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Restoring and Strengthening the Federal Death Penalty

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Office of Legal Policy

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Statement of the Acting Attorney General

On January 20, 2017—Donald Trump's first day in office—sixty murderers sat on federal death row. For each a jury had unanimously concluded death was the only just punishment for the atrocious acts they committed. Their sentences had been upheld against various legal challenges and many of the sixty awaited implementation of their capital sentence.

Yet fourteen years had passed since the Justice Department had carried out an execution. Despite federal prosecutors consistently seeking and defending capital sentences under the leadership of both political parties, the Department had not prioritized implementing them. The federal death penalty had been rendered a dead letter, effectively transforming *sub silentio* each death sentence into a life sentence.

This changed when Donald Trump became President. He recognizes that capital punishment is "an essential tool" in a functioning criminal justice system. Not only does it "deter[] and punish[] those who would commit the most heinous crimes," but death, more than any other punishment, communicates the immeasurable value of innocent human life. It also provides a sense of closure and finality to the families of murder victims.

In the summer of 2019, the Department announced that it had secured a source of pentobarbital—the gold standard of lethal injection drugs. It then scheduled the executions of five men convicted of murdering children. Executions began the following summer. By the end of President Trump's first term, the Department had executed thirteen murderers.

Among the men executed was Keith Dwayne Nelson. Twenty-one years earlier, he kidnapped ten-year-old Pamela Butler while she rollerbladed outside her home. After forcing her into his pickup truck, he dragged her to a wooded area behind a church, tore off her clothes, and violently raped her. He then wrapped a rusted wire around her neck and squeezed, strangling her to death.

His execution occurred without incident, like the twelve others. After witnessing his death, Pamela's mother stood before reporters and, in a quivering voice, told the world, "I feel at peace now, and I feel Pammy's soul is at peace and that she can rest."

Thanks to President Trump and countless public servants who for over two decades poured untold effort into her case, Pamela and her still-grieving mother finally received justice. As did each victim of the murderers executed during the first Trump Administration.

The four years following saw the Department retreat from its historic approach to capital cases, as this report details. Attorney General Merrick Garland—who early in his career secured a death sentence against Timothy McVeigh—imposed a moratorium on executions and ordered prosecutors to stand down from seeking the death penalty. These decisions inflicted untold damage on victims of crime and, ultimately, to the rule of law itself.

On November 5, 2024, the American people rejected this misguided approach to criminal justice and instead endorsed a return to President Trump's law-and-order agenda. But then, on December 23, 2024, Joe Biden did the unthinkable. In the twilight of his presidency, and upon the grievous recommendation of Attorney General Garland, the White House announced that President Biden had commuted the death sentences of 37 of the 40 remaining murderers on death row. Justice had been thwarted.

Under President Trump's leadership, the Department of Justice will do everything in its power to reverse these failures and restore justice. This report is an important part of that effort. It exposes the damage caused by President Biden and Attorney General Garland, detailing how they undermined the federal death penalty and left victims, their families, their communities, and the Nation to bear the consequences. It also identifies concrete actions the Department and Congress can take to strengthen the federal death penalty in order to improve public safety and deliver justice for victims.

That is our highest duty as public servants.

Acting Attorney General Todd Blanche

Introduction

Since our Nation's Founding, both the Constitution and federal law have permitted capital punishment as a just sentence for those who commit the very worst crimes.[1] The American people have repeatedly reaffirmed the effectiveness of capital punishment in deterring crime, achieving justice for victims, and providing closure for loved ones.[2] In turn, the Department of Justice has carried out its solemn duty to seek, obtain, and implement lawful capital sentences. During President Donald Trump's first term, for instance, the Department sought the death penalty against thirty-nine defendants and implemented thirteen capital sentences. Other presidential administrations have likewise sought and implemented capital sentences.

In 2021, the Department began deviating from this longstanding practice. Under the leadership of President Joe Biden, Attorney General Merrick Garland imposed a moratorium on federal executions, directed prosecutors not to seek death sentences, and dismantled the federal government's capital punishment apparatus. He also recommended that President Biden commute the lawful death sentences of thirty-seven convicted murderers, and he did so without fully considering the views of the victims' families, the communities that endured these crimes, or the prosecutors who tried these cases. These actions inflicted untold damage on countless lives and, ultimately, on the public's confidence in the rule of law itself.

On January 20, 2025, President Trump directed the Department to once again faithfully implement the laws that authorize capital punishment.[3] In Executive Order 14164, the President recognized that "[c]apital punishment is an essential tool for deterring and punishing those who would commit the most heinous crimes and acts of lethal violence against American citizens."[4] He directed the Attorney General and the Department to, consistent with federal law, "pursue the death penalty for all crimes of a severity demanding its use," and to take other appropriate actions to preserve the availability of capital punishment at both the federal and state level.[5]

In furtherance of President Trump's executive order, on her first day in office, Attorney General Pamela Bondi issued *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions* (referred to throughout as "the *Reviving the Federal Death Penalty*

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[1] U.S. Const. amend. V; Crimes Act of 1790, ch. 9, 1 Stat. 112.

[2] *See, e.g.*, Michelle Mark, *The death penalty won in every state that had it on the ballot*, Bus. Insider (Nov. 9, 2016), https://perma.cc/ZX3S-RWUQ (discussing competing ballot measures in California: a successful measure to accelerate capital punishment by reducing litigation impediments and a failed measure to replace capital sentences with life without parole); Austin Sarat, *Asking voters is not the way to end the death penalty*, The Hill (Jan. 24, 2022), https://perma.cc/PBE5-W3JT ("Since 1968, during America's tough-on-crime, law-and-order era, the public has been called on to vote on capital punishment 18 different times…. [I]n every case, since 1968, [proponents of capital punishment] succeeded.").

[3] Exec. Order No. 14,164*, Restoring the Death Penalty and Protecting Public Safety*, 90 Fed. Reg. 8463 (Jan. 20, 2025), https://perma.cc/RN97-BA76.

[4] *Id.* at 8463.

[5] *Id.* at 8463–64.

Memorandum").[6] The memorandum committed the Department to "once again act as the law demands—including by seeking death sentences in appropriate cases and swiftly implementing those sentences in accordance with the law."[7] The memorandum lifted the moratorium on federal executions and directed the Department to "seek[] death sentences in appropriate cases."[8] The memorandum also directed the Office of Legal Policy ("OLP")[9] to consider: (1) "whether the Federal Bureau of Prisons should readopt" the execution protocol utilized during the first Trump Administration, which relied upon a single-dose injection of pentobarbital, and (2) "potential avenues to strengthen the federal death penalty as a valid means of punishment for the heinous crimes it is intended to punish[.]"[10] When evaluating the first issue, the memorandum directed OLP to determine (a) "whether the use of pentobarbital as a single-drug lethal injection comports with the Eighth Amendment," and (b) whether potential revisions to the execution protocol should be offered "to include other manners of execution."[11]

OLP now submits this three-part report. Part I outlines the history of the Department's capital case practice and identifies efforts by prior leadership to depart from the Department's historical duty, consistent with the Constitution and federal law, to implement the federal death penalty. Part II revisits the Department's Biden-era practices and recommends that the Bureau of Prisons ("BOP") readopt the execution protocol used during the first Trump Administration with further amendments to include alternative methods of execution. Finally, Part III identifies several additional forward-looking proposals to strengthen the federal death penalty.

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[6] Memorandum from Attorney General Pam Bondi to All Department Employees, *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions*, at 1 (Feb. 5, 2025), https://perma.cc/H6HB-7KNT.

[7] *Id*.

[8] *Id*.

[9] The Office of Legal Policy has the principal responsibility to "plan, develop, and coordinate the implementation of major policy initiatives of high priority to the Department and to the Administration." 28 C.F.R. § 0.23.

[10] *Reviving the Federal Death Penalty* Memorandum, *supra* note 6, at 3.

[11] *Id*.

I. History of the Department's Approach to Capital Crimes

Throughout our Nation's history, capital punishment has been used to punish individuals convicted of the most heinous crimes. The Department of Justice has played a key role in this process since the Founding, seeking and defending death sentences as well as implementing lawful death sentences after a defendant has exhausted his available appellate remedies. For nearly 250 years, during administrations of different political parties, the Department faithfully and consistently carried out this work while partnering with Congress to strengthen the federal death penalty. But the Department's approach radically shifted during the Biden Administration—undermining the rule of law, failing to achieve justice for victims, and hurting victims' families.

A. 1789–2021: The Department Consistently Upheld Its Obligation to Seek and Implement Capital Sentences

Since the earliest days of the Republic, Congress has charged federal prosecutors with seeking death in appropriate criminal cases. The Judiciary Act of 1789, passed in the first session of the First Congress, contained a federal death-penalty venue and jury-selection provision.[12] That same Act provided for the first federal prosecutors, directing the appointment in each federal district of a "person learned in the law to act as attorney for the United States."[13] In its very next session, Congress completed the Nation's first federal criminal code, defining as federal offenses treason, murder, piracy, and forgery, and establishing death as the mandatory penalty upon conviction.[14]

Three decades after Congress first defined capital crimes, the House of Representatives sought a report regarding the number of convictions and executions under such offenses.[15] In 1829, the President reported that, from 1790 to that year, federal prosecutors brought 138 federal capital cases, securing convictions in 118.[16]

Over the next century-and-a-half, the Department continued faithfully to seek and implement the death penalty in appropriate cases.[17] The largest number of federal executions took

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[12] *See* Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 ("[I]n cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors shall be summoned from thence.").

[13] *Id.* § 35, 1 Stat. at 92.

[14] *See* Crimes Act of 1790, ch. 9, § 1, 1 Stat. 112, 112 ("treason . . . shall suffer death"); *id.* § 3, 1 Stat. at 113 ("wilful murder" on federal property "shall suffer death"); *id.* § 8, 1 Stat. at 113–14 (piracy "shall suffer death"); *id.* § 14, 1 Stat. at 115 (forgery and counterfeiting "shall suffer death").

[15] *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urb. L.J. 347, 366 (1999) (citing H. Res. 545 (Jan. 13, 1825)).

[16] *See id.* (citing H.R. Exec. No. 20-146 (1829)).

[17] *See* Hannah Freedman, *The Modern Federal Death Penalty*, 107 Cornell L. Rev. 1689, 1712–13 (2022) (documenting that the federal government has carried out "at least 350 executions" since 1790).

place following the Civil War between 1870 and 1910,[18] with at least 123 executions occurring.[19] The federal government carried out five executions between 1911 and 1925, and another thirty-four executions from 1926 to 1963.[20]

In 1972, the Supreme Court held that statutes permitting the arbitrary or discriminatory imposition of the death penalty violate the Eighth Amendment.[21] In the wake of that decision, the Department continued to take the view that capital punishment procedures with specific guidelines to prevent the arbitrary or discriminatory imposition of the death penalty remained constitutionally permissible,[22] and the Department worked with Congress to craft constitutionally permissible capital punishment procedures.[23]

In 1988, a Democratic-controlled Congress passed legislation, which President Ronald Reagan signed into law, that empowered the Department to seek a capital sentence against any person who engages in "furtherance of a continuing criminal enterprise" and who "intentionally kills or . . . causes the intentional killing of an individual and such killing results," for certain drug-related killings and provided implementing procedures.[24] The Department subsequently moved to seek death in appropriate cases.[25] In total, the Department sought and received approval from the Attorney General to seek the death penalty against forty-seven defendants between 1988 and 1994.[26]

Six years later, a Democratic-controlled Congress passed the Federal Death Penalty Act of 1994 ("FDPA"), which President Bill Clinton signed into law.[27] The FDPA increased to sixty the number of offenses for which the death penalty could be imposed and established general statutory procedures for seeking and imposing capital sentences.[28] Once the FDPA became law, then-

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[18] *See id.* at 1713.

[19] *See List of Federal Executions. 1790-2021*, Federal Death Penalty Project, https://perma.cc/SCT4-QBKR.

[20] *See id.;* Fed. Bureau of Prisons, *Capital Punishment*, https://perma.cc/FH6A-PEED.

[21] *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

[22] The Department never conceded that all federal death penalty statutes had been invalidated by *Furman*. *See* Little, *supra* note 15, at 375 n.149 (quoting U.S. Dep't of Just., U.S. Att'ys' Manual § 9-10.010 (Oct. 1, 1988) ("[T]he Department's view [is] that [the air piracy] procedure is constitutional"); U.S. Dep't of Just., Just. Manual § 9-63.134 (Prentice Hall 1993 Supp., p. 9-1311) (describing air piracy death penalty provision, "which the Department believes complies with . . . the *Furman* decision")).

[23] *See id.* at 373–80.

[24] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(a), 102 Stat. 4181, 4387 (codified at 21 U.S.C. § 848(e)).

[25] *See* Little, *supra* note 15, at 383–84 (citing cases); *United States v. Cooper*, 754 F. Supp. 617, 620 (N.D. Ill. 1990) ("This is the first case in the country . . . in which the United States seeks imposition of the death penalty under the now two-year-old provisions of 21 U.S.C. § 848[.]").

[26] U.S. Dep't of Just., *The Federal Death Penalty System: A Statistical Survey (1988-2000)* 2 (Sept. 12, 2000), https://perma.cc/CAD2-E435.

[27] *See* Pub. L. No. 103-322, tit. VI, 108 Stat. 1796, 1959 (codified at 18 U.S.C. §§ 3591–98).

[28] *See id.*

Attorney General Janet Reno—despite a personal opposition to the death penalty—"quickly set about implementing its provisions."[29] On January 27, 1995, Attorney General Reno amended the U.S. Attorneys' Manual section on "Federal Prosecutions in Which the Death Penalty May Be Sought," which came to be known as the "Death Penalty Protocol."[30]

As Congress sought to reinvigorate capital punishment as a means of deterring and punishing the most heinous offenses, the Department followed suit by vigorously enforcing the recently enacted capital laws. Consistent with Congress's directives, from 1990 to 1998, the Department authorized prosecutors to seek the death penalty against 135 defendants.[31] For example, in 1997, a federal jury sentenced Timothy McVeigh to death for murdering 168 people, including nineteen children, in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[32] The Department subsequently executed McVeigh and two others between 2001 and 2003.[33] None of the three inmates challenged the procedures by which they were executed.[34]

Following these executions, activists opposed to the death penalty sought "to make it impossible . . . to obtain drugs that could be used to carry out capital punishment with little, if any, pain[.]"[35] In 2005, three federal inmates who had been sentenced to death challenged their pending executions via the then-standard three-drug lethal injection protocol.[36] By 2011, the Department announced that BOP could no longer purchase one of the necessary three drugs because the last remaining supplier to the United States ceased production following pressure from a foreign

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[29] *See* Little, *supra* note 15, at 406–07 & n.316 (quoting *Search for Attorney General Finally Final* (Nat'l Pub. Radio, Feb. 12, 1993) ("Ms. Reno: 'I'm personally opposed to the death penalty, as I've told the [P]resident. But I've probably asked for it as much as many prosecutors in the country, and have secured it. And when the evidence and the law justify the death penalty, I will ask for it."); *Attorney General Reno Visits NYU*, NYU L. Sch. Mag., Autumn 1998 (reporting that Reno "confessed to being personally opposed to the death penalty").

[30] Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. Pa. J. of Const. L. 57, 77 (2009).

[31] *See* Little, *supra* note 15, at 429.

[32] Statement by Attorney General John Ashcroft Regarding the Execution of Timothy McVeigh, U.S. Dep't of Just. (Apr. 12, 2001), https://perma.cc/R48C-TZDQ.

[33] *See* Fed. Bureau of Prisons, *supra* note 20.

[34] *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 110 (D.C. Cir. 2020).

[35] Transcript of Oral Argument at 14, *Glossip v. Gross*, 576 U.S. 863 (2015) (No. 14-7955), https://perma.cc/CY99-XWRB.

