

# FEDERAL DEATH PENALTY

## Capital Clemency Information Memorandum

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## **Introduction**

Clemency in capital cases serves a vital role in our American criminal justice system by acting as a “fail-safe” to prevent unjust executions and to ensure that there is meaningful due process and review at every stage of a capital case. Prior to the execution of a death-sentenced prisoner, a clemency petition asks a decision maker to conduct a full review of the case and grant either a *reprieve* (a delay of execution for a set or undetermined period of time); a *pardon* (effectively ‘undoing’ the initial conviction); or a *commutation* of sentence (for example, reducing a sentence of death to a sentence of life in prison). In the capital clemency context, death row petitioners typically seek either a *reprieve* or a *commutation*.

As the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a prisoner may seek executive commutation of a death sentence for a wide range of reasons that may not have been issues in his or her case at the time of legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that would govern bringing an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—a nuanced understanding of the relevant issues that can be brought to bear on the decision-making entity.

Clemency has long been recognized as an essential component of our criminal justice system. While not explicitly set forth in the federal Constitution, capital clemency petitioners are afforded certain due process rights recognized by the Supreme Court and other Article III courts. *See, e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288-89 (1988) (O’Connor, J., concurring); *see also, Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000). The President’s authority to grant clemency is enshrined in the Article II, Section 2, Clause 1 of the U.S. Constitution.

The following information about the federal clemency process was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding capital clemency at the federal level.

The information contained within this memorandum is **not intended to serve as the basis for a capital clemency petition or campaign and is not designed to encapsulate all the diverse issues to consider in capital clemency**, but we hope that it will provide a valuable starting point for all stakeholders interested in this important issue.

## I. Basics of the Federal Capital Clemency Process

*In many jurisdictions, the capital clemency process is opaque, with few national or state-specific resources on the topic. As a result, extensive research has been conducted in preparing these memoranda – including online research, calls to governors’ offices and parole boards, and lengthy interviews with local practitioners – to help clarify the process for practitioners and others seeking information. Nevertheless, certain areas of practice, such as when to file a petition, and how a petition is likely to receive a response from the decision maker, are not governed by clearly established law or policy. As a result, any gaps noted within these documents reflect a lack of available information or clear answers. Additionally, it is important to remember that the **capital** clemency process oftentimes differs from **non-capital** clemency processes, and that much of the publicly available information regarding clemency pertains only to non-death-penalty cases.*

### a. The Power Defined

Article II, Section 2 Clause 1 of the United States Constitution vests the president of the United States with the “Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment.”<sup>1</sup> Alexander Hamilton defended inclusion of the clemency power in the Constitution in Federalist No. 74, stating, “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”<sup>2</sup>

The president’s clemency power can be exercised through a pardon, commutation of sentence, remission of fine or restitution, or reprieve.<sup>3</sup>

A pardon is “an expression of the [p]resident’s forgiveness and ordinarily is granted in recognition of the applicant’s acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or completion of sentence.”<sup>4</sup> A commutation of sentence, however, “reduces a sentence, either totally or partially, that is then being served, but it does not change the fact of conviction, imply innocence, or remove civil disabilities that apply to the convicted person as a result of the criminal conviction.”<sup>5</sup> The president can commute a sentence to time served, reduce a sentence to achieve the

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<sup>1</sup> U.S. Const. art. II, § 2 c.1. The president cannot use the clemency power to save himself or another from impeachment.

<sup>2</sup> Alexander Hamilton, Federalist No. 74 (1788).

<sup>3</sup> 28 C.F.R. § 1.1. A “reprieve” is a “delay in the imposition of a sentence.” See also Gregory Korte, *Can Trump Really Do That The Presidential Pardon Power, Explained*, USA Today, (June 4, 2018), <https://www.usatoday.com/story/news/politics/2018/06/04/presidential-pardons-explanation-executive-clemency-powers/660381002/>.

<sup>4</sup> *Frequently Asked Questions*, U.S. Dep’t of Just., (Dec. 7, 2020), <https://www.justice.gov/pardon/frequently-asked-questions>.

<sup>5</sup> *Id.* A commutation of sentence is the form of executive clemency most frequently requested in capital cases, and is the focus of this memorandum.

petitioner's release after a specified period of time, or—as is most typical in death penalty cases—commute a death sentence to a sentence of life in prison without the possibility of parole.<sup>6</sup>

The president's clemency power extends only to *federal* criminal offenses; not *state* criminal offenses.<sup>7</sup> **As such, this memorandum will relate specifically to the clemency process as it functions in federal death penalty cases. Federal death penalty offenses are adjudicated in United States district courts.**<sup>8</sup>

Prior to August 2, 2000, federal regulations did not proscribe procedures unique to the consideration of clemency in capital cases. With the addition of 28 C.F.R. § 1.10, the Department of Justice (DOJ) promulgated specific procedures in capital cases “intended to supplement the already existing clemency procedures for non-capital cases.”<sup>9</sup>

#### **b. The Decision Maker(s)**

The federal clemency power is available only to the president of the United States.<sup>10</sup> However, the Office of the Pardon Attorney (OPA), within the DOJ, typically aids the president in their exercise of the clemency power.<sup>11</sup>

Under the procedures set out by the Department of Justice, requests for executive clemency are first reviewed and investigated by the pardon attorney before the DOJ makes a nonbinding recommendation for action to the president, which is signed by the deputy attorney general.<sup>12</sup> The OPA further prepares the documents the president signs when granting clemency and notifies the petitioner of the president's decision.<sup>13</sup> The OPA also “acts as a liaison with the public during the pendency of a clemency petition, responding to correspondence and answering inquiries about clemency cases and issues.”<sup>14</sup> The OPA has assisted the president in clemency decisions since 1894.<sup>15</sup>

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<sup>6</sup> See U.S. Dep't of Just. Manual § 9-140.113.

<sup>7</sup> 28 C.F.R. § 1.4.

<sup>8</sup> *Frequently Asked Questions*, *supra* note 4.

<sup>9</sup> *Rules Governing Petitions for Executive Clemency: Capital Cases*, U.S. Dep't of Just., (Aug. 8, 2000), <https://www.federalregister.gov/documents/2000/08/08/00-19973/rules-governing-petitions-for-executive-clemency-capital-cases>.

<sup>10</sup> U.S. Const. art. II, § 1. “The power to commute a sentence for a federal offense is vested in the President alone. It is an extraordinary remedy that is very rarely granted.” *Frequently Asked Questions*, *supra* note 4.

<sup>11</sup> *About the Office*, U.S. Dep't of Just., (Apr. 29, 2020), <https://www.justice.gov/pardon/about-office>. Of note, counsel for the thirteen federal prisoners executed between July 2020 and January 2021 indicate that they never received a decision or communication from the OPA or the White House regarding the clemency applications submitted on their clients' behalf. *Information from email correspondence with federal defense counsel on file with author*.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> U.S. Dep't of Just. Manual § 9-140.110.

<sup>15</sup> *Frequently Asked Questions*, *supra* note 4. “Responsibility . . . was shared by the Secretary of State and the Attorney General from 1789–1853. The Attorney General had administrative responsibility for pardon application review, 1853–70, although the Department of State continued to issue pardon warrants until a Presidential order of

Although the DOJ provides clemency recommendations to the president, recommendations and regulations relating to clemency are merely advisory and therefore, do not restrict the authority granted to the president under the Constitution.<sup>16</sup>

If a president leaves office without acting on a particular clemency petition, such petition remains open and active until the incoming president makes a decision.<sup>17</sup>

### c. When to Bring a Petition

A petitioner *sentenced to death* by a United States District Court may only seek commutation of that death sentence after “predictable” proceedings on their direct appeal of the judgment of conviction and their first petition under 28 U.S.C. § 2255<sup>18</sup> have concluded.<sup>19</sup> For consideration prior to execution, the petition must be filed within **30 days** of receiving notification from the Bureau of Prisons of the scheduled execution date.<sup>20</sup> Papers supporting the petition for commutation of a death sentence must be filed **within 15 days after the filing of the petition itself**.<sup>21</sup> Such deadlines are “intended to preserve an appropriate amount of time to process and consider a clemency request.”<sup>22</sup>

On July 31, 2020, the DOJ amended its execution protocols, reducing the amount of time death-row prisoners can expect to receive notice of their execution dates from 90 days to 50 days.<sup>23</sup> Although the government can of course still provide more than 50 days’ notice when scheduling an execution date, this change, if acted on, would also reduce the amount of time the OPA and president have to review the clemency petition. Where before, a clemency petition timely filed upon receiving 90 days’ notice of a given execution date would leave the OPA and the White House 60 days’ time to review the petition, transmit a recommendation, and come to a final clemency decision, under the new rules, if only 50 days’ notice of the execution date is given, the OPA and the White House would have at most 20 days to complete their clemency review and reach a decision. If additional documentation were filed (which must be received

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June 6, 1893, transferred this function to the Department of Justice. Pardon responsibilities were delegated to the Office of the Clerk of Pardons, established in the Office of the Attorney General” in 1865. “The Office of the Clerk of Pardons became a component of the newly created Department of Justice, pursuant to its enabling act” in 1870. “It was superseded by the Office of the Attorney in Charge of Pardons, established in the Department of Justice” in 1891, “and re-designated the Office of the Pardon Attorney in 1894.” *Id.*

<sup>16</sup> 28 C.F.R. § 1.11. The regulations “create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the [p]resident under Article II, section 2 of the Constitution.” *Id.* Therefore, the president may exercise their clemency power without a DOJ recommendation. See also **Judicial Review of Clemency**, *infra*.

<sup>17</sup> U.S. Dep’t of Just. Manual § 9-140.111.

<sup>18</sup> § 2255 motions aim to “vacate, set aside or correct the sentence” by way of “collateral attack.” 28 U.S.C. § 2255(a). The petitioner must be in custody when seeking relief under § 2255. *Id.*

<sup>19</sup> 28 C.F.R. § 1.10.

<sup>20</sup> *Id.* “In the case of an execution date set by the Bureau of Prisons, [setting such date] will normally occur no later than 60 days after the termination of proceedings on the defendant’s first section 2255 petition, and which will normally provide at least 120 days’ notice of the date of execution.” *Rules Governing Petitions for Executive Clemency: Capital Cases*, *supra* note 9. See also 65 FR 48379-02.

