When Executive Power Overreaches: A Constitutional Analysis of Executive Order 14164, *Restoring the Death Penalty and Protecting Public Safety*

Ana M. Otero*

DOI: https://doi.org/10.15779/Z38348GJ9J

* Professor Ana M. Otero is the Eugene Harrington Professor of Law at Thurgood Marshall School of Law. I am grateful to Brandon Kirk for his capable and thoughtful research assistance, which provided valuable support for the initial draft of this Article. I am deeply grateful to my research assistant, Felisha Lauren Lucio, whose extraordinary dedication and insight shaped this Article in countless meaningful ways. Her rigorous research, thoughtful engagement with each draft, and meticulous attention to the footnotes strengthened the work at every stage. She brought clarity, precision, and a rare steadiness of judgment to the project. This Article is immeasurably better because of her commitment to excellence, diligence, and the care she invested in every detail. I also extend my deepest gratitude to the editorial staff of the *Berkeley Journal of Criminal Law* (BJCL). My thanks go to Alice Choi, Lucas Baker, the editorial board, and every team member whose careful work ensured that this piece truly shone. Finally, to J - through darkness and return, the belief endured.

INTRODUCTION

On January 20, 2025, President Donald Trump signed twenty-six executive orders shortly after his inauguration.[1] The orders spanned a wide range of topics, reflecting a diverse and sometimes unpredictable agenda, from national energy production to "gender ideology" to the "Department of Governmental Efficiency."[2]

President Trump's initial executive orders appeared to lack a coherent strategy, spanning a wide array of issues that, while varied in scope, echoed themes he frequently championed during campaign rallies—messages that undoubtedly energized the Make America Great Again (MAGA) base. This broad, seemingly disjointed approach suggested that many of the directives were

1. Exec. Order No. 14147, 90 Fed. Reg. 8235 (Jan. 28, 2025); Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025); Exec. Order No. 14149, 90 Fed Reg. 8243 (Jan. 28, 2025); Exec. Order No. 14150, 90 Fed. Reg. 8337 (Jan. 29, 2025); Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 29, 2025); Exec. Order No. 14152, 90 Fed. Reg. 8343 (Jan. 29, 2025); Exec. Order No. 14153, 90 Fed. Reg. 8347 (Jan. 29, 2025); Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 29, 2025); Exec. Order No. 14155, 90 Fed. Reg. 8361 (Jan. 29, 2025); Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 29, 2025); Exec. Order No. 14157, 90 Fed. Reg. 8439 (Jan. 29, 2025); Exec. Order No. 14158, 90 Fed. Reg. 8441 (Jan. 29, 2025); Exec. Order No. 14159, 90 Fed. Reg. 8443 (Jan. 29, 2025); Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 29, 2025); Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 30, 2025); Exec. Order No. 14162, 90 Fed. Reg. 8455 (Jan. 30, 2025); Exec. Order No. 14163, 90 Fed. Reg. 8459 (Jan. 30, 2025); Exec. Order No. 14164, 90 Fed. Reg. 8463 (Jan. 30, 2025); Exec. Order No. 14165, 90 Fed. Reg. 8467 (Jan. 30, 2025); Exec. Order No. 14166, 90 Fed. Reg. 8611 (Jan. 30, 2025); Exec. Order No. 14167, 90 Fed. Reg. 8613 (Jan. 30, 2025); Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025); Exec. Order No. 14169, 90 Fed. Reg. 8619 (Jan. 30, 2025); Exec. Order No. 14170, 90 Fed. Reg. 8621 (Jan. 30, 2025); Exec. Order No. 14171, 90 Fed. Reg. 8625 (Jan. 30, 2025); Exec. Order No. 14172, 90 Fed. Reg. 8629 (Jan. 30, 2025).

2. Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025); Exec. Order No. 14158, 90 Fed. Reg. 8441 (Jan. 29, 2025).

not spontaneous but rather the product of behind-the-scenes coordination by influential figures within Trump's inner circle. Notably, several of these orders closely mirrored the policy framework outlined in Project 2025,[3] a sweeping blueprint developed by The Heritage Foundation and allied organizations to reshape the federal government.[4] While Project 2025 is often described as a conservative roadmap, its proposals also serve to reflect and reinforce President Trump's personal ambitions—amplifying his desire to project strength, consolidate executive power, and leave a lasting imprint on federal governance. Despite his public denial of involvement with the initiative, the alignment between his executive actions and Project 2025's agenda suggests a broader, orchestrated effort to implement policies that elevate his political brand and legacy. Executive Order No. 14164, which restores and expands the federal death penalty, exemplifies this trend: it reflects not just a law-and-order posture, but a more profound shift toward policies that prioritize presidential authority and symbolic dominance over individual rights.[5]

Executive Order 14164, *Restoring the Death Penalty and Protecting Public Safety*, is divided into seven sections.[6] This article examines sections one through five individually and argues that the main goal of the mandates is not only to expand the use of the federal death penalty but also to empower states with active death penalty statutes to enforce them more aggressively. The vague directives instruct the attorney general to undertake actions that could violate the Constitution. The order, while ostensibly promoting capital punishment as a deterrent, functions less as a principled policy and more as a vehicle for undermining the rights of death row inmates. It disregards the complexities and systemic flaws in how the death penalty is administered, while echoing Trump's pattern of misinformation through unverified claims and outright falsehoods—ultimately weakening its stated purpose due to a lack of factual support. Beneath its law-and-order rhetoric, the order appears designed to erode procedural safeguards, limit avenues for post-conviction relief, and create additional barriers to challenging the validity of convictions and sentences. Rather than advancing justice, it signals a troubling shift toward policies that prioritize punitive symbolism over constitutional protections.

Although the details of the order may be unclear, the initiative's goal appears less rooted in neutral policy reform and more aligned with advancing a conservative ideological agenda. Key actors have strategically leveraged the institutional power of Trump's presidency to normalize and implement long-

3. MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE I-VII (Paul Dans & Steven Groves eds., 2023).

4. *See* Brianna Seid, *Project 2025's Plan for Criminal Justice Under Trump*, BRENNAN CTR. FOR JUST. (Jan. 25, 2025), https://www.brennancenter.org/our-work/analysis-opinion/project-2025s-plan-criminal-justice-under-trump.

5. *Id.*

6. Exec. Order No. 14164, 90 Fed. Reg. 8463.

standing goals, transforming the executive apparatus into a vehicle for partisan priorities. The executive order, however, underscores Trump's unwavering support for the death penalty, even in the face of contrary evidence—as exemplified by his stance on the Central Park Five case.[7]

In 1989, five teenagers—Antron McCray (15), Kevin Richardson (14), Yusef Salaam (15), Raymond Santana (14), and Korey Wise (16)—were wrongfully convicted of the brutal rape and beating of 28-year-old Trisha Meili, a white woman who had been jogging in Central Park.[8] These four Black and Latino teenagers from Harlem became victims of a grave miscarriage of justice.[9] The crime sparked public outrage and generated sensational headlines during their prosecutions and convictions, revealing deep-rooted racial divides.[10] At the time, Trump spent $85,000 on a full-page ad published in prominent New York newspapers to proclaim, "Bring Back the Death Penalty. Bring Back the Police," further igniting fear and anger in the city."[11]

The young men served between five and thirteen years in prison until 2002, when they were exonerated following a shocking confession from serial rapist Matias Reyes, along with a DNA match that confirmed his culpability.[12] A year later, they filed civil lawsuits against the City of New York and the police officers and prosecutors involved in their wrongful conviction. In 2014, they settled the civil case for $41 million.[13] Despite their exonerations, the police and prosecutors involved in the case continue to assert that the teenagers were guilty of the crime. In 2019, Trump refused to apologize and continued to spread falsehoods about this case as recently as during his presidential debate at Philadelphia's National Constitution Center in September 2024.[14] Trump's vocal support for the death penalty in the Central Park Five case serves as a stark illustration of his readiness to endorse the most severe punishments—even when the evidence is deeply flawed or later disproven. Despite the eventual exoneration of the five young men through DNA evidence and a confession from the actual perpetrator, Trump continued to advocate for their execution. This unwavering stance reveals a troubling willingness to prioritize punitive measures over factual accuracy and due process.

---

7. Aisha Harris, *The Central Park Five: 'We Were just Baby Boys,'* N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html.

8. *Conviction and Exoneration*, PBS, https://www.pbs.org/kenburns/the-central-park-five/conviction-and-exoneration/ (last visited July 26, 2025).

9. *Id.*

10. *Id.*

11. Donald J. Trump, *Bring Back the Death Penalty. Bring Back Our Police*, NEWSDAY (May 1, 1989), https://www.documentcloud.org/documents/6131533-trumpdeathpenaltyad05011989/.

12. PBS, *supra* note 8.

13. *Id.*

14. *Why Are the Central Park Five Suing Donald Trump?*, AL JAZEERA (Oct. 22, 2024), https://www.aljazeera.com/news/2024/10/22/why-are-the-central-park-five-suing-donald-trump.

Trump's Executive Order continues the trajectory of Trump's first presidency, during which his administration, through Attorney General William Barr's DOJ, prioritized an unprecedented spree of federal executions, often bypassing established procedures.[15] It also directly challenges Attorney General Merrick Garland's January 2021 memorandum, which established a moratorium on the federal death penalty.[16]

Trump's Executive Order also stands as a stark rebuke to President Joe Biden, who, in his final days in office, commuted the sentences of thirty-seven federal death row inmates in a move aligned with his administration's stance against capital punishment.[17] The order appears to reject these reforms, signaling a return to the controversial practices of Trump's first presidency.

I argue that Trump's Executive Order raises concerns about its impact on the rule of law and constitutional principles. Its mandates undermine judicial discretion and due process, which are fundamental to the American legal system. One of the most troubling aspects of the order is its broad application of capital punishment, especially in cases involving undocumented immigrants and crimes against law enforcement officers. By prioritizing the death penalty in these situations, the order risks politicizing the criminal justice system and eroding the principle of equal protection under the law, as enshrined in the Fourteenth Amendment.

The Trump administration's effort to expand the use of the death penalty threatens to exacerbate systemic injustices, particularly for people of color who are already overrepresented on death row. Decades of empirical research have established that capital punishment disproportionately affects communities of color.[18] Yet, Trump's Executive Order remains conspicuously silent on these disparities, failing to address the racial bias and the risk of wrongful conviction that permeate the system of capital punishment. By promoting the continued use of capital punishment and endorsing execution methods that have documented histories of inhumanity, the order risks violating the Eighth Amendment and entrenching discriminatory practices that undermine constitutional protections.

The absence of safeguards against wrongful executions threatens to violate the Eighth Amendment's ban on cruel and unusual punishment and infringes upon the fundamental right to life.[19] Furthermore, the order weakens state

15. Ana M. Otero, *In Search of Better Angels: Trump's Execution Spree – The Story of Lisa Marie Montgomery*, 34 BERKELEY LATINE J.L. & POL'Y 1, 3–5 (2024).

16. Memorandum from Merrick Garland, U.S. Att'y Gen., on Moratorium on Federal Executions Pending Review of Policies and Procedures (July 1, 2021).

17. Lauren Mascarenhas & Javon Huynh, *Praise and Outrage Follow Biden's Decision to Commute Federal Death Row Sentences*, CNN (Dec. 23, 2024, 9:27 PM EST), https://www.cnn.com/us/death-row-inmates-sentences-commutes.

18. *See* Jeffrey A. Fagan, Garth Davies & Ray Paternoster, *Getting to Death: Race and the Paths of Capital Cases after Furman*, 107 CORNELL L. REV. 1565, 1613–1616 (2022).

19. U.S. CONST. amend. VIII.

sovereignty by pressuring state prosecutors to pursue capital charges and disrupting state-level sentencing decisions. Its reversal of Biden's moratorium on federal executions may lack a proper statutory basis and ignore global trends and U.S. treaty obligations that favor abolishing the death penalty.[20]

The significant flaws in the current death penalty system—shown by documented arbitrariness and widespread injustices—make any attempt to expand its use deeply concerning. Encouraging states to adopt similarly harsh measures only exacerbates these urgent problems. While Trump's support for the death penalty is expected, the emergence of new influential ultra-conservative voices pushing for these changes signals a concerning shift in strategy. If Trump's mandates under this executive order are carried out, they risk unraveling hard-won reforms aimed at creating a more humane and equitable capital punishment system. Over the past two decades, growing awareness of wrongful convictions, racial disparities, and the psychological toll of execution protocols has led to increased scrutiny and restraint in federal death penalty practices. This order reverses that trajectory by accelerating executions, limiting avenues for post-conviction relief, and weakening procedural safeguards—particularly for vulnerable defendants. Rather than addressing these systemic inequalities, the mandate reinforces them, prioritizing speed and severity over fairness and constitutional protections. More critically, the order, based on flawed statements, enforces mandates that could violate the Constitution—an issue seemingly overlooked by Trump and many officials, who appear to relinquish their authority in favor of his unchecked ambitions. Ultimately, a stable democracy depends on institutions that ensure transparency, fairness, and accountability. When those systems fail to hold a presidency accountable, the country risks political and legal chaos, weakening its democratic foundations. Protecting democratic norms requires vigilance, engagement, and a commitment to uphold the rule of law—without these protections, the nation edges closer to instability. The Executive Order exemplifies how executive overreach, especially when used to expand punitive state power, can erode foundational rights and bypass the checks and balances that safeguard justice in a constitutional democracy.

20. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414; Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S No. 73; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948). The Second Optional Protocol to the ICCPR and the Protocol to the American Convention on Human Rights are the main treaties explicitly favoring abolition of the death penalty. The United States has not ratified these, but it is subject to other international agreements and resolutions that increasingly advocate for the restriction or abolition of capital punishment.

PART I: SECTION 1, UNMASKING MISCONCEPTIONS: A CRITICAL REVIEW OF PUBLIC SUPPORT, DETERRENCE CLAIMS, AND JUDICIAL INTEGRITY IN CAPITAL PUNISHMENT

A. The Myth of Deterrence

The opening section of the Executive Order contains several factual inaccuracies, which cast doubt about its credibility and the motives behind it. Misrepresenting key facts undermines the foundation needed for well-supported directives.

Section 1 of Trump's executive order states:

Purpose. Capital punishment is an essential tool for deterring and punishing those who would commit the most heinous crimes and acts of lethal violence against American citizens. Before, during, and after the founding of the United States, our cities, States, and country have continuously relied upon capital punishment as the ultimate deterrent and only proper punishment for the vilest crimes. Our Founders knew well that only capital punishment can bring justice and restore order in response to such evil. For this and other reasons, capital punishment continues to enjoy broad popular support.[21]

This section exposes significant flaws in the legal reasoning supporting the defense of capital punishment. Empirical research overwhelmingly demonstrates that the death penalty does not deter violent crime.[22] Multiple longitudinal studies have failed to identify any credible link between executions and reductions in murder rates.[23] Jurisdictions that have abolished capital punishment consistently report no increase in violent offenses, undermining claims that it enhances public safety.[24] Moreover, the premise that capital punishment is the only way to ensure justice is deeply flawed. The fairness of the death penalty system is called into question by frequent racial disparities, wrongful convictions, and inconsistent sentencing practices. Despite decades of judicial efforts to standardize its application, arbitrariness remains a persistent characteristic of capital punishment. This inconsistency leads to outcomes that violate the foundational principles of equal protection and due process under the Fourteenth Amendment, and it also raises serious concerns regarding the Eighth Amendment.

Death penalty cases focus on the Eighth Amendment because it prohibits "cruel and unusual punishment,"[25] and the Supreme Court has interpreted this clause as setting constitutional limits on how the death penalty can be imposed

21. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

22. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 841–845 (2005).

23. John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, 3 ECONOMISTS' VOICE 1, 5 (2006).

24. *Id.*

25. U.S. CONST. amend. VIII.

and carried out. In 1958, a majority of the Supreme Court in *Trop v. Dulles*[26] held:

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment -- and they are forceful -- the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

Trop established a critical principle in Eighth Amendment jurisprudence—that the definition of "cruel and unusual punishment" is not static but must evolve in tandem with societal values.[27] In his plurality opinion, Chief Justice Earl Warren famously stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[28] This principle has become a fundamental benchmark in death penalty law, guiding how courts determine whether capital punishment aligns with modern moral values and constitutional standards. Over time, it has directed judicial examination of the fairness, proportionality, and societal approval of the death penalty, grounding legal analysis in the context of a society that is increasingly aware of rights.

Between 1958 and 1972, the death penalty became increasingly vulnerable to legal challenges, as courts and legal scholars began questioning its constitutionality, fairness, and application. In 1961, Gerald H. Gottlieb's influential law review article challenged Justice Warren's premise that the death penalty did not violate the constitutional concept of cruelty, arguing instead that the death penalty violated contemporary "standards of decency."[29] Then, in 1963, in a dissenting opinion in *Rudolph v. Alabama*,[30] three Supreme Court

---

26. 356 U.S. 86, 99 (1958).

27. *Id.* at 101.

28. *Id.* (noting that Chief Justice Earl Warren announced the judgment of the Court and delivered the plurality opinion joined by Justices Black, Douglas, and Whittaker).

29. Gerald H. Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268, 278 (1961).

30. 375 U.S. 889, 889–891 (1963) (Goldberg, J., dissenting). Justices Goldberg, Douglas, and Brennan posed the following questions:

> (1) In light of the trend both in this country and throughout the world against punishing rape by death does the imposition of the death penalty by those States which retain it for rape violate 'evolving standards of decency that mark the progress of [our] maturing society,' or 'standards of decency more or less universally accepted?'
>
> (2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive … severity are greatly disproportioned to the offenses charged?'
>
> (3) Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e.g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?'

justices suggested that the Court might be willing to hear arguments against the death penalty in future cases. This law review article and the dissent in Rudolph laid the groundwork for the legal strategy later adopted by the NAACP Legal Defense Fund (LDF).[31]

In the 1960s, the LDF developed a comprehensive legal strategy to challenge the death penalty in the United States. This plan aimed to establish a "moratorium" on executions by mounting legal challenges in as many death penalty cases as possible.[32] The LDF systematically challenged the constitutionality of the death penalty under the Eighth Amendment, arguing that its arbitrary and discriminatory application amounted to "cruel and unusual" punishment."[33] The organization collected and presented evidence of racial disparities in the application of the death penalty, particularly its disproportionate use against Black defendants.[34] It highlighted the lack of standards guiding juries, which resulted in inconsistent and unpredictable death sentences.[35] Additionally, the LDF raised various procedural concerns, including inadequate legal representation, biased jury selection, and the overall fairness of trials.[36] The campaign began with targeted challenges against the application of the death penalty for crimes like rape, especially in cases involving Black defendants and white victims, where the death penalty was most disproportionately applied.[37]

LDF's broad and strategic legal approach reframed the national conversation on the death penalty—moving it from abstract moral debates to a constitutional argument grounded in evolving societal standards. This shift played a pivotal role in litigation that led to a temporary nationwide halt of executions, culminating in the Supreme Court's landmark 1972 decision in *Furman v. Georgia*.[38] Thus, in *Furman*, the Court shifted dramatically from its

31. *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 154–92 (2016) (discussing the history and legal strategies surrounding capital punishment, including the role played by the NAACP LDF in shaping litigation efforts that led to the death penalty moratorium in the 1960s and early 1970s).

32. Michael Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1113–39 (May 1, 1973).

33. Elaine McArdle, *The End of the Death Penalty? 'Unintended consequences' and the legacy of* Furman v. Georgia, HARV. L. BULL. (Feb. 14, 2023).

34. Maurice Chammah, *The Odds of Overturning the Death Penalty*, MARSHALL PROJECT (Nov. 16, 2015, 7:15 AM), https://www.themarshallproject.org/2015/11/16/the-odds-of-overturning-the-death-penalty.

35. Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 168 (1985).

36. Chammah, *supra* note 34.

37. *Id.*

38. 408 U.S. 238, 257 (1972). In a plurality decision, the United States Supreme Court held that the current form of the death penalty was unconstitutional and violated the Eighth and Fourteenth Amendments. The Court reasoned that abdicating the decision to juries necessarily produced arbitrary and capricious results; therefore, it violated the Eighth Amendment's prohibition of cruel and unusual punishment as applied to the states through the Fourteenth Amendment. *Id.* at 255–56.

position just one year earlier in *McGautha v. California*,[39] where the Court had held that the absence of definitive standards guiding jury discretion in death penalty sentencing did not violate the Fourteenth Amendment's Due Process Clause. In *McGautha*, the Court had reasoned that creating a precise formula for deciding between life and death was impractical, affirming that juries could exercise broad discretion when imposing capital punishment.[40] The shift in *Furman* was primarily driven by changing judicial perspectives. Two justices who had voted with the majority in *McGautha*, Potter Stewart and Byron White, changed their stance in *Furman*, recognizing that the arbitrary and inconsistent application of capital punishment violated the Eighth and Fourteenth Amendments. Justice Stewart famously described the death penalty as "wanton and freakish," comparing its randomness to being struck by lightning.[41] Justice White, similarly, acknowledged that the infrequency and unpredictability of executions undermined the penological goals of deterrence and retribution.[42] This shift in judicial perspective helped secure a narrow 5-4 majority that temporarily halted executions across the country.

Furman was a landmark case that fundamentally reshaped death penalty jurisprudence in the United States.[43] While the Court determined that capital punishment itself was not inherently unconstitutional, it ruled that the specific death penalty statutes being reviewed were arbitrary and capricious.[44] This arbitrariness constituted cruel and unusual punishment, violating the Eighth and Fourteenth Amendments.[45] The Court struck down as unconstitutional the death penalty statutes of all states and the federal government, and 629 death sentences were commuted.[46]

---

39. 402 U.S. 183, 207 (1971).

40. *Id.* at 203.

41. *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (highlighting the arbitrary and inconsistent application of the death penalty; Justice Stewart compared it to being "struck by lightning," and Justice White noted "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" *Id.* at 309, 313 (White, J., concurring)).

42. *Id.* at 312–314 (White, J., concurring).

43. *Id.* at 239–40; *see also* Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1347 (1994) (immediately following this decision, death penalty states scrambled to amend their death penalty statutes to comply with *Furman*'s mandates).

44. *Id.* at 309–10 (Stewart, J., concurring)

45. *Id.* at 239–40 (The U.S. Supreme Court decided two other death penalty cases along with *Furman*: *Jackson v. Georgia* and *Branch v. Texas*); *see also* Ana M. Otero, *A Murder of Crows: The Politics of Death in Texas – The Bobby James Moore Story*, 47 GONZ. L. REV. 425, 450 (2022) (explaining the effects of Furman's mandate and state's responses to revamp their statutes.); Otero, *In Search of Better Angels*, *supra* note 15, at 8 (2024) (explaining that the then-instituted death penalty statutes that were in front of the Court were "arbitrary, capricious, and constitute cruel and unusual punishment under the eighth and fourteenth amendments," and effectively eliminated thirty-nine state statutes and the federal government's statute.)

46. McArdle, *supra* note 33.

In *Furman*, Justice Thurgood Marshall addressed the issue of deterrence as a justification for the death penalty.[47] He noted that the deterrence argument is key to the debate between supporters and opponents of capital punishment. Justice Marshall observed that statistical studies, particularly those based on trends in states that had abolished the death penalty, generally failed to demonstrate that the death penalty is a superior deterrent to other forms of punishment.[48] He referenced the findings of the United Nations Committee, which concluded that while the death penalty is defended by retentionists as a deterrent, existing data show no correlation between its use and lower rates of capital crime.[49] Justice Marshall emphasized the importance of not basing penal policy on exaggerated claims about the deterrent effect of the death penalty.[50]

After more than thirty years of research investigating whether the death penalty deters individuals from committing aggravated murder, there is no reliable evidence to suggest that it does. The National Research Council of the National Academies has concluded that studies asserting the death penalty has a deterrent effect are "fundamentally flawed."[51] The report identified three fundamental flaws in existing studies on deterrence:[52]

- The studies fail to account for the potential impact of alternative punishments that could also influence criminal behavior.
- The studies rely on incomplete or unrealistic models of how potential offenders perceive and respond to capital punishment.
- Estimates of capital punishment's effectiveness are based on statistical models with questionable assumptions, undermining their credibility.

The National Research Council's conclusions are reinforced by numerous prior studies, further casting doubt on the deterrent effect of the death penalty.[53]

---

47. *Furman*, 408 U.S at 345–54 (Marshall, J., concurring). Justice Marshall expounded on studies that found no correlation between the death penalty and deterrence across 4 factors—whether murders are less frequent in states that have the death penalty, whether murders are decrease upon abolishment and increase upon reinstatement, whether deterrence exists "most powerfully" in the communities where the death penalty is most closely used, and whether law enforcement is safer from murderous attacks in states with the death penalty than in those without it. *Id.* at 349.

48. *Id.* at 353–54.

49. *Id.* at 353.

50. *Id.* at 354.

51. *Studies on Deterrence Debunked*, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/policy-issues/policy/deterrence/discussion-of-recent-deterrence-studies (last visited July 28, 2025) (citing NAT'L RSCH. COUNCIL NAT'L ACADS., DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012).

52. NAT'L RSCH. COUNCIL NAT'L ACADS., DETERRENCE AND THE DEATH PENALTY 2-5, 7 (Daniel S. Nagin & John V. Pepper eds., 2012).

53. *See, e.g.*, Emily Williams, *Capital Punishment Does Not Deter Murder, Fagan Says*, U. VA. SCH. L. NEWS (Apr. 11, 2006), https://www.law.virginia.edu/news/200604/capital-punishment-does-not-deter-murder-fagan-says (Professor Fagan argued that several reports claiming a connection between capital punishment and murder were "deeply flawed technically and methodologically. For example, they fail to take into account life-without-parole candidates, incarcerations, or drug homicides.

Additionally, evidence indicates that murder rates, including, for example, the killings of police officers, are consistently higher in states that maintain the death penalty. In contrast, states that have abolished the death penalty exhibit the lowest rates of police officers killed in the line of duty.[54]

Today, studies are even more conclusive, showing that moratoriums on capital punishment "resulted in nonsignificant homicide reductions."[55] In other words, the absence of an increase in homicides, the typical capital punishment offense, indicates the death penalty does not act as a deterrent when it is in effect.[56] This issue is further compounded by the nature of deterrence and its relationship to the individuals who commit capital offenses such as murder. Because it is unlikely that offenders carefully think out their decisions before making them, deterrence is unlikely to be a contributing factor in whether the individual commits the offense,[57] nor is it likely that offenders have a coherent and accurate perception of the risks involved in the offense with respect to capital punishment.[58] As a well-noted scholar stated, "I have some doubts about the validity of the causal story about deterrence, particularly given what we understand about murder, which is impulsive[.] Murderers themselves often have cognitive impairments, the kind of impairments that could stem from organic brain damage, could stem from a lifetime of abuse, could stem from substance abuse, alcohol—any one of a number of factors."[59]

In 2002, citing numerous reports, Justice Stephen Breyer noted the continued difficulty of justifying capital punishment in terms of its ability to deter crime in *Ring v. Arizona*.[60]

There are huge chunks of missing data and strange computational decisions made, and the studies never do a direct test of deterrence.").

54. *NEW PODCAST: DPIC Study Finds No Evidence that Death Penalty Deters Murder or Protects Police*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/new-podcast-dpic-study-finds-no-evidence-that-death-penalty-deters-murder-or-protects-police.

