être behind the sovereign decision taken by the Navajo Nation, that is, that death by a member of their nation on Navajo territory should not be punishable by death. In fact, this legal subterfuge resulted in practice in the application of a death sentence not for the murder but for a car robbery, an offence involving the protection of a minor legal interest... In addition, the application of the death penalty using this legal maneuver resulted in a violation of a collective dimension, and affects the values and autonomy of the Navajo Nation. The Commission notes that neither the State nor the Attorney

¹¹⁸ Reservations are territories reserved as permanent tribal homelands”, justice.gov/otj/about-native-americans#otj25. The Navajo Nation's reservation is the largest in the USA, extending into Utah, Arizona and New Mexico.

¹¹⁹ Statement of Helen Elaine Avalos, Assistant Attorney General, Navajo Department of Justice, on behalf of Peterson Zah, President of the Navajo Nation. Hearing before the Subcommittee on Crime and Criminal Justice of House Judiciary Committee, 103. Cong., 2d Sess., 22 February 1994.

Attorney General have presented an explanation to justify the reasons why the application of death penalty in the specific case would seek a better interest than the interest of the Navajo Nation and the protection of its autonomy and culture in conformity with their own worldview...

Mr Mitchell's right to be sentenced in accordance with the general understanding of the Navajo Nation that the commission of a murder by a Navajo on tribal territory should not lead to the death penalty, is a component of the right to a fair trial and to the protection against the arbitrary imposition of a penalty. Therefore, in the absence of a justification to override this decision of the Navajo Nation, the State also infringed Mr Mitchell's rights to a fair trial."¹²²

The bypassing of the "tribal option" was found legal by the US Court of Appeals for the Ninth Circuit,¹²³ but raised consternation not just within the Navajo government and the IACHR, but also the federal judiciary. In 2015, a Court of Appeals judge, dissenting, wrote that while legally available "the novel use of carjacking as a loophole to circumvent the tribal option" had set Mitchell up to "suffer the ignominious fate of being the first person to be executed for an intra-Indian crime that occurred in Indian country." The government's conduct, he continued, "reflects a lack of sensitivity to the tribe's values and autonomy, and demonstrates a lack of respect for its status as a sovereign entity." He wrote that "the arbitrariness of the death penalty in this case is apparent."¹²⁴

The capital decision-making process under then-Attorney General John Ashcroft had been made "less deferential" to local federal prosecutors and the "number of capital prosecutions increased substantially", resulting in an almost tripling of the federal death row under President George W. Bush.¹²⁵ Before the Mitchell trial, the US Attorney for Arizona had advised against the federal government pursuing execution, citing the Navajo Nation's opposition to the death penalty. The daughter and mother of the victims also requested that the death penalty not be sought. Attorney General Ashcroft overruled the US Attorney "and forced a capital prosecution based on the carjacking aspect of the crime, thereby avoiding the application of the tribal option."¹²⁶ As things stood, this judge concluded in the above dissent, execution would represent no more than fulfilment of "the wishes of a former attorney general."¹²⁷

The UN Human Rights Committee has said that it is "contrary to the object and purpose of article 6 [of the ICCPR] for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty."¹²⁸ Attorney General Ashcroft's decision to overrule the Arizona federal prosecutor "marked the beginning of an aggressive expansion of the federal death penalty, particularly into jurisdictions that did not permit the use of that penalty. Mitchell was the first object of the new policy."¹²⁹

¹²⁰ Letter from Chief Justice Yazzie, Supreme Court of the Navajo Nation, 21 July 2014. Submitted to IACHR and quoted in OEA/Ser.L/V/II, Doc. 225, 24 August 2020, Report No 211/20, Report on Admissibility and Merits, Lezmond C. Mitchell, United States of America. The letter continued: "The federal jurisdictional basis for first-degree murder was based on the fact that the crime took place on Navajo land, thus implicating the Federal Death Penalty Act requirement of the tribe's approval. But the jurisdictional basis for the carjacking charge was interstate commerce, which allowed the Department of Justice to disregard our wishes. This loophole allowed the federal government to bypass our wishes, and we view this action as both a moral and political affront to Navajo sovereignty."

¹²¹ In 2020, a federal judge described the decision as "a betrayal of a promise made to the Navajo Nation... our history shows that the United States gave tribes the option to decide for themselves", US Court of Appeals for the Ninth Circuit, Mitchell v. United States, 19 June 2015, Circuit Judge Christen, concurring.

¹²² Report no. 211/20, Case 13.570, Report on admissibility and merits. Lezmond C. Mitchell, United States of America.

¹²³ US Court of Appeals for the Ninth Circuit, USA v. Mitchell, 7 September 2007.

¹²⁴ US Court of Appeals for the Ninth Circuit, Mitchell v. US, 19 June 2015, Circuit Judge Reinhardt, dissenting in part.

¹²⁵ Update on Cost and Quality of Defense Representation in Federal Death Penalty Cases, September 2010, uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx

The trial took place far from the Navajo reservation, having been moved from Prescott to Phoenix, Arizona. This move contributed to a jury being selected which consisted of 11 white people and one Navajo person. In the original jury pool, there were as many as three dozen Native Americans. However, all but one were dismissed either because of their opposition to the death penalty – consistent with their religion and culture – and only “death-qualified” jurors (those willing to pass a death sentence) can sit on a capital jury in the USA;¹³⁰ or because they spoke Navajo as their first language; or because of the “hardship created by the long distance between the Navajo Nation and Phoenix.”¹³¹ That the prosecution appeared to favor a white jury was indicated when it peremptorily excluded the only African American and the only remaining Native American who had continued to that stage of jury selection. The defense objected to both exclusions; the judge allowed the removal of the Black juror.¹³² The judge did not allow the removal of the Native American juror, concluding that the prosecution’s dismissal had been discriminatory.

In 2015, the death sentence was upheld by the US Court of Appeals for the Ninth Circuit over the dissent of one of the three judges. He pointed to the “myriad ways in which [trial] counsel performed deficiently”, including failure to investigate and present mitigating “evidence of drug and alcohol abuse, physical abuse, and of emotional and mental problems that would have helped the jury understand what led up to Mitchell’s commission of [the crime].”¹³³ In her testimony before Congress in 1994, mentioned above, the Assistant Attorney General in the Navajo Department of Justice had said: “The vast majority of major crimes committed on the Navajo Nation and within other Indian reservations are precipitated by the abuse of alcohol. The death penalty will not address the root of the problem; rather rehabilitation efforts will be more effective.”¹³⁴

When the Court of Appeals upheld the death sentence in 2020, one of the three judges expressed the hope that the Trump administration, with the “unfettered ability to make the final decision”, would “carefully consider whether the death penalty is appropriate in this unusual case.”¹³⁵ There were no signs of any such care taken. Lezmond Mitchell was executed on 26 August 2020.

¹²⁶ US Court of Appeals for the Ninth Circuit, *Mitchell v. US*, 19 June 2015, Circuit Judge Reinhardt, dissenting in part.

¹²⁷ US Court of Appeals for the Ninth Circuit, *Mitchell v. US*, 19 June 2015, Circuit Judge Reinhardt, dissenting in part.

¹²⁸ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 50.

¹²⁹ US Court of Appeals for the Ninth Circuit, *Mitchell v. USA*, 19 June 2015, Circuit Judge Reinhardt, dissenting in part.

¹³⁰ *Wainwright v. Witt* (1985). Under the Witt standard, a juror can be dismissed for cause if his or her feelings about the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Morgan v. Illinois* (1992) explicitly extended the Witt standard to include proponents of the death penalty.

¹³¹ Office of the Speaker of the 24th Navajo Nation Council, “Navajo Nation calls for end to federal execution of tribal member, Lezmond Mitchell”, News Release, 13 August 2020.

¹³² US Court of Appeals for the Ninth Circuit, *USA v. Mitchell*, 5 September 2007, Judge Reinhardt dissenting: “So improper and arbitrary a justification cannot be presumed to be the prosecution’s true motive.”

¹³³ US Court of Appeals for the Ninth Circuit, *Mitchell v. USA*, 19 June 2015, Circuit Judge Reinhardt dissenting in part. Such background information was provided in his clemency petition: “In his early adolescence, Lezmond began self-medicating with drugs and alcohol. By the time he was seventeen, a mental health professional who treated Lezmond after he was caught with marijuana insisted that Lezmond was suicidal and required intensive psychotherapy and residential treatment to address his mental health and substance abuse issues. But Lezmond, lacking the support of his family, went untreated, and his substance abuse and mental illness worsened. In the months leading up to the commitment offenses, he was drinking alcohol and smoking marijuana daily, and using near-lethal doses of cocaine, methamphetamine, and ecstasy. On the day of the crimes, Lezmond had been awake for several days bingeing on drugs and alcohol, and he and [his 16-year-old co-defendant] continued to drink and use cocaine, methamphetamine, marijuana and ecstasy. A board-certified psychiatrist has opined that Lezmond was psychotic at the time of the killings.”

¹³⁴ Statement before Subcommittee on Crime and Criminal Justice of House Judiciary Committee, 22 February 1994, (previously cited).

¹³⁵ US Court of Appeals for the Ninth Circuit, *Mitchell v. US*, 30 April 2020, Circuit Judge Hurwitz concurring.

2.2 REJECTION OF MITIGATION AND REHABILITATION

THE DEATH PENALTY, WROTE JUSTICE POTTER STEWART IN HIS FURMAN V. GEORGIA CONCURRENCE IN 1972, “IS UNIQUE IN ITS IRREVOCABILITY. IT IS UNIQUE IN ITS REJECTION OF REHABILITATION OF THE CONVICT AS A BASIC PURPOSE OF CRIMINAL JUSTICE. AND IT IS UNIQUE, FINALLY, IN ITS ABSOLUTE RENUNCIATION OF ALL THAT IS EMBODIED IN OUR CONCEPT OF HUMANITY.”

On 7 February 2000, a letter was faxed from Attorney General Janet Reno in Washington, DC, to the US Attorney for the District of Western Texas in San Antonio telling him he was authorized to seek the death penalty against Christopher Vialva and Brandon Bernard for their part in a carjacking and robbery planned by a group of teenagers in June 1999. The carjacking had ended in the murder of a young couple on the Fort Hood military base.

Twenty years after this fax was sent, the instruction contained in it reached its lethal conclusion when, first Christopher Vialva and then Brandon Bernard were put to death in the federal execution chamber. Brandon Bernard was 18 years old at the time of the crime; Christopher Vialva was eight weeks older and had recently turned 19. By the time of their deaths, they had spent half their lives on death row. Their plight represented the absolute failure of the federal authorities to recognize that prioritizing reform and rehabilitation would have been the constructive route to have taken and one compatible with international human rights law, which sets reformation and social rehabilitation as the goal of incarceration.¹³⁶

¹³⁶ See ICCPR Article 10.3.

¹³⁷ US Supreme Court, *Roper v. Simmons*, 1 March 2005. Four months before the US Attorney General sent the fax authorizing the death penalty in the Vialva/Bernard case, the Clinton administration had urged the Supreme Court not to review the issue of executing people for crimes committed when they were under 18. The Court agreed not to (see *Domingues v. Nevada*, Section 4.2).

¹³⁸ US Supreme Court (1989), *Stanford v. Kentucky*, Justices Brennan, Marshall, Blackmun and Stevens dissenting.

¹³⁹ For example, in the US District Court for the District of Vermont, *USA v. Fell*, Order, on 20 August 2018, a federal judge addressed the federal defendant's age at the time of the carjacking murder – 20. The judge noted that “a person is more likely to act in a reckless, thoughtless manner at age 20 than at age 30” and that “neuroscience has begun the process of identifying biological explanations for these differences.” He said that the “arbitrary nature of a fixed age rule is ameliorated by the fact that the age and maturity of an individual defendant may be presented as a mitigating factor.” Donald Fell, sentenced to death in 2005, was granted a new trial in 2014. Under a plea deal in 2018, Fell was sentenced to life without parole.

CHRISTOPHER ANDRE VIALVA AND BRANDON BERNARD

It was not until 2005 that the Supreme Court banned the death penalty against individuals under 18 years old, recognizing young people's immaturity, impulsiveness, poor judgment, underdeveloped sense of responsibility and vulnerability or susceptibility to "negative influences and outside pressures, including peer pressure", as well as their potential for reform. Its ruling in *Roper v. Simmons* noted that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18."¹³⁷ Even a decade and a half earlier, four dissenting US Justices had written in a Kentucky capital case that "many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s."¹³⁸

Youth can be presented as a mitigating factor.¹³⁹ Indeed, the right of defendants to present mitigating evidence has been emphasized by US authorities when offering reassuring words on the international stage about the "heightened procedural protections" in capital cases.¹⁴⁰

At the joint trial of Christopher Vialva and Brandon Bernard in 2000, according to the jury verdict form, *not a single juror* considered the age of either to be a mitigating factor. On direct appeal to the Fifth Circuit Court of Appeals in 2002, lawyers argued that the jurors had arbitrarily refused to acknowledge the existence of a mitigating factor that plainly existed. The very law under which they were charged – the FDPA – did not allow anyone under the age of 18 to be sentenced to death, yet the age of these two defendants just outside that categorical exemption was considered to have no mitigating effect whatsoever. The Fifth Circuit rejected the appeal.¹⁴¹

The federal prosecutor who wrote government briefs and conducted oral argument in the direct appeal before the Fifth Circuit, defending the death penalty in the Bernard/Vialva case, herself pointed out in 2020 in an article that "science has made dramatic strides in understanding the youthful brain. In 2000, it was not widely appreciated that the brain remains physically immature well past age 18. Since then, science has established that the structures of the brain are not fully developed in young men until they are 25 or 26... That same science shows that 18-year-olds are no different from 17-year-olds in both immaturities and potential for rehabilitation."¹⁴²

¹⁴⁰ Common Core Document of the USA: Submitted with the Fourth Periodic Report of the USA to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights, 30 December 2011, para. 152.

¹⁴¹ US Court of Appeals for the Fifth Circuit, *US v. Bernard*, Opinion, 19 July 2002.

¹⁴² Angela Moore, *USA Today*, "I helped put an 18-year-old Black teen on federal death row. I now think he should live", 7 December 2020. She noted "recent research" tends to view Black youth as "more blameworthy than their white counterparts, even when other relevant circumstances are identical." See also, for example, *Glossip v. Gross*, 2015.

¹⁴³ Updated from Amnesty International, "He could have been a good kid": Texas set to execute third young offender in two months, May 2014, [amnesty.org/en/documents/amr51/027/2014/en/](https://www.amnesty.org/en/documents/amr51/027/2014/en/)

The federal trial was conducted in Texas, where more teenaged defendants have been sentenced to death and executed at state level than in any other state. Only four other states have executed more people of *any age* than Texas has executed teenaged offenders since *Furman v. Georgia*. Ninety of the 574 people put to death there from 1982 to June 2022 were teenagers (17, 18 or 19 years old) at the time of the crimes for which they were sentenced to death. Of these 90 people, 56 were African American (62%) and of these 56 people, 40 (71%) were convicted of crimes involving white victims.¹⁴³ Since 2014, Texas has executed nine people for crimes committed when they were 18; four were Black, three were Hispanic and two were white.

“When I heard about the crime through the media coverage”, Brandon Bernard’s former juvenile probation officer recalled in 2020, “I knew that the race of the defendants and the victims would be a factor in the outcome of the trial. Since Brandon and his friends were African American and the victims were white, church-going people, race would be an issue, especially in this part of Texas.”¹⁴⁴

Another contributing factor to the sentencing outcome may have been that the case unfolded during a period in the USA in which youth were portrayed in the media and by politicians as “superpredators”.

“[T]he now discredited superpredator myth – that Black adolescent males were inherently dangerous and must be locked up else they grow more and more violent [was] exactly the theory that the government advanced to secure a death sentence... While the term was not explicitly racist, it was racially charged... The term’s negative impact across communities of color can hardly be overstated – it changed for the worse the way prosecutors, judges, juries, and the

community at large viewed young Black men. A constant media focus on the term ‘superpredator’ caused an unfounded panic... In fact, the government invited the jurors to return a verdict that was based on that false myth. The crux of the government case was that Vialva and Brandon were apex predators who needed to be killed rather than merely caged.”¹⁴⁵

Christopher Vialva was executed on 24 September 2020. By the time that Brandon Bernard was scheduled for execution on 10 December 2020, five of the nine surviving jurors said that they had come to believe that life imprisonment was adequate punishment for Brandon Bernard. Two of the former jurors signed declarations in 2016 in support of his bid for clemency from President Obama. One said: “I felt that Brandon was a kid who got caught up with the wrong crowd” and that he was “just an adolescent, trying to find belonging... my understanding now, as I am older, with more life experiences, about teenagers and our brain and social development factors into my current wishes for clemency. I do not want Brandon to be executed for bad decisions he made when he was a teenager.”¹⁴⁶ The other expressed her view that Brandon Bernard’s “trial attorneys failed even to adequately represent him. Due to this failure in legal representation, I am not opposed to Mr Bernard requesting his death sentence be commuted to life without the possibility of parole.”¹⁴⁷ As the execution neared in 2020, another of the former jurors declared his hope that President Trump “rights this wrong and commutes Mr Bernard’s sentence to life imprisonment.”¹⁴⁸ In similar vein, the man who served as the foreperson of the jury said that he was “praying the President commutes Brandon Bernard’s death sentence.”¹⁴⁹

¹⁴⁴ Declaration of Novotny Baez, 25 August 2020.

¹⁴⁵ US District Court for the Western District of Texas, *USA v. Bernard*, Motion to modify sentence under 18 USC §(c)(1), 7 December 2020.

¹⁴⁶ Declaration, Jason Fuller, 21 July 2016.

¹⁴⁷ Declaration, Laird Cooper, 26 May 2016.

After Brandon Bernard's first appeal had run its course, his lawyers sought authorization to file a successive petition to present a new claim that the government had failed to disclose evidence favorable to Bernard and had presented false testimony at the trial. The appeal lawyers had discovered this evidence of prosecutorial misconduct in 2018, after it emerged in a re-sentencing of one of the younger co-defendants in the case. However, because the new evidence raised concerned evidence at the sentencing phase, rather than challenging the evidence of Brandon Bernard's guilt, the US Court of Appeals for the Fifth Circuit ruled that he could not overcome the barrier imposed under the AEDPA for authorization to file a successive petition.¹⁵⁰ The Fifth Circuit "got it wrong", according to US Supreme Court Justice Sonia Sotomayor. Brandon Bernard had "never had the opportunity to test" his "troubling allegations that the Government secured his death sentence by withholding exculpatory evidence and knowing eliciting false testimony against him", and now he never would, Justice Sotomayor added.¹⁵¹

What the appeal lawyers had discovered was that before the 2000 trial, the prosecutors had consulted with the former head of the Gang Unit in the Police Department for Killeen in Texas. She had told them that in the 13-tier hierarchy of the gang to which the defendants were alleged to belong, Brandon Bernard had been at the bottom. That he was on the periphery of the gang contradicted the prosecution's argument that the structure was flat, that he was an equal participant and that he therefore posed the same risk of "future dangerousness". The gang expert had even produced a striking pyramidal diagram depicting the structure, developed with an informant.

¹⁴⁸ Declaration, Gary McClung, 13 August 2020.

¹⁴⁹ Declaration, Calvin Kruger, 6 November 2020.

¹⁵⁰ *In re: Brandon Bernard*, US Court of Appeals for the Fifth Circuit, 9 September 2020.

¹⁵¹ *Barnard v. United States*, 10 December 2020, Justice Sotomayor dissenting.

¹⁵² Declaration of Mark Bezy, 20 August 2016.

¹⁵³ US District Court for the Western District of Texas, *USA v. Bernard*, Government's consolidated response to Bernard's motion to modify sentence under 18 USC § 3582(c)(1) and motion to stay or modify execution date, 8 December 2020.

The prosecution knew all of this before Brandon Bernard was tried but did not tell his lawyers. Under international law, this violates the principle of "equality of arms". In a criminal trial, where the prosecution has all the machinery of the state behind it, this principle guarantees that the defense has a genuine opportunity to prepare and present its case.

Even before this evidence came to light, a former warden of federal death row had supported clemency for Brandon Bernard in 2016 and had criticized the government's argument at trial that his gang affiliation in the outside world inevitably meant he would associate with any such gang in prison and be a future danger. This "was exaggerated and inaccurate", said the former warden, and Bernard's lack of dangerousness had subsequently been shown in his prison record which was one of "zero disciplinary infractions in [at that point] 16 years."¹⁵²

On the eve of Brandon Bernard's execution, the government rejected efforts to have the judiciary reduce the death sentence in recognition of its excessive nature and the evidence of his remorse and reform. Such claims, "might be fodder for a clemency petition", it said, but they did not qualify as reasons for the courts to reduce his sentence.¹⁵³ Neither it seems did they qualify as reasons for executive clemency.

2.3 RACE MATTERS

THE MAN WHO GAVE HIS NAME TO THE *FURMAN V. GEORGIA* RULING WAS WILLIAM HENRY FURMAN. THIS BLACK MAN WAS TRIED AND SENTENCED TO DEATH IN 1967 BEFORE A JURY CONSISTING OF 11 WHITE JURORS AND ONE BLACK JUROR FOR THE MURDER OF A WHITE MAN DURING A BURGLARY. WHILE ARBITRARINESS WAS THE ISSUE AROUND WHICH THE *FURMAN V. GEORGIA* RULING COALESCED, RACE WAS THE ELEPHANT IN THE ROOM.

Concurring in the ruling, Justice Potter Stewart noted that “if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.” Fifty years on, the elected branches must surely finally face up to the reality that the USA has failed to devise and “may not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the system” and that “where a morally irrelevant – indeed, a repugnant – consideration plays a major role in the determination of who shall live and who shall die”, continued resort to the death penalty “in light of its clear and admitted defects is deserving of a sober second thought.”¹⁵⁴ Such sober reflection was entirely absent during the federal execution spree.

**ORLANDO
CORDIA
HALL**

The last federal execution before resumption in 2020 was of Louis Jones, a Black defendant tried in the Northern District of Texas in front of an almost all-white jury, who was executed in the federal death chamber in March 2003.¹⁵⁵ Seventeen and a half years later, Orlando Hall, another Black man sentenced to death in the same US District met the same fate. Orlando Hall was tried before an all-white jury and a prosecutor who would later be named in two major judicial rulings overturning death sentences because of the prosecution’s racist jury selection techniques.

In September 1994, a 16-year-old girl was murdered near Pine Bluff in Arkansas after she had been abducted in Texas. Five men, including Orlando Hall, were charged in the crime. In 1995, the federal government filed notice of its intent to seek the death penalty against Orlando Hall and Bruce Webster under the FDPA. Orlando Hall and Bruce Webster were tried separately in the Northern District of Texas. Both were sentenced to death. Bruce Webster’s death sentence was overturned in 2019 because of his intellectual disability, after records supporting this claim – which the Social Security Administration had told his lawyers did not exist – emerged.¹⁵⁶

¹⁵⁴ *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

¹⁵⁵ Amnesty International, *Another planned killing by the US Government: The imminent federal execution of Louis Jones, February 2003*, [amnesty.org/en/documents/amr51/020/2003/en/](https://www.amnesty.org/en/documents/amr51/020/2003/en/)

¹⁵⁶ Bruce Webster was sentenced to death in June 1996. The District Court vacation of his sentence was affirmed by the Seventh Circuit in 2020.

Given the facts alleged in the crime, Orlando Hall and Bruce Webster could have been tried in either the Northern District of Texas (Fort Worth Division) or the Eastern District of Arkansas (Pine Bluff Division). Around that time, the latter had a Black population of 35.85% compared to 10.41% in the Texas location. The result of the Clinton administration's decision to prosecute in Texas was therefore to dilute the presence of Black jurors. In the end, none of the 12 jurors at Orlando Hall's trial was Black; prosecutors used their peremptory challenges to dismiss four Black prospective jurors at jury selection.¹⁵⁷

At trial, the defense presented no evidence and waived closing argument. Orlando Hall was convicted on all counts. The penalty phase lasted three days. The prosecution presented evidence of the defendant's previous convictions for drug-related crimes and seven witnesses to testify as to the defendant's purported bad character, all but one of whom defense counsel declined to cross-examine. The defense presented only the defendant's sister and mother as character witnesses. The federal trial judge denied Orlando Hall's request to make a statement expressing his remorse and asking for forgiveness from his own and the murder victim's family. The jury voted for death and the judge formally sentenced Orlando Hall to death on 12 February 1996.