<sup>21</sup> 28 C.F.R. § 1.10.

<sup>22</sup> *Rules Governing Petitions for Executive Clemency: Capital Cases*, *supra* note 9.

<sup>23</sup> See Ch. 1, Sec. II(C), BOP Execution Protocol; see also *In re BOP Execution Protocol Cases*, No. 19-mc-145, Defendants’ Notice of 4<sup>th</sup> Supplement to the Administrative Record, Doc. 171, p. 1-2 (D. D.C. July 31, 2020).

within 15 days of the filing of the petition itself)—and only 50 days’ notice of the execution date were given—that would leave only five days for consideration of this material and transmission of a clemency recommendation and decision before the execution were carried out.

Under “well-established procedures,” the OPA will not “process a clemency application while litigation concerning the case is pending.”<sup>24</sup> The petitioner must have “concluded all judicial challenges.”<sup>25</sup> If the petitioner’s case is adversely resolved and no other litigation follows, they may then submit a commutation of sentence petition.<sup>26</sup>

Unique to capital cases, “clemency proceedings may be suspended if a court orders a stay of execution for any reason other than to allow completion of the clemency proceeding.”<sup>27</sup> This allows a petitioner, after their petition under § 2255 is terminated, “to pursue clemency while litigation is pending, but provides for the suspension of the clemency proceedings when a court-ordered stay of execution is entered for a reason other than to permit the clemency proceedings to be completed.”<sup>28</sup>

#### d. How to Bring a Petition

The rules governing how to seek clemency for a person under sentence of death imposed by a United States District Court are laid out in 28 CFR 1.10. This provision provides:

##### **§ 1.10 Procedures applicable to prisoners under a sentence of death imposed by a United States District Court.**

The following procedures shall apply with respect to any request for clemency by a person under a sentence of death imposed by a United States District Court for an offense against the United States. Other provisions set forth in this part shall also apply to the extent they are not inconsistent with this section.

**(a)** Clemency in the form of reprieve or commutation of a death sentence imposed by a United States District Court shall be requested by the person under the sentence of death or by the person’s attorney acting with the person’s written and signed authorization.

**(b)** No petition for reprieve or commutation of a death sentence should be filed before proceedings on the petitioner’s direct appeal of the judgment of conviction and first petition under [28 U.S.C. 2255](#) have terminated. A petition for commutation of sentence should be filed no later than 30 days after the petitioner has received

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<sup>24</sup> *Frequently Asked Questions*, *supra* note 4.

<sup>25</sup> *Information and Instructions for Petition for Commutation of Sentence*, U.S. Dep’t of Just., <https://www.justice.gov/pardon/file/960571/download> (last visited Jan. 6, 2021).

<sup>26</sup> *Frequently Asked Questions*, *supra* note 4. “Requests for commutation generally are not accepted unless and until a person has begun serving that sentence.” U.S. Dep’t of Just. Manual, *supra* note 6.

<sup>27</sup> 28 C.F.R. § 1.10.

<sup>28</sup> *Rules Governing Petitions for Executive Clemency: Capital Cases*, *supra* note 9.

notification from the Bureau of Prisons of the scheduled date of execution. All papers in support of a petition for commutation of sentence should be filed no later than 15 days after the filing of the petition itself. Papers filed by the petitioner more than 15 days after the commutation petition has been filed may be excluded from consideration.

**(c)** The petitioner's clemency counsel may request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney in support of the clemency petition. The presentation should be requested at the time the clemency petition is filed. The family or families of any victim of an offense for which the petitioner was sentenced to death may, with the assistance of the prosecuting office, request to make an oral presentation of reasonable duration to the Office of the Pardon Attorney.

**(d)** Clemency proceedings may be suspended if a court orders a stay of execution for any reason other than to allow completion of the clemency proceeding.

**(e)** Only one request for commutation of a death sentence will be processed to completion, absent a clear showing of exceptional circumstances.

**(f)** The provisions of this [§ 1.10](#) apply to any person under a sentence of death imposed by a United States District Court for whom an execution date is set on or after August 1, 2000.<sup>29</sup>

According to federal death penalty practitioners, because "Rule 1.10 doesn't say whether the capital petitioner should submit the petition using the form provided on the website (or say what information must be included in the petition), our understanding (consistent with our experience) is that capital petitioners must [also] fulfill Rule 1.1's requirement that 'each petition for executive clemency should include the information required in the [form](#) prescribed by the Attorney General.'"<sup>30</sup>

28 CFR Rule 1.1 provides:

§ 1.1 Submission of petition; form to be used; contents of petition.

A person seeking executive clemency by pardon, reprieve, commutation of sentence, or remission of fine shall execute a formal petition. The petition shall be addressed to the President of the United States and shall be submitted to the Pardon Attorney, Department of Justice, Washington, DC 20530, except for petitions relating to military offenses. Petitions and other required forms may be obtained from the Pardon Attorney. Petition forms for commutation of sentence also may be obtained from the wardens of federal penal institutions. A petitioner

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<sup>29</sup> 28 C.F.R. § 1.10.

<sup>30</sup> Information from conversations with experienced federal death penalty practitioners. Information on file with author.

applying for executive clemency with respect to military offenses should submit his or her petition directly to the Secretary of the military department that had original jurisdiction over the court-martial trial and conviction of the petitioner. In such a case, a form furnished by the Pardon Attorney may be used but should be modified to meet the needs of the particular case. Each petition for executive clemency should include the information required in the form prescribed by the Attorney General.<sup>31</sup>

According to experienced federal death penalty counsel, “the most important thing for [federal capital clemency] practitioners to know is that there is a specific rule—1.10—that governs the process for capital cases, and the rest of the rules only come into play where 1.10 is silent.”<sup>32</sup>

#### e. Hearing Practice

In capital cases, petitioner’s counsel **may request** to make an oral presentation to the OPA in support of the clemency petition.<sup>33</sup> The presentation should be requested when the petition is filed and is one of “reasonable duration.”<sup>34</sup> In response, the victim’s family, with the assistance of the prosecuting office, may also request to make an oral presentation to the OPA.<sup>35</sup>

#### f. Responding to a Petition

*Note: the following information is gleaned from the federal rules as well as the DOJ’s own [forms](#) and website. That said, it is likely that much of the information provided below refers to the process for responding to a petition for commutation in **non-capital cases**; in **capital cases**, the timing and processing of a commutation petition will necessarily be impacted by the imminence of an execution date and any case-specific arrangements that may be made between counsel and the OPA. However, because it is not clear from anywhere in the rules that the information below would **not** apply in capital cases where a commutation is processed to completion (perhaps even outside the presence of an execution date), we are including it below.*

After reviewing each petition for clemency, the pardon attorney prepares, in writing, a proposed recommendation that is submitted to the deputy attorney general, who then makes the final determination of the DOJ’s recommendation to the president.<sup>36</sup> The deputy attorney general then signs the recommendation, which is sent to the White House, and acted upon by the president if and when they feel appropriate to do so.<sup>37</sup>

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<sup>31</sup> 28 C.F.R. § 1.1.

<sup>32</sup> Information from conversations with experienced federal death penalty practitioners. Information on file with author.

<sup>33</sup> 28 C.F.R. § 1.10.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Frequently Asked Questions*, *supra* note 4.

<sup>37</sup> *Id.*; 28 C.F.R. § 1.6.



In forming a recommendation, the OPA may consider some of the following factors<sup>38</sup>:

- (1) Disparity or undue severity of sentence;
- (2) Critical illness or old age;
- (3) Meritorious service to the government that has not been adequately rewarded by other official actions;
- (4) Seriousness of the offense of conviction;
- (5) Overall criminal record;
- (6) Nature of adjustment to prison supervision;
- (7) Length of time already served;
- (8) Availability of other remedies;<sup>39</sup> and
- (9) Candor in the commutation application.

Often, especially in cases that appear to have merit, the pardon attorney will request the United States attorney in the district of conviction or a particular DOJ assistant attorney general, to provide comments and recommendations on whether clemency is warranted.<sup>40</sup> The pardon attorney usually seeks a response within 30 days.<sup>41</sup> Comments and recommendations made by the United States attorney or assistant attorney general are “given considerable weight” and are included in the report and recommendation presented to the president.<sup>42</sup>

The pardon attorney may also request that the director of the Bureau of Prisons submit a recommendation on the petition for clemency.<sup>43</sup> Prior to making their recommendation, the director may request comments from the warden of the institution where the petitioner is confined.<sup>44</sup>

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<sup>38</sup> U.S. Dep’t of Just. Manual § 9-140.113. Considerations for recommending the grant of a *pardon* petition are found under Department of Justice Manual § 9-140.112.

<sup>39</sup> This may include the possibility that the DOJ itself could accomplish the same result by petitioning the sentencing court, through a motion to reward substantial assistance under Federal Rules of Criminal Procedure 35, a motion for modification or remission of fine under 18 U.S.C. § 3573, or a request for compassionate reduction in sentence under 18 U.S.C. § 3582(c)(1). See also U.S. Dep’t of Just. Manual § 9-140.113.

<sup>40</sup> U.S. Dep’t of Just. Manual § 9-140.111. Although the correctness of the underlying conviction is assumed, if a petitioner “refuses to accept guilt, minimizes culpability, or raises a claim of innocence or miscarriage of justice, the United States Attorney or Assistant Attorney General should address these issues.” *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 28 C.F.R. § 571.41.

<sup>44</sup> *Id.*

If the president acts to grant a commutation petition, the petitioner will be notified of such action, in writing, and mailed or sent a warrant of pardon or commutation.<sup>45</sup> The written notification is sent to the last address the petitioner provides to the pardon attorney.<sup>46</sup> Therefore, the petitioner should notify the pardon attorney if their address changes while the petition is under consideration.<sup>47</sup> The pardon attorney will also forward the original, signed and sealed warrant of clemency to the warden, with a copy to the director of the Bureau of Prisons.<sup>48</sup> The warden then must deliver the original warrant to the petitioner, and obtain a signed receipt for return to the pardon attorney.<sup>49</sup>

If the petition is denied, DOJ regulations dictate that the petitioner will be notified and the case will be closed.<sup>50</sup> The pardon attorney “ordinarily notifies the Warden, requesting that the Warden notify the [petitioner] of the denial.”<sup>51</sup>

“As a general matter, Presidents in recent times have rarely announced their reasons for granting or denying clemency, although the President may choose to do so in a given case. Consistent with long-standing policy, if the President does not issue a public statement concerning his action in a clemency matter, no explanation is provided by the [DOJ].”<sup>52</sup>

The president also is not required to respond to a petition, and in the case of the 13 federal executions carried out in the Trump administration between 2020 and 2021, the pardon attorney has not provided statistics suggesting that President Trump responded to any corresponding clemency petitions.<sup>53</sup> Furthermore, notification of a denial was not made, as the clemency cases were assumed presumptively closed when the executions were carried out.