55. Stephen N. Oliphant, *Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method*, 21 CRIMINOLOGY & PUB. POL'Y 915 (2022).

56. *Id.* at 940–41.

57. Tomislav V. Kovandzic, Lynne M. Vieraitis & Denise Paquette Boots, *Does the death penalty save lives? New evidence from state panel data, 1977 to 2006*, 8 CRIMINOLOGY & PUB. POL'Y 803, 836 (2009).

58. *Id.*

59. Williams, *supra* note 53.

60. 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (stating that studies of deterrence are, at most, inconclusive); *see, e.g.*, Jon Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481 (1999) (no evidence of a deterrent effect); Raymond Bonner & Ford Fessenden, *ABSENCE OF EXECUTIONS: A special report.; States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES (Sept. 22, 2000), https://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html; *see also* Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8 (1996) (noting that over 80% of criminologists believe existing research fails to support deterrence justification).

Statistics published by Amnesty International indicate that in 2004, the average murder rate in states in the United States that employed the death penalty was 5.71 per 100,000 people, compared to 4.02 per 100,000 in states that did not use it.[61] Additionally, in Canada, twenty-seven years after the abolition of the death penalty in 1976, the murder rate had decreased by 44 percent since 1975, when capital punishment was still in effect.[62]

A 2009 study found that 88 percent of the nation's leading criminologists reject the idea that the death penalty serves as an effective deterrent to crime. This overwhelming consensus reflects decades of empirical research showing that capital punishment fails to reduce violent crime rates.[63] The study reports:

> Nearly 78% of those surveyed said that having the death penalty in a state does not lower the murder rate. In addition, 91% of respondents said politicians support the death penalty in order to appear tough on crime – and 75% said that it distracts legislatures on the state and national level from focusing on real solutions to crime problems. Overall, 94% agreed that there was little emp[i]rical evidence to support the deterrent effect of the death penalty. And 90% said the death penalty had little effect overall on the committing of murder. Additionally, 91.6% said that increasing the frequency of executions would not add a deterrent effect, and 87.6% said that speeding up executions wouldn't work either.
>
> Public opinion also reflects these findings. In a 2006 Gallup Poll, only 34% of respondents agreed that "the death penalty acts as a deterrent to the commitment of murder, that it lowers the murder rate." In 2004, 62% of people said the death penalty was not a deterrent. By contrast, in 1985, 62% believed the death penalty acted as a deterrent to murder.[64]

Finally, a report by the Death Penalty Project investigating deterrence as justification for the death penalty observed the limited research studies beyond the United States. [65] Murder rates in Singapore, which has the death penalty, and Hong Kong, which does not have the death penalty (and shares similarities of circumstance with Singapore, beyond penal policy), declined at relatively the same rate across a period of 30 years, even as Hong Kong abolished the death

61. *Does the Death Penalty Deter Crime: Getting the Facts Straight*, AMNESTY INT'L (June 1, 2008), https://www.amnesty.org/fr/wp-content/uploads/2021/06/act500062008en.pdf.

62. *Id.*

63. *Id.* at 504.

64. *Study: 88% of criminologists do not believe the death penalty is an effective deterrent*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/study-88-of-criminologists-do-not-believe-the-death-penalty-is-an-effective-deterrent.

65. *Deterrence and the Death Penalty*, DEATH PENALTY PROJECT (Nov. 1, 2022), https://deathpenaltyproject.org/wp-content/uploads/2022/08/The-Death-Penalty-Project_Policy-Deterrence.pdf.

penalty. These findings reinforce the broader consensus that the presence or absence of capital punishment has little measurable impact on homicide rates.[66]

The argument that capital punishment is an essential deterrent may seem convincing to those unfamiliar with its complexities. However, the reality is quite different—extensive research and legal analyses consistently show that the death penalty does not effectively deter crime. Studies regularly demonstrate that factors such as social conditions, law enforcement effectiveness, and the certainty of punishment play much larger roles in crime prevention than the presence of capital punishment.[67] Moreover, the ongoing struggles of the legal system to apply the death penalty fairly and consistently only underscore its ineffectiveness as a deterrent. Despite persistent rhetoric supporting its necessity, evidence overwhelmingly indicates that capital punishment remains an unreliable and ineffective method for promoting justice and public safety.

B. The Misconception of Overwhelming Support for Capital Punishment

This first section of Trump's Executive Order also pronounces that the death penalty "*continues to enjoy broad popular support."* This statement, too, lacks factual support. Over the last fifty years, support for the death penalty has gradually declined, reaching a new low in 2024.[68] In 2024, the death penalty only enjoyed 53 percent support, with over half of adults between the ages of eighteen and forty-three opposing the death penalty, a significant decline from the 80 percent support recorded in 1994.[69] Not only does this suggest a culture shift from support to opposition, but it also indicates that newer generations are disapproving; as more generations are born, there will be even less support. National polling data shows that support for the death penalty among those aged twenty-eight to forty-three (millennials) has declined by about 25 percent over the last quarter-century.[70]

The national shift towards abolition does not reflect the supposed "broad support" for the death penalty that the order boasts. Since 2000, eleven states have abolished the death penalty,[71] including five in the past decade—Delaware,

66. *Id.* at 3.

67. George Antunes & A. Lee Hunt, Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis, 64 J. Crim. L. & Criminology 486, 492–493 (1973); Five Things About Deterrence, Nat'l Inst. of Just. (June 5, 2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

68. *The Death Penalty in 2024: Year End Report*, DEATH PENALTY INFO. CTR. at 3 (Dec. 19, 2024), https://dpic-cdn.org/production/documents/DPI-2024-Year-End-Report.pdf?dm=1735847939.

69. *Id.* at 11.

70. Jeffrey M. Jones, *Drop in Death Penalty Support Led by Younger Generations*, GALLUP (Nov. 14, 2024), https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations.aspx.

71. *State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited July 28, 2025).

Washington, New Hampshire, Colorado, and Virginia.[72] Three additional states have declared a moratorium on executions: Oregon (2011), Pennsylvania (2015) and California (2019).[73]

Overall, the nationwide number of executions has dramatically decreased from ninety-eight in 1999 to twenty-five in 2024.[74] Equally telling is the drop in the number of death sentences issued annually across the nation, which fell from 151 in 2003 to twenty-six in 2024.[75] Several factors, alongside waning public support, have contributed to the ongoing decline of the death penalty in the United States. A significant influence is the sharp decrease in violent crime; specifically, the number of murders and non-negligent manslaughters fell from 24,703 in 1991 to fewer than 15,000 in 2010.[76] This reduction has diminished the perceived need for capital punishment. Another critical factor is the shift in sentencing laws. Since the 1980s, many states have implemented life without parole as an alternative to the death penalty.[77] This option enables juries to permanently remove serious offenders without resorting to execution, resulting in fewer death sentences and reinforcing the trend away from capital punishment. Additionally, there are growing concerns about fairness, the risk of executing innocent people, and the overall improvement in legal representation for defendants.[78]

When California Governor Gavin Newsom announced a moratorium on the death penalty, he cited numerous issues affecting the system. He described California's death penalty as "unfair, unjust, wasteful, protracted, and does not make our state safer."[79] Newsom pointed out that the system discriminates against individuals with mental illnesses, people of color, and those who cannot afford expensive legal representation. He raised concerns about the risk of irreversible errors, stating that "as many as one in 25 people sentenced to death in the United States is likely innocent."[80] Furthermore, he noted that no executions had taken place since 2006 due to unlawful protocols in California.[81]

---

72. *Id.*

73. *Id.*

74. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Feb. 3, 2026), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

75. *Id.*

76. ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 2, NCJ 236018 (Nov. 2011), https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf.

77. *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFO. CTR. (Aug. 2, 2010), https://deathpenaltyinfo.org/stories/year-that-states-adopted-life-without-parole-lwop-sentencing.

78. Ian Millhiser, *The long decline of the American death penalty, explained President Biden's latest move against the death penalty is part of a much larger nationwide trend*, VOX (Dec. 23, 2024, 12:20 PM), https://www.vox.com/criminal-justice/392570/death-penalty-supreme-court-joe-biden.

79. Cal. Exec. Order No. N-09-19 (Mar. 13, 2019).

80. *Id.*

81. *Id.*

Finally, he highlighted that the state has spent $5 billion on its death penalty system since 1978, resulting in only thirteen executions.[82]

Today, while twenty-seven states retain the death penalty, only a handful are actively enforcing it.[83] In 2024, the United States executed 25 individuals in nine states.[84] Four states—Alabama, Texas, Missouri, and Oklahoma, which have always had strong support for the death penalty—were responsible for 76 percent of those executions.[85] This leaves just 24 percent of executions occurring in the other 5 states, a far cry from the broad popular support alleged by Trump. In fact, since 1976, the United States has executed 1,635 individuals; 1,336 of those executions, or 82 percent, occurred in the Southern states.[86]

Trump's Executive Order's assertion of 'broad support' for the death penalty becomes less credible when considering states like Texas, which, despite its long-standing and extensive history of capital punishment, has seen a 77 percent decrease in executions from 1999 to 2023.[87] This significant decline in the use of capital punishment in a state historically known for its high execution rates challenges the claim that there is broad support for the death penalty. For example, there were two death sentences in 2022, three in 2023, and six in 2024.[88] "Since 2020, juries have rejected the death penalty in 20 percent of the capital murder cases that have proceeded to trial with death as a potential verdict."[89] Early this year, the Texas Tribune reported on the record-low numbers of executions and death sentences:

At the turn of the century in 2000, the population on Texas' death row reached a record high of 459 inmates and officials carried out 40 executions, the most in a single year. Decades later, the state's interest in capital punishment appears to have cooled, according to available data, influenced by cultural shifts, legal updates and what some experts have called "evolving standards of decency."

82. *Id.*

83. *Outcomes of Death Warrants in 2025*, DEATH PENALTY INFO. CTR. (July 31, 2025), https://deathpenaltyinfo.org/executions/upcoming-executions/outcomes-of-warrants/outcomes-of-death-warrants-in-2025.

84. DEATH PENALTY INFO. CTR., *Facts*, *supra* note 74.

85. *Id.*

86. *Id.*

87. *See* TEX. COAL. TO ABOLISH THE DEATH PENALTY, *Texas Death Penalty Developments in 2024: The Year in Review* 5 (2024), https://tcadp.org/wp-content/uploads/2024/12/Texas-Death-Penalty-Developments-in-2024-FINAL-REPORT.pdf.

88. *Id.* at 1.

89. *Id.* at 4.

In 2022, the death row population dropped to under 200 inmates for the first time in almost three decades, and by the start of 2025, there were 174 people on Texas' death row.[90]

The decline in death sentences cannot be attributed to a single factor but rather to a combination of legal and social influences, according to Kristin Houlé Cuellar, executive director of the Texas Coalition to Abolish the Death Penalty (TCADP).[91] One of the most significant contributors to this decrease, she explained, was Texas's adoption of life sentences without parole as an alternative to capital punishment in 2005. "That has given prosecutors and juries more discretion in terms of how they handle capital cases,"[92] Houlé Cuellar said. "So what we've seen is that in the vast majority—and by vast majority, I would say 99-point-something-percent of capital cases—prosecutors in Texas are not pursuing the death penalty as a sentencing option."[93]

This sentiment is not exclusive to Texas either. A survey of jurors in California (Orange County) found that broad demographics oppose, not support, the death penalty.[94] Among other things, the authors reported that even many jurors who support the death penalty harbor significant doubts about it.[95] When asked about the decade-long absence of executions in California, jurors across all attitudes toward the death penalty said they were less inclined to impose a death sentence. This rarity of executions contributes to perceptions of arbitrariness in how the death penalty is applied, even among those who find it morally acceptable.[96] This arbitrariness conflicts with the Eighth Amendment's prohibition on "cruel and unusual punishments," which the Supreme Court has interpreted to forbid punishments that are imposed capriciously or unevenly.

The claim of widespread support for the death penalty is therefore misleading, as its use in the United States has steadily declined since 1999.[97] Nationally, there has been a significant drop in executions, and a sharp decline in new death sentences has led to a shrinking death row population, reflecting changing attitudes and policies.[98] Additionally, high-profile exonerations and increased awareness of wrongful convictions have intensified calls for abolition.

---

90. Ayden Runnels, *Fewer Texans sentenced to death, executed amid "evolving standards of decency,"* TEX. TRIB. (Jan. 22, 2025, 5:00 AM CST), https://www.texastribune.org/2025/01/22/texas-death-penalty-executions-decline/.

91. *Id.* (Texas Coalition to Abolish the Death Penalty (TCADP) is a grassroots organization dedicated to death penalty education and abolition.).

92. *Id.*

93. *Id.*

94. Brandon Garrett, Daniel Krauss & Nicholas Scurich, *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417, 420, 427–30 (2017) (discussing demographic shift in attitudes toward the death penalty).

95. *Id.*

96. *Id.*

97. DEATH PENALTY INFO. CTR., *Facts*, *supra* note 74.

98. *See id.*

In 2025, the United States reached a milestone of 201 death row exonerations,[99] drawing substantial public and media attention to the risk of executing innocent individuals and reinforcing concerns about the reliability and fairness of capital punishment. Even in states with a long-standing history of support for the death penalty, such as Texas, public backing has noticeably declined over the past decade, reflecting a broader shift in societal attitudes about capital punishment.[100] Concerns over innocence and racial disparities further fuel this decline, as wrongful convictions highlight systemic failures in capital punishment. The abolition movement is increasingly linked to broader civil rights issues, with activists emphasizing the disproportionate impact of the death penalty on Black, poor, and marginalized communities.

C. Have Judges Lost Their Neutral Role?

Section 1 of the order continues:

Yet for too long, politicians and judges who oppose capital punishment have defied and subverted the laws of our country. At every turn, they seek to thwart the execution of lawfully imposed capital sentences and choose to enforce their personal beliefs rather than the law.[101]

This statement relies on inflammatory language instead of a factual understanding of capital litigation and judicial review. It is intentionally misleading because it suggests that judges' and politicians' opposition to the death penalty is driven solely by personal emotions or ideological bias, rather than by legal, ethical, and practical considerations. Legal interpretation and policy decisions are shaped by evolving standards of justice, legislative changes, and Supreme Court rulings. Judges and politicians who oppose the death penalty do not defy or subvert the law; instead, they typically operate within established legal frameworks, interpreting constitutional principles and addressing concerns that arise in capital cases. As outlined above, many opponents of capital punishment cite well-documented issues, including the risk of wrongful convictions, racial and socioeconomic disparities in sentencing, the high costs associated with death penalty cases compared to life imprisonment, and doubts regarding its effectiveness as a deterrent. Some argue that it clashes with constitutional principles of justice and human rights. Judges must base their decisions on established legal precedent and constitutional interpretation, rather than personal preference. Politicians who advocate against the death penalty often do so based on data, policy analysis, and public interest rather than merely ideological leanings. This framing simplifies a complex issue and ignores the substantial evidence that motivates opposition to the death penalty.

---

99. *Id.* (201 exonerations as of 2025).

100. *State Poll and Studies*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/policy/public-opinion-polls/state-polls-and-studies (last visited July 26, 2025).

101. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

In the United States, the judicial system provides multiple layers of review in death penalty cases—including direct appeals, state and federal habeas corpus petitions, and clemency proceedings—all designed to safeguard constitutional rights and promote procedural fairness. These mechanisms serve a critical function: to ensure that convictions and death sentences rest on reliable, lawful grounds, and to prevent the execution of individuals who may have been wrongfully convicted. Particularly in capital cases, where the consequences are irreversible, this rigorous review structure reflects the judiciary's commitment to accuracy, equity, and the integrity of the criminal justice system. At the trial level, under post-*Furman* death penalty statutes, most states require capital cases to be tried by a jury; bench trials are not allowed.[102] This principle was reiterated in *Ring v. Arizona*, where the Supreme Court held that the Sixth Amendment requires a jury to determine any fact that increases a defendant's maximum punishment, including those necessary to impose the death penalty.[103] Further, in most states, the jury, not the trial judge, renders a conviction and imposes a death sentence.[104] With minor exceptions,[105] the jury must be unanimous.

After the *Furman* decision, states that wished to retain the death penalty were required to revise their statutes. Some, including Alabama, Florida, and Delaware, initially allowed judges to override jury verdicts and impose death sentences even when juries recommended life imprisonment. Originally justified as a safeguard against perceived jury leniency, this judicial override system soon revealed significant flaws. Case reviews and data indicated that judicial overrides often subverted the jury's moral judgment, resulting in disproportionately high death sentence rates and creating opportunities for arbitrary or politically motivated outcomes. This historical experience directly contradicts the Trump Executive Order's depiction of judges as neutral arbiters who predominantly use their discretion to prevent death sentences. Instead, when empowered to override jury decisions, judges frequently imposed their pro-death penalty views—even against jury recommendations. The subsequent rollback of judicial override

102. Ray Bonner, *Push Is on for Larger Jury in Military Capital Cases*, N.Y TIMES (Sept. 4, 2001), https://www.nytimes.com/2001/09/04/us/push-is-on-for-larger-jury-in-military-capital-cases.html.

103. *Ring*, 536 U.S. at 609 (2002).

104. *U.S. Supreme Court:* Ring v. Arizona, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/u-s-supreme-court-ring-v-arizona (last visited Nov. 11, 2025).

105. Hannah Emory, *Who decides on life or death: judge or jury?*, CAMPBELL L. OBSERVER (Mar. 14, 2016) http://campbelllawobserver.com/who-decides-on-life-or-death-judge-or-jury (stating that the imposition of the death penalty despite a jury's recommendation of a life sentence is only allowed in three states—Florida, Alabama, and Delaware. In these states, a unanimous jury verdict is not required. For example, in Florida, only 10 of 12 jurors are required to impose the death penalty.); *see Unanimous juries are no longer required for Florida death penalty sentences*, ASSOCIATED PRESS (Apr. 20, 2023, 4:52 PM EDT), https://www.wusf.org/politics-issues/2023-04-20/unanimous-juries-are-no-longer-required-for-florida-death-penalty-sentences; *When Jurors Do Not Agree, Should a Death Sentence be Imposed?*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/when-jurors-do-not-agree-should-a-death-sentence-be-imposed.

mechanisms reflects a broader trend toward limiting judicial discretion, ensuring fewer opportunities for personal biases to dictate capital sentencing—once again challenging the narrative advanced by Trump's Executive Order.

Nowhere are the constitutional and ethical implications of jury override more apparent than in Alabama's capital punishment system, which reflects the erosion of jury authority and heightens the risk of arbitrary sentencing. In 1995, the Supreme Court upheld Alabama's capital sentencing scheme in *Harris v. Alabama*, allowing the trial judge to impose a death sentence after merely "considering" the jury's recommendation and finding that the Constitution was not violated if the scheme adequately channels the judge's discretion to prevent arbitrariness.[106] During that period, only three other states—Delaware, Florida, and Indiana—permitted judges to override jury verdicts.[107]

However, by 2013, when the Court ruled on *Woodward v. Alabama*,[108] jury overrides in these three states were almost nonexistent; only Alabama retained this practice. Justice Sotomayor dissented in the Court's denial of certiorari, challenging the constitutionality of jury override and its devastating effects:

Since Alabama adopted its current statute, its judges have imposed death sentences on 95 defendants contrary to a jury's verdict. Forty-three of these defendants remain on death row today. Because I harbor deep concerns about whether this practice offends the Sixth and Eighth Amendments, I would grant Woodward's petition for certiorari so that the Court could give this issue the close attention that it deserves.[109]

She further explained:

> In the nearly two decades since we decided *Harris*, the practice of judicial overrides has become increasingly rare. In the 1980's, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.[110]

These statistics, which clearly showed Alabama as an "outlier,"[111] caused Justice Sotomayor to ask, "*What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty?*"[112] Acknowledging that there is no evidence to suggest that criminal activity in Alabama is more prevalent than in other states, or that juries in Alabama are particularly lenient when considering aggravating and

106. 513 U.S. 504, 515 (1995).

107. Michael Radelet & G. Ben Cohen, *The Decline of the Judicial Override, Annual Review of Law and Social Science*, 15 ANN. REV. L. & SOC. SCI. 539, 545 (2009).

108. 571 U.S. 1045, 1045 (2013).

109. *Id.* at 1046 (Sotomayor, J., dissenting).

110. *Id.* at 1049.

111. *Id.*

112. *Id.* at 1050.

mitigating circumstances, she concluded that the only explanation is that judges in Alabama, who are elected through partisan processes, seem to have yielded to electoral pressures.[113] Citing several reputable reports and statistics, she explained that there is a statistically significant correlation between judicial overrides and election years in most counties where these overrides occur.[114]

One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had "'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,'" and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment.[115]

By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes. For example, Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict. In many cases, judges have done so without offering a meaningful explanation for the decision to disregard the jury's verdict. In sentencing a defendant with an IQ of 65, for example, one judge concluded that "'[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests.'"[116]

Although the Executive Order claims that judges and elected officials obstruct the enforcement of lawfully imposed death sentences to impose their personal beliefs, the historical record shows the opposite. The practice of judicial override in states that allowed it, such as Alabama, Florida, and Delaware, ultimately led to devastating outcomes for many capital defendants, undermining public confidence in fair sentencing and increasing the risk of wrongful executions. Today, with evolving constitutional interpretations and mounting evidence of its unfairness, jury override has been abolished, marking a significant shift toward honoring the community's voice in life-and-death decisions. Landmark rulings, such as *Hurst v. Florida* and *Apprendi v. New Jersey*, emphasized the Sixth Amendment's requirement that a jury decide key facts related to sentencing, prompting this change.[117] The current legal landscape demonstrates a return to emphasizing the jury's crucial role in capital sentencing and safeguarding against wrongful executions. As of 2025, no state that still employs the death penalty permits judicial override of the sentence.

113. *Id.*
114. *Id.*
115. *Id.* at 1050–51.
116. *Id.* at 1051.
117. Hurst v. Florida, 577 U.S. 92, 94 (2016) (ruling that Florida's procedure, which allowed a judge to independently find the existence of aggravating circumstances necessary for the imposition of the death penalty, violated the defendant's right to an impartial jury); Apprendi v. New Jersey, 530 U.S. 466 (2000).

While the judicial override of jury decisions has rightly drawn criticism for its role in imposing death sentences contrary to community judgment, it is far from the only mechanism that tilts the scales toward execution in capital cases. State court justices tend to uphold death sentences rather than overturn, executing their tough-on-crime platforms.[118] In one example, Tennessee Supreme Court justices up for reelection boasted that they had "uph[eld] nearly 90 percent of death sentences" during their reelection campaign.[119] Further, scholars conclude that reelection pressures weigh on judges in capital cases.[120]

Governors are also impacted by reelection pressures. Among governors not running for reelection, clemency is far more common; 56 percent of clemency grants were made by those who were not running for reelection, and 84.6 percent of individual clemencies were granted by governors who were not facing reelection. However, among governors with sole authority to make clemency decisions who were facing reelection, clemency was granted only four times in fifty years.[121]

This trend may be reversing now, however, as more prosecutors shift to campaigns against the death penalty, such as Pennsylvania District Attorney Larry Krasner.[122] Or, amazingly, in Harris County, Texas, Kim Ogg's 2016 election as District Attorney marked a pivotal shift in the county's approach to capital punishment.[123] Historically dubbed the "death penalty capital of the nation," Harris County had long led the country in executions.[124] But Ogg campaigned on reform, declaring that this reputation was not a badge of honor and promising to reserve the death penalty for only the "worst of the worst."[125] During her tenure, she declined to pursue death sentences in many cases, contributing to a dramatic drop in new capital prosecutions.[126] In 2017, Harris County did not execute or sentence anyone to death—a first time occurrence since 1985.[127] In addition, Ogg emphasized proportional justice, stating that

118. *Elected Judges Uphold More Death Sentences, Study Finds*, EQUAL JUST. INITIATIVE (Nov. 4, 2014), https://eji.org/news/study-elected-judges-uphold-more-death-sentences/.

119. *Death Penalty Information Center Releases New Report on Politicization of the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/death-penalty-information-center-releases-new-report-on-politicization-of-the-death-penalty.

120. Brandice Canes-Wrone, Tom S. Clark, & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 37–38 (2014).

121. DEATH PENALTY INFO. CTR., *Politicization of the Death Penalty*, *supra* note 119; *see New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, BRENNAN CTR. FOR JUST. (Dec. 2, 2015), https://www.brennancenter.org/our-work/analysis-opinion/new-analysis-judicial-re-election-pressures-tied-harsher-criminal.

122. *Id.*

123. Jolie McCullough, *Kim Ogg: DA Under Fire*, GARRISON PROJECT (Feb. 23, 2024), https://thegarrisonproject.org/ogg-da-under-fire/.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

safety was not measured by convictions but by whether punishment fit the crime.[128]

While the trend in some states may be changing, many states that have historically been in favor of the death penalty still have judges and district attorneys who run on a tough-on-crime platform.[129] There is substantial scholarly and journalistic evidence that, over the past thirty years, judges have often faced misleading or negative political campaigns claiming they are "soft on crime" or opposed to the death penalty, especially in states where judges are elected. Research shows that interest groups have, since the late 1970s, made strategic efforts to sway judicial elections by targeting judges perceived as hostile toward the death penalty.[130] These campaigns have clearly affected judicial retention outcomes, as seen in the 1986 electoral defeat of three California Supreme Court justices—including Chief Justice Rose Bird—who were removed primarily for their opposition to the death penalty.[131] For example, George Gascón, former district attorney of Los Angeles County, banned the seeking of the death penalty and lost reelection in 2024 to Nathan Hochman, who immediately stated he was bringing back the death penalty.[132]

This dynamic elevates the political ambitions of judges and prosecutors above the sanctity of human life, casting serious doubt on the constitutional integrity of the process. When electoral incentives influence capital charging or sentencing decisions, the impartial administration of justice is compromised. Such practices not only erode public trust but also risk violating fundamental constitutional protections, including the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process. In capital cases, where the consequences are irreversible, this distortion of priorities is not merely troubling—it is deeply incompatible with the principles of a fair and impartial legal system.

Appellate judges at all levels of the federal and state judicial branches are uniquely positioned to challenge the death penalty after reviewing the extensive record of inequities, injustices, and disparities in capital cases—not out of sentimentality or personal gain, as some tough-on-crime judges might, but because the sheer volume of systemic flaws makes it impossible to ignore.

---

128. *Id.*

129. *See Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFO. CTR. (Oct. 18, 1996), https://deathpenaltyinfo.org/research/analysis/reports/in-depth/killing-for-votes-the-dangers-of-politicizing-the-death-penalty-processs.

130. Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 37–38 (2014).

131. *Id.* at 32–35.

132. *See* Los Angeles County District Attorney's Office, DA Hochman Announces Important Policy Changes in Prosecutions of Murders with Special Circumstances (March 25, 2025), https://da.lacounty.gov/media/news/da-hochman-announces-important-policy-changes-prosecutions-murders-special-circumstances.