His appeal, filed in 2000, was denied in 2004. It was only after this that detailed new evidence fully emerged of the history of racially motivated jury selection tactics employed by one of the prosecutors, Paul Macaluso, when working at Texas county level. Paul Macaluso had trained and practiced in the Dallas County District Attorney's Office from 1973 to 1988. During this whole time, "prosecutors in the Dallas County office had followed a specific policy of system-

-atically excluding [B]lacks from juries."¹⁵⁸ This policy was contained in a manual, known as the *Sparling Manual*, written in 1968, which directs prosecutors that "you are not looking for any member of a minority group which may subject him to oppression – they almost always empathize with the accused."

In 2005, in its ruling in *Miller-El v. Dretke* (*Miller-El II*), the US Supreme Court found that Paul Macaluso's "chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion, indicating the very discrimination the explanations were meant to deny."

In August 2020, Hall's lawyers became aware of a statistical analysis filed in another case with the IACHR of the federal government's pursuit of the death penalty in Texas between 1988 and 2010. This analysis, conducted by an Associate Professor in the Department of Sociology and Criminology at the University of Denver, found that:

"Federal prosecutors in Texas have requested authorization to seek the death penalty against 32 men and obtained a death verdict in 13 cases. Ten of the 13 men who received the federal death penalty in Texas are black. Thus, while blacks make up 12% of the Texas population, they constitute 77% of all the federal death verdicts within the State of Texas..."

[F]ederal prosecutors in Texas were almost six times more likely to request authorization to seek the death penalty against black defendants... Moreover, authorization was almost eight times more likely to be granted in cases with black defendants... Finally, a death verdict was about sixteen times more likely to be rendered in cases with black defendants... [emphasis in original]

¹⁵⁷ US District Court for the Southern District of Indiana *Hall v. Watson*, Order denying motion for stay of execution, 17 November 2020. Of the 100 prospective jurors at jury selection, seven were Black. "After strikes for cause, five qualified black prospective jurors remained. The defense struck one black juror due to her strong pro-death-penalty views, and the government peremptorily struck the remaining four, leaving no black jurors."

¹⁵⁸ US Supreme Court, *Miller-El v. Dretke*, 13 June 2005.

It is highly unlikely that a race-neutral factor or factors could explain why black defendants were 16 times more likely to be sentenced to death. The racial disparities are almost surely too extreme to have a benign explanation. Indeed, the racial disparities are the most acute I have seen in my years of research on the subject.¹⁵⁹

The federal government's response to the petition filed for Orlando Hall was that it was too late and was "nothing more than a last-ditch attempt to level barred and baseless allegations against the US Attorney's Office."¹⁶⁰ The claims, it said, were based on "jury-selection issues and alleged discrimination in the application of the death penalty – events that occurred 25 years ago" and the delay in making the discrimination claim was "unfair to the government".

The District Court judge acknowledged as "real" the many limitations that counsel said they faced throughout the process.¹⁶¹ However, he denied the petition and refused to stay the execution as to allow Orlando Hall's racial discrimination claims to be brought now "would be contrary to the framework Congress created for federal prisoners seeking postconviction relief" under the AEDPA. Orlando Hall was executed on 19 November 2020.

¹⁵⁹ Declaration of Scott Phillips, 29 March 2011.

¹⁶⁰ Hall v. Watson, Response to Hall's 28 USC § 2241 petition and response in opposition to Hall's motion for stay, 16 November 2020.

¹⁶¹ Hall v. Watson, Order denying motion for stay of execution, 17 November 2020.

2.4 MENTAL DISABILITY AND LEGAL REPRESENTATION

EXECUTING SOMEONE WHO LACKS A RATIONAL UNDERSTANDING OF THEIR EXECUTION VIOLATES THE US CONSTITUTION.¹⁶² INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS PROHIBIT THE USE OF THE DEATH PENALTY AGAINST PEOPLE WITH MENTAL (PSYCHOSOCIAL) AND INTELLECTUAL DISABILITIES.

The UN Human Rights Committee has said that under the ICCPR “States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence, and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence.”¹⁶³

International legal standards require that anyone facing the death penalty is provided “adequate legal assistance at all stages of the proceedings” and this should go “above and beyond the protections afforded in non-capital cases.”¹⁶⁴ Adequate legal representation is essential in all cases, but in none more so than where a case can end in a death sentence and one in which there is evidence of serious mental disability.¹⁶⁵

After the executions of Wesley Purkey and Lisa Montgomery, Justice Sotomayor pointed out that both executions may have been unconstitutional given the significant evidence that both lacked a rational understanding of the reason for and reality of their impending execution. “We will never have definitive answers” to the question of constitutionality, she wrote, “because this Court sanctioned their executions anyway.”¹⁶⁶

**WESLEY
IRA
PURKEY**

¹⁶² *US Supreme Court, Ford v. Wainwright*, 26 June 1986; *US Supreme Court, Panetti v. Quarterman*, 28 June 2007.

¹⁶³ *Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 49. See also Safeguard no.3 of the UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, ECOSOC Resolution 1984/50.*

¹⁶⁴ *UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC 1984/50, and Additions to Safeguards as agreed by ECOSOC Resolution 1989/64.*

In jail in Kansas in 1998, Wesley Purkey asked to be prosecuted by the federal government if he confessed to the murder of a 16-year-old girl who had gone missing earlier that year in an unsolved crime. He was facing a life sentence under state law for another murder and “he thought that if he were convicted on federal charges, he would also receive a life sentence, but he could serve it in a federal facility. It apparently did not occur to him that the death penalty is possible for certain federal crimes.”¹⁶⁷

On 5 November 2003, in the Western District of Missouri, a jury found Wesley Purkey guilty of the kidnapping, rape and murder of the girl. At the sentencing, his lawyers presented evidence of organic brain damage, diminished mental capacity and of physical, sexual and emotional abuse he had endured as a child. The jurors voted for a death sentence but left blank the form on which they were supposed to record how many of them had found mitigating factors. The defense lawyer initially objected but in the face of the federal prosecutor’s objection dropped the matter. Without knowing how or even whether the jurors had weighed the mitigating and aggravating evidence, the trial judge formally imposed the death sentence on 23 January 2004.

Wesley Purkey’s final appeal lawyers argued that the legal representation during the sentencing phase had been minimal and inadequate, and the Seventh Circuit agreed that “the efforts of trial counsel to build a case for mitigation fell short of what current counsel have now found.” The panel ruled it could not say the jury’s decision would have been different if it had been presented with this additional mitigation. It nevertheless said

that it was “disturbed” by the blank jury form: “It was for the jury to balance aggravating and mitigating factors, but it is hard to know whether it did that.” The trial judge “never resolved the question whether the blank form meant that the jury neglected to address the question of mitigation, or if it meant that it thought about the subject and concluded that there was nothing to report.”¹⁶⁸

“As the law now stands”, the Seventh Circuit said, “once a Sixth Amendment claim of ineffective assistance of counsel has been raised, as happened in Purkey’s case, that is the end of the line.” The Seventh Circuit acknowledged that “the failure of trial counsel to conduct a proper mitigation analysis” was “worthy of further explanation” and that it was not rejecting the claim “on the merits”, but under “our understanding” of the “draconian” rules for permitting a successor petition. If this reading of these rules was “too restrictive, there would be significant issues to litigate”, it added.¹⁶⁹

Wesley Purkey’s mental disability was long-standing and had worsened over the years. “In 1971, at 19 years of age, Mr Purkey was diagnosed with Schizophrenia Reaction, Schizo-Affective Type, and Depression. In 1998 with Psychosis; in 1999 with Bipolar Disorder.” He made numerous suicide attempts.¹⁷⁰ At the time he made his contact with the FBI – without a lawyer – to confess to the murder of the 16-year-old, he had been “fixated on his delusional beliefs about an extensive poisoning conspiracy” in which “chemicals were coming through the vents and ceiling and had planted something in his chest.”¹⁷¹

¹⁶⁵ See also Report of the Office of the UN High Commissioner for Human Rights, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, 27 December 2017, UN Doc. A/HRC/37/25, paras 19 and 24–32.

¹⁶⁶ *US v. Higgs*, 15 January 2021, Justice Sotomayor dissenting.

¹⁶⁷ *US Court of Appeals for the Seventh Circuit, Purkey v. USA*, 2 July 2020.

¹⁶⁸ *US Court of Appeals for the Seventh Circuit, Purkey v. USA*, 2 July 2020.

¹⁶⁹ *US Court of Appeals for the Seventh Circuit, Purkey v. USA*, 2 July 2020.

¹⁷⁰ Report of Bhushan S. Agharkar, MD, DFAPA, 19 November 2019, p. 5.

¹⁷¹ Report of Bhushan S. Agharkar, (previously cited), p. 7.

ON DEATH ROW, HIS MENTAL CONDITION DETERIORATED.

In 2016, he was diagnosed with “lifelong complex-PTSD (Post-Traumatic Stress Disorder) as a result of severe trauma from his experiences of extreme physical, sexual, and emotional abuse throughout his childhood and adolescence, and Major Depressive Disorder secondary to his PTSD.” Neurological testing in 2003 and 2016 showed “evidence of brain damage, particularly frontal lobe damage” further limiting his “capacity to regulate his thoughts, emotion, and behavior, which has significantly deteriorated over time.”¹⁷² In 2017, he was diagnosed with the early stages of dementia, likely Alzheimer’s disease, consistent with his family history and his head injuries.¹⁷³

After his execution was set for 13 December 2019, his lawyers filed an action in the US District Court for Washington, DC, asserting that their client was incompetent to be executed. On 15 June 2020 the government reset four execution dates, including Wesley Purkey’s, for 15 July 2020. The District Court judge blocked the execution, noting that Purkey’s lawyers had “made a substantial showing” of his incompetence for execution, while the government had “provided no independent evidence of competence.”¹⁷⁴

However, the Trump administration turned to the Supreme Court against the decision. On 16 July 2020, in a single sentence, and over the dissent of four justices who accused the majority of “shortcut[ting] judicial review and permit[ting] the execution of an individual who may well be incompetent”, the Court vacated the District Court’s order.¹⁷⁵

The lawyers refiled the competency claim in the Southern District of Indiana and lodged an emergency application for a stay of execution in the Seventh Circuit. While that was pending, the execution went ahead at around 8am on 16 July 2020. International law and standards set out as one of the safeguards to guarantee protection of the rights of those facing the death penalty that executions may not be carried out “pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.”¹⁷⁶

The Department of Justice asserted that Wesley Purkey had been “afforded every due process of law under our Constitution.”¹⁷⁷ Four Supreme Court justices were nevertheless among those who protested the injustice. They wrote that proceeding with the execution, “despite the grave questions and factual findings regarding his mental competency, casts a shroud of constitutional doubt over the most irrevocable of injuries.”¹⁷⁸

¹⁷² Report of Bhushan S. Agharkar, (previously cited), p. 8.

¹⁷³ Report of Bhushan S. Agharkar, (previously cited), p. 9

¹⁷⁴ US District Court for DC, Purkey v. Barr, Order, 15 July 2020.

¹⁷⁵ Barr v. Purkey, On application for stay or vacatur, 16 July 2020, Justices Sotomayor, Ginsburg, Breyer and Kagan, dissenting.

¹⁷⁶ Safeguard no.8 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by ECOSOC resolution 1984/50 of 25 May 1984 and endorsed by the UN General Assembly without a vote; UN Human Rights Committee, General comment No. 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 46.¹⁷⁴ US District Court for DC, Purkey v. Barr, Order, 15 July 2020.

¹⁷⁷ Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of Wesley Ira Purkey, 16 July 2020, www.justice.gov/opa/pr/statement-department-justice-spokesperson-kerri-kupec-execution-wesley-ira-purkey

¹⁷⁸ Barr v. Purkey, On application for stay or vacatur, 16 July 2021, Justices Sotomayor, Ginsburg, Breyer and Kagan, dissenting.

LISA MARIE MONTGOMERY

A week before the Trump administration left office, Lisa Montgomery was executed by lethal injection, the first woman to be put to death by the federal government in 67 years.

In 2007, a federal jury in Kansas City, Missouri, voted that Lisa Montgomery be sentenced to death, after convicting her of the kidnapping and killing in December 2004 of a woman and cutting her unborn baby from her body. Lisa Montgomery had taken the baby with her to the neighboring State of Kansas and claimed it was her child. She was arrested soon afterwards.

Lisa Montgomery's lawyers outlined her background of abuse and trauma in a complaint filed in federal court in November 2020:

"Mrs. Montgomery is a victim of incest, child sex trafficking, gang rape, physical abuse, and neglect. These harrowing experiences, combined with congenital brain damage and multiple traumatic brain injuries, have resulted in incurable and significant psychiatric disabilities.

Mrs. Montgomery's profound trauma began during her childhood. Her alcoholic stepfather sexually abused her beginning when she was eleven years old. In subsequent years, he raped her on a weekly basis. He built her a room on the outside of the family's trailer to isolate her from the rest of the

family. He invited his friends to rape her as well; she told a police officer at the time that they raped her anally, vaginally, and orally, one after the other. When they were finished, they urinated on her. Her mother, far from protecting Lisa, threatened, abused, and beat her, and trafficked her to men in exchange for services. This sexual violence continued when, as a teen, Lisa was pressured into marrying her stepbrother, who then sexually tortured and raped her.

Decades of rapes, beatings, and sexual torture have taken a devastating toll. Mrs. Montgomery has documented brain damage, experiences temporal lobe seizures, and has been diagnosed with Bipolar Disorder and Complex Post Traumatic Stress Disorder ("Complex PTSD"). She dissociates regularly, involuntarily detaching from her circumstances, and struggles to know what is real and what is not. She endures hallucinations, psychosis, mania and depression, affecting every aspect of her daily life. To treat her episodes of florid psychosis and mitigate the debilitating symptoms of her other psychiatric disabilities, FMC Carswell personnel administer her anti-psychotic, anti-epileptic, and anti-depressant medications. Even with these treatments, Mrs. Montgomery continues to experience severe, distressing, and near-constant symptoms of her mental illnesses.¹⁷⁹

After the execution was set, Lisa Montgomery's two long-standing post-conviction lawyers both contracted Covid-19 while travelling to meet their client in the Federal Medical Center in Carswell, Texas, where she was held, and their resulting serious illness prevented them from working on her clemency petition. Their client's background and mental disability compounded the challenges to ensure effective legal representation at that critical stage before her set execution. Firstly, these two lawyers had spent many years earning

¹⁷⁹ US District Court for DC, *Montgomery v. Barr et al. Complaint for injunctive and declaratory relief for violations of the Fifth Amendment to the United States Constitution and 18 USC §3599*, 12 November 2020.

¹⁸⁰ US District Court for DC, *Montgomery v. Barr, Defendants' response in opposition to motion for Temporary Restraining Order and preliminary injunction*, 14 November 2020.

DESPITE THIS, THE ADMINISTRATION ARGUED THAT LISA MONTGOMERY WAS NOT ENTITLED TO HAVE HER EXECUTION POSTPONED

arguing that the lawyers could have worked on a clemency petition before contracting Covid-19, that other lawyers could take it forward remotely and that “the public interest in allowing the execution to proceed as planned is overwhelming.”¹⁸⁰ However, the District Court dismissed any suggestion that the two lawyers had been anything “less than diligent in this matter” before they had contracted the virus and rejected the notion that other attorneys could “fill the shoes” of the two sick lawyers “at this late date”, in particular because of the expertise needed in dealing with a client who was “severely mentally ill”. In response to the assertion that there was an “overwhelming” public interest in having the execution proceed, the judge ruled that “the public has an interest in ensuring that this failsafe of our criminal justice system [clemency] operates in a fair and considered manner.” On 19 November 2020, the judge issued an order preventing the government from executing Lisa Montgomery before 31 December 2020, to allow the two lawyers time to recover and to finalize the clemency petition (they eventually filed it on 24 December).

By this time, President Trump had already lost the election. The administration was now running out of time to see its timetable of executions through if courts issued stays, even temporary ones. On 23 November 2020, with less than a month left in office, the Trump administration reset the execution of Lisa Montgomery for 12 January 2021. It did so despite federal regulations stating: “If the date designated for execution passes by reason of stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons *when the stay is lifted*” [emphasis added].

On 24 December 2020, the District Court judge concluded that the order setting a new execution date while his earlier stay was in effect was unlawful. He duly vacated the 23 November BOP order setting the 12 January 2021 execution date. However, on 1 January 2021, a three-judge panel of the US Court of Appeals for the DC Circuit summarily reversed this, without a full briefing on the merits. On 5 January, the Court of Appeals refused to grant a rehearing before the full court.

The lawyers also argued that the scheduling of the execution violated the FDPA by contravening Missouri law (where she was tried) which required a minimum of 90 days’ notice. On 8 January 2021, the judge ruled that the government had not violated the FDPA. On 11 January, a three-judge panel of the DC Circuit Court of Appeals denied an emergency motion for a stay of execution.¹⁸¹ However, this time, the court agreed to rehear the case in front of the full court on an expedited schedule. This schedule would nevertheless have taken the case just beyond the end of the Trump administration.

¹⁸¹ US Court of Appeals for the DC Circuit, *Montgomery v. Rosen*, Order, 11 January 2021, Circuit Judge Millett, dissenting.

¹⁸² *Montgomery v. Warden*, Order granting motion to stay execution pending a competence hearing, 11 January 2021.

¹⁸³ US Court of Appeals for the Seventh Circuit, *Montgomery v. Watson*, Emergency motion to vacate District Court’s order staying Montgomery’s execution, 12 January 2021.

¹⁸⁴ US Court of Appeals for the Seventh Circuit, *Montgomery v. Watson*, Order, 12 January 2021.

¹⁸⁵ IACHR resolution 91/2020 Precautionary Measure No. 1048-20 Lisa Montgomery regarding the USA, 1 December 2020.

One of the judges had earlier pointed out that if Lisa Montgomery's lawyers were "right on the law, she will be executed prematurely in violation of law... That itself is the very essence of an injury that cannot be remediated after the fact." In contrast, there was "no corresponding harm to the government entailed in simply postponing for a short time the date of execution." The Trump administration thought otherwise, appealed to the Supreme Court, which lifted the stay, over the dissent of three justices.

Meanwhile, while all this had been going on, the conditions in which Lisa Montgomery was held after her execution was scheduled had been giving rise to serious concern. She was subjected to 24-hour video surveillance and illumination of the cell, low temperatures, had no contact with other prisoners and was allowed a cold shower three times a week. The prison authorities asserted that the conditions were to protect her from suicide, but her lawyers responded that it was contributing to a serious deterioration in her mental health.

A US District Court judge issued a stay of execution based on the "ample evidence" before him that the person's "current mental state is so divorced from reality that she cannot rationally understand the government's rationale for her execution." Having made a "substantial threshold showing of insanity", she was entitled to a fair hearing on this issue.¹⁸² The government responded that this claim should have been filed a few weeks earlier, but the judge responded that the claim was "not frivolous", was backed by expert opinion and, given the individual's "deterioration, this case's procedural history and what's at stake", the timing was "not unreasonable".

The Trump administration, now with only days left in office, filed an "emergency motion" in the US Court of Appeals for the Seventh Circuit arguing that the district court had "erred by rewarding her egregious ploy to evade her lawful death sentence."¹⁸³ The Seventh Circuit panel granted the motion on the grounds that Lisa Montgomery had "not overcome the strong presumption against last-minute stays."¹⁸⁴ Her lawyers turned to the US Supreme Court, but it declined to intervene. Justices Breyer, Sotomayor and Kagan would have granted a stay of execution.

On 1 December 2020, the IACHR had issued "precautionary measures" in the case, calling on the US government not to allow the execution of Lisa Montgomery to proceed until the it had had the time to reach a decision on her petition, which raised the questions of her serious mental disability, the adequacy of her trial representation, and her conditions of confinement. The US government responded that "the Commission lacks authority to request precautionary measures, since the State is not a party to the American Convention, and requests that the IACHR refrain from requesting such measures."¹⁸⁵ Notwithstanding the government's position, the execution of Lisa Montgomery in the face of IACHR precautionary measures violated international law.¹⁸⁶

ONCE AGAIN, THE FEDERAL GOVERNMENT'S FAILURE TO LEAD BY EXAMPLE WAS CLEAR.¹⁸⁷

¹⁸⁶ [D]eath sentences must not be carried out as long as international interim measures requiring a stay of execution are in place. Such interim measures are designed to allow review of the sentence before international courts, human rights courts and commissions, and international monitoring bodies, such as the United Nations treaty bodies. Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies." Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 47.

¹⁸⁷ See, for example, IACHR resolution 95/2020, Precautionary Measure No. 1080-20, Christa Pike regarding the United States of America, 11 December 2020, and IACHR resolution 57/2021, Precautionary Measure No. 551-21, Erica Sheppard regarding the United States of America, 29 July 2021. The IACHR noted that the US government had reaffirmed "its longstanding position that the Commission lacks the authority to require that States adopt precautionary measures."

2.5 INTELLECTUAL DISABILITY AND OUTDATED DIAGNOSTICS

INTERNATIONAL HUMAN RIGHTS LAW AND SAFEGUARDS PROHIBIT THE USE OF THE DEATH PENALTY AGAINST THOSE WITH INTELLECTUAL DISABILITIES.¹⁸⁸ THE ADMINISTRATION'S DRIVE TO EXECUTE, IN THE CONTEXT OF THE SUPREME COURT'S WILLINGNESS TO LEAVE SERIOUS LEGAL CLAIMS UNRESOLVED, MEANS THAT THE FEDERAL GOVERNMENT MAY WELL HAVE VIOLATED THE CONSTITUTION, THE FDPA AND INTERNATIONAL LAW WHEN IT KILLED ALFRED BOURGEOIS AND THEN AGAIN WHEN IT EXECUTED COREY JOHNSON A MONTH LATER.

The FDPA states that a sentence of death shall not be carried out upon a person who has intellectual disability. In June 2002 the US Supreme Court outlawed the use of the death penalty on anyone with intellectual disability. The Court left it to states as to how to implement the ruling. It did not define intellectual disability, but pointed to definitions used by professional bodies, which referred to significantly sub-average intellectual functioning (usually assessed by IQ score), related limitations in adaptive functioning and onset before the age of 18.¹⁸⁹

The determination of the line between intellectual disability and borderline intellectual disability – which in a capital case can determine life or death for the individual in question – can

be a close call, possibly with disagreement among experts. It is not an exact science. Moreover, diagnostic standards evolve as the knowledge of the medical community grows over time. Alfred Bourgeois and Corey Johnson, two men on federal death row and scheduled for execution, presented substantial evidence that they had intellectual disability under modern diagnostic standards. However, federal courts decided that the men could not challenge their executions on this issue because they had earlier been denied relief on it, albeit under standards that were now outdated.

¹⁸⁸ *Strengthening of the UN Safeguards as agreed by ECOSOC Resolution 1996/15.*

¹⁸⁹ *Atkins v. Virginia*, 20 June 2002. *Atkins* overturned *Penry v. Lynaugh* (1989).

¹⁹⁰ *US v. Higgs*, 15 July 2021, *Justice Sotomayor dissenting.*

Justice Sotomayor argued that the Supreme Court should have answered the question as to whether “prior proceedings relying on obsolete medical standards” do or do not preclude under the FDPA whether an individual “is intellectually disabled at the time of his execution.” It did not. The Bourgeois and Johnson executions “may well have been illegal”, she said.¹⁹⁰

ALFRED BOURGEOIS

Alfred Bourgeois, who lived in LaPlace, Louisiana, was sentenced to death in the Southern District of Texas in March 2004 for the murder of his two-year-old daughter, J. G., in July 2002. The murder occurred in his 18-wheel tractor/trailer at a time when he was making a delivery at the Corpus Christi Naval Air Station in Texas. His family – his wife, their two children and J. G. (his child from another relationship) – were accompanying him on his long-haul trucking route.

Lawyers for Alfred Bourgeois challenged his death sentence in 2020 in the US District Court in the Southern District of Indiana (where federal death row is located) on the grounds of intellectual disability. The same claim had been brought a decade earlier in the Southern District of Texas. That court found that it had not been established by a preponderance of the evidence that Alfred Bourgeois had intellectual disability.

In their 2020 action in the Southern District of Indiana, the lawyers brought a habeas corpus petition, arguing that the 2011 decision of the District Court in Texas had “applied non-clinical, unscientific standards; relied largely on commonly held, but erroneous stereotypes of intellectually disabled persons” and had employed factors described by the US Supreme Court in 2017 as “untied” to the “medical community’s information” creating “an unacceptable risk that persons with intellectual disability will be executed.”¹⁹¹

On 10 March 2020, the Indiana federal court stayed the execution. The judge found that the lawyers had made a strong showing that Alfred Bourgeois met all three criteria for intellectual disability: evidence of appropriately adjusted IQ scores of 68 and 70, strong evidence of deficits in all three adaptive skill sets and a strong showing that the onset of his deficits occurred when he was under 18.¹⁹²

The US administration appealed and on 6 October 2020, the Court of Appeals for the Seventh Circuit reversed the District Court’s finding on procedural grounds and vacated the stay. The Court of Appeals took the view that even if Alfred Bourgeois was deemed to have intellectual disability under current standards, he could not overcome the procedural bar against second or successive petitions imposed by the AEDPA.