Typically in federal death penalty cases, “only one request for commutation of a death sentence will be processed to completion, absent a clear showing of exceptional circumstances.”<sup>54</sup> This restriction is “designed to encourage the petitioner to raise all claims in a single request and to contribute to a swifter

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<sup>45</sup> 28 C.F.R. § 1.7.

<sup>46</sup> *Frequently Asked Questions*, *supra* note 4.

<sup>47</sup> *Id.*

<sup>48</sup> 28 C.F.R. § 571.41.

<sup>49</sup> *Id.*

<sup>50</sup> 28 C.F.R. § 1.8. If the recommendation to the president is to deny a clemency request, and the president does not act with respect to that recommendation within 30 days after its submission, it is presumed that the president agrees with the denial and the petitioner will be notified that the case will be closed. *Id.* This rule, however, does not apply to death penalty cases. *Id.*

<sup>51</sup> 28 C.F.R. § 571.41.

<sup>52</sup> *Frequently Asked Questions*, *supra* note 4.

<sup>53</sup> See *Commutations Denied by President Trump*, U.S. Dep’t of Just., <https://www.justice.gov/pardon/commutations-denied-president-donald-j-trump> (last visited Feb. 11, 2021).

<sup>54</sup> 28 C.F.R. § 1.10.

resolution of the case.”<sup>55</sup> But “if changed circumstances make it impossible to have raised all claims previously, additional petitions should be permitted.”<sup>56</sup>

There is no appeal from the president's decision to deny a clemency request.<sup>57</sup>

## II. State Political and Judicial Information

### a. Current Clemency Decision Maker(s)

#### President Biden

President Joe Biden was elected to the presidency in 2020 after having previously served as the 47th Vice President under President Obama from 2008 to 2016.<sup>58</sup> Biden began his career as an attorney in Wilmington, Delaware.<sup>59</sup> He was elected to the Senate in 1972 and served as Delaware's senator for 36 years until he became Vice President.<sup>60</sup> After leaving the White House, Biden focused on his philanthropic initiatives until launching his campaign for president in 2019.<sup>61</sup>

In the past, Biden supported the death penalty and helped author the 1994 crime law that created dozens of new death-penalty-eligible federal crimes.<sup>62</sup> In 2000, Biden again stated his support for the death penalty in a Senate Judiciary Committee hearing.<sup>63</sup> Biden officially reversed his position during the 2020 presidential campaign, tweeting “Because we can't ensure that we get these cases right every time, we must eliminate the death penalty.”<sup>64</sup> After winning the presidency, Biden reaffirmed his opposition to the death penalty and vowed to work to end capital punishment.<sup>65</sup>

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<sup>55</sup> *Rules Governing Petitions for Executive Clemency: Capital Cases*, *supra* note 9.

<sup>56</sup> *Id.* According to conversations with federal death penalty petitioners, however, capital clemency petitioners in the federal system should assume that they will have only one chance for a clemency application to be processed to completion, and should not assume they will be able to show “exceptional circumstances” allowing them to seek clemency a second time.

<sup>57</sup> *Information and Instructions for Petition for Commutation of Sentence*, *supra* note 25.

<sup>58</sup> Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. Times, (Nov. 18, 2020), <https://www.nytimes.com/2020/11/07/us/politics/biden-election.html>; Joe Biden: The President-Elect, Biden-Harris Transition, <https://buildbackbetter.gov/the-president-elect> (last visited Jan. 6, 2021).

<sup>59</sup> Joe's Story, Battle for the Soul of the Nation, <https://joebiden.com/joes-story> (last visited Jan. 6, 2021).

<sup>60</sup> Vice President Joe Biden, The White House: President Barack Obama, <https://obamawhitehouse.archives.gov/realitycheck/node/110> (last visited Jan. 6, 2021).

<sup>61</sup> Joe's Story, *supra* note 74.

<sup>62</sup> Andrew Cohen, *Biden Can Reshape the Federal Death Penalty in America*, Brennan Ctr. for Justice, (Dec. 22, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/biden-can-reshape-federal-death-penalty-america>; German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, Vox (Sept. 29, 2020), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration>.

<sup>63</sup> Christopher Cadelago, *Biden Appears to Be Softening His Stance on the Death Penalty*, Politico, (June 20, 2019), <https://www.politico.com/story/2019/06/20/joe-biden-death-penalty-1371932>.

<sup>64</sup> Joe Biden (@JoeBiden), Twitter (July 25, 2019), <https://twitter.com/JoeBiden/status/1154500277124251648?s=20>.

<sup>65</sup> Michael Balsamo, *Biden To Work To End Executions As Government Sets 3 More*, Associated Press, (Nov. 21, 2020), <https://apnews.com/article/joe-biden-prisons-inaugurations-coronavirus-pandemic-executions-365258989e6be8d7077b2f67d8c3e190>.

## Pardon Attorney

The current acting pardon attorney is Rosalind Sargent-Burns.<sup>66</sup> Ms. Sargent-Burns has worked in the Office since 2008, when she joined as an attorney advisor.<sup>67</sup> She has held positions of increasing authority, the latest being the deputy pardon attorney.<sup>68</sup> She has served as acting pardon attorney since 2019.<sup>69</sup>

### b. Judicial Review of Clemency

In a 5-4 decision, the Supreme Court in *Furman v. Georgia* held that the death penalty, as applied to three defendants, two convicted of rape and one convicted of murder, was cruel and unusual punishment that violated the Eighth and Fourteenth Amendments.<sup>70</sup> Four years later, in *Gregg v. Georgia*, the Supreme Court found that Georgia's revised capital sentencing scheme passed constitutional muster, and the death penalty was reinstated in numerous jurisdictions throughout the United States.<sup>71</sup> Since then, the Court has ruled on several cases touching on the critical role of clemency in our justice system, particularly for those convicted of capital crimes. Despite the Court's frequent affirmations that the availability of clemency is an integral part of the U.S. justice system, however, it has also continually affirmed that clemency is a wholly discretionary process almost always beyond the purview of the courts.

For example, in *Herrera v. Collins*, the Supreme Court reaffirmed that capital clemency review is intended to serve as a vital check on the criminal justice system. Ten years after having been convicted of murder and sentenced to death, Leonel Torres Herrera filed a federal habeas petition arguing that new evidence showed he was factually innocent, and that as a result, his execution would violate the Eighth and Fourteenth Amendments.<sup>72</sup> The Court held that the existence of newly discovered evidence bearing on a prisoner's guilt is not grounds for allowing a prisoner a chance to file a second or successive federal habeas petition if one has already been timely filed and ruled upon, and that factual innocence is not grounds for habeas relief if the process has already been lawfully concluded.<sup>73</sup> In defense of this position, the Court noted that Herrera was not totally without recourse to present his evidence, because executive clemency serves as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."<sup>74</sup> The Court described clemency as the "fail safe" in an inevitably fallible justice system administered by humans.<sup>75</sup> Despite the Court's remarks regarding the importance of clemency, Herrera

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<sup>66</sup> *Meet the Acting Pardon Attorney*, U.S. Dep't of Just., <https://www.justice.gov/pardon/staff-profile/meet-acting-pardon-attorney> (last visited Jan. 11, 2021).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 408 U.S. 238, 239 (1972).

<sup>71</sup> 428 U.S. 153, 169 (1976).

<sup>72</sup> 506 U.S. 390, 393 (1993).

<sup>73</sup> *Id.* at 400.

<sup>74</sup> *Id.* at 411.

<sup>75</sup> *Id.* at 415.

was denied clemency and was ultimately executed four months after the Supreme Court handed down its decision.<sup>76</sup> He maintained his innocence until his death.<sup>77</sup>

In *Ohio Adult Parole Authority v. Woodard*,<sup>78</sup> the Supreme Court considered the interplay between due process and clemency procedures. Respondent Eugene Woodard, a prisoner on death row in Ohio, was informed that he could request a clemency interview as part of the clemency evaluation process. Instead of requesting the interview, Woodard objected to the short notice of the potential interview and sought assurances that his counsel could participate in the interview.<sup>79</sup> After receiving no response as to counsel's attendance, Woodard challenged Ohio's clemency process as violating his right to due process and right against self-incrimination.<sup>80</sup> Although the Court held that Ohio's clemency procedures, namely the clemency interview, did not violate the Fifth Amendment,<sup>81</sup> a plurality of the Court also held that Woodard **did have a due process interest in life**, despite having been convicted and sentenced to death.<sup>82</sup> In her concurrence, which serves as the controlling opinion in the case, Justice O'Connor further stated that "some minimal procedural safeguards apply to clemency proceedings"<sup>83</sup> in light of Woodard still retaining some interest in his life.

In *Harbison v. Bell*, the Supreme Court considered the role of federally appointed defense counsel in state clemency proceedings. Petitioner Edward Jerome Harbison had been convicted and sentenced to death in Tennessee state court.<sup>84</sup> The federal district court appointed a federal public defender to represent Harbison in filing a writ of habeas corpus in federal court.<sup>85</sup> After his federal habeas petition was denied, Harbison requested appointed federal counsel to represent him in state clemency proceedings.<sup>86</sup> Because state law did not allow for the appointment of state public defenders or other experienced counsel for clemency proceedings, Harbison's federal counsel sought to continue her representation of Harbison in state clemency, which the federal district and circuit courts consequently denied.<sup>87</sup>

Once it reached the U.S. Supreme Court, the Court held that 18 U.S.C. § 3599, the statute that authorizes federal defenders to be appointed as counsel to a state death penalty prisoner in federal habeas proceedings, contemplates that this federally funded counsel will continue on to represent the petitioner in state clemency proceedings.<sup>88</sup> The Court based this holding on the plain language of the statute, which states federal counsel "shall also represent the defendant in . . . proceedings for executive or other

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<sup>76</sup> Death Row Information, Tex. Dep't of Crim. Just.,  
[https://www.tdcj.texas.gov/death\\_row/dr\\_info/hererraleonellast.html](https://www.tdcj.texas.gov/death_row/dr_info/hererraleonellast.html) (last visited Jan. 13, 2021).