Take, for example, Judge Elsa Alcala of the Texas Court of Criminal Appeals, the state's highest court for criminal appeals.[133] When Justice Alcala first joined the court in 2011, she was relatively unknown.[134] She was the first new judge to be appointed in a decade, filling an empty seat after being appointed by then-Governor Rick Perry, a Republican.[135] Prior to this role, she had experience as an appellate judge, a district judge, and a prosecutor in Harris County, where she handled death penalty cases.[136] It took her at least a year to fully grasp the complexities of her caseload in what is often referred to as the busiest court in the country.[137]

At the beginning of her judicial career, Judge Alcala supported the death penalty, seeing it as an appropriate punishment for the "worst of the worst" offenders.[138] However, her views changed significantly during her time on the bench as she became more aware of the structural inequities in Texas's capital punishment system.[139] Alcala encountered numerous systemic failures: ineffective assistance of counsel, prosecutorial misconduct, suppression of exculpatory evidence, and a judicial tendency to prioritize finality over the accuracy of verdicts and sentences. In light of these persistent shortcomings and the growing number of exonerations resulting from post-conviction reviews, Alcala ultimately concluded that capital punishment should be abolished. Her stance reflected a belief that human fallibility renders any system of irreversible punishment fundamentally untenable.[140]

Judge Alcala's reevaluation of the death penalty is not an isolated incident within the court. In recent years, similar ideological shifts have occurred among other long-serving judges.[141] For instance, in 2014, former Republican Judge Tom Price publicly advocated for the abolition of capital punishment, marking a significant departure from traditional party beliefs.[142] Likewise, in 2016, Judge Larry Meyers—who switched from the Republican Party to the Democratic Party during his tenure—stated that life imprisonment without parole should be considered the state's most severe form of punishment.[143] These statements,

133. *See* Jolie McCullough, *Eight years on Texas' highest criminal court turned Elsa Alcala into a death penalty skeptic, How will the court change without her?*, TEX. TRIB. (Jan. 16, 2019, 12 AM CST), https://www.texastribune.org/2019/01/16/texas-court-of-criminal-appeals-elsa-alcala-departure/; *see also Elsa Alcala*, BALLOTPEDIA, https://ballotpedia.org/Elsa_Alcala (last visited July 28, 2025).

134. *Id.*

135. *Id.*

136. McCullough, *Kim Ogg*, *supra* note 123.

137. *Id.*

138. *Discussions with DPIC Podcast: Retired Judge Elsa Alcala on the Death Penalty in Texas*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/discussions-with-dpic-podcast-retired-judge-elsa-alcala-on-the-death-penalty-in-texas.

139. *Id.*

140. *Id.*

141. McCullough, *Kim Ogg*, *supra* note 123.

142. *Id.*

143. *Id.*

made toward the end of each judge's career, highlight a wider trend of critical reassessment of the moral, procedural, and systemic foundations of the death penalty within Texas's highest criminal court.

Like judges in the highest courts of the states, Supreme Court justices occupy a unique vantage point from which they witness firsthand the deep-seated inequities embedded within the national death penalty system. Throughout history, some justices who once upheld capital punishment have come to reject it entirely, often dissenting in pivotal cases and exposing the systemic flaws that make the practice deeply unjust. Their legal opinions document troubling patterns—racial bias, inadequate defense, wrongful convictions—that erode confidence in the fairness of the death penalty. Over time, these observations have led certain justices to renounce their earlier support, acknowledging that the system fails to deliver justice consistently. Their evolving stance highlights the profound moral and legal dilemmas that the highest court must confront when faced with matters of life and death.

Supreme Court Justice Harry A. Blackmun was nominated by President Richard M. Nixon and confirmed by the Senate in 1970. He served on the Court for twenty-four years. During that time, he struggled mightily with the implementation of the death penalty. Although he dissented in *Furman* in 1972, in 1994, he renounced the death penalty:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . to develop . . . rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . .
>
> Perhaps one day this court will develop procedural rules or verbal formulas that actually will provide consistency, fairness and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this court eventually will 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.' I may not live to see that day, but I have faith that eventually it will arrive. The path the court has chosen lessens us all.[144]

144. Callins v. Collins, 510 U.S. 1141, 1130–59 (1994) (Blackmun, J., dissenting) (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980)).

Twenty-one years later, in 2015, dissenting in *Glossip v. Gross*,[145] Justice Breyer explained why the death penalty experiment does not work:

> In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.
>
> I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishmen[t]."[146]

Presently, twenty-seven states, the federal government, and the military authorize the death penalty.[147] But as noted above, four states have gubernatorial holds on executions,[148] and in some states, the death penalty is infrequently sought.[149] For almost two decades, the federal government did not carry out any executions, reflecting a broader decline in capital punishment across the nation. This period of inactivity ended during President Trump's administration, which oversaw the execution of thirteen federal inmates in the final two years of his first term.[150]

Perhaps the most compelling argument against the death penalty is the risk of wrongful convictions—a reality underscored by the 201 exonerations of death row inmates since 1976. [151] Data from the National Registry of Exonerations and the Death Penalty Information Center highlight that official misconduct and perjury or false accusation are the leading contributors to these wrongful convictions, each playing a role in over two-thirds of homicide exonerations. Additional factors include false or misleading forensic evidence, inadequate

145. 576 U.S. 863 (2015).

146. *Id.* at 908–09 (citations omitted).

147. DEATH PENALTY INFO. CTR., *State by State*, *supra* note 71.

148. *Id.*

149. John Gramlich, *10 facts about the death penalty in the U.S. (2021)*, PEW RSCH. CTR. (July 19, 2021), https://www.pewresearch.org/short-reads/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/.

150. *See Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (last visited July 28, 2025); *Capital Punishment*, FED. BUREAU PRISONS, https://www.bop.gov/about/history/federal_executions.jsp (last visited July 28, 2025).

151. DEATH PENALTY INFO. CTR., *Facts*, *supra* note 74.

legal defense, and false or fabricated confessions, with inadequate representation and coerced or fabricated confessions implicated in a significant share of these cases.[152] This persistent risk of error demonstrates how systemic flaws undermine the reliability and fairness of capital punishment.

[T]he most recent data from the National Registry of Exonerations points to two factors as the most overwhelmingly prevalent causes of wrongful convictions in death penalty cases: official misconduct and perjury or false accusation. As of May 31, 2017, the Registry reports that official misconduct was a contributing factor in 571 of 836 homicide exonerations 68.3%, very often in combination with perjury or false accusation […] and false or fabricated confessions were present in more than a fifth of the exonerations (182, 21.8%). The Registry lists inadequate legal representation at trial as a contributing factor in more than a quarter (218, 26.1%) of these wrongful homicide convictions.

Two 2017 reports from the National Registry of Exonerations, *Exonerations in 2016* and *Race and Wrongful Convictions in the United States*, elucidate a link between race of the defendant and official misconduct in wrongful capital prosecutions:

> 54 of the 2016 exonerations — nearly a third — involved wrongful homicide convictions. At least 13 of these cases involved the wrongful use of the death penalty — meaning that the death penalty played a role in nearly a quarter of the 54 homicide exonerations in 2016. Every one of these wrongful convictions involved either official misconduct or perjured testimony/false accusation, and eleven (84.6%) of them involved both. The National Registry's race report documents that the "rate of official misconduct is considerably higher among murder exonerations with black defendants than those with white defendants, 76% compared to 63%. The rate of misconduct is higher overall in capital cases, and the difference by race is greater: 87% of black exonerees who were sentenced to death were victims of official misconduct, compared to 67% of white death-row exonerees.[153]

Since the reinstatement of the death penalty in the United States in 1976,[154] the system has faced significant issues. These issues include arbitrariness, racial disparities, ineffective legal counsel, and concerning cases involving the execution of individuals with mental illnesses and intellectual disabilities. Trump's executive order belies the stark realities of the flawed implementation of the death penalty, ignoring well-documented reports and ample evidence that the system is profoundly ineffective.

---

152. *DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions (last visited July 28, 2025).

153. *Id.*

154. Gregg v. Georgia, 428 U.S. 153, 207 (1976).

D. Biden's Moratorium vs. Trump's Death Penalty Agenda: A Tale of Two Justice Systems

Section 1 of the executive order continues:

When President Biden took office in 2021, he allowed his Department of Justice to issue a moratorium on Federal executions, in defiance of his duty to faithfully execute the laws of the United States that provide for capital punishment. And on December 23, 2024, President Biden commuted the sentences of 37 of the 40 most vile and sadistic rapists, child molesters, and murderers on Federal death row: remorseless criminals who brutalized young children, strangled and drowned their victims, and hunted strangers for sport. He commuted their sentences even though the laws of our Nation have always protected victims by applying capital punishment to barbaric acts like theirs. Judges who oppose capital punishment have likewise disregarded the law by falsely claiming that capital punishment is unconstitutional, even though the Constitution explicitly acknowledges the legality of capital punishment.

These efforts to subvert and undermine capital punishment defy the laws of our nation, make a mockery of justice, and insult the victims of these horrible crimes. The Government's most solemn responsibility is to protect its citizens from abhorrent acts, and my Administration will not tolerate efforts to stymie and eviscerate the laws that authorize capital punishment against those who commit horrible acts of violence against American citizens.[155]

On July 1, 2021, shortly after President Biden took office, Attorney General Merrick Garland issued a memorandum imposing a moratorium on federal executions.[156] The moratorium's purpose reflected the Biden administration's recognition of the death penalty system's inherent flaws.[157]

The Department of Justice must ensure that everyone in the federal criminal justice system is not only afforded the rights guaranteed by the Constitution and laws of the United States, but is also treated fairly and humanely. That obligation has special force in capital cases.

In the last two years, the Department made a series of changes to its policies and procedures in this area. Those changes were accompanied by the first federal executions in nearly two decades. To ensure that the Department's policies and procedures are consistent with the principles articulated in this memorandum, I am asking the Deputy Attorney General to undertake and supervise the following reviews.[158]

This moratorium sought to address the procedural violations and ethical concerns raised during Trump's first presidency when his administration

155. Exec. Order No. 14164, 90 Fed. Reg. at 8463.
156. Memorandum from Merrick Garland, *supra* note 16.
157. *Id.*
158. *Id.*

expedited the execution of thirteen individuals in just six months—the most in over a century.[159] This unprecedented rush to execute so many individuals, often bypassing established protocols and disregarding legal and procedural norms, required then Attorney General Barr to revise and amend federal capital regulations to achieve the administration's goals.[160] For instance, some executions proceeded despite pending appeals, and questionable practices were employed, such as using drugs from unverified sources and hiring private executioners paid in cash.[161] Attorney General Merrick Garland halted all federal executions while conducting a comprehensive review of the Justice Department's execution policies and protocols.[162] This decision reversed former Attorney General William Barr's directive to resume federal executions after a 17-year pause.[163] Garland's memorandum specifically aimed to address the revisions made by Barr in December 2020, which had expanded execution methods beyond lethal injection to include practices such as electrocution and firing squads.[164] During the review, Garland instructed the Bureau of Prisons (BOP) to halt the use of pentobarbital—a short-acting barbiturate that acts as a central nervous system depressant—because some medical experts had concluded it might cause pulmonary edema.[165] Garland had also revoked Barr's aggressive stance on capital punishment, which had focused on expedited executions and increased eligibility, by ordering a review of Barr's amendments to Title 9, Chapter 10 of the Justice Manual.[166]

The last person executed by Trump's administration was Dustin Higgs, who was executed on January 16, 2021, just five days before President Biden's inauguration.[167] In Higgs's unsuccessful appeal to the United States Supreme

159. *See* Isaac Arnsdorf, *Inside Trump and Barr's Last-Minute Killing Spree*, PROPUBLICA (Dec. 23, 2020), https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree; *see also* Khaleda Rahman, *Trump Admin Spent Millions Carrying Out Federal Executions*, NEWSWEEK (Jan. 14, 2021), https://www.newsweek.com/trump-admin-spent-millions-carrying-out-federal-executions-pandemic-1560496.

160. Arnsdorf, *supra* note 159.

161. *Id.*

162. Memorandum from Merrick Garland, *supra* note 16.

163. *Id.*

164. *Id.*

165. *Id.* (showing the memorandum stated:

Although some medical experts have concluded that the use of pentobarbital may risk inflicting painful pulmonary edema, the Supreme Court found that this risk was insufficient "to justify last-minute intervention by a Federal Court" shortly before an execution was scheduled to occur. Barr v. Lee, 591 U.S. 979, 981 (2020) (per curiam). A risk need not meet the Court's high threshold for such relief, or violate the Eighth Amendment, to raise important questions about our responsibility to treat individuals humanely and avoid unnecessary pain and suffering.)

166. *Id.*

167. Hailey Fuchs, *U.S. Executes Dustin Higgs for Role in 3 1996 Murders*, N.Y TIMES (Jan. 16, 2021) https://www.nytimes.com/2021/01/16/us/politics/dustin-higgs-executed.html.

Court, Justices Breyer and Sotomayor dissented.[168] Justice Breyer expounded upon a litany of legal questions regarding the executions carried out during Trump's first term. These legal questions included the use of pentobarbital as a method of execution, consideration of mental incompetency and intellectual disabilities, successive challenges of habeas corpus, and inadequate counsel during initial habeas challenges.[169] Citing the court's own rule, where the case must be "of such imperative public importance as to justify deviation from normal appellate practice," Breyer alluded to the problem in our legal system where an individual would be executed without answering the novel legal question presented by the instant case.[170]

The execution served as a stark illustration of the widening ideological fissures within the Supreme Court.[171] Instead of exercising caution and giving a brief delay—which could have allowed the court to resolve lingering legal uncertainties and the incoming administration to reassess the government's position—the majority pressed ahead with surprising determination. This decision fits into an increasingly discernible pattern: the Court's conservative bloc aligning with the Trump administration's agenda, often at the expense of procedural thoroughness and impartiality.

What distinguishes *Higgs* is the presence of significant concerns regarding the validity of the conviction. Given the gravity and finality of the outcome, one might expect the Court to embody the highest virtues of legal prudence. Instead, the rush to carry out the execution cast a long shadow over the judiciary's role as a neutral arbiter. It raised unsettling doubts about the influence of partisanship in matters of life and death.

In addition to joining Justice Breyer's dissent, Justice Sotomayor wrote a separate scathing dissent in the *Higgs* opinion, highlighting the deliberate and reckless trampling of procedures.[172] She raised concerns about both the DOJ's and the Court's actions in a historic and unprecedented rush of federal executions.[173] She condemned the DOJ's decision to schedule and pursue executions at a rapid pace, forcing those facing execution to "fast-track challenges to their sentences"[174] and not allowing courts enough time to determine if the executions were even legal.[175] She also argued that, after waiting nearly two decades to resume executions, the government should have acted with

168. United States v. Higgs, 141 S. Ct. 645 (2021) (Breyer, J., dissenting & Sotomayor, J., dissenting).

169. *Id.* at 645–46 (Breyer, J., dissenting).

170. *Id.* at 646.

171. Fuchs, *supra* note 167.

172. 141 S. Ct. at 647 (Sotomayor, J., dissenting).

173. *Id.*

174. *Id.*

175. *Id.*

restraint to ensure legality and fairness.[176] Instead, the DOJ "consistently refused to postpone executions and sought emergency relief to proceed before courts had meaningful opportunities to determine if the executions were legal."[177] She highlighted significant, unresolved legal issues, such as the interpretation of the Federal Death Penalty Act and the constitutionality of the DOJ's 2019 single-drug (pentobarbital) execution protocol, which were not given adequate judicial scrutiny.[178] She argued that the Government sought and obtained 13 executions despite its knowledge that the use of pentobarbital would result in further litigation. To Sotomayor, this marked a stark contrast to how the government had acted in the past, where the only executions enacted under the Federal Death Penalty Act were the two executions in 2001 and one execution in 2003, respectively.[179] Not only did the government proceed in the face of "deep legal uncertainty," she said, but the government opposed postponements and sought expedited emergency relief so the executions could proceed before courts had an adequate opportunity to assess whether they were lawful.[180]

Justice Sotomayor also criticized the Supreme Court:

> Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. 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.[181]

The legal concerns raised by Justices Breyer and Sotomayor—especially regarding the fairness, consistency, and constitutionality of the death penalty—highlight the compelling reasons behind President Biden's DOJ instating an immediate moratorium on federal executions. Contrary to the language in Trump's executive order, Biden did not "issue a moratorium . . . in defiance of his duty to faithfully execute the laws of the United States."[182] Instead, this decisive action reflects a profound commitment to rigorously scrutinize critical

176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

and unresolved issues, such as the potential for racial bias, procedural errors, and the grave risk of executing innocent individuals.

By pausing all executions, President Biden's DOJ sought to ensure that the implementation of the death penalty was not only just but also firmly rooted in the principles of equity and due process. Attorney General Merrick Garland's memorandum recognized the significant flaws in the system.[183] Those "weighty concerns"—arbitrariness, racial disparity, and the troubling number of exonerations—the memo stated, warrant careful study and evaluation by lawmakers.[184] He reiterated the DOJ's commitment to fairness and humane treatment in the administration of capital sentencing laws.[185]

The memorandum called for a swift review of the November 27, 2020, amendments to the Code of Federal Regulations and changes to Title 9, Chapter 10 of the Justice Manual made under Trump's DOJ.[186] Garland stated that the changes were "a departure from longstanding practice" and needed to be reviewed to determine whether they should be rescinded or modified.[187]

On January 25, 2022, Lisa Monaco, the Deputy Attorney General, unveiled a series of immediate changes to the Department's procedures regarding death-eligible cases.[188] These reforms were designed to enhance the principles of fairness and justice while curtailing unnecessary delays in capital prosecutions that are manifestly unwarranted.[189] Monaco further indicated that the Department's review of Title 9 of the Justice Manual would be an ongoing effort, reflecting a commitment to continual improvement in the justice system.[190]

To those who are uninformed, the rhetoric in Trump's executive order might seem consistent with his campaign's tough-on-crime stance, portraying Biden's administration as weak on enforcing capital punishment. Throughout his campaign, Trump promised to expand the federal death penalty to include crimes such as child rape, the killing of U.S. citizens by undocumented migrants, and drug and human trafficking, stating, "These are terrible, terrible, horrible people who are responsible for death, carnage, and crime all over the country."[191] However, for those familiar with the systemic issues surrounding the death penalty, this directive appears to be a calculated strategy to galvanize political

183. Memorandum from Merrick Garland, *supra* note 16.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Memorandum from Lisa Monoco, Deputy Att'y Gen., on Interim Changes to Procedures for Authorization Not to Seek the Death Penalty (Jan. 25, 2022), https://www.justice.gov/oip/foia-library/general_topics/dag_memo_capital_protocol_%20changes/dl.

189. *Id.*

190. *Id.*

191. Erik Ortiz, *Trump wants to expand the federal death penalty, setting up legal challenges in second term* (Nov. 9, 2024, 6:00 AM CST), NBC NEWS, https://www.nbcnews.com/politics/2024-election/trump-wants-expand-federal-death-penalty-setting-legal-challenges-seco-rcna178979.

support while deflecting attention from the inherent flaws in the system. This maneuver—prioritizing political optics over addressing systemic issues—can erode trust in governance.[192] By ignoring the deep-rooted flaws in the death penalty system, such as racial bias and wrongful convictions, Trump's executive order shifts focus to a narrative of strength and control. This approach, often seen in regimes where the rule of law is secondary to political agendas,[193] risks undermining the principles of justice it claims to uphold. It's a stark reminder of how policy can be wielded as a tool for personal ambition, fostering division and ignoring the critical need for meaningful reform.

President Biden is not the only leader in the United States who has raised significant concerns regarding the death penalty and called for a moratorium. When Oregon Governor John Kitzhaber instituted a moratorium on the death penalty in 2011, he stated that he was opposed to capital punishment.[194] He expressed regret for allowing the two executions that occurred during his tenure in 1996 and 1997.[195] Further, he would not allow it for the rest of his term. He also granted a reprieve to another individual on death row, and the moratorium has remained in place ever since.[196]

In 2015, Pennsylvania Governor Tom Wolf stated that he had effectively put a moratorium on the death penalty in Pennsylvania, noting that capital punishment was expensive, ineffective, and inaccurate due to six Pennsylvania men being exonerated from death row.[197] He also noted that it was in no way an expression of sympathy, but the cost of the penalty outweighed its utility.[198] He granted a reprieve for the current death row inmates who had their executions scheduled, and the moratorium on the death penalty has remained in place ever since.[199] In 2023, when Governor Shapiro was elected, he continued the moratorium.[200] Moreover, he urged the Pennsylvania General Assembly to repeal capital punishment.[201]

---

192. Saul Lehrfreund, *The Politics of the Death Penalty – Trump's Legacy of Violence*, DEATH PENALTY RSCH. UNIT (Jan. 11, 2021), https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/01/politics-death-penalty-trumps.

193. Dunia Schaffa, *How the Death Penalty is Politicized: A Reflection on the 8th World Congress Against the Death Penalty*, WORLD COAL. AGAINST DEATH PENALTY (Jan. 27, 2023), https://worldcoalition.org/2023/01/27/how-the-death-penalty-is-politicized-8th-world-congress/.

194. Jonathan J. Cooper, *Oregon court upholds governor's execution delay*, ASSOCIATED PRESS (June 20, 2013), https://apnews.com/article/73c010e8179e4b328b0fb08bbcc1ece6.

195. *Id.*

196. *Id.*

197. Sara Begley, *Pennsylvania Stops Using the Death Penalty*, TIME (Feb. 13, 2015, 11:37 AM EST),
https://time.com/3709215/death-penalty-pennsylvania-moratorium.

198. *Id.*

199. *Id.*

200. *Pennsylvania*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania (last visited November 11, 2025).

201. *Id.*

Trump's executive order reveals his contempt for President Biden's decision to commute the death sentences of nearly all federal death row prisoners to life in prison. Biden's weighty decision, rooted in his commitment to justice and opposition to the death penalty, demonstrates his compassion and empathy and reinforces his legacy as a leader dedicated to fairness and racial justice. On one hand, the commutation of thirty-seven individuals' sentences acknowledges the systemic flaws in the criminal legal system and prioritizes justice over vengeance. On the other hand, the authorization of executions under the guise of political optics risks perpetuating those flaws and undermining the integrity of the justice system. The contrast between these approaches reveals a fundamental choice: whether to confront the structural injustices embedded in the death penalty system or to lean into the politics of retribution. Trump's executive order, particularly its language criticizing Biden's commutations, underscores his frustration at being denied the opportunity to build a legacy of federal executions—an effort that would reinforce his tough-on-crime image. He dismissed Biden's clemency decisions as "mak[ing] no sense," and pledged to "vigorously pursue" the death penalty.[202] This reaction appears driven less by a commitment to legal principles or public safety and more by a desire to sustain provocative rhetoric that energizes his political base. By positioning himself as a defender of law and order, Trump deflects attention from the systemic flaws in capital punishment and advances a narrative that favors political expediency over meaningful reform. This anger seems less about upholding legal principles or fulfilling the government's duty to protect its citizens and more about promoting incendiary rhetoric to rally his base. By framing himself as a champion of law and order, Trump masks the deeper flaws in the justice system and perpetuates a narrative that prioritizes political gain over genuine reform.

The order vividly illustrates the contradictions inherent in his approach to justice. On one side, Trump's executive order conveys a hardline stance on crime, signaling a commitment to strict legal enforcement. Conversely, the selective pardons extended to January 6 insurrectionists prioritize political allegiance over the unwavering application of legal principles. On the first day of his second term, President Trump pardoned fourteen leading January 6 offenders, including leaders of the Oath Keepers and Proud Boys, and issued a full, unconditional pardon to about 1,560 individuals charged in connection with the Capitol attack, even those convicted of violent assaults on law enforcement.[203] Both the Oath Keepers and the Proud Boys are male-dominated and militaristic. The Proud Boys are frequently linked with neo-fascist, white

202. Erik Ortiz, *Trump wants to expand the federal death penalty, setting up legal challenges in second term* (Nov. 9, 2024, 6:00 AM CST), NBC NEWS, https://www.nbcnews.com/politics/2024-election/trump-wants-expand-federal-death-penalty-setting-legal-challenges-seco-rcna178979.

203. Ivana Saric, *The most notorious Jan. 6 defendants pardoned by Trump*, AXIOS (Jan. 21, 2025), https://www.axios.com/2025/01/21/trump-jan-6-pardons-j6-proud-boys-oath-keepers.

nationalist, and misogynist beliefs. They claim to oppose "leftist suppression," but are widely associated with white supremacy.[204] Many of those called "patriots" had serious criminal histories, with previous convictions or pending charges for offenses such as rape, sexual abuse of minors, and manslaughter.[205] While these pardons did not erase unrelated past crimes, they effectively protected recipients from accountability for their actions on January 6th.[206] Since then, some pardoned individuals have been rearrested for new offenses, including violent confrontations with police. Among the clemencies were 169 individuals who pleaded guilty to assaulting police officers during the Capitol riot.[207] That day, over eighty U.S. Capitol Police officers and more than sixty officers from the Washington, D.C. Metropolitan Police Department were assaulted, marking one of the largest single-day attacks on law enforcement in U.S. history.[208] The hypocrisy in all this has not gone unnoticed.[209] In a scathing statement, Janai Nelson, President and Director-Counsel of the NAACP Legal Defense Fund (LDF), condemned President Trump's executive actions related to capital punishment and pardons in early 2025:

> In the same week that he selectively pardoned and commuted the sentences of roughly 1,500 people connected to the overthrowing of our democratic process and whose actions contributed to the injury and death of law enforcement officers, President Trump is also now ordering the death penalty to be more fervently pursued for individuals who murder law enforcement officers – conveniently excluding the people whose sentences he commuted and pardoned that were willing to exercise violence against law enforcement to undermine democracy in his name.[210]

Trump's angry rhetoric at Biden's commutation of "the most vile and sadistic…murderers on death row"[211] ignores Trump's own record of executive clemency at the end of his first presidency. On December 22, 2020, President

---

204. Jarret Bencks, *The Proud Boys, the Oath Keepers and jihadist extremists: What they have in common and what they don't,* BRANDEISNOW (June 13, 2022), https://www.brandeis.edu/now/2022/june/klausen-proud-boys-oath-keepers-jihadists.html.

205. *Id.*

206. Press Release, Sen. Sheldon Whitehouse, Senate Republicans Block Resolution Condemning Pardons of Violent J6 Offenders (Feb. 3, 2025), https://www.whitehouse.senate.gov/news/release/senate-republicans-block-resolution-condemning-pardons-of-violent-j6-offenders/.

207. *Id.*

208. *Id.*

209. *Id.*

210. *LDF Condemns President Trump's Executive Order Expanding the Federal Death Penalty,* LEGAL DEF. FUND (Jan. 23, 2025), https://www.naacpldf.org/press-release/ldf-condemns-president-trumps-executive-order-expanding-the-federal-death-penalty/#:~:text=Legal%20Defense%20Fund%20(LDF)%20President%20and%20Director%2DCounsel%20Janai%20Nelson.

211. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

Trump granted several controversial pardons, including those of four former Blackwater security contractors involved in the 2007 killings of more than a dozen unarmed Iraqi civilians.[212] These guards were serving prison sentences for their involvement in the killing of fourteen civilians, including two children, in Baghdad in 2007.[213] This massacre sparked international outrage over the use of mercenaries in warfare.[214] The four guards—Paul Slough, Evan Liberty, Dustin Heard, and Nicholas Slatten—were part of an armored convoy that opened fire indiscriminately on a crowd of unarmed people in a square in the Iraqi capital using machine guns, grenade launchers, and a sniper.[215] In 2014, Slough, Liberty, and Heard were convicted on multiple charges of voluntary and attempted manslaughter.[216] Slatten, who initiated the shooting, was convicted of first-degree murder.[217] As a result, Slatten received a life sentence, while the others were each sentenced to 30 years in prison.[218]

These pardons, along with the pardoning of corrupt political allies convicted of crimes, was one of the most shocking actions taken by Trump during his first presidency.[219] Trump also issued several controversial pardons and commutations, some of which included individuals convicted of serious crimes like murder and drug trafficking.[220] Infamous pardons include Michael Flynn, Roger Stone, Paul Manafort, Charles Kushner, Joe Arpaio, and Steve Bannon. Michael Flynn, Trump's former National Security Adviser, pleaded guilty to lying to the FBI about contacts with a Russian Ambassador, in violation of 18 U.S.C. § 1901.[221] Roger Stone, a longtime Trump ally and political consultant, was found guilty of obstruction, false statements, and witness tampering during an investigation by Congress.[222] Paul Manafort, Trump's

212. *See* Sebastian Murdock, *Trump's parting Clemency List: Steve Bannon, Lil Wayne And More*, HUFFPOST (Jan. 20, 2021, 01:10 AM EST), https://www.huffpost.com/entry/donald-trump-pardons_n_5fe4b87dc5b6e1ce8338ec5a; *see also Pardons Granted by President Donald J. Trump (2017-2021)*, U.S DEP'T OF JUST. (Oct. 23, 2024), https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021.

213. Michael Safi, *Trump pardons Blackwater contractors jailed for massacre of Iraq civilians*, GUARDIAN (Dec. 23, 2020, at 04:32 EST), https://www.theguardian.com/world/2020/dec/23/trump-pardons-blackwater-contractors-jailed-for-massacre-of-iraq-civilians [https://perma.cc/A3FF-S2JK].

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Murdock, *supra* note 212.

220. *Pardons Granted by President Donald J. Trump (2017-2021)*, U.S. DEP'T OF JUST. (Oct. 23, 2024), https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021.

221. David A. Sklansky, *DOJ Drops Charges Against Former National Security Advisor Michael Flynn*, STAN. L. SCH. (May 11, 2020), https://law.stanford.edu/2020/05/11/doj-drops-charges-against-former-national-security-advisor-michael-flynn/.

222. Press Release, U.S Att'y's Office D.C., Roger Stone Found Guilty of Obstruction, False Statements, and Witness Tampering (Dec. 4, 2019), https://www.justice.gov/usao-dc/pr/roger-stone-found-guilty-obstruction-false-statements-and-witness-tampering.

former campaign chairman, was convicted of money laundering, tax fraud, and illegal foreign lobbying during the Mueller investigation.[223] Charles Kushner, the father of Trump's son-in-law, was convicted of tax evasion, witness tampering, and illegal campaign contributions.[224] Joe Arpaio, former sheriff of Maricopa County, Arizona, was convicted of criminal contempt for disobeying a federal judge's order to stop racial profiling in detaining individuals.[225] Lastly, Steve Bannon, Trump's former strategist, was sentenced to four months of incarceration on two counts of contempt of Congress.

These decisions sparked widespread controversy, with critics arguing that they eroded the integrity of the justice system, while proponents framed them as expressions of mercy or strategic alignment with political priorities. It's a stark reminder of how the power of clemency can be wielded in ways that generate public backlash and deeper contemplation about the boundaries of executive power.

The final paragraph of Section 1 of Trump's executive order asserts that judges who oppose capital punishment demonstrate a clear disregard for the law. This statement reflects a troubling misunderstanding of the judiciary and the legal principles that guide its decisions. While the Supreme Court has never declared the death penalty itself unconstitutional in the United States, it has recognized serious flaws associated with it and has taken significant action to curtail its use. The Court's landmark ruling in *Furman* had a profound impact on the death penalty across the country. It struck down the death penalty statutes of all states and the federal government as unconstitutional, resulting in the commutation of sentences for over 600 death row defendants.[226] This important ruling, which angered many, underscored the judiciary's authority to determine the constitutionality of laws.[227] The courts are responsible for ensuring that laws governing capital punishment comply with constitutional principles. Ignoring this critical function, Trump's executive order risks distorting public understanding of the judiciary's essential role in safeguarding justice. Since 1972, the Court has made many significant decisions regarding the constitutionality of death penalty statutes in the country, abolishing the death penalty for various crimes. The primary purpose of the Court's review of

223. *Manafort sentenced to additional 43 months in prison*, A.B.A., https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/manafort-sentenced-to-47-months/ (last visited July 28, 2025).

224. *Political Contributor and Developer Charles Kushner Sentenced to Maximum 24 Months for Witness Retaliation and Other Crimes*, U.S. DEP'T OF JUST. (Mar. 4, 2005), https://www.justice.gov/archive/tax/usaopress/2005/txdv05kush0304_r.htm.

225. Brian Tashman, *Arizona Voters Deserve to Know Joe Arpaio's True Record of Brutality and Abuse*, ACLU (Aug. 25, 2019), https://www.aclu.org/news/criminal-law-reform/arizona-voters-deserve-know-joe-arpaios-true-record-brutality-and-abuse.

226. 408 U.S at 239–40.

227. *Id.*

potentially unconstitutional provisions is to assert its role as the arbiter of the law and ensure that the laws enacted in this country comply with the fundamental principles of the Constitution. Accusing judges who uphold these principles of undermining a vibrant democracy could lead the country down a path of lawlessness and chaos, as seen in other authoritarian governments.

Section 1 of Trump's executive order ends with powerful and emotionally charged language. It accuses judges and politicians of "subverting the law" and making a "mockery of justice." The order asserts that President Biden's commutations of death sentences "insult the victims" and states that the Trump administration "will not tolerate efforts to stymie and eviscerate" capital punishment. The lofty rhetoric about restoring justice and upholding the rule of law becomes quite ironic when contrasted with the chaotic and legally questionable actions of Trump's first 100 days in his second term. The administration's moral absolutism and calls for justice ring hollow, given that its actions have undermined the very principles it professes to defend.

Efforts to abolish capital punishment in the United States are not an affront to justice—they are a response to its ongoing failure. Far from "subverting the law," these efforts aim to uphold the Constitution's guarantees of due process and equal protection by challenging a system that has repeatedly proven to be racially biased, error-prone, and morally inconsistent. The idea that ending the death penalty "insults victims" ignores the growing number of victims' families who oppose executions, recognizing that true justice is not served by perpetuating a system riddled with wrongful convictions, prosecutorial misconduct, and arbitrary outcomes.

What truly makes a mockery of justice is a government that continues to pursue and expedite executions despite overwhelming evidence of systemic flaws. Moreover, invoking the "solemn responsibility" to protect citizens sounds performative when juxtaposed with President Trump's sweeping pardons of January 6 insurrectionists, many of whom violently assaulted law enforcement officers and caused millions in damage to the U.S. Capitol. These pardons, which absolved over 1,500 individuals and erased more than $1.3 billion in restitution owed to victims and taxpayers,[228] undermine the very rule of law that capital punishment is purported to defend. If the government's duty is to protect its citizens from "abhorrent acts," then excusing political violence while accelerating executions reveals a troubling double standard—one that prioritizes political loyalty over public safety and retribution over reform.

228. *See* Scott MacFarlane, *Trump pardons cost victims, taxpayers $1.3 billion, House Democrats' review says*, MSN (June 17, 2025), https://www.msn.com/en-us/news/crime/trump-pardons-cost-victims-taxpayers-13-billion-house-democrats-review-says/ar-AA1GTZCE; *see also* Sara Dorn, *Trump pardons allowed recipients to skirt more than $1.3B in restitution*, FORBES (July 4, 2025, at 6:00 AM EDT), https://www.forbes.com/sites/saradorn/2025/07/04/trumps-pardons-cost-at-least-15-billion-in-restitution/.

Moreover, the Executive Order's bombastic rhetoric falls flat in light of the policies the Trump administration has implemented, which, according to a leading human rights organization, has fostered a climate of fear and instability.[229] These actions include mass deportations, severe restrictions on the right to seek asylum, and the suppression of dissent and peaceful protest.[230] Beyond the immediate harm to vulnerable communities, these measures have undermined core legal norms and democratic institutions—weakening the very foundations meant to safeguard civil liberties and protect the rights of all citizens. Federal judges have ruled that Trump's executive orders targeting disfavored law firms violated the First and Fifth Amendments, the right to legal counsel, and the separation of powers.[231] His administration has also been accused of retaliating against attorneys, suppressing dissent, and freezing foreign aid in ways that legal experts say exceed presidential authority and create global instability.[232]

In this light, efforts to reform or abolish capital punishment are not attempts to "eviscerate" the law—they are efforts to *restore* its integrity. What truly makes a mockery of justice is a government that invokes solemn duty while disregarding constitutional protections, weaponizing executive power, and eroding the very institutions meant to safeguard democracy.

PART II: SECTION 2, MISCHARACTERIZING THE COURTS: HOW TRUMP'S EXECUTIVE ORDER UNDERMINES JUDICIAL INDEPENDENCE

Section 2 of the order reads as follows:

Policy. It is the policy of the United States to ensure that the laws that authorize capital punishment are respected and faithfully implemented, and to counteract the politicians and judges who subvert the law by obstructing and preventing the execution of capital sentences.[233]

This statement misrepresents the roles of both state and federal judges by suggesting that judicial decisions defending constitutional protections are acts of rebellion rather than legitimate exercises of judicial review. In the American legal system, judges are not policymakers; their role is to interpret and enforce the law, including the Constitution, in each case. When courts delay executions, overturn death sentences, or review methods of execution, they are not obstructing the law; they are ensuring the law aligns with constitutional

229. *US: Trump's First 100 Days an Assault on Rights Compilation of 100 Harmful Actions Offers Snapshot of Unfolding Crisis*, HUM. RTS. WATCH (Apr. 24, 2025, at 01:01 ET), https://www.hrw.org/news/2025/04/24/us-trumps-first-100-days-assault-rights.

230. *Id.*

231. Jacob Sullum, *A Federal Judge Lists 8 Ways That Trump Violated the Constitution by Punishing a Disfavored Law Firm*, REASON (May 28, 2025, at 15:15 PST), https://reason.com/2025/05/28/a-federal-judge-lists-8-ways-that-trump-violated-the-constitution-by-punishing-a-disfavored-law-firm/.

232. *Id.*

233. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

guarantees such as due process, equal protection, and the Eighth Amendment's ban on cruel and unusual punishment.

Judges and politicians who scrutinize the process aim to uphold these principles by ensuring that no one is wrongfully executed and that all legal avenues are exhausted. The death penalty is irreversible. Judicial review, including stays or halts to executions, is a vital safeguard to prevent wrongful executions and ensure all legal avenues and evidence are fully considered. This is a core function of an independent judiciary, not an act of subversion. Since 1976, over 200 individuals have been exonerated from death row in the United States, demonstrating the real risk of executing innocent people.[234] Additionally, governors are empowered to grant clemency or commutation when there is evidence of unfair trials, new evidence, or humanitarian concerns. This is a legitimate and historically established part of the justice system, not an obstruction to it.

By framing judicial oversight as obstruction, this statement in Trump's executive order undermines the principle of separation of powers. Halting an execution based on a wrongful conviction is a form of judicial independence that highlights the judiciary's constitutional role as an impartial check on the executive and legislative branches of government, as well as a defender of individual rights. This statement conflates lawful judicial review with political opposition, distorting the judiciary's essential function in a constitutional democracy. The United States Constitution shields the judiciary from political pressure by granting federal judges lifetime appointments and protecting their salaries, specifically so they can make decisions—such as delaying or halting executions—without fear of retaliation from the executive or legislative branches.[235] This independence ensures that courts can serve as a check on government power, even when their rulings are unpopular or go against the wishes of elected officials. Judicial independence means the courts must be free to review, question, and, if necessary, stop government actions that threaten fundamental rights, including the right to life.[236] This is a cornerstone of our democracy and the rule of law, not an act of obstruction.

Moreover, the suggestion that judges "subvert the law" by ruling against capital punishment in specific cases overlooks the complex legal standards that guide such decisions. For example, state and federal courts often review death penalty cases through habeas corpus petitions, where they must determine whether a conviction or sentence violated established federal law. These rulings

234. DEATH PENALTY INFO. CTR., *Facts*, *supra* note 74.

235. *See* Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, A.B.A. (Nov. 6, 2019), https://www.americanbar.org/groups/litigation/about/awards-initiatives/american-judicial-system/threats-to-judicial-independence-and-rule-of-law/.

236. *See id.*

are grounded in precedent and statutory interpretation, rather than personal ideology.

As previously noted, the quintessential exercise of judicial review in capital jurisprudence is *Furman*, in which the Supreme Court struck down the death penalty statutes of all states as unconstitutional, marking a pivotal moment in Eighth Amendment jurisprudence and reshaping the landscape of capital punishment nationwide.[237] Since the *Furman* decision, the Supreme Court has examined the death penalty statutes of various states and declared some provisions unconstitutional. When justices assess the constitutionality of these provisions, they fulfill their essential role as interpreters and guardians of the Constitution. Their rulings help ensure that laws are enforced consistently and without bias, preserving the integrity of the justice system. Rather than weakening the law, this process reinforces it by ensuring that its application reflects constitutional values and a genuine commitment to fairness—that is, equal protection under the law, due process, and protection from arbitrary or discriminatory practices. The judiciary plays a vital role in balancing accountability with justice by identifying and correcting systemic flaws. For example, over the past three decades, the Supreme Court has invalidated multiple provisions of Florida's death penalty statute for failing to meet constitutional standards.

In 1982, in *Enmund v. Florida*,[238] the Supreme Court struck down as unconstitutional a provision of Florida's death penalty statute that allowed the death penalty to be imposed on a defendant solely because he was a "constructive aider and abettor."[239] It held that the Eighth Amendment's prohibition on cruel and unusual punishment forbids imposing the death penalty on a defendant who did not kill, attempt to kill, or intend that a killing take place during the commission of a felony.[240] Emphasizing that a death penalty statute must satisfy the goals of retribution and deterrence to comply with the Eighth Amendment, the Court concluded that sentencing someone to death solely for being present at the scene of a murder—without having killed, attempted to kill, or intended for a killing to occur—violates the Constitution.[241] With respect to retribution, the court found that there was no retribution to be had when the degree of culpability (and the lack of his intention for a murder) did not match the defendant's personal

237. 408 U.S. at 239–40 (plurality opinion) (holding that the current form of the death penalty was unconstitutional and violated the Eighth and Fourteenth Amendments). The Court reasoned that abdicating the decision to juries necessarily produced arbitrary and capricious results; therefore, it violated the Eighth Amendment's prohibition of cruel and unusual punishment as applied to the states through the Fourteenth Amendment. *Id.* at 255–56.

238. 458 U.S. 782 (1982).

239. *Id.* at 788.

240. *Id.* at 797.

241. *Id.* at 798–801.

responsibility.[242] The Court emphasized that punishment must be tailored to the individual's personal responsibility and moral guilt, and that mere participation in a felony during which a murder occurs is not enough to warrant the death penalty unless the defendant killed, attempted to kill, or intended for a killing to occur.[243] Further, with respect to deterrence, the court was unconvinced that the threat of the death penalty would measurably deter a person who did not already intend to kill or have the purpose of taking a life.[244] The Court found that there was "no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." [245]

In 2014, in *Hall v. Florida*, the Court struck down Florida's rigid IQ cutoff of 70 for determining intellectual disability in capital cases, ruling that it violated the Eighth Amendment's prohibition on cruel and unusual punishment.[246] The Court re-emphasized the two prongs of the test. It stated that the Florida statute disregarded established medical practice in two ways: taking the IQ score as final and conclusive of one's intellectual capacity (rather than considering further evidence) and using an IQ score, which by its very nature is imprecise.[247] The Court found that deterrence is unlikely in cases involving intellectual disability because individuals with this condition are unlikely to make the judgments required for the crime for which deterrence would be effective.[248] Further, retribution is not served in these same cases because the moral culpability of the defendant is low due to their intellectual disability.[249] Thus, the Court found that setting an IQ cutoff and not allowing further evidence beyond IQ to determine mental competency serves neither of the purposes of the death penalty and was therefore unconstitutional under the Eighth Amendment.[250]

In 2016, in *Hurst v. Florida*, the Supreme Court found yet another Florida death penalty statute unconstitutional, this time regarding sentencing under the Sixth Amendment.[251] The Florida sentencing guidelines made the jury's function under Florida's death penalty statute advisory only, where the judge was the sole determiner of whether the defendant received the death penalty.[252] Furthermore, it was at the judge's sole discretion to determine whether mitigating or aggravating circumstances were present.[253] Because defendants are entitled to a

242. *Id.* at 798, 800–01.
243. *Id.* at 801.
244. *Id.* at 798–99.
245. *Id.* at 799.
246. 572 U.S. 701, 723 (2014).
247. *Id.* at 712.
248. *Id.* at 709.
249. *Id.*
250. *See id.* at 723.
251. 577 U.S. 92, 102–03 (2016).
252. *Id.* at 94.
253. *Id.* at 95–96.

jury (not a judge) deciding on the facts on whether there were mitigating or aggravating circumstances that warrant the death penalty, Florida's death penalty statutes were held in violation of the Sixth Amendment.[254]

Edmund, *Hall*, and *Hurst* demonstrate the Supreme Court's constitutional duty to exercise judicial review, especially in protecting individual rights under the Eighth Amendment. In each case, the Court struck down state laws or practices related to capital punishment not for political or policy reasons but because they violated constitutional protections against cruel and unusual punishment. These decisions reflect the core principle of judicial review: the Court's duty to invalidate laws and state actions that conflict with the Constitution. By invoking the Eighth Amendment in every case, the Court clarified that its role is not just to defer to legislative judgment but to ensure that such judgment complies with constitutional mandates. Judicial review, in this context, functions not as an act of judicial will but as a constitutional necessity.

Judges in states with the death penalty are often influenced by electoral and financial pressures that can subtly—but powerfully—shape their decisions, especially in criminal cases involving the death penalty.[255] In many states, judges are elected rather than appointed, which encourages them to appear "tough on crime."[256] Judicial elections—especially in states that allow or require judges to campaign—drive candidates to project toughness, particularly during election seasons.[257] This dynamic significantly influences how judges handle capital punishment cases.[258] Contrary to what Trump's executive order claims, if judges are inclined to subvert the law, it is usually in support of capital punishment, not against it. Empirical studies indicate that judges facing reelection are much more likely to uphold death sentences, impose harsher punishments, and, in states like Alabama and Florida, have overridden jury recommendations for life imprisonment in favor of the death penalty.[259] The closer judges are to an election, the more punitive their rulings tend to become.[260] This is particularly

254. *Id.* at 94.

255. KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES, BRENNAN CTR. FOR JUST. 9 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf ("Researchers have found that appellate judges facing re-election are more inclined to affirm death sentences, and less inclined to dissent from orders affirming them.").

256. *Id.* at 5–6.

257. Dan Levine & Kristina Cooke, *Uneven Justice: In States with Elected High Court Judges, A Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015, at 14:00 GMT), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/.

258. *Id.*

259. BERRY, *supra* note 255, at 7–11; *see also* Robin M. Maher & Leah Roemer, *Lethal Election: How the U.S. Electoral Process Increases the Arbitrariness of the Death Penalty*, DEATH PENALTY INFO. CTR. (July 2024), https://dpic-cdn.org/production/documents/Lethal-Election-Report_Spreads.pdf?dm=1719886362 (addressing how politics can influence the imposition of, and judicial decisions to affirm, death sentences).

260. BERRY, *supra* note 255, at 7.

true in states where public support for the death penalty is high and where campaign ads frequently emphasize a judge's record in criminal cases.[261]

A review of 2,102 state supreme court rulings on death penalty appeals from the 37 states that heard such cases over the past 15 years found a strong correlation between the results in those cases and the way each state chooses its justices. In the 15 states where high court judges are directly elected, justices rejected the death sentence in 11 percent of appeals, less than half the 26 percent reversal rate in the seven states where justices are appointed.[262]

In many capital punishment states, judicial elections are predominantly financed by conservative donors and political action committees advocating a "tough on crime" agenda—pressures that have been shown to correlate with judges being more inclined to uphold, and in some cases expand, the use of the death penalty. Conservative donors in Texas, for example, play a decisive role in shaping the judiciary, especially in courts that oversee death penalty cases, by channeling substantial funds to candidates who align with tough-on-crime platforms and capital. This influence is amplified by Texas's permissive campaign finance rules and partisan election system.

This was evident in the 2024–2025 Texas elections, as conservative donors and political networks utilized targeted funding to reshape the state's highest criminal court.[263] This ensured loyalty to a "tough on crime" agenda, which includes support for the death penalty.[264] Major conservative donors—including West Texas oilman Dan Wilks, telecom founder Kenny Troutt, and software executive Mike Rydin—invested over $350,000 through a political action committee that targeted the Texas Court of Criminal Appeals, the state's final authority on capital punishment appeals.[265]

Conservative donors' efforts to fill the Texas Court of Criminal Appeals intensified after the court limited Attorney General Ken Paxton's unilateral power to prosecute voter fraud, prompting Paxton and his allies to mobilize these donors and secure endorsements from President Trump to remove judges who ruled against him.[266] Backed by Paxton and endorsed by President Trump, three new judicial candidates for the Texas Court of Criminal Appeals —David

261. *Id.* at 5–6.

262. Levine & Cooke, *supra* note 257.

263. Neena Satija & Matt Zdun, *Ken Paxton's megadonors helped put a top Texas judge in office. Now he wants to reform the system.*, HOU. CHRON. (Feb. 5, 2025), https://www.houstonchronicle.com/news/investigations/article/paxton-schenk-criminal-court-appeals-reform-19978841.php.

264. *Id.*

265. *Id.*

266. *Id.*; Luca Cacciatore, *AG Paxton's Criminal Appeals Court Picks Unseat Incumbents*, TEX. SCORECARD (Mar. 6, 2024), https://texasscorecard.com/state/ag-paxtons-criminal-appeals-court-picks-unseat-incumbents/; Toluwani Osibamowo, *Judges who ruled against AG Ken Paxton lost to candidates he supported*, KERA NEWS (Mar. 8, 2024), https://www.keranews.org/politics/2024-03-06/texas-ken-paxton-endorsements-texas-court-of-criminal-appeals-primary.

Schenck, Gina Parker, and Lee Finley—defeated veteran judges Sharon Keller, Barbara Hervey, and Michelle Slaughter, each of whom had long shaped how the court handled death penalty appeals.[267] Critics described the result as Paxton and his allies effectively "buying" a new slate of judges more aligned with conservative interests.[268]

Furthermore, Texas allows judges to raise unlimited sums directly from donors, even those with pending cases before the same court.[269] Legal scholars and former judges argue that this structure undermines the court's duty to safeguard fair review, especially when an individual's life is at stake.[270] After the election, Paxton revived efforts to expand his unilateral prosecution power, banking on a court now more likely to sustain his agenda.[271] The same court remains connected to his unresolved securities fraud case and disputes over special prosecutor pay, reminding observers that donor influence does not stop at a single ruling.[272]

The pattern in Texas illustrates how the Supreme Court's *Citizens United v. FEC*[273] decision continues to enable wealthy donors and PACs to shape who controls life and death decisions in capital punishment states.[274] In Texas, the connection between money and capital punishment is clear: partisan primaries and concentrated donor spending keep the death penalty politically resilient, even as national support for its repeal continues to grow.[275]

Likewise, at the federal level, President Trump's executive order reflects an effort to extend this partisan influence by directly targeting the courts. The

267. William Melhado, *Ken Paxton successfully ousts three Republican criminal appeal court judges*, TEX. TRIB. (Mar. 6, 2024, at 13:00 CST), https://www.texastribune.org/2024/03/05/texas-court-of-criminal-appeals-republican-primary/.

268. Satija & Zdun, *supra* note 263.

269. Melhado, *supra* note 267.

270. Satija & Zdun, *supra* note 263.

271. *See* Press Release, Ken Paxton, Tex. Att'y Gen., Attorney General Ken Paxton Urges Texas House to Pass Legislation to Ensure the Prosecution of Voter Fraud (May 28, 2024), https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-urges-texas-house-pass-legislation-ensure-prosecution-voter-fraud-and.

272. Emma Platoff, *Criminal case against Texas Attorney General Ken Paxton remains threatened after court upholds prosecutor pay decision*, TEX. TRIB. (Jun. 19, 2019, at 9:30 CST), https://www.texastribune.org/2019/06/19/court-criminal-appeals-upholds-paxton-prosecutor-pay-threaten-case/.

273. 558 U.S. 310, 365–66 (2010) (holding that federal restrictions on corporate independent expenditures violated the First Amendment's protection of political speech and reasoning that suppressing speech based on corporate identity impermissibly distorts democratic debate).

274. Marina Pino & Julia Fishman, *Fifteen Years Later*, Citizens United *Defined the 2024 Election*, BRENNAN CTR. FOR JUST. (Jan. 14, 2025), https://www.brennancenter.org/our-work/research-reports/fifteen-years-later-citizens-united-defined-2024-election.

275. Hayley Bedard, *NEW POLL: Overall Support for the Death Penalty Remains at Five-Decade Low as Opposition to the Death Penalty Grows Among Younger Generations*, DEATH PENALTY INFO CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/new-poll-overall-support-for-the-death-penalty-remains-at-five-decade-low-as-opposition-to-the-death-penalty-grows-among-younger-generations.

executive order reflects a broader pattern in which Trump portrays judges as political enemies, aiming to delegitimize their authority, discredit their rulings, and fuel a narrative of judicial subversion among MAGA supporters.[276] While criticizing judicial decisions is hardly new in American politics, Trump has refined and amplified the practice into something more systematic and personal. Unlike earlier eras where disagreement with the courts might be couched in legal reasoning or policy critique, Trump has routinely attacked individual judges—often by name, background, or perceived ideology—casting them as enemies rather than arbiters.[277]

This rhetoric doesn't just challenge judicial outcomes; it delegitimizes the judiciary itself as a coequal branch of government. By framing judges as obstacles to political will rather than guardians of constitutional limits, these attacks help cultivate public hostility toward the courts and, in some cases, foster distrust and even threats against individual jurists. The net effect is not only to undermine faith in judicial independence, but to intimidate the very institution designed to check executive power. In discussing the dangers of attacking the judiciary, Judge Paul L. Friedman argued:

> But what is so troubling today is that such personal and caustic attacks on judges are on the rise. The attacks are better organized, more partisan, more vitriolic, often extremely heavily financed, and more purposefully misleading than ever before. And – with social media like Twitter – the attacks are instant, widespread, and often rapidly "retweeted" to thousands of people. What should concern us all is not when politicians, government officials, and the press express their disagreements with judicial decisions, but when they attack the integrity and motives of the judges who have issued those decisions, attempting to paint them as partisan or political. These personal attacks undermine public confidence in the courts, endanger judicial independence, and ultimately may undermine faith in the rule of law itself. [278]

This obviously is a trend we're seeing throughout public life, but, I would suggest, the stakes in attacking the judiciary have graver implications. And regrettably, the current President of the United States is feeding right into this destructive narrative. We are in uncharted territory. We are witnessing a chief executive who criticizes virtually every judicial decision that doesn't go his way and denigrates judges who rule against him, sometimes in very personal terms. He seems to view the courts and the justice system as obstacles to be attacked and undermined, not as a co-equal branch to be respected even when he disagrees with its decisions.