The government had argued that because intellectual disability is a permanent condition present by the time a person reaches 18, a claim of intellectual disability must be raised at the time of sentencing or, at the latest, in a Section 2255 motion (the main statute authorizing post-conviction relief for people in federal prison). Alfred Bourgeois had raised such a claim in 2011 – which was the claim that had been rejected based on now outdated medical standards.

¹⁹¹ US Supreme Court, *Moore v. Texas*, 28 March 2017.

¹⁹² US District Court for the Southern District of Indiana *Bourgeois v. Warden*, Order staying execution of Alfred Bourgeois, 10 March 2020.

¹⁹³ *Bourgeois v. Watson*, 11 December 2020, Justice Sotomayor, joined by Justice Kagan, dissenting.

The Supreme Court declined to take the case, over the dissent of Justices Sotomayor and Kagan who were concerned by the government's argument about people on death row with intellectual disability claims invariably needing only one opportunity to make their case:

“[W]hile a prisoner’s intellectual disability may not change, the medical standards used to assess that disability constantly evolve as the scientific community’s understanding grows... Bourgeois thus puts forth a strong argument that federal prisoners sentenced to death should be able to file new habeas petitions if they can show a potentially dispositive change in the diagnostic landscape following their first petition... Bourgeois presents a serious question that is likely to recur... I would therefore resolve this open legal issue before sanctioning Bourgeois’ execution.”¹⁹³

The execution went ahead on 11 December 2020. There was not long to wait for what Justice Sotomayor, joined by Justice Kagan, predicted when the Supreme Court allowed the execution to proceed – that the “serious question” presented by the Bourgeois case “was likely to recur.” Thirty-five days after it killed Alfred Bourgeois, and less than a week from the end of the Trump administration, the federal government executed Corey Johnson despite his unresolved claim of intellectual disability.

COREY JOHNSON

Corey Johnson and two co-defendants, charged under the 1988 Anti-Drug Abuse Act for a series of drug-related murders in Virginia in 1992, were convicted and sentenced to death at a joint federal trial in 1993.¹⁹⁴

At the sentencing, the defense presented evidence that Corey Johnson had an IQ of 77, in the borderline intellectual disability range. His lawyers argued that his impaired intellectual functioning rendered him “unable to cope and adapt to society” and should mitigate against a death sentence even if it did not categorically bar him from it.

The expert presented by the defense knew that the defendant had scored an IQ of 69 when he was 16, but because of the earlier IQ 77 score, he made no further effort to assess the other criteria for a diagnosis of intellectual disability and neither the judge nor the jurors were asked to determine the issue. Eight jurors found that Corey Johnson’s IQ of 77 was a mitigating factor but recommended the death penalty on seven counts of capital murder.

Meanwhile, the courts had continued to take the position that the IQ 77 score presented at Corey Johnson’s trial placed him outside of the diagnostic range for intellectual disability. When new lawyers had taken over his case, they located two more IQ scores that Corey Johnson had received as a child, one of 73 at age eight, and another 75. The lawyers arranged to have three renowned experts conduct evaluations and review all relevant materials and interview witnesses from Johnson’s background. All three concluded that he had intellectual disability; assessed his corrected (under modern standards) IQ scores at 72 (age eight), 75 (age 12), 65 (age 16), and 73 (age 23); found that he had adaptive deficits in all three domains (conceptual, social and practical); and determined that his intellectual and adaptive deficits began well before the age of 18.¹⁹⁵

¹⁹⁴ The Clinton administration withdrew its notice of intent to seek the death penalty against a fourth defendant shortly before his trial after his lawyer produced evidence of his intellectual disability and an IQ of 71.

¹⁹⁵ *USA v. Johnson*, Motion pursuant to 28 USC § 2255 raising claim of ineligibility to be executed under 18 USC § 3596(c), In the 14 December 2020.

As Corey Johnson's execution date neared, on 2 January 2021, the US District Court rejected his petition: "In passing the AEDPA, Congress sought to put an end to eleventh-hour relief that capital defendants often sought in district courts."¹⁹⁶ There was greater concern within the US Court of Appeals for the Fourth Circuit which voted by eight to seven to deny Corey Johnson's petition to have the whole court rehear the case. One of the seven dissenting judges wrote:

"Although Johnson fell just 2 points short (77) of the IQ threshold for intellectual disability (70-75) in 1993, the newly available evidence convincingly demonstrates that his old IQ score is incorrect and that he is intellectually disabled under current diagnostic standards. But no court has ever considered such evidence. If Johnson's execution is carried out today, the United States will execute an intellectually disabled person, which is unconstitutional" [emphasis in original].¹⁹⁷

Cory Johnson was executed on 14 January 2021, less than a week before the inauguration of President Biden, after the US Supreme Court denied Johnson's emergency application for a stay of execution to permit him to present evidence that the Constitution prohibited his execution because he had intellectual disability.

¹⁹⁶ US District Court for the Eastern District of Virginia, *USA v. Johnson*, Memorandum opinion, 2 January 2021.

¹⁹⁷ US Court of Appeals for the Fourth Circuit, *USA v. Johnson*, Order, 14 January 2021, Judge Wynn, dissenting from the denial of rehearing en banc.

¹⁹⁸ *US v. Higgs*, 15 July 2021, Justice Sotomayor dissenting.

2.6 NO MERCY: WAS CLEMENCY ALWAYS A LOST CAUSE?

WHILE THE SUPREME COURT “REPEATEDLY SIDESTEPED ITS USUAL DELIBERATIVE PROCESSES, OFTEN AT THE GOVERNMENT’S REQUEST, ALLOWING IT TO PUSH FORWARD WITH AN UNPRECEDENTED, BREAKNECK TIMETABLE OF EXECUTIONS”,¹⁹⁸ THE ADMINISTRATION DID NOTHING TO OFFSET THIS JUDICIAL HANDS-OFF APPROACH WITH ANY DUE DILIGENCE OF ITS OWN.

Even a global pandemic was not allowed to get in the way, whether it was attorneys contracting the disease, as in the case of Lisa Montgomery’s clemency lawyers (see Section 2.4) or the condemned individuals themselves.

Despite “the current record high rates of infections and fatalities”, noted the US District Court judge overseeing the lethal injection litigation as the final executions in the spree approached, the Trump administration “intend[s] to go forward with the scheduled executions of... Corey Johnson and Dustin Higgs on January 14 and 15, 2021, although both men have been diagnosed with COVID-19.” Both tested positive less than a month before their scheduled executions, she continued, after the government had assured the Court that adequate procedures were in place to protect the people imprisoned at Terre Haute. Defense lawyers argued that their

Covid-19 infections increased the risk of an excruciating death by lethal injection, specifically that damage to their lungs and other organs could cause them to experience the sensation of drowning before being rendered unconscious during the execution. The judge granted a “limited” injunction, to remain in effect until 16 March 2021 which, if not reversed, would have seen them live into the Biden administration.¹⁹⁹ The Trump administration appealed and the Court of Appeals vacated the injunction, over the dissent of one of the three judges.

DUSTIN HIGGS

¹⁹⁹ US District Court for DC, *In the matter of the Federal Bureau of Prisons Execution Protocol Cases*, Memorandum Opinion, 12 January 2021.

²⁰⁰ US District Court for the District of Maryland, *USA v. Higgs*, Memorandum opinion, 29 December 2020.

²⁰¹ US Supreme Court, *USA v Higgs*, Respondent’s brief in opposition to petition for writ of certiorari, 13 January 2021.

THE LAST OF THE 13 EXECUTIONS SCHEDULED WAS THAT OF DUSTIN HIGGS.

A US District Judge wrote: “It is not lost on the Court that this execution is scheduled to occur just five days before the inauguration of a new president who has stated his opposition to capital punishment.”²⁰⁰ For their part, the defense lawyers described the administration as being “driven by the desire to execute Mr Higgs before President-elect Biden is inaugurated on January 20, 2021.”²⁰¹ The government lawyers in turn accused them of “simply trying to run out the clock until the next Administration, which [they] envision will be more favorably disposed toward [Higgs] than the one that sought and secured nine death sentences for his triple murder (President Clinton’s) and the three that defended those sentences against his many challenges (President Bush’s, President Obama’s, and President Trump’s).”²⁰²

International law requires that anyone facing the death penalty is provided “adequate legal assistance at all stages of the proceedings” and this should go “above and beyond the protections afforded in non-capital cases.”²⁰³ Every capital defendant must be given all due process guarantees under Article 14 of the ICCPR, with governments also “bearing in mind” international instruments such as the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors²⁰⁴ Under such standards, lawyers seeking to keep their clients alive through legitimate court and clemency actions are acting as they should, consistent with the Basic Principle that “Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law.”²⁰⁵

²⁰² US Supreme Court, *USA v Higgs*, Reply brief for the petitioner, January 2021.

²⁰³ UN Safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC resolution 1984/50, , and Additions to safeguards as agreed by ECOSOC Resolution 1989/64.

²⁰⁴ Strengthening of the UN Safeguards, as agreed by ECOSOC Resolution 1996/15.

²⁰⁵ UN Basic Principles on the Role of Lawyers, 1990, Principle 14.

In 2020 and 2021, Department of Justice lawyers were in possession of the same knowledge about the incoming administration’s abolitionist pledge and obliged to “respect and protect human dignity and uphold human rights.”²⁰⁶

THE PRESIDENT-ELECT’S PROMISE TO WORK FOR ABOLITION OF THE DEATH PENALTY WAS CONSISTENT WITH US HUMAN RIGHTS OBLIGATIONS.

Knowing that within days or weeks the very same individuals they were seeking to hustle towards the death chamber could benefit from a change in policy and law surely behooved the Attorney General, the Solicitor General and other Department of Justice lawyers to pause for thought and consider the bigger picture. In such a situation, one might hope that government lawyers, acting in the spirit of international human rights law, would give the benefit of the doubt to life.

INSTEAD, THEY MAINTAINED THE **RELENTLESS PURSUIT OF EXECUTION.**²⁰⁷

During the years that Dustin Higgs was on death row, 10 states in the USA had abolished the death penalty. One was Maryland, where Dustin Higgs had been sentenced to death. Under the FDPA, a federal death sentence can only be implemented “in the manner prescribed by the law of the State in which the sentence is imposed” or, if the state does not have the death penalty, then the court must designate another state which does. Because Maryland had the death penalty at the time Dustin Higgs was sentenced to death, the District Court’s final Judgment and Order of 3 January 2001 did not

designate another state. The government had from 2013, when Maryland abolished the death penalty, to 2020 to seek this change. It did nothing to this end in those seven years, instead waiting until the execution was scheduled.

The Trump administration filed a motion in the US District Court in Maryland asking the judge to amend the original judgment and order to designate Indiana, the location of federal death row, “as the state implementing death.”²⁰⁸ During this process, and without waiting for the final decision, the Department of Justice announced on 20 November 2020 that Higgs would be executed on 15 January 2021, five days before the end of the Trump administration. On 29 December, the judge denied the government’s motion, finding he did not have the authority to amend the original order. The government appealed to the Fourth Circuit Court of Appeals, which set oral argument for 27 January 2021, a week after President Trump was due to leave office. The Court of Appeals denied a government motion to expedite the process.

AS IT HAD DONE THROUGHOUT ITS EXECUTION SPREE, THE TRUMP ADMINISTRATION TURNED TO THE US SUPREME COURT.

On 15 January 2021, without comment, the Court granted the government’s petition for “certiorari before judgment”, reversed the District Court order and instructed the Fourth Circuit to remand the case to the District Court for the prompt designation of Indiana. Certiorari before judgment is a procedural move rarely used by the

Supreme Court to take a case before there is a judgment from the court below (in this case the Fourth Circuit Court of Appeals). Under the rules of the Supreme Court such petitions will only be granted “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”²⁰⁹ Here the “imperative public importance” was never explained, leaving the suspicion that this was an administration simply looking, and being allowed, “to check one more execution off its list.”²¹⁰ Indeed, according to a leading US Supreme Court expert, this may have been the first time in the history of the US Supreme Court that it had reached out in this way in order to summarily reverse. And it did so with the only outcome in the case being that Dustin Higgs would be killed by the government without the Supreme Court even examining the novel legal theory that allowed it to do so.²¹¹

Dustin Higgs – who maintained his innocence to the end (the actual gunman in the murders had received a life sentence)²¹² – sought clemency from President Trump. Given the relentlessness of the administration’s pursuit of these executions, however, was executive clemency ever a real prospect, as required under international human rights law? Even before anyone knew how the execution schedule would unfold, the IACHR had concluded that the structure of the federal executive clemency process in the USA failed to meet its international law obligation to guarantee the right to minimal fairness standards.²¹³

²⁰⁶ UN Guidelines on the Role of Prosecutors, 1990, para. 12.

²⁰⁷ US Supreme Court, *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting: “we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.”

²⁰⁸ US District Court for the District of Maryland, *USA v. Higgs*, Motion to amend Judgment and Order, 4 August 2020.

²⁰⁹ See *Rules of the Supreme Court of the United States*, 2019, Rule 11, supremecourt.gov/ctrules/2019rulesoftheCourt.pdf

²¹⁰ US Court of Appeals for the DC Circuit, *Roane v. Rosen*, Order, 13 January 2021, Circuit Judge Pillard, dissenting: “The government insists that these final scheduled executions [of Corey Johnson and Dustin Higgs] must proceed as planned. It fails to explain why they must take place this week... I believe the government has failed to meet the high burden required to second-guess the district court’s factfinding and stay its order. Any desire on the part of the government to check two more executions off its list does not justify concluding otherwise.”

²¹¹ Testimony of Stephen I. Wladeck, *Case Selection and Review at the Supreme Court*. Hearing before the Presidential Commission on the Supreme Court of the United States, 30 June 2021, page 9, www.whitehouse.gov/wp-content/uploads/2021/06/Wladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf

The US Supreme Court has described executive clemency as “the ‘fail safe’ in our criminal justice system.”²¹⁴ In the past three decades since the federal death penalty was reinstated, two individuals on federal death row have been granted executive clemency, both at the end of presidential terms, when the act of clemency carries no political cost to the outgoing president. Neither man had an execution date at the time.²¹⁵

NO ONE ON FEDERAL DEATH ROW FACING IMMINENT EXECUTION HAS YET BEEN GRANTED CLEMENCY.

President George W. Bush denied clemency to Juan Raul Garza, despite the IACHR calling for commutation after finding that the death sentence was “arbitrary and capricious”.²¹⁶ The third federal execution in the post-Furman v. Georgia era took place on the eve of the US-led invasion of Iraq in March 2003 after the President denied clemency to Louis Jones, “an African American war veteran [who] had returned home from the first Gulf War with post-traumatic stress disorder and brain damage likely linked to his exposure to nerve gas during the war – known as Gulf War Syndrome – and displayed symptoms of that syndrome during his commission of the crime.”²¹⁷

AS UNDER PRESIDENT BUSH, THERE WAS A 100% FAILURE RATE OF THE CLEMENCY PETITIONS PUT BEFORE PRESIDENT TRUMP.

²¹² The co-defendant was tried first – charged with being the person who had shot the three young women – and the jury found him guilty of all three murders. He was sentenced to life imprisonment after the jurors were unable to reach a unanimous verdict on sentence. Dustin Higgs’s trial began five weeks later in front of a different jury. A key witness at the guilt stage was a third defendant who was present at the crime and who faced over 15 years in prison. The government had agreed to seek a lighter sentence in the murder case in exchange for his cooperation in the Higgs prosecution (he was sentenced to seven years). The jurors unanimously found in mitigation that Higgs was “not the sole proximate cause of the victims’ deaths” but rejected as a mitigating factor that Haynes was an equally culpable defendant who had not been sentenced to death for the murders.

²¹³ IACHR Report No. 28/20, Case 12.719, Report on Merits: Orlando Cordia Hall, USA, 22 April 2020, para. 80.

²¹⁴ See *Herrera v. Collins* (1993) and *Harbison v. Bell* (2009).

²¹⁵ On his last day in office in 2001, President Clinton commuted the death sentence of David Chandler and in his last week in office in 2017 President Obama commuted Aboleda Ortiz’s death sentence. Nine of the 13 individuals executed under President Trump had sought clemency from the outgoing President Obama.

²¹⁶ See Amnesty International, “Open letter to the US Attorney General concerning the imminent execution of Juan Raul Garza”, 14 June 2001, [amnesty.org/en/documents/amr51/088/2001/en/](https://www.amnesty.org/en/documents/amr51/088/2001/en/) The first federal execution in 38 years was of Timothy McVeigh, who waived his appeals and did not seek clemency. President Bush did not intervene to stop the execution.

²¹⁷ US Court of Appeals for the Ninth Circuit, *Mitchell v. USA*, 19 June 2015, Circuit Judge Reinhardt dissenting in part.

²¹⁸ Daniel Lee, Wesley Purkey, Lezmond Mitchell, William LeCroy, Christopher Vialva, Brandon Bernard, Alfred Bourgeois, Lisa Montgomery, Corey Johnson and Dustin Higgs.

Ten of the 13 individuals executed between July 2020 and January 2021 had sought presidential commutation of their death sentences.²¹⁸ An 11th, Orlando Hall, had sought a court-ordered injunction on the grounds that “the dramatically abbreviated notice [of execution] and the ongoing COVID-19 pandemic make it impossible for Mr Hall to prepare an adequate case for clemency with the assistance of counsel.” The US District Court ruled against him stating: “[Hall] alleges that [the government is] violating his due process and statutory rights by executing him in the middle of a pandemic, which has made it impossible to meaningfully pursue clemency. The argument raises issues that the court finds troubling, but, ultimately, unlikely to succeed.”²¹⁹

The seventh of the 13 federal executions, and the last before the presidential election, was of Christopher Vialva, carried out on 24 September 2020. Earlier that day, President Trump had spoken at a pre-election rally in Florida. Having told the audience that the Democrats wanted to “pack” the US Supreme Court with “far-left Justices” who, among other things, would “declare the death penalty totally unconstitutional”. He said: “They came to my office today and the death penalty – for clemency. I said, ‘What was the crime?’ The crime was so horrible that I won’t tell you what it was, but it’s been going on for 21 years or so. The crime was so horrible that this person committed, that I said, ‘Look, I just can’t talk about it’. It was so horrible.”²²⁰

The 10 petitions presented to President Trump contained compelling cases for clemency, including claims of intellectual and mental disability, inadequate legal representation, rehabilitation, arbitrariness, racial discrimination and prosecutorial misconduct. It seems that none of the requests for commutation was formally denied or even acknowledged by the President. Each petition was simply “administratively closed” after the execution.²²¹

THIS DEFICIT OF MERCY STOOD IN EVEN STARKER RELIEF WHEN SET AGAINST THE SAME PRESIDENT’S USE OF HIS CLEMENCY POWER ELSEWHERE DURING THE SAME PERIOD, RAISING FURTHER QUESTIONS ABOUT ARBITRARINESS IN THE DEATH PENALTY.

On 22 December 2020, after 10 federal executions in the previous five months, in seven of which cases the individual had sought executive clemency, President Trump granted a “full and unconditional” pardon to four private US security contractors convicted of crimes committed during a massacre in Iraq in 2007. They included one man who was convicted of first-degree murder and sentenced to life imprisonment. Denying a motion of acquittal in 2019, a federal judge noted the convicted man’s “anti-Iraqi animus”, describing how this contractor’s actions had prompted a “twenty-minute barrage of death and destruction [which] killed fourteen civilians and wounded seventeen others – many attempting to flee, and at least one with his hands up.” The judge noted that “all told, two different juries – twenty-four different people – considered weeks of evidence and unanimously concluded [the contractor] committed first-degree murder.”²²²

²¹⁹ US District Court for DC, *Hall v. Barr*, Memorandum opinion, 16 November 2020.

²²⁰ Remarks at a “Great American Comeback” rally in Jacksonville, Florida, 24 September 2020.

²²¹ See UN Human Rights Committee, General Comment 36, 3 September 2019, UN Doc. CCPR/C/GC/36, para. 47: “pardon or commutation procedures must offer certain essential guarantees, including certainty about the processes followed and the substantive criteria applied and the rights for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances, to be informed in advance when the request will be considered, and to be informed promptly about the outcome of the procedure.”

THE CHAIRPERSON OF THE UN WORKING GROUP ON THE USE OF MERCENARIES DESCRIBED THE FOUR PARDONS AS “AN AFFRONT TO JUSTICE” AND A VIOLATION OF THE USA’S OBLIGATIONS UNDER INTERNATIONAL LAW WHICH UNDERMINED “HUMANITARIAN LAW AND HUMAN RIGHTS AT A GLOBAL LEVEL”.²²³

Lisa Montgomery, who had petitioned President Trump for clemency, was executed less than a month after the pardon was issued in the contractor case. Three months after President Biden took office, a US District Court Judge in Indiana drew a line under her case: “Lisa Marie Montgomery filed this habeas corpus petition challenging her competence to be executed. The government executed Ms Montgomery on January 13, 2021. There now is no relief available, so this action is moot.”²²⁴ An executed person “has indeed lost the right to have rights”, as Justice William Brennan wrote half a century ago in *Furman v. Georgia*.

DUSTIN HIGGS, WHO HAD ALSO PETITIONED PRESIDENT TRUMP FOR CLEMENCY, WAS EXECUTED MAINTAINING HIS INNOCENCE: “I DID NOT KILL THEM AND DID NOT ORDER THE MURDERS.”²²⁵

On the eve of President Trump's departure from office, a letter was received by the US District Court Judge in Maryland who had overseen the trial of Dustin Higgs and had rejected the government's motion to amend the 2001 Order to allow the execution to go forward. It was from the Warden of federal death row in Indiana: "This is to inform you of the death of inmate Dustin John Higgs... Inmate Higgs passed away at 1:23am on January 16, 2021... The cause of death was execution by lethal injection."²²⁶

ENOUGH IS ENOUGH. MAY THAT BE THE FINAL FEDERAL EXECUTION IN US HISTORY.

²²² US District Court for DC, *USA v. Slatten*, Memorandum Opinion, 30 August 2019. The defendant was convicted in his first trial, but was granted a retrial, US Court of Appeals for the DC Circuit, *USA v. Slatten*, 4 August 2017.

²²³ UN Office of the High Commissioner for Human Rights, "US pardons for Blackwater guards an 'affront to justice' – UN experts", 30 December 2020, ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26633

²²⁴ US District Court for the Southern District of Indiana, *Montgomery v. Warden*, Order dismissing action as moot, 27 May 2021.

²²⁵ See Caroline Lester, *Harper's Magazine*, "The Lightning Farm", May 2021.

²²⁶ Letter from T. J. Watson, Warden, Federal Correctional Complex, Terre Haute, Indiana, to The Honorable Peter J. Messitte, US District Court Judge for the District of Maryland, 19 January 2021.

3.0 INTERNATIONAL LAW

**44 THERE IS NO TREATY OR
OVERWHELMING INTERNATIONAL
CONSENSUS TO ABOLISH THE DEATH
PENALTY WHICH IMPOSES ANY
OBLIGATIONS ON THE UNITED STATES”**

Obama administration, November 2011²²⁷

“Taking international law seriously where the death penalty is concerned”, US Supreme Court Justice Harry Blackmun said in April 1994 shortly before his retirement, “draws into question the United States’ entire capital punishment enterprise.”²²⁸ The federal government, however, has not taken international law on the death penalty in good faith. It ratified the ICCPR in 1992 with a “reservation” – which itself violates international treaty law – aimed at protecting judicial killing around the country from international legal constraint. And it has routinely ignored calls from treaty monitoring bodies to work for a moratorium and abolition, or to address racial discrimination in the capital justice system. On a regional level, the USA has become something of a rogue outlier in the Inter-American system.

Transmitting the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) to the Senate over four decades ago for its advice and consent on ratification, the Carter administration stated that it was “increasingly anomalous that the list of parties does not include the United States, whose human rights record domestically and internationally has long served as an example to the world community.”²²⁹

OVER THOSE 40-PLUS YEARS, WHAT HAS BECOME INCREASINGLY ANOMALOUS IS THAT THE LIST OF ABOLITIONIST STATES DOES NOT INCLUDE THE USA.

²²⁷ *US District Court for the District Court of Puerto Rico, USA v. Casey, USA's response in opposition to defendant's motion to declare the Federal Death Penalty Act inapplicable in the Commonwealth of Puerto Rico, 14 November 2011: "To the extent the United States has signed any treaty attempting to prohibit or limit the imposition of the death penalty, the United States customarily objects to such provisions and reserves its right to impose the death penalty within constitutional constraints."*

²²⁸ See Margaret E. McGuiness, “The Internationalism of Justice Harry Blackmun” in *Missouri Law Review*, Vol 70, Issue 4 (2005).