<sup>77</sup> See *id.*

<sup>78</sup> 523 U.S. 272, 277 (1998).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 286.

<sup>82</sup> *Id.* at 289 (O'Connor, J., concurring).

<sup>83</sup> *Id.*

<sup>84</sup> *Harbison v. Bell*, 556 U.S. 180, 182 (2009).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 184–85.

clemency as may be available to the defendant.”<sup>89</sup> Because federal clemency is at the sole discretion of the president, the Court concluded Section 3599(e) could only refer to state clemency proceedings, and therefore, explicitly allowed federal appointed counsel in state clemency applications.<sup>90</sup>

### III. Judicial Review of Clemency During the 2020 Federal Executions<sup>91</sup>

#### a. William LeCroy

In *LeCroy v. United States*, William Emmett LeCroy, Jr., a federal death row prisoner, moved the district court to postpone his execution date of September 22, 2020, because two of his three appointed lawyers were unable to meet with him to discuss or prepare his petition in light of COVID-19 related circumstances.<sup>92</sup> The district court denied the motion, holding that postponing the execution date “would amount to a stay” and “LeCroy could not invoke the All Writs Act, 28 U.S.C. § 1651, as a means of circumventing the traditional stay requirements.”<sup>93</sup> Upon appeal, the Eleventh Circuit Court of Appeals affirmed the district court’s denial, holding the “district court correctly concluded that it lacked the authority to postpone LeCroy’s execution” because LeCroy did not “even attempt[] to satisfy the requirements necessary to stay his execution—even temporarily—and” did not identify any authority “that would otherwise permit a federal court to ‘reset’ or ‘modify’ his execution date.”<sup>94</sup>

LeCroy asserted that he had a “statutory right to assistance with his clemency petition under 18 U.S.C. § 3599(e).”<sup>95</sup> He argued this right was interfered with when two of his three appointed lawyers were “unable to meet with him face-to-face to assist in the preparation and filing of a clemency petition” and “unable to be on hand in person to witness his scheduled execution.”<sup>96</sup> The Eleventh Circuit rejected these arguments holding that “[n]ot only can LeCroy avail himself of unmonitored telephone calls and face-to-face videoconferences with all three of his lawyers, but he can also meet with one of them . . . in person at the prison.”<sup>97</sup> Further, although 18 U.S.C. § 3596(a) states “that an execution shall be implemented ‘in the manner prescribed by the law of the State in which the sentenced is imposed,’” and according to LeCroy, § 3596(a) incorporates Ga. Code Ann. § 17-10-41, which states that “the convicted person may request the

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<sup>89</sup> *Id.* at 185 (quoting 18 U.S.C. § 3599(e)).

<sup>90</sup> *Id.* at 186–87.

<sup>91</sup> Several of the thirteen federal prisoners slated for execution during the final months of the Trump administration raised challenges to the due process protections afforded them in the clemency process on account of the COVID-19 pandemic and other factors. Three of those cases and the ways in which they were resolved by the courts are discussed here.

<sup>92</sup> *LeCroy v. United States*, 975 F.3d 1192, 1194 (11th Cir. 2020).

<sup>93</sup> *Id.* at 1195.

<sup>94</sup> *Id.* at 1197.

<sup>95</sup> *Id.* 18 U.S.C. § 3599(e) states, “[u]nless replaced by similarly qualified counsel upon the attorney’s own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and *proceedings for executive or other clemency* as may be available to the defendant.” (emphasis added).

<sup>96</sup> *LeCroy*, 975 F.3d at 1197.

<sup>97</sup> *Id.*

presence of his or her counsel,” the court was “confident” that such a reading “does not extend to ensuring a lawyer’s presence at execution.”<sup>98</sup>

**b. Orlando Hall**

In 1995, Orlando Hall was convicted of kidnapping resulting in death and interstate travel in aid of a racketeering enterprise and sentenced to death on the charge of kidnapping with a death resulting.<sup>99</sup> Following exhaustion of his direct appeals and first 28 U.S.C. § 2255 petition in 2007, Hall intervened in a civil action along with other federal death-row prisoners before the U.S. District Court for the District of Columbia, challenging the Federal Bureau of Prisons’ lethal injection protocol.<sup>100</sup> While the district court initially granted a temporary injunction barring execution during the pendency of litigation, the district court ultimately lifted the injunction on September 20, 2020, following an intervening 2019 change to the Bureau of Prisons federal execution protocol.<sup>101</sup> Ten days later, the Bureau of Prisons noticed Hall’s execution for November 19, 2020, giving Hall just 50 days’ notice prior to execution.<sup>102</sup>

On November 3, 2020, Hall filed suit in the U.S. District Court for the District of Columbia, seeking a preliminary injunction against his scheduled execution and asserting, among other claims, that the only fifty-days’ notice of the execution date in the midst of the pandemic deprived him of his procedural due process rights, as well as his statutory right to clemency representation pursuant to 18 U.S.C. § 3599.<sup>103</sup> In support of his claims, Hall argued that the fifty days’ execution notice given during a global pandemic which made it unsafe for his attorneys to visit him or travel to conduct any of the investigation or work normally contemplated of clemency counsel was arbitrary and deprived him of whatever minimal process is due clemency petitioners. Hall also argued that the COVID-19 pandemic had prevented him from meeting in person with his counsel, which interfered with his right under Section 3599 to be represented by counsel in “proceedings for executive or other clemency.”<sup>104</sup>

The district court denied relief, holding that Hall had received sufficient procedural safeguards under both the Constitution and Section 3599 to prepare his clemency petition prior to his execution date being set, and that the 50 days’ notice given and difficulties in ordinary work due to COVID-19 did not rise to the violation of either constitutional or statutory rights.<sup>105</sup> In its memorandum opinion, the court stated that Hall had received ample time to prepare a clemency petition, as he had been legally able to do so since exhaustion of his 28 U.S.C. § 2255 petition in 2007. The court also stated that it was “not persuaded that the COVID-19 pandemic has denied [Hall] access to the clemency process,” citing to *Lecroy* for the proposition that failure to meet with counsel in-person due to the pandemic did not provide sufficient

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<sup>98</sup> *Id.* at 1198.

<sup>99</sup> *United States v. Hall*, 152 F.3d 381, 390 (5th Cir. 1998).

<sup>100</sup> Memorandum Opinion at 3-4, *Roane v. Gonzalez*, No. 05-cv-2337 (D.D.C. Apr. 20, 2009).

<sup>101</sup> Memorandum Opinion at 3-4, *Hall v. Barr*, No. 20-cv-3184 (D.D.C. Nov. 16, 2020).

<sup>102</sup> *Id.* at 1.

<sup>103</sup> *Id.* at 4-5.

<sup>104</sup> *Id.* at 10.

<sup>105</sup> *Id.* at 7-10, 20.

grounds alone for a stay of execution.<sup>106</sup> On appeal, the D.C. Circuit affirmed the district court's holding.<sup>107</sup> The U.S. Supreme Court denied Hall's subsequent petition for a writ of certiorari.<sup>108</sup>

**c. Lisa Montgomery**

Lisa Montgomery was convicted of a kidnapping resulting in death and sentenced to death.<sup>109</sup> After exhausting her appeals, Montgomery was notified on October 16, 2020, that her execution had been scheduled for December 8, 2020.<sup>110</sup> Despite the risks attendant to travel and visiting a federal penitentiary during the COVID-19 pandemic, Montgomery's attorneys chose to visit her once her execution date was set. Importantly, Montgomery was extremely mentally ill and could not communicate easily or competently over the phone. A few days subsequent to traveling to visit their client, Montgomery's attorneys contracted COVID-19, rendering them unable to continue their work on Montgomery's clemency application.<sup>111</sup> On November 12, 2020, Montgomery filed a complaint for injunctive and declaratory relief for violations of her due process and statutory rights in seeking executive clemency brought about by her attorneys' incapacitation due to COVID-19 and resulting inability to adequately prepare her petition for executive clemency.<sup>112</sup>

In her complaint, Montgomery argued that her Fifth Amendment due process rights were violated by having her execution scheduled during the pandemic because the public health crisis prevented her defense team from meaningfully participating in the clemency application process.<sup>113</sup> Montgomery also argued that her statutory right to counsel for clemency proceedings under 18 U.S.C. § 3599 was violated due to her lawyers' illnesses, which came about during a critical time for the preparation and submission of her clemency petition.<sup>114</sup>

The district court granted Montgomery's request for an injunction in part and stayed Montgomery's execution date to allow her attorneys time to recover from COVID-19 and resume work on Montgomery's case.<sup>115</sup> Importantly, the court held that Section 3599 "creates an entitlement to the continuity of representation by qualified counsel through post-conviction review, competency proceedings, and whatever clemency proceedings that are 'available to the defendant.'"<sup>116</sup> The court rejected the Government's argument that because other attorneys were available to represent Montgomery in her clemency application, there was no statutory violation, instead finding that new attorneys largely unfamiliar with her case could not take over the case at this late stage and effectively provide the representation contemplated

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<sup>106</sup> *Id.* at 9.

<sup>107</sup> *Hall v. Barr*, No. 20-5340, at 4 (D.C. Cir. Nov. 19, 2020).

<sup>108</sup> *See Hall v. Barr*, No. 20-688 (S. Ct. Nov. 19, 2020).

<sup>109</sup> *United States v. Montgomery*, 635 F.3d 1074, 1081-85 (8th Cir. 2011).

<sup>110</sup> *United States v. Montgomery*, Case No. 05-cr-06002-GAF-1 (W.D. Mo. Oct. 16, 2020) (Government's Notice Regarding Execution Date, R. 444).

<sup>111</sup> Complaint for Injunctive and Declaratory Relief for Violations of the Fifth Amendment to the United States Constitution and 18 U.S.C. § 3599 at 10-12, *Montgomery v. Barr*, No 1:20-cv-03261-RDM (D.D.C. Nov. 12, 2020).

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 19.

<sup>114</sup> *Id.* at 20.

<sup>115</sup> Memorandum Opinion at 24, *Montgomery v. Barr*, No 1:20-cv-03261-RDM (D.D.C. Nov. 19, 2020).