---

276. Ned Parker et al., *These Judges Ruled Against Trump. Then Their Families Came Under Attack*., REUTERS (May 3, 2025), https://www.reuters.com/investigations/these-judges-ruled-against-trump-then-their-families-came-under-attack-2025-05-02/.

277. *Id.*

278. Friedman, *supra* note 235.

This reality is exemplified by Trump's continuous and escalating attacks on federal judges. Throughout his first campaign, presidential term, post-presidency, and now his second term, Trump has consistently targeted and criticized federal judges.[279] Trump began his spree of maligning judges in 2016, during his first presidential campaign, calling Judge Gonzalo Curiel, the federal judge who oversaw his two class action fraud lawsuits, a "hater."[280] Additionally, Trump asserted that Judge Curiel was biased because he was of Mexican heritage.[281] In addition, Trump called for authorities to investigate Judge Curiel further, criticizing him as a "total disgrace" after the judge ordered the release of internal documents that exposed predatory marketing practices at the for-profit Trump University.[282]

Once in office, Trump escalated his approach, repeatedly disparaging judges who blocked significant initiatives—such as Judge James Robart's travel-ban injunction and Judge Jon Tigar's asylum-rule rulings—as "so-called judges," "Obama judges," or "highly partisan" rather than neutral arbiters.[283] Further, he demanded that Justices Sotomayor and Ginsburg recuse themselves from cases involving his administration, solely due to ideological disagreement.[284]

Alongside his public attacks on Federal judges, Trump systematically expanded partisan control of the federal bench through an unprecedented wave of appointments.[285] By the end of his first term, Trump appointed three justices to the U.S. Supreme Court, 54 judges to the United States Circuit Courts of Appeals, and 174 United States District Court judges, which significantly shifted the ideological balance of the lower federal courts and the Supreme Court.[286] Empirical analysis supports that this combination of public attacks and Trump's large-scale appointments to the federal judiciary has blurred the boundary between executive power and judicial independence.[287] Moreover, Trump continued and escalated his attacks as he faced civil and criminal proceedings, describing Judge Arthur Engoron, who presided over his New York civil fraud

279. Parker et al., *supra* note 276.

280. Scott Bixby, *Donald Trump says judge in university court case biased by 'Mexican heritage'*, GUARDIAN (Jun. 2, 2016), https://www.theguardian.com/us-news/2016/jun/03/donald-trump-judge-curiel-university-case-biased-mexican.

281. *Id.*

282. *Id.*; Parker et al., *supra* note 276.

283. *'Lunatic': Trump's Long History of Abusing Judges Who Oppose Him*, AL JAZEERA (Mar. 20, 2025), https://www.aljazeera.com/news/2023/8/9/lunatic-trumps-long-history-of-abusing-judges-who-oppose-him.

284. *Id.*

285. John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

286. *Id.*

287. *Id.*

trial, as "unhinged" and labeling Judge Tanya Chutkan, who presided over his federal election interference case, as "very biased and unfair" and "out to get him," further portraying the courts as partisan obstacles to be discredited.[288]

Now, during Trump's second term, the DOJ has taken the unprecedented step of suing every sitting federal district judge in Maryland to block an unfavorable deportation ruling, an action that legal scholars have described as a direct attempt to intimidate the federal judiciary itself.[289] As legal scholars and former judges have cautioned, such efforts threaten to erode public confidence in courts as neutral guardians of constitutional limits and to undermine the principle that no one, not even a president, is above the law.[290] As Judge Paul L. Friedman has warned, the independence of the judiciary is under attack, and such attacks pose a direct threat to our democracy.[291]

PART III: SECTION 3, EXECUTIVE OVERREACH: FEDERAL DEATH PENALTY EXPANSION AND CONSTITUTIONAL CONFLICTS

A. Blanket Death Penalty Policies: Eighth Amendment and Equal Protection Issues

Section 3 of Trump's Executive Order states:

Federal Capital Punishment. (a) The Attorney General shall pursue the death penalty for all crimes of a severity demanding its use.

(b) In addition to pursuing the death penalty where possible, the Attorney General shall, where consistent with applicable law, pursue Federal jurisdiction and seek the death penalty regardless of other factors for every federal capital crime involving:

(i) The murder of a law-enforcement officer; or

(ii) A capital crime committed by an alien illegally present in this country.[292]

The federal death penalty applies to all fifty states and the United States territories.[293] After the Supreme Court's ruling in *Furman*, the federal government did not reinstate the death penalty until 1988.[294] This reinstatement came with the passage of the Anti-Drug Abuse Act of 1988, which restored the

288. AL JAZEERA, *Lunatic*, *supra* note 283; *see* Parker et al., *supra* note 276.

289. Salvador Rizzo & Katie Mettler, *Trump Administration Sues Every Federal Judge in Maryland*, WASH POST. (June 25, 2025), https://www.washingtonpost.com/dc-md-va/2025/06/25/doj-sues-maryland-judges/.

290. *See* Friedman, *supra* note 235 (discussing the principle that no president is above the law and the importance of an independent judiciary).

291. *Id.*

292. Exec. Order No. 14164, 90 Fed. Reg. at 8463.

293. *State & Federal Info: The Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty (last visited July 19, 2025).

294. *Id.*

federal death penalty for a very narrow class of crimes.[295] However, in 1994, Congress passed the Federal Death Penalty Act (FDPA),[296] which established constitutional procedures for the imposition of the death penalty for an expansive sixty offenses.[297] The FDPA, the Code of Federal Regulations, and internal policies and regulations, published by the DOJ, govern federal capital cases.[298]

Consequently, in 1976, four years after the Supreme Court decided *Furman*, it ruled on *Woodson v. North Carolina*.[299] In *Woodson*, the Court struck down a state law that mandated automatic death sentences for individuals convicted of first-degree murder.[300] The Court held that such laws violate the Eighth and Fourteenth Amendments because they fail to consider the unique circumstances of both the offender and the offense.[301]

Policies that automatically seek the death penalty for all qualifying crimes, or for specific categories of offenders, disregard the constitutional mandate and ignore vast Supreme Court precedents. This principle was further reinforced two years later in *Lockett v. Ohio*, where the Court invalidated an Ohio statute that narrowly limited the mitigating factors a judge could consider during sentencing.[302] The Court emphasized that sentencing authorities must be allowed to consider any relevant aspect of a defendant's character, background, or the circumstances of the crime when deciding whether to impose the death penalty.[303] Together, these rulings establish that the Eighth Amendment prohibits mandatory death sentences—even for serious crimes—because such laws ignore critical mitigating factors like mental illness, intellectual disability, or reduced culpability. The Eighth Amendment bars cruel and unusual punishment.[304] The Supreme Court has ruled that the death penalty must be reserved for the "worst of the worst"—offenders whose extreme culpability makes them most deserving of execution. This sentiment has been a constant

295. Merrit Kennedy, *Federal Government to Resume Capital Punishment After Nearly 20-Year Hiatus*, NPR (July 25, 2019), https://www.npr.org/2019/07/25/745223284/federal-government-to-resume-cap-ital-punishment-after-nearly-20-year-hiatus.

296. *The Federal Death Penalty Act of 1994*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/usam/criminal-resource-manual-69-federal-death-penalty-act-1994 (updated Dec. 7, 2018) ("The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. *See* Pub. L. 103-322, Title VI, Sections 60001-26, Sept. 13, 1994, 108 Stat. 1959 (codified at 18 U.S.C. 3591-3598). In passing this legislation, Congress established constitutional procedures for imposition of the death penalty for 60 offenses under 13 existing and 28 newly-created Federal capital statutes, which fall into three broad categories: (1) homicide offenses; (2) espionage and treason; and (3) non-homicidal narcotics offenses.").

297. *Id.*

298. U.S. Dep't of Just., Just. Manual §§ 9-10.010–9-10.230 (2025).

299. 428 U.S. 280, 305 (1976).

300. *Id.* at 285–86, 305.

301. *Id.* at 304–05.

302. 438 U.S. 586, 608–09 (1978).

303. *Id.* at 597, 605.

304. U.S. CONST. amend. VIII.

theme of the Court: "our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes."[305]

Therefore, Trump's Executive Order's requirement that the Attorney General pursue the death penalty "regardless of other factors for a capital crime committed by an illegal alien present in this country" ignores constitutional laws and important legal precedents. This requirement is especially concerning because making the death penalty dependent on immigration status risks breaching the Equal Protection Clause by targeting a specific group for harsher punishment. Using immigration status to increase punishment applies a blanket penalty that is not based on individual guilt or moral blameworthiness. Anthropologist Cathy Buerger explains:

> In effect, the order is intended to transform immigration status into a sentencing factor—one that mandates the harshest punishment available under U.S. law. And by mandating the death penalty for undocumented migrants, while permitting prosecutorial discretion in comparable cases involving U.S. citizens, the president would have the American public believe that migrants pose a unique threat and are less entitled to the legal protections extended to others. Notably, the order singles out only one other instance in which the death penalty should always be sought – when a law enforcement officer is murdered. By grouping these two, the order draws a moral equivalency between them and primes the public to view crimes committed by undocumented people as especially heinous, thereby legitimizing the unequal application of justice.[306]

Furthermore, targeting undocumented immigrants for the death penalty may worsen existing racial and ethnic disparities in the criminal justice system, reinforcing perceptions of bias and discrimination. This strategy could foster the belief that immigration status serves as a proxy for race or ethnicity in capital sentencing. Such policies might further erode public trust in the fairness of the justice system, especially within marginalized communities. This is particularly troubling given that racial disparity remains one of the most significant issues facing the death penalty system.[307]

Policies that treat immigration status as an aggravating factor in capital cases—or mandate the death penalty for non-citizens—are constitutionally infirm. They contradict the Supreme Court's requirement of individualized

---

305. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

306. Cathy Buerger, *Unequal Before the Law: How Trump's Death Penalty Order Codifies Dangerous Speech*, JUST SECURITY (Jun. 6, 2025), https://www.justsecurity.org/114155/trump-death-penalty-codifies-dangerous-speech/.

307. *See Race and the Death Penalty*, NAT'L ASS'N CRIMINAL DEF. LAWS. (Nov. 4, 2025), https://www.nacdl.org/Content/Race-and-the-Death-Penalty#:~:text=In%20the%20five%20years%20after,non%2Dwhite%20male%20victims.%E2%80%9D.

sentencing in capital cases, violate the Eighth Amendment and the Equal Protection Clause, and undermine the legitimacy of a fair justice system.

B. From Guidance to Command: Federal Overreach in State Capital Cases

Section 3 continues:

The Attorney General shall encourage State attorneys general and district attorneys to bring State capital charges for all capital crimes with special attention to the crimes described in Subsections (i) and (ii), regardless of whether the federal trial results in a capital sentence.[308]

This forceful rhetoric suggesting that the U.S. Attorney General can order state attorneys general to pursue the death penalty may sound convincing, but it is based on deeply flawed assumptions and fundamental misunderstandings of the U.S. legal system. The United States operates as a federal system, meaning that both the federal government and the states function as distinct sovereign entities. Each entity has complete autonomy over its criminal justice system, including matters related to capital punishment. The U.S. Attorney General is responsible for federal prosecutions and does not have the legal power to mandate state prosecutors to seek the death penalty or to override state laws regarding its use. Even executive orders or directives from the DOJ aimed at encouraging state actions do not carry the weight of legal enforcement. State attorneys general are accountable to their constitutions, legislatures, and voters, not to federal officials. Any attempt to impose federal will on state prosecutorial decisions would violate the Tenth Amendment to the U.S. Constitution, which reserves to the states all powers not delegated to the federal government.[309]

Moreover, state law governs the death penalty for offenses committed under state statutes. The federal government has its capital punishment laws, which apply only to federal crimes. Therefore, any attempt by the U.S. Attorney General to direct state attorneys general would likely face significant legal challenges and political pushback, as it could be perceived as an overreach of federal authority into state jurisdiction. There is no historical precedent for the U.S. Attorney General requiring state prosecutors to pursue the death penalty. The interaction between federal and state law enforcement is characterized by cooperation rather than command.

States have diverse approaches to the death penalty, with some abolishing it entirely while others apply it rarely or not at all. These variations reflect individual state laws, societal values, and political contexts, rather than the preferences of the executive branch. These mechanisms collectively provide a robust defense against federal pressure, emphasizing the importance of federalism in the implementation of justice at the state level.

---

308. Exec. Order No. 14164, 90 Fed. Reg. at 8463–64.

309. U.S. CONST. amend. X.

While the U.S. Attorney General may implement sweeping federal policies, her jurisdiction is limited when it comes to state criminal law. The power to decide life and death in state prosecutions remains a uniquely local—and fiercely protected—prerogative. That's federalism in action: two sovereigns, two sets of laws, and a built-in check against overreach from either side.

There are legal precedents that uphold the idea of state autonomy in criminal affairs. For instance, in 1997, the Supreme Court decided *Printz v. United States*, which addressed the constitutionality of a federal law requiring state law enforcement officials to assist in implementing a federal gun control regulatory scheme.[310] The Court determined that this mandate violated the principle of state autonomy, as it compelled state officials to execute federal law, infringing upon the federal structure established by the Constitution.[311]

While the Attorney General may try to influence the use of capital punishment, such efforts are not widely supported, even in traditionally conservative states. Resistance to the death penalty is increasing in several red states, where Republican lawmakers are leading reform efforts.[312]

In states like Indiana, Kansas, Kentucky, and Ohio, GOP lawmakers have introduced bills seeking to eliminate the death penalty entirely, citing concerns over wrongful convictions, racial disparities, and the high costs related to capital punishment prosecutions.[313]

Meanwhile, Georgia's House of Representatives took a significant step forward in March by passing House Bill 123, a bipartisan measure designed to protect individuals with intellectual disabilities from execution.[314] The bill lowers the burden of proof for intellectual disability claims from "beyond a reasonable doubt" to a "preponderance of the evidence."[315] It introduces pretrial hearings to assess intellectual disability before trial proceedings begin.[316] This reform aligns Georgia with national legal standards and reflects a broader shift toward fairness and constitutional compliance in capital cases. On May 13, 2025, Governor Brian Kemp signed House Bill 123 into law after it passed the Georgia

310. 521 U.S. 898, 904 (1997).

311. *Id.* at 935.

312. Amanda Hernández, *Trump's death penalty push faces resistance in some red states*, STATELINE (Mar. 7, 2025, 5:00 AM), https://stateline.org/2025/03/07/trumps-death-penalty-push-faces-resistance-in-some-red-states/.

313. *Id.*

314. *The Georgia House Unanimously Passes Bill to Protect People with Intellectual Disability from the Death Penalty*, S. CTR. HUM. RTS. (Mar. 5, 2025), https://www.schr.org/the-georgia-house-unanimously-passes-bill-to-protect-people-with-intellectual-disability-from-the-death-penalty/.

315. *Id.*

316. *Georgia House of Representatives Unanimously Passes Bill to Ease Threshold to Prove Intellectual Disability Ahead of Capital Trials*, DEATH PENALTY INFO. CTR. (Mar. 10, 2025), https://deathpenaltyinfo.org/georgia-house-of-representatives-unanimously-passes-bill-to-ease-threshold-to-prove-intellectual-disability-ahead-of-capital-trials.

Senate on March 31, 2025, marking historic reform on how Georgia handles death penalty cases involving vulnerable defendants.[317]

While some conservative states have moved to limit or repeal the use of capital punishment, others are advancing legislation aimed at expanding its scope and severity.[318] In Oklahoma, a proposed bill would make undocumented immigrants convicted of first-degree murder automatically eligible for the death penalty.[319] Meanwhile, Iowa and New Mexico, both of which have abolished capital punishment, are considering legislation that would reinstate the death penalty specifically for the murder of law enforcement officers.[320]

Further, states like Florida, Idaho, and Oklahoma reflect a broader legislative pattern in which retribution rather than fairness has reemerged as the central justification for capital punishment. For instance, Florida enacted laws such as HB 693 and SB 4C, expanding aggravating circumstances to include offenses committed at religious, school, or government events and mandating death for undocumented individuals convicted of capital felonies.[321] Idaho and Oklahoma have gone further, enacting statutes that make certain non-homicide sexual offenses—such as aggravated lewd conduct with a child twelve years old and under in Idaho and rape or molestation of a child under fourteen years old in Oklahoma—death eligible, directly contravening the Supreme Court's holding in *Kennedy v. Louisiana*,[322] which limited the death penalty to crimes resulting in death.[323]

Consequently, these legislative initiatives not only conflict with established Supreme Court precedent but also expose partisan alliances influenced by Trump's executive order and Project 2025 agenda.[324] Presented as capital punishment reform, these initiatives are motivated by political incentives, reflecting a larger strategy to align with "tough-on-crime" platforms and strengthen party loyalty to retribution.[325] These targeted proposals reflect a broader trend in which certain conservative states, responding directly to the

317. Hayley Bedard, *Georgia Senate Passes Bill Lowering Legal Standard for Intellectual Disability for Capital Defendants; Sends Bill to Governor's Desk*, DEATH PENALTY INFO. CTR. (May 14, 2025), https://deathpenaltyinfo.org/georgia-senate-passes-bill-lowering-legal-standard-for-intellectual-disability-for-capital-defendants-sends-bill-to-governors-desk.

318. Hernández, *supra* note 312.

319. *Id.*

320. *Id.*

321. Nina Motazedi, *2025 Roundup of Death Penalty Related Legislation*, DEATH PENALTY INFO. CTR. (Jun. 16, 2025), https://deathpenaltyinfo.org/news/2025-roundup-of-death-penalty-related-legislation.

322. 554 U.S. 407, 437 (2008).

323. Motazedi, *supra* note 321.

324. *See* Brianna Seid, *supra* note 4; *see also* Alison Durkee, *Here's How Trump's Executive Orders Align With Project 2025—As Author Hails President's Agenda As 'Beyond My Wildest Dreams,'* FORBES (Mar. 17, 2025), https://www.forbes.com/sites/alisondurkee/2025/03/17/heres-how-trumps-executive-orders-align-with-project-2025-as-he-touts-agenda-in-speech-to-congress/.

325. *See* Hernández, *supra* note 312.

executive order, have moved to revive or expand capital punishment—even in places with a history of opposition or prior repeal.

C. Politicizing the Justice Manual

Section 3(d) of the order reads as follows:

The Attorney General shall take all appropriate action to modify the Justice Manual based on the policy and purpose set forth in this Executive Order.[326]

The Justice Manual serves as the foundation of federal policy, guiding capital prosecutions and establishing a structured and principled approach to seeking the death penalty. On February 5, 2025, her first day in office, Attorney General Pam Bondi issued a set of fourteen broad policy directives.[327] Among these are two memoranda specifically addressing the federal death penalty, aligning with Trump's executive order. One memorandum, titled "Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions," (Reviving the Federal Death Penalty)[328] reversed the Biden-era moratorium on federal executions. It aggressively expanded the federal government's use of the death penalty. The other memorandum, titled "Restoring A Measure of Justice to the Families of Victims of Commuted Murderers" (Restoring a Measure of Justice),[329] addresses President Biden's commutation of thirty-seven federal death sentences, directing the Justice Department to assist local prosecutors in pursuing state death sentences for those individuals.

In a sweeping shift of federal criminal justice policy, "Reviving the Federal Death Penalty" ordered the DOJ to "swiftly implement" death sentences handed down by federal courts, signaling a dramatic reversal from the previous administration's posture.[330] Bondi's memorandum outlined an aggressive new stance toward capital punishment. Federal prosecutors were directed to pursue the death penalty in the most serious, readily provable cases, particularly those involving violent drug trafficking, the murder of law enforcement officers, and capital crimes committed by undocumented immigrants.[331] Any decision not to seek the death penalty in eligible cases now requires high-level approval and formal documentation.[332] In a move that underscores the administration's

326. Exec. Order No. 14164, 90 Fed. Reg. at 8464.

327. *New Attorney General Issues Memo Regarding DOJ Policies*, DEF. SERVS. OFF. TRAINING DIV. (Feb. 7, 2025), https://www.fd.org/news/new-attorney-general-issues-memo-regarding-doj-policies.

328. Memorandum from Pamela Bondi, U.S. Att'y Gen., on Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions (Feb. 5, 2025), https://www.justice.gov/ag/media/1388561/dl.

329. Memorandum from Pamela Bondi, U.S. Att'y Gen., on Restoring a Measure of Justice to the Families of Victims of Commuted Murderers to all Dep't Emps. (Feb. 5, 2025), https://www.justice.gov/ag/media/1388526/dl?inline.

330. Memorandum from Pamela Bondi on Reviving the Federal Death Penalty, *supra* note 328.

331. *Id.*

332. *Id.*

commitment to reestablishing capital punishment, Bondi ordered a comprehensive review of all death-eligible cases from the Biden era, where prosecutors had declined to pursue the death penalty.[333] The DOJ's Capital Review Committee was given 120 days to reconsider those decisions.[334] As part of this renewed drive to expand capital punishment, the DOJ and Bureau of Prisons (BOP) were directed to assist states in obtaining lethal injection drugs and resolving logistical or legal obstacles to executions.[335]

The memorandum also rescinded all DOJ policies regarding the death penalty that conflict with the current Executive Order.[336] This includes former Attorney General Garland's memorandum from January 15, 2025, titled "Determination Following Review of the Federal Execution Protocol and the Manner of Execution Regulations."[337] That memorandum had instructed the BOP to withdraw the July 25, 2019, addendum to the execution protocol. Additionally, all revisions to Justice Manual § 9-10.000 and related sections made between January 20, 2021, and January 19, 2025, were suspended for a period of 45 days. During this suspension, the Office of Legal Policy, in coordination with relevant components, will review these revisions and recommend to the Deputy Attorney General whether they should be retained, amended, or permanently rescinded.[338]

The Office of Legal Policy will also lead a comprehensive evaluation of all internal policies and procedures related to capital crimes. This effort aims to propose changes that will strengthen the federal death penalty framework moving forward.[339]

The "Reviving the Federal Death Penalty" memorandum cannot be viewed in isolation; it must be understood within the broader context of Attorney General Bondi's overarching directives, especially her zealous advocacy policy.[340] That policy, also issued on her first day in office, imposes a strict mandate on DOJ attorneys to pursue the Attorney General's priorities with unwavering commitment, under threat of disciplinary action or termination for perceived underperformance.[341] This creates a coercive environment in which prosecutors may feel compelled to seek the death penalty not solely based on legal merit, but to comply with top-down mandates. When viewed together, these

333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. Memorandum from Pamela Bondi, U.S. Att'y Gen., on General Policy Regarding Zealous Advocacy on Behalf of the United States (Feb. 5, 2025), https://www.justice.gov/ag/media/1388521/dl?inline.
341. *Id.*

directives raise serious concerns about the erosion of prosecutorial discretion and ethical independence, suggesting that capital punishment decisions may be driven more by political will than by principled legal judgment. The deeply concerning cumulative effect of Bondi's directives and actions has attracted increasing scrutiny from legal scholars, civil rights advocates, and career officials worried about the erosion of institutional norms and the rule of law.

On June 5, 2025, seventy-two signatories filed a complaint against Bondi with the Florida Bar, alleging serious professional misconduct during her tenure as U.S. Attorney General.[342] They accused her of pressuring DOJ attorneys to violate their ethical duties under the guise of "zealous advocacy."[343] The signatories include law professors, attorneys, former Massachusetts Attorney General Scott Harshbarger, former federal judge Nancy Gertner, and retired Florida Supreme Court Justices Barbara Pariente and Peggy Quince.[344] The complaint highlights three specific instances where Bondi is accused of either firing or forcing the resignation of subordinates who refused to comply with unethical demands from her or someone in her office.[345]

The gravamen of this complaint is that Ms. Bondi, personally and through her senior management, has sought to compel Department of Justice lawyers to violate their ethical obligations under the guise of "zealous advocacy" as announced in her memorandum to all Department employees, issued on her first day in office, threatening employees with discipline and possible termination for falling short. She has exerted this pressure even though the Rules of Professional Conduct limit the "zeal" of attorneys to "lawful and ethical measures." Such conduct violates Florida Rule of Professional Conduct 4-8.4(a), which makes it misconduct for a lawyer to "knowingly assist or induce another … to violate the Rules of Professional Conduct"; Rule 4-5.1, which imposes ethical duties on Ms. Bondi to take reasonable measures with respect to her managerial duties as Attorney General and her supervisory duties over subordinate lawyers to ensure that lawyers in the Department comply with their ethical duties; and Rule 4-8.4(d), which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice.[346]

The complaint highlighted three significant instances of misconduct under Attorney General Bondi's leadership.[347] The first and most troubling example involves the firing of Erez Reuveni, a respected and accomplished attorney.[348]

342. Memorandum from Laws. Defending Am. Democracy (LDAD), Democracy Defs. Fund & Laws. for Rule L. on Ethics Complaint Against Pamela Jo Bondi to Fla. Bar (Jun. 5, 2025), https://ldad.org/wp-content/uploads/2025/06/Pamela-Bondi-Ethics-Complaint-6.5.25-1.pdf.

343. *Id.* at 2.

344. *Id.* at 19–23.

345. *Id.* at 3.

346. *Id.* at 2.

347. *Id.* at 3.

348. Memorandum from LDAD, *surpra* note 342.

Mr. Reuveni was terminated after he truthfully testified before a tribunal in the case of Kilmar Garcia, a man who was deported to El Salvador despite a court order specifically prohibiting deportation to that country.[349] The second instance concerns Denise Cheung, a veteran of the Department with nearly twenty-five years of service.[350] She was forced to resign after refusing to initiate a criminal investigation that lacked sufficient legal grounds.[351] The third example is the Department's proposal to dismiss a criminal indictment against New York Mayor Eric Adams in exchange for his cooperation on immigration enforcement.[352] This was seen as an improper quid pro quo.[353] When the Acting U.S. Attorney for the Southern District of New York, along with nearly a dozen other DOJ attorneys, including members of the Public Integrity Section, objected to the dismissal, they were swiftly removed from their positions or placed on administrative leave.[354] Many ultimately chose to leave the Department rather than retract their professional concerns regarding the prosecution.[355]

Through her "zealous advocacy" memorandum and its application in these three cases, Ms. Bondi has sent a message to all Justice Department lawyers that they must disregard the applicable Rules of Professional Conduct, fundamental ethical principles, and longstanding norms of the Department in order to zealously pursue the President's political objectives—and, if they fail to do so, they will be disciplined or fired. However, as Ms. Bondi and her senior staff are fond of saying, no one is above the law, and this includes Ms. Bondi.[356]

This was the third complaint the group filed against Bondi. As with the other two, the Florida Bar dismissed it, arguing that it "does not investigate or prosecute sitting officers appointed under the U.S. Constitution while they are in office." [357] DOJ Chief of Staff Chad Mizelle said in a statement, "The Florida Bar has twice rejected performative attempts by these out-of-state lawyers to weaponize the bar complaint process against AG Bondi. [. . .] This third vexatious attempt will fail to do anything other than prove that the signatories have less intelligence — and independent thoughts — than sheep." [358]

---

349. *Id.* at 5–7.
350. *Id.* at 7–8.
351. *Id.*
352. *Id.* at 8–10.
353. *Id.* at 3.
354. *Id.*
355. Memorandum from LDAD, *surpra* note 342.
356. *Id.* at 3.
357. Jay Weaver, *Legal group urges state Supreme Court to order Florida Bar to investigate Bondi*, MIAMI HERALD (Jul. 15, 2025, 4:18 PM), https://www.miamiherald.com/news/politics-government/state-politics/article310669975.html.
358. Nina Golgowski, *Legal Experts File Complaint Against Pam Bondi, Citing 'Serious' Misconduct, Trump Bias*, HUFFINGTON POST (Jun. 6, 2025), https://www.huffpost.com/entry/pam-bondi-florida-bar-ethics-complaint_n_6842e94de4b004bd540a33ac.