²²⁹ Letter of submittal, *Four treaties pertaining to human rights: Message from the President of the US*, 23 February 1978.

3.1 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

ARTICLE 6(6) OF THE ICCPR REQUIRES STATES PARTIES TO BE ON AN “IRREVOCABLE PATH TOWARDS COMPLETE ERADICATION OF THE DEATH PENALTY, DE FACTO AND DE JURE, IN THE FORESEEABLE FUTURE.”²³⁰ THE USA SIGNED THE ICCPR FOUR AND A HALF DECADES AGO AND HAS BEEN A STATE PARTY TO THIS TREATY FOR 30 YEARS.²³¹

Article 6 requires state parties that have not yet abolished the death penalty to narrow its application and clearly establishes the goal of working towards its abolition. In 1982, the UN Human Rights Committee expressed concern that state reports submitted to it showed that “progress made towards abolishing or limiting the application of the death penalty [was] quite inadequate.” Since then, abolition has taken off around the world.²³²

The US government, however, still does not accept that working for abolition amounts to any sort of international legal requirement. In March 2021, at the UN and facing calls from other countries for the USA to abandon the death penalty, the Biden administration adopted a long-held US attitude when it responded that: “While we respect those who make these recommendations,

they reflect continuing differences of policy, not differences about what the United States’ international human rights obligations require.”²³³

Under ICCPR Article 4, there can be no derogation from Article 6 on the provisions relating to the right to life, recognizing its nature as a peremptory norm of international law.²³⁴ The UN Human Rights Committee has confirmed that “reservations with respect to the peremptory and non-derogable obligations set out in Article 6 are incompatible with the object and purpose of the Covenant.”²³⁵

²³⁰ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 50.

²³¹ The USA signed the ICCPR on 5 October 1977 and ratified it on 8 June 1992.

²³² Human Rights Committee, General Comment 6: Article 6 (Right to life), 1982, para. 6.

²³³ Statement during the adoption of the Third Universal Periodic Review (UPR) of the United States, Lisa Peterson, Acting Assistant Secretary of State for Democracy, Human Rights and Labor, Geneva, 17 March 2021, geneva.usmission.gov/2021/03/17/us-upr-1/

The USA, however, ratified the ICCPR in 1992 with a “reservation” aimed at protecting the death penalty from international constraint. The administration of George H. W. Bush had told the Senate Committee on Foreign Relations in 1992 that: “Given the sharply differing view taken by many of our future treaty partners on the issue of the death penalty, it is advisable to state our position clearly.”²³⁶ This position was that, regardless of what the ICCPR might require in relation to the death penalty, the USA reserved the right to use it against anyone, subject only to its own constitutional constraints.²³⁷ The Committee approved ratification, adding:

“In view of the leading role that the United States plays in the international struggle for human rights, the absence of ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the US commitment to human rights and strengthen the impact of US efforts in the human rights field.”²³⁸

If a purpose of ratifying the ICCPR was to dispel accusations of human rights hypocrisy, the conditions the USA attached meant that it was always likely to fail in this aim. According to a former US Assistant Secretary of State for Democracy, Human Rights and Labor in the Clinton administration:

“Increasingly, I found important bilateral meetings with our closest allies – particularly from European Union and Latin American countries – consumed with answering demarches challenging the death penalty... The practice has caused allies and adversaries alike to challenge our claim of moral leadership in international human rights.”²³⁹

²³⁴ Human Rights Committee, General Comment 29, States of Emergency (Art. 4), UN Doc. CCPR/C/21/Rev.1/Add.11, para. 11.

²³⁵ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 68.

²³⁶ ICCPR, Report from Senator Clairborne Pell, 1992, (previously cited).

²³⁷ The sole quasi-concession to the ICCPR, but in reality a reflection of domestic political considerations, was that “the Administration is now prepared to accept the prohibition against the execution of pregnant women.”

²³⁸ ICCPR, Report from Senator Clairborne Pell, 1992, (previously cited).

²³⁹ Harold Hongju Koh, “Paying ‘decent respect’ to world opinion on the death penalty”, U. C. Davis Law Review, Vol. 35, No. 5, June 2002.

THE UN HUMAN RIGHTS COMMITTEE HAS FOUND SERIOUS SHORTCOMINGS IN US COMPLIANCE SINCE RATIFICATION, INCLUDING ON THE DEATH PENALTY, BUT THE USA HAS ROUTINELY FAILED TO IMPLEMENT THE COMMITTEE’S RECOMMENDATIONS.

The Committee’s scrutiny of the USA’s initial report under the ICCPR came in 1995. The Committee was troubled by “the extent” of the reservations, understandings and declarations which it believed were intended to ensure that the USA was accepting only what was already the law of the USA, and no more – effectively this was ratification in name only. It stated that the reservations to Articles 6 and Article 7 (prohibiting torture and other cruel, inhuman or degrading treatment or punishment), which the USA had formulated to protect the death penalty, were “incompatible with the object and purpose of the Covenant”; that is, in violation of the prohibition of such reservations.²⁴⁰

In its 1995 conclusions, the UN Human Rights Committee made clear that it “deplore[d]” the expansion of the death penalty under the FDPA and called on the USA to narrow the death penalty’s scope with a view to abolition, in conformity with Article 6 of the ICCPR.

In 2006, the UN Human Rights Committee reviewed the USA's Second and Third Reports, expressing regret that, despite its previous call, the USA had "extended the number of offences for which the death penalty is applicable." It again called for a moratorium, "bearing in mind the desirability of abolishing the death penalty."²⁴¹

In 2014, in its review of the USA's Fourth Report, the UN Human Rights Committee again pointed to the racial disparities in imposition of the death penalty, "exacerbated by the rule that discrimination has to be proven on a case-by-case basis" (under the 1987 US Supreme Court ruling in *McCleskey v. Kemp*). It called for a moratorium at the federal level and engagement of the federal authorities with "retentionist states with a view to achieving a nationwide moratorium."²⁴²

The UN Human Rights Committee has been seeking withdrawal of the USA's reservations, understandings and declarations for a quarter of a century. As a senator, Joe Biden was a member of the Committee on Foreign Relations when it approved these conditions. During his time on this Committee, the USA ratified the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and ICERD.²⁴³

The Obama administration, with Joe Biden as vice president, promised that: "The United States is committed to meeting its United Nations treaty obligations and participating in a meaningful dialogue with treaty body members."²⁴⁴ That same administration simultaneously insisted that

"since the death penalty is clearly and unambiguously authorized by the Constitution, the right to impose the death penalty is not prohibited by the treaty."²⁴⁵ It also told the UN Human Rights Committee that, following the 2005 Supreme Court prohibition of the execution of offenders for crimes committed when under 18, "the United States now implements Article 6(5) in full." This was repeated by the Trump administration in January 2021.²⁴⁶ Yet this is far from the whole story. The reservation filed by the USA applied, by its wording, to Article 6 *in its entirety*. Again, the reservation was aimed at preserving the use of the death penalty against "any person", subject solely to constitutional constraints.

Article 6.1 of the ICCPR prohibits the "arbitrary" deprivation of life – a provision routinely implicated in the application of the death penalty in the USA. Article 6.4 guarantees meaningful availability of clemency in capital cases. And Article 6.6, as repeatedly made clear by the UN Human Rights Committee, confirms the abolitionist intent of the Covenant.²⁴⁷ An overarching prohibition also is that the death penalty "must not be imposed in a discriminatory manner contrary to articles 2(1) and 26 of the Covenant."²⁴⁸

²⁴⁰ Article 19(c), Vienna Convention on the Law of Treaties, Report of the Human Rights Committee, United States of America, 3 October 1995, UN Doc. A/50/40, para. 279.

²⁴¹ Human Rights Committee, Concluding observations: USA, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para. 29.

²⁴² Human Rights Committee, Concluding observations on the fourth periodic report of the USA, 23 April 2014, UN Doc. CCPR/C/USA/CO/4, para. 8.

²⁴³ He became the Committee's ranking minority member in 1997 and served as its chair from 2001 to 2003 and from 2007 to 2009. He resigned as a senator in January 2009 shortly before becoming vice president under President Obama.

²⁴⁴ Annex to the letter dated 22 April 2009 from the Permanent Representative of the USA to the United Nations addressed to the President of the General Assembly Human rights commitments and pledges of the USA, UN Doc. A/63/831, p. 4.

²⁴⁵ US District Court for the District of Puerto Rico, *USA v. Casey*, United States' response in opposition to defendant's motion to declare the Federal Death Penalty Act inapplicable in the Commonwealth of Puerto Rico, 14 November 2011.

²⁴⁶ Fourth Periodic Report of the USA to the UN Human Rights Committee, 22 May 2012, UN Doc. CCPR/C/USA/4, para. 151, and UN Human Rights Committee, Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020, 19 January 2021, UN Doc. CCPR/C/USA/5, para. 15.

²⁴⁷ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 50.

²⁴⁸ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 44.

The US reservation to Article 7 of the ICCPR – that the USA considered itself bound only to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited under the Constitution – was filed in part to protect its use of the death penalty (it filed an identical one to Article 16 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1994). It said that “because the Human Rights Committee, like the European Court of Human Rights, has adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute [cruel, inhuman or degrading] treatment, US ratification of the Covenant should be conditioned upon a reservation limiting our undertakings to the prohibitions of the Fifth, Eighth and/or Fourteenth Amendments” to the Constitution.

After the attacks of 11 September 2001, this reservation formulated to protect the death penalty, was exploited by Bush administration lawyers to give legal approval to torture and other ill-treatment, as well as enforced disappearance, against foreign nationals held outside the USA in the “war on terror”²⁴⁹. Today, six individuals in US custody at Guantánamo, who were earlier subjected to torture and enforced disappearance in US custody under this detention regime, face the death penalty at unfair trials under the Military Commissions Act. If any execution were to follow such proceedings, which fail to meet international fair trial standards, it would violate international law and constitute a violation of the right to life. In the case of any of the six men currently facing capital trial at Guantánamo, their execution would amount to killing witnesses to crimes, specifically the crimes under international law of torture and enforced disappearance committed against them and others by US personnel, for which the perpetrators continue to enjoy impunity.²⁵⁰

²⁴⁹ Amnesty International, USA: *Life, liberty and the pursuit of human rights: A submission to the UN Human Rights Committee for the 109th session of the Committee, September 2013*, [amnesty.org/en/documents/amr51/061/2013/en/](https://www.amnesty.org/en/documents/amr51/061/2013/en/); *Concluding observations on the fourth periodic report of the USA, 23 April 2014*, UN Doc. CCPR/C/USA/CO/4, para. 5; Amnesty International, USA: *Submission to the UN Committee Against Torture: 53rd session of the Committee, October 2014*, [amnesty.org/en/documents/amr51/049/2014/en/](https://www.amnesty.org/en/documents/amr51/049/2014/en/); and *Committee against Torture, Concluding observations on the combined third to fifth periodic reports of the United States of America, 19 December 2014*, UN Doc. CAT/C/USA/CO/3-5, para. 12.

²⁵⁰ Amnesty International, USA: *Right the wrong: Decision time on Guantánamo, 11 January 2021, Chapter 5*, www.amnesty.org/en/documents/amr51/3474/2021/en/

3.2 PROHIBITION OF RACIAL DISCRIMINATION

APPROXIMATELY 13% OF THE POPULATION OF THE USA IS BLACK. IN FEDERAL CASES, OF 539 DEFENDANTS WHOSE CASES WERE AUTHORIZED FOR A FEDERAL CAPITAL PROSECUTION BETWEEN 1988 AND APRIL 2021, 263 (49%) WERE AFRICAN AMERICAN, 148 (28%) WERE WHITE, 99 (18%) WERE LATINO AND 29 (5%) WERE “OTHER”. OF THE 16 PEOPLE PUT TO DEATH IN FEDERAL EXECUTIONS SINCE 2001, SEVEN WERE WHITE, SEVEN WERE BLACK, ONE WAS LATINO AND ONE WAS NATIVE AMERICAN.

The USA ratified the ICERD on 21 October 1994. The Senate Committee on Foreign Relations approved ratification of ICERD saying that it would “enable the United States to participate in the work of the Committee on the Elimination of Racial Discrimination established by the Convention to monitor compliance.”²⁵¹

The Clinton administration submitted the USA’s combined initial, second and third reports in 2000. On the death penalty, the administration acknowledged public concerns about evidence of racial bias and discrimination but said that “the US Government remains confident that the death penalty is imposed only in the most egregious cases and only in the context of the heightened procedural safeguards required by our state and federal constitutions and statutes.”²⁵²

The Committee for the Elimination of Racial Discrimination (CERD) did not share this confidence and urged the USA “to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons.”²⁵³

Eight years later, the CERD considered the USA’s combined fourth, fifth and sixth periodic reports. It remained concerned about “the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim.” In addition to calling on the George W. Bush administration to “identify the underlying factors of the substantial

²⁵¹ Senate, 103rd Congress. Executive Report 103-29, ICERD, 2 June 1994.

²⁵² Combined initial, second and third State Party reports of United States of America, 10 October 2000, UN Doc. CERD/C/351/Add.1, paras 322-325.

²⁵³ Report of the Committee on the Elimination of Racial Discrimination, Fifty eighth session (6 23 March 2001), Fifty ninth session (30 July 17 August 2001), UN Doc. A/56/18 (Supp), para. 396.

²⁵⁴ Consideration of reports submitted by States Parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 23.

racial disparities in the imposition of the death penalty” and root out discriminatory practices, it reiterated its earlier call to the USA to “adopt all necessary measures, including a moratorium, to ensure that death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers.”²⁵⁴

The USA’s seventh, eighth and ninth combined reports under ICERD were submitted by the Obama administration in 2013.²⁵⁵ After scrutinizing the USA’s reports, CERD repeated its call for a moratorium on the death penalty “at the federal level, with a view to abolishing the death penalty.”²⁵⁶

Today, over half a century after the USA signed the ICERD, and more than 25 years after ratifying it, the intransigence of the federal government on the death penalty may be softening. In June 2021, the Biden administration submitted its combined 10th, 11th and 12th reports to the CERD confirming that it “supports legislatively ending the death penalty at the federal level and encouraging states to follow the federal government’s example.” At the same time, however, it continued to display a level of confidence in the capital justice system not justified by the evidence of discrimination within it.

“[T]he US judicial system provides an exhaustive system of protections at both the federal and state levels to ensure the death penalty is not applied in a summary, arbitrary, or discriminatory manner, and that its implementation is undertaken with exacting procedural safeguards, after multiple layers of judicial review, in conformity with the US Constitution and US international obligations. DOJ continues to take great precautions to ensure that decisions to seek the death penalty at the federal level are not based on factors that include race or national origin.”²⁵⁷

This confidence notwithstanding, Attorney General Merrick Garland has reiterated what he said at his confirmation hearing, stating: “I have concerns about the death penalty... and I’m concerned about disparate impact on Black Americans.”²⁵⁸ He is not the first. In 2000, Attorney General Reno said that she was “sorely troubled” by the evidence of racial bias in the federal death penalty system.²⁵⁹ In 2013, Attorney General Holder pointed to the need to “confront the reality” that “people of color often face harsher punishments than their peers.”²⁶⁰

Over 1,500 executions have been carried out under the USA’s current capital justice system, begun in the fourth quarter of the 20th century, and continuing into the 21st. Over 80% of these executions have occurred in the South, a region where around 38% of the USA’s population lives. A third of the individuals executed nationally were Black, despite the fact that Black people comprise only approximately 13% of the population. Over 75% of executions were of people convicted of crimes involving white victims.

In 2008 the most senior justice on the US Supreme Court stated that it had allowed race “to continue to play an unacceptable role in capital cases.”²⁶¹ A principal culprit is the Court’s now 35-year-old *McCleskey v. Kemp* decision in which it ruled that “the same types of statistical data that were routinely accepted as proof of racial discrimination in housing, employment, education, and the denial of other civil rights were not sufficient as proof that a death sentence had been unconstitutionally imposed.”²⁶² The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in his report of his mission to the USA in 1997, noted that the 1987 *McCleskey v. Kemp* ruling, under which a successful claim of racial discrimination

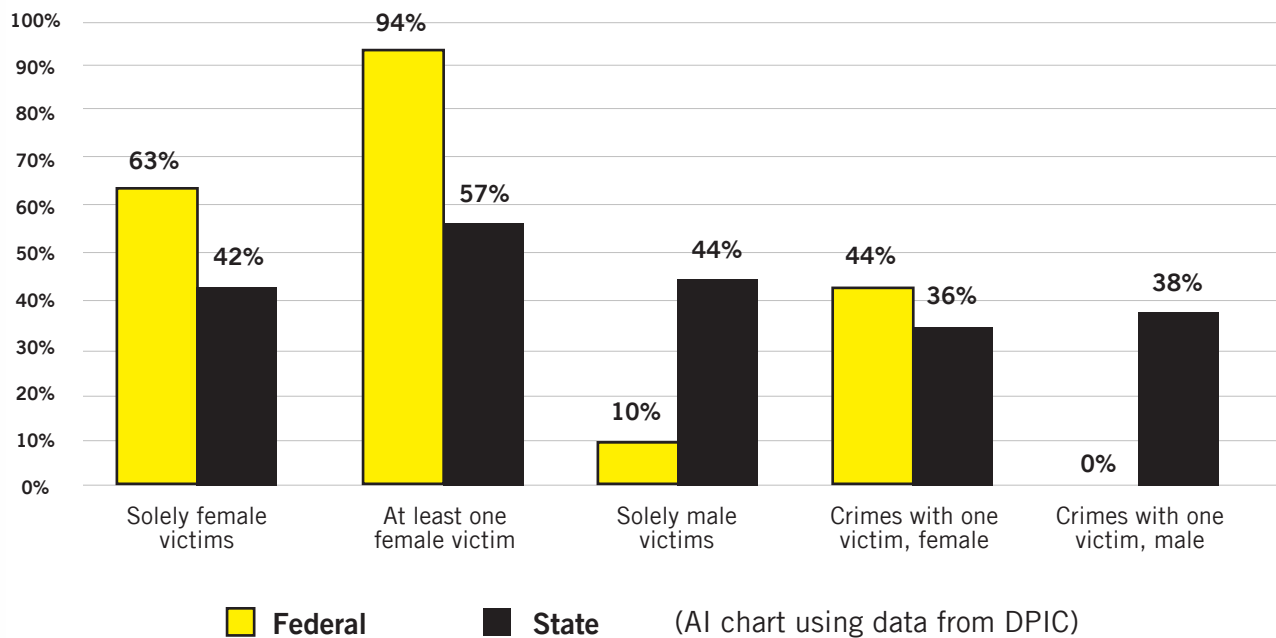
²⁵⁵ Reports submitted by States parties under article 9 of the Convention. Seventh to ninth periodic reports of States parties due in 2011. United States of America, 3 October 2013, UN Doc. CERD/C/USA/7-9, para. 70 (“With respect to the Committee’s comment concerning a potential moratorium on the death penalty, there is vigorous public debate in the United States on the death penalty... Any further decisions concerning a moratorium would have to be made separately at the federal level and by each of the 32 states that retain the death penalty”)

²⁵⁶ CERD, Concluding observations on the combined seventh to ninth periodic reports of the USA, 25 September 2014, UN Doc. CERD/C/USA/CO/7-9, para. 20.

would have to prove discriminatory intent by the decision-makers, “has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases.” The Rapporteur questioned the compatibility of the ruling “with obligations undertaken under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States parties to take appropriate steps to eliminate both direct and indirect discrimination.”²⁶³ Discrimination under the Convention “includes purposive or intentional discrimination and *discrimination in effect*” [emphasis added].²⁶⁴

McCleskey v. Kemp was present during the Trump administration’s defense of death sentences as well as during its execution spree. For example, three days before Orlando Hall was executed on 19 November 2020, having raised statistical evidence of systemic racism in federal capital justice in Texas, the government simply turned to *McCleskey v. Kemp*: “the Supreme Court has rejected such claims predicated on these types of statistics and has instead explained that a defendant who tries to demonstrate this kind of constitutional violation ‘must prove that the decisionmakers in his case acted with discriminatory purpose.’”²⁶⁵

CHART 4: EXECUTIONS 1972-2022, GENDER OF MURDER VICTIM



²⁵⁷ CERD, Combined 10th to 12th reports, 8 June 2021, UN Doc. CERD/C/USA/10-12, (previously cited), para. 116.

²⁵⁸ US Attorney General reviews Justice Dept’s federal death penalty policies, Reuters, 22 June 2021.

²⁵⁹ New York Times, “Reno troubled by death penalty statistics”, 12 September 2000.

²⁶⁰ Attorney General Eric Holder to American Bar Association, 12 August 2013.

²⁶¹ *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in the judgment.

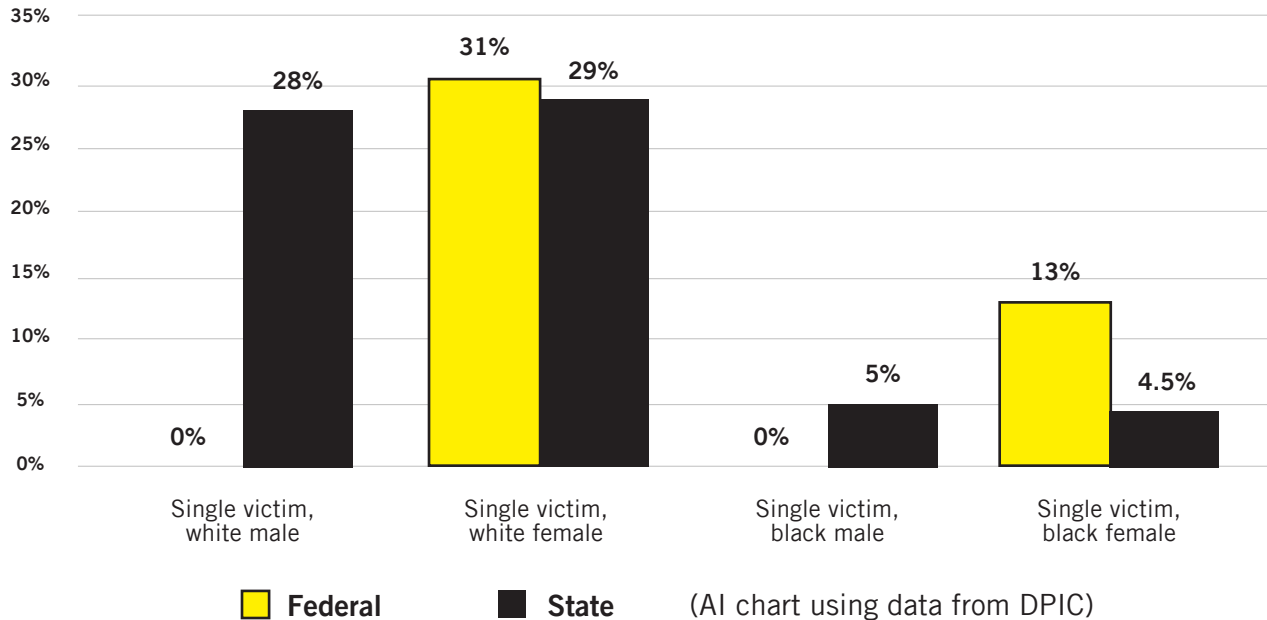
²⁶² Death Penalty Information Center, “35 years after *McCleskey v. Kemp*: A legacy of racial injustice in the administration of the death penalty”, 21 April 2022, deathpenaltyinfo.org/news/35-years-after-mccleskey-v-kemp-a-legacy-of-racial-injustice-in-the-administration-of-the-death-penalty

²⁶³ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, January 1998, UN Doc. E/CN.4/1998/68/Add.3, (previously cited), paras 64-65.

²⁶⁴ CERD, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination*, 24 September 2009, UN Doc. CERD/C/GC/32, para. 7.

CHART 5: EXECUTIONS AS PERCENTAGE OF FEDERAL AND STATE TOTALS, 1972-2022, FOR SINGLE VICTIM CRIMES, BY GENDER AND RACE OF VICTIM

74% of state executions were of individuals sentenced to death for a single murder
50% of federal executions were of individuals sentenced to death for a single murder



Meanwhile, the McCleskey obstacle remains firmly in place. In 2019, Brandon Council was facing the death penalty at his federal trial in South Carolina, despite his offers to plead guilty and serve life without the possibility of release.²⁶⁶ This African American man was charged with fatally shooting two white women during a bank robbery in Conway, South Carolina, in 2017. His lawyers filed a motion to strike the death penalty from the case based on its disproportionate use against those charged with the murder of white female victims. According to the Federal Death Penalty Resource Counsel Project, “since 2000, in a grossly disproportionate number of cases, juries have imposed the death penalty when

the victims was a white female... many times greater than one would expect given the pool of white female victim cases.”²⁶⁷ According to expert evidence presented pre-trial in Brandon Council’s case, there was a “one in one thousand chance” that the race and gender of the victim was unrelated to the capital sentencing outcome.²⁶⁸ The District Court ruled that the “[d]efendant’s arguments are foreclosed by Supreme Court precedent”, particularly *McCleskey v. Kemp*, and that he was “not entitled to discovery or an evidentiary hearing.”²⁶⁹ The trial went ahead and in 2019 the jury voted for death. Only 10 of the 12 jurors found in mitigation that “all life has value”.