<sup>116</sup> *Id.* at 14.



by § 3599.<sup>117</sup> On appeal the Government did not challenge the district court’s interpretation of Section 3599 as guaranteeing a right to continuous counsel throughout post-conviction proceedings.<sup>118</sup> Instead, the government reset Montgomery’s execution date for January 13, 2021.

#### IV. Supplemental Information

##### a. Federal Death Row Population and Demographics

As of March 2021, there were 47 prisoners on federal death row.<sup>119</sup> All current federal death-row prisoners are male; the previous sole female federal death-row prisoner, Lisa Montgomery, was executed on January 13, 2021.<sup>120</sup> Most of the federal death-row population is housed in the all-male U.S. Penitentiary at Terre Haute, Indiana, which holds the death-row prisoners in single cells in a special confinement unit.<sup>121</sup> In 2016, the Department of Justice issued a report detailing the potential for long-term negative health impacts on prisoners subject to solitary confinement due to extreme isolation.<sup>122</sup>

Race	Female	Male	Total
White	0%	43%	43%
Black	0%	40%	40%
Hispanic/Latinx	0%	15%	15%
Asian	0%	2%	2%
<b>TOTAL</b>	0	50	50
	0%	100%	100%

(Data taken from the Death Penalty Information Center; last updated April 6, 2021).

According to this data, roughly 55% of current federal death-row prisoners in the United States are Black or Latinx.<sup>124</sup> Furthermore, even though only approximately half of national murder victims are white, approximately 80% of the murder victims in cases resulting in execution are white, suggesting that if a white

<sup>117</sup> *Id.* at 18.

<sup>118</sup> See Emergency Motion to Stay or Vacate Order Vacating Execution Date of Lisa Montgomery, No. 20-5379 (D.C. Cir. Dec. 29, 2020).

<sup>119</sup> *List of Federal Death-Row Prisoners*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> (last visited April 6, 2021).

<sup>120</sup> *Lisa Montgomery: US Executes Only Woman on Federal Death Row*, BBC News, (Jan. 13, 2021), <https://www.bbc.com/news/world-us-canada-55642177>.

<sup>121</sup> Madeleine Carlisle, *Amid Large Scale Outbreak on Death Row, Trump Administration Continues an Unprecedented Week of Executions*, TIME, (Jan. 14, 2021), <https://time.com/5928974/coronavirus-death-row-prisoners-executions-trump/>. According to conversations with federal death penalty practitioners, two prisoners are currently incarcerated at ADX Colorado, and two have been incarcerated at a prison medical facility for several months.

<sup>122</sup> *Report and Recommendations Concerning the Use of Restrictive Housing*, U.S. Dep’t of Just. Archives, <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing>, (last updated Mar. 13, 2017).

<sup>123</sup> *List of Federal Death-Row Prisoners*, *supra* note 119.

<sup>124</sup> *Federal Death Penalty*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty> (last visited Jan. 15, 2021).

person is killed, the capital defendant is more likely to face execution upon conviction.<sup>125</sup> In 2000, a Justice Department review of the federal death penalty found that 80% of the cases submitted by federal prosecutors for death penalty review in the past five years have involved racial minorities as defendants, with more than half of the cases involving Black defendants.<sup>126</sup> Further, geographic disparities go hand in hand with racial disparities in the federal death penalty: by 2020, just three high-execution states—Texas, Missouri, and Virginia—accounted for more than half of the federal death row.<sup>127</sup>

## b. Executions (Past and Pending)

There have been 49 federal executions carried out since 1927.<sup>128</sup> Prior to 2020, only three federal death-row prisoners had been executed since 1963.<sup>129</sup> However, on July 25, 2019, Attorney General Bill Barr directed the Federal Bureau of Prisons to resume federal capital punishment and schedule the executions of five federal death-row prisoners.<sup>130</sup> Since the 2019 directive, the Bureau of Prisons has executed 13 federal death-row prisoners. No further executions are currently scheduled, and President Biden has suggested he will pursue abolition of the federal death penalty altogether.<sup>131</sup>

Ten of the thirteen executions were conducted in 2020, marking the first time in U.S. history where the federal government has carried out more executions in a year than in all states that still conduct executions.<sup>132</sup> The ten executions marked the highest yearly federal total under any presidency since the 1800s.<sup>133</sup>

The thirteen federal death-row prisoners executed between 2020 and 2021 are listed below<sup>134</sup>:

- **Daniel Lewis Lee.** Lee was executed on July 14, 2020.
- **Wesley Ira Purkey.** Purkey was executed on July 16, 2020.

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<sup>125</sup> *Race and the Death Penalty*, Am. C.L. Union, <https://www.aclu.org/other/race-and-death-penalty> (last visited Jan. 15, 2021).

<sup>126</sup> See *Survey of the Federal Death Penalty System 1988-2000*, U.S. Dep't of Just., (Mar. 3, 2017), <https://www.justice.gov/archives/dag/survey-federal-death-penalty-system>.

<sup>127</sup> Ngozi Ndulue, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty* 61 (Robert Dunn ed., 2020), <https://files.deathpenaltyinfo.org/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>.

<sup>128</sup> *Capital Punishment*, Fed. Bureau of Prisons, [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp) (last visited Jan. 15, 2021).

<sup>129</sup> *Id.*

<sup>130</sup> Press Release, U.S. Dep't of Just., *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

<sup>131</sup> *Capital Punishment*, *supra* note 128.

<sup>132</sup> Michael Tarm, *Report: Federal Execution Numbers Top States' for 1st Time*, Associated Press, (Dec. 16, 2020), <https://apnews.com/article/donald-trump-coronavirus-pandemic-executions-736b68c22e821be7c5faa85f1bf0b245>.

<sup>133</sup> *Id.*

<sup>134</sup> See *Federal Execution Updates*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/stories/federal-execution-updates>, (last updated Jan. 16, 2021).

- **Dustin Lee Honken.** Honken was executed on July 17, 2020).
- **Lezmond Charles Mitchell.** Mitchell was executed on August 26, 2020.
- **Keith Dwayne Nelson.** Nelson was executed August 28, 2020.
- **William Emmett LeCroy, Jr..** LeCroy was executed on September 22, 2020.
- **Christopher Andre Vialva.** Vialva was executed on September 24, 2020.
- **Orlando Cordia Hall.** Hall was executed on November 19, 2020.
- **Brandon Bernard.** Bernard was executed on December 10, 2020.
- **Alfred Bourgeois.** Bourgeois was executed on December 11, 2020.
- **Lisa Montgomery.** Montgomery was executed on January 13, 2021.
- **Corey Johnson.** Johnson was executed on January 14, 2021.
- **Dustin John Higgs.** Higgs was executed on January 15, 2021.

Scheduled executions can be found on the Federal Bureau of Prisons website.<sup>135</sup> A full list of all executed federal death-row prisoners since 1927 can also be found there.<sup>136</sup>

Since 2001, lethal injection has been the method of execution used for federal executions.<sup>137</sup> Federal law stipulates that the execution manner must also correspond with what the state where the execution takes place permits.<sup>138</sup> If a state does not permit the death penalty in the jurisdiction in which a defendant is convicted, a judge can designate a different state to carry out the execution under the authority of the federal government.<sup>139</sup> Executions by the federal government in the modern era have been carried at the United States Penitentiary in Terre Haute, Indiana. However, pursuant to 18 U.S.C. §§ 3596, 3597, state

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<sup>135</sup> *Scheduled Executions*, Fed. Bureau of Prisons, [https://www.bop.gov/resources/federal\\_executions\\_info.jsp](https://www.bop.gov/resources/federal_executions_info.jsp) (last visited Jan. 15, 2021). Of note, a review of the Bureau of Prisons (“BOP”) case descriptions for some of the thirteen individuals executed by the federal government between 2019 and 2021 has revealed some misstatements in the descriptions of the cases. Compare, e.g., BOP description of Brandon Bernard as “sentenced to death for numerous offenses,” [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp), with “Vialva was convicted on three capital murder counts, and Bernard on a single count for Stacie’s death,” *United States v. Bernard*, 762 F.3d 467, 470 (5th Cir. 2014).

<sup>136</sup> *Capital Punishment*, *supra* note 128.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

facilities may be used to carry out federal executions, as well.<sup>140</sup> Lethal injection is currently the sole permissible method of execution in Indiana.<sup>141</sup>

**c. Exonerations/Innocence**

Since 1973, 185 prisoners sentenced to death under state law have been exonerated.<sup>142</sup> There have been no exonerations for federal death-row prisoners in the modern era,<sup>143</sup> though at least two of the prisoners executed in the recent federal execution spree claimed innocence of their charged roles in the crimes for which they were convicted and sentenced to death.

**V. Federal Capital Clemency Decisions**

**a. Grants<sup>144</sup>**

As of January 2020, the Office of the Pardon Attorney received 11,611 petitions for *non-capital* clemency during the Trump administration (1,854 petitions for pardon; 9,757 petitions for commutation of sentence).<sup>145</sup> President Trump granted clemency in 206 cases (117 pardons; 89 commutations).<sup>146</sup>

Since the resumption of federal executions in 2019, the Office of the Pardon Attorney received twelve capital clemency applications for a commutation of sentence.<sup>147</sup> No decision on these applications was ever reported, and all of the executions proceeded.<sup>148</sup> Of the thirteen death-row prisoners executed since July 2020, only Keith Dwayne Nelson and Orlando Hall declined to submit a formal clemency petition to the Office of the Pardon Attorney.<sup>149</sup>

Only three petitions for capital clemency have been granted since 2001, out of dozens filed.<sup>150</sup> In each case, the respective president granted the clemency petitions in his final hours in office.<sup>151</sup> Presidents

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<sup>140</sup> *Id.*

<sup>141</sup> Ind. Code § 35-38-6-1 (2021).

<sup>142</sup> DPIC Special Report: *The Innocence Epidemic*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-special-report-the-innocence-epidemic> (last visited Mar. 5, 2021).

<sup>143</sup> *Id.*

<sup>144</sup> For the purposes of this memo and in this section, “grants” will refer specifically to commutations.

<sup>145</sup> *Clemency Statistics*, U.S. Dep’t of Just., Off. of the Pardon Att’y, <https://www.justice.gov/pardon/clemency-statistics>, (last updated Jan. 20, 2021).