[36] *See* Compl., *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C. Dec. 6, 2005) (ECF No. 1). Two of these defendants, James Roane and Richard Tipton, were among the 37 death row inmates whose sentences Attorney General Garland recommended be commuted, nearly 20 years after they first filed their appeal and over 30 years after their involvement in a drug-trafficking conspiracy that resulted in 10 murders. *See United States v. Roane*, 378 F.3d 382, 390 (4th Cir. 2004); *Fact Sheet: President Biden Commutes the Sentences of 37 Individuals on Death Row*, White House (Dec. 23, 2024), https://perma.cc/LU3N-9BYT. The final defendant, Corey Johnson, was executed during President Trump's first Administration.

government.[37] The Department announced that BOP would "modify its lethal injection protocol"[38] while it continued to seek death sentences in appropriate cases. From 2000 to 2016, Attorneys General of both political parties authorized prosecutors to seek a sentence of death against 347 defendants.[39]

In January 2017, President Trump took office for the first time. Although the Department had sought and defended capital sentences throughout the Bush and Obama Administrations, it had been nearly fourteen years since the Department had implemented a capital sentence. The Department made it a priority to begin implementing lawful capital sentences once again. By 2019, the Department had procured a supply of pentobarbital—a barbiturate commonly used by states to carry out executions and that the Supreme Court had found consistent with the Eighth Amendment.[40]

The Department thereafter adopted a single-drug pentobarbital execution protocol (referred to throughout as the "Pentobarbital Protocol").[41] In selecting pentobarbital, the Department concluded that it was medically and scientifically appropriate for executions and met all constitutional requirements. Indeed, when explaining this choice, the Department noted that, "[s]ince 2010, 14 states have used pentobarbital in over 200 executions, and federal courts, including the Supreme Court, have repeatedly upheld the use of pentobarbital in executions as consistent with the Eighth Amendment."[42] Moreover, several inmates sentenced to death had requested replacement of three-drug protocols with administration of a single drug, and advocates for death row inmates similarly proposed replacing three-drug protocols with a single drug.[43]

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[37] *See* Letter from Attorney General Eric Holder to James McPherson, Executive Director of National Association of Attorneys General (Mar. 4, 2011), https://perma.cc/E6NX-3TLR; *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 110; *see also Glossip*, 576 U.S. at 870; Chris McGreal, *Lethal injection drug production ends in the US*, The Guardian (Jan. 23, 2011), https://perma.cc/EHX3-LEFZ.

[38] *In re Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (TSC), 2020 WL 5594118, at *1 (D.D.C. Sept. 20, 2020) (quoting Joint Mot. to Continue 2, *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C. July 28, 2011) (ECF No. 288)).

[39] Data on file with the Department of Justice.

[40] *See Bucklew v. Precythe*, 587 U.S. 119, 143–149 (2019) (rejecting challenge to the use of pentobarbital in Missouri's execution protocol); *Zagorski v. Parker*, 586 U.S. 938, 939 (2018) (Mem.) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari) ("Pentobarbital, a barbiturate, does not carry the risks described above; . . . pentobarbital is widely conceded to be able to render a person fully insensate.").

[41] *See e.g.*, Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures (effective July 25, 2019), available in Petition for Writ of Certiorari Appendix 210a–13a, *In re Fed. Bureau of Prisons' Execution Protocol Cases* (No. 19A1050), https://perma.cc/U7VR-MZS5.

[42] *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse*, U.S. Dep't of Just. (July 25, 2019), https://perma.cc/WFB5-GH69; *see also Barr v. Lee*, 591 U.S. 979, 980 (2020) (explaining that pentobarbital had been "used to carry out over 100 executions, without incident" and had been "repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions").

[43] *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 56 (2008) (opinion of Roberts, C.J.); Linda Lindhorst, *Ending the Unconstitutional Torture of Three-Drug Lethal Injections: A Rebuke of* Glossip v. Gross, 73 NLG Rev. (Spring 2016), https://perma.cc/VS7T-UG5D ("The sweeping criticisms of midazolam and three-drug lethal injections compelled

Following the adoption of the Pentobarbital Protocol, advocates who had recommended pentobarbital over other protocols challenged the drug as cruel and unusual in violation of the Eighth Amendment.[44] The Supreme Court rejected these challenges.[45]

Between July 2020 and January 2021, the Department executed thirteen federal inmates pursuant to lawful capital sentences.[46] The inmates executed included Daniel Lewis Lee, a white supremacist who murdered an eight-year-old girl and her parents by shooting them with a stun gun, taping plastic bags around their heads, weighing them down with rocks, and drowning them in a swamp;[47] Keith Dwayne Nelson, who kidnapped, raped, and strangled a ten-year-old girl to death before burying her body behind a church;[48] and Orlando Cordia Hall, who kidnapped a sixteen-year-old girl, raped her in the back of a car, and—after his accomplices repeatedly raped her in a hotel room—beat her with a shovel, soaked her with gasoline, and buried her alive.[49]

The executions had a profound impact on the victims' families. After the execution of serial-killer Dustin Lee Honkin, relatives of murder victims Lori Duncan and her young daughters, Amber and Kandance, provided a statement that read, "Finally justice is being done. It will bring a sense of closure, but we will continue to live with their loss. However this is a step toward healing of broken hearts and shattered lives."[50] The family of Todd and Stacie Bagley, murder victims of Christopher Vialva and Brandon Bernard, said, "We appreciate that President Trump felt compassion to the victims and the families to reinstate the Death Penalty, and allow us some closure and to give Todd and Stacie justice."[51] The brother-in-law of Bobbie Jo Stinnett, the murder victim of Lisa Montgomery, told the press, "This brings us closure, we're going on with our lives now. Justice has been served."[52]

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several states to turn to a more simple, consistent, and error-proof method of lethal injection that involves only one drug."); *id.* (noting that an inmate "showed no sign of suffering" after administration of a single drug lethal injection and citing "[e]xperts throughout the nation" as endorsing replacement of three-drug-protocol with single drug lethal injections).

[44] *See Bucklew*, 587 U.S. at 124–25 (citing *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007), *cert denied*, 553 U.S. 1004 (2008)).

[45] *See, e.g.*, *id.* at 140–51.

[46] Fed. Bureau of Prisons, *supra* note 20.

[47] Statement by Attorney General William P. Barr on the Execution of Daniel Lewis Lee, U.S. Dep't of Just. (July 14, 2020), https://perma.cc/MXB9-537U.

[48] Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of Keith Dwayne Nelson, U.S. Dep't of Just. (Aug. 28, 2020), https://perma.cc/A4L6-8YLH.

[49] *Orlando Cordia Hall Executed for 1994 Kidnapping and Murder of 16-Year-Old Girl*, U.S. Dep't of Just. (Nov. 19, 2020), https://perma.cc/5VZ4-RX23.

[50] Courtney Crowder, *'Hail Mary, Mother of God, Pray for Me': Iowan Dustin Honkin Says Short Prayer Before Being Executed*, Des Moines Register (July 17, 2020), https://perma.cc/4MSY-PDL8.

[51] *'Please Remember the Victims,' Todd Bagley's Mother Releases Statement Following Vialva Execution*, MyWabashValley.com (Sept. 24, 2020), https://perma.cc/NJ7Z-BJDL.

[52] Katy Forrester, *Lisa Montgomery: Womb raider victim Bobbi Jo Stinnett's daughter Victoria Jo 'has closure' after execution, family says*, The U.S. Sun (Jan. 13, 2021), https://perma.cc/E6MF-NVRE.

B. 2021– January 2025: The Department Abandoned Its Obligation to Seek and Implement Capital Sentences

Upon assuming office, Attorney General Garland instituted policies that sharply deviated from the Department's historical approach to capital crimes. On July 1, 2021, Attorney General Garland imposed a moratorium on federal executions and directed the Department to "assess the risk of pain and suffering associated with the use of pentobarbital."[53] It took the remaining three-and-a-half years of the Biden Administration to complete this review. At its conclusion, Attorney General Garland extended indefinitely the moratorium on federal executions.

Throughout his tenure, Attorney General Garland undermined the federal death penalty in other ways. He withdrew notices of intent to seek death sentences for thirty-five defendants in twenty-nine cases, which represented all but two of the outstanding cases authorized by prior Attorneys General. He refused to seek the death penalty against murderers accused of heinous crimes. He undermined states' efforts to qualify for expedited judicial review of capital cases under chapter 154 of title 28. And he recommended that President Biden commute the death sentences of thirty-seven of the forty murderers on federal death row.

1. Attorney General Garland's 2021 Execution Moratorium

In July 2021, Attorney General Garland issued a moratorium on federal executions—an act never before taken by an Attorney General—to "ensure that everyone in the federal criminal justice system is not only afforded the rights guaranteed by the Constitution and the laws of the United States, but is also treated fairly and humanely."[54] The moratorium would last until the Department could ensure the death penalty could be carried out "fairly and humanely"—terms Attorney General Garland neither defined nor identified as rooted in our Nation's history, tradition, or any legal authority. He then directed OLP to review the Pentobarbital Protocol and revisions to the Justice Manual and manner of execution regulations finalized during the first Trump Administration.[55]

2. Attorney General Garland's 2025 Recission of the Pentobarbital Protocol and Indefinite Suspension of Executions

On January 8, 2025, OLP released its *Review of the Federal Execution Protocol Addendum and Manner of Execution Regulations* ("the Garland Report"), with findings and recommendations

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[53] Memorandum from Attorney General Merrick Garland to the Deputy Attorney General, the Associate Attorney General, and the Heads of Department Components, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, at 2 (July 1, 2021), https://perma.cc/NG7S-M52W [hereinafter "Garland 2021 Moratorium"].

[54] *Id*. at 1.

[55] *Id*.

resulting from the review ordered by Attorney General Garland in 2021.[56] The report recommended that the Department not carry out federal executions unless and until the Department met the heightened standard laid out in the Garland 2021 Moratorium—effectively recommending an indefinite suspension of federal executions.[57] Attorney General Garland adopted this recommendation on January 15, 2025, based on OLP's finding of "significant uncertainty" regarding whether pentobarbital causes "unnecessary pain and suffering."[58] Due to this "uncertainty," Attorney General Garland rescinded the Pentobarbital Protocol and directed the Department not to reinstate it, or any other manner of execution, "until that uncertainty is resolved" and there is "reasonable confidence" that a manner of execution "treats individuals being executed fairly and humanely."[59]

As explained in Part II, the Garland Report and the conclusions it reached are inconsistent with the Department's longstanding practice and legal obligations. Attorney General Garland required the execution protocol to meet not only constitutional muster but also a subjective and undefined "fair and humane" standard. He also required that, prior to implementing a capital sentence, the Department "resolve" all "uncertainty" (no matter the risk) about whether a particular manner of execution could cause "unnecessary pain and suffering"—obligations found nowhere in the Constitution, federal law, or Supreme Court precedent, let alone our Nation's history and tradition. The Garland Report then relied on a purported disagreement among scientific experts (primarily those self-identified as opposed to the death penalty) to reach a finding of "uncertainty" about the risks of pentobarbital.[60] These standards provided the support necessary for Attorney General Garland's indefinite moratorium on federal executions.

The Garland Report failed to find fault with the Trump Administration's revisions to the manner of execution regulations, which expanded the available manner of executions beyond lethal injection.[61] Those revisions conformed Departmental policy with the FDPA, which requires a capital sentence in a federal case to be implemented "in the manner prescribed by the law of the State in which the sentence is imposed."[62] Despite concluding that the revisions conformed with

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[56] U.S. Dep't of Just., *Review of the Federal Execution Protocol Addendum and Manner of Execution Regulations* (Jan. 8, 2025), https://perma.cc/5X6T-C3WM.

[57] *Id.* at 2.

[58] Memorandum from Attorney General Merrick Garland to the Director, Federal Bureau of Prisons, *Determination Following Review of the Federal Execution Protocol Addendum and the Manner of Execution Regulations*, at 2 (Jan. 15, 2025), https://perma.cc/W972-CCV4 [hereinafter "Garland 2025 Memorandum"].

[59] *Id.* (alterations adopted and internal quotation marks omitted).

[60] *See, e.g.,* Michael Hibblen, *Anesthesiologist Testifies As Arkansas Lethal Injection Trial Ends Week 1*, Little Rock Pub. Radio (Apr. 26, 2019), https://perma.cc/G7T6-ERGA ("Van Norman also acknowledged she is personally opposed to the death penalty and would never consult with a state on how to proceed with an execution."); *see also* Testimony of Joel B. Zivot, Kan. H.B. 2782 (Feb. 15, 2024), https://perma.cc/9AGS-LL5M (opposing introduction of nitrogen hypoxia as a method execution and stating that "lethal injection, *in any form*, is flawed on its face") (emphasis added); Josh Sanburn, *The Harsh Reality of Execution by Firing Squad*, Time Mag. (Mar. 12, 2015), https://perma.cc/VLM9-2WQR ("Is the firing squad needlessly cruel punishment? The executed cannot say[.]").

[61] Garland Report, *supra* note 56, at 2.

[62] 18 U.S.C. § 3596(a).

the law, the Garland Report recommended that the Department not proceed with an alternative manner of execution until the Attorney General is "confident" the manner presents no risk of pain or suffering.[63] The Garland Report likewise recommended that the Attorney General review whether the implementation of an alternative manner of execution in BOP facilities and by BOP personnel would separately "create a risk of inhumane treatment"—even if the underlying manner of execution otherwise presented no risk of pain or suffering.[64]

3. Attorney General Garland Refused to Seek the Death Penalty in Appropriate Cases

Throughout his tenure, Attorney General Garland also refused to seek the death penalty when the facts of a particular defendant's conduct merited it—a practice that upended longstanding Department norms. Attorney General Garland justified these decisions on the grounds that the cases did not cause "the most harm to the nation, including through widespread impact to the community."[65] The Department had never before relied on this standard when evaluating whether to seek the death penalty—and for good reason. It is neither based in this Nation's history or traditions, nor in any legal authority. Yet Attorney General Garland nevertheless inserted this standard into the capital case evaluation process set out in the Justice Manual.[66] Rather than achieve consistency in capital cases, Attorney General Garland's efforts introduced a level of arbitrariness that diminished the trust Americans place in the Department.

Despite Attorney General Garland's "most harm to the nation" standard, throughout his term in office, career prosecutors and United States Attorneys appointed by President Biden nonetheless requested authorization to seek the death penalty against twenty-seven defendants. For two additional defendants, the Department's Capital Review Committee by a majority vote recommended pursuing the death penalty. For each referred defendant, however, Attorney General Garland overrode the Department's prosecutors and ordered they not seek death.

The facts of these crimes are appalling. In one case, two defendants lured a 3-year-old girl into a car by offering her candy, then took her to an apartment where they gave her methamphetamine and a sedative and, likely after sexually abusing her, smothered her to death.[67]

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[63] Garland Report, *supra* note 56, at 20.

[64] *Id.*

[65] U.S. Dep't of Just., Just. Manual § 9-10.140 (2023); *see also* Sadie Gurman Aruna Viswanatha & Corinne Ramey, *Merrick Garland Raises the Bar for Death Penalty*, Wall St. J. (Feb. 17, 2023), https://perma.cc/9BRQ-SDAC (attributing the quoted policy to Deputy Attorney General Lisa Monaco).

[66] *See* U.S. Dep't of Just., Just. Manual § 9-10.140 (2023). Pursuant to the *Reviving the Federal Death Penalty Memorandum*, *supra* note 6, at § IV, this and other amendments to the Justice Manual's provisions regarding capital punishment were suspended, pending OLP review and recommendations to the Office of the Deputy Attorney General regarding finality.

[67] U.S. Dep't of Just., *Two Individuals Sentenced for Kidnapping Resulting in Death* (Mar. 3, 2023), https://perma.cc/7KRJ-YY6J; *see, e.g.*, Julia Jacobo, *Kamille 'Cupcake' McKinney was given meth, sedative before she was murdered: Prosecutor*, ABC News (Dec. 11, 2019), https://perma.cc/7PF3-94KP.

The defendants threw the child's body into a dumpster which law enforcement later recovered from a landfill.[68]

Other cases are equally shocking. In one, the defendant murdered twenty-three people in a racially motivated mass shooting in a shopping center parking lot.[69] Another murderer stabbed his pregnant girlfriend in the presence of three children—killing the mother and her unborn child.[70] Others involved murders of law enforcement officers carrying out their lawful duties,[71] a fatal mailbombing of an innocent person when a local police officer was the intended target,[72] and murders of witnesses who had taken the courageous step to testify about the defendants' other (often drug-related) crimes.[73]

At the same time that he failed to seek capital sentences in new cases, Attorney General Garland also abandoned already-pending capital cases—cases that prior Attorneys General had authorized to proceed and that prosecutors were in the midst of trying. In one instance, a federal court of appeals, finding ineffective assistance of trial counsel, overturned a death sentence imposed on a defendant who had murdered a police officer.[74] Prosecutors, with the support of the victim's surviving spouse, sought to retry the penalty phase. But Attorney General Garland directed the prosecutors to withdraw the notice of intent to seek the death penalty.