²⁶⁵ US District Court for the Southern District of Indiana, *Hall v. Watson*. Response to Hall’s 28 USC §2241 petition and response in opposition to Hall’s motion for stay, 16 November 2020.

²⁶⁶ US District Court for the District of South Carolina, *USA v. Council*, Brandon Council’s motion to strike the Federal Death Penalty Act allegations from the indictment and as a possible punishment in this case, 18 September 2018.

²⁶⁷ Declaration of Kevin McNally regarding the geographic location of cases, the frequency of federal death sentences and the race and gender of defendants and victims, 17 June 2016. Ten of 16 (63%) of federal executions have involved white female victims. This is many times greater than one would expect given the pool of white female victim cases.

²⁶⁸ Declaration of Laura Cohen Bell, 2016.

²⁶⁹ US District Court for the District of South Carolina, *USA v. Council*, Order, 7 May 2019.

Victor Silvers was facing a federal capital trial in Kentucky, with the government having filed notice of its intent to seek the death penalty a month after President Biden took office. His lawyers challenged the constitutionality of the FDPA, including on race. Citing statistical evidence that of the 539 defendants whose cases had been authorized for a federal capital prosecution as of 15 April 2021, the breakdown was as follows, (A) African American, 263 (49%); (B) white, 148 (28%); (C) Latino, 99 (18%); and (D) “other,” 29 (5%).²⁷⁰ The government responded that the “defendant’s arguments are foreclosed by Supreme Court precedent”, particularly *McCleskey v. Kemp*.²⁷¹ The judge denied this motion as moot on 29 April 2022 after the US Attorney General authorized withdrawal of the USA’s Notice of Intent to Seek the Death Penalty.²⁷²

CERD has long called for the USA to implement “effective strategies aimed at rooting out discriminatory practices” in the application of the death penalty.²⁷³ In so doing, it has pointed to its General Recommendation 31 under ICERD, issued more than a decade and a half ago, which calls for “special attention” to the death penalty “in countries which have not abolished it”, especially when there is evidence of racial discrimination in its application.”²⁷⁴

The IACHR has taken the view that heightened scrutiny is required where the allegation concerns racial discrimination, so that it can be ensured that the distinction “is not based on the prejudices and/or stereotypes that generally surround suspect categories of distinction”. At the same time, the principle of equality and non-discrimination incorporates both “the prohibition

of arbitrary differences of treatment” and “the obligation of States to create conditions of real equality for groups that have been historically excluded or that are at greater risk of being discriminated against.”²⁷⁵

In July 2019, the IACHR transmitted a report on its analysis of Orlando Hall’s case to the Trump administration. Unlike the US authorities, once it found that there was “no direct evidence” of racial discrimination against Hall, this was not the end of its inquiry. Instead, it considered the “indicia of suspected use of race in the application of the death penalty”; the “lack of information” provided by the authorities and “the fact that the prosecuting attorney responsible for assembling the all-white jury was later found to have engaged in racial discrimination in jury selection in two separate cases.”

The IACHR found that the US government had failed “to fully respond to the allegations concerning possible racial discrimination raised throughout this process” and that this and the condemned person’s “lack of access to an effective remedy with regard to the allegation of racial discrimination” violated the USA’s international obligations. By April 2020, the administration had not replied to the IACHR. The Commission urged that Orlando Hall’s death sentence to be commuted. Instead, he was executed on 19 November 2020.

²⁷⁰ US District Court for the Western District of Kentucky, *USA v. Silvers, Motion to declare Federal Death Penalty Act unconstitutional*, 8 December 2021 (citing Declaration of Kevin McNally regarding the geographic location of federal cases, the frequency of authorizations, death sentences and executions and the race and gender of defendants and victims).

²⁷¹ US District Court for the Western District of Kentucky, *USA v. Silvers, United States response to Defendant’s motion to declare Federal Death Penalty Act unconstitutional*, 21 December 2021.

²⁷² US District Court for the Western District of Kentucky, *USA v. Silvers, Order*, 29 April 2022.

²⁷³ Concluding observations of the Committee on the Elimination of Racial Discrimination, 8 May 2008, UN Doc. CERD/C/USA/CO/6, para. 23. See also, Concluding observations on the combined seventh to ninth periodic reports of the USA, 25 September 2014, UN Doc. CERD/C/USA/CO/7-9, para. 20.

²⁷⁴ CERD, General Recommendation 31 on the prevention of racial discrimination in the administering and functioning of the criminal justice system (2005), para. 35.

²⁷⁵ See, for example, IACHR Report No. 28/20, Case 12.719, Report on Merits: Orlando Cordia Hall, USA, 22 April 2020.

3.3 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

THE USA IS ONE OF 35 MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES (OAS). IT IS THE ONLY ONE THAT CURRENTLY CARRIES OUT JUDICIAL EXECUTIONS.²⁷⁶

The principal human rights treaty of the Americas region, the American Convention on Human Rights (ACHR), was signed by the USA on 1 June 1977.²⁷⁷ The treaty was referred to the Senate Committee on Foreign Relations, whose members at the time included Senator Joe Biden. Hearings were held in November 1979. That was the last action taken towards ratification.

Like the ICCPR, the ACHR has provisions on the death penalty (Article 4). By signing the ACHR, the USA committed itself, under international law, not to do anything to undermine the object and purpose of the treaty pending its decision to ratify it.²⁷⁸ Article 4.4 states: “The death penalty shall not be re-established in states that have abolished it.” Article 28.1, meanwhile, states that: “Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.” The reinstatement of the federal death penalty in 1988 and expansion of

it in 1994 were incompatible with the object and purpose of the ACHR.

The IACHR is the expert body established under the ACHR, along with the Inter-American Court of Human Rights, to monitor implementation of and compliance with the treaty. In the case of OAS member states that have not ratified the ACHR, “the Commission examines the international responsibility of OAS Member States based on the American Declaration [on the Rights and Duties of Man²⁷⁹], and is authorized to do so by the OAS Charter.”²⁸⁰

The US government pledged in April 2009, when Joe Biden was vice president, that: “The United States is committed to cooperating with the human rights mechanisms of the United Nations, as well as the Inter-American Commission on Human Rights and other regional human rights bodies.”²⁸¹ The USA continues to defy calls from the IACHR to meet its international human rights obligations in relation to the death penalty.

²⁷⁶ IACHR, “IACHR condemns resumed use of the death penalty at the federal level in the United States after a 17-year lapse”, Press Release, 20 June 2020, [oas.org/en/iachr/media_center/PReleases/2020/149.asp](https://www.oas.org/en/iachr/media_center/PReleases/2020/149.asp)

²⁷⁷ The Carter administration proposed a reservation to ACHR Article 4 with similar intention to that filed on the ICCPR: “United States adherence to Article 4 is subject to the Constitution and other law of the United States.”

²⁷⁸ President Carter transmitted the ACHR to the Senate on 23 February 1978 “with a view to... ratification.”

²⁷⁹ American Declaration of the Rights and Duties of Man, [cidh.oas.org/basicos/english/basic2.american%20declaration.htm](https://www.oas.org/basicos/english/basic2.american%20declaration.htm)

In 2019, when the Trump administration moved to resume federal executions, the IACHR reminded the US government that to do so would be “contrary to the fundamental human rights obligations of an OAS member state pursuant to the American Declaration and the Charter of the Organization of Americas States and the instruments deriving from it.”²⁸² In a US federal case two decades earlier, the IACHR had said that “in capital cases, the failure of a member state to preserve a condemned prisoner’s life pending review by the Commission of his or her complaint... deprives condemned persons of their right to petition in the Inter-American human rights system, and results in serious and irreparable harm to those individuals, and accordingly is inconsistent with the state’s human rights obligations.”²⁸³

INTERNATIONAL HUMAN RIGHTS LAW PROHIBITS EXECUTIONS FROM BEING CARRIED OUT UNTIL ALL RIGHTS TO APPEAL HAVE BEEN EXHAUSTED AND RECOURSE TO PROCEEDINGS HAVE BEEN COMPLETED, INCLUDING TO INTERNATIONAL AND REGIONAL BODIES. THE USA IS A SERIAL VIOLATOR IN THIS REGARD IN RELATION TO THE INTER-AMERICAN HUMAN RIGHTS SYSTEM.²⁸⁴

At least 47 people have been executed in the USA since 1996 in the face of “precautionary measures” issued by the IACHR calling for a stay of execution to allow the Commission time to review the merits of the person’s petition. The Commission has said that it considers the USA’s “incompliance with the principles of the system to be of the utmost gravity.”²⁸⁵

Not only does the federal government effectively shield individual states as they carry out executions in the face of precautionary measures or findings on the merits of petitions,²⁸⁶ it has also set an appalling example in its own direct cases. A quarter of all federal executions (four of 16) in the USA since 2001 were carried out despite the IACHR’s findings of international law violations upon full analysis of the merits of petitions and government responses – Juan Raul Garza (2001), Lezmond Mitchell (2020) and Orlando Hall (2020) – or in the face of IACHR precautionary measures calling for a stay of execution pending full review of the petition – Lisa Montgomery (2021). Since the federal execution spree, there has been another execution in the USA carried out in defiance of IACHR precautionary measures. Clarence Dixon was executed on 11 May 2022 despite his long-standing mental disability, including repeated diagnoses of paranoid schizophrenia.²⁸⁷

²⁸⁰ IACHR, *Basic Documents in the Inter-American System*, oas.org/en/iachr/mandate/Basics/intro.asp, including Note 11. See also, IACHR, *Towards the closure of Guantánamo*, 2015, para. 18: “According to the well-established and long-standing jurisprudence and practice of the Inter-American system, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including in particular those States that are not parties to the American Convention on Human Rights”, oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf

²⁸¹ Annex to the letter dated 22 April 2009 from the Permanent Representative of the USA to the United Nations addressed to the President of the General Assembly Human rights commitments and pledges of the USA, UN Doc. A/63/831, p. 4.

²⁸² IACHR, “IACHR expresses its profound concern for the reinstatement of the death penalty at the federal level in the United States”, Press Release, 15 August 2019, oas.org/en/iachr/media_center/PReleases/2019/201.asp

²⁸³ IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza, USA, 4 April 2001, para. 118.

²⁸⁴ Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36, (previously cited), para. 47: “death sentences must not be carried out as long as international interim measures requiring a stay of execution are in place... Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies.”

²⁸⁵ IACHR, *The death penalty in the Inter-American Human Rights System: From restrictions to abolition*, OEA/Ser.L/V/II, Doc. 68, 31 December 2011, paras 48-49, oas.org/en/iachr/docs/pdf/deathpenalty.pdf

²⁸⁶ See for example, “IACHR condemns execution of Russell Bucklew in Missouri, United States of America”, Press Release, 7 October 2019, oas.org/en/iachr/media_center/PReleases/2019/249.asp

²⁸⁷ Amnesty International, USA: Execution set despite mental disability, 25 April 2022, [amnesty.org/en/documents/amr51/5500/2022/en](https://www.amnesty.org/en/documents/amr51/5500/2022/en)

4.0 END FEDERAL ENABLING OF STATE DEATH PENALTY

“THE FEDERAL GOVERNMENT WILL REMOVE ANY FEDERAL INHIBITION TO THE STATES’ ABILITIES TO MEET THEIR OBLIGATIONS”

US Senate Committee on Foreign Relations report recommending ratification of ICCPR, 24 March 1992²⁸⁸

On 8 April 2022, the White House was asked whether President Biden would seek the Texas Governor's intervention in the case of a woman facing imminent execution in Texas despite serious doubts about the reliability of her conviction and the fairness of her trial. The Press Secretary's response was to point to the review of the federal death penalty and that the case in question was "obviously at a state level".²⁸⁹ A similar response had been given five months earlier in relation to an Oklahoma death penalty case – the case in question, it said, involved "a state-level sentence... there wasn't a real role that the federal government could officially play."²⁹⁰

As already noted, there have been more than a dozen executions at state level since President Biden took office. His promise to go beyond working to end the federal death penalty and to incentivize states to do the same is an important part of his pledge, but he and his administration should act on it as a matter of urgency.

Over the past five decades, the federal government has failed to build on abolitionist moves by states. On the contrary, in addition to its own use of the death penalty, it has promoted, facilitated and defended its use by states. All too often it has been silent, hiding behind the federal structure to wash its hands of the death penalty at the state level. It has fended off criticism of the death penalty on the international stage and filed briefs in the US Supreme Court in support of states defending aspects of their capital justice system. In some cases, it has even added an expansionary twist to the reach of the death penalty by seeking it where the state is unwilling or unable to.

Article 50 of the ICCPR expressly states that the provisions of the Covenant "shall extend to all parts of federal states without any limitations or exceptions." As already noted, there is an obligation under Article 6 of the ICCPR for governments to work for abolition within a reasonable timeframe and all branches of government in all jurisdictions should work to ensure compliance with the country's international treaty obligations.

The first Bush administration proposed that the USA file an "understanding" to Article 50 upon ratification, and the Senate Committee on Foreign Relations approved it.²⁹¹ The understanding was intended to signal that "the Federal Government will remove any federal inhibition to the States' abilities to meet their obligations."²⁹² At the time of the USA's initial report to it, the UN Human Rights Committee noted "with satisfaction" US assurances that this understanding was not a reservation and was "not intended to affect the international obligations of the United States." Yet the federal government has continued to assist or enable the states in their death penalty pursuits.

²⁸⁸ ICCPR, Report from Senator Clairborne Pell, 1992, (previously cited), p. 18.

²⁸⁹ Press briefing, White House, 8 April 2022. See, Amnesty International, "USA; Woman's execution would violate international law", 30 March 2022, [amnesty.org/en/documents/amr51/5420/2022/en/](https://www.amnesty.org/en/documents/amr51/5420/2022/en/)

²⁹⁰ Press briefing, White House, 18 November 2021. The Oklahoma case was that of Julius Jones.

²⁹¹ "That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local government may take appropriate measures for the fulfillment of the Covenant."

²⁹² ICCPR, Report from Senator Clairborne Pell, 1992, (previously cited).

4.1 END FEDERAL BACKSTOPPING FOR STATES

THE FEDERAL GOVERNMENT HAS ON OCCASION ASSISTED STATES WHEN THEY HAVE RUN INTO DIFFICULTIES WITH THEIR OWN CAPITAL STATUTES IN THE COURTS.

A penchant for some federal officials to seek to extend the reach of the federal death penalty was illustrated in 1989 when President George H. W. Bush promoted pursuit of the death penalty where state law did not allow it: “In those States where police are not protected by death penalty provisions, we should make full use of those Federal laws that permit the death penalty for cop-killers.”²⁹³

An example of this came in 2004, when the administration of President George W. Bush took over the prosecution of Ronell Wilson for the 2003 murder of two undercover New York City Police Department officers. Twenty-year-old Wilson was initially charged with first degree murder in state court and the District Attorney filed notice of intent to seek the death penalty under state law. However, 15 months later, the New York Court of Appeals ruled that the state’s death penalty statute was unconstitutional. The state could have continued to prosecute Ronell

Wilson with a maximum sentence of life imprisonment. Instead, the Bush administration took over and the defendant was indicted in federal court. He was sentenced to death in 2007, the first federal death sentence passed in New York since 1954.²⁹⁴

The death sentence was later overturned due to prosecutorial misconduct at the sentencing. The Obama administration chose to pursue the death penalty at resentencing.²⁹⁵ Wilson’s lawyers told the judge that they were intending to introduce in mitigation “that Mr Wilson would not and could not have faced the death penalty if the federal government had not taken over the prosecution.”²⁹⁶ The judge prohibited this on the grounds that “New York’s ban on capital punishment is due to a specific, technical opinion by the State’s highest court that would require substantial explanation.”²⁹⁷ The following month the jury voted for a death sentence and on 10 September 2013 the judge sentenced the defendant to death for the second time.

²⁹³ Remarks at a Briefing on Law Enforcement for United States Attorneys, 16 June 1989.

²⁹⁴ Other cases of federal government intervention include Richard Jackson, currently on federal death row, and Kenneth Barrett, who is awaiting resentencing after his federal death sentence was overturned in 2021 due to inadequate representation at the original sentencing. Both men were serving lengthy state sentences for the same crimes that the Department of Justice the prosecuted and obtained death sentences.

²⁹⁵ US District Court for the Eastern District of New York, *USA v. Wilson*, Memorandum and Order, 7 February 2013.

In 2016, a federal court review found that an earlier ruling that Wilson did not have intellectual disability had applied an inappropriate standard. Applying the correct standard led to this finding being reversed and his death sentence was found unconstitutional. Thirteen years after Wilson was indicted under state law, he was sentenced to life imprisonment under federal law, the maximum the state prosecution could have obtained after New York's capital statute was overturned (the legislature has not replaced the statute).

This was not an isolated case of the federal government directly assisting a state in its death penalty travails. In Kansas in 2005, Scott Cheever was charged in state court with the capital murder of a Kansas county Sheriff. However, a month before the crime, the Kansas Supreme Court had ruled that the state's death penalty statute was unconstitutional.²⁹⁸ Although the State of Kansas could have gone ahead and pursued a life sentence against Scott Cheever, it instead turned to the US administration to prosecute him under the FDPA so that the death penalty could be pursued against him.²⁹⁹ The federal government could have chosen not to involve itself or even encouraged the state to take the death penalty off the table. Instead, Scott Cheever was charged with capital murder under the FDPA and in July 2005 the administration of George W. Bush filed notice of its intention to seek the death penalty.³⁰⁰

Meanwhile, the state succeeded in having the US Supreme Court overturn, by a vote of five to four, the Kansas Supreme Court's ruling on the constitutionality of the state's capital statute.³⁰¹

Jury selection in the federal prosecution began in September 2006, but proceedings were suspended a week later. The state authorities asked that the case be returned to state court given that the death penalty was now an option again under state law. The federal government filed a motion to dismiss, which was granted by the federal judge on 2 November 2006, a year and a half after the federal indictment. The capital murder charge against Scott Cheever was re-filed under state law. Scott Cheever was convicted and sentenced to death.

The US administration's involvement in the case did not end there. In 2012, the Kansas Supreme Court overturned Cheever's capital murder conviction and his death sentence, finding that his constitutional Fifth Amendment right not to be compelled to incriminate himself had been violated. The state appealed to the US Supreme Court. In 2013 the Obama administration filed a brief in the US Supreme Court in support of the State of Kansas. The brief asserted that the federal government "has a significant interest in the Court's disposition of this case" because the Fifth Amendment "applies to the federal government as well as to the States." Given its earlier pursuit of the death penalty against this defendant, the federal government's interest apparently included ensuring a death sentence.³⁰² The US Supreme Court overturned the ruling of the Kansas Supreme Court which then upheld Scott Cheever's conviction and death sentence.³⁰³ At the time of writing, he remained on death row.

²⁹⁶ *USA v. Wilson*, Letter to the Honorable Nicholas G. Garaufis, District Judge, US District Court for the Eastern District of New York, from Loretta Lynch, US Attorney for the Eastern District of New York, 29 May 2013 (misdated 29 March).

²⁹⁷ *US District Court, Eastern District of New York, USA v. Wilson*, Memorandum & Order, 14 June 2013, the judge noted that at jury selection, "numerous jurors... were confused as to why the death penalty is an available option given New York's ban."

²⁹⁸ *Supreme Court of the State of Kansas, Kansas v. Marsh*, 17 December 2004.

²⁹⁹ *US Supreme Court, Kansas v. Cheever*, 11 December 2013, "Rather than continuing to prosecute Cheever without any chance of a death sentence, state prosecutors dismissed their charges and allowed federal authorities to prosecute Cheever under the Federal Death Penalty Act of 1994."

³⁰⁰ *US District Court, District of Kansas, Memorandum and order, USA v. Cheever*, 29 March 2006. In one of his pre-trial rulings, the judge wrote: "In the years since *Furman*... the Supreme Court has revisited its death penalty jurisprudence numerous times... Sometimes the decisions flow from one another; but on other occasions, what was a well settled rule of law in one decade is found repugnant to the Constitution in the next. Lower courts administering capital cases are severely burdened with not only understanding the present state of the law, but also divining what it will be next week, next term, or ten years from now when cases presently being tried may still be in the throes of appellate review."

In Amnesty International's view, the domestic transfer of a defendant facing a capital charge from a jurisdiction without the death penalty to one with it, *for the sole purpose of keeping the death penalty as a sentencing option*, contravenes the spirit of the *lex mitior* principle whereby, if the law relevant to the offence of the accused has been amended, the less severe law should be applied.³⁰⁴ The UN Human Rights Committee has said:

“the abolition of the death penalty should apply retroactively to individuals charged or convicted of a capital offence in accordance with the retroactive leniency (lex mitior) principle, which finds partial expression in the third sentence of article 15(1) [of the ICCPR], requiring States parties to grant offenders the benefit of lighter penalties adopted after the commission of the offence. The retroactive application of the abolition of the death penalty to all individuals charged or convicted of a capital crime also derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished.”³⁰⁵

The argument has been made and accepted by courts that to enforce a federal death penalty only if the crimes were committed in a state that had the death penalty would create or exacerbate geographic disparities in the application of the death penalty.³⁰⁶ This may be true (although to pursue a death sentence does not necessarily result in one). However, the government – whether at state or federal level – is also under an obligation to work for abolition.

FROM A HUMAN RIGHTS LAW PERSPECTIVE, THE ANSWER TO GEOGRAPHIC DISPARITIES IN THE APPLICATION OF THE DEATH PENALTY IS NOT TO EMBARK ON THE PURSUIT OF MORE DEATH SENTENCES TO EVEN OUT THE SPREAD OF THEM GEOGRAPHICALLY, BUT TO ERADICATE THE DEATH PENALTY ALTOGETHER.

³⁰¹ *Kansas v. Marsh*, 26 June 2006.

³⁰² When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities." *Justice Manual*, Section 9, 10.110, www.justice.gov/jm/jm-9-10000-capital-crimes#9-10.010

³⁰³ *Supreme Court of Kansas, State of Kansas v. Scott D. Cheever*, 22 July 2016.

³⁰⁴ See also, for example, *US Court of Appeals for the Fourth Circuit, US v. Hager*, 20 June 2013, Judge Wynn dissenting: "nothing prevented Virginia from prosecuting this case in its courts... Perhaps the driving consideration behind prosecuting this matter in federal court was that it is not clear whether, under Virginia's capital punishment statute, this murder falls into any of Virginia's fifteen categories of death-eligible murders." *Thomas Hager remains on federal death row. Virginia abolished the death penalty in 2021.*

³⁰⁵ *Human Rights Committee, General Comment 36, UN Doc. CCPR/C/GC/36*, (previously cited), para. 38.

³⁰⁶ For example, *US District Court for the District of Vermont, USA v Michael Jacques, Opinion and order re: Defendant's motion to reconsider point eight in favor of striking the Notice of Intent to Seek the Death Penalty*, 2 September 2011: "Determining that certain offenders convicted of death-eligible offenses under federal law would not be eligible for the death penalty simply because of the district in which they were tried – while others, convicted of the same federal offenses in other districts would be eligible – would violate the principle that, to be rational, narrowing must be based on the heinousness of the offense."

4.2 END LITIGATION BACKING STATE EXECUTIONS

PRESIDENT BIDEN’S PROMISE TO WORK FOR ABOLITION OF THE FEDERAL DEATH PENALTY AND TO ENCOURAGE STATES TO ABOLISH THEIRS, MUST INCLUDE STOPPING ALL FEDERAL ACTIVITIES THAT SUPPORT OR FACILITATE STATE EXECUTIONS.

Even before reinstating the federal death penalty in 1988, the US government was ratifying treaties in ways that gave states the go ahead to ignore international legal constraints on the death penalty. It was also intervening in litigation in support of state capital justice. Below are a few examples of such interventions over the years. In this way, the federal government has contributed to the development of domestic law that has allowed violations of international human rights safeguards protecting those facing the death penalty.

1983 – STRICKLAND V. WASHINGTON:

The Reagan administration urged the Supreme Court to reverse a Court of Appeals decision that the legal representation at trial of a person on Florida’s death row had been inadequate. The

administration argued that for a successful appeal on this issue, not only should the performance of the lawyer have fallen “measurably below the range of competence demanded of defense counsel”, but it would also have to be shown that “substantial prejudice resulted”.³⁰⁷ The Supreme Court indeed ruled that “the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The 1984 *Strickland* ruling has allowed executions of people whose representation had contravened the international standard that anyone facing the death penalty be provided “adequate legal assistance at all stages of the proceedings”, “above and beyond the protections afforded in non-capital cases”.³⁰⁸

³⁰⁷ *Strickland v Washington*, Brief for the United States as amicus curiae supporting petitioners, August 1983.