<sup>146</sup> *Id.*

<sup>147</sup> See *Clemency Database*, U.S. Dep’t of Just., Off. of the Pardon Att’y, <https://www.justice.gov/pardon/search-clemency-case-status-since-1989>, (last updated Dec. 3, 2020).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> *List of Clemencies Since 1976*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> (last visited Jan.15, 2021).

<sup>151</sup> See Rob Warden & John Seasley, *David Chandler: Evidence of Innocence Moves Him off Death Row, but not out of Prison*, Injustice Watch, (Nov. 4, 2019), <https://www.injusticewatch.org/projects/unrequited-innocence/2019/david-chandler-evidence-of-innocence-moves-him-off-death-row-but-not-out-of-prison/>; Maurice Chammah, *How Obama Disappointed on the Death Penalty*, The Marshall Project, (Jan. 18, 2017), <https://www.themarshallproject.org/2017/01/18/how-obama-disappointed-on-the-death-penalty>.

have commonly issued a significant number of pardons and commutations just prior to completing their terms.<sup>152</sup>

- **David Ronald Chandler (Commuted)**

In 2001, President Bill Clinton issued his sole death penalty commutation to David Ronald Chandler, citing doubt concerning Chandler's guilt in the crime for which he was set to be executed.<sup>153</sup> Chandler was convicted in 1991 of running a drug ring that trafficked marijuana from the foothills of northeast Alabama and was condemned to death for ordering the shooting murder of an associate-turned-informant.<sup>154</sup> But the principle evidence tying him to the murder was the confession of one witness, who later recanted his testimony and stated that he had in fact shot the victim.<sup>155</sup> Two hours before President Clinton left office, he commuted Chandler's sentence to life in prison.<sup>156</sup>

- **Abelardo Arboleda Ortiz (Commuted)**

President Barack Obama issued the first of two death penalty commutations during his presidency in the case of Abelardo Ortiz, who was convicted along with two others of killing a drug dealer in 1998.<sup>157</sup> Ortiz's clemency lawyers sought clemency on a variety of grounds, including that Ortiz is intellectually disabled, but his trial lawyer did not investigate that disability;<sup>158</sup> that Ortiz, a Colombian national, sought, but did not receive access to, assistance from the Colombian consulate, which is required under the Vienna Convention on Consular Rights;<sup>159</sup> and that two of Ortiz's co-defendants did not receive death sentences, even though Ortiz was not in the room when the victim was killed.<sup>160</sup> On January 17, 2017, President Obama commuted Ortiz's death sentence to life without parole.<sup>161</sup> While President Obama did not announce a reason for granting clemency, Ortiz's petition centered on the intellectual disability claim, pointing to IQ scores ranging from 44 to 70 and the fact that Ortiz could not read or write in either Spanish or English.<sup>162</sup>

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<sup>152</sup> See Kathryn Watson, *How Trump and Past Presidents Have Wielded the Presidential Pardon*, CBS News, (Dec. 18, 2020), <https://www.cbsnews.com/news/how-trump-and-past-presidents-have-wielded-presidential-pardon-powers/>.

<sup>153</sup> See *List of Clemencies Since 1976*, *supra* note 150.

<sup>154</sup> Gary Mitchell, *Clinton Commutes Execution Sentence*, Wash. Post Archives, (Jan. 20, 2001), [https://www.washingtonpost.com/wp-srv/aponline/20010120/aponline184839\\_000.htm](https://www.washingtonpost.com/wp-srv/aponline/20010120/aponline184839_000.htm).

<sup>155</sup> Warden & Seasily, *supra* note 151.

<sup>156</sup> *Id.*

<sup>157</sup> Debra Cassens Weiss, *Obama's Overlooked Last-Minute Commutation Lifts Death Sentence for Disabled Inmate*, ABA J., (Jan. 18, 2017), [https://www.abajournal.com/news/article/federal\\_death\\_row\\_inmate\\_is\\_among\\_those\\_winning\\_sentence\\_commutations](https://www.abajournal.com/news/article/federal_death_row_inmate_is_among_those_winning_sentence_commutations).

<sup>158</sup> See *List of Clemencies Since 1976*, *supra* note 150.

<sup>159</sup> *Id.*

<sup>160</sup> Weiss, *supra* note 157.

<sup>161</sup> ABA, *Abelardo Arboleda Ortiz*, (June 5, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/success-stories/success-stories-archive/abelardo-arboleda-ortiz/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/success-stories/success-stories-archive/abelardo-arboleda-ortiz/).

<sup>162</sup> *Id.*

## b. Denials

As noted, of the thirteen death-row prisoners executed since the resumption of the federal death penalty in July 2019, eleven of the thirteen submitted a formal clemency petition to the Office of the Pardon Attorney.<sup>163</sup> None received a response indicating an affirmative denial from either the White House or the Department of Justice.<sup>164</sup> A few examples of the cases in which clemency petitions were not acted upon are included below.<sup>165</sup>

- **Daniel Lee Lewis (2020)**<sup>166</sup>

Daniel Lee Lewis was sentenced to death in connection with the 1996 murder of a husband, wife, and daughter.<sup>167</sup> The prosecution's case rested predominantly on the actions of codefendant Chevie Kehoe whom the government described as the ringleader in the case and the one responsible for the child's death. When Mr. Lee's execution date was set, Mrs. Earlene Branch Peterson, the mother of the deceased wife and grandmother of her child, made a plea to President Trump seeking commutation of Lee's sentence to life in prison.<sup>168</sup> Also seeking clemency along with the victim's family was the lead prosecutor at trial as well as the trial judge—an unusual, if unprecedented coalition in a death penalty case.<sup>169</sup> Mrs. Peterson stated, "I can't see how executing Daniel Lee will honor my daughter in any way. In fact, it's kind of like it dirties her name, because she wouldn't want it and I don't want it. That's not the way it should be."<sup>170</sup> Notwithstanding these statements from the victims' family and other evidence that may have changed the outcome of the trial had it been known and disclosed at the time, the clemency petition was never ruled

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<sup>163</sup> See *Clemency Database*, *supra* note 147.

<sup>164</sup> See *id.*

<sup>165</sup> Of note, not all of the clemency petitions for the prisoners discussed here were made public, meaning that there may have been arguments for clemency advanced to the government that are not publicly known or reflected here.

<sup>166</sup> Ariane de Vogue, et al., *Daniel Lee Lewis Executed after Supreme Court Clears the Way for First Federal Execution in 17 Years*, CNN, (July 14, 2020), <https://www.cnn.com/2020/07/14/politics/daniel-lewis-lee-supreme-court-rule-execution/index.html>.

<sup>167</sup> See *id.*

<sup>168</sup> Campbell Robertson, *Before First Federal Execution in Years, Family of Victims Dissents*, N.Y. Times, (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/us/arkansas-federal-death-penalty.html>.

<sup>169</sup> *Id.*

<sup>170</sup> U.S. v. Lee: Mrs. Earlene Peterson, Vimeo, (Sept. 12, 2019), <https://vimeo.com/359661291>.

on, and Lewis was executed on July 14, 2020.<sup>171</sup> Lewis's execution marked the first federal death penalty execution since 2003.<sup>172</sup>

- **Orlando Hall (2020)**<sup>173</sup>

Orlando Hall was sentenced to death in November 1995.<sup>174</sup> Hall first petitioned for clemency in December 2016, though he voluntarily withdrew the petition in January 2017.<sup>175</sup> On October 30, 2020, after Hall received an execution date for 50 days' later that fall, Hall's counsel contacted the Office of the Pardon Attorney regarding their inability to effectively prepare and present a petition for executive clemency in light of the ongoing COVID-19 pandemic.<sup>176</sup> Hall's counsel maintained that they were unable to file a new formal petition for clemency or provide an oral presentation to the Office of the Pardon Attorney,<sup>177</sup> given the unprecedentedly short notice Hall was given of his execution date, and the fact that the COVID-19 pandemic prevented Hall's attorneys from traveling to visit him or do any of the necessary investigative work needed to supplement his petition.

In November 2020, Hall filed an emergency motion raising, among others, a due process claim, asserting his inability to effectively prepare and present a clemency application under the circumstances compromising effective representation created by the pandemic.<sup>178</sup> The D.C. District Court denied the motion, and the D.C. Circuit Court of Appeals affirmed.<sup>179</sup> Hall sought certiorari review of the denial and petitioned the Supreme Court for an emergency stay of execution.<sup>180</sup> On November 19, 2020, the Supreme Court denied the stay application and petition for certiorari.<sup>181</sup>

On November 19, 2020, Hall was executed by lethal injection at the U.S. Penitentiary in Terre Haute, Indiana.<sup>182</sup> His execution marked the first under a lame-duck president for over a century.<sup>183</sup> Eight members of the Bureau of Prisons execution team and a religious advisor subsequently tested positive for the

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<sup>171</sup> See *Clemency Database*, *supra* note 147; Andrew DeMillo, *Victims' Relatives Most Vocal Opponents of Man's Execution*, Associated Press, (July 13, 2020), <https://apnews.com/article/773ebcab369d826ddfb0a9448a90fc3>.

<sup>172</sup> *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 Jan. 15, 2021).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Hall v. Barr*, No. 20-5340, Appendix A, 5a (D.C. Cir. 2020).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* See also *Hall v. Barr*, *supra* note 101.

<sup>179</sup> *Id.*

<sup>180</sup> See *Hall v. Barr*, 592 U.S. 20-688 (20A100) (2020).

<sup>181</sup> *Id.*

<sup>182</sup> Associated Press, *Man Who Kidnapped, Raped, Buried Texas Teen Alive is Executed*, (Nov. 20, 2020) <https://www.nbcnews.com/news/us-news/man-who-kidnapped-raped-buried-texas-teen-alive-executed-n1248333>.

