

PERSPECTIVE

It's Time To Put Capital Punishment, A Racist Relic, to Death

BY JASON P.W. HALPERIN

On July 14, 2020, the federal government executed Daniel Lewis Lee, ending a 17-year informal moratorium on the federal death penalty. Since then, in the last six months of the Trump Administration, the federal government executed 12 more prisoners, including Lisa Montgomery—the only woman on federal Death Row and the first female inmate to be executed by the federal government in 67 years. Federal Execution Updates, Death Penalty Information Center (last visited March 5, 2021).

This dark, macabre rush to execute inmates before President Biden's inauguration was to a large degree overshadowed by the events of January 6 and the dispute about the election results. But in the ongoing renewed introspection in America about racial justice and the criminal justice system, we should put banning the federal death penalty at the top of the list of criminal justice reforms.

The Federal and State Death Penalty Dichotomy

Strikingly, as the federal government raced to execute inmates in late 2020, the states moved in the polar opposite direction. Indeed, 2020 was the first year

in the nation's entire history where the number of people executed by the federal government was more than the total number of people *executed by all the states combined*. The Death Penalty in 2020: Year End Report, Death Penalty Information Center (last visited March 5, 2021) (hereinafter 2020 Year End Report). The Death Penalty Information Center attributes the historically low numbers of executions by the states to a combination of the long-term trend away from capital punishment and court closures and public health concerns surrounding the COVID-19 pandemic. *Id.*

Notwithstanding the movement away from the death penalty in the states, in late 2020, President Trump and the Justice Department ended the moratorium on the federal practice and also sought to expand the means of executions, even calling for the addition of electrocution and death by firing squad. Manner of Federal Executions, 85 Fed. Reg. 47324 (proposed Aug. 5, 2020) (to be codified at 28 C.F.R. pt. 26). Before this proposed federal regulation, a death sentence imposed by a federal court could be carried out only by lethal injection. 28 C.F.R. §26.2(a) (2) (2019). The purpose of the proposed rule was to make it easier for



Demonstrators, including members of the anti-death penalty Abolitionist Action Committee (AAC) and faith leaders, protest on the steps of the U.S. Supreme Court, marking the 40th anniversary of the first execution since the death penalty was reinstated, on Tuesday, January 17, 2017.

the federal government to conduct executions, even as a growing number of Americans disfavored the policy. 85 Fed. Reg. 47325.

It is time for President Biden and Congress to enact legislation permanently ending the federal death penalty. If the federal government leads, hopefully even more states will follow suit.

SCOTUS History

Supreme Court jurisprudence over the last 50 years also supports ending the federal death penalty.

In 1972, in *Furman v. Georgia*, the Supreme Court found that the imposition of the death penalty was

unconstitutional in three cases coming out of Georgia. 408 U.S. 238 (1972). All three petitioners were Black. Two were convicted of rape, and one of murder. *Id.* at 239. The court granted certiorari to determine whether the imposition and carrying out of the death penalty in these cases violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* In a concise per curiam opinion the court held that the death penalty, as applied to the three petitioners, was unconstitutional because it was applied in a manner that disproportionately harmed people of color. *Id.*

Each Justice filed his own opinion, five concurring and four dissenting. *Id.* Notably, Justices Brennan and Marshall argued that the death penalty was unconstitutional in all circumstances. *Id.* at 257, 314. Justice Brennan emphasized that death is "fatally offensive to human dignity" and found that the state loses nothing, and the purpose of punishment is fulfilled, by confining criminals to prison. *Id.* at 305 (Brennan, J., concurring).

The effect of this decision was to place a four-year moratorium on all executions until more guidance came from the court. That moment came in 1976 in *Gregg v. Georgia*, when the Supreme Court reinstated capital punishment, leading to the modern era of the death penalty. See 428 U.S. 153 (1976).

Since 1976, 1,532 people have been executed by the 50 states and the federal government. Facts About the Death Penalty, Death Penalty Information Center (last visited March 5, 2021) (hereinafter Death Penalty Fact Sheet).

Capital Punishment's Racist History

There have always been numerous compelling arguments against

capital punishment: (1) it has never been shown to deter crime; (2) there is a real risk of executing an innocent person and studies have shown that the United States has certainly done so, see, e.g., Innocence, Death Penalty Information Center ("Since 1973, more than 170 people who had been wrongly convicted and sentenced to death in the U.S. have been exonerated.") (last visited March 5, 2021); Daniel Lennard and Rob Warden, *Death in America Under Color of Law: Our Long, Inglorious Experience With Capital Punishment*, 13 Nw. J. L. & Soc. Pol'y 194, 264 (discussing the innocence of Larry Griffin who was wrongfully executed by lethal injection in 1995); (3) it is immoral; (4) the government should not be in

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the business of killing prisoners; and (5) our country's historic embrace of capital punishment makes it an international pariah—the United States is the only western democracy that still allows for the death penalty, with all of the European Union banning it. Ionel Zamfir, The death penalty and the EU's fight against it, European Parliament Think Tank, (Feb. 12, 2019). And the list goes on.

Yet in many ways, the most glaring problem with capital punishment in the United States has been how blatantly racist it has been in practice.