In light of these decisions, Attorney General Garland's tenure produced fervent dissension among career prosecutors and outrage from victims' families.[75] It also produced anomalous results: He was the first Attorney General to withdraw more authorizations to seek the death penalty than

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[68] *See* Jacobo, *supra* note 67.

[69] *United States v. Crusius*, No. EP-20-CR-00389-DCG, 2020 WL 4340550, at *1 (W.D. Tex. July 28, 2020).

[70] *United States v. Burciaga*, No. 23-2663, 2025 WL 3187361, at *1 (9th Cir. Nov. 14, 2025).

[71] *United States v. Brown*, No. 23 C 50312, 2025 WL 1940376, at *1 (N.D. Ill. July 15, 2025); *United States v. Goddard*, No. 3:19-CR-171, 2022 WL 1569985, at *1 (S.D. Ohio May 18, 2022); U.S. Dep't of Just., *Member of Frankford-Based Drug Gang Sentenced to 75 Years in Prison for Killing Philadelphia Police Sergeant James O'Connor, Kaseem Rogers, Tyrone Tyree, and Dontae Walker, and Additional Drug, Gun, and Violent Crimes* (July 23, 2025), https://perma.cc/YF6P-D5YC.

[72] U.S. Dep't of Just., *Brooklyn Man Arrested for Using a Weapon of Mass Destruction* (Feb. 28, 2018), https://perma.cc/64QF-KPX9.

[73] U.S. Dep't of Just., *Columbus man gets multiple life sentences for murdering 3 victims, directing others to dismember & bury 2 of the bodies* (July 1, 2025), https://perma.cc/2KAG-NG7P; U.S. Dep't of Just., *Three Charged With Murder of a Federal Witness* (Mar. 3, 2021), https://perma.cc/ET35-VAL2; U.S. Dep't of Just., *Martinsburg Federal Grand Jury indicts four in kidnapping and murder case* (Nov. 11, 2020), https://perma.cc/2LEG-G4W7.

[74] *United States v. Barrett*, 985 F.3d 1203, 1207, 1233 (10th Cir. 2021).

[75] *See, e.g.*, Benjamin Weister & Hailey Fuchs, *U.S. Won't Seek Death Penalty in 7 Cases, Signaling a Shift Under Biden*, N.Y. Times (July 22, 2021), https://perma.cc/7KUL-F8JW ("The families of murder victims are clearly not included in the calculus when ordering U.S. attorneys not to pursue capital punishment in the worst cases[.]").

he authorized—and the first presidentially appointed Attorney General since the FDPA's enactment to authorize seeking the death penalty against only one defendant.[76]

Attorney General[77]	Authorizations	Withdrawals	Difference
Janet Reno	45	1	44
John Ashcroft	147	18	129
Alberto Gonzales	96	49	47
Michael Mukasey	23	15	8
Eric Holder	39	39	0
Loretta Lynch	5	4	1
Jefferson Sessions	24	3	21
William Barr	13	3	10
Merrick Garland	1	35	-34
Pamela Bondi	35	0	35

Attorney General Garland's decisions thus marked an unprecedented break from the Department's longstanding approach to the death penalty across administrations of both political parties.

4. Attorney General Garland Undermined States' Efforts to Expedite Judicial Review of Capital Sentences

Attorney General Garland also stymied states' efforts to pursue a congressionally sanctioned method for expediting judicial review of capital cases. In both the federal and state capital-case contexts, lengthy case delays burden victims' families and the justice system and prevent the imposition of swift justice and a measure of finality. As the Supreme Court has noted, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence," and those interests can be frustrated in capital cases.[78]

Federal habeas corpus review of state capital judgments is a major cause of delay. Through this process, a defendant convicted at the state level of committing a capital offense can secure review of his sentence in federal court on the ground that "he is in custody in violation of the Constitution or laws or treaties of the United States."[79]

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[76] The Department's records regarding decisions to seek the death penalty date back only to 1993. It is therefore possible that, under Attorney General Garland, the Department sought the death penalty fewer times than in any period in our Nation's history.

[77] This table does not include data from those who served as acting Attorney General and authorized or withdrew the death penalty in any case. Moreover, nine additional withdrawals are not included in this table because they were made prior to a requirement that the Attorney General approve withdrawal of the death penalty.

[78] *Bucklew*, 587 U.S. at 149.

[79] 28 U.S.C. § 2254(a).

To address lengthy habeas delays, Congress enacted a special procedure for these cases in chapter 154 of title 28. If the Attorney General certifies under 28 U.S.C. § 2265 that a state has established a qualifying mechanism for providing counsel in postconviction proceedings and counsel is appointed pursuant to that mechanism—thus going beyond their constitutional obligations—then a federal court reviewing a state capital judgment must conduct expedited habeas review.[80]

Throughout the Biden Administration, the Department prolonged and obstructed the implementation of chapter 154. In 2020, Attorney General Barr certified that Arizona had established a qualifying capital counsel mechanism, and the Department defended that certification on review in the D.C. Circuit. But after the transition to the Biden Administration, Attorney General Garland effectively nullified the certification through a voluntary remand in the D.C. Circuit litigation, followed by new rounds of information requests to Arizona and additional public comment.[81] These newly imposed hurdles delayed resolution for nearly four years. Ultimately, three days before the end of the Biden Administration, Attorney General Garland purported to deny certification to Arizona.[82]

5. Attorney General Garland Recommended Commuting Thirty-Seven Capital Sentences

Capital punishment is reserved for those who "commit the most heinous crimes."[83] In late December 2024, forty inmates awaited execution on federal death row. Each committed atrocious crimes that amply justified their capital sentences.

Yet, on December 5, 2024, Attorney General Garland hand delivered a very short memorandum to the White House recommending that President Biden commute the capital sentences of thirty-seven of the forty federal death row inmates.[84] This recommendation was informed by a series of memoranda from Attorney General Garland's hand-picked Pardon Attorney, Elizabeth G. Oyer, recommending the commutation of *all forty* murderers on death row—including Dylann Roof, a neo-Nazi who murdered nine African Americans at a church Bible study; Dzhokhar Tsarnaev, a terrorist responsible for the Boston Marathon bombing that killed three people and injured 264 others; and Robert Bowers, a white-supremacist who murdered

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[80] *See* 28 U.S.C. §§ 2261–66.

[81] In April 2020, Attorney General Barr granted Arizona's request for certification. *See* Certification of Arizona Capital Counsel Mechanism, 85 Fed. Reg. 20705, 20721 (Apr. 14, 2020). On October 12, 2021, the Garland Department of Justice reopened the matter, following a voluntary remand of the certification. *See* Letter from Theophani K. Stamos, U.S. Dep't of Just., to Mark Brnovich, Attorney General for the State of Arizona (Oct. 12, 2021), https://perma.cc/WKC8-BDGR.

[82] Letter from Theodore Schroeder, U.S. Dep't of Just., to Kris Mayes, Attorney General for the State of Arizona (Jan. 17, 2025), https://perma.cc/7AK8-EGP9.

[83] Exec. Order No. 14,164, *supra* note 3.

[84] Memorandum from Attorney General Merrick Garland to the Counsel to the President, *Recommendation for Commutation of 37 Death Sentences* (Dec. 5, 2024) (on file with the Department) [hereinafter "Garland Commutation Recommendation"].

eleven people worshiping at a synagogue—as well as those sentenced to death by military courts. (These memoranda are collectively referred to as the "Garland-Oyer Commutation Memoranda.")

The Garland-Oyer Commutation Memoranda departed from the Department's historical approach to capital cases in three important ways.

First, Attorney General Garland's analysis and recommendation failed to give weight to critically important interests, including those of the victims and their families,[85] the resources expended by the Department to secure and defend the convictions and sentences, the juries' final verdicts on guilt and the appropriate sentence, and the independent judicial review that upheld the sentences in these cases. Rather, Attorney General Garland relied upon the "new standards" he had written into the Justice Manual that restricted capital cases only to those "involving the most harm to the nation, including through widespread impact to the community."[86] According to Attorney General Garland, of the forty prisoners then on federal death row, only three cases satisfied that "narrow category" because they constituted "mass-casualty offenses motivated by hate or terrorism."[87] Although he conceded the remaining thirty-seven cases involved "extremely serious" conduct that merited "grave punishment," he nonetheless recommended commutation because *he* would not have "authorized" seeking "the death penalty" against those murderers.[88]

Even a cursory review of the cases demonstrates that this standard produced arbitrary results. One of the murderers, Kaboni Savage, ordered the firebombing of a home where a federal witness lived, killing six people including four children.[89] Savage was eventually convicted of twelve different murders.[90] Another of the murderers, Marvin Gabrion, abducted and chained a 19-year-old woman to cement blocks and drowned her in a lake two days before the start of his trial for raping her.[91] Gabrion is also the prime suspect in the murder of the woman's infant daughter, as well as several other people.[92] These crimes and others undoubtedly had a "widespread impact" on the families and the communities in which they lived.

Former Pardon Attorney Oyer also appeared to recognize the arbitrary results produced by Attorney General Garland's standard in a November 4, 2024, memorandum in which she recommended a "categorical" commutation for all individuals on death row because the "narrower alternative of commuting only the subset of defendants whose case would not meet current

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[85] Throughout this section, "victims" and "victims' families" may be used interchangeably.

[86] Garland Commutation Recommendation at 1.

[87] *Id.* at 2.

[88] *Id.* at 1–2.

[89] *Drug Kingpin Kaboni Savage and Sister Kidada Convicted of Arson Murders*, U.S. Dep't of Just. (May 13, 2013), https://perma.cc/TGC6-WKM7.

[90] *Id.*

[91] *See United States v. Gabrion*, 719 F.3d 511, 515–17 (6th Cir. 2013).

[92] *See id.* at 517 (stating that "it is virtually undisputed that Gabrion killed" the infant daughter and that Gabrion "told two inmates that he 'killed the baby because there was nowhere else to put it'"); *id.* at 518 (detailing testimony regarding Gabrion's "likely role" in the murder of "three other people").

standards for authorization" "would be more challenging to implement."[93] She noted that although the Biden Administration had authorized one capital prosecution for a hate-motivated mass shooting, it failed to do so in "at least two cases implicating similarly substantial federal interests." These included the cases of Anderson Aldrich, who murdered five people and injured 19 in a mass shooting at an LGBT nightclub, and Patrick Crusius, who murdered 23 people and injured 22 others in a hate-motivated mass shooting at a Walmart store. Oyer suggested the "simplest and most efficient approach" would be to commute the death sentences for all forty individuals on death row, presumably based on the difficulty of applying consistently Attorney General Garland's standard.[94]

Second, the Garland-Oyer Commutation Memoranda denigrated the justice system, the Department's own prosecutors, and jury members who served honorably. Attorney General Garland suggested that in certain cases (without citing any particular case) prosecutors failed to show that there was "no doubt" the defendant committed the crime. But federal capital case prosecutions are known for the thoroughness of their evidentiary standards and for the enormous amount of time, energy, and resources expended to prove the cases. Indeed, as the Supreme Court has noted, defendants in capital cases receive an extraordinary amount of process. They are "afforded counsel and tried before a jury of their peers—tried twice, once to determine whether they were guilty and once to determine whether death was the appropriate sentence."[95] They also have "the right to appeal and to seek postconviction relief."[96]

Attorney General Garland's purported doubts about the outcome of these cases contradicted the valid outcome of this extensive process and denigrated decisions of countless prosecutors who fought to vindicate the rights of victims. Attorney General Garland also discounted the views of his own U.S. Attorneys; in nineteen cases, U.S. Attorneys expressly opposed commuting death sentences, and in another twelve cases, the Department simply failed to seek their input.[97] And he disregarded the unanimous findings of dozens of juries convinced beyond a reasonable doubt not only that the defendants committed murders and other related heinous crimes but also that those crimes merited a sentence of death.

Third, the Garland-Oyer Commutation Memoranda departed from Attorney General Garland's own stated position of how the Department should treat victims of crime. Before his commutation recommendation, Attorney General Garland noted that "[o]ne of [the Department's] responsibilities is to ensure that victims are informed, have a voice, and are supported in the healing

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[93] *See* Memorandum from Elizabeth G. Oyer, Pardon Attorney, to Attorney General Merrick Garland, *Recommendation for Commutation of Death Sentences*, at 70, (Nov. 4, 2024) (on file with the Department) [hereinafter "Oyer Memorandum"].

[94] *Id.*

[95] *Glossip*, 576 U.S. at 894 (Scalia, J., concurring).

[96] *Id.*

[97] *See* Oyer Memorandum, *supra* note 93. Although she spent pages discussing the views of U.S. Attorneys who supported clemency, former Pardon Attorney Oyer relegated the views of U.S. Attorneys opposed to commutation to a handful of sentences.

process."[98] He called on the Department to "[e]mpower[] and encourag[e] people who have been victimized to participate in our legal system," and to "[d]emonstrat[e] to the victims of crimes that we hear them and see them" so that the Department can "earn[] their trust in our work."[99]

But prior to recommending the commutations, Attorney General Garland failed to give the victims' families an opportunity to share their views.[100] A memorandum from then-Pardon Attorney Oyer indicates that her office had, at some point in the past, solicited the views of victims in twenty-two cases as part of its ordinary consideration of commutation requests—not as part of the then-ongoing effort to mass-commute the sentences of death row inmates.[101] According to the memorandum, all victims' families supported commutation in only four of the twenty-two cases. In seven cases, the victims' families had varying views, and in another 11 cases, all victims opposed commutation. As for the remaining eighteen cases, Pardon Attorney Oyer reported that the Department "ha[s] no information about the victims' views."[102] Attorney General Garland and Pardon Attorney Oyer nonetheless recommended commutations without soliciting input from these families.

Attorney General Garland and Pardon Attorney Oyer also gave little weight to the views of victims from whom they had heard. In her 73-page commutation recommendation memorandum, Pardon Attorney Oyer expended only three paragraphs discussing the views of victims' families.[103] Even then, Pardon Attorney Oyer did not address the views of specific victims as to specific cases.[104] Instead, while noting that the "majority of victims who have shared their

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[98] *Attorney General Merrick Garland Recognizes Individuals and Organizations for Service to Crime Victims*, U.S. Dep't of Just. (Apr. 23, 2021), https://perma.cc/ZFP4-865Z.

[99] *Attorney General Merrick B. Garland Delivers Remarks at the National Crime Victims' Service Award Ceremony*, U.S. Dep't of Just. (Apr. 29, 2022), https://perma.cc/XN4X-U3QW.

[100] *See* Memorandum from Elizabeth G. Oyer, Pardon Attorney, to the WHCO/ODAG Clemency Work Group, *Victims' Views Regarding Possible Commutation of Death Sentences*, (Dec. 17, 2024) (on file with the Department).

[101] *Id.*

[102] *Id.*

[103] *See* Oyer Memorandum, *supra* note 93, at 62–63.

[104] The only exception came in the case of Dylann Roof. On October 30, 2024, former Pardon Attorney Oyer sent a separate memorandum to Attorney General Garland specifically advocating in favor of clemency for Roof—even though Oyer herself acknowledged Roof committed "one of the most heinous" crimes in the "history of our nation." *See* Memorandum from Elizabeth G. Oyer, Pardon Attorney, to Attorney General Merrick Garland, *Clemency Request of Dylann Roof* (Oct. 30, 2024) (on file with the Department). In a three-paragraph section labeled "Stakeholder Input," Oyer conceded that Adair Ford Boroughs, the Biden-appointed U.S. Attorney for the District of South Carolina, Kristen M. Clarke, the Biden-appointed Assistant Attorney General for the Civil Rights Division, and the families of Roof's victims *all* opposed commutation of Roof's death sentence. In fact, in an eleven-page memorandum issued the month prior, AAG Clarke emphasized to Oyer the "unanimous[] support for a sentence of death" among nearly seventy victims' family members and carefully addressed several reasons why Roof's case failed to meet even one basis for clemency. *See* Memorandum from Assistant Attorney General Kristen Clarke, Civil Rights Division, to Elizabeth G. Oyer, Pardon Attorney, *Recommendation Against Commutation of the Death Sentence for Dylann Storm Roof*, (Sept. 20, 2024) (on file with the Department). Oyer nonetheless recommended commuting Roof's death sentence over AAG Clarke's stringent (and principled) objections and the views of the victims' families

views support moving ahead with the executions," Pardon Attorney Oyer emphasized that victims across different cases had varying opinions—which had the effect of devaluing the strong and vehement opposition and of bolstering her own view that the Department should commute *all* death sentences.[105]

Further, prior to the White House announcing the commutations, the Department failed to give notice to each of the victims' families.[106] The announcement two days before Christmas devastated—and re-victimized—these families.[107] Some heard the news at church, others learned from defense attorneys for the very murderers who killed their loved ones, and still others found out from journalists calling for comment or while watching the news.[108]

The widow of an officer murdered in the line of duty called the commutations a "complete dismissal and undermining of the federal justice system."[109] The father of a daughter raped and murdered said the commutations had caused victims' families "only pain. Where's the justice in just giving him a prison bed to die comfortably in?"[110] The daughter of a woman killed during a bank robbery said the commutations were a "clear gross abuse of power. At no point did the [P]resident consider the victims. . . . He, and his supporters, have blood on their hands."[111]

In sum, Attorney General Garland broke the Department's sacred promise to achieve justice for victims and their families, causing untold damage to the public's trust in the Department and to those impacted by his decisions. Attorney General Garland once said that the Department has a duty to support "victims' ability to begin to recover from crime," to "empower[] survivors,"

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because, in Oyer's view, Roof's decision to represent himself at sentencing so that he could spread a message of racial hatred prevented the jury from conducting an "individualized assessment" of his "character and record." Oyer came to this conclusion even though the federal court of appeals that reviewed Roof's conviction and sentence determined that "[n]o cold record or careful parsing of statutes and precedents can capture the full horror of what Roof did," and that "[h]is crimes qualify him for the harshest penalty that a just society can impose." *United States v. Roof*, 10 F.4th 314, 405 (4th Cir. 2021).