³⁰⁸ *UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ECOSOC 1984/50, and Additions to Safeguards as agreed by ECOSOC Resolution 1989/64.

³⁰⁹ *Payne v. Tennessee*, Brief for the United States as amicus curiae supporting respondent, April 1991.

³¹⁰ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, January 1998, UN Doc. E/CN.4/1998/68/Add.3, (previously cited), para. 153.

1991 – PAYNE V. TENNESSEE:

The George H. W. Bush administration filed a brief in the US Supreme Court in support of Tennessee's efforts to have *Booth v. Maryland* (1987) and *South Carolina v. Gathers* (1989), prohibiting the introduction of "victim impact" testimony at capital trials, overturned.³⁰⁹ The state had introduced victim impact evidence at Pervis Payne's 1987 trial, in violation of the *Booth* ruling. In *Booth v. Maryland*, the Supreme Court had said that: "One can understand the grief and anger of the family... [b]ut the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." In *Payne v. Tennessee*, the US Supreme Court (with some new justices) reversed this earlier decision, ruling that victim impact testimony was admissible and thereby upholding Pervis Payne's death sentence. In 1998, the UN expert on the death penalty expressed his concern at the approach to victims' rights in the USA and warned that, while victims were "entitled to respect and compassion, access to justice and prompt redress, these rights should not be at the expense of those accused. Court should not become a forum for retaliation."³¹⁰ In 2021, 19 years after the Supreme Court outlawed the use of the death penalty against those with intellectual disability, and after more than three decades of seeking to execute Pervis Payne, who continued to assert his innocence, the state conceded that it had no evidence to refute the claim that he had intellectual disability. He was resentenced to life in prison in 2022.

³¹¹ Senator Clairborne Pell, *Congressional Record*, 7 June 1995: "With this time-honored tradition of habeas corpus so much a part of the bedrock legal principles which underpin our society, why are we considering changing it all? The answer is clear and has been readily acknowledged by the proponents of this so-called reform: they want to expedite the execution of those who have received the death penalty. It is that simple. There is no other driving force behind these efforts."

³¹² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, January 1998, UN Doc. E/CN.4/1998/68/Add.3, (previously cited), para. 147.

³¹³ US Supreme Court, *Domingues v. Nevada*, Brief for US as amicus curiae., October 1999. See Amnesty International, "USA: Death Penalty/legal concern: Michael Domingues", 28 June 1999, [amnesty.org/en/documents/amr51/102/1999/en/](https://www.amnesty.org/en/documents/amr51/102/1999/en/) and "USA: Further information on death penalty / legal concern: Michael Domingues", 1 November 1999, [amnesty.org/en/documents/amr51/148/1999/en/](https://www.amnesty.org/en/documents/amr51/148/1999/en/)

³¹⁴ US Supreme Court, *Mickens v. Taylor*, Brief for the United States as amicus curiae supporting respondent, September 2001.

³¹⁵ See Amnesty International, "USA (Virginia): Death penalty/Legal concern", 28 May 2002, www.amnesty.org/en/library/info/AMR51/081/2002/en and "USA (Virginia): Further information on Death penalty/Legal concern – Walter Mickens (m), black, aged 47", 12 June 2002, [amnesty.org/en/library/info/AMR51/097/2002/en](https://www.amnesty.org/en/library/info/AMR51/097/2002/en)

1996 – FELKER V. TURPIN:

President Clinton signed the AEDPA into law in 1996, at least in part to hasten executions.³¹¹ The administration was then asked for its views by the Supreme Court after Ellis Felker, on death row in Georgia, challenged the Act's constitutionality. The administration asserted that the limits the AEDPA placed on the filing of second or successive habeas petitions were "based on reasonable principles of finality." In 1998, the UN's expert on the death penalty said that the AEDPA had "further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments."³¹² The AEDPA precluded scrutiny of constitutional violations raised in several of the 13 federal execution cases under President Trump.

1999 – DOMINGUES V. NEVADA:

Invited by the US Supreme Court to express its views on whether executing individuals for crimes committed when they were under 18 years old violated international law, the Clinton administration urged the Court not to review the question (despite the FDPA prohibiting the death penalty against people from this age group).³¹³ The Court dismissed the case. Nine more people were executed in the USA for crimes committed when they were children – in clear violation of international law – before the US Supreme Court finally ruled in 2005 that such executions were unconstitutional.

2001 – MICKENS V. TAYLOR:

Walter Mickens was sentenced to death in Virginia in 1993 for murder. The murder victim was facing weapons and assault charges at the time of his death. The judge dismissed these charges because of his death. On the next working day, the same judge appointed the lawyer who had been representing the murder victim to represent Mickens. Neither the judge nor the lawyer disclosed to Mickens that he was being defended by the lawyer of the murder victim. The matter remained undisclosed until it was discovered years later by Mickens's appeal lawyer. The Supreme Court agreed to review the case and the George W. Bush administration filed a brief in support of Virginia urging the Court to uphold the death sentence, asserting its interest because "claims of ineffective assistance of counsel are frequently asserted... in federal criminal cases."³¹⁴ The Court upheld the death sentence, over the dissent of four justices that Mickens should get a new trial. In 2002, Walter Mickens was executed, in violation of the ICCPR.³¹⁵

2007 – UTTECHT V. BROWN:

In 2006, the Ninth Circuit overturned Cal Brown's death sentence in Washington because a prospective juror had been unlawfully excluded at jury selection. The man in question had said that he believed the death penalty was "appropriate in severe cases", that he would consider mitigating and aggravating factors and would "follow the law" without reservation. However, the prosecution had objected to the juror on the grounds that he was too reluctant to impose the death penalty and the trial judge allowed his exclusion. The State appealed to the US Supreme

Court to reinstate the death sentence and the George W. Bush administration filed a brief in support.³¹⁶ In 2007, the Supreme Court reimposed the death sentence, finding that "deference to the trial court is appropriate", adding that the AEDPA "of course, provide[s] additional, and binding, directions to accord deference" to the trial court.³¹⁷ Four justices accused the majority of "defer[ring] blindly" to a state court's error. Cal Brown was executed in 2008.

2019 – KAHLER V. KANSAS:

Kraig Kahler, a man with serious mental disabilities, was sentenced to death in Kansas for the murder in 2009 of four of his family members. Kansas law does not allow the jury to consider mental disease or defect as a defense to crime, except to the extent that a defendant is shown to lack the mental state required to commit the offence. This law effectively abolishes the "insanity defense". The Kansas Supreme Court upheld Kahler's conviction and death sentence and the US Supreme Court decided to take the case. The Trump administration filed a brief urging the US Supreme Court to affirm the Kansas Supreme Court's decision, asserting its interest in the outcome on the grounds that, although federal law currently provided for an insanity defense, "the federal insanity standard has varied over time, and the United States has an interest in Congress's authority to prescribe the contours of criminal liability." In March 2020, the US Supreme Court affirmed the Kansas Supreme Court's judgment. Three justices dissented. While they recognized that "the Constitution gives the States broad leeway... to provide different

³¹⁶ US Supreme Court, *Uttecht v. Brown*, Brief for the United States as amicus curiae supporting petitioner, February 2007. The Bush administration pointed to the case of Wesley Purkey, since executed in the Trump execution spree, and the rejection by the Eighth Circuit of his challenge to the removal of three would-be jurors for their reluctance to impose the death penalty.

³¹⁷ *Uttecht v. Brown*, 4 June 2007.

³¹⁸ US Supreme Court, *Kahler v. Kansas*, 23 March 2020, Justices Breyer, Ginsburg and Sotomayor dissenting.

³¹⁹ For example, In the US Supreme Court, *USA v. Tsarnaev*, Reply brief for the United States, September 2021 (arguing for reinstatement of the federal death sentence – death sentence reinstated by Court on 4 March 2022) and *Savage v. US*, Brief for the United States in opposition, October 2021 (arguing for death row prisoner's petition challenging gaps in the appellate record to be denied – petition denied by the Court on 15 November 2021). The current administration continues to fight for the death sentence in the cases of all the individuals on federal death row.

definitions and standards related to the defense of insanity... Kansas has not simply redefined the insanity defense. Rather, it has eliminated the core of a defense that has existed for centuries: that the defendant, due to mental illness, lacked the mental capacity necessary for his conduct to be considered morally blameworthy.”³¹⁸

Since the Biden administration took office, there have been at least three occasions in which it has involved itself in litigation in state capital cases before the US Supreme Court (in addition to the federal cases in which it continues to defend the death penalty in lower courts and, when the cases reach there, the US Supreme Court).³¹⁹ However, in these three cases (from Georgia, Ohio and Texas), it has not sided with the state. In the Georgia case, it filed an *amicus curiae* brief in support of the individual on death row (see below) and in the other two it supported neither party.³²⁰ It is unclear whether this approach stems from a change in direction pursuant to the Biden abolitionist pledge or merely reflects the issues raised in the cases. However, the Department of Justice briefs made no reference to the administration’s abolitionist promise or opposition to the death sentence in question, omissions which effectively leave it supporting the state’s pursuit of execution.

Michael Nance is, at the time of writing, under sentence of death in Georgia and his case before the US Supreme Court concerns the procedural mechanism for an individual on state death row to challenge the method of execution. The Biden administration asserted that its “interest in the case” was that “federal law authorizes capital punishment for certain criminal offenses” and “the decision in this case could alter the procedure by which federal capital inmates bring method-of-execution claims.”³²¹ This is far from being an abolitionist stance, and indeed at oral argument on 25 April 2022 the federal administration took a position that was of concern about procedures for challenging execution protocols rather than of concerns about executions per se. The Assistant to the US Solicitor General explained to the Court that the federal government was concerned to minimize “procedural complexity” and therefore supported the petitioner’s contention that he could challenge the execution protocol under the civil rights statute (42 U.S.C. §1983) as opposed to in a habeas corpus petition as the state was arguing. The Supreme Court’s decision was pending at the time of writing.

³²⁰ US Supreme Court, *Ramirez v. Collier*, Brief for the United States as Amicus Curiae supporting neither party, September 2021. The Court stayed the execution of John Ramirez in Texas to consider his challenge to Texas’s policies prohibiting his spiritual advisor from praying audibly or laying hands on the condemned man in the execution chamber. The Biden administration asserted its interest as including clarification of relevant practices of the Federal Bureau of Prisons. On 24 March 2022, the Court reversed the Fifth Circuit Court of Appeals, finding that Texas could create procedures to accommodate Ramirez’s request. See also, US Supreme Court, *Shoop v. Twyford*, Brief for the United States as Amicus Curiae supporting neither party, March 2022. Raymond Twyford is on death row in Ohio. His traumatic childhood included him shooting himself in the head at the age of 13, leaving bullet fragments in his skull. The case before the Supreme Court arose because a US District Court, under the All Writs Act, ordered the warden to transport Raymond Twyford to a medical facility for neuroimaging for use in his legal challenges. The state appealed the order. The decision in *Shoop* was pending at the time of writing.

³²¹ Nance v. Ward, Brief for the United States as Amicus Curiae supporting Petitioner, March 2022.

4.3 END WORK WITH STATES ON EXECUTION METHODS

OVER THE PAST FOUR DECADES, THE FEDERAL GOVERNMENT HAS COME TO THE AID OF STATES WHEN THE USA'S PREFERRED METHOD OF EXECUTION DURING THIS PERIOD – LETHAL INJECTION – HAS COME UNDER THREAT THROUGH LEGAL CHALLENGES OR LACK OF DRUGS.

In 2007, for example, the Bush administration sided with the states in defending the constitutionality of lethal injection. In an amicus curiae brief filed in the US Supreme Court in relation to a legal challenge to Kentucky's lethal injection protocol, the administration argued that "the use of capital punishment in America dates virtually from the foundation of the first colony" and that "[a]ny risk of pain inherent in lethal injection is manifestly one that today's society chooses to tolerate." The US Supreme Court upheld Kentucky's injection protocol and ended a six-month moratorium in practice on lethal injections. More than 400 people have been put to death by lethal injection since the Court's decision in April 2008.

In 2011, with the sole US manufacturer of sodium thiopental suspending production and withdrawing from the market altogether, the USA's death penalty states turned to each other, to sources overseas and to the federal government to seek solutions. A 2011 letter from 13 state attorneys general to the US Attorney General solicited his "assistance in either identifying an appropriate source for sodium thiopental or making supplies held by the Federal Government available to the States."³²² Rather than using the opportunity to work against executions, Attorney General Holder replied that he was "optimistic" solutions could be found to allow lethal injections to proceed.³²³

³²² Letter to US Attorney General from Attorneys General of Alabama, Colorado, Delaware, Florida, Idaho, Mississippi, Missouri, Nevada, Oregon, Tennessee, Utah, Washington and Wyoming, 25 January 2011.

³²³ Letter from Attorney General Eric Holder to James McPherson, Executive Director, National Association of Attorneys General, 4 March 2011. Again, in 2012, the attorneys general of 15 states urged the US Attorney General to ensure that the federal Food and Drug Administration (FDA) appealed against a District Court ruling that the FDA had acted "arbitrarily and capriciously" when allowing imports of a "misbranded" and "unapproved" drug used in lethal injections. The Obama administration agreed to the states' request. On 23 July 2013, however, the Court of Appeals upheld the District Court ruling. The Obama administration did not appeal further.

³²⁴ Deposition of Brad Weinsheimer, 29 January 2020, (previously cited).

³²⁵ Deposition of Rick Winter, In the matter of the Federal Bureau of Prisons Execution Protocol Cases, 15 November 2019.

The Obama administration continued to work on the federal lethal injection protocol, including “reviewing state protocols and discussing the issue with states.”³²⁴ According to a BOP lawyer, BOP personnel travelled to Mississippi in 2011 to witness an execution under the state’s single-drug protocol using pentobarbital as the lethal agent. BOP personnel subsequently, possibly in 2014, visited Ohio to witness an execution there under that state’s two-drug protocol (in the event, the execution did not take place). There had also been an earlier trip to Texas and, similar to that visit, the BOP “was interested in seeing how Ohio was going to carry out an execution involving midazolam and hydromorphone. We wanted to observe their procedures or practices, meet their personnel, tour their facilities, gain knowledge.” In the case of Texas, the BOP personnel “reviewed their press packet”, the materials provided to the media attending an execution.³²⁵

After President Trump took office, Attorney General Sessions set about resolving the federal government’s lethal injection problems and the effort was delegated to the BOP with the Attorney General kept in the loop. The administration finally settled on adopting a one-drug protocol and arranged to source the drug from domestic suppliers. All 13 federal executions were carried out under this protocol.

In addition to the six federal executions carried out after the 2020 presidential election, Attorney General Barr finalized new regulations in that same “lame duck” period allowing for the use of methods other than lethal injection in future federal executions. As noted above, the FDPA requires that executions are carried out “in the manner prescribed by the State in which the sentence is imposed” or, if that state is one without the death penalty, the trial judge is to designate another state that does have it. The

new rules noted that the regulations used until now had been “promulgated in a final rule on January 19, 1993.” That was the final full day of President George H. W. Bush’s “lame duck” period and it had been his Attorney General, William Barr, who had overseen finalization of that new rule too.

The 1993 regulations authorized executions only by lethal injection. Yet, as Attorney General Barr’s new 2020 rules state, “some States also authorize execution by other means in certain circumstances”, including electrocution, nitrogen hypoxia and firing squad, and “States may authorize execution by other means in the future” and could even authorize methods to the exclusion of lethal injection. The new rule noted that the current federal execution chamber was equipped only to carry out lethal injections, so that “if cases arise in which the Department is required to execute a Federal inmate according to the law of a State that uses a method other than lethal injection, the most expedient means of carrying out the execution may be to arrange for State assistance.” The new rule aimed to give the federal government “greater flexibility to conduct executions” and to allow for “State and local facilities and personnel” to be used in carrying out federal executions.³²⁶ The rule became effective on 24 December 2020.

Brandon Council was sentenced to death in South Carolina in October 2019. As standard under the FDPA, the final judgment reads: “When the sentence of death is to be implemented, the Attorney General shall release the defendant to the custody of a United States Marshal, who shall supervise the implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.”

³²⁶ Office of Attorney General, *Manner of Federal Executions*, 28 CFR Part 26, Final rule, effective on 24 December 2020.

³²⁷ US District Court for the District of South Carolina, *USA v. Council*, Government’s response in opposition to defendant’s motion to vacate, 5 August 2021.

³²⁸ US District Court for the District of South Carolina, *USA v. Council*, Order, 10 September 2021.

In May 2021, the South Carolina General Assembly amended the state's death penalty statute in response to claims by the Department of Corrections that it could not obtain the drugs needed for its lethal injection protocol. The amendments changed the state's default method of execution from lethal injection to electrocution, and purported to give those on death row a choice between three methods: electrocution, the firing squad, or lethal injection (if available). If the person sentenced to death did not select anything, his or her execution would be electrocution. Lawyers for Brandon Council moved to have his death sentences vacated on the grounds that, as things stood, execution would be by electrocution.

“No execution date has been scheduled for Defendant, and no method of execution has been selected. In fact, the Government has imposed a moratorium on all federal executions and, even in the absence of that moratorium, cannot schedule Defendant’s execution until after he has exhausted [his appeals]... [T]he transient unavailability of that [lethal injection] option to State prisoners is immaterial to whether the Federal Bureau of Prisons could accomplish a federal execution by lethal injection ‘in the manner prescribed by the law of the State’.”³²⁷

In September 2021, the US District Court denied Brandon Council's motion. Among other things the Court said that “simply put, the obstacles facing the South Carolina Department of Corrections (such as not being able to obtain lethal injection drugs) are immaterial. In fact, the Federal Government executed thirteen prisoners with a lethal injection drug (pentobarbital) after [Brandon Council] was sentenced.” The judge also noted the case of Dustin Higgs, the last person executed under President Trump after the US Supreme Court

summarily ruled that the District Court in Maryland had to designate Indiana as the executing state, given that Maryland had abolished the death penalty (see Section 2.6). In Brandon Council's case, the Court concluded that: “By logical implication, if a federal defendant can still be executed despite the particular state no longer having capital punishment, it would seem a defendant could still be executed even if, for example, a particular method of execution (such as electrocution) was later declared unconstitutional (i.e., the death sentence could still be implemented by lethal injection or firing squad).”³²⁸

AMNESTY INTERNATIONAL URGES THE FEDERAL GOVERNMENT TO RECOGNIZE THAT ONLY ABOLITION WILL END THE CRUELTY THAT THE DEATH PENALTY CONTINUES TO INFLICT ON THE CONDEMNED, REGARDLESS OF THE EXECUTION METHOD PROPOSED.³²⁹

While the FDPA requires the federal government to carry out executions in the manner used by the state in which the individual was convicted in federal court, Attorney General Barr's new regulations did not stop there, and were additionally aimed at shielding government decisions from scrutiny and reducing judicial review. It amended the regulations to say that when the federal government implements a death sentence, that is, carries out an execution, if “applicable law conflicts with any provision” of the regulations, the US Attorney General “may vary from that provision to the extent necessary to comply with the applicable law”. This amendment fails to provide any details, such as

³²⁹ See, for example, US Supreme Court, *Buntion v. Lumpkin*, 21 April 2022, Statement of Justice Breyer respecting the denial of application for stay: “We have described even four weeks of waiting in prison under the threat of execution as ‘one of the most horrible feelings to which [a person] can be subjected’ ... [Carl Wayne] Buntion has suffered under such conditions for decades. When efforts to administer the death penalty produce results such as this, it raises serious questions about whether that practice complies with the Constitution’s prohibition against cruel and unusual punishment.” Carl Buntion, aged 78, was executed in Texas on 21 April 2022 after 31 years on death row.

who would need to know, or when, as the execution approached. In addition, the regulations state that the Attorney General may delegate such decisions to, say, the prison warden, who could then vary from the procedures, without any outside oversight or scrutiny.

Secondly, the amended regulations remove the courts from the process of scheduling federal execution dates, leaving the date, time, place, and manner of execution to be set by the Director of the Federal Bureau of Prisons. Lawyers for those on federal death row have expressed deep disquiet at this change, based on their view that, in the federal system the Attorney General and his or her delegates lack the legal authority to set execution dates, an aspect of the federal death penalty which for nearly 200 years has been done by the judiciary.

AGAIN, THE THREAT OF A BAD FEDERAL EXAMPLE TO STATES IS PRESENT, THIS TIME THE EXAMPLE BEING PROMOTED IS ONE OF **REDUCTION IN TRANSPARENCY AND JUDICIAL OVERSIGHT.**

THE SIGNAL THAT SENDS TO THE OUTLIER EXECUTING STATES IS A TROUBLING ONE.

IF THE BIDEN PLEDGE IS TO BE MET, THE ONLY MESSAGE ON THE DEATH PENALTY THAT SHOULD BE TRANSMITTED FROM THE FEDERAL GOVERNMENT TO THE STATES IS THAT THE GOAL IS ABOLITION OF THIS **CRUEL AND UNNECESSARY PUNISHMENT ACROSS ALL JURISDICTIONS.**

5.0 COMMUTE ALL FEDERAL DEATH SENTENCES

“STATE-SANCTIONED MURDER IS NOT JUSTICE, AND THE DEATH PENALTY, WHICH KILLS BLACK AND BROWN PEOPLE DISPROPORTIONATELY, HAS ABSOLUTELY NO PLACE IN OUR SOCIETY. ENDING THE FEDERAL DEATH PENALTY – WHICH IS AS CRUEL AS IT IS INEFFECTIVE IN DETERRING CRIME – IS A RACIAL JUSTICE ISSUE AND MUST COME TO AN END”

US Congresswoman Ayanna Pressley, January 2021³³⁰

Between the post-*Furman v. Georgia* reintroduction of the federal death penalty in 1988 and April 2021, the number of potential federal capital defendants – that is, individuals accused of crimes that potentially carried the federal death penalty – reviewed by the US Department of Justice was 4,274. Of these cases, 539 defendants were authorized for capital prosecution – 13% of defendants against whom the death penalty could have been sought by the US Government. These cases have resulted in death sentences against 82 individuals.³³¹ Sixteen people have been executed by the federal government, 13 of them in the six months between July 2020 and January 2021.

As at state level, the federal death penalty is a story of “extraordinary attrition”³³² – of thousands of murders, some of which are “death-eligible”, fewer that are pursued for capital prosecution, only some of which reach trial, of which not all end in a death sentence and fewer still in execution. The government would have society believe that this narrowing and sorting ensures that the death penalty is, as constitutional law requires, “limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”³³³ The evidence is compelling that the death penalty fails to meet this constitutional requirement.

According to US Supreme Court Justice Stephen Breyer in 2015, “whether one looks at research indicating that irrelevant or improper factors – such as race, gender, local geography, and resources – do significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors – such as “egregiousness” – do not determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.”³³⁴

Eleven of the 16 federal executions (69%) carried out since *Furman v. Georgia* were of individuals tried and convicted in the South, the region where 82% of the people executed at state level since 1972 had been sentenced to death. Six of the 16 (37.5%) were tried in a single state, Texas. Texas accounts for 38% of all state executions in the USA.

As of May 2022, there were 42 people on federal death row: 18 were white, 17 were Black, six were Hispanic and one was Asian.³³⁵ Of the 42 individuals, 29 (70%) were tried in federal court in the South, Texas alone accounting for seven of the 42 (17%). Seventeen of the 42 (40%) were tried in federal court in three states – Texas (seven), Virginia (six) and Missouri (four).³³⁶ These three states account for just over half of all state executions in the USA since 1972 (779 of 1,547).³³⁷

³³⁰ Pressley, Durbin, Colleagues Announce Plans to Reintroduce Bill to End Federal Death Penalty, 11 January 2021, pressley.house.gov/media/press-releases/pressley-durbin-colleagues-announce-plans-reintroduce-bill-end-federal-death

³³¹ Federal Death Penalty Resource Counsel Project, Declaration of Kevin McNally regarding the geographic location of federal cases, the frequency of authorizations, death sentences and executions and the race and gender of defendants and victims, 26 April 2021.

³³² Hugo Adam Bedau, “The United States of America” in (Eds. P. Hodgkinson and A. Rutherford), *Capital Punishment: Global Issues and Prospects*, Waterside Press, 1996, Chapter 3.

³³³ *Roper v. Simmons*, US Supreme Court, 1 March 2005.

³³⁴ *Glossip v. Gross*, 29 June 2015, Justice Breyer dissenting.