It is deeply troubling when a state agency—whose primary mission is to protect the public by investigating and prosecuting lawyer misconduct in accordance with the rules of professional conduct—abandons that responsibility and condones blatant ethical violations under the guise of federal infallibility. This behavior erodes public trust and weakens accountability within the legal profession. Because the Attorney General holds the highest legal office in the nation, she wields unmatched influence over the DOJ and sets the tone for its culture and ethical standards. When she engages in misconduct or issues politicized directives and actively instructs subordinates to adopt the same stance, it isn't just a policy violation—it becomes a systemic threat to the integrity of the entire justice system. Accountability at that level is not optional; it is essential. Her leadership should uphold the law's highest principles, not override them.

When Trump's appointed officials prioritize his policies and personal interests over the rule of law, it leads to the systemic politicization and weaponization of the DOJ. This has serious consequences for constitutional governance and legal integrity. Bondi's tenure as Attorney General serves as a prime example of this dynamic. Despite her promise during the confirmation hearing to maintain the DOJ's independence and keep it free from political influence, her directives align closely with Trump's political agenda.

As a result, the DOJ under President Trump has undergone a significant transformation—one that legal experts warn could pose a serious threat to the rule of law. Central to this shift is a sweeping purge of career officials and investigators who were deemed insufficiently loyal or who resisted political interference.[359] Among those removed were prosecutors who had worked on cases involving Trump and his allies, signaling a clear message: dissent will not be tolerated.[360] This crackdown has been accompanied by a wave of investigations and internal reviews targeting political adversaries and individuals involved in prior prosecutions of the president. These actions have been framed as efforts to eliminate "politically motivated witch hunts," but critics argue they are thinly veiled attempts at retaliation.[361]

Inside the DOJ, the atmosphere has grown increasingly hostile to professional independence. Attorneys are facing mounting pressure to align with the administration's priorities, even when doing so conflicts with their ethical

359. Josh Meyer & Bart Jansen, *AG Pam Bondi promised to depoliticize the Justice Department. Has she done the opposite?*, USA TODAY (Mar. 16, 2025), https://www.usatoday.com/story/news/politics/2025/03/12/ag-pam-bondi-changes-at-justice-department/81662933007/.

360. *See id.*

361. Eric Tucker & Alanna Durkin Richer, *Justice Department's independence is threatened as Trump's team asserts power over cases and staff*, AP NEWS (Feb. 16, 2025), https://apnews.com/article/fbi-justice-department-trump-bondi-bove-adams-a003af9d9aebe89cd289361a65c9401b.

obligations to uphold the law and the Constitution.[362] The suppression of dissent has created a chilling effect, undermining the DOJ's credibility and its role as a neutral enforcer of justice.[363]

David Laufman, a senior DOJ official across Democratic and Republican administrations, said, "We have seen now a punishing ruthlessness that acting department leadership and the attorney general are bringing to essentially subjugate the workforce to the wishes and demands of the administration, even when it's obvious that some of the decisions have all the signs 'of corrupting the criminal justice system.'"[364]

Legal scholars and government watchdogs have sounded the alarm. They argue that the politicization of the DOJ represents a direct assault on democratic governance.[365] As one analysis put it, when the Department bends legal principles to serve political ends, it corrodes both institutional integrity and public trust.[366] Bondi's DOJ, operating under the shadow of Donald Trump's imperial directives, abandoned its institutional responsibility, cast aside its foundational values, and transformed into a political instrument that prioritizes loyalty over law. This is a far cry from the traditional role and purpose of the DOJ:

> As the nation's principal law enforcement agency, the Department of Justice (DOJ) plays a unique role in protecting rule of law and, therefore, U.S. democracy. Despite the fact that the attorney general is appointed by the president and serves at the president's pleasure, a recognition of the comparable independence of the DOJ from the political priorities of the rest of the executive branch has been critical for maintaining the department's integrity and credibility over the course of its roughly 150-year history. To assure the American public that the actions of the DOJ are based on legitimate prosecutorial discretion rather than on political favoritism or electoral politics, prosecutions must be politically neutral and motivated only by the goal of evenhanded enforcement of the law, without prejudice produced by presidential political aims. The DOJ articulates its mission as to "enforce the law and defend the interests of the United States according to the law," an aim that, when fulfilled, allows the department to serve as the guardian of the rule of law for the country as a whole. When the DOJ faithfully conforms to both law and ethics, it powerfully reinforces the foundations of democratic governance.[367]

362. *Id.*
363. *Id.*
364. *Id.*
365. Claire Finkelstein & Richard W. Painter, *Restoring the Rule of Law through Department of Justice Reform*, *in* OVERCOMING TRUMPERY: HOW TO RESTORE ETHICS, THE RULE OF LAW, AND DEMOCRACY 121–22 (Norman Eisen ed., Brookings 2022).
366. *Id.* at 122.
367. *Id.*

The DOJ, once known for its fierce protection of independence and impartial enforcement of the law, now bears a strikingly different posture under Bondi's leadership. The recent directives—particularly those tying prosecutorial decisions to political loyalty and top-down mandates—signal a profound departure from the DOJ's traditional values of discretion, neutrality, and constitutional fidelity. Where the original DOJ prioritized justice above influence, this version appears increasingly driven by executive will and political objectives. The transformation is not just administrative—it's philosophical. And legal experts are right to say that when law enforcement loses its center of gravity, the impact ripples far beyond the courtroom.

Compounding these concerns are Trump's public assertions of unchecked presidential authority and his administration's repeated disregard for constitutional boundaries—including due process rights, congressional control over federal spending, and the separation of powers. These actions have triggered a wave of lawsuits alleging serious constitutional and statutory violations, further highlighting the stakes of this unprecedented shift in federal law enforcement.

However, from a practical perspective, the federal government is bound by rigid statutory requirements in seeking the death penalty, as established by the provisions of the Justice Manual § 9-10.000 - Capital Crimes.[368] The Justice Manual guides capital prosecutions and establishes a structured and principled approach to seeking the death penalty. As noted above, Attorney General Bondi's "Reviving the Federal Death Penalty" memorandum rescinded all the revisions made by former Attorney General Merrick Garland to the Justice Manual § 9-10.000 and has suspended all revisions.[369] Until further notice, the provisions that existed before 2021 remain the current guidance.[370]

The core purpose of the provisions currently in effect is to ensure that death penalty decisions are made with uniformity and consistency, preventing arbitrary or uneven application across different jurisdictions. This national framework helps uphold fairness and prevent disparities that could weaken public trust. To safeguard the rights of defendants, the manual mandates rigorous due process and legal review. Every potential capital case must go through detailed documentation and approval from the DOJ's Capital Review Committee, with the Attorney General holding the final decision.[371] These oversight steps are designed to safeguard constitutional rights and ensure that only the most serious and appropriate cases proceed. Most importantly, the manual stresses individualized decision-making. Prosecutors are required to evaluate each case based on its specific facts, considering aggravating and mitigating factors rather than relying on broad policies or unchecked discretion. This approach ensures

368. U.S. Dep't of Just., Just. Manual, *supra* note 298.
369. Memorandum from Pamela Bondi on Reviving the Federal Death Penalty, *supra* note 328.
370. U.S. Dep't of Just., Just. Manual, *supra* note 298.
371. *Id.* at § 9-10.130.

that the pursuit of capital punishment is based on a thorough legal and factual examination. As stated in provision 9-10.030 of the Justice Manual, "Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case."[372] Lastly, the manual encourages accountability and transparency within the Department.[373] It specifies detailed procedures for internal review and oversight, emphasizing the importance of integrity and centralized control in capital prosecutions.[374]

Given recent developments under Attorney General Bondi's leadership, many observers find it increasingly difficult to believe that the DOJ will continue to uphold the aspirational standards outlined in Justice Manual § 9-10.000. These policies were intended to promote consistency, safeguard due process, and ensure that decisions to pursue the death penalty reflect the highest ideals of justice and equity. The current trajectory of the DOJ under Bondi appears to sideline those principles in favor of rigid mandates and politicized enforcement strategies.

Actions such as lifting the federal execution moratorium, reauthorizing broad capital prosecutions, and rescinding previous safeguards undermine the procedural integrity the Manual sought to preserve. When directives are framed around loyalty and top-down obedience—rather than individualized, ethical decision-making—the legitimacy of the department's actions in capital cases comes into question. The dissonance between what these guidelines promise and how the DOJ now operates is not just troubling—it's a warning sign that we may be losing the guardrails meant to protect justice in its most irreversible form.

D. Undermining Clemency: Retaliatory Policies Against Commuted Prisoners

Section 3(e) continues:

The Attorney General shall evaluate the places of imprisonment and conditions of confinement for each of the 37 murderers whose Federal death sentences were commuted by President Biden, and the Attorney General shall take all lawful and appropriate action to ensure that these offenders are imprisoned in conditions consistent with the monstrosity of their crimes and the threats they pose. The Attorney General shall further evaluate whether these

372. *Id.*

373. *See id.* § 9-10.140 (updated Apr. 2011, reverted pursuant to the Attorney General's February 5, 2025 memorandum), https://www.justice.gov/jm/jm-9-10000-capital-crimes#9-10.140 (For example, regarding fairness, the protocol states: "Fairness requires all reviewers to evaluate each case on its own merits and on its own terms. As with all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty.").

374. *See id.*

offenders can be charged with State capital crimes and shall recommend appropriate action to state and local authorities.[375]

On December 25, 2024, Trump's post on Truth Social attacked President Biden's commutation of thirty-seven individuals on federal death row with pure vitriol:

> Also, to the 37 most violent criminals, who killed, raped, and plundered like virtually no one before them, but were just given, incredibly, a pardon by Sleepy Joe Biden. I refuse to wish a Merry Christmas to those lucky "souls" but, instead, will say, GO TO HELL! We had the Greatest Election in the History of our Country, a bright light is now shining over the U.S.A. and, in 26 days, we will, MAKE AMERICA GREAT AGAIN. MERRY CHRISTMAS![376]

Trump's "go to hell" remark was not just a metaphor or rhetorical flourish—it was a direct condemnation. The use of "souls" in quotes, along with the capitalized command "GO TO HELL," indicates that Trump was making a literal moral judgment, suggesting these individuals deserve eternal damnation rather than mere public scorn. This view is supported by the context of the post, which was filled with moral outrage and religious overtones. Instead of using "go to hell" as a casual insult, Trump seemed to be making a theological point that, in his eyes, these individuals are beyond forgiveness and headed for spiritual punishment.

Trump's remark, "go to hell," was not merely a metaphor; it was a direct condemnation that reflected a potent mix of political messaging, moral outrage, and campaign rhetoric. This statement aimed to reinforce his tough-on-crime stance while undermining Biden's criminal justice policies. By using the term "souls" in quotes and the capitalized command "GO TO HELL," Trump was making a literal moral judgment, portraying these individuals as irredeemable sinners deserving of eternal damnation rather than just life imprisonment. This interpretation is supported by the post's overall tone, which was rife with moral outrage and religious undertones. Instead of offering "go to hell" as a casual insult, Trump seemed to make a theological assertion: in his view, these individuals are beyond forgiveness and destined for spiritual punishment. The post illustrates Trump's blend of religious nationalism, populist anger, and a focus on punitive justice. His condemnation was less about the inmates themselves and more about using rhetoric to frame his upcoming 2025 administration as a restoration of divine and legal balance. This theme aligns closely with Project 2025's declared goals of reinvigorating capital punishment and removing perceived restrictions on retributive justice.

---

375. Exec. Order No. 14164, 90 Fed. Reg. at 8464.

376. Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Dec. 25, 2024, 2:43 PM), https://truthsocial.com/@realDonaldTrump/posts/113715169361854155.

A month later, Trump's incendiary rhetoric was embedded in policy through this executive order. The directive to the Attorney General to assess whether these prisoners are kept in conditions that reflect "the monstrosity of their crimes" and the "threats they pose" uses language that implies a punitive approach that surpasses lawful imprisonment and veers into retributive excess. This directive effectively weaponized the executive branch's authority to review and escalate punishment for individuals who had already received clemency, a constitutionally protected act under Article II of the Constitution.[377] Legal scholars and civil rights advocates have argued that this move undermines the spirit of the clemency power and may violate the Eighth Amendment's prohibition on cruel and unusual punishment.[378]

By directing the DOJ to pursue stricter confinement and consider renewed capital prosecutions, Trump's executive order exceeds constitutional limits. If the goal is to ensure public safety, policies should be based on risk assessments rather than rhetorical appeals to monstrosity. When the line between proportional punishment and political messaging becomes blurred, constitutional values begin to deteriorate.

But these are not concerns of the DOJ under Bondi. Her memorandum, "Restoring A Measure of Justice," issued on her first day in office, directed the BOP to "ensure that the conditions of confinement for each of the thirty-seven commuted murderers are consistent with the security risks those inmates present because of their egregious crimes, criminal histories, and all other relevant considerations."[379]

On April 16, 2025, twenty-one of the thirty-seven targeted individuals, currently housed at Terre Haute, Indiana, filed a lawsuit[380] seeking "declaratory and injunctive relief from the Trump Administration's express targeting of Plaintiffs for categorical, unjustified, and unconstitutional punishment of incarceration in conditions of 'monstrosity.'"[381] The lawsuit argues that:

> EO 14164 and the Bondi Memo instituted a new procedure replacing the usual BOP redesignation process. In defiance of the controlling statutes, regulations, and policies governing the BOP redesignation process, Defendants Bondi and Bove ordered BOP staff to engage in a new sham process that categorically predetermined that all Plaintiffs—regardless of what the statutory BOP redesignation process had determined—will be incarcerated indefinitely in the most oppressive

377. U.S. CONST. art. II, § 2, cl. 1.

378. Brianna Seid, *Administration's Plan Seeks to Undo Biden's Federal Death Row Commutations*, BRENNAN CTR. FOR JUST. (May 28, 2025), https://www.brennancenter.org/our-work/analysis-opinion/administrations-plan-seeks-undo-bidens-federal-death-row-commutations.

379. Memorandum from Pamela Bondi on Restoring a Measure of Justice, *supra* note 329.

380. Complaint at 1, Taylor v. Trump, No. 1:25-cv-01161 (D.D.C. Apr. 16, 2025), https://storage.courtlistener.com/recap/gov.uscourts.dcd.279618/gov.uscourts.dcd.279618.1.0.pdf.

381. *Id.*

> conditions in the entire federal prison system: USP Florence Administrative Maximum Facility ("ADX"), the only federal supermax prison, located in Florence, Colorado.[382]

Counsel for the Plaintiffs, the Center for Constitutional Rights, explains:

> ADX is the most restrictive federal penitentiary in the country. Even in general population, people at ADX are imprisoned under uniquely oppressive conditions and isolated from nearly all human contact. They live alone in a concrete and steel cell smaller than a parking space. Their food is delivered through a slot in the door. They eat in their cells, within arm's reach of their toilets. They shower in their cells, so that staff need not engage in even the limited contact required to escort them to showers on the range. Any religious or educational "programming" takes place in their cells, via closed circuit television. Group prayer, an essential tenet of some faiths, is strictly forbidden. Natural light comes through a single, narrow slit of a window, four inches wide, designed to ensure that nothing is visible except cement and sky. And people remain in these cells nearly all day, every day. If they get a chance to exercise, they do so alone, either in a small cage that staff refer to as a "dog run" or in an empty indoor room only slightly larger than their cells.[383]

Finally, the order also requires that Bondi evaluate whether these offenders can be charged with state capital crimes and recommend appropriate action to state and local authorities. Pursuing state-level capital prosecutions against individuals whose federal death sentences have been lawfully commuted is both constitutionally problematic and legally unwise. Attorney General Bondi's directive to pursue such actions undermines the finality of presidential clemency and conflicts with core principles of justice and due process.

Under Article II of the U.S. Constitution, the President's clemency power is absolute within the federal system.[384] Once a death sentence is commuted to life imprisonment, that decision is final and binding. Encouraging state prosecutors to revisit the same offenses for capital punishment—especially after the federal government has already exercised mercy—amounts to an attempt to nullify executive clemency through proxy punishment. Courts have warned against this in cases involving vindictive justice and double punishment.

While the dual sovereignty doctrine technically allows both federal and state governments to prosecute the same conduct under their respective laws, using this doctrine to circumvent clemency raises significant due process concerns. As noted above, the Supreme Court has established that punishment must be proportionate and individualized.[385] Reopening capital charges en

382. *Id.* at 2–3.

383. *Taylor v. Trump*, CTR. FOR CONST. RTS. (Apr. 23, 2025), https://ccrjustice.org/home/what-we-do/our-cases/taylor-v-trump.

384. U.S. CONST. art. II, § 2, cl. 1.

385. *Woodson*, 428 U.S. at 304–05; *Lockett*, 438 U.S. at 606.

masse—without new evidence or individualized justification—violates this constitutional requirement.

Many of the crimes in question took place in jurisdictions that have either banned the death penalty or effectively abolished it. Even where capital punishment remains legal, prosecutors have been hesitant to pursue new trials, citing outdated cases, insufficient evidence, and the fact that defendants are already serving life sentences. This indicates that Bondi's directive is driven less by legal necessity than by political motives—further eroding trust in the justice system.

In summary, Bondi's initiative to seek state capital remedies for commuted inmates is not only legally questionable; it is also a direct violation of constitutional protections, the rule of law, and ethical boundaries of prosecutorial discretion. It weaponizes state authority to override federal mercy, setting a dangerous precedent that punishment can be relentlessly pursued until political satisfaction is achieved.

The DOJ's recent actions under the Trump administration reflect a troubling shift toward punitive governance lacking compassion, revealing a disregard for constitutional boundaries and a top-down approach to criminal justice. From directives imposing stricter confinement on inmates with commutations to efforts supporting state-level capital prosecutions, the DOJ appears to pursue a retributive agenda that violates the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection. Legal scholars have warned that this pattern—characterized by defiance of court orders, retaliatory executive actions, and politicized prosecutions—indicates a broader disrespect for constitutional principles and norms.[386] Even more concerning is the apparent loyalty-driven culture within the DOJ, where officials execute these orders without regard for integrity, fairness, or the rule of law. This institutional stance not only damages public trust but also reveals a governing philosophy rooted in vengeance rather than justice.[387]

PART IV: SECTION 4, PRESERVING CAPITAL PUNISHMENT: TRUMP'S DIRECTIVES ON LETHAL INJECTION AND EXPEDITED HABEAS REVIEW

A. Lethal Injection at Any Cost: Drug Shortages, Botched Executions, and Secrecy Laws

Section 4(a) Preserving Capital Punishment in the States reads as follows:

386. *See* David Comfort, *Trump Administration Actions Considered Unconstitutional, Illegal, or Unethical by Legal Scholars*, DEMOCRACY ACTION NETWORK (Mar. 22, 2025), https://democracyactionnetwork.com/trump-administration-actions-considered-unconstitutional-illegal-or-unethical-by-legal-scholars/.

387. *See id.*

(a) The Attorney General shall take all necessary and lawful action to ensure that each state that allows capital punishment has a sufficient supply of drugs needed to carry out lethal injection.[388]

Trump's directive ignores the complex and worsening problems with sourcing execution drugs, such as pharmaceutical resistance, legal challenges, and widespread reports of unnecessary pain and suffering. Instead of addressing these systemic problems, the order risks perpetuating a method of execution that has repeatedly failed to meet constitutional standards for humane treatment.

Since the death penalty was reinstated in 1976, the United States has employed different methods of execution, but none has guaranteed a truly humane death. This ongoing struggle underscores the country's unresolved quest to find a more ethical and constitutionally acceptable means of implementing capital punishment. Of the 1655 executions since 1976, 163 have been by electrocution, nineteen by gas, six by firing squad, and three by hanging.[389] But 1464 executions have been carried out by lethal injection, which remains the predominant method of execution.[390]

Lethal injection was introduced in the United States in the late 20th century to address growing concerns about the humanity and cost of traditional execution methods, such as electrocution, hanging, and the gas chamber.[391] In 1977, Oklahoma became the first state to authorize lethal injection as a method of execution.[392] Developed by the state's medical examiner, the protocol consisted of a three-drug combination: sodium thiopental, pancuronium bromide, and potassium chloride.[393] By 1981, five states had adopted the procedure, but it was not until December 7, 1982 that Texas became the first state to employ it, for the execution of Charles Brooks.[394] Brooks's excessive drug use prevented his executioners from finding a suitable vein, resulting in a botched process and prolonged death. It took Brooks seven minutes to die, and according to witnesses, he appeared to experience visible pain and discomfort throughout the process.[395]

---

388. Exec. Order No. 14164, 90 Fed. Reg. at 8464.

389. DEATH PENALTY INFO. CTR., *Facts*, *supra* note 74.

390. *Id.*

391. Deborah W. Denno, *Six Execution Methods and the Disastrous Quest for Humaneness*, *in* THE ELGAR COMPANION TO CAPITAL PUNISHMENT AND SOCIETY 152–53 (Benjamin Fleury-Steiner & Austin Sarat, eds. 2024); *see also* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007).

392. *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline (last visited July 27, 2025).

393. Denno, *Six Execution Methods*, *supra* note 391, at 153.

394. *Id.*

395. *Id.*; *see also* Anthony J. Blinken, *Painful Questions, Taking Sides*, HARV. CRIMSON (Dec. 16, 1982), https://www.thecrimson.com/article/1982/12/16/painful-questions-pbtbhe-execution-of-charles/ ("Sometimes it's tough as hell to find a vein. If you miss, the pain can be excruciating. And besides, even if you do get the vein, no one is really sure the convict doesn't suffer for a few minutes while the drug is being administered.").

Brooks's visibly flawed execution in 1982 foreshadowed a troubling pattern of botched lethal injections that has persisted for decades. Professor Michael L. Radelet compiled a list of sixty-two botched executions or attempted executions: two by asphyxiation, ten by electrocuting, and fifty by lethal injection, including six failed executions that were stopped when execution personnel couldn't set an IV line.[396] The following describes one of the most appalling botched executions using lethal injection.

- **April 29, 2014. Oklahoma. Clayton D. Lockett. Lethal Injection.**[397]

  Despite prolonged litigation and numerous warnings from defense attorneys about the dangers of using an experimental drug protocol with the drug midazolam, Oklahoma went ahead and scheduled the executions of Clayton Lockett and Charles Warner. Plans for the execution and the drugs used were cloaked in secrecy, with the state refusing to release information about the source and efficacy of the lethal drugs, making it impossible to accurately predict the effects of the combination of drugs. Nonetheless, Oklahoma Governor Mary Fallon pressured the Courts to allow the execution, a bill was introduced in the Oklahoma House of Representatives to impeach the Justices who had voted to stay the execution, and the state Supreme Court allowed the executions to go forward.

  Mr. Lockett was the first who was scheduled to die. An hour before the execution began, the governor was notified that the executioner (a "phlebotomist") was having problems finding a usable vein, but she did not intervene. After an hour, a vein was finally found in Mr. Lockett's "groin area," and the execution went forward. Ten minutes after the administration of the first drug, a sedative, the physician supervising the process (whose very presence violated ethical standards of several medical organizations) announced that the inmate was unconscious, and therefore ready to receive the other two drugs that would actually kill him. Those two drugs were known to cause excruciating pain if the recipient was conscious. However, Mr. Lockett was not unconscious. Three minutes after the latter two drugs were injected, "he began breathing heavily, writhing on the gurney, clenching his teeth and straining to lift his head off the pillow." Officials then lowered the blinds to prohibit witnesses from seeing what was going on, and 15 minutes later the witnesses were ordered to leave the room.

  Twenty minutes after the first drugs were administered, the Director [of] the Oklahoma Department of Corrections halted the execution and issued a two-week stay (later extended by extensive litigation) for the execution of Mr. Warner. Mr. Lockett died 43 minutes after the

396. Michael L. Radelet, *Examples of Post*-Furman *Botched Executions*, DEATH PENALTY INFO. CTR. (June 4, 2025), https://deathpenaltyinfo.org/executions/botched-executions.

397. *Id.*

execution began, of a heart attack, while still in the execution chamber.

In fifteen years, three U.S. Supreme Court cases have challenged the constitutionality of lethal injection on Eighth Amendment grounds. These cases include *Baze v. Rees* (2008),[398] *Glossip v. Gross* (2015),[399] and *Barber v. Ivey*, (2023).[400]

In *Baze*, the Supreme Court considered whether Kentucky's three-drug lethal injection protocol violated the Eighth Amendment's ban on cruel and unusual punishment.[401] On behalf of the petitioners, the Death Penalty Clinic at the University of California, Berkeley School of Law, submitted an amicus curiae brief with substantial supporting evidence.[402] The amicus brief advanced three arguments in support of the petitioners, each addressing a distinct constitutional concern: first, that lethal injection is a method with virtually no tolerance for error;[403] second, that public records across multiple jurisdictions reveal a "pervasive lack of professionalism" in execution protocol design and personnel oversight;[404] and third, that these systemic flaws have led to numerous preventable and foreseeably botched executions.[405]

> Execution by lethal injection can be performed constitutionally. The three-drug formula employed in almost all jurisdictions can result in humane executions, but only if administered properly, with the precision and care the use of such drugs requires. Because the drugs used are so volatile, and will inflict excruciating pain and suffering on inadequately anesthetized inmates, the question is whether jurisdictions that employ lethal injection have put in place reasonable procedures to effectuate a humane execution and to deal with the foreseeable problems with this method of execution. This brief argues that many of them have not done so. Instead, they have turned a blind eye to these foreseeable problems, allowing ignorance and neglect – rather than science and deliberation – to guide the formation and implementation of lethal injection protocols. The result has been botched executions that are entirely predictable and preventable.[406]

By the time *Baze* reached the Supreme Court, there was substantial evidence of botched lethal injection executions—twenty-eight had already been widely reported.[407] Reports published around this time, such as the 2006 Human

398. 553 U.S. 35 (2008).
399. 576 U.S. 863 (2015).
400. 143 S. Ct. 2545 (2023).
401. 553 U.S. at 41.
402. Brief for Amici Curiae Michael Morales, Michael Taylor, Vernon Evans, Jr., & John Gary Hardwick, Jr., in Support of Petitioners, *Baze*, 553 U.S. 35 (2008) (No. 07-5439).
403. *Id.* at *4–8.
404. *Id.* at *8–28.
405. *Id.* at *29–36.
406. *Id.* at *2.
407. Radelet, *supra* note 396.