[105] *See Oyer Memorandum*, *supra* note 93.

[106] Email from Bradley Weinsheimer (Associate Deputy Attorney General) to Matthew Klapper (Chief of Staff and Senior Counselor to the Attorney General), Andrew Bruck (Chief of Staff to the Deputy Attorney General and Associate Deputy Attorney General), and Xochitl Hinojosa (Director of Department of Justice Office of Public Affairs) (Dec. 22, 2024) ("To be clear, some USAs will not be making victim notifications under the circumstances.") (on file with the Department).

[107] *See, e.g.*, Ted Oberg, *Biden death sentence commutation 'reprehensible' says Virginia victim's father*, NBC News (Dec. 23, 2024), https://perma.cc/B4VK-SS3P; Monica Sager, *Victims' Families Rebuke Joe Biden's Pardons: 'Undermining Justice System*,*'* Newsweek (Dec. 24, 2024), https://perma.cc/JNG3-WTNV; Matthew Foldi, *EXCLUSIVE: Families devastated by Biden's Last-minute clemency meet with Pam Bondi, thank Trump 'for fighting for justice*,*'* Wash. Reporter (May 13, 2025), https://perma.cc/L24Y-T6UA.

[108] At a May 7, 2025, forum Department leadership heard from families affected by Attorney General Garland's recommendation that the sentences of the 37 death row inmates be commuted.

[109] Jeffrey Collins & Ali Swenson *Relief, Defiance, Anger: Families and Advocates React to Biden's Death Row Commutations*, Assoc. Press (Dec. 23, 2024), https://perma.cc/7GAQ-BREX.

[110] *Id.*

[111] *Id.*

and to "fulfill[] [the Department's] responsibilities to them as they navigate the federal criminal justice system."[112] The actions taken by Attorney General Garland violated this duty.

[112] Attorney General Merrick Garland, *The Attorney General Guidelines for Victim and Witness Assistance*, at i, U.S. Dep't of Just. (2022), https://perma.cc/67UE-8LV6.

II. Review of Pentobarbital and Other Available Methods of Execution

During President Trump's first term, the Department utilized pentobarbital to carry out thirteen lawful executions. The administration of pentobarbital in these executions complied with the strictures of the Eighth Amendment. Nonetheless, in January 2025, Attorney General Garland rescinded the Department's Pentobarbital Protocol, adopting the conclusion reached by the Garland Report "that there remains significant uncertainty about whether . . . pentobarbital . . . causes unnecessary pain and suffering."

The Garland Report's conclusion rests on several flawed premises. Not only does it supplant the Department's historical approach to evaluating a manner of execution with a subjective and arbitrary standard that is not rooted in the Constitution, federal law, or the Nation's history and tradition, but it also does not fairly describe the available scientific evidence regarding the administration of pentobarbital.

Under proper analysis, the administration of pentobarbital as a single-drug lethal injection protocol readily comports with all legal requirements. The Department should therefore readopt the Pentobarbital Protocol and expand the execution protocol to include alternative methods of execution.

A. The Garland Report Got the Standard and the Science Wrong

The Garland Report, adopted on January 15, 2025, reached two key conclusions, both based on a flawed understanding of the applicable legal standards and the body of scientific evidence.

First, the Garland Report concluded "that there remains significant uncertainty about whether the use of pentobarbital as a single-drug lethal injection causes unnecessary pain and suffering."[113] Based on this determination, the report recommended ceasing the use of pentobarbital in federal executions. The report noted that the Supreme Court had rejected challenges to the administration of pentobarbital as cruel and unusual in part because pentobarbital had been "used to carry out over 100 executions, without incident" and had been "repeatedly invoked by prisoners as a less painful and risky alternative to the lethal injection protocols of other jurisdictions."[114] Regardless, it recommended that the Department "err on the side of humane treatment and avoidance of unnecessary pain and suffering, and therefore halt the use of pentobarbital unless and until that uncertainty is resolved."[115]

Second, the Garland Report addressed the manner-of-execution regulations and concluded that, because the amendments made in 2020 largely reflected statutory law, there was no reason to

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[113] Garland Report, *supra* note 56, at 2.

[114] *See id.* at 10 n.72 (quoting *Barr v. Lee*, 591 U.S. 979, 980 (2020)).

[115] *Id.* at 2.

modify or rescind them. The report noted, however, that if the federal government had to conduct an execution utilizing an alternative manner, the Department should proceed only after evaluating that manner and concluding that it "does not risk inhumane treatment or unnecessary pain and suffering."[116]

In adopting the report, Attorney General Garland determined that the Pentobarbital Protocol "should be rescinded and not reinstated unless and until [any] uncertainty is resolved."[117] As discussed below, the Department should reject the findings and conclusions of the Garland Report and Attorney General Garland's subsequent memorandum adopting the report's recommendations.

1. Wrong on the Standard

The Garland Report reached its conclusion—"that there remains significant uncertainty about whether the use of pentobarbital as a single-drug lethal injection causes unnecessary pain and suffering"—by applying the wrong legal standard. The report set as the measuring stick a standard announced in the Garland 2021 Moratorium. In that memorandum, he announced that "[a] risk need not meet the [Supreme] Court's high threshold . . . or violate the Eighth Amendment, to raise important questions about our responsibility to treat individuals humanely and avoid unnecessary pain and suffering."[118] Applying this standard, the report concluded that the Department should suspend the use of pentobarbital—and any other method of execution—until all risks purportedly associated with its administration have been resolved.

The Garland Report's standard does not reflect the Department's longstanding practice or the Constitution's requirements. The Supreme Court has held that the Eighth Amendment provides the government with wide latitude in implementing capital sentences.[119] By contrast, applying an arbitrary standard that restricts available methods of execution—regardless of their constitutionality—to the point that the Department cannot implement capital sentences runs contrary to the rule of law. That is not to say that the Department has no discretion in choosing an appropriate manner of execution. But, in determining a manner of execution, the Department should follow the Supreme Court's clear guidance and use methods that are feasible, readily implementable, penologically justified, and that do not introduce a substantial risk of severe pain.[120]

Because the Garland Report relied on an arbitrary standard in evaluating whether the Department should utilize pentobarbital in its execution protocol, its analysis and conclusion should be rejected.

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[116] *Id.* at 20.

[117] Garland 2025 Memorandum, *supra* note 58, at 2.

[118] Garland 2021 Moratorium, *supra* note 53, at 1.

[119] *Baze*, 553 U.S. at 62 (opinion of Roberts, C.J.) ("Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.").

[120] *See Bucklew*, 587 U.S. at 134.

2. Wrong on the Science

The Garland Report identified two potential causes of "unnecessary pain and suffering" an inmate executed with pentobarbital could suffer: "flash pulmonary edema" and "pain associated with the injection of a highly alkaline solution into the bloodstream."[121] In evaluating these potential causes of pain, however, the report failed to grapple with all available scientific evidence, including the widespread use of pentobarbital in physician-assisted suicides and affidavits signed by government witnesses who viewed the thirteen executions carried out during the first term of the Trump Administration. It also failed to address the overwhelming evidence that an inmate injected with 5 grams of pentobarbital quickly loses consciousness—rendering him unable to experience pain.

The Garland Report first concluded that pentobarbital is associated with a "significant risk" of flash pulmonary edema—a condition that leads to the presence of fluid in the lungs and can cause difficulty breathing.[122] According to the Report, this conclusion follows from a review of post-execution autopsies. But the main scientific study relied upon involved a small sample of fifteen inmates—ten of whom showed signs of lung edema post-execution.[123] A review of autopsies (likely including those autopsies addressed in the study cited in the Garland Report) found that of 58 inmates executed with pentobarbital, 49 evidenced pulmonary edema.[124] The Garland Report also looked at the autopsies of two inmates executed during the first Trump Administration that indicated edema.[125] However, these studies do not consistently distinguish between significant or minimal edema, nor do they indicate whether the inmates expressed or evidenced pain or discomfort during the execution.

Although these limited studies indicate the possibility of edema in some individuals executed with pentobarbital, the Garland Report failed to account for the counterevidence showing that, even if edema occurs, inmates do not feel the pain associated with it. That is because inmates injected with 5 grams of pentobarbital very quickly lose consciousness. Dr. Craig Lindsley of the Vanderbilt Center for Neuroscience Drug Discovery has found that unconsciousness occurs within 10-30 seconds.[126] Dr. Joseph F. Antognini, a clinical professor of anesthesiology and pain medicine at the University of California Davis School of Medicine, pinpoints loss of consciousness at 20–30 seconds.[127] Either way, pulmonary edema typically does not occur until *after* this point—if it

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[121] *See* Garland Report, *supra* note 56, at 11.

[122] *Id.* at 11–13.

[123] *Id.* at 12–13 (discussing Joel B. Zivot, Mark A. Edgar & David Lubarsky, *Execution by lethal injection: Autopsy findings of pulmonary edema* (2022)).

[124] Noah Caldwell, Alisa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020), https://perma.cc/K8FR-JX68.

[125] Garland Report, *supra* note 56, at 13.

[126] *See* Expert Report of Craig W. Lindsley, Ph.D. (May 26, 2017), Administrative Record 525, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. Nov. 13, 2019) (ECF No. 39-1), https://perma.cc/GHX4-MKGN.

[127] *See* Transcript of Preliminary Injunction Hearing 549:12–550:3 (Jan. 17, 2017), Administrative Record 582–83, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, *supra* note 126 (Testimony of Dr. Joseph Antognini).

occurs at all.[128] An inmate injected with 5 grams of pentobarbital, therefore, cannot feel a sensation of pain, suffocation, or air hunger before losing consciousness.[129]

The Garland Report does not come to a contrary conclusion. Rather, it found that "[i]t is not clear whether a person who receives 5 grams of pentobarbital can feel and experience the impact the drug has on the body" based upon an apparent debate among medical professionals about the effect of anesthesia for patients undergoing medical procedures and a claim that there is no "reliably tested" manner for determining whether an individual is unconscious while under anesthesia.[130] But the anesthesia used during medical procedures is intended to keep a patient alive and only involves as much medication as is required to maintain unconsciousness. A lethal-injection protocol, by contrast, administers a vastly larger quantity of a drug for the purpose of inducing death. For example, the clinical dosage of pentobarbital for anesthetic purposes is no more than 500 milligrams *per day*.[131] The Pentobarbital Protocol, on the other hand, calls for 2.5 grams of pentobarbital (*i.e.*, 2,500 milligrams)—five times the maximum anesthetic dose—followed by another 2.5 grams.[132] This dosage quickly triggers "profound brain suppression" and "electrical brain silence," leaving an inmate unable to experience pain.[133] Any debate within the medical community regarding a patient's level of consciousness during the administration of an anesthetic dose has no relevance to the administration of lethal dosages of pentobarbital for purposes of capital punishment.

Witness accounts of the 13 executions carried out during the first Trump Administration confirm that inmates do not experience severe pain or discomfort. BOP officials who stood beside the inmates within the execution chamber attested that the executed inmates "did not appear to be in any pain or discomfort,"[134] but instead appeared to fall asleep shortly after the administration of lethal injection began.[135] These descriptions are signed by BOP officials under penalty of perjury.

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[128] *See* Decl. of Joseph F. Antognini, M.D., M.B.A. ¶ 8, Response to Motion for Preliminary Injunction, Exhibit D, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. June 25, 2020) (ECF No. 111), https://perma.cc/9AQE-EAC6; Expert Report of Craig W. Lindsley, Ph.D., *supra* note 126, at 525.

[129] *See* Decl. of Joseph F. Antognini, M.D., M.B.A., *supra* note 128, ¶ 8.

[130] Garland Report, *supra* note 56, at 15–16.

[131] Hikma Pharmaceuticals USA Inc., *Pentobarbital Sodium Injection, USP*, Daily Med, Nat'l Library of Medicine, Nat'l Institutes of Health, https://perma.cc/2BMP-RD22; *see also Pentobarbital Dosage*, Drugs.com, https://perma.cc/8P54-ZAAU.

[132] *See* Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures, *supra* note 41.

[133] *See* Decl. of Joseph F. Antognini, M.D., M.B.A., *supra* note 128, ¶ 12.

[134] Decl. Regarding Execution of Brandon Bernard, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145 (D.D.C. Dec. 22, 2020) (ECF No. 367-1).

[135] Decl. Regarding Execution of Alfred Bourgeois, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145 (D.D.C. Dec. 22, 2020) (ECF No. 367-2) ("Approximately 1 ½ minutes after the administration of the lethal injection began, Mr. Bourgeois closed his eyes, took a deep breath, and snored loudly."); Decl. Regarding Execution of Cory Johnson, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145 (D.D.C. Dec. 8, 2020) ("Mr. Johnson looked towards the Minister of Record and stated 'tell Anna I love her.' He then closed his

Rather than citing these reliable and attested witness statements, the Garland Report instead recited the accounts of journalists who witnessed the executions from the media witness room—which is separated from the execution chamber by a glass window. But even the media reports do not prove that the inmates experienced any level of pain, let alone extreme suffering, during the executions.[136]

The report also evaluated the risk of "pain associated with the injection of a highly alkaline solution into the bloodstream."[137] But the report concedes that no specific scientific studies have evaluated the risk of such pain, which is typically only present if pentobarbital is "improperly administered."[138] One expert indicated that an inmate could experience pain if, for example, "extravasation [where IV fluid leaks from the veins] or infiltration of the peripheral IV catheter occurs, or if inadvertent intra-arterial injection occurs."[139] Unaddressed are whether safeguards built into BOP's execution protocol adequately foreclose the rare circumstances in which such pain could hypothetically occur.[140] In fact, experts that reviewed the Pentobarbital Protocol concluded that it "includes the proper safeguards that will ensure proper [intravenous] administration of pentobarbital."[141]

* * *

In sum, the Garland Report reached findings inconsistent with a complete and impartial review of the evidence. Experts have concluded that the administration of pentobarbital renders a person unconscious within 10–30 seconds, that pulmonary edema occurs after this point (if at all), and that the dosage called for in the Pentobarbital Protocol causes electrical brain silence, ensuring a person does not experience pain or suffering. Reliable witnesses confirm the absence of pain during executions. The Garland Report was wrong to recommend suspension of the Pentobarbital Protocol, and Attorney General Garland was wrong to adopt that recommendation and impose an indefinite moratorium on federal executions.

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eyes and appeared to fall asleep."); Decl. Regarding Execution of William LeCroy, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-00145 (Oct. 9, 2020) (ECF No. 291-5) ("[I]t appeared to me that LeCroy was in a deep, comfortable sleep, with his eyes closed. LeCroy did not make any other sounds and he did not appear to be in any distress, discomfort, or pain.").

[136] Garland Report, *supra* note 56, at 15.

[137] *Id.* at 11.

[138] *Id*. at 14.

[139] *Id.* at 14–15 (alteration in original).

[140] *See Baze*, 553 U.S. at 50 (opinion of Roberts, C.J.) ("[A]n isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'").

[141] Expert Report of Craig W. Lindsley, Ph.D., *supra* note 126, at 526.