<sup>183</sup> *The Death Penalty in 2020: Year End Report*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report#federal-death-penalty>, (last updated Dec. 16, 2020).

coronavirus after participating in his execution.<sup>184</sup> The COVID-19 infections, which federal authorities had not previously revealed, came to light in documents produced in a lawsuit two non-death-row prisoners filed to halt the remaining federal executions scheduled at Terre Haute.<sup>185</sup> Notwithstanding these revelations, each of the Bureau of Prisons' originally scheduled executions through January 2021 were carried out amidst the pandemic.<sup>186</sup>

- **Brandon Bernard (2020)**<sup>187</sup>

Brandon Bernard was sentenced to death in 1999 for a death that occurred as a part of a robbery plot he was involved in at age eighteen.<sup>188</sup> On November 10, 2020, he submitted a clemency petition to President Trump.<sup>189</sup> In his petition, Bernard noted his youth at the time of the crime, the ineffectiveness of his trial counsel for failing to challenge unfounded evidence that he would be a future danger, and his lack of culpability compared to his co-defendants.<sup>190</sup> Bernard also pointed to evidence that was never reviewed on the merits by any court that prosecutors suppressed information that Bernard played a low-level role in the gang involved in the robbery, despite claiming the opposite at trial.<sup>191</sup> Bernard's clemency petition stressed his background role in the crime, arguing that he was "neither the shooter nor the ringleader in the carjacking and murder."<sup>192</sup> Although Bernard was convicted of murder after prosecutors convinced the jury that one of the victims, Stacie Bagley, died of smoke inhalation after Bernard set her car on fire, an expert later testified that at that point, Bagley would have already been dead.<sup>193</sup> The petition further described Bernard's standout conduct in prison, such as the fact that he had never had a disciplinary infraction and counseled others to help them avoid choices that would lead to incarceration.<sup>194</sup> Massive public support accompanied

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<sup>184</sup> Michael Balsamo & Michael R. Sisak, *Execution Staff Have COVID-19 After Inmate Put to Death*, Associated Press, (Dec. 8, 2020), <https://apnews.com/article/prisons-coronavirus-pandemic-executions-terre-haute-indiana-e80af6a566bbff50ed5e9a097c305dbb>.

<sup>185</sup> *Id.*

<sup>186</sup> See Mallika Kallingal & Christina Carrega, *Dustin Higgs Executed Less than a Week Before Inauguration Day*, CNN, (Jan. 16, 2021), <https://www.cnn.com/2021/01/16/us/dustin-higgs-executed/index.html> ("Dustin John Higgs was executed in the early hours of Saturday morning becoming the 13th and last federal death row inmate to be executed since the Justice Department restarted federal executions in July 2019 . . . Higgs' execution went forward despite his attorney, Shawn Nolan's appeal to delay the proceeding because of Higgs' Covid-19 diagnosis.").

<sup>187</sup> Hailey Fuchs, *Planned Execution Stirs Debate Over Punishment for Young Offenders*, N.Y. Times, (pub. Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/us/politics/brandon-bernard-death-penalty.html>.

<sup>188</sup> *Id.*

<sup>189</sup> *Despite Lame-Duck Status, Federal Government Carries Out Three Executions In December*, ABA Death Penalty Representation Year-End 2020, (Jan. 26, 2021), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/project\\_press/2020/year-end-2020/despite-lame-duck-status-federal-government-carries-out-three-more-executions/](https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/despite-lame-duck-status-federal-government-carries-out-three-more-executions/).

<sup>190</sup> Hailey Fuchs, *Justice Department Executes Man for Murder Committed When He Was 18*, N.Y. Times, (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/brandon-bernard-execution-death-penalty.html>.

<sup>191</sup> Fuchs, *supra* note 187.

<sup>192</sup> *Id.*

<sup>193</sup> Paulina Smolinski and Clare Hymes, *Brandon Bernard Executed for Role in 1999 Murder of Couple*, CBS News, (Dec. 11, 2020), <https://www.cbsnews.com/news/brandon-bernard-executed-federal-government/>.

<sup>194</sup> In Re: Brandon Bernard, Petition for Clemency Seeking Commutation of Death Sentence, available at: <https://eji.org/wp-content/uploads/2020/12/brandon-bernard-clemency-petition.pdf>.



Bernard's campaign for clemency. Five of the jurors who sentenced him to death<sup>195</sup> and the prosecutor who defended his death sentence on appeal<sup>196</sup> spoke out publicly against his execution, citing his young age and the fact that he was not the “ringleader” of the crime. Kim Kardashian West and Cory Booker were among the celebrities that came out in support of clemency. Supporters sent tens of thousands of letters advocating for a commutation to President Trump.<sup>197</sup> It was further speculated that the DOJ recommended that Bernard be granted clemency.<sup>198</sup> However, President Trump took no action on the petition, and Bernard was executed on December 10, 2020.<sup>199</sup> Bernard, who was 40 years old at the time of his death, is the youngest person to be executed by the federal government in almost 70 years.<sup>200</sup>

- **Lisa Montgomery (2021)**<sup>201</sup>

Lisa Montgomery was sentenced to death in 2008, following her conviction for the murder of a pregnant woman and the kidnapping of the mother's unborn child.<sup>202</sup> At the time of sentencing, she became the third woman on federal death row.<sup>203</sup> Although none of this information was presented at trial, later investigation by her attorneys revealed that Montgomery suffered repeated physical and sexual trauma as a child, as her mother forced her to “pay the bills” through sexual acts with various repairmen, and her stepfather regularly subjected her to sexual abuse, according to a clinical psychologist.<sup>204</sup> Once an execution date was set, Montgomery's counsel claimed she was incompetent for execution, citing mental illness, neurological impairment, and complex trauma.<sup>205</sup> Montgomery's lawyers also argued that by granting clemency and commuting her sentence to life imprisonment, President Trump could affirm the experiences of abuse survivors and their resulting trauma.<sup>206</sup> However, President Trump did not grant the petition, and

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<sup>195</sup> Liliana Segura, *Trump Prepares to Kill Brandon Bernard Even as Jurors Say His Life Should Be Spared*, The Intercept, (Dec. 5, 2020), <https://theintercept.com/2020/12/05/federal-executions-brandon-bernard/>; *Five of the Nine Surviving Jurors No Longer Believe That A Death Sentence Is Necessary For Brandon*, Help Save Brandon, <https://www.helpsavebrandon.com/jurors-who-now-support-saving-brandon>.

<sup>196</sup> Angela Moore, Opinion, *I Helped Put Brandon Bernard on Federal Death Row. I Now Think He Should Live.*, Indy Star, (Nov. 18, 2020), <https://www.indystar.com/story/opinion/2020/11/18/op-ed-brandon-bernard-execution-prosecutor-says-he-should-live/6329685002/>.

<sup>197</sup> Fuchs, *supra* note 187. See also Rest in Peace Brandon Bernard, <https://www.helpsavebrandon.com/>.

<sup>198</sup> Liliana Segura (@LilianaSegura), Twitter (Dec. 10, 2020, 7:45 AM), <https://twitter.com/LilianaSegura/status/1337015473066696704>.

<sup>199</sup> Fuchs, *supra* note 190.

<sup>200</sup> *Brandon Bernard Executed In Trump's Final Days*, BBC, (last updated Dec. 11, 2020), <https://www.bbc.com/news/world-us-canada-55261224>.

<sup>201</sup> Hailey Fuchs, *U.S. Executes Lisa Montgomery for 2004 Murder*, N.Y. Times, (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/lisa-montgomery-execution.html>.

<sup>202</sup> *Executions Under the Federal Death Penalty*, *supra* note 172.

<sup>203</sup> *Id.*

<sup>204</sup> Fuchs, *supra* note 201.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

Montgomery was executed on January 12, 2021.<sup>207</sup> By the time of her execution, Montgomery was the sole female on death row, and her execution marked the first federal execution of a woman in nearly 70 years.<sup>208</sup>

- **Dustin John Higgs (2021)<sup>209</sup>**

Dustin Higgs marked the thirteenth and final execution under the federal death penalty in the Trump administration.<sup>210</sup> Higgs was sentenced to death in 2000 in connection with a triple murder in 1996.<sup>211</sup> Higgs submitted an initial clemency petition, which the Bureau of Pardons administratively closed in 2017.<sup>212</sup> In 2020, Higgs submitted an additional clemency petition, seeking commutation of sentence on the assertion that he was not the actual killer, and also in light of the fact that his co-defendant, Willis Haynes, was tried separately and sentenced to life in prison without parole.<sup>213</sup> Higgs' lawyers asserted that it was "arbitrary and inequitable" that Higgs should receive a death sentence while the man who pulled the trigger got life.<sup>214</sup> The petition also asserted that Higgs had contracted the coronavirus less than a month prior to his execution date, which would force Higgs to spend his remaining time alive battling a disease and potentially complicate the execution.<sup>215</sup> President Trump again declined to take action on the petition, and Higgs was executed on January 15, 2021.<sup>216</sup> Higgs maintained his claim of innocence through the execution, stating, "I'd like to say I am an innocent man," mentioning the three victims by name, and stating that he did not order the murders.<sup>217</sup>

## VI. Other Relevant Legal, Historical, or Social Issues re: the Federal Death Penalty

The resumption of executions under the federal death penalty from 2019–2021 comes amidst declining support for the death penalty nationwide. In June 2020, a Gallup poll reported that the percentage of Americans who say the death penalty is morally acceptable was at its lowest point in the 20-year history of the poll.<sup>218</sup> Fifty-four percent of respondents said they found capital punishment morally acceptable, down

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<sup>207</sup> Christina Carrega, *Attorneys for Woman on Death Row Head to Supreme Court, Pleading with Trump to Read Clemency Petition*, CNN, (Jan. 5, 2021), <https://www.cnn.com/2021/01/05/politics/lisa-montgomery-clemency-scotus/index.html>.

<sup>208</sup> Fuchs, *supra* note 201.

<sup>209</sup> Kallingal & Carrega, *supra* note 186.

<sup>210</sup> *Id.*

<sup>211</sup> 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>.

<sup>212</sup> See *Clemency Database*, "Dustin Higgs", Dep't of Just., Off. of the Pardon Att'y, [https://www.justice.gov/pardon/search-clemency-case-status-since-1989?first\\_name=Dustin&last\\_name=Higgs](https://www.justice.gov/pardon/search-clemency-case-status-since-1989?first_name=Dustin&last_name=Higgs), (last updated Dec. 3, 2020).

<sup>213</sup> Ed Pilkington, *U.S. Death Row Prisoner Dustin Higgs Petitions Trump for Clemency*, Guardian, (Dec. 21, 2020), <https://www.theguardian.com/world/2020/dec/21/dustin-higgs-trump-death-row-execution>.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> Fuchs, *supra* note 201.