The death penalty always has, and still disproportionately harms people of color, especially African-Americans. 34.1% of the 1,532 people executed since 1976 were Black. *Id.* Comparatively, in

2019, only about 13.4% of the American population was Black. Visualizing the U.S. Population by Race, Visual Capitalist. Furthermore, a 2014 University of Washington study found that jurors in Washington State were three times more likely to recommend a death sentence for a Black defendant than for a white defendant in a similar case. See Death Penalty Fact Sheet. Studies have also shown that in many states where there have been reviews of race and the death penalty, there is a pattern of either race-of-victim or race-of-defendant discrimination, or both. *Id.* For example, a 2005 study in California found that defendants convicted of killing white people were more than three times as likely to be sentenced to death as those convicted of killing Black people. A similar 2011 study in Louisiana found that the odds of receiving a death sentence were 97% higher for those whose victim was white than for those whose victim was Black. *Id.*

While there is ample evidence that the death penalty is still applied in a racially discriminatory manner, the Supreme Court has yet to completely outlaw it. The court's trend line over the past 20 years, however, has been to limit its application. First, in 2002, in *Atkins v. Virginia*, the court held that the Eighth Amendment forbids executing individuals with intellectual disabilities. 536 U.S. 304 (2002). Then, in 2005, the court further narrowed its scope, finding that it is cruel and unusual to sentence to death juvenile offenders who committed their crime while under the age of 18. *Roper v. Simmons*, 543 U.S. 551 (2005).

In both *Atkins* and *Simmons*, the court emphasized the national consensus against the death penalty for people with disabilities and juveniles, respectively. Specifically, when *Atkins* was decided, 30 states prohibited the

death penalty for individuals with intellectual disabilities. *Atkins*, 536 U.S. at 313-15. The same number of states prohibited the juvenile death penalty in 2005 when *Simmons* was decided, with 12 states having outlawed it altogether, and 18 states expressly excluding juveniles from its reach. *Simmons*, 543 U.S. at 564.

Numerous States Reject Capital Punishment

Just as the states disfavored the death penalty for individuals with disabilities and juvenile offenders leading up to *Atkins* and *Simmons*, more and more states have now moved away from capital punishment for any offender, no matter their age or intellectual ability.

As recently as 1999, 38 states had the death penalty on the books. But, in the past two decades, the tide has shifted strongly against the death penalty. This trend has coincided with a serious rethinking of criminal penalties and a broader look at the criminal justice system in the past several years. By the end of 2020, only 25 states still had the death penalty. 22 states plus the District of Columbia have now outlawed capital punishment completely, while three more states have governor-imposed moratoriums. State by State, Death Penalty Information Center (last visited March 5, 2021). That is a stark drop from 76% of the states 21 years ago, to only 50% of the states now.

Moreover, public opinion polling has shown significant changes in the way Americans view the death penalty. Between the mid-1960s and mid-1990s, support for the death penalty was growing. But since the mid-1990s, support for the death penalty has declined rapidly. For example, a 2019 Gallup Poll found that a record high of 60%

of Americans preferred life sentences to capital punishment. Additionally, a 2020 Gallup Poll found that public support for the death penalty was at its lowest in a half-century. National Polls and Studies, Death Penalty Information Center.

President Biden's Death Penalty Policy

The national movement away from capital punishment in some ways mirrors President Biden's evolution on criminal justice issues. In the 1990s, President Biden played a key role in drafting and enacting the Violent Crime Control and Law Enforcement Act of 1994. Part of the Act, known as the "Federal Death Penalty Act of 1994" established new procedures for the imposition of the death penalty and greatly expanded the number of death-eligible offenses.

But during his 2020 presidential campaign, President Biden vowed to eliminate the federal death penalty. Citing to the more than 160 individuals who have been exonerated from death sentences since 1973, President Biden pledged to work to pass legislation to eliminate the death penalty at the federal level and incentivize states to do the same. The Biden Plan for Strengthening America's Commitment to Justice (last visited March 5, 2021).

Conclusion

It is time for President Biden to act on his campaign promise and work with Congress to enact legislation ending the federal death penalty. The events of this past summer, including the murder of George Floyd and others, shed light on the grim reality that the criminal justice system does not work the same for African-Americans and other people of color as for white Americans.

Abolishing the federal death penalty would alleviate at least some of this ingrained racism from the criminal justice system.

Moreover, the trend in the states continues to move away from capital punishment. President Biden and Congress should use this momentum from the states and among the American people to finally put a stop to the federal death penalty. Hopefully, the end of federal capital punishment would encourage more of the remaining 25 states to take the death penalty off their books, leading ultimately to the end of executions in the United States once and for all.

In *Roper*, the Supreme Court stated that to determine which punishments are so disproportionate as to be cruel and unusual, we must consider the "evolving standards of decency that mark the progress of a maturing society." 543 U.S. at 561. We are now at a point where we must put an end to the federal death penalty because it does not comport with the American standard of decency. President Biden and Congress should enact legislation ending this cruel, unusual, immoral and racist punishment.

JASON P.W. HALPERIN is a member at Mintz in the white-collar defense and government investigations practice. He served for 11 years as a federal prosecutor with the U.S. Attorney's Office for the Southern District of New York. AUDREY MCQUADE, an associate in the Litigation Section at Mintz, assisted in the preparation of this article.