B. Execution by Injection of Pentobarbital Complies with the Eighth Amendment and Should Be Readopted into the Federal Execution Protocol

The Constitution permits capital punishment. Ratified simultaneously with the Eighth Amendment, the Fifth Amendment provides that a criminal defendant may be tried for a "capital" crime and "deprived of life" after receiving due process of law.[142] The Supreme Court, too, has held that "there must be a means of carrying . . . out" capital sentences that does not violate the Eighth Amendment's prohibition on cruel and unusual punishment.[143]

Over time, the Supreme Court's jurisprudence has provided clear guidance to assess whether a manner of execution violates the Constitution. As the Court has explained, the Eighth Amendment does not "demand[] the elimination of essentially all risk of pain" because such a standard "would effectively outlaw the death penalty altogether."[144] Rather, the Eighth Amendment bars those methods of execution that "intensif[y] the sentence of death with a (cruel) superaddition of terror, pain, or disgrace"[145]—methods such as "burning at the stake, crucifixion[,] breaking on the wheel, or the like."[146]

The administration of pentobarbital to effectuate a lawful death sentence is consistent with the Eighth Amendment. Pentobarbital is a commonly used drug in various medical settings, including in aid-in-dying practices for those suffering from terminal illnesses. It has repeatedly been found to be less risky and more humane than other methods of execution—indeed, it was the preferred drug for lethal injection for many condemned inmates before it became less available because of pressure from anti-death penalty activists. Federal courts also have repeatedly held that the administration of pentobarbital does not violate the Eighth Amendment, and the Supreme Court itself has noted that pentobarbital has been used repeatedly and "without incident."[147] The Department therefore should readopt the Pentobarbital Protocol.

1. The Three-Part *Bucklew* Test

In *Bucklew v. Precythe*, the Supreme Court held that Missouri's pentobarbital-based lethal-injection protocol did not violate the Eighth Amendment.[148] In reaching this conclusion, the Court held that a prisoner challenging a "chosen method of execution" "must show a feasible and readily

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[142] U.S. Const. amend. V; *see Glossip*, 576 U.S. at 867–69.

[143] *Baze*, 553 U.S. at 47 (opinion of Roberts, C.J.); *see also Glossip*, 576 U.S. at 894 (Scalia, J., concurring) ("It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that '[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,' and that no person shall be 'deprived of life . . . without due process of law.'").

[144] *Glossip*, 576 U.S. at 869; *cf.* U.S. Const. amend. V.

[145] *Bucklew*, 587 U.S. at 133 (cleaned up).

[146] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[147] *Barr*, 591 U.S. at 980.

[148] 587 U.S. at 140–49.

implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt [that method] without a legitimate penological reason."[149] Any execution protocol, therefore, must be consistent with the following three principles.

First, the manner of execution must not pose "a substantial risk of severe pain," meaning it cannot involve methods that "cruelly superadd[] pain" "beyond what's needed to effectuate a death sentence."[150] In *Wilkerson v. Utah*, the Court explained that William Blackstone's *Commentaries on the Laws of England* "admit[ted] that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded"—such as being "drawn or dragged to the place of execution," disembowelment, being quartered or beheaded, "public dissection," or "burning alive."[151] To ensure capital punishment is carried out consistent with the Eighth Amendment, a method of execution "that is sure or very likely to cause serious illness and needless suffering" should not be utilized.[152]

Second, a method of execution cannot be adopted if there is a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain."[153] This does not require adopting an alternative method that is only "slightly or marginally safer."[154] Rather, "the difference [in risk] must be clear and considerable."[155]

For this reason, the Court has never interpreted the Constitution to require unanimity among scientific professionals about the degree of pain or suffering a particular method of execution could impose. Although the recommendations of a professional association or individual expert may be informative, they "simply do not establish the constitutional minima."[156] Instead, the Eighth Amendment forbids the "unnecessary and wanton infliction of pain."[157] It does not forbid using a manner of execution that, according to some scientific professionals, presents some risk of pain.

Further, the presence of "an arguably more humane method" of execution does not "necessarily render[] unconstitutional" "traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection."[158] An inmate who cannot identify a

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[149] *Id.* at 134.

[150] *Id.* at 134, 137–38.

[151] 99 U.S. 130, 135 (1878).

[152] *Glossip*, 576 U.S. at 877 (internal quotation marks omitted).

[153] *Bucklew*, 587 U.S. at 134.

[154] *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 51 (opinion of Roberts, C.J.)).

[155] *Bucklew*, 587 U.S. at 143.

[156] *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979).

[157] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

[158] *Bucklew*, 587 U.S. at 134.

"well established" alternative that does not have "problems of its own" will not succeed in challenging an execution protocol.[159]

Third, and finally, if an inmate identifies an alternative manner of execution that would significantly reduce a substantial risk of severe pain, he must then show that the government has refused to adopt that manner without a "legitimate penological reason."[160]

2. Application of the *Bucklew* Test to the Pentobarbital Protocol

In July 2019, the Department replaced a three-drug execution protocol with a single-drug protocol using pentobarbital—which, after extensive study, the Department determined was medically and scientifically appropriate and met all constitutional requirements.[161] Pentobarbital is a fast-acting barbiturate that depresses the central nervous system, which controls many basic functions including breathing.[162] At clinical doses, medical practitioners use pentobarbital as an anesthetic and for managing several medical conditions, including seizures, status epilepticus, and insomnia.[163] At higher doses, it can impair the central nervous system and cause death.[164] Pentobarbital is commonly prescribed by medical professionals in jurisdictions that permit physician-assisted suicide.[165] And veterinarians commonly use pentobarbital for animal euthanasia.[166]

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[159] *Baze*, 553 U.S. at 57, 62 (opinion of Roberts, C.J.).

[160] *Bucklew*, 587 U.S. at 134. The Department is unaware of any instance in which the constitutionality of a method of execution has ever turned on the resolution of this issue.

[161] *Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures*, *supra* note 41; *see Bucklew*, 587 U.S. at 140–51 (affirming grant of summary judgment holding that execution by single-drug pentobarbital lethal injection did not violate the Eighth Amendment); *Glossip*, 576 U.S. at 870–71.

[162] *Glossip*, 576 U.S. at 953 (Sotomayor, J., dissenting); *see also* Anna B. Johnson & Nazia M. Sadiq, Pentobarbital, Stat Pearls, Nat'l Inst. of Health (Feb. 25, 2024), https://perma.cc/C67G-3YUR.

[163] *See* Johnson & Sadiq, *supra* note 162.

[164] *Id.*

[165] *Beaty v. Brewer*, 649 F.3d 1071, 1075 (9th Cir. 2011) (Tallman J., concurring) (supporting denial of rehearing en banc because inmate had no likelihood of success on Eighth Amendment claim challenging the use of pentobarbital in a single-drug protocol because "[p]entobarbital is a barbiturate commonly used to euthanize terminally ill patients who seek death with dignity in states such as Oregon and Washington"); Jennifer Fass & Andrea Fass, *Physician-Assisted Suicide: Ongoing Challenges for Pharmacists*, 69 Am. J. Health-Sys. Pharmacy 846, 847 (2011) (noting that, at the time, pentobarbital was the second most commonly prescribed suicide medication in Oregon).

[166] Dino F. Druda et al., *Deliberate Self-poisoning with a Lethal Dose of Pentobarbital with Confirmatory Serum Drug Concentrations: Survival After Cardiac Arrest with Supportive Care*, 15 J. Med. Toxicology 45–58 (2019), https://perma.cc/AX2S-5YAD (noting that pentobarbital "is widely used in veterinary practice for anesthesia and euthanasia"); *id.* (explaining that some individuals have self-administered pentobarbital in effort to commit suicide because of the drug's recommendation "for euthanasia or assisted suicide" and "due to its rapid onset of coma and perception of peaceful death").

In addition, for many years, advocates for death row inmates repeatedly argued that execution by a single dose of pentobarbital would not violate the Eighth Amendment. Multiple death row inmates identified pentobarbital as preferable to other methods of execution,[167] conceding that it "can reliably induce and maintain a comalike state that renders a person insensate to pain."[168] For example, in the 2008 case *Baze v. Rees*, death row inmates challenging Kentucky's three-drug protocol contended that "a one-drug protocol . . . using a single dose of sodium thiopental or other barbiturate" such as pentobarbital was "a preferred method of execution."[169] Similarly, in the 2015 Supreme Court case *Glossip v. Gross*, death row inmates challenging Oklahoma's three-drug protocol "suggested that it might also be constitutional for Oklahoma to use pentobarbital" in a single-drug protocol.[170]

It was not until the single-dose pentobarbital execution protocol became more widely adopted that advocates who had previously argued in support of it reversed course and asserted that it constituted cruel and unusual punishment in violation of the Eighth Amendment.[171] Multiple federal courts of appeals, and eventually the Supreme Court, rejected successive challenges, concluding each time that execution by pentobarbital comports with the Constitution.

The Supreme Court also explicitly permitted the Department to carry out executions utilizing the Pentobarbital Protocol. In that case, multiple death row inmates alleged that the use of pentobarbital violated the Eighth Amendment because its administration presented an unconstitutionally high risk of flash pulmonary edema.[172] In reversing a preliminary injunction issued hours before the first scheduled execution, the Supreme Court pointed to five facts supporting the constitutionality of using pentobarbital in a single-drug execution protocol: (1) of the states that had implemented the death penalty, five had adopted a pentobarbital-based protocol; (2) more than 100 executions using pentobarbital had been carried out without incident; (3) prisoners had "repeatedly invoked" pentobarbital "as a *less* painful and risky

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[167] *Glossip*, 576 U.S. at 867, 878; (single-drug pentobarbital execution protocol proposed instead of a three-drug protocol involving midazolam); *Baze*, 553 U.S. at 56–58 (opinion of Roberts, C.J.) (single-drug execution protocol proposed in place of Kentucky's three-drug protocol); *Grayson v. Dunn*, 218 F. Supp. 3d 1321, 1325–26 (M.D. Ala. 2016) (one-drug pentobarbital protocol proposed as an alternative to three-drug protocol involving midazolam); *West v. Schofield*, 519 S.W.3d 550, 562 (Tenn. 2017) (noting agreement between testifying experts that single-drug protocol of 5 grams of pentobarbital "will likely cause death with minimal pain and with quick loss of consciousness"); *First Amend. Coal. of Ariz., Inc. v. Ryan*, 188 F. Supp. 3d 940, 950–51 (D. Ariz. 2016) (pentobarbital proposed as alternative to midazolam in a three-drug protocol); *see also Jackson v. Danberg*, 656 F.3d 157, 165 & n.9 (3d Cir. 2011) (suggesting that the one-drug protocol presents less comparative risk than a three-drug protocol when upholding denial of a stay of execution); *Beaty*, 649 F.3d at 1075 (Tallman, J., concurring); *cf. DeYoung v. Owens*, 646 F.3d 1319, 1325–27 (11th Cir. 2011) (rejecting challenge to use of pentobarbital in a three-drug protocol); *Pavatt v. Jones*, 627 F.3d 1336, 1337, 1340 (10th Cir. 2010) (upholding the substitution of pentobarbital for another drug in a three-drug protocol).

[168] *Glossip*, 576 U.S. at 870–71 (internal quotation marks omitted).

[169] 553 U.S. at 56–57 (opinion of Roberts, C.J.).

[170] 576 U.S. at 878.

[171] *Cf. Bucklew*, 587 U.S. at 124–25.

[172] *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 213 (D.D.C. 2020), *vacated*, *Barr v. Lee*, 591 U.S. 979 (2020).

alternative to lethal injection protocols of other jurisdictions"; (4) the Court upheld the use of pentobarbital in *Bucklew*; and (5) the Fifth, Eighth, and Eleventh Circuit Courts of Appeals had rejected similar Eighth Amendment challenges.[173] The Supreme Court therefore concluded that the death row inmates had not established a likelihood that the alleged risks rendered the administration of pentobarbital unconstitutional. It explained that the single-drug pentobarbital protocol for lethal injection, "'does not carry the risks' of pain that some have associated with other lethal injection protocols."[174]

In summary, lethal injection is the most frequently utilized method of execution across the United States, and it is often done through the administration of pentobarbital. There is no indication that pentobarbital "superadds" pain, the threshold necessary to determine a particular method of execution is inconsistent with the Eighth Amendment. And the Supreme Court, as Attorney General Garland acknowledged, has concluded that the administration of pentobarbital does not violate the Eighth Amendment.[175] This report therefore concludes that the administration of pentobarbital comports with the Eighth Amendment. In view of this precedent and the robust scientific opinion that the administration of pentobarbital will not cause unnecessary pain and suffering, BOP should readopt the Pentobarbital Protocol, including any previously incorporated improvements.[176]

C. The Federal Execution Protocol Should Include Other Manners of Execution

The Supreme Court has never rejected a method of execution as unconstitutional.[177] The Court first considered whether a method of execution comported with the Eighth Amendment in 1878 in *Wilkerson v. Utah*. There, the Court held that death by firing squad does not constitute cruel and unusual punishment.[178] Since then, the Court has repeatedly held that other methods of

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[173] *Barr*, 591 U.S. at 980–81.

[174] *Id*. at 980 (quoting *Zagorski*, 586 U.S. at 940 (Sotomayor, J. dissenting from denial of application for stay and denial of certiorari)).

[175] *See* Garland 2021 Moratorium, *supra* note 53, at 1.

[176] The Pentobarbital Protocol comprises eight parts, including that federal death sentences are to be implemented "by an intravenous injection of a lethal substance or substances in a quantity sufficient to cause death," that the identities of those who assist with the functions related to imposing lethal injection should "be protected from disclosure to the fullest extent permitted by law," and that personnel who assist in federal executions must meet certain qualifications and training. *Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures*, *supra* note 41. The protocol also explains the procedures for the preparation of pentobarbital, the preparation of the death row inmate for injection, and how pentobarbital is to be administered. *See id.* OLP has reviewed the 2019 Addendum in full and finds no reason to modify any element of the protocol.

[177] *Baze*, 553 U.S. at 62 (opinion of Roberts, C.J.) ("Throughout our history, whenever a method of execution has been challenged in this Court as cruel and unusual, the Court has rejected the challenge.").

[178] 99 U.S. at 134–35 (holding that execution by firing squad did not violate the Eighth Amendment).

execution—including the electric chair, gas chamber, and lethal injection[179]—are consistent with the Eighth Amendment.

The FDPA and its implementing regulations allow the Department to carry out a death sentence through any manner legally permitted by the state in which the death sentence is imposed—or, if that state does not permit capital punishment, another state designated by the court.[180] All states with an active death penalty permit lethal injection,[181] which has been the federal government's default method of execution since January 1993.[182]

In recent years, anti-death-penalty activists have waged a public campaign against providers of lethal-injection drugs—including pharmaceutical companies, manufacturers of active pharmaceutical ingredients, compounding pharmacies, and diagnostic laboratories—jeopardizing the future of lethal injection as a method of execution.[183] Members of Congress and certain media outlets facilitated these efforts by publicly disclosing the identities of companies and their owners—which the Garland Report confirmed as BOP's sources.[184] These events resulted in supply chain challenges that limit the availability of lethal injection drugs—access difficulties that are compounded when an execution protocol specifies multiple drugs.[185]

Lethal injection has also faced repeated and continuing legal challenges. Prior to pentobarbital's widespread adoption, for example, opponents of capital punishment pointed to it

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[179] *See, e.g.*, *In re Kemmler*, 136 U.S. at 441–47 (electric chair); *Gray v. Lucas*, 463 U.S. 1237, 1239 (1983) (gas chamber); *Baze*, 553 U.S. at 53–54 (opinion of Roberts, C.J.) (lethal injection); *Barr*, 591 U.S. at 981 (lethal injection with pentobarbital).

[180] *See* 18 U.S.C. § 3596(a); 28 C.F.R. Part 26.

[181] Currently, in 13 of the 27 states that authorize capital punishment, lethal injection is the sole means of execution permitted by law. *See* Table of Methods of Execution Approved by State Legislatures, *infra* Section II.C.4. Nearly all the remaining states require execution by lethal injection unless prevented from doing so by law or circumstance. No state proscribes lethal injection as a method of execution. *Id*.

[182] *See* 28 C.F.R. § 26.3(a), (a)(4) ("[A] sentence of death shall be executed . . . [b]y intravenous injection of a lethal substance or substances in a quantity sufficient to cause death[.]").

[183] *See Glossip*, 576 U.S. at 871; George Hale, *Connecticut lawmakers weigh ban on drugs used for executions in Indiana*, WFYI (Mar. 4, 2025), https://perma.cc/5MZF-ERAV; George Hale, *Chemical company accused of supplying drugs for executions in Terre Haute ends pentobarbital sales*, Ind. Pub. Media (June 24, 2024), https://perma.cc/36NN-9E4J.