<sup>217</sup> See Kallingal & Carrega, *supra* note 186.

<sup>218</sup> See Robert Dunham, *DPIC Analysis: Federal Execution Spree Out of Step with U.S. Death Penalty Trends and Attitudes*, Death Penalty Info. Ctr., (Sept. 3, 2020), <https://deathpenaltyinfo.org/news/dpic-analysis-federal-execution-spree-out-of-step-with-u-s-death-penalty-trends-and-attitudes>.

17 percentage points since 2006.<sup>219</sup> In March 2020, Colorado became the 22nd U.S. state to abolish capital punishment, and in the first half of the year, Louisiana and Utah marked ten years since their last executions.<sup>220</sup> Thirty-four American states—68% of the Union—have now either formally abolished the death penalty or not put anyone to death in more than a decade.<sup>221</sup> Notwithstanding, the federal government conducted more executions in 2020 than in any other year since the 1970s when capital punishment resumed in the U.S.<sup>222</sup>

### **COVID-19, Clemency, and the Federal Executions**

The federal prisoners scheduled for execution in 2020 were forced to prepare for and seek clemency amidst the global coronavirus pandemic, which impacted their cases in myriad ways. Concerns about contracting the virus limited attorneys' ability to travel and conduct in-person meetings and investigations supporting their client's clemency petitions, prompting litigation regarding the adequacy of representation that clients received.<sup>223</sup>

Attorneys' concerns were not unfounded. In the case of Lisa Montgomery, Montgomery's two lawyers contracted the coronavirus shortly after visiting Montgomery to prepare her clemency petition on November 3, 2020.<sup>224</sup> Their sickness led to litigation ultimately prompting the U.S. District Court for the District of Columbia to stay Montgomery's execution through December 31, 2020, until counsel could recover and continue with preparation of Montgomery's clemency petition.<sup>225</sup> In other cases, including those of William LeCroy and Orlando Hall, the federal courts declined to allow additional time for preparation of clemency petitions, notwithstanding prisoners' claims that counsel were unable to meaningfully prepare for or present their cases for clemency in light of the coronavirus.<sup>226</sup>

Reporting has also suggested that federal death penalty executions carried out in late 2020 and early 2021 contributed to a significant outbreak of COVID-19 within the federal death-row prisoner population itself. According to a February 2021 report by the Associated Press, seventy percent of federal death-row prisoners had contracted the virus by the end of the Trump administration term in January 2021.<sup>227</sup> Employees at the Terre Haute penitentiary were found to have had contact with prisoners and other people

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<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> See, e.g., Complaint for Injunctive and Declaratory Relief for Violations of the Fifth Amendment to the United States Constitution and 18 U.S.C. § 3599, *Montgomery v. Barr*, *supra* note 111.

<sup>224</sup> *Id.* See also *Lawyers for Lisa Montgomery Contract COVID-19 During Prison Visits, Seek Stay of Execution*, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/news/lawyers-for-lisa-montgomery-contract-covid-19-during-prison-visits-seek-stay-of-execution> (Nov. 13, 2020).

<sup>225</sup> See Bryan Pietsch, *Ruling on Woman on Death Row Puts Her Execution in Doubt*, N.Y. Times (Dec. 25, 2020), <https://www.nytimes.com/2020/12/25/us/lisa-montgomery-execution.html>.

<sup>226</sup> See *LeCroy*, 975 F.3d at 1194; see also Memorandum Opinion at 3-4, *Hall v. Barr*, No. 20-cv-3184 (D.D.C. Nov. 16, 2020).

<sup>227</sup> Michael Tarm, et al., *AP Analysis: Federal Executions Likely a COVID Superspreader*, Associated Press, (Feb. 5, 2021), <https://apnews.com/article/public-health-prisons-health-coronavirus-pandemic-executions-956da680790108d8b7e2d8f1567f3803>.

infected with the coronavirus, but they were able to refuse testing and declined to participate in contact tracing efforts and were still permitted to return to their work assignments.<sup>228</sup> Concerns about inadequate coronavirus precautions at Terre Haute were so significant that, on January 7, 2021, the U.S. District Court for the Southern District of Indiana enjoined the Department of Justice from carrying out further executions until the Bureau of Prisons personnel at Terre Haute complied with basic Centers for Disease Control and Prevention (CDC) guidelines regarding the wearing of masks, contact tracing, and isolation procedures.<sup>229</sup>

The American Bar Association cited the prejudicial impacts of the coronavirus outbreak on federal death penalty prisoners' clemency proceedings in letters to then-President Trump and acting Attorney General Jeffrey Rosen in November 2020 and January 2021, respectively. In the letters, the ABA noted that its guidelines for death penalty cases expect "zealous representation by counsel throughout every stage of the legal proceedings, including in applications for executive clemency."<sup>230</sup> These standards in turn "require that attorneys visit with their clients regularly."<sup>231</sup> The letters included a declaration noting that "[r]emote technology options such as video conferencing and phone calls do not provide an adequate alternative for capital defenders, mitigation specialists, experts, or investigators" and that, while some of the work that a capital defender does can be done remotely for a period of time, the investigation required to develop the facts relevant to clemency, as well as attorneys' duty to "keep clients whole," requires an attorney to meet with clients and witnesses in person.<sup>232</sup> Given these ABA guidelines, the letters expressed "urgent concern" over the government's plan to continue federal executions through January 2021 without delay or accommodation for the impacts of the coronavirus on clemency proceedings or the right to zealous representation by counsel.<sup>233</sup>

### **Congressional Calls for Clemency & Repeal**

Given the significant number of federal executions carried out under the Trump administration compared to recent historical precedent, some lawmakers have called on President Biden to use his clemency powers as a way to prevent further federal executions. In December 2020, then Congresswoman-elect Cori Bush (D-MO) publicly called on President-elect Biden to grant clemency to every person on federal death row.<sup>234</sup> Now Congresswoman Bush represents one of more than three dozen members of Congress who, as of

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<sup>228</sup> *Id.*

<sup>229</sup> *Smith v. Rosen*, No. 2:20-cv-00630-JMS-DLP (S.D. Ind., Jan. 7, 2021) (COVID-19 Order).

<sup>230</sup> Letter, Patricia Lee Refo, *Re: Federal Executions Scheduled for Federal Executions Scheduled for January 12-15, 2021*, Am. Bar Ass'n, (Jan. 12, 2021),

<https://www.americanbar.org/content/dam/aba/administrative/news/2021/01/refo-letter-to-rosen-re-executions.pdf>;

see also Letter, Patricia Lee Refo, *Re: Federal Executions Scheduled for November and December 2020*, Am. Bar Ass'n, (Nov. 12, 2020),

[https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/statements\\_testimony/aba-letter-federal-execution-refo.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/statements_testimony/aba-letter-federal-execution-refo.pdf).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See *id.*

<sup>234</sup> Cori Bush, *Joe Biden Says He Opposes the Death Penalty. He Can Help End it with the Stroke of a Pen*, TIME, (Dec. 14, 2020), <https://time.com/5921335/joe-biden-death-penalty/>.

2020, called on the incoming Biden administration to pursue a variety of means, including federal clemency, to abolish the death penalty in all jurisdictions.<sup>235</sup>

Part of the motivation for those seeking greater use of the clemency power by President Biden stems from concerns about the adequacy of prior, less formal restrictions on the use of the federal death penalty. Former President Barack Obama did not use his clemency powers widely to commute federal death sentences to life terms.<sup>236</sup> In 2014, President Obama asked the Department of Justice to conduct a formal review of capital punishment nationwide, following the botched 2014 Oklahoma execution of Clayton D. Lockett.<sup>237</sup> During the review, a Department of Justice spokeswoman noted that, at the time, the nation had “in effect, a moratorium in place on federal executions,” referencing the federal government’s inability to receive certain chemical ingredients required for the existing lethal injection protocol.<sup>238</sup> While there was apparently some discussion of imposing a formal moratorium on use of the death penalty or otherwise commuting the row, the Department of Justice never presented a formal policy proposal for President Obama’s consideration.<sup>239</sup> Had President Obama followed his moratorium with grants of federal clemency, death penalty opponents say, the 13 federal prisoners executed between 2020 and 2021 would have been spared.<sup>240</sup>

Current opponents of the federal death penalty continue to debate the most effective means for its abolition. “A U.S. president does not have the power to abolish the federal death penalty,” according to Robert Dunham of the non-partisan Death Penalty Information Center.<sup>241</sup> According to Dunham, “the only way that the federal death penalty can be abolished is an act of Congress signed by a president, or from a court decision by the U.S. Supreme Court. It’s clear from the current composition of the Supreme Court that that’s not going to happen, so the only way that the Biden administration would be able to end the federal death penalty would be to have some sort of bipartisan support in Congress.”<sup>242</sup> Notwithstanding this view, Congresswoman Bush has suggested that clemency remains a direct means to abolishing the death penalty for federal death-row prisoners: “With the stroke of a pen,” Congresswoman Bush wrote in a 2020 article, “[President Biden] can grant clemency to all who are on federal death row, reducing their sentences or pardoning them altogether . . . . If [President Biden] truly opposes the death penalty, he must do everything in his power to stop it for good. Granting clemency to all on federal death row is his most effective tool.”<sup>243</sup>

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<sup>235</sup> Christina Carrega, *Dozens of Members of Congress Call on Biden Administration to End the Federal Death Penalty*, CNN, (Dec. 15, 2020), [https://www.cnn.com/politics/live-news/biden-trump-us-election-news-12-15-20/h\\_bb2fb3d91b08683b561f8b273be8e2](https://www.cnn.com/politics/live-news/biden-trump-us-election-news-12-15-20/h_bb2fb3d91b08683b561f8b273be8e2).

<sup>236</sup> Juana Summers, *‘End This Cruelty’: Progressives Call on Biden to Work to Stop Executions*, Nat’l Pub. Radio, (Dec. 30, 2020), <https://www.npr.org/2020/12/30/950105746/end-this-cruelty-progressives-call-on-biden-to-work-to-stop-executions>.

<sup>237</sup> Matt Apuzzo, *Obama Administration Steps Back from Effort to End Federal Death Penalty*, N.Y. Times, (Apr. 29, 2015), <https://www.nytimes.com/2015/04/30/us/white-house-balks-on-ending-death-penalty.html>.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Summers, *supra* note 236.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Bush, *supra* note 234.