³³⁵ Not counted here are the federal death sentences of two other men, handed down in Oklahoma in 2005 and North Dakota on 2006, but overturned on appeal in January and September 2021 respectively due to inadequate legal representation at their sentencing phases: US District Court for the District of North Dakota, *USA v. Rodriguez*, Order appointing Federal Community Defender for the Eastern District of Pennsylvania for penalty phase of re-trial, 5 May 2022, and US District Court for the Eastern District of Oklahoma *USA v. Barrett*, Response in opposition to motion to alter or amend judgment, 10 January 2022.

³³⁶ Source: Federal Capital Habeas Project. Another person sentenced to death in federal court in Missouri died in September 2021. Robert Bolden, a Black man, was sentenced to death for the murder of a white bank security guard in 2002. Robert Bolden, a Canadian national, was an insulin-dependent diabetic whose medical condition deteriorated during nearly a decade on federal death row in Indiana. He was transferred in 2016 to the US Medical Center for Federal Prisoners (MCFP) in Missouri after a medical emergency in which he had kidney failure. His lawyers then challenged the “exceedingly harsh and restrictive, if not draconian, conditions” they said he was held in in MCFP, and “constitutionally inadequate medical care”. In the US District Court for the Western District of Missouri, *Bolden v. Kane*, Plaintiff’s revised complaint for injunctive and declaratory relief and compensatory damages, 15 February 2018.

³³⁷ Virginia abolished the death penalty in March 2021.

CHART 6: RACE AND THE DEATH PENALTY

Execution at state and federal level since 1972

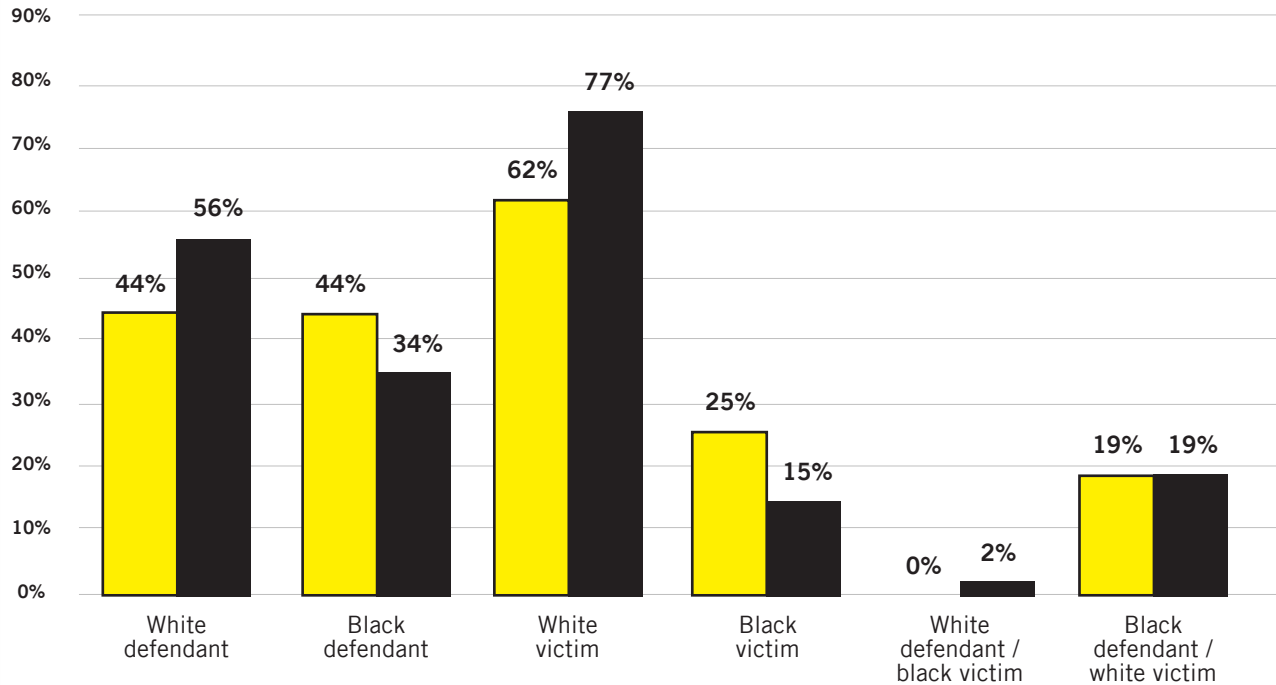
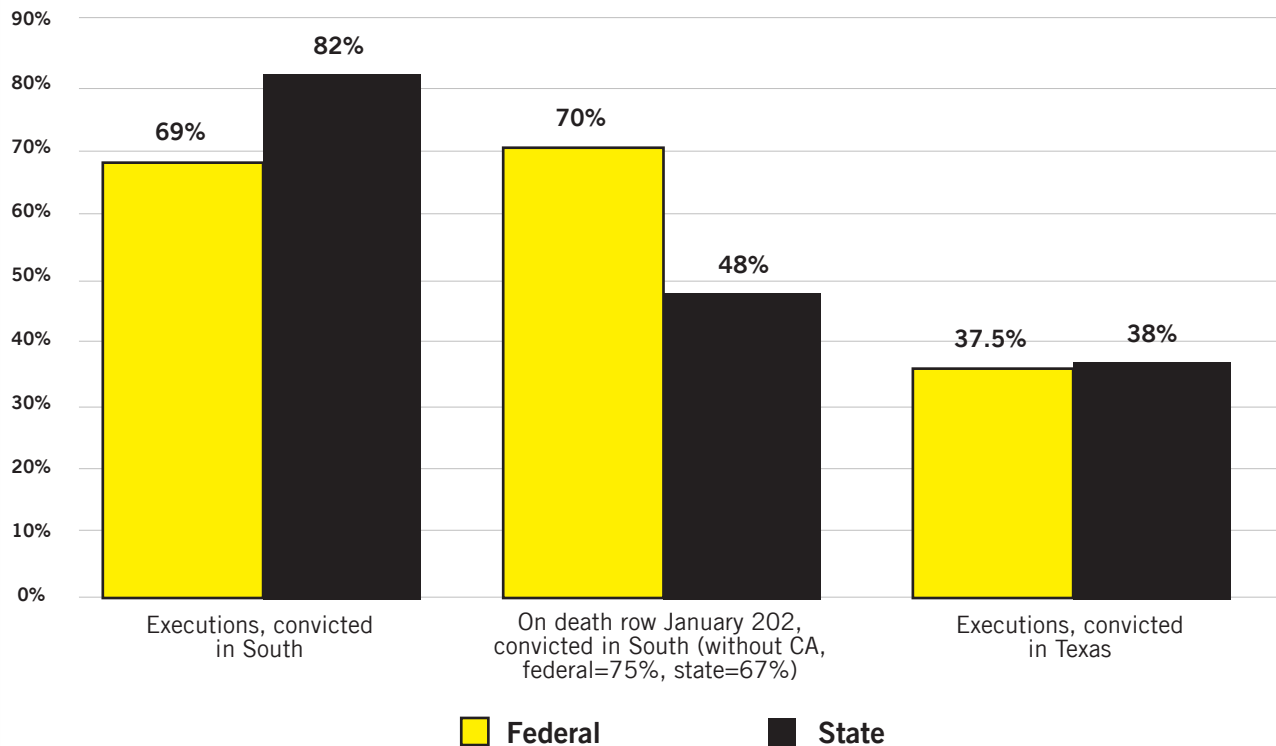


CHART 7: GEOGRAPHY OF JUDICIAL KILLING IN THE USA

Federal death penalty mirrors regional bias of state system



(Source for Both Graphs: AI chart using data from DPIC)

"PERHAPS IT SHOULD NOT BE SURPRISING THAT THE BIASES AND PREJUDICES THAT INFECT SOCIETY GENERALLY WOULD INFLUENCE THE DETERMINATION OF WHO IS SENTENCED TO DEATH"

wrote Justice Breyer's predecessor, Justice Harry Blackmun, in 1994 when announcing that he was giving up on the post-*Furman* death penalty. He expressed the hope that the day would come when the US Supreme Court would conclude that "the effort to eliminate arbitrariness while preserving fairness in the infliction of death is so plainly doomed to failure that it - and the death penalty - must be abandoned altogether". While he might "not live to see that day" Justice Blackmun said, he had "faith that eventually it will arrive".³³⁸ Justice Blackmun died nearly a quarter of a century ago. Today, the USA continues its attachment to the death penalty, even as the list of countries that have abandoned it has grown year by year, and even though international law requires abolition within a reasonable timeframe. In line with his abolitionist promise, and pending legislation to end the death penalty altogether, President Biden must now commute all federal death sentences.

³³⁸ *Callins v. Collins*, 22 February 1994, Justice Blackmun dissenting.

5.1 THE CASE OF BILLIE ALLEN

TWO OF THE 42 PEOPLE ON FEDERAL DEATH ROW AT THE TIME OF WRITING WERE SENTENCED TO DEATH FOR A MURDER COMMITTED DURING A BANK ROBBERY IN ST LOUIS, MISSOURI, IN MARCH 1997. ONE OF THEM IS BILLIE JEROME ALLEN.



At about 10.35am on 17 March 1997, two men got out of a minivan in front of a bank in St Louis, Missouri, wearing ski masks and armed with semi-automatic rifles and walked into the lobby of the bank. Shots were fired and an armed and uniformed security guard, Richard Heflin, was hit and fell to the floor, where he was shot again and fatally wounded.

One of the assailants took money from the cash drawers and the two men returned to the van. They drove into a park, whereupon a fire started in the van (its interior had apparently been pre-soaked with gasoline and was accidentally ignited by a cigarette lighter). The driver, later identified as Norris Holder, was arrested near the vehicle. The passenger ran into a wooded area and was not captured at the scene.

Billie Allen, aged 19, was arrested at about 2am the next morning and taken to police headquarters, where he remained in an interrogation room, handcuffed to a table, for the next seven or eight hours. After two hours, he asked for a lawyer, but remained incommunicado. Later that morning, he was positively identified in an identity line-up by two forestry workers who had come across an individual in the woods after the van fire. According to the police, after being told of these identifications, Billie Allen said he wanted to discuss the robbery, recanted his request for a lawyer and made statements incriminating himself in the murder.

ON 17 APRIL 1997, BILLIE ALLEN WAS INDICTED ON TWO CHARGES: (1) KILLING THE GUARD WHILE COMMITTING AN ARMED BANK ROBBERY AND (2) THE USE OF A FIREARM TO COMMIT A CRIME OF VIOLENCE RESULTING IN THE MURDER.

The Clinton administration filed notice of its intent to seek the death penalty against both defendants on 8 August 1997.

The two were tried separately, Billie Allen first. Billie Allen was convicted on both counts. The jury found identical aggravating and mitigating factors on each count but returned a sentence of life imprisonment on Count 1 and death on Count 2.³³⁹ The judge imposed the death sentence on 4 June 1998.

Billie Allen is Black, as is his co-defendant. The murder victim was white. The prosecutors, the judge and the defense team were all white. On appeal in 2009, Billie Allen's lawyers sought an evidentiary hearing on the race issue, noting that as of 12 May 2009, of the 460 federal defendants against whom the US Attorney General had authorized federal prosecutors to seek the death penalty, 119 were white and 341 were from minority racial or ethnic groups, of whom 237 were Black.

The government response to the statistical evidence of disparity was to denigrate it, saying: "There are three kinds of lies: lies, damned lies, and statistics." It argued that the race claim was anyway doomed to fail under the Supreme Court's 1987 *McCleskey v. Kemp* ruling which requires proof that "the decision-makers in his case acted with discriminatory purpose." The District Court

judge ruled that, "even if the Court were to agree with Allen that these statistics amount to a compelling indictment of the federal government's use of the death penalty against minority defendants, the law is nevertheless clear that a defendant cannot make out a selective prosecution claim under the Equal Protection Clause without evidence that there was discriminatory motive to prosecute him in particular."³⁴⁰

The fact that this case was prosecuted as a federal crime rather than a state case likely had an impact on the eventual racial composition of the jury:

*"Most federally-prosecuted capital crimes occur in minority-concentrated areas. Thus, expansion of the venire [jury pool] to the federal district level (which often includes white-flight suburbs) has a dramatic effect on the circumstance of the prosecution... as the jury pool gets whiter, the opportunity for implicit race bias increases (and minority group defendants suffer the consequences)."*³⁴¹

THE CRIME OCCURRED IN ST LOUIS, WHERE THE BLACK POPULATION IS AROUND 46% OF THE TOTAL (AS IS THE WHITE POPULATION). BECAUSE THE CASE WAS PROSECUTED IN FEDERAL COURT, THE JURY POOL WAS PULLED FROM THE ENTIRE EASTERN HALF OF THE STATE, WHICH IS PREDOMINANTLY WHITE.

³³⁹ Norris Holder was convicted and sentenced to death on both counts.

³⁴⁰ US District for the Eastern District of Missouri, Memorandum and order, *Allen v. USA*, 10 May 2011.

³⁴¹ G.B. Cohen & R.J. Smith, "The racial geography of the federal death penalty" in *Washington Law Review*, Vol. 85: 425 (2010).

Billie Allen's jury consisted of 10 white jurors and two African American jurors, after the prosecution used peremptory challenges to dismiss five of the eight African Americans at jury selection. The defense challenged this as racially motivated. After the prosecution gave its "race-neutral" reasons, the defense conceded that in two cases the challenges had been based on the individuals' reservations about the death penalty but argued that the reasons given for the other three were pretextual. The judge ruled the reasons sufficient.

Whether or not he was right, the reasons given further indicate how "death-qualifying" jurors stacks the deck against the defendant. One of the African Americans indicated that she was sympathetic to psychiatric or psychological testimony. Another said she was generally opposed to the death penalty but could put aside those feelings if the facts and law required it. In the case of the third African American, several of her relatives had been convicted of crimes (drug possession, shoplifting) and in response to a question she had indicated her belief that African Americans were unfairly treated in the criminal justice system. In 2011, the District Court agreed that Allen had "non-frivolous arguments" that the prosecution's dismissals of these three jurors were racially discriminatory but denied the appeal without an evidentiary hearing.

During the whole of his trial, Billie Allen was made to wear an electro-shock stun belt.³⁴²

Amnesty International has long called for abolition of the stun belt on the grounds that its use violates the right to be free from torture and other ill-treatment. In 2000, the UN Committee against Torture called on the USA to abolish them.³⁴³ In the context of a trial, the use of such devices also raises fair trial concerns.³⁴⁴

There was no hearing held to determine whether or why Billie Allen should be made to wear a stun belt and the judge made no record of the reason for the decision. On appeal, lawyers for Billie Allen sought to interview jurors to establish if they were aware that he had been wearing the device (stun belts are worn under clothing but can nevertheless be visible in profile). The prosecution objected (describing the request as part of a "fishing expedition" by the defense)³⁴⁵ and the request was denied. The District Court ruled that Allen had not been prejudiced by the stun belt, even if the jury had been aware or seen that he was wearing one.³⁴⁶

Although individual jurors found some mitigating factors, jointly they found few. Ten of them found that Billie Allen had "consistently demonstrated impaired judgment, no real leadership potential, the personality characteristics of a 'follower' or an incapacity to plan an event as complicated as the offenses for which he has been convicted." No juror found his age (19) at the time of the crime to be a mitigating factor, despite it being only one year above the minimum age for eligibility for the death penalty under the FDPA (and since 2005 under constitutional law).

³⁴² This is a device – a weapon worn by its victim – that can be triggered by a law enforcement official operating a remote-control transmitter up to 300 feet (90m) away or, as had already happened in several cases, by accident. On activation, the belt delivers a 50,000 volt, three to four milliampere shock which lasts eight seconds. This high-pulsed current enters the wearer's body at the site of the electrodes, near the kidneys, and passes through the body, causing a rapid electric shock. The shock causes incapacitation in the first few seconds and severe pain rising during the eight seconds. See Amnesty International, USA: Cruelty in control? The stun belt and other electro-shock equipment in law enforcement, 7 June 1999, amnesty.org/en/documents/AMR51/054/1999/en/

³⁴³ Report of the Committee against Torture (23rd (8–19 November 1999) and 24th (1–19 May 2000) sessions), UN Doc. A/55/44, Chapter IV(M), para. 180(c).

³⁴⁴ Less than a year after Billie Allen's trial, on 26 January 1999, a federal judge in the US District Court for the Central District of California, in *Hawkins v. Comparet-Cassani*, found that when used in the context of a courtroom, "the stun belt, even if not activated, has the potential of compromising the defense. It has a chilling effect... A pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law." In 2002, a federal appeals court found that the stun belt appeared to pose "a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles" and that being made to wear a stun belt is a "considerable impediment to a defendant's ability to follow the proceedings and take an active interest", given the anxiety over the possible triggering of the belt (*US v. Durham*, US Court of Appeals for the Eleventh Circuit, 4 April 2002).

³⁴⁵ US District Court for the Eastern District of Missouri, *Allen v. USA, Government's response to petitioner's motion for leave to interview trial jurors*, 17 December 2007.

³⁴⁶ US District Court for the Eastern District of Missouri, *Memorandum and order, Allen v. USA*, 10 May 2011.

Billie Allen's trial lawyers retained a mitigation expert, but due to a misunderstanding or poor communication, he did little or no work on the case, and by the time this was known several months later, the trial was approaching and the expert withdrew. A new specialist was retained less than a month before the trial. He has said that: "Based on my experience as a mitigation specialist, I knew there was no way an adequate investigation could be completed" in the time available. He later said that it had been an error for him to accept the case as it "may have presented a veneer of competence or adequacy to the mitigation investigation and sentencing phase, where none existed." The mitigation effort, he said, was a "chaotic, seat-of-the-pants scramble." In 2009, he reviewed the "compelling" mitigation evidence investigated since the trial and concluded: "there was a mitigation story to tell on Mr Allen's behalf, and we failed to tell it."³⁴⁷

The trial lawyer said that the topics covered by current counsel included "childhood abuse, neglect, family dysfunction, family and neighborhood impoverishment, and abandonment" and a "far more comprehensive explanation of the stressors and traumas, and organic brain dysfunction that helped to shape Mr Allen's life and adult conduct, and therefore a far more compelling case for life than what was actually presented at trial."³⁴⁸ The District Court judge disagreed. Over the second half of 2012, an evidentiary hearing was held on the claim that Billie Allen's legal representation had been inadequate on the investigation and presentation of mitigation evidence. In a 278-page decision, the judge rejected the claim, ruling that the lawyer had made reasonable decisions on what to present and that these had not been driven solely by time constraints.³⁴⁹

The mitigation case that was presented was denigrated by the federal prosecution in arguing for execution. The prosecutor characterized the evidence of mental impairments as "a joke" and "excuses"; "what does your common sense tell you about depression, post-traumatic stress disorder, and that he had little trouble learning in school? Your common sense tells you these are excuses." Other mitigation evidence was similarly treated.

Mitigation evidence presented to humanize the defendant was dismissed with retributive prosecutorial argument: "You weigh the cold-blooded murder of Richard Heflin against the evidence he put on in mitigation, that he's kind and gentle and artistic. [H]e wasn't artistic on the day of this robbery. What was he creating that day? Murder and mayhem, total destruction in that bank. The evidence and the law in this case make it so clear that this defendant deserves one punishment, and it's not life in prison, it's death."

For a prosecutor to denigrate such evidence to obtain a death sentence calls into serious question their adherence to the obligation to "perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process."³⁵⁰

The prosecution presented 11 victim impact witnesses at Billie Allen's sentencing, including the victim's mother, his wife of six months, his three children, his ex-wife (the children's mother) and two of his siblings, as well as three co-workers. They testified about him, his military service in the Vietnam War, the effects on them of his death and their last contacts with him. Particularly troubling were the prosecution's retributive arguments, building on this victim impact evidence, that Billie Allen should be executed. For example:

³⁴⁷ Declaration of David Randall, 28 July 2009.

³⁴⁸ Declaration of Richard Sindel, 27 July 2009.

³⁴⁹ US District Court for the Eastern District of Missouri, *Allen v. USA*, Memorandum and order, 25 June 2014.

“He has the nerve to come in here and say, ‘My dad was an alcoholic and so don’t impose the death sentence on me, my dad wasn’t a good dad.’ This is the same guy who took [names of the victim’s three sons] father from them so he could have money, and he has the nerve to come in and say, ‘well, gee, I didn’t have a good dad.’”

“When you’re weighing, when you’re weighing the defendant’s mitigating evidence back there and you’re weighing that bag of fog, that bag of air they presented to you, weigh it against the weight of Richard Heflin’s body. Because that’s what this is all about.”

“He wants to go to prison for life. He wants to go there, and he wants to watch movies and read books, he wants to write letters and have visits from his relatives, he wants to exercise and play basketball and volleyball. Don’t let him down there dribbling basketballs on Richard Heflin’s grave; it wouldn’t be right.”

“But when you’re back there [in the jury room] I want you to remember one thing – three things, really: That Richard Heflin’s mother on Christmas day will always have an empty chair at her Christmas table. [Name of Richard Heflin’s son] when he’s hitting a home run or making a great play in baseball will never look up and see his father sitting in those stands cheering for him. And [Richard Heflin’s wife], when she looks out her window and sees those doves on Richard Heflin’s bird feeder, her heart is going to break yet again.”

“How about the mitigator that you’re going to see on that verdict form that this defendant is a gentle, light-hearted, likable person? Richard Heflin didn’t think this guy with the mask, armed for war, armed to kill, was kind, light-hearted, or gentle. He thought he was a murderous dog coming in there to kill people for money.”

The Eighth Circuit Court of Appeals found that the prosecutor’s use of the term “murderous dog” had been “inappropriate and improper”, but that Allen had not been prejudiced by it.³⁵¹

Billie Allen’s lawyers have been seeking DNA testing of evidence from the crime, which they say could exculpate him, but for years the government has refused this. Police recovered blood evidence from a bulletproof vest worn by one of the assailants. DNA testing excluded the murder victim and Billie Allen as sources of the blood. The government has said that this blood evidence was not assessed against the DNA profile of Billie Allen’s co-defendant, but instead apparently presumed that more DNA testing would only provide additional evidence against the co-defendant, with no other possible result from the testing. Billie Allen has named another man (J.B.) as the most likely second assailant. If DNA testing were to identify this individual (who died in 1998), this would bolster his innocence claim.

BILLIE ALLEN HAS SPENT FAR MORE THAN HALF OF HIS LIFE ON FEDERAL DEATH ROW. HIS AND THE DEATH SENTENCES OF OTHERS ON DEATH ROW SHOULD BE COMMUTED AS PART OF THE BIDEN ABOLITIONIST PLEDGE.

³⁵⁰ UN Guidelines on the Role of Prosecutors, 1990, para. 12.

³⁵¹ US Court of Appeals for the Eighth Circuit, *US v. Allen*, 12 April 2001.

6.0 CONCLUSIONS

AND

RECOMMENDATIONS

74 PAPUA NEW GUINEA JOINS A GLOBAL TREND AWAY FROM USE OF THE DEATH PENALTY... I HOPE PAPUA NEW GUINEA'S EXAMPLE WILL ENCOURAGE THOSE REMAINING STATES THAT RETAIN THE DEATH PENALTY TO TAKE SIMILARLY PROGRESSIVE AND COURAGEOUS STEPS TO ABOLISH IT"

UN High Commissioner for Human Rights Michelle Bachelet, 21 January 2022³⁵²

“President Biden often speaks of the power of our example”, a US official noted at the UN in Geneva in March 2021, adding that “American leadership on human rights must begin at home.”³⁵³ On the first anniversary of President Biden taking office on an abolitionist promise, the parliament of Papua New Guinea voted to do what the USA has failed to – rid itself of the death penalty.³⁵⁴

Over the decades, there have been too many throwaway statements made by US officials claiming exemplary US leadership on human rights.³⁵⁵ After resuming federal executions in July 2020, for instance, the Trump administration told the UN Human Rights Council that the US government was “committed to the principle that leadership in the field of human rights is by example.”³⁵⁶ The day after the federal government conducted its 13th execution in six months, President Trump declared that “the United States is a shining example of human rights for the world.”³⁵⁷

President Biden has said that his administration will reclaim “our credibility and moral authority, much of which has been lost.”³⁵⁸ In relation to human rights, a loss of credibility happened well before his predecessor’s term in office and the USA’s continuing resort to the death penalty has contributed to it. The spate of federal executions under President Trump – to which a long line of presidents, attorneys general and members of Congress contributed – has now been added to this back catalogue. Indeed, should President Biden not give clemency to the men now on federal death row, such inaction would leave them exposed to a future execution spree.