[184] Jonathan Allen, *U.S. lawmakers ask four companies about role in government's execution drugs*, Reuters (July 14, 2020), https://perma.cc/5XK5-JJYX; Garland Report, *supra* note 56, at 10 & n.66.

[185] For instance, in 2017, Nebraska publicly announced it would use a four-drug protocol for executions. The four drugs to be used are: (1) diazepam, (2) fentanyl citrate, (3) cisatracurium besylate, and (4) potassium chloride. Nebraska scheduled Carey Dean Moore's execution in 2018. Moore did not challenge the four-drug protocol as a violation of his Eighth Amendment rights. Nonetheless, a European drug company sought to prevent Moore's execution because it manufactured two of the four types of drugs used in the protocol and "suspected that these drugs had been obtained improperly from distributors doing business with the Plaintiff." *Fresenius Kabi USA, LLC v. Nebraska*, No. 4:18-cv-3109, 2018 WL 3826681, at *2 (D. Neb. Aug. 10, 2018). After Moore's execution, Nebraska reported that it was having trouble sourcing the drugs necessary for its protocol. Mark Berman, *Nebraska becomes the first state to use fentanyl in an execution*, Wash. Post (Aug. 14, 2018), https://perma.cc/UL7S-3WE2.

as the preferred protocol with the least likelihood of risk.[186] This changed once states and the federal government began using it. One federal court of appeals judge recently called out such "gamesmanship," noting that inmates who previously alleged pentobarbital violated the Eighth Amendment subsequently proposed execution using that same method upon learning of a government's inability to procure the drug.[187]

In light of these challenges, states have begun expanding the manners of execution available to implement death sentences. BOP should follow suit by modifying its execution protocol to include additional, constitutional manners of execution that are currently provided for by the law of certain states. This modification will help ensure the Department is prepared to carry out lawful executions even if a specific drug is unavailable. The additional manners of execution that BOP should consider adopting include the firing squad, electrocution, and lethal gas—each of which the Supreme Court has found to be consistent with the Eighth Amendment.

1. Firing Squad

With lethal injection protocols facing supply issues, some states have reinstated the use of firing squads, another historically common method for capital punishment.[188] Execution by firing squad has a long history in the United States. Its first use took place in 1608 in the Virginia Jamestown colony.[189] More than 250 years later, in 1878, the Supreme Court held in a unanimous opinion that the firing squad does not offend the Constitution's prohibition on cruel and unusual punishments.[190]

The *Wilkerson* decision remains good law, and the Court has "decline[d] to effectively overrule" its holding that death by firing squad is consistent with the Eighth Amendment.[191] As Justice Sotomayor recently described, although "[s]ome might find [the firing squad] regressive . . . the available evidence suggests 'that a competently performed shooting may cause nearly instant death," "may also be comparatively painless," and historically "has yielded

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[186] *See supra* note 167; *In re Ohio Execution Protocol Litig.*, 235 F. Supp. 3d 892, 953 (S.D. Ohio 2017), (holding that a three-drug protocol employing midazolam likely violated the Eighth Amendment because "[a]ll the parties and witnesses in this case agree that use of a barbiturate . . . would be preferable," and stating that "[c]ompounded pentobarbital would be preferable to midazolam to all parties in this case"), *vacated on other grounds*, 860 F.3d 881 (6th Cir. 2017).

[187] *Middlebrooks v. Parker*, 22 F.4th 621, 622 (6th Cir. 2022) (Thapar, J., statement respecting denial of rehearing en banc).

[188] *See, e.g.*, Utah Code Ann. § 77-18-113 (2025); *Owens v. Stirling*, 904 S.E.2d 580, 586 (S.C. 2024); Kevin Fixler & Ryan Suppe, *Gov. Brad Little signs bill to let Idaho execute inmates by firing squad*, Idaho Statesman (Apr. 12, 2023), https://perma.cc/87YV-SNN9.

[189] M. Watt Espy & John Ortiz Smykla, *Execution in the United States, 1608–2002: The Espy File*, at 2 (Mar. 2004), https://perma.cc/EW5V-QXBV.

[190] *See Wilkerson*, 99 U.S. at 134–35 ("Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.").

[191] *Glossip*, 576 U.S. at 881; *see also Baze*, 553 U.S. at 48 (opinion of Roberts, C.J.) (explaining *Wilkerson*'s holding that the use of a firing squad to carry out a lawful execution does not violate the Eighth Amendment).

significantly fewer botched executions" than other methods.[192] Indeed, in recent years, death row inmates have begun to argue that execution by firing squad is a feasible, readily implemented alternative to lethal injection that carries fewer risks.[193]

Five states currently provide for the firing squad as a method of execution,[194] with Idaho recently adopting the firing squad as its primary method of execution in March 2025.[195] Protocols that authorize execution by firing squad vary slightly from state to state. In Utah, for example, the firing squad team is comprised of five peace officers, in addition to two alternate members of the team and a team leader.[196] The team leader is responsible for loading the firearms (.30 caliber rifles), with a total of two rounds per rifle, with one rifle containing blank cartridges.[197] Members of the team do not know which firearm is loaded with blank cartridges.[198] A target is placed over the inmate's heart, the inmate's head is covered, and the firearms are discharged towards the target.[199] South Carolina's protocol calls for a team of three members discharging firearms, all of which are loaded with live ammunition.[200]

In the post-*Furman* era, Gary Gilmore was the first to face execution by firing squad after his conviction for murdering two men with young children.[201] In more recent years, Utah and South Carolina executed inmates by firing squad in 2010 and 2025 respectively.[202] One of the

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[192] *Arthur v. Dunn*, 137 S. Ct. 725, 733–34 (2017) (Mem.) (Sotomayor, J., dissenting from denial of certiorari) (quoting Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 688 (1994)); *see also Bucklew*, 587 U.S. at 153 (Kavanaugh, J., concurring) (noting Justice Sotomayor's position that the "firing squad is an alternative method of execution that generally causes an immediate and certain death, with close to zero risk of a botched execution"); *Glossip*, 576 U.S. at 977 (Sotomayor, J., dissenting) ("There is some reason to think that [the firing squad] is relatively quick and painless."); *see also Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("The firing squad strikes me as the most promising [method of execution] . . . causing instant death every time.").

[193] *See, e.g.*, *Nance v. Ward*, 597 U.S. 159, 165–66 (2022); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 21–5004, 2021 WL 164918, at *7 (D.C. Cir. Jan. 13, 2021) (Pillard, J., dissenting); *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 867 (11th Cir. 2017).

[194] *See* Table of Methods of Execution Approved by State Legislatures, *infra* Section II.C.4.

[195] 2025 Idaho Sess. Laws 174 (signed into law Mar. 12, 2025, effective July 1, 2026).

[196] Utah Dep't of Corrs., Execution Protocols § TMF 01/05.04.B.1 (2010), https://perma.cc/L3GZ-VQCC.

[197] *Id.* § TMF 01/05.16.B.2–3.

[198] *Id.* § TMF 01/05.16.B.4.

[199] *Id.* § TMF 01/05.16.C.

[200] S.C. Dep't of Corrs., *Press Release Regarding Firing Squad Protocol* (Mar. 18, 2022), https://perma.cc/FY2T-32GX. Idaho, Mississippi, and Oklahoma also permit execution by firing squad but have not publicly released their protocols.

[201] Vern Anderson, *10 Years Later, Victims Can't Forget Gary Gilmore: Utah Killer Spurned Appeals, Demanded His Quick Execution*, L.A. Times (Jan. 11, 1987), https://perma.cc/CE5D-CTLC.

[202] Emiley Morgan, *Ronnie Lee Gardner executed by firing squad*, Deseret News (June 18, 2010), https://perma.cc/P2ED-QU3U (Utah); *South Carolina executes second man by firing squad in 5 weeks*, PBS (Apr. 11, 2025), https://perma.cc/4QVM-73V3 (South Carolina).

South Carolina inmates raised state constitutional challenges to his execution, which the South Carolina Supreme Court rejected, holding as a matter of first impression under state law that the firing squad is neither cruel nor unusual.[203] No other contemporary challenges to execution by firing squad have been identified.

2. Electrocution

Electrocution has been used in the United States to carry out lawful executions since the late 1800s.[204] Today, nine states—Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, and Tennessee—provide for execution by electrocution.[205] In Alabama, for example, execution by electrocution involves the placement of sponges upon the inmate's head and the attachment of electrodes to the inmate's head and left leg. Upon activation of the electric chair, 2200 volts of electricity flow through the inmate's body for 20 seconds, followed by a reduced designated flow of 220 volts of electricity for an additional 100 seconds.[206]

Federal courts have consistently upheld execution by electrocution as constitutional. When it first addressed the issue in 1890, the Supreme Court concluded that it had "no hesitation in saying" the electric chair did not violate the Constitution.[207] The Court explained that the Eighth Amendment forbids "something more than the mere extinguishment of life."[208] In 1947, the Supreme Court addressed a challenge by a death row inmate who had experienced a "mechanical difficulty" during the first attempt at execution using the electric chair.[209] The inmate argued that the state's approach constituted cruel and unusual punishment. The Supreme Court "f[ou]nd nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense."[210] The Court's reasoning echoes in current Eighth Amendment jurisprudence: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[211]

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[203] *Owens*, 904 S.E.2d at 608. South Carolina law permits death row inmates to select their method of execution. *Id.* at 586.

[204] *See In re Kemmler*, 136 U.S. at 441–47.

[205] *See* Table of Methods of Execution Approved by State Legislatures, *infra* Section II.C.4.

[206] Ala. Dep't of Corrs., Execution Procedures: Lethal Injection, Nitrogen Hypoxia, Electrocution § 10(C) (Aug. 2023), https://perma.cc/85K6-LJYE. Kentucky has a similar protocol for electrocution. 501 Ky. Admin. Regs. 16:340. Florida's method of electrocution is similar to Alabama's protocol but includes three separate administrations of electricity. *See* Fla. Dep't of Corrs., Execution by Electrocution Procedures (Feb. 2025), https://perma.cc/4JPB-RBVJ. The remaining states that permit execution by electrocution have not publicly released their protocols. South Carolina, however, has identified a dual application protocol in court filings. *See* Amended Final Br. of Resp. 20, *Owens v. Stirling*, 904 S.E.2d 580 (S.C. 2024), 2023 WL 9196692, at *20.

[207] *In re Kemmler*, 136 U.S. at 447.

[208] *Id.*

[209] *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460 (1947).

[210] *Id.* at 463.

[211] *Id.* at 464; *cf. Baze*, 553 U.S. at 50 (opinion of Roberts, C.J.).

"[E]lectrocution remained the predominant method of execution until" 1972, when the Supreme Court's decision in *Furman v. Georgia* temporarily paused capital punishment in the United States.[212] Although other methods of execution have since become more prevalent, the Supreme Court has not revisited its decisions upholding electrocution as a constitutional method of execution,[213] despite some justices arguing in dissenting opinions that electrocution violates the Eighth Amendment.[214] Instead, in response to these dissents, a majority of the Court has "decline[d] to effectively overrule" its judgment that execution by electrocution is constitutional.[215]

3. Lethal Gas

Like execution by firing squad and electrocution, lethal gas has a long history of use as a form of capital punishment in the United States. In hundreds of cases between 1924 and the early 2000s, lethal gas was used as the method of execution.[216]

The Supreme Court has said little regarding execution by lethal gas, but it has repeatedly denied certiorari in challenges to lower court determinations that execution by lethal gas does not violate the Eighth Amendment.[217] For example, the Ninth Circuit found that the use of cyanide gas was unconstitutional, but the Supreme Court vacated the judgment and remanded the case in light of California passing a new statute making lethal injection the default method while allowing an inmate to choose lethal gas.[218]

Execution by lethal gas historically involved the use of cyanide gas, but in recent years, Alabama and Louisiana have used nitrogen gas to cause death by hypoxia (*i.e.*, deprivation of oxygen).[219] In Alabama, execution by nitrogen hypoxia involves the distribution of the gas into a mask applied to the inmate's face, for the longer of either a period of fifteen minutes or five minutes

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[212] *See Glossip*, 576 U.S. at 868; *see Furman v. Georgia*, 408 U.S. 238 (1972).

[213] *See Resweber*, 329 U.S. at 464 (upholding second attempt at electrocution after first attempt failed to cause death).

[214] *See Glass v. Louisiana,* 471 U.S. 1080, 1093 (1985) (Brennan, J., dissenting from denial of certiorari).

[215] *Glossip*, 576 U.S. at 881. Federal appellate courts have followed suit and applied the Supreme Court's binding precedent to find that electrocution is consistent with the Eighth Amendment. *See Glass*, 471 U.S. at 1081 n.3 (Brennan, J., dissenting from denial of certiorari) (listing federal and state cases as of 1985).

[216] *See* Randy Dotinga, *Execution by gas has a brutal 100-year history. Now it's back*, Wash. Post (Jan. 24, 2024), https://perma.cc/4D86-3KSU.

[217] *See, e.g.*, *Hunt v. Nuth*, 57 F.3d 1327, 1337–38 (4th Cir. 1995), *cert. denied*, 516 U.S. 1054 (1996); *Gray v. Lucas*, 710 F.2d 1048, 1060 (5th Cir. 1983) (explaining that "a number of states have upheld the use of the gas chamber"), *cert. denied*, 463 U.S. 1237 (1983); *People v. Daugherty*, 256 P.2d 911, 922–23 (Cal. 1953), *cert. denied*, 346 U.S. 827 (1953); *In re Anderson*, 447 P.2d 117, 130 (Cal. 1968), *cert. denied sub nom. Anderson v. California*, 406 U.S. 971 (1972); *State v. Lopez*, 857 P.2d 1261, 1271 (Ariz. 1993), *cert. denied sub nom. Villegas Lopez v. Arizona*, 511 U.S. 1046 (1994); *Calhoun v. State*, 468 A.2d 45, 68–70 (Md. 1983), *cert. denied*, 466 U.S. 993 (1984); *Billiot v. State*, 454 So.2d 445, 464 (Miss. 1984), *cert. denied sub nom. Billiot v. Mississippi*, 469 U.S. 1230 (1985).

[218] *See Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Mem.).

[219] *Alabama carries out nation's 3rd nitrogen gas execution*, NPR (Nov. 22, 2024), https://perma.cc/448A-ZJE9; Erik Ortiz & Abigail Brooks, *Louisiana executes man with nitrogen gas after 15-year pause*, NBC News (Mar. 18, 2025), https://perma.cc/F5ZB-RBZ8.

after a flatline.[220] As with various lethal injection protocols, death by nitrogen hypoxia has been suggested by advocates of medically assisted suicide and employed during veterinary euthanasia.[221] And death row inmates have also pointed to nitrogen hypoxia as an alternative method of execution when bringing Eighth Amendment claims.[222]

Although the Supreme Court has not addressed whether execution by nitrogen hypoxia is constitutional, at least two federal appellate courts have recently addressed the method. On two occasions in as many years, the Eleventh Circuit has considered whether execution by nitrogen hypoxia presents an unnecessary risk of "conscious suffocation" that violates the Eighth Amendment.[223] In both cases, the appellate court agreed with district courts that execution by nitrogen hypoxia comports with the Eighth Amendment.[224] And in both cases, the Supreme Court denied requests to stay the executions.[225]

Similarly, in Louisiana, a death row inmate sought to avoid execution by nitrogen hypoxia and instead proposed being executed by firing squad or lethal injection.[226] The Fifth Circuit found that "[b]reathing 100% pure nitrogen causes unconsciousness in less than a minute, with death following rapidly within ten to fifteen minutes. And it does not produce physical pain."[227] The court concluded that death by nitrogen hypoxia was no more painful than other methods of execution already approved by the Supreme Court.[228] It therefore vacated a preliminary injunction, and allowed the execution to proceed.[229] The Supreme Court denied an application to stay the execution,[230] and Louisiana carried out the execution.

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[220] *See* Ala. Dep't of Corrs., Execution Procedures, *supra* note 206. Louisiana provides for similar protocol. *See Brief Summary of Nitrogen Hypoxia Execution Protocol*, https://perma.cc/7M6Q-3L44. Arkansas, Oklahoma, and Mississippi all authorize execution by nitrogen hypoxia but have not publicly released their protocols.

[221] Kevin M. Morrow, *Execution by Nitrogen Hypoxia: Search for Scientific Consensus*, 59 Jurimetrics J. 457, 479 (2019) (noting that the "available scientific literature indicates that nitrogen gas hypoxia is effective as a euthanasia method for some species" of animals).