Rights Watch report[408] and systematic reviews by groups like Reprieve[409] and Austin Sarat,[410] outlined the frequency, causes, and effects of mishandled lethal injections and were widely cited in court filings. Petitioners in *Baze* drew on this growing body of literature to argue that the three-drug protocol used by states posed a significant, demonstrated risk of severe pain.[411] They argued that insufficient training, faulty protocols, and systemic secrecy caused mistakes ranging from incorrect anesthesia to failed IV access, all of which could lead to unconstitutional pain and suffering.[412]

The Supreme Court was not persuaded. It ruled that the protocol did not violate constitutional standards, stating that a method of execution is unconstitutional only if it presents a "substantial risk of serious harm" or an "objectively intolerable risk of harm."[413] The Court also clarified that the Eighth Amendment does not require the complete elimination of pain during executions.[414] Moreover, it held that inmates challenging a method of execution must identify a feasible and easily implemented alternative that would significantly reduce the risk of severe pain.[415]

When the Supreme Court agreed to hear *Baze* on September 25, 2007, it did not impose a legal moratorium on the death penalty; however, a de facto moratorium emerged.[416] Executions across the country were effectively put on hold as states waited for the Supreme Court's ruling on whether lethal injection constituted cruel and unusual punishment.[417] This pause lasted from September 2007 until April 2008, when the Supreme Court ultimately upheld Kentucky's lethal injection protocol, ending the nationwide halt on executions.[418]

For advocates of meaningful reform, the ruling in *Baze* was a significant setback, exposing the Supreme Court's reluctance to address the cruelty

408. Jamie Fellner, *So Long as They Die, Lethal Injections in the United States*, HUM. RTS. WATCH (Apr. 23, 2006), https://www.hrw.org/report/2006/04/23/so-long-they-die/lethal-injections-united-states.

409. *Lethal injection in the modern era: cruel, unusual and racist*, REPRIEVE, 4 (Apr. 17, 2024), https://reprieve.org/wp-content/uploads/sites/2/2024/04/2024_04_17_PUB-Botched-lethal-injection-report-FINAL.pdf.

410. Radelet, *supra* note 396 (citing to Austin Sarat et al., *Gruesome Spectacles: The Cultural Reception of Botched Executions in America, 1890-1920*, 1 BRIT. J. AM. LEGAL STUD. 1 (Spring 2012)).

411. *Baze*, 553 U.S. at 49.

412. *Id.* at 49–50.

413. *Id.* at 53.

414. *Id.* at 50.

415. *Id.* at 52.

416. *The Death Penalty in 2007: Year-End Report*, DEATH PENALTY INFO. CTR. (Dec. 17, 2007), https://deathpenaltyinfo.org/research/analysis/reports/year-end-reports/the-death-penalty-in-2007-year-end-report ("Executions halted after September 25 when the U.S. Supreme Court agreed to hear a challenge to the constitutionality of the mixture of chemicals used in lethal injections in Kentucky (*Baze v. Rees*). This *de facto* moratorium on lethal injections contributed to the fewest number of executions in 13 years.").

417. *Id.*

418. *Id.*

associated with lethal injection protocols. However, the case played an important role in revealing these cruelties, garnering extensive media coverage, public debate, and expert testimony about the widespread problems with lethal injections. *Baze* highlighted its concrete dangers, such as intense pain, failed executions, and the difficulties states face in ensuring a humane process. By sharing stories of flawed executions and the ethical concerns surrounding execution methods, *Baze* compelled both the legal community and the public to confront harsh truths about the death penalty in the United States.

The botched execution of Clayton Lockett in Oklahoma on April 29, 2014,[419] became a flashpoint in the national debate over lethal injection. After the state was unable to obtain traditional execution drugs due to pharmaceutical restrictions, it adopted a new protocol using midazolam—a sedative not approved for use as the sole anesthetic in surgical procedures—as the first drug in a three-drug sequence.[420] As noted above, Lockett was the first person executed under this revised protocol, and the results were catastrophic: the drugs failed to render him unconscious, and he visibly writhed, groaned, and attempted to speak before dying of a heart attack approximately forty minutes later.[421]

In response to Lockett's botched execution, a group of Oklahoma death row inmates filed a lawsuit under 42 U.S.C. §1983—*Glossip v. Gross*—arguing that the state's use of midazolam created an unconstitutional risk of severe pain in violation of the Eighth Amendment.[422] In 2015, in *Glossip*, the Supreme Court reaffirmed its earlier holding in *Baze v. Rees*, concluding that Oklahoma's three-drug lethal injection protocol—beginning with midazolam—did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[423] The petitioners argued that midazolam did not reliably make individuals insensate to pain, creating a substantial risk of severe suffering.[424] However, the Court held that the protocol was constitutional, emphasizing two key requirements for such claims: (1) the inmate must demonstrate that the method "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,'" and (2) the inmate must propose a feasible, readily implemented alternative that would significantly reduce that risk.[425]

Since *Glossip*, legal scrutiny of lethal injection protocols intensified. In *Barber v. Ivey*, the Supreme Court refused to grant a stay of execution for an Alabama inmate despite documented failures in previous executions, including prolonged and painful attempts to establish IV access.[426] Justice Sotomayor,

419. Radelet, *supra* note 396.
420. *Id.*
421. *Id.*
422. 576 U.S. at 867 (2015).
423. *Id.*
424. *Id.*
425. *Id.* at 875 (quoting *Baze*, 553 U.S. at 40).
426. 143 S. Ct. 2545, 2545 (2023).

joined by Justices Kagan and Jackson, issued a strong dissent, arguing that Alabama's protocol posed a substantial risk of unnecessary pain and lacked transparency and oversight, raising serious Eighth Amendment concerns.[427] Her dissent highlighted Alabama's troubling lack of transparency and its failure to adequately address ongoing issues with its lethal injection protocol.[428] Barber had requested discovery to examine whether the state had resolved problems related to a series of botched executions, but his request was denied at every level: by state courts, federal courts, and ultimately by the Supreme Court majority.[429] Justice Sotomayor argued that this refusal to allow scrutiny not only undermines the protections guaranteed by the Eighth Amendment but also hinders the development of legal standards concerning humane execution practices.[430]

As Justice Sotomayor explained, Barber's execution was scheduled shortly after Alabama had severely botched three: Joe Nathan James, Jr., Alan Eugene Miller, and Kenneth Eugene Smith. These failed executions led Alabama's Governor Kay Ivey to pause executions and order a review of the state's execution procedures and protocols.[431]

Joe Nathan James Jr.'s execution was originally scheduled for July 28, 2022, at 6:00 p.m. Central Time, but was delayed by three hours due to reasons the Alabama Department of Corrections (ADOC) did not clearly explain. Officials said the delay was to follow protocol without using a cut-down procedure, insisting that "nothing out of the ordinary" had happened. However, a private autopsy later contradicted this explanation.[432]

An exposé in The Atlantic, by journalist Elizabeth Bruenig, claimed the autopsy revealed multiple failed attempts to establish an intravenous line, puncture wounds in muscle tissue unrelated to vein access, unexplained incisions, and significant bruising and bleeding around James's wrists where he had been strapped to the gurney.[433] Bruenig described the execution as "lengthy and painful," and a physician present at the autopsy concluded that the execution team was "unqualified for the task in a most dramatic way."[434] The estimated

427. *Id.* at 2550–51 (2023) (Sotomayor, J., dissenting).
428. *Id.* at 2548–49.
429. *Id.* at 2547.
430. *Id.* at 2550–51.
431. *Id.* at 2546.
432. Radelet, *supra* note 396.
433. *Id.*
434. Radelet, *supra* note 396:

> The private autopsy found puncture wounds and bruising around James' knuckles and wrists, which doctors said suggested that execution team members had tried and failed to insert IV lines in those locations. The autopsy also documented puncture wounds in James' musculature that, Emory University anesthesiologist Joel Zivot said, were "not in the anatomical vicinity of a known vein."

time of three to three-and-a-half hours from the first IV attempt to James's death represents the longest failed lethal injection execution since the method was introduced in the United States in 1982.[435] According to the human rights group Reprieve, which funded the autopsy, this was the longest recorded gap between the start of an execution and death for any method in U.S. history.[436]

Alabama next tried to execute Alan Eugene Miller on September 22, 2022.[437] According to an October 12th court filing, two men in scrubs repeatedly probed Miller's arms, legs, feet, and hands with needles—at one point using a cell phone flashlight to locate a vein.[438] His attorneys described him as the "only living execution survivor in the United States" and argued that the ordeal amounted to "precisely the unnecessary and wanton infliction of pain that the Eighth Amendment was intended to prohibit."[439]

Two months later, on November 17, 2022, Alabama tried to execute Kenneth Eugene Smith.[440] A lawsuit filed on his behalf reveals the gruesome events of the attempted execution:

> At around 10:00 p.m., an IV team entered the execution chamber and began repeatedly jabbing Mr. Smith's arms and hands with needles, well past the point at which the executioners should have known that it was not reasonably possible to access a vein. Even when Mr. Smith told them they were sticking the needle in his muscle, which was causing pain, they retorted back, "No I'm not."
>
> Mr. Smith was then tilted in an inverse crucifixion position while strapped to the gurney and left there for several minutes while the IV team left the room. When they returned, he was injected with an unknown substance that, as alleged below and on information and belief, was some sort of sedative and/or anesthetic. He specifically

---

> "It is possible that this just represents gross incompetence, or some, or one, or more of these punctures were actually intramuscular injections," Zivot explained. "An intramuscular injection in this setting would only be used to deliver a sedating medication," Zivot said.
>
> On the inside of James's left arm, the autopsy examiners found a jagged incision, which Zivot concluded was likely from a "cutdown" — a deep cut in the skin made to expose a vein. "I can't tell if local anesthetic was first infused into the skin, as slicing deep into the skin with a sharp surgical blade in an awake person without local anesthesia would be extremely painful," Zivot explained."

435. *Id.*

436. *Id.*

437. Kim Chandler, *Attorneys: Inmate endured 'torture' during execution attempt*, ASSOCIATED PRESS (Oct. 11, 2022) https://aldailynews.com/attorneys-inmate-endured-torture-during-execution-attempt/.

438. *Id.*; *see also* Second Amended Complaint at 24-26, Miller v. Hamm, No. 2:22-cv-00506-RAH (M.D. Ala. Oct. 6, 2022).

439. Chandler, *supra* note 437.

440. Second Amended Complaint at 4–6, Smith v. Hamm, No. 2:22-cv-00497-RAH (M.D. Ala. Nov. 25, 2022), https://www.documentcloud.org/documents/23321446-2022-11-25-motion-dckt-63_1/#document/p1.

> objected to this injection, as he was aware that the State had represented that it "does not deliver intramuscular injections as part of the execution process" and had been ordered not to use "intramuscular sedation" during his execution.. After this injection, a person of unknown medical credentials wearing a face shield started repeatedly stabbing his collarbone area with a large needle in an attempt to begin a central line IV in his subclavian artery. Against Mr. Smith's will, a prison official physically grabbed and held his head away from the area where the needle was being inserted. Mr. Smith writhed in pain and agony as the executioner repeatedly jabbed him with the large needle, which he could feel going underneath his collarbone. He felt sharp and intense pain, as though he were being "stabbed" in the chest. Those attempts at establishing intravenous access in the collarbone area went well past the point that the executioner should have known he would not achieve access. Throughout the ordeal, Mr. Smith's cries of pain were ignored, as were his requests that officials in the room contact his counsel and the Court because his constitutional rights and the orders of the Court were being violated.[441]

These three executions were shockingly botched (marked by prolonged delays), repeated failed attempts to establish IV access, and visible signs of pain and trauma. These incidents underscore not only a profound lack of competence in carrying out lethal injection protocols but also a disregard for transparency and constitutional protections. They represent some of the most egregious examples of failed state-administered executions in modern U.S. history, raising serious questions about the viability and ethics of continuing to rely on such methods. It is deeply troubling that, despite the overwhelming evidence of failed execution attempts—marked by unnecessary pain, procedural chaos, and systemic incompetence—the Supreme Court continues to stand unmoved, declining to intervene or demand accountability.

The extensive media coverage of botched executions in the United States significantly contributed to pharmaceutical companies ceasing the production and distribution of drugs used in lethal injections. As reports of prolonged, painful, and failed executions drew national and international attention, major drug manufacturers faced increasing ethical and reputational pressure.[442] Companies such as Pfizer, Fresenius Kabi, Johnson & Johnson, and Baxter International have publicly stated that their products are intended for therapeutic use—not to be used in state-sanctioned executions.[443] Many pharmaceutical companies implemented strict distribution controls, refused to sell directly to

441. *Id.* at 5–6.

442. Lincoln Caplan, *The End of the Open Market for Lethal Injection Drugs*, NEW YORKER (May 21, 2016), https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs/.

443. *Id.*

correctional institutions, and even pursued legal action to prevent their drugs from being diverted for lethal injection protocols.[444] These actions reflect a broader ethical reckoning within the pharmaceutical industry: that participation in executions not only contradicts their mission to heal but also exposes companies to legal liability, public backlash, and investor scrutiny.[445]

This industry-wide stance has created a significant shortage of FDA-approved execution drugs, forcing some states to turn to unregulated compounding pharmacies or illicit sources, often resulting in botched and inhumane executions.[446] The European Union has also banned the export of lethal injection drugs to the United States, reinforcing the global consensus against the misuse of medical products for capital punishment.[447]

According to a 2023 report, four major medical supply manufacturers—Baxter International, B. Braun Medical, Fresenius Kabi, and Johnson & Johnson—have refused to sell their equipment for use in lethal injection executions.[448] This includes essential items such as IV catheters, syringes, and IV bags, which are critical to administering lethal injection protocols.[449] Their stance reflects growing ethical opposition within the healthcare industry to participating in capital punishment.[450]

Together, these industry-wide refusals are making it increasingly difficult for states to obtain both the drugs and the equipment needed to carry out executions—raising serious questions about the future viability of lethal injection as a method of capital punishment.[451]

As a result of these restrictions, states have begun to rely on compounding pharmacies to provide execution drugs, and many states have enacted secrecy or

444. *Some Medical Supply Manufacturers Ban Use of IV Equipment in Lethal Injection Executions*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/some-medical-supply-manufacturers-ban-use-of-iv-equipment-in-lethal-injection-executions.

445. Rose Rimler, *Will Pharmaceutical Companies Kill the Death Penalty?*, HEALTHLINE (Oct. 16, 2019), https://www.healthline.com/health-news/will-pharmaceutical-companies-kill-death-penalty.

446. *Helping pharmaceutical companies stop their medicines being used to kill*, REPRIEVE (Feb. 9, 2017), https://reprieve.org/us/2017/02/09/helping-pharmaceutical-companies-stop-medicines-used-kill/.

447. Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (codification), art. 3, 2019 O.J. (L 30) 1; *see also* European Commission Press Release IP/11/1578, Commission extends control over goods which could be used for capital punishment or torture, (Dec. 20, 2011).

448. DEATH PENALTY INFO. CTR., *2007: Year-End Report*, *supra* note 416.

449. *Id.*

450. *Id.*

451. *Id.*; *see also* Maurice Chammah & Tom Meagher, *How the Drug Shortage Has Slowed the Death-Penalty Treadmill*, MARSHALL PROJECT (Apr. 12, 2016), https://www.themarshallproject.org/2016/04/12/how-the-drug-shortage-has-slowed-the-death-penalty-treadmill.

shield laws to obscure the details of the lethal injection process.[452] Compounding pharmacies are specialized pharmacies that create customized medications tailored to the specific needs of individual patients.[453] Unlike traditional pharmacies that dispense mass-produced, FDA-approved drugs, compounding pharmacies mix, alter, or combine ingredients to produce medications that aren't commercially available.[454] However, compounding pharmacies face serious scrutiny due to recurring issues with drug quality, including the distribution of tainted or contaminated products that have led to patient harm and, in some cases, death.[455] The Food and Drug Administration has "investigate[d] many reports of serious adverse events associated with contaminated or otherwise poor-quality compounded drugs."[456]

In numerous documented cases, these facilities have distributed medicines contaminated with dangerous bacteria due to non-sterile working conditions—putting patients at risk of severe infections and even death.[457] Some pharmacies have compounded drugs using unapproved ingredients that were never safety-tested for human use, bypassing critical regulatory safeguards.[458] Others have opted for cheaper, research-grade components that lack the purity required for pharmaceutical applications, further compromising drug quality and patient safety.[459]

Many compounding pharmacies supplying execution drugs have been cited for serious safety violations, including failing to maintain sterile environments, using improper techniques, and keeping outdated medications in stock.[460] For example, investigations revealed Texas obtained lethal injection drugs from compounding pharmacies like Greenpark and Rite-Away, both of which had extensive records of safety and cleanliness infractions, such as failing to properly sterilize equipment or inaccurately preparing solutions.[461] Such violations not

452. *COMPOUNDING PHARMACIES AND LETHAL INJECTION*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/lethal-injection/compounding-pharmacies (last visited July 28, 2025).

453. Hallie Levine, *Thinking of using a compounding pharmacy? What you need to know*, HARV. HEALTH PUBL'G (Sep. 26, 2024), https://www.health.harvard.edu/staying-healthy/thinking-of-using-a-compounding-pharmacy-what-you-need-to-know.

454. *Id.*

455. *Understanding the Risk of Compounded Drugs*, FDA (Dec.18, 2024), https://www.fda.gov/drugs/human-drug-compounding/understanding-risks-compounded-drugs.

456. *Id.*

457. *Have patients been harmed by unsafe drug compounding?*, P'SHIP FOR SAFE MEDICINES, https://www.safemedicines.org/2024/07/compounding-patient-harm.html (last visited July 28, 2025).

458. *Id.*

459. *Id.*

460. DEATH PENALTY INFO. CTR., *Compounding Pharmacies*, *supra* note 452.

461. *Investigation Reveals Texas Obtained Possibly Tainted Execution Drugs from Pharmacy With Tainted Safety Record*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://deathpenaltyinfo.org/investigation-reveals-texas-obtained-possibly-tainted-execution-drugs-from-pharmacy-with-tainted-safety-record.

only compromise the integrity of the drugs but also increase the risk of botched executions, raising serious constitutional concerns under the Eighth Amendment.[462]

To obscure the method by which drugs are obtained, States have enacted secrecy or shield laws. According to a recent report—"*Behind the Curtain: Secrecy and the Death Penalty in the United States*,"—since 2011, thirteen states have enacted secrecy or shield laws that hide crucial information about the execution process.[463] Between January 2011 and August 31, 2018, every state of the seventeen states that conducted 246 lethal injection executions withheld some detail about the execution process.[464] All but one of these states refused to disclose the sources of execution drugs.[465] Among the seventeen states that used lethal injections, fourteen states did not allow witnesses to view certain parts of the execution, while fifteen states prevented witnesses from hearing what was happening inside the execution chamber.[466] Not a single state allowed witnesses to know the timing of when each drug was administered during the procedure.[467]

In May 2024, eight Democratic senators—including Elizabeth Warren and Cory Booker—sent a letter urging the Food and Drug Administration (FDA) and the Drug Enforcement Administration (DEA) to regulate drugs used in executions.[468] In a separate letter to Attorney General Merrick Garland, the senators called for the rescission of a Trump-era DOJ legal opinion that excluded execution drugs from FDA oversight, describing this position as "deeply flawed," both legally and morally.[469] The senators cited the multitude of problems caused by these unregulated drugs:

> In this unregulated and opaque environment, states execute people using drugs of unknown origin and dubious quality. Sometimes, the drugs are misbranded or unlabeled, shipped in "unmarked jars and boxes" and with shipment invoices falsely describing the contents as "harmless medicine." Other times, the drugs are expired, degraded, improperly stored, or contaminated. In one case, a clear solution was discovered to have turned yellow and cloudy shortly before an execution.[470]

---

462. *Id.*

463. Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, DEATH PENALTY INFO. CTR. (Nov. 20, 2018), https://dpic-cdn.org/production/documents/pdf/SecrecyReport-2.f1560295685.pdf?dm=1683576587.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. Letter from Elizabeth Warren et al. to Robert M. Califf, FDA Comm'r, & Anne Milgram, DEA Adm'r (May 21, 2024), https://www.warren.senate.gov/imo/media/doc/dea_lethal_injection_letter.pdf.

469. Letter from Elizabeth Warren et al. to Merrick Garland, U.S. Att'y Gen. (May 21, 2024), https://www.warren.senate.gov/imo/media/doc/52124finaldojolcletter.pdf.

470. Letter from Elizabeth Warren et al. to FDA & DEA, *supra* note 468, at 4–5 (citations omitted).

These unregulated, poor-quality drugs contribute to botched executions. For example, botched executions have resulted from states using sub-potent drugs that cause needless pain, long-expired drugs that could obstruct IV lines, drugs in untested doses, and drugs delivered in unmarked boxes that turn out to be the wrong drug altogether. One sedative commonly used in executions, midazolam, frequently fails to adequately anesthetize individuals; in 2017, for example, over 60 percent of executions involving midazolam were botched. Individuals who face botched executions are often left "gasping, heaving, [and] writhing" for upwards of 45 to 60 minutes.

Even when functioning as intended, execution drugs often cause extreme pain, and untested, experimental drug cocktails have unpredictable effects. For example, pentobarbital, the most common execution drug, has been found to cause the sensation of drowning and suffocation, contrary to officials' claims that such executions are quick and painless. And common lethal injection drug combinations have been described as the "chemical equivalent of being burned alive," and have led people to exclaim during their executions that they could feel their bodies burning from the inside out. While lethal injection is perceived as more humane than methods like the electric chair or firing squad, this practice often results in an "excruciatingly painful death hidden behind a veneer of medication," and has the highest botch rate of any method of execution.

In 2024, Reprieve, a legal action organization, released a report that examined seventy-three botched executions carried out between 1976 and 2023.[471] The report reveals disturbing patterns of racial disparity, procedural failure, and systemic secrecy.[472] Black individuals were found to have 220 percent higher odds of suffering a botched execution compared to white individuals—a disparity that persisted regardless of the drug protocol used.[473] Whether states employed a one-drug or three-drug regimen, and whether the primary drug was sodium thiopental, pentobarbital, or midazolam, the likelihood of a botched procedure remained alarmingly consistent.[474]

Botched executions were not only more frequent among Black prisoners, but also notably prolonged.[475] Over one-third of these executions lasted more than forty-five minutes, and more than a quarter extended beyond an hour.[476] Age was another contributing factor: the odds of a botched execution increased by 6 percent for each additional year of age, suggesting that older individuals face heightened risks during the procedure.[477]

471. REPRIEVE, *Lethal injection*, *supra* note 409, at 4.
472. *Id.* at 4–5.
473. *Id.* at 4, 11.
474. *Id.* at 10–11.
475. *Id.* at 10.
476. *Id.*
477. *Id.* at 9.

The racial disparities were especially stark in Southern states. In Arkansas, 75 percent of botched executions involved Black individuals, though they accounted for only 33 percent of total executions.[478] In Georgia, 86 percent of botched executions were of Black people, despite comprising just 30 percent of those executed.[479] Similarly, in Oklahoma, 83 percent of botched executions involved Black individuals, while they represented only 30 percent of executions overall.[480]

Researchers also identified secrecy and haste as key factors contributing to these failures.[481] States often concealed critical details about the execution process, including drug sourcing and administration protocols, and rushed to carry out executions without adequate preparation or oversight—conditions that significantly increased the likelihood of error and suffering.[482]

Considering the serious legal, constitutional, and ethical issues detailed in the report, Reprieve issued a set of urgent recommendations that sharply oppose President Trump's efforts to expand the use of the death penalty.[483] Rather than reinforcing President Trump's directive to expand the death penalty, the report's recommendations advocate for restraint and reform—reflecting a policy vision grounded in the practical realities of capital punishment's implementation. These proposals acknowledge persistent issues, such as wrongful convictions, racial disparities, high costs, and lengthy appeals, which have plagued the system and raised serious concerns about its efficacy and fairness. As such, the recommendations mark a decisive shift away from politically driven expansion of the death penalty and toward a more pragmatic, justice-focused approach. First and foremost, Reprieve recommended that an immediate moratorium be imposed on all lethal injection executions at both the state and federal levels to allow for a thorough examination of the systemic failures involved. It called on the federal government to consider these findings as it continues to evaluate the use of capital punishment.[484] Particular attention should be given to the disturbing pattern of racial disparities in botched lethal injections, and any policies or guidelines contributing to such outcomes should be rescinded to prevent future harm.[485]

Reprieve urged governors in states with the death penalty to follow the example of their counterparts in Ohio, Arizona, and Virginia by halting further executions and commissioning independent investigations into the procedural

478. *Id.* at 4.
479. *Id.*
480. *Id.*
481. *Id.* at 5.
482. *Id.* at 18–21.
483. *Id.* at 24–25.
484. *Id.*
485. *Id.*

and ethical issues surrounding lethal injection.[486] It also encouraged lawmakers in these states to advocate for the repeal of secrecy laws and opaque practices that hide the death penalty process from public oversight and accountability.[487]

The report also urged correction departments to update their procedures to ensure transparency and to allow witnesses to be present from the moment an individual is prepared for execution.[488] It recommended that no part of the execution should be hidden from view, and a detailed, time-stamped record of each step should be created, with the official start time marked as when the lethal injection preparation begins.[489]

Finally, federal agencies like the FDA and the Drug Enforcement Administration should enforce existing drug laws and act against entities involved in illegal lethal injection drug deals.[490] Additionally, these agencies should critically examine how state laws and policies circumvent federal oversight, which increases the risks and legal issues associated with execution protocols.[491]

Despite the clear evidence of racial disparities, procedural failures, and inhumane conditions surrounding lethal injection executions, it remains sadly improbable that these appalling statistics will compel meaningful change. The current administration has shown little willingness to confront the profound ethical and legal failures embedded in the practice of capital punishment. With an unwavering commitment to preserving the death penalty at all costs, efforts to acknowledge systemic injustices—let alone implement reforms—are unlikely to gain traction. These grim realities, though urgent and deeply troubling, continue to be met with institutional indifference.

However, in response to the mounting failures and legal challenges surrounding lethal injection, states are forging ahead with alternative execution methods. On January 25, 2024, Alabama made history—and ignited global controversy—by becoming the first U.S. state to execute a person using nitrogen hypoxia, a method never before tested on humans.[492] The individual was Kenneth Eugene Smith, whose previous execution attempt by lethal injection in

---

486. *Id.*
487. *Id.*
488. *Id.* at 24–25.
489. *Id.*
490. *Id.*
491. *Id.*
492. Jeanine Santucci & Thao Nguyen, *Alabama Executes Killer with Nitrogen Gas in Controversial First-of-Its-Kind Method*, USA TODAY (Jan. 25, 2024), https://www.usatoday.com/story/news/nation/2024/01/25/kenneth-eugene-smith-execution-follows-many-capital-punishment-botches/72328311007/. *See also* Smith v. Hamm, 144 S. Ct. 414 (2024) (Sotomayor, J., dissenting from denial of stay of execution and denial of certiorari) ("Alabama plans to execute Kenneth Eugene Smith tonight by nitrogen hypoxia. That method is untested. Smith is the first person in this country ever to be executed in this way."