President Biden has asserted that “America is back” and that this means that the USA will fully engage internationally, including in making international institutions stronger. US engagement, he has said, must be “rooted in America’s most cherished democratic values: defending freedom, championing opportunity, upholding universal rights, respecting the rule of law, and treating every person with dignity.” The President, his administration and Congress must recognize that respect for human dignity³⁵⁹ and retention of the death penalty are incompatible; that respect for the rule of law must include international human rights law guaranteeing protection of the rights of those facing the death penalty; that upholding universal rights must include upholding the right of everyone to life and freedom from cruel, inhuman or degrading treatment or punishment; and that making international institutions stronger must include implementing the conclusions of UN human rights treaty bodies. Such bodies have long been telling the USA that working for abolition within a reasonable timeframe is an international human rights obligation. Thus far, the USA has responded that the death penalty is a domestic policy choice subject only to constitutional constraints.

The federal execution spree in 2020 and 2021 cast a spotlight on the distance between constitutional protections and international human rights safeguards on the death penalty and the ever-growing gap between countries that retain the death penalty and the majority that have eradicated it.

³⁵² UN, “Comment by UN High Commissioner for Human Rights Michelle Bachelet on Papua New Guinea’s repeal of the death penalty”, 21 January 2022, ohchr.org/en/2022/01/comment-un-high-commissioner-human-rights-michelle-bachelet-papua-new-guineas-repeal-death

³⁵³ Statement during adoption of the Third Universal Periodic Review of the USA, Lisa Peterson, Acting Assistant Secretary of State for Democracy, Human Rights and Labor, Geneva, 17 March 2021, geneva.usmission.gov/2021/03/17/us-upr-1/

³⁵⁴ The PNG abolitionist law came into force in April 2022.

³⁵⁵ In April 2002, for example, President George W. Bush said: “we believe in human rights and the dignity and worth of each individual.” Remarks on the Citizens Corps in Knoxville, 8 April 2002. A week earlier, he had authorized an enforced disappearance, a crime under international law. Over the ensuing months, the individual in question would be subjected to torture in secret US custody under authority granted by President Bush. Amnesty International, USA: Crimes and impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under International law ensured, April 2015, p. 87, [amnesty.org/en/documents/amr51/1432/2015/en/](https://www.amnesty.org/en/documents/amr51/1432/2015/en/)

³⁵⁶ National report under Human Rights Council resolution 16/21: USA, 13 August 2020 UN Doc. A/HRC/WG.6/36/USA/1.

³⁵⁷ Proclamation 10136, 17 January 2021 (previously cited).

After his retirement, US Supreme Court Justice Lewis Powell, who had dissented from the *Furman v. Georgia* ruling half a century earlier, said that the death penalty “brings discredit on the whole legal system.”³⁶⁰ A prime example of this was seen during the federal execution spree. And a few months before his retirement, Justice Harry Blackmun wrote that, in relation to the death penalty, “the path chosen by the Court lessens us all.”³⁶¹ The White House and Congress must choose a new way, forging an irrevocable path to abolition.

Of course, troubling details about misconduct by prosecutors, or the defense provided to capital defendants, or evidence of direct and indirect racial and socio-economic discrimination, or the execution of people with mental or intellectual disabilities, not to mention the procedural obstacles placed in the way of capital appellants by federal law, are well-known for riddling cases at state level. These deficiencies and obstacles are fully evident in the federal capital cases as well. The federal execution spree should not only remind the US authorities why abolition of the federal death penalty is urgent, but also why they should not stop there. They must work for abolition in states also, as they are required to do under international human rights law.

Executions were given the go-ahead by the US Supreme Court to leave “the question of capital punishment” with “the people and their representatives, not the courts, to resolve.”³⁶² This nod to the political branches called to mind the belief of Justice Thurgood Marshall, the first African American US Supreme Court justice and one of two justices who found the death penalty per se unconstitutional in *Furman v. Georgia*, that “the great mass of citizens”, upon consideration

and other aspects of capital justice which the US Supreme Court had before it, would conclude that “the death penalty is immoral, and therefore unconstitutional.”³⁶³

Fifty years after *Furman*, Amnesty International welcomes President Biden’s abolitionist pledge. He must commute the death sentences of all those on federal death row, throw his weight behind abolitionist legislation and a public information campaign about the flaws and injustices of the death penalty, and ensure that the death penalty is deauthorized in all pending capital cases.

“The future will belong to those who embrace human dignity, not trample it”, President Biden told the UN General Assembly in September 2021.³⁶⁴ He must now work for a future without the death penalty. As the UN Human Rights Committee has made clear, abolition of the death penalty is “necessary for the enhancement of human dignity and progressive development of human rights.”³⁶⁵

The USA must finally recognize the death penalty as a human rights issue on which it should offer exemplary leadership, not just to retentionist states within the country but to the diminishing list of countries that retain this punishment.

AS FAR AS INTERNATIONAL HUMAN RIGHTS LAW AND THE DEATH PENALTY ARE CONCERNED, “AMERICA IS BACK” MUST NOT MEAN BUSINESS AS USUAL.

³⁵⁸ Remarks by President Biden on America’s place in the world, 4 February 2021, [whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/)

³⁵⁹ Remarks by President Biden on America’s place in the world, 4 February 2021.

³⁶⁰ John C. Jeffries, *Justice Lewis F. Powell, Jr.: A biography* (1994).

³⁶¹ *Callins v. Collins*, Justice Blackmun dissenting.

³⁶² *Barr v. Lee*, 14 July 2020.

³⁶³ *Furman v. Georgia*, Justice Marshall concurring.

³⁶⁴ Remarks by President Biden Before the 76th Session of the UN General Assembly, 21 September 2021.

³⁶⁵ Human Rights Committee, General Comment 36, Article 6: Right to life, 3 September 2019, UN Doc. CCPR/C/GC/36, para. 50.

KEY RECOMMENDATIONS

TO THE PRESIDENT OF THE USA:

- Immediately commute all existing federal death sentences and ensure the closure of federal death row and dismantling of the execution chamber.
- Work with Members of Congress to fully abolish the death penalty at federal level and under the Military Commissions Act and under military law.
- Support a public information campaign about abolition, aimed at showing the facts about arbitrariness, racial bias and impact, errors and other realities of capital justice, as well as about the requirements of international human rights law and the national and global trends towards abolition.
- In public proclamations and public statements on international human rights matters, where appropriate, include reference to the USA's commitment to ending the death penalty in the USA and worldwide.

TO THE US CONGRESS:

- Immediately work with the White House to promptly enact legislation to abolish the federal death penalty.
- Ratify the American Convention on Human Rights and its Protocol on the abolition of the death penalty as well as the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, without any limiting conditions or reservations. Immediately withdraw reservations made at point of ratification of the International Covenant on Civil and Political Rights.

TO THE US DEPARTMENT OF JUSTICE:

- Maintain the moratorium on executions until abolition of the federal death penalty is signed into law and all federal death sentences have been commuted.
- Support commutation of every current federal sentence of death.
- Work actively to vacate every current federal death sentence rather than oppose relief.
- Instruct all US attorneys that the government will no longer authorize pursuit of death sentences in federal prosecutions, and ensure motions are filed in all pending federal capital prosecutions to request that the court allow withdrawal of any active Notices of Intent to Seek the Death Penalty.

- Actively oppose the death penalty in any litigation in any case at state or federal level that touches directly or indirectly on this punishment and make clear in any such legal materials that the US government is committed to abolition.
- Cease any action which could assist a state in the USA, or a country outside the USA, in imposing or implementing a death sentence.
- Ensure disposal of any chemicals in the possession of the federal authorities for use in lethal injection.
- Desist from any transfer or extradition of anyone to a situation where they would face the risk of the death penalty.

TO THE US DEPARTMENT OF DEFENSE

- Deauthorize and end pursuit of the death penalty in all trials under the Military Commissions Act.

TO THE US STATE DEPARTMENT:

- Ensure withdrawal of all limiting reservations, understandings and declarations filed with human rights treaty ratifications.
- Ensure implementation of outstanding recommendations to the USA made by UN and regional human rights monitoring bodies, including on the death penalty.
- Ensure implementation of Inter-American Commission on Human Rights precautionary measures and recommendations from merits reports on death penalty cases.
- Vote in favor of UN General Assembly resolutions on a moratorium on the use of the death penalty and support other international initiatives in favor of abolition.
- Support and promote abolition of the death penalty in bilateral and multilateral diplomatic forums.
- In annual country reports on human rights practices, ensure coverage of death penalty issues.

APPENDIX: A CENTURY CENTERING ON FURMAN, 1922 → 1972 → 2022

- 1922** Panama abolishes the death penalty for all crimes. 144 executions in the USA.
- 1928** Iceland abolishes the death penalty for all crimes.
- 1942** Six German nationals accused of planning sabotage in the USA are sentenced to death on 3 August after a secret trial by federal military commission at the US Department of Justice and are killed over the course of three hours on 8 August in the electric chair in Washington, DC. These are six of 13 federal executions in the 1940s.
- 1948** Universal Declaration of Human Rights (UDHR) is adopted on 10 December. Four of the year's 117 executions in the USA are carried out on that day. 1948 sees five federal executions, two in California's gas chamber a week before the UDHR adoption and one on the day of it.
- 1949** Germany abolishes the death penalty for all crimes.
- 1957** Honduras abolishes the death penalty for all crimes.
- 1957** 65 executions in the USA, including two federal executions. Alaska and Hawaii abolish the death penalty.
- 1962** Monaco abolishes the death penalty for all crimes.
- 1963** 21 executions in the USA, including what will be the last federal execution until 2001. Michigan adopts constitutional amendment prohibiting the death penalty. It had abolished it for all but treason in 1847.
- 1965** Iowa and West Virginia abolish the death penalty.
- 1966** International Covenant on Civil and Political Rights (ICCPR) opens for signature.
- 1966** Dominican Republic abolishes the death penalty for all crimes.
- 1966** USA signs the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
- 1967** Two executions in the USA. These will be the last executions until 1977.
- 1968** Austria abolishes the death penalty for all crimes; 138 new death sentences in the USA.

- 1969** The Holy See (Vatican City) abolishes the death penalty for all crimes; 143 new death sentences in USA.
- 1971** UN General Assembly (UNGA) affirms that “to fully guarantee the right to life” under the UDHR, the main objective is to progressively restrict the number of offences for which the death penalty may be imposed, “with a view to the desirability of abolishing this punishment in all countries”; 113 new death sentences in the USA.
- 1972** Finland and Sweden abolish the death penalty for all crimes; 83 new death sentences in the USA.
- 1972** California’s Supreme Court (*People v. Anderson*) rules the death penalty “impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process”. In a sign of things to come nationally, California’s Governor, Ronald Reagan, future US President, asserts that the ruling, if allowed to stand, would be “an almost lethal blow to society’s right to protect law-abiding citizens and their families against violence and crime”.
- 1972** In *Furman v. Georgia*, the US Supreme Court voids the USA’s capital laws because of the arbitrary application of the death penalty. Each Justice writes a separate opinion; only two find the death penalty per se unconstitutional. State legislators scramble to reinstate the death penalty. In Florida, for example, the Governor calls the legislature back into special session within days of the ruling to pass a new statute. In California, Governor Reagan backs Proposition 17, a ballot initiative to nullify the Anderson ruling. Proposition 17 passes.
- 1973** 42 new death sentences in USA. North Dakota abolishes the death penalty. Georgia’s Governor, and future US President, Jimmy Carter signs Georgia’s post-*Furman* capital statute into law. President Nixon proposes reinstatement of the federal death penalty, telling Congress: “the sharp reduction in the application of the death penalty was a component of the more permissive attitude toward crime in the last decade”.
- 1974** 165 new death sentences. Congress amends Federal Aviation Act of 1958 to allow federal death penalty for air piracy resulting in death (Antihijacking Act of 1974); President Nixon signs it four days before resigning.
- 1975** 322 new death sentences in the USA, the most in a year between 1972 and 2022.

- 1976** In *Gregg v. Georgia*, the US Supreme Court upholds capital laws in Georgia, Florida, Texas, and states with similar schemes: “[T]he post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people. In the only state-wide referendum occurring since *Furman*, the people of California adopted a constitutional amendment that authorized capital punishment”.
- 1976** Portugal abolishes death penalty for all crimes; 249 new death sentences in the USA.
- 1977** First execution in USA since 1967; in Utah, the condemned man refuses all appeals and demands execution. USA signs the ICCPR.
- 1978** 1,000th death sentence in the USA since *Furman*.
- 1978** Denmark abolishes death penalty for all crimes.
- 1979** Luxembourg, Nicaragua, and Norway abolish death penalty for all crimes.
- 1979** First ‘non-consensual’ execution since *Furman*, carried out in Florida. The new Governor of Arkansas and future US President, Bill Clinton, is among those who advise the Florida Governor to ensure that the execution proceeds to facilitate the death penalty in other states. Rhode Island Supreme Court rules state’s capital statute unconstitutional; the state legislature will repeal the law in 1984.
- 1980** Massachusetts Supreme Court rules the death penalty, “with its full panoply of concomitant physical and mental tortures, impermissibly cruel”, adding that it “brutalizes the State which condemns and kills its prisoners”. In 1982, a constitutional amendment will be passed allowing the death penalty, but in 1984 the state Supreme Court will find the subsequent capital statute unconstitutional.
- 1981** France and Cabo Verde abolish death penalty for all crimes.
- 1981** 25th exoneration of an individual sentenced to death since *Furman*.
- 1982** The Netherlands abolishes death penalty for all crimes.
- 1983** 2,000th death sentence in the USA since *Furman*.
- 1985** Australia abolishes death penalty for all crimes.
- 1987** 3,000th death sentence in the USA since *Furman*.
- 1987** US Supreme Court issues *McCleskey v. Kemp*, to this day setting up appeals based on evidence of systemic racism in capital justice to fail.

- 1987** Haiti, Liechtenstein and the German Democratic Republic abolish death penalty for all crimes.
- 1988** 100th post-*Furman* execution in the USA.
- 1988** President Reagan signs reinstatement of the federal death penalty into law in the Anti-Drug Abuse Act.
- 1989** Cambodia, New Zealand, Romania, and Slovenia abolish the death penalty for all crimes.
- 1989** US Supreme Court rules that neither intellectual disability nor being under 18 at the time of the crime is a bar to execution (*Penry v. Lynaugh and Stanford v. Kentucky*).
- 1990** Andorra, Croatia, Czech & Slovak Federal Republic (in 1993 splits to become Czech Republic and Slovakia), Hungary, Ireland, Mozambique, Namibia and Sao Tomé and Príncipe abolish death penalty for all crimes.
- 1990** 4,000th death sentence in the USA since *Furman*.
- 1990** 50th exoneration of an individual sentenced to death since *Furman*.
- 1991** Macedonia abolishes the death penalty for all crimes.
- 1991** The first federal death sentence since *Furman* is passed. This death sentence will be commuted by President Clinton in January 2001, two hours before he leaves office. There are doubts about the reliability of the conviction and the adequacy of the defence representation at trial.
- 1992** Arkansas Governor Bill Clinton leaves the presidential campaign trail to return to Arkansas for an execution there.
- 1992** Angola, Paraguay and Switzerland abolish death penalty for all crimes.
- 1992** USA ratifies ICCPR, files “reservation” aimed at protecting the death penalty from international legal constraint.
- 1993** 200th post-*Furman* execution in the USA.
- 1993** Guinea-Bissau, Hong Kong and Seychelles abolish death penalty for all crimes.
- 1994** Italy abolishes death penalty for all crimes.
- 1994** 5,000th death sentence in the USA since *Furman*.
- 1994** President Clinton signs into law a huge expansion of the federal death penalty, in the Federal Death Penalty Act.

- 1994** USA ratifies ICERD and UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).
- 1995** UN Human Rights Committee, in its conclusions on the USA's initial report under the ICCPR, calls on the USA to restrict the number of offences carrying the death penalty "with a view eventually to abolishing it". It condemns the expansion of the federal death penalty.
- 1995** 300th post-*Furman* execution in the USA.
- 1995** Djibouti, Mauritius, Moldova, and Spain abolish death penalty for all crimes.
- 1996** President Clinton signs into law the Antiterrorism and Effective Death Penalty Act (AEDPA), in part to speed up executions.
- 1996** 315 new death sentences in the USA, the third consecutive year that the total has been more than 300.
- 1996** 75th exoneration of an individual sentenced to death since *Furman*.
- 1996** Belgium abolishes death penalty for all crimes.
- 1997** 400th post-*Furman* execution in the USA.
- 1997** Georgia, Nepal, Poland, and South Africa abolish the death penalty for all crimes.
- 1997** 6,000th death sentence in the USA since *Furman*.
- 1998** 500th post-*Furman* execution in the USA.
- 1998** Azerbaijan, Bulgaria, Canada, Estonia, Lithuania, and United Kingdom abolish death penalty for all crimes.
- 1999** Timor-Leste, Turkmenistan and Ukraine abolish death penalty for all crimes.
- 1999** 98 executions in the USA, in what will be the most in a single year between 1972 and 2022.
- 2000** 600th post-*Furman* execution in the USA.
- 2000** 100th exoneration of an individual sentenced to death since *Furman*.
- 2000** Côte d'Ivoire and Malta abolish the death penalty for all
- 2000** George W. Bush wins presidential election after overseeing some 150 executions while Texas Governor.

- 2000** 700th post-*Furman* execution in the USA.
- 2001** Bosnia and Herzegovina abolishes the death penalty for all crimes.
- 2001** 7,000th death sentence in the USA since *Furman*.
- 2001** First US federal execution since *Furman* (and first since 1963), followed by another eight days later.
- 2001** President Bush signs military order authorizing military commissions, executive bodies with the power to hand down death sentences for selected foreign nationals tried for international terrorism, modelled on an order signed by President Franklin Roosevelt in 1942 (see 1942).
- 2002** 800th post-*Furman* execution in the USA.
- 2002** The Rome Statute of the International Criminal Court (ICC) comes into force. The ICC, which will prosecute the most serious crimes under international law, including war crimes and crimes against humanity, will not have the death penalty as a sentencing option. The USA announces it will not ratify the treaty, and considers it has “no legal obligations” arising from its 2000 signature to it.
- 2002** The US Supreme Court bans death penalty against people with intellectual disability (*Atkins v. Virginia*).
- 2002** Cyprus and Yugoslavia (now two states Serbia and Montenegro) abolish the death penalty for all crimes.
- 2003** Armenia abolishes the death penalty for all crimes.
- 2003** Third federal execution in two years, which will be the last for 17 years.
- 2004** 900th post-*Furman* execution in the USA.
- 2004** Bhutan, Greece, Samoa, Senegal, and Turkey abolish the death penalty for all crimes.
- 2004** New York State Court of Appeals rules the state’s capital statute unconstitutional. By 2022, the legislature will not have replaced it.
- 2004** 125th exoneration of an individual sentenced to death since *Furman*.
- 2005** 1,000th post-*Furman* execution in the USA.
- 2005** In *Roper v. Simmons*, the US Supreme Court rules the execution of people who were under 18 years old at the time of the crime unconstitutional. Since *Furman*, 22 individuals have been executed in the USA for crimes committed when they were 16 or 17.

- 2005** Liberia and Mexico abolish the death penalty for all crimes.
- 2006** UN Human Rights Committee reviews USA's Second and Third Periodic Reports under the ICCPR; calls on USA to impose "a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty".
- 2006** Philippines abolishes the death penalty for all crimes.
- 2006** President Bush signs into law the Military Commissions Act under which selected foreign nationals suspected of "war crimes" committed in the context of international terrorism can be prosecuted by military commissions with the power to hand down death sentences.
- 2007** Albania, Cook Islands, Kyrgyzstan, and Rwanda abolish the death penalty for all crimes.
- 2007** New Jersey abolishes the death penalty.
- 2007** UNGA adopts its first resolution calling for the establishment of a moratorium on executions with a view to abolishing the death penalty (moratorium resolution), with 104 countries voting for it. USA is one of 54 countries voting against.
- 2008** 1,100th post-*Furman* execution in the USA.
- 2008** Uzbekistan and Argentina abolish the death penalty for all crimes.
- 2008** UNGA adopts its second moratorium resolution, with 106 countries voting for it. USA is one of 46 countries voting against.
- 2009** New Mexico abolishes the death penalty (prospectively – the two men remaining on death row will be removed in 2019).
- 2009** 8,000th death sentence in the USA since *Furman*.
- 2009** Burundi and Togo abolish the death penalty for all crimes.
- 2010** 1,200th post-*Furman* execution in the USA.
- 2010** 150th exoneration of an individual sentenced to death since *Furman*.
- 2010** Gabon abolishes the death penalty for all crimes.
- 2010** UNGA adopts its third moratorium resolution, with 109 countries voting for it. USA is one of 41 countries voting against.
- 2011** Illinois abolishes the death penalty; first year since 1973 with fewer than 100 new death sentences.

- 2012** 1,300th post-*Furman* execution in the USA. Connecticut abolishes the death penalty.
- 2012** Latvia abolishes the death penalty for all crimes.
- 2012** UNGA adopts its fourth moratorium resolution, with 111 countries voting for it. USA is one of 41 countries voting against.
- 2013** Bolivia abolishes the death penalty for all crimes.
- 2013** Maryland abolishes the death penalty.
- 2014** The UN Human Rights Committee concludes its review of the USA's Fourth Periodic Report, emphasizing the death penalty's disproportionate impact on African Americans, and on US government to establish a federal moratorium and "engage with retentionist states with a view to achieving a nationwide moratorium".
- 2014** CERD issues its concluding observations on its review of the USA's combined Seventh to Ninth Periodic Reports in which it calls on the USA to impose "a moratorium on the death penalty, at the federal level, with a view to abolishing the death penalty".
- 2014** The UN Committee Against Torture issues its concluding observations on the USA's combined Third to Fifth Periodic Reports in which it urges the USA to establish a moratorium on executions, with a view to abolishing the death penalty.
- 2014** UNGA adopts its fifth moratorium resolution, with 117 countries voting for it. USA is one of 38 countries voting against.
- 2015** 1,400th post-*Furman* execution in the USA.
- 2015** Fiji, Republic of the Congo, Suriname, and Madagascar abolish the death penalty for all crimes.
- 2016** Benin and Nauru abolish the death penalty for all crimes.
- 2016** Delaware Supreme Court rules provisions of the state's capital statute unconstitutional. The state remains abolitionist today.
- 2016** UNGA adopts its sixth moratorium resolution, with 117 countries voting for it. USA is one of 40 countries voting against.
- 2017** Guinea abolishes the death penalty for all crimes.
- 2018** UNGA adopts its seventh moratorium resolution, with 121 countries voting for it. USA is one of 35 countries voting against.

- 2018** Burkina Faso abolishes the death penalty for all crimes.
- 2018** 175th exoneration of an individual sentenced to death since *Furman*.
- 2018** Washington Supreme Court rules that state's death penalty unconstitutional as "it is imposed in an arbitrary and racially biased manner".
- 2019** 1,500th post-*Furman* execution in the USA. New Hampshire abolishes the death penalty.
- 2019** The Governor of California, the state with the USA's largest death row, orders a moratorium on executions, citing discrimination, cost, lack of deterrence, and irrevocability. President Donald Trump tweets: "Defying voters the Governor of California will halt all death penalty executions of 737 stone cold killers. Friends and families of the always forgotten VICTIMS are not thrilled and neither am I!".
- 2019** UN Human Rights Committee issues General Comment 36 on ICCPR, article 6, emphasizing that "States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future".
- 2020** Chad abolishes the death penalty for all crimes.
- 2020** Colorado abolishes the death penalty.
- 2020** Federal executions resume after 17 years with none. There are 10 such executions from July to December.
- 2020** UNGA adopts its eighth moratorium resolution, with 123 countries voting for it. USA is one of 38 countries voting against.
- 2021** Three more federal executions conducted during the Trump administration's final week in office. Virginia abolishes the death penalty.
- 2021** The new US Attorney General orders a temporary moratorium on federal executions pending review of policies and procedures relating to such executions. His memorandum leaves to legislators the systemic problems of capital justice: "Serious concerns have been raised about the continued use of the death penalty across the country, including arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases. Those weighty concerns deserve careful study and evaluation by lawmakers".
- 2021** In Sierra Leone, an Act to abolish the death penalty for all crimes is unanimously adopted by parliament.

2021

Eleventh consecutive year with fewer than 100 new death sentences in the USA, and the seventh consecutive year with fewer than 50. The 11 executions during the year is the lowest national total since 1988.

2022

Kazakhstan becomes abolitionist for all crimes after law passed and signed in late 2021 comes into force. In January, the National Parliament of Papua New Guinea votes to repeal the death penalty, with the law coming into force in April. The Presidents of Zambia and Liberia announce plans to work with their parliaments to abolish the death penalty. The National Assembly of the Central African Republic adopts a law to abolish the death penalty.

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**WHEN INJUSTICE HAPPENS TO ONE
PERSON, IT MATTERS TO US ALL.**



**USA: THE
POWER OF
EXAMPLE**

**WHETHER THE BIDEN DEATH
PENALTY PROMISE?**