[222] *See, e.g.*, *Bucklew*, 587 U.S. at 141; *Barber v. Governor of Alabama*, 73 F.4th 1306, 1314 (11th Cir. 2023); *Price v. Comm'r, Dep't of Corrs.*, 920 F.3d 1317, 1322, 1326–29 (11th Cir. 2019).

[223] *Grayson v. Comm'r., Ala. Dep't of Corrs.*, 121 F.4th 894, 898 (11th Cir. 2024); *Boyd v. Comm'r, Ala. Dep't of Corrs.*, No. 25-13545, 2025 WL 2970017, at *1 (11th Cir. Oct. 20, 2025).

[224] *Grayson*, 121 F.4th at 897–898, 900; *Boyd*, 2025 WL 2970017 at *4.

[225] *Grayson v. Hamm*, 145 S. Ct. 586 (2024) (Mem.); *Boyd v. Hamm*, No. 25A457, 2025 WL 2984339 (Oct. 23, 2025) (Mem.).

[226] *Hoffman v. Westcott*, 131 F.4th 332, 336 (5th Cir. 2025).

[227] *Id.* at 334.

[228] *Id.* at 336.

[229] *Id.*

[230] *Hoffman v. Westcott*, 145 S. Ct. 797 (2025) (Mem.).

4. Table of Methods of Execution Approved by State Legislatures

Federal law permits federal authorities to carry out executions using any method permitted by the law of the state in which the sentence is imposed. This table details the methods of execution adopted by states that permit capital punishment. Although governors have imposed moratoriums in some of these states, and executions have not been carried out recently in others, state law in each still permits capital punishment. As a result, the methods of execution prescribed by these states satisfy federal law governing the implementation of a death sentence under 18 U.S.C. § 3596 when the sentence is imposed in the state listed.

State	Permissible Methods of Execution
Alabama	Lethal injection, unless affirmative selection of nitrogen hypoxia or electrocution. Ala. Code § 15-18-82.1(a).
Arizona	Single- or multi-drug protocol. Inmates who committed their capital offense(s) prior to November 23, 1992, are permitted to select lethal gas in the alternative. Ariz. Rev. Stat. § 13-757(A), (B).
Arkansas	Single- or three-drug protocol, or nitrogen hypoxia. Electrocution is prescribed if lethal injection is invalidated by final and unappealable court order. Ark. Code Ann. § 5-4-617(a), (d), (m).
California	Single- or multi-drug protocol unless affirmative selection of lethal gas. Cal. Penal Code § 3604(a), (b).
Florida	Single- or multi-drug protocol unless affirmative selection of electrocution. Any manner of execution is permitted if these methods are deemed unconstitutional. Fla. Stat. § 922.105(1), (3).
Georgia	Single- or multi-drug protocol. Ga. Code Ann. § 17-10-38.
Idaho	Single- or multi-drug protocol, followed by firing squad if lethal injection is unavailable. (This sequence will be reversed pursuant to a law signed by the Governor in March 2025, effective July 2026.) Idaho Code § 19-2716(1), as amended by 2025 Idaho Sess. Laws 174, signed into law Mar. 12, 2025, effective July 1, 2026.
Indiana	Single- or multi-drug protocol. Ind. Code § 35-38-6-1.
Kansas	Single- or multi-drug protocol. Kan. Stat. Ann. § 22-4001.
Kentucky	Single- or multi-drug protocol. Inmates sentenced to death prior to March 31, 1998, are permitted to select electrocution in the alternative. Ky. Rev. Stat. Ann. § 431.220.
Louisiana	Single- or multi-drug protocol, nitrogen hypoxia, or electrocution. La. Stat. Ann. § 15:569(A).
Mississippi	Single- or multi-drug protocol, nitrogen hypoxia, electrocution, or firing squad. If lethal injection is unavailable, nitrogen hypoxia may be administered. If both are unavailable, electrocution may be administered. If all are unavailable, execution may be administered by firing squad. Miss. Code Ann. § 99-19-51(1).
Missouri	Lethal injection or lethal gas. Mo. Rev. Stat. § 546.720.
Montana	Dual-drug protocol of an ultra-fast-acting barbiturate combined with a chemical paralytic agent. Mont. Code Ann. § 46-19-103.

State	Permissible Methods of Execution
Nebraska	Single- or multi-drug protocol. Neb. Rev. Stat. § 83-964.
Nevada	Single- or multi-drug protocol. Nev. Rev. Stat. § 176.355.
North Carolina	Single- or multi-drug protocol. Any other constitutional method can be used if lethal injection is deemed unconstitutional. N.C. Gen. Stat. § 15-188.
Ohio	Single- or multi-drug protocol. Any other constitutional method can be used if lethal injection is deemed unconstitutional. Ohio Rev. Code Ann. § 2949.22.
Oklahoma	Single- or multi-drug protocol. If lethal injection is deemed unconstitutional, nitrogen hypoxia may be administered. If both are deemed unconstitutional, electrocution may be administered. If all are deemed unconstitutional, execution may be administered by firing squad. Okla. Stat. tit. 22, § 1014.
Oregon	Three-drug protocol. Or. Rev. Stat. § 137.473(1).
Pennsylvania	Dual-drug protocol consisting of an ultrashort-acting barbiturate and a chemical paralytic agent. 61 Pa. Cons. Stat. § 4304.
South Carolina	Inmates can select between lethal injection, electrocution, or firing squad. S.C. Code Ann. § 24-3-530.
South Dakota	Single- or multi-drug protocol. Inmates convicted prior to July 1, 2007, may choose alternative method of execution. S.D. Codified Laws §§ 23A-27A-32, 32.1.
Tennessee	Lethal injection. Inmates who committed offense prior to January 1, 1999, may elect to be executed by electrocution. Alternative methods permitted if these methods are deemed unconstitutional. Tenn. Code Ann. § 40-23-114(a), (b), (d).
Texas	Single- or multi-drug protocol. Tex. Code Crim. Proc. Ann. art. 43.14(a).
Utah	Lethal injection, or firing squad if lethal injection is unavailable. Utah Code § 77-18-113.
Wyoming	Single- or three-drug protocol, or lethal gas if lethal injection is unavailable. Wyo. Stat. Ann. § 7-13-904.

5. Whether to Permit Selection Between Multiple Methods of Execution

A number of states—including Alabama,[231] Florida,[232] and South Carolina[233]—permit a death row inmate to select between several methods of execution. Alabama law prescribes lethal

[231] Ala. Code § 15-18-82.1 (2018). This statute was challenged as unconstitutionally vague and ambiguous for failing "to specify the method of execution." *Mulkey v. State*, No. CR-2023-0304, 2025 WL 1272751, at *18 (Ala. Crim. App. May 2, 2025). The Alabama court of criminal appeals rejected this argument. *See id.*

[232] Fla. Stat. § 922.105 (2005).

[233] S.C. Code Ann. § 24-3-530 (2021).

injection as the primary method of execution "unless the person sentenced to death affirmatively elects to be executed by electrocution or nitrogen hypoxia."[234] Florida law provides for death by lethal injections, "unless the person sentenced to death affirmatively elects to be executed by electrocution."[235] South Carolina law provides that "[a] person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, *at the election of the convicted person*, by firing squad or lethal injection, if it is available at the time of election[.]"[236]

The FDPA likely does not require the federal government to provide death row inmates with the same choice as to the manner of execution as is provided in a given states' law, so long as the manner of execution prescribed in the federal execution protocol is consistent with at least one manner permitted by the relevant state. However, nothing in the Constitution prohibits such a choice, and the Department may choose to modify its execution protocol to permit a death row inmate to choose any manner of execution provided for in state law.

The FDPA provides that, when a death sentence is to be "implemented," "the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed."[237] If the death penalty is prohibited in the state in which the sentence is imposed, the sentencing court must "designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law."[238]

Courts have split as to what it means for a death sentence to be "implement[ed]" "in the manner prescribed by the law of the State." For instance, in litigation during the first Trump Administration, Judge Katsas of the U.S. Court of Appeals for the D.C. Circuit opined that "manner" refers only to the "top-line choice among mechanisms of death such as hanging, electrocution, or lethal injection."[239] Judge Rao, however, determined that the FDPA requires the federal government to apply the relevant "statutes and formal regulations" and implement an execution consistent with "a range of procedures and safeguards" provided by state law.[240] However, as other courts have explained, no court has come to the conclusion that the FDPA requires the federal government to follow "every nuance" of state law that relates to the death penalty—rather, BOP must follow only "those procedures that effectuate the death."[241] In other

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[234] Ala. Code § 15-18-82.1(a) (2018).

[235] Fla. Stat. § 922.105(1) (2005).

[236] S.C. Code Ann. § 24-3-530(A) (2021) (emphasis added).

[237] 18 U.S.C. § 3596(a).

[238] *Id.*

[239] *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 114 (D.C. Cir. 2020) (Katsas, J., concurring).

[240] *Id.* at 129, 133 (Rao, J., concurring).

[241] *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) (quoting *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 151 (Tatel, J., dissenting)).

words, the FDPA "addresses, at most, state laws that set forth procedures for giving practical effect to a sentence of death,"[242] and it does not extend to "pre-execution process requirements."[243] Because the FDPA does not incorporate state "pre-execution process requirements," it likely does not require that the federal execution protocol mimic state laws that permit a death row inmate to choose their method of execution.

Nonetheless, if BOP determines that one or more additional methods of execution could be made available and readily implemented, the Department could permit death row inmates to choose any execution method permitted under state law. Nothing in the Constitution prohibits providing inmates a choice between lawful methods of execution, and providing that choice may facilitate finality and reduce litigation.

For instance, in 2024, a death row inmate challenged the constitutionality of the South Carolina statute's "element of choice."[244] In upholding the law's constitutionality, the South Carolina Supreme Court opined that the law's choice provisions were a "sincere effort to make the death penalty less inhumane while enabling the State to carry out its laws. . . . [C]hoice cannot be considered cruel because the condemned inmate may elect to have the State employ the method he and his lawyers believe will cause him the least pain."[245] It concluded that, under the choice provision, "a condemned inmate in South Carolina will never be subjected to execution by a method he contends is more inhumane than another method that is available."[246]

As a result, the Department should consider amending the execution protocol to permit death row inmates to choose their method of execution, consistent with relevant state law, so long as additional methods of execution are readily available.

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[242] *United States v. Mitchell*, 971 F.3d 993, 997 (9th Cir. 2020).

[243] *United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020).

[244] *Owens*, 904 S.E.2d at 605.

[245] *Id.* at 608.

[246] *Id.*

III. Strengthening the Federal Death Penalty

The death penalty is a critical component of a just and effective criminal justice system. It empowers society to exact retribution proportionate to the worst offenses while also deterring others. More than any other punishment, a death sentence also conveys the full gravity of a crime and affirms the principle that human life is of the highest value by reserving the ultimate penalty for the most egregious betrayals of human dignity and communicating with moral clarity that society will not tolerate such violations. By imposing a punishment that fits the crime, capital sentences bring a measure of closure and moral resolution to victims' families, reaffirming that justice has been done.

Nonetheless, over the last several decades, anti-death penalty activists have succeeded in undermining the effectiveness of the death penalty. Today, each stage of the process takes too long—from seeking and securing a capital sentence to defending the sentence through various stages of postconviction review and finally implementing the sentence. The thirteen inmates executed during the first Trump Administration, for example, were on average sentenced to death eighteen years earlier.

There is much that can be done to preserve and enhance the death penalty's role in deterring heinous crimes, bringing closure to victims' families, and affirming society's most fundamental values. The most significant changes require legislative action. But the Department has the authority to institute positive reforms. This report recommends a series of changes that will strengthen the federal death penalty.

A. Changes to Department Policies, Procedures, and Priorities

On February 5, 2025, the *Reviving the Federal Death Penalty* Memorandum reversed Attorney General Garland's policies on the death penalty, including his moratorium on federal executions, the subjective standard he utilized to evaluate manners of execution, and the arbitrary standard he imposed upon prosecutors in evaluating whether to seek the death penalty in a particular case. In their place, the memorandum restored the Department's historical and time-tested standards. These measures were a significant step towards restoring the federal death penalty's important role in the criminal justice system.

The Department also began a process of "evaluat[ing] . . . all internal policies and procedures concerning capital crimes," and will soon publish those changes in the Justice Manual.[247] These changes will include:

Giving Voice to Victims and Their Families and Communities

On her first day in office, Attorney General Bondi issued *Restoring a Measure of Justice to the Families of Victims of Commuted Murderers*, a memorandum committed to correcting the wrongs inflicted upon the families of the victims of the thirty-seven death row inmates whose

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[247] Reviving the Federal Death Penalty Memorandum, *supra* note 6, at 1 § 4.

sentences Attorney General Garland recommended for commutation.[248] That effort has so far included working with state and local authorities to re-prosecute several of these murderers, as well as reviewing the Department's role in recommending these commutations. The Department has also begun discussions with the victims' families—an ongoing effort that began on May 7, 2025—with a listening session at the Department's headquarters.

Through these efforts, it has become clear that under the leadership of Attorney General Garland, the Department failed to appropriately consider the views of victims and their families and communities before taking important actions. For example, the Department failed to consult with victims' families and communities before withdrawing notices of intent to seek the death penalty. Likewise, the Department failed to consult with victims' families before recommending the commutations of death-row inmates. To be sure, some of the victims' families had met with the Office of the Pardon Attorney to provide their views about an inmate's application for clemency. But at least one family found these meetings perfunctory and impersonal. And the Office of the Pardon Attorney *did not* solicit the views of victims' families before recommending the commutation of all death-row inmates.

It is critical that the Department and its personnel thoughtfully solicit and consider input from victims and their families throughout the course of prosecution, sentencing, appeals, and incarceration. The Department should never rescind a decision to seek a death sentence or recommend commuting a death sentence without first seeking input from the families of victims impacted by the crimes. That this frequently and repeatedly occurred under the leadership of Attorney General Garland is profoundly troubling. The Department's forthcoming revisions to the Justice Manual will ensure it never happens again.

Expanding Victim Rights

President Trump and the Department are committed to ensuring the timely and just imposition of the death penalty. However, future Attorneys General in other administrations may be less responsive and could impose another explicit moratorium or a shadow moratorium simply by refusing to set an execution date. Family members of victims currently have no means to gain visibility into why delays are occurring and no means to advance the interests of certainty and timeliness. The Department should consider developing procedures to give the families of victims a right to request that the Attorney General set an execution date if the Attorney General fails to faithfully do so within a set period following the conclusion of judicial review. If the Attorney General fails to set an execution date within a given period, the Attorney General could be required to provide a written justification for inaction.

Restricting When Death-Sentenced Inmates Apply for Clemency

The Department can improve the efficiency of death penalty procedures by adhering to, or amending as necessary, its regulations limiting the acceptance of premature clemency requests. Currently, the Department's regulations prohibit death row inmates from submitting clemency petitions before exhausting their initial appeals and collateral motions because many, if not most, bases alleged by inmates in clemency requests involve legal issues that are typically developed

[248] Memorandum from Attorney General Pam Bondi to All Department Employees, *Restoring a Measure of Justice to the Families of Victims of Commuted Murderers* (Feb. 5, 2025), https://perma.cc/4SF4-3C7S.

during that litigation.[249] The Department benefits from discovery, evidentiary hearings, and court decisions on those issues.

Under Attorney General Garland, this provision was interpreted to restrict only an inmate's ability to petition for clemency, but not the Office of the Pardon Attorney's ability to consider a grant of clemency *sua sponte*. Functionally, this interpretation—imposed over the protests of career Department employees who are capital case subject matter experts—meant that even if an inmate violated the regulations' prohibition, the Pardon Attorney's Office could nevertheless process the clemency petition. This interpretation nullified the purpose of the regulation and misdirected Department resources. Because clemency petitions typically include legal arguments that would otherwise be litigated during an appeal or habeas review, it is premature for the Pardon Attorney's Office to review and decide those issues before a court does. Further, this premature evaluation undermines the efforts of the Department's components, which are often actively litigating these same judicial review proceedings.

To minimize potentially counterproductive efforts by Department personnel (*i.e.*, defending death sentences while also investigating clemency applications in the same cases), the current regulations should be clarified to explicitly prohibit capital inmates from submitting clemency petitions, and the Office of the Pardon Attorney from considering such petitions, until any decisions in the inmate's direct appeal and first collateral attack are final. This clarification would improve the clemency process, avoid wasteful and competing efforts by Department personnel, and facilitate effective implementation of the death penalty. Nothing in these regulations would prohibit the President from exercising his clemency authority in any case should he be so inclined.