2022 had been botched when officials failed to establish intravenous access, leaving him physically and psychologically traumatized.[493]

Alabama's decision to proceed with nitrogen hypoxia was not born of innovation, but desperation. With pharmaceutical companies unwilling to supply lethal injection drugs, and courts intensifying scrutiny of execution protocols, states like Alabama—already burdened by a high rate of botched executions—are resorting to untested and controversial execution methods to keep capital punishment alive at any cost. This shift toward experimental practices reflects not only the erosion of conventional execution standards but also a broader willingness to sidestep constitutional safeguards in pursuit of punishment over justice.[494] Smith's execution, which involved strapping him to a gurney and administering pure nitrogen through a mask, lasted twenty-two minutes and was marked by visible signs of distress—including convulsions, gasping, and prolonged breathing—despite claims that the method would cause a swift and painless death.[495]

This shift toward nitrogen hypoxia reflects a troubling trend: rather than addressing the systemic flaws of lethal injection, states are seeking new ways to

493. *Id. See also Smith*, 144 S.Ct. at 414 (citations omitted):

> Smith is a surprising candidate to test this novel method. Alabama tried and failed to execute him before. In November 2022, Alabama botched Smith's execution by lethal injection. . . . Smith had warned repeatedly that Alabama would struggle and likely fail to complete its lethal injection in light of a "pattern of the State's difficulties in establishing venous access." This Court did not listen. It instead vacated a stay of execution without explanation, over three noted dissents. As a result, Smith's arms were strapped over his head and he watched as his executioners repeatedly stabbed needles into his hands, arms, and collarbone, trying to access his veins. It took an hour and half after this Court vacated the stay before Alabama called off the execution.
>
> Since that day, Smith has suffered from posttraumatic stress. Reliving those hours strapped to the gurney, his medical records confirm worsening bouts of nausea and vomiting over the past few weeks. Those symptoms have been resistant to prescribed medications. He is therefore likely to vomit during the execution as a combined result of this posttraumatic stress and oxygen deprivation.

494. *Id. See also Smith*, 144 S.Ct. at 415–16 (citations omitted):

> Having failed to kill Smith on its first attempt, Alabama has selected him as its "guinea pig" to test a method of execution never attempted before. . . . This Court yet again permits Alabama to "experiment . . . with a human life," while depriving Smith of "meaningful discovery" on meritorious constitutional claims. This time around, Alabama has adopted a new protocol concerning a never-before-used method of execution. Consistent with Alabama's "familiar veil of secrecy over its capital punishment procedures," it has released only a "heavily redacted" version of that protocol. Smith should be allowed to complete discovery and litigate the merits of his claims challenging this new protocol in the ordinary course. That information is important not only to Smith, who has an extra reason to fear the gurney, but to anyone the State seeks to execute after him using this novel method.
>
> Not long ago, this Court remarked that "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." This case shows how that protection can be all too fragile. Twice now this Court has ignored Smith's warning that Alabama will subject him to an unconstitutional risk of pain. The first time, Smith's predictions came true. He "survived to describe the intense fear and pain [he] experienced during Alabama's tortuous attempts to execute [him]." This time, he predicts that Alabama's protocol will cause him to suffocate and choke to death on his own vomit. I sincerely hope that he is not proven correct a second time.

495. *Id.*

circumvent accountability and public scrutiny. Smith's execution has been widely condemned by medical experts, human rights advocates, and even members of the judiciary, who warned that the procedure amounted to human experimentation and posed serious ethical and constitutional concerns.[496]

B. Expediting Executions: State Certification Under 28 U.S.C. § 2265 and the Erosion of Habeas Protections

Section 4(b) Preserving Capital Punishment in the States reads as follows:

The Attorney General shall take all appropriate action to approve or deny any pending requests for certification made by any State under 28 U.S.C. 2265.[497]

This section directs the Attorney General to take "all appropriate action" to approve or deny pending state requests for certification under 28 U.S.C. § 2265,"[498] rather than allowing them to remain unresolved. Section 2265 is one of several sections within Chapter 154 of Title 28, United States Code, which collectively establish a special, expedited process for federal habeas corpus review in capital (death penalty) cases.[499] Chapter 154 was enacted as part of the Antiterrorism and Effective Death Penalty Act (AEDPA),[500] and applies only to states that meet certain requirements for providing competent legal representation in post-conviction proceedings. AEDPA is a cornerstone of the federal framework governing the execution of death sentences, imposing strict limitations and procedural constraints on federal habeas corpus review for individuals sentenced to death in state courts.

Title 28 U.S.C. § 2265 governs certification and judicial review of habeas corpus[501] for state death penalty cases. Its purpose is to streamline federal habeas corpus review in capital cases by ensuring that states have robust mechanisms in place for appointing and compensating competent counsel in post-conviction proceedings.

Under the AEDPA, § 2265 authorizes the U.S. Attorney General to certify that a state has established an adequate mechanism for providing competent post-

496. Ralph Chapoco, *Kenneth Eugene Smith Executed by Nitrogen Gas for 1988 Murder-for-Hire Scheme*, ALA. REFLECTOR (Jan. 25, 2024, 9:28 PM), https://alabamareflector.com/2024/01/25/kenneth-eugene-smith-executed-by-nitrogen-gas-for-1988-murder-for-hire-scheme/.

497. Exec. Order No. 14164, 90 Fed. Reg. at 8464.

498. 28 U.S.C. § 2265.

499. *Id.*

500. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996).

501. Comer v. Schriro, 463 F.3d 934, 949 (9th Cir. 2006) (In capital cases, federal habeas corpus offers a crucial safeguard by reviewing constitutional violations—such as ineffective counsel, prosecutorial misconduct, or new evidence—to ensure state courts upheld due process. *Id.*).

conviction counsel to indigent death row prisoners.[502] This certification process allows states to "opt in" to the expedited federal habeas corpus procedures outlined in Chapter 154 of Title 28,[503] which include shortened filing deadlines and streamlined federal review for capital cases.

Section 2265 outlines three key criteria for certification:[504] (1) The state must provide for the appointment, compensation, and payment of reasonable litigation expenses for counsel in capital post-conviction cases; (2) It must establish standards of competency for the appointed counsel; (3) The Attorney General must determine the effective date of the mechanism, which then applies retroactively.

The certification process also includes a public comment period, during which the Attorney General must collect and evaluate feedback before making a decision.[505] Once approved, certification reduces the deadline for filing federal habeas petitions from one year to 180 days, significantly accelerating the timeline for executions.[506]

Trump's order aims to eliminate the backlog of certification requests, potentially granting more states fast-track status. The practical effect of this is to expedite executions by limiting the ability of death row inmates to pursue prolonged appeals. Additionally, it pressures states to apply for certification and to align their legal standards with federal requirements.

As more states become certified, the use of the death penalty is likely to grow, enabling executions to occur with less federal judicial oversight and fewer procedural delays. Therefore, the ability of federal courts to review state death penalty convictions decreases, raising concerns about uncorrected mistakes or unfair trials. Ultimately, the purpose of the order is to remove procedural hurdles and speed up the execution process in certified states, while limiting the legal options available to prisoners seeking relief.

PART V: SECTION 5, DISMANTLING PRECEDENT: EXECUTIVE EFFORTS TO OVERTURN SUPREME COURT PRECEDENT

Section 5 reads:

Seeking The Overruling of Supreme Court Precedents That Hinder Capital Punishment. The Attorney General shall take all appropriate action to seek the overruling of Supreme Court precedents that limit the authority of State and Federal governments to impose capital punishment.[507]

---

502. 28 U.S.C. § 2265.
503. *Id.*
504. *Id.*
505. *Id.*
506. 28 U.S.C. § 2263(a) (The 180-day limit under § 2263 applies only if the state is certified under § 2265 as providing adequate post-conviction counsel).
507. Exec. Order No. 14164, 90 Fed. Reg. at 8464.

This section of Trump's executive order is notably vague, failing to specify which precedents it intends to challenge and ignoring the careful and deliberate nature of Supreme Court jurisprudence. Changing or overturning constitutional precedent is not a decision the executive branch can make alone. It requires thorough and complex legal procedures through litigation or legislation. Any effort to quickly "undo" well-established interpretations is legally weak and likely to face strong judicial pushback. More importantly, as with other mandates in the order, this section shows troubling disregard for core constitutional principles—such as respect for judicial precedent, separation of powers, federalism, and state autonomy. It also neglects the protection of the Eighth Amendment and the well-known risks of wrongful executions, thus undermining both the legal legitimacy and moral integrity of the capital punishment system.

Since 1976, the Supreme Court has significantly limited and, in some cases, abolished the death penalty for certain classes of offenses and defendants, shaping the modern scope of capital punishment in the United States. Specifically, the Court has forbidden the execution of juveniles under eighteen, individuals with intellectual disabilities, and those who were suffering from significant mental illness at the time of the offense. Additionally, the death penalty has been ruled unconstitutional for crimes such as the rape of a woman or a child when the victim did not die.

The rationale behind these landmark decisions rests on compelling evidence regarding diminished culpability in these populations and the disproportionate severity of capital punishment in such cases. The Court concluded that executing individuals from these protected groups or for non-homicide offenses does not meaningfully advance the principal objectives of the death penalty—deterrence and retribution. Instead, these categorical bans reflect a commitment to fundamental fairness and evolving societal standards of decency.

In 1976, individuals sentenced to death in Georgia, Texas, Louisiana, Florida, and North Carolina contested the constitutionality of their states' newly revised statutes enacted after *Furman*.[508] The Supreme Court ultimately upheld the death penalty statutes of Georgia, Florida, and Texas, thereby reviving capital punishment and marking the beginning of its modern era.[509] Just one year later, in 1977, the Court decided *Coker v. Georgia*,[510] holding that the imposition of the death penalty for the crime of rape of an adult woman, where the victim was

508. *See generally* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion) (reviewing *Gregg* and four companion cases of defendants sentenced to death under post-*Furman* statutes: Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).

509. *See Gregg*, 428 U.S. at 207; *Proffitt*, 428 U.S. at 242; *Woodson*, 428 U.S. at 280; *Roberts*, 428 U.S. at 325; *Jurek*, 428 U.S. at 262.

510. 433 U.S. 584, 584 (1977).

not killed, constitutes cruel and unusual punishment under the Eighth Amendment.[511] The Court determined that such a punishment was disproportionate to the crime and therefore unconstitutional.[512]

When the Supreme Court decided *Coker*, only one state—Georgia—authorized the death penalty for the rape of an adult woman.[513] The Court observed that, over the past fifty years, no majority of states had authorized the death penalty for this crime.[514] In 1925, eighteen states, along with the District of Columbia and the federal government, permitted capital punishment for the rape of an adult woman.[515] By 1971, this number had decreased to sixteen states plus the federal government.[516] However, in 1977, after *Furman*, most states had abolished the death penalty for rape.[517] At the time of the *Coker* decision, only Georgia still had the death penalty for adult rape, while two other jurisdictions allowed capital punishment when the victim was a child.[518] Following *Furman* and its aftermath, other states, including North Carolina and Louisiana, eliminated the death penalty for rape.[519] In abolishing the death penalty for rape, the Court held:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," is an excessive penalty for the rapist who, as such, does not take human life.[520]

511. *Id.* at 592.
512. *Id.*
513. *Id.* at 594.
514. *Id.* at 593.
515. *Id.*
516. *Id.* at 593.
517. *Id.*
518. *Id.* at 594.
519. *Id.*
520. *Id.* at 598 (citations omitted). This paragraph, taken from Justice White's plurality opinion, has faced widespread criticism for its insensitivity to the trauma of sexual violence, especially from a gendered perspective. When *Coker* was decided, no women were serving on the Supreme Court. This all-male bench likely contributed to a limited understanding of rape and its consequences, lacking direct representation from those most affected. The absence of female voices contributed to a framing of rape that minimized its psychological, emotional, and social devastation. The statement suggests that rape is less severe than murder, arguing that the victim's life "is not over and normally is not beyond repair. This framing reduces rape to a survivable inconvenience, ignoring long-term consequences like PTSD,

> We note finally that in Georgia a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. He also commits that crime when in the commission of a felony he causes the death of another human being, irrespective of malice. But even where the killing is deliberate, it is not punishable by death absent proof of aggravating circumstances. It is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist does not himself take the life of his victim. The judgment of the Georgia Supreme Court upholding the death sentence is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.[521]

Ten years later, the Supreme Court decided *Ford v. Wainwright*, where it held that executing a prisoner who is insane at the time of execution violates the Eighth Amendment's prohibition on cruel and unusual punishment.[522] Justice Marshall argued that the common law's longstanding rejection of executing the insane rests on principles that remain as compelling today as they were centuries ago.[523] Such executions lack retributive justification, offer no deterrent effect, and fundamentally offend our collective sense of humanity.[524] Whether the objective is to shield the condemned from the terror of dying without comprehension or to preserve society's moral integrity by refraining from "mindless vengeance," the prohibition endures.[525] These principles find constitutional expression in the Eighth Amendment's ban on cruel and unusual punishment, reflecting both legal and ethical imperatives that transcend time.[526]

In 2002, the Supreme Court decided *Atkins v. Virginia*.[527] There, the Court held that capital punishment could not be imposed on individuals with intellectual disabilities because such executions violated the Eighth Amendment.[528] In reaching this conclusion, the Court pointed to three factors:

---

depression, anxiety, social stigma, and the erosion of bodily autonomy. It also fails to recognize that some rape victims do not survive, either due to physical violence during the assault or suicide afterward. The phrase "if no more than that" implies that rape, in isolation, is not a serious enough crime to warrant the death penalty. While the Court was ruling on proportionality under the Eighth Amendment, the language used trivializes the severity of sexual violence. It reflects a legal culture that, at the time, often viewed rape as a crime against male property or honor rather than a violation of a woman's autonomy and dignity.

521. *Id.* at 600.

522. 477 U.S. 399, 400 (1986) (holding that states determine what constitutes mental illness and competence for execution but mandated that such determinations be made through judicial hearings consistent with due process, not just by executive or administrative fiat).

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.*

527. 536 U.S. 304 (2002).

528. *Id.*

the emergence of a national consensus opposing such executions,[529] the weakened applicability of retribution and deterrence where culpability is reduced,[530] and the exceptional risk of wrongful execution for defendants with intellectual disabilities.[531]

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[532]

Just three years later, in *Roper v. Simmons*, the Court extended this reasoning to juveniles, holding that the Eighth Amendment prohibits the imposition of the death penalty on offenders who were under the age of eighteen at the time of their crimes.[533] The Court emphasized that juveniles are less culpable than adults due to their immaturity, underdeveloped sense of responsibility, susceptibility to negative influences, and the transient nature of their personality traits.[534] These factors make juveniles less deserving of the most severe punishments, including the death penalty.[535]

---

529. *Id.* at 314–19.

530. *Id.* at 318–19.

531. *Id.* at 320–21.

532. *Id.* (citations omitted). The Court's ruling on *Atkins* has been criticized by scholars and medical professionals as well. *See* Douglas Mossman, Atkins v. Virginia*: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 256 (2003):

> Whether *Atkins* reflects good legal reasoning or—as Justice Scalia called it in his dissent—"nothing but the personal views of its members," it is poor psychiatric thinking for three reasons. First, *Atkins* implicitly assumes that persons with mental retardation comprise a discrete psychiatric category of individuals who are readily and naturally distinguishable from other persons, when, in fact, the opposite is the case: mental retardation is a classification defined by arbitrary statistical boundaries. Second, *Atkins* mistakenly (and perhaps ominously) approves of basing opinions about moral capacities on a person's psychiatric diagnosis; in offering protection to a group of mentally disabled persons, *Atkins* at the same time stigmatizes those citizens as morally inferior by virtue of their mental condition. Third, through its characterization of the links between reduced moral culpability, mental retardation, and exemptions from the death penalty, *Atkins* commits the American criminal justice system to deciding whether sufferers of other psychiatric disabilities also have reduced blameworthiness and deserve barriers to executions.

533. 543 U.S. 551, 575–79 (2005).

534. *Id.* at 579.

535. *Id.* at 569–70.

Both *Atkins* and *Roper* reflect the Court's reliance on "evolving standards of decency" to determine the proportionality of punishments under the Eighth Amendment. The Court in *Roper* explicitly drew upon the reasoning in *Atkins*, noting the similarities in the diminished culpability of juveniles and individuals with intellectual disabilities, and concluded that the death penalty is a disproportionate punishment for both groups.[536]

However, Scott Sundby argues that the U.S. Supreme Court's rulings in *Atkins* and *Roper* go beyond merely defining the limits of proportionality in capital punishment.[537] Instead, these cases introduced what he calls the "unreliability principle."[538] This principle holds that if there is too great a risk that juries cannot reliably understand and properly consider constitutionally-protected, mitigating evidence related to a defendant's intellectual disability or youth, then the death penalty cannot be constitutionally imposed.[539] He further argues that this principle should extend to mentally ill defendants, as many of the same factors impair juries' ability to assess mitigation reliably for them.[540] He identifies six key factors from *Atkins* and *Roper* that trigger the unreliability principle, such as the defendant's impaired ability to assist defense counsel, serve as a witness, or make rational decisions.[541] Applying this framework raises serious constitutional questions about the use of the death penalty on mentally ill defendants.[542] It potentially calls into question the reliability and fairness of the entire capital sentencing system.[543]

Sundby's article provides an additional argument—beyond the rulings in *Roper* and *Atkins*—for barring the death penalty for minors and individuals with intellectual disabilities. Due to their diminished capacities, juries often struggle to properly assess critical mitigating evidence, rendering it inherently unreliable and unfair to impose such severe punishment. This systemic unreliability not

536. *Id.*

537. Scott E. Sundby, *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487, 487 (2014).

538. *Id.* at 492.

539. *Id.* at 493.

540. *Id.* at 496.

541. *Id.* at 511–22 (referencing what Sundby has coined as the six "*Atkins-Roper* unreliability factors which are: (1) where the mitigation impairs the defendant's cooperation with his lawyer and the lawyer's ability to prepare a defense; (2) where the mitigation makes the defendant into a "poor witness," in part because of the likelihood that their demeanor would make them appear to be remorseless; (3) where the mitigation causes distortions in the defendant's thinking process that are likely to produce bad decisions; (4) when the mitigation has a double- edged nature that poses the risk that it will be improperly turned into aggravation; when the complexity and conflicting views of experts in the area are likely to generate confusion and misunderstanding among the jurors;and (6) when the risk that the sheer "brutality" of the crime will preclude jurors from properly considering the mitigation.).

542. Sundby, *supra* note 537, at 487.

543. *Id.*

only compromises the pursuit of justice but also violates the constitutional prohibition against cruel and unusual punishment.

In 2008, the Court ruled in *Kennedy v. Louisiana* that the Eighth Amendment prohibits the imposition of the death penalty for the crime of child rape when the crime did not result, and was not intended to result, in the death of the victim.[544] The Court reasoned that the death penalty should be reserved for a narrow category of the most serious crimes, specifically those involving the taking of human life, and that crimes against individuals that do not result in death do not meet this threshold of severity.[545] Drawing from previous cases, the Court emphasized that the punishment must align with "evolving standards of decency" and reflect respect for human dignity.[546] It concluded that even in cases of heinous crimes like child rape, the death penalty is disproportionate when the victim's life is not taken.[547] The decision also rejected arguments based on a nascent legislative trend toward permitting capital punishment for child rape, finding insufficient national consensus to justify such a penalty.[548] Additionally, as in *Coker*, the Court highlighted the distinction between homicide and non-homicide crimes, noting that while non-homicide crimes like child rape are devastating, they do not carry the same moral depravity or irrevocability as murder.[549] This distinction underpins the constitutional limit on the use of the death penalty in such cases.[550]

Over the past two decades, the Supreme Court has established categorical exemptions to the death penalty. In landmark rulings such as *Atkins* and *Roper*, the Court found that capital punishment does not fulfill its intended goals of deterrence and retribution when applied to individuals with intellectual disabilities or juveniles. Likewise, in *Coker* and *Kennedy*, the Court ruled that the death penalty is unconstitutional for non-homicide crimes, stressing that even among murder cases, not all qualify for capital punishment. Extending it to lesser offenses, the Court reasoned, violates principles of logic and constitutional proportionality. Across these decisions, the Court consistently acknowledged that deterrence and retribution are not served in these contexts.

Further, these rulings reflect the Court's commitment to the Eighth Amendment's evolving standards of decency, which demand a humane and just approach to the most irrevocable of punishments. Trump's executive order's directive to the Attorney General to seek the overruling of these precedents not only disregards this constitutional evolution but also actively undermines the

544. 554 U.S. 407, 446–47 (2008).
545. *Id.* at 420.
546. *Id.*
547. *Id.* at 421.
548. *Id.*
549. *Id.* at 438.
550. *Id.*

judiciary's role in safeguarding individual rights. It attempts to reverse decades of progress and reintroduce a vision of justice steeped in arbitrariness, racial and geographic disparities, and procedural fragility—concerns that *Furman* sought to remedy. Moreover, such action exceeds the constitutional authority of the executive branch, which is tasked with faithfully executing the law, not reshaping constitutional doctrine. The Supreme Court, as the final arbiter of constitutional interpretation, operates independently from political influence and is entrusted with ensuring that laws comport with the Constitution. Unlike the executive, which may advocate policy preferences, the judiciary must use reasoned deliberation to uphold the rule of law. To conflate these roles is to erode the separation of powers and threaten the integrity of our constitutional democracy.

That said, Trump's executive order appears to be deeply rooted in the ideological framework of Project 2025, the sweeping policy blueprint crafted by conservative think tanks to reshape the federal government in line with maximalist executive power. The order reflects a mindset that prioritizes rigid enforcement and retributive justice over constitutional principles such as proportionality, humane punishment, and evolving standards of decency. Emboldened by the current conservative majority on the Court, the order draws rhetorical and strategic support from Justice Clarence Thomas's dicta, which has repeatedly suggested that the Court should revisit and potentially overturn precedents that limit the scope of capital punishment. Thomas has criticized what he views as "vexatious death penalty litigation,"[551] and has expressed frustration with the Court's leniency in some instances, signaling a judicial openness to more expansive use of the death penalty.

Justice Thomas was appointed to the Supreme Court in 1991,[552] so he was not on the bench when *Coker* and *Ford* were decided. Since his appointment, he has consistently embraced a deeply originalist and textualist approach to constitutional interpretation, especially in Eighth Amendment cases. He often dissents from rulings that expand protections against certain forms of punishment, arguing that such decisions stray from the Constitution's original meaning. His dissents in *Atkins*, *Roper*, and *Kennedy* exemplify this philosophy.

551. Andrea Picciotti-Bayer, *Death-Penalty Case: Clarence Thomas Dissent Right*, NAT'L REV., (Mar. 28, 2022), https://www.nationalreview.com/bench-memos/making-sense-of-clarence-thomass-lone-dissent-in-a-recent-death-penalty-case/ ("Today, this Court should have denied equitable relief to a prisoner who has acted inequitably — as both the District Court and Court of Appeals did before us." Thomas added: "The evidence that demonstrates Ramirez is bringing abusive litigation to delay his execution also strongly suggests that he does not sincerely believe that his pastor needs to touch him in the execution chamber.").

552. *The Current Court: Justice Clarence Thomas*, SUP. CT. HIST. SOC'Y https://supremecourthistory.org/supreme-court-justices/associate-justice-clarence-thomas/ (last visited Aug. 2, 2025).

In *Dobbs v. Jackson Women's Health Organization*, Thomas called for revisiting all substantive due process precedents, describing them as "demonstrably erroneous."[553] If the Court were to follow his lead, it could reopen the constitutionality of various restrictions on the death penalty. Specifically, the Court might reassess whether protections for vulnerable groups—such as juveniles or individuals with intellectual disabilities—are constitutionally required. This shift would move away from evolving standards of decency and toward an originalist interpretation of the Eighth Amendment, potentially allowing broader use of capital punishment. While Thomas's position does not guarantee immediate change, it lays the groundwork for future challenges to death penalty limitations that were built on substantive due process reasoning. If the conservative majority were to embrace his view more fully, it could significantly reshape how constitutional protections are defined in capital cases.

That said, this executive action is not just a policy change; it is a constitutional challenge. It aims to alter the course of humane jurisprudence and reestablish a punitive system that has been repeatedly criticized for its arbitrariness, racial and geographic disparities, and failure to uphold standards of a just society. Additionally, it raises serious separation-of-powers issues: the executive branch lacks the authority to redefine constitutional interpretation unilaterally. That role belongs to the judiciary, whose independence is vital for maintaining the rule of law. Encouraging the Attorney General to seek reversal of landmark decisions undermines the Court's integrity and erodes the constitutional checks that prevent authoritarian overreach.

CONCLUSION

In the first six months of his second term, President Trump has signed executive orders and issued cabinet-level mandates that relentlessly press against constitutional guardrails. The administration appears unrestrained by legal boundaries, operating with a disregard for the checks and balances that have long defined American governance. While it is beyond the scope of this article to catalog the full array of actions that raise serious legal and ethical concerns, a common thread runs through them all: a striking absence of compassion, a disinterest in humane justice, and a willingness to sideline democratic principles.

This era may be remembered as a moment when the nation teetered on the brink of unraveling nearly 250 years of constitutional democracy. Capital punishment is implicitly authorized by the U.S. Constitution, particularly through the Fifth Amendment's guarantee of due process and the Eighth Amendment's prohibition on cruel and unusual punishments. However, the Trump administration's approach—marked by retribution, vindictiveness, and a persistent disregard for the constitutional limits established by the Founders—

553. 597 U.S. 215, 332 (2022) (Thomas, J., concurring).

threatens not only the rule of law but also the ethical foundation upon which American governance rests.

This administration has shown a concerning disregard for accurate statistics and relies on exaggerated rhetoric to enforce its mandates. Executive Order 14164 collapses under the weight of precise data. This article dismantles the hollow claims upon which the order is based, debunking the myth that the death penalty acts as a deterrent. It reveals alarming rates of wrongful convictions, botched executions that shatter any illusion of competence, entrenched racial disparities, and a pattern of arbitrariness rooted not in justice, but in political theater. Our justice policy deserves more than performative pronouncements; it demands rigorous, evidence-driven scrutiny anchored in the relentless honesty of real numbers.

The execution spree during President Trump's first term should have served as an ominous warning: a harbinger of an administration ready to test—and ultimately uproot—the Constitution's limits. By accelerating federal executions at the end of his initial tenure, he signaled a willingness to derail established precedent, dismantle procedural safeguards, and trample the sacrosanct rules that have preserved due process for nearly a quarter-millennium. Trump's executive order is simply the next act in this drama of raw power, substituting political spectacle for reasoned justice. If the rule of law is to survive, courts, legislators, and citizens alike must reassert those guardrails and reaffirm the humane principles that this administration has shown itself eager to discard.

While legal challenges to the Trump administration's capital punishment mandates may offer a procedural avenue for resistance, they are unlikely to yield meaningful relief. The courtroom, though essential to testing the constitutionality of executive action, is a slow and uncertain battleground—especially when the highest court in the land has repeatedly demonstrated deference to this administration's assertions of authority. Relying on litigation alone risks not only delay but defeat, as the Supreme Court's recent posture suggests a willingness to uphold expansive executive power even in the face of grave constitutional concerns. The urgency of the issue demands a broader strategy—one that does not hinge solely on judicial intervention.

As historians look back on this era, they will see an administration determined to entrench a capital-punishment apparatus stripped of equitable process. In doing so, it has eroded the foundational values the Founders enshrined—dignity, fairness, and the separation of powers—and betrayed the spirit of a nation built on liberty under law. The path forward requires recommitment to those ideals: a reinvigoration of checks and balances, humane justice, and the courage to let evidence—not edict—shape our most solemn penalties.