Issuing Charging Policy Guidance

Prosecutors should consider the possibility that a capital sentence may be appropriate and make charging decisions to ensure that the Department retains maximum flexibility. The Department should issue additional guidance regarding how to appropriately charge offenses to ensure a defendant remains death penalty eligible and to give prosecutors the best opportunity to prove the elements of a capital case.

Providing Adequate Resources to Pursue Capital Case Prosecutions

Death penalty prosecutions are among the most complicated and resource-intensive of all federal criminal cases. Capital cases involve unique rules, procedures, and practices not found in any other type of criminal prosecution, with associated extra costs in terms of staffing and financing expert reports and other trial needs.

Federal prosecutors typically spend more than one year investigating and preparing for capital cases. United States Attorneys' Offices regularly dedicate two or more Assistant U.S. Attorneys to work exclusively on these cases. The Criminal Division's Capital Case Section attorneys additionally spend an average of approximately two months on travel for pretrial work.

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[249] *See, e.g.*, 28 C.F.R. § 1.10(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.").

Capital cases are invariably heavily litigated, with trials typically lasting three to six months. The dockets often involve well over 1,000 entries.[250]

Appeals in capital cases are equally resource intensive, with defendants frequently raising dozens of issues on direct appeal over multiple rounds of briefing that may span hundreds of pages. After the direct appeal concludes, capital defendants almost always file a motion for postconviction relief under 28 U.S.C. § 2255, which often involves multi-week evidentiary hearings, voluminous discovery, and a new set of experts. These proceedings typically culminate in another full round of appellate review, further extending the length and complexity of federal capital litigation.

In addition, competently seeking the death penalty once the Department has decided to pursue it is expensive. Capital-case litigation regularly includes significant costs to retain expert witnesses and conduct jury consultations. Experts often provide pretrial reports relating to competency and intellectual disability claims. Hiring qualified experts requires substantial outlays, usually totaling between $250,000 to $350,000 for the government. Penological experts who testify about risks of future dangerousness may cost an additional $25,000 to $50,000.

Capital prosecution teams often work with jury consultants to prepare for jury selection, an important step toward empaneling a jury that may find guilt and impose a capital sentence in cases when the government carries its burden of proof. Capital cases involve long questionnaires (often 80–90 questions) and large jury pools (from 500 to 1,500 potential jurors). Reviewing, organizing, and grading the questionnaires takes two to three weeks, which usually immediately precedes the start of trial when prosecutors are focused on witness preparation and evidence assembly. Each juror's grade must be reevaluated at the close of each day of *voir dire*, which averages another two to three weeks. Jury consultants can greatly assist the prosecution team in meeting these burdens and selecting qualified jurors. The Department recently spent $300,000 in *United States v. Gendron* (the Buffalo grocery store hate crime) on jury consultants alone. That cost, though seemingly very high, was justified given the Department's strong interest in bringing to justice a white supremacist who murdered ten innocent people in a grocery store parking lot.

In light of these realities, the Department should consider allocating additional funds to hire more Capital Case Section attorneys, Assistant U.S. Attorneys, and support staff to meet the labor demands that capital cases require. The Department also should evaluate how to best use its existing resources in capital cases, and, if more resources are necessary, take appropriate steps to address personnel or budgetary requirements.

Encouraging Reconsideration of Certain Precedents

The Department's work to impose capital punishment in just and appropriate cases may be constrained by existing Supreme Court precedent. Although capital punishment is an essential tool to deter and punish those who commit the most heinous crimes and violent acts against American

[250] *See, e.g.*, *United States v. Bowers*, No. 18-cr-292 (W.D. Pa.) (Tree of Life synagogue mass murder with 1,640 entries); *United States v. Tsarnaev*, No. 13-cr-10200 (D. Mass.) (Boston Marathon bombing with 1,479 entries); *United States v. Roof*, No. 15-cr-472 (D.S.C.) (Charleston church mass shooting with 1,055 entries despite defendant proceeding *pro se* for much of the trial).

citizens, existing precedent limits which categories of crimes are eligible for the death penalty and shields some categories of offenders from capital punishment.

For example, in *Kennedy v. Louisiana*, the Supreme Court held that the Eighth Amendment prohibits imposition of the death penalty "for the rape of a child where the crime did not result, and was not intended to result, in death of the victim."[251] The *Kennedy* majority concluded that there was a "national consensus" that it is unacceptable to impose the death penalty as punishment for the rape of a child.[252] It based its analysis "not by the standards that prevailed" when the Eighth Amendment was adopted but "by the norms that 'currently prevail.'"[253] As justification, the Court noted that six of fifty states then imposed the death penalty for the rape of a child.[254]

As Justice Alito noted, however, the Court likely undercounted public support because states conformed their policies to dicta in other Supreme Court cases.[255] Moreover, perceived public opinion is an unsteady guide for determining constitutional meaning, as evidenced by several states' recent efforts to challenge *Kennedy* and restore the death penalty as punishment for this heinous crime.[256] Today, the Supreme Court focuses on constitutional text, history, and tradition, rather than perceived public consensus, and the Court may reconsider *Kennedy* and similar precedent in an appropriate challenge.

The Department should examine existing Supreme Court precedent to identify whether certain decisions, especially regarding categorical exemptions for certain crimes or defendants, are inconsistent with the Eighth Amendment. In appropriate cases, the Department may consider pursuing test cases to challenge precedents that seem particularly unmoored from the Constitution's text and the Nation's history and tradition, including if Congress were to amend current law to allow use of the death penalty in additional cases. The Department has proposed such amendments to Congress. The Department may also consider filing *amicus curiae* briefs in related state challenges to those precedents.

Ensuring State Access to Congressionally Enacted Expedited Federal Habeas Review of State Capital Convictions

Chapter 154 of title 28 authorizes expedited federal habeas corpus review of state capital cases, when the Attorney General certifies that the state has established a qualifying mechanism for providing counsel in state postconviction proceedings for indigent prisoners under sentence of death. The Department's implementing regulations for chapter 154, appearing at 28 CFR § 26.20 *et seq*., impose preconditions for certification that go beyond what chapter 154 itself requires. This makes it difficult for any state to be certified, and it facilitates the nullification of a previously

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[251] 554 U.S. 407, 413, *op. modified on denial of reh'g*, 554 U.S. 945 (2008).

[252] *Id.* at 426.

[253] *Id*. at 419 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

[254] *Id*. at 426.

[255] *Id.* at 448 (Alito, J., dissenting).

[256] *Florida Prosecutor Announces First Death Penalty Case Under New Child Rape Law*, USA Today (Dec. 15, 2023), https://perma.cc/NX5G-S95Y; *see also* Safiyah Riddle & Kim Chandler, *Alabama Seeks to Join States That Allow the Death Penalty for Child Rape*, Assoc. Press (Feb. 11, 2025), https://perma.cc/P9EN-KVE8.

granted certification after changes in presidential administrations, as occurred during the Biden Administration with respect to the previously granted certification of Arizona.[257] On March 18, 2026, the Department published the Certification Process for State Capital Counsel Systems, a notice of proposed rulemaking that would amend the regulations to more closely align with the statutory scheme.[258]

Explore Relocating or Expanding Federal Death Row and Construction of a New Execution Facility

For federal capital cases, the manner of execution depends on the law of the state in which the sentence is imposed.[259] Where the state does not have a death penalty, the sentencing court designates another state where the sentence will be carried out.[260] On June 18, 1993, the Director of BOP established the United States Penitentiary in Terre Haute, Indiana, as the site of federal executions.[261] As a result, the executions of federal capital defendants convicted in states without the death penalty have been carried out pursuant to the law of Indiana.[262] As noted above, Indiana permits executions to be carried out by single- or multi-drug lethal injection protocols.[263] Within the next six months, the BOP Director should deliver a report to the Deputy Attorney General detailing the options to relocate or expand federal death row, or to construct a second federal execution facility in a state that permits additional manners of execution. Such options would ensure that federal executions may continue apace.

B. Legislative Proposals

While the Department can take certain steps to strengthen the federal death penalty, some policy changes require congressional action. In particular, the Department should consider advocating that Congress implement legislative fixes to expand the categories of crimes eligible for the death penalty, address delays in habeas proceedings, and provide needed reforms to the time, place, and manner of executions, among other changes to strengthen the federal death penalty.

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[257] *See supra* Section I.B.4.

[258] Certification Process for State Capital Counsel Systems, 91 Fed. Reg. 12525 (Mar. 16, 2026)

[259] 18 U.S.C. § 3596(a).

[260] *Id.*

[261] *See, e.g.*, Appendix to Emergency Application for Stay of Execution (No. 20A32), app. G-047, https://perma.cc/C7HX-LMQX.

[262] *See, e.g.*, *Tsarnaev*, No. 13-cr-10200 (D. Mass. June 24, 2015) (ECF No. 1480 at 6).

[263] *See* Table of Methods of Execution Approved by State Legislatures, *supra* Section II.C.4.

1. Clarifying Statutory Language Regarding Death Penalty Eligible Offenses

Addressing Crimes of Violence

Current case law regarding what constitutes a crime of violence restricts the Department's ability to seek capital punishment for murders committed in violation of 18 U.S.C. §§ 924(c) and (j).[264] The Department has offered legislation to expand the list of crimes that constitute a crime of violence, which would extend capital punishment eligibility under these provisions and facilitate justice outside the context of capital punishment.

Correcting Gaps in Death-Eligible Offenses

Only certain offenses are explicitly death penalty eligible. Others are not, even though they may address conduct similar to death penalty-eligible crimes. For example, deaths caused in the course of damage to religious property or obstruction in the free exercise of religion, 18 U.S.C.§ 247, are death eligible, but deaths caused under the general hate crimes statute, 18 U.S.C. § 249, are not. These shortfalls in death penalty authorizations either require the Department to charge and prove other ancillary death penalty-eligible offenses to ensure appropriate penalty parity for similarly situated murderers or accept that the death penalty is unavailable for criminal offenses that mirror others that constitute capital murder.

The Department should consider offering legislation to correct gaps and deficiencies in the authorization of capital punishment for the most heinous crimes, including, *inter alia*, murders of law enforcement officers; murders by aliens illegally in the United States; and murders constituting or committed in the commission of hate crimes, stalking, material support for terrorism, or domestic violence.

2. Proposals to Address Delays in the Legal Process

Addressing Undue Delays in Postconviction Collateral Proceedings

Currently, prisoners are permitted by law to file motions for postconviction relief to challenge the execution of their capital sentences up through the day of execution.[265] The current system of collateral review results in lengthy, unnecessary, and unjustified delays, a fact the Supreme Court has acknowledged for decades.[266]

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[264] 18 U.S.C. § 924, which prescribes penalties for federal firearm-related offenses, defines "crime of violence" and "murder." *See* 18 U.S.C. § 924(c) and (j), respectively. These definitions must be satisfied as elements in seeking a death sentence pursuant to 18 U.S.C. § 924(j)(1).

[265] *See* 28 U.S.C. § 2255.

[266] *See Bucklew*, 587 U.S. at 149 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence. Those interests have been frustrated in this case. [The defendant] committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this,

Both states and the federal government have a strong interest in the timely enforcement of a sentence, and victims "deserve better" because "the long delays that now typically occur between the time an offender is sentenced to death and his execution are excessive."[267] The Department should consider offering reforms that extend to federal capital cases the expedited postconviction review procedures authorized for state capital cases under 28 U.S.C. §§ 2254 and 2261, *et seq*., and that prevent capital defendants from attempting to further delay their executions by filing other meritless legal challenges after the denial of their first postconviction motion has become final.

In addition, federal courts can take years to resolve a state prisoner's habeas petitions, failing to issue timely rulings and denying swift justice for victims. The Department should offer legislative reforms that would permit it to file pleadings expressing the views of victims' families who want to inquire about the status of a case when it has been at least six months, without resolution, since a death-row inmate has filed a habeas petition.

Issues in Penalty Phase Sentencing

Pursuant to 18 U.S.C. §§ 3593(e) and 3594, a non-unanimous jury recommendation of death requires the presiding judge to impose a sentence below capital punishment. This system does not align with the Department's interest in seeking and imposing capital punishment when doing so is just and fair. The Department should consider supporting a legislative proposal that, in the event of a hung jury, would allow prosecutors to seek to impanel a new jury for a second penalty phase.

Coordination with Courts on Improving Transparency and Timeliness

Courts often postpone the administration of justice by allowing for extended periods of delay. Judges often take months and sometimes even years to consider appeals and collateral motions, adding even more delay to a lengthy legal process. Some inmates may take advantage of the courts' slow resolutions and file decades' worth of motions and appeals to prevent execution.

The Department should consider working with the Administrative Office of the U.S. Courts to propose legislation that requires federal courts to report any pending cases involving the death penalty (including challenges to state sentences through the habeas process). This report would include how long a case has been pending and the current procedural posture of the case. It would function similarly to the existing six-month list reported by federal district courts under the Criminal Justice Reform Act.[268]

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his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning." (internal citations omitted)).

In 1983, more than 35 years before *Bucklew*, Chief Justice Burger concurred in the denial of a petition for a writ of certiorari and in the denial of the application for a stay of execution, writing: "This case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality." *Gray*, 463 U.S. at 1240 (Burger, C.J., concurring).

[267] *Id*. (internal quotations omitted).

[268] *See* 28 U.S.C. § 476.

3. Administrative Proposals Regarding Time, Place, and Manner

Empowering the Attorney General to Determine the Manner of Execution

Currently, the United States Code and Code of Federal Regulations call for federal executions to be carried out by lethal injection or a manner prescribed by the state in which the sentence is imposed. Because many states allow for execution only by lethal injection, federal executions could be delayed in instances in which an inmate challenges the use of lethal injection. Likewise, supply issues may prevent the government from obtaining the relevant drugs, thus indefinitely delaying executions. The limitation to state-authorized methods of execution also creates needless litigation in cases where the United States obtains a death sentence in a state that does not itself authorize capital punishment.

Notably, existing federal law limits the Attorney General's discretion to determine the method of execution. The Department should consider offering language to amend 18 U.S.C. § 3596 to give the Attorney General wider discretion regarding methods of execution in carrying out federal death sentences and to explicitly allow for other methods of execution, thus untethering federal executions from state law.

Protecting Access to Lethal Injection Drugs and Participation of Qualified Professionals Through Confidentiality Provisions

Anti-death penalty activists often seek to expose the names of companies that provide drugs and equipment to facilitate capital punishment, and they work to identify individuals participating in the death sentencing process using public information provisions. The Department should consider a proposal to protect the confidentiality of these companies and individuals. Such legislation would protect individuals involved in facilitating lawful capital punishment from harassment or professional reprisals. Likewise, confidentiality provisions that limit the disclosure of which companies are producing lethal injection drugs would protect the supply chain from interference by outside activists.

Reducing External Risk to the Supply Chain

Private companies that produce drugs used in lethal injections are subject to pressure by anti-death penalty activists, and they are often concerned that anti-death penalty blowback could negatively affect their financial health. To address this issue, the Department should consider offering language to authorize federal agencies to produce pentobarbital for use in federal and state executions. If the federal government can produce the drug without relying on outside manufacturers, new confidentiality provisions may not be needed.

Appropriately Clarifying the Limits of the Federal Food, Drug, and Cosmetic Act

Some courts have attempted to introduce additional bureaucratic hurdles to execution by requiring that drugs administered during death penalty procedures be prescribed by a medical professional for that use.[269] The Department should consider drafting legislation clarifying that

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[269] *See e.g.*, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d at 126–27 (discussing the prescription issue).

drugs and devices that are ordinarily covered by the Federal Food, Drug, and Cosmetic Act are exempt from prescription requirements when used in execution.

Conclusion

The Department should return to its longstanding practice of seeking and implementing capital sentences in appropriate cases, consistent with the Eighth Amendment, federal law, and the will of the American people. The Bureau of Prisons should readopt the Pentobarbital Protocol because the administration of a single-drug protocol of pentobarbital complies with the Eighth Amendment. The Department should also consider alternative methods of execution when appropriate to promptly achieve finality in death penalty cases. Finally, the Department should adopt improvements to internal policies and propose legislation to strengthen the federal death penalty and protect victims' rights. The Department must recommit itself to faithfully executing the laws and fulfilling its "most solemn responsibility" of protecting American citizens and holding to account the most heinous criminals.[270]

[270] Exec. Order No. 14,164, *supra* note 3.