Until Death Due Us Part: The Due Process Clause's Broken Vow to Protect Against Arbitrary and Discriminatory Enforcement of Federal Capital Punishment

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Introduction

Daniel Lewis Lee, Wesley Ira Purkey, Alfred Bourgeois, Dustin Lee Honken were executed in July of 2020.[2] Federal death row inmates are facing approaching execution dates for the first time in over a decade as a result of shifting sentiment towards the federal death penalty.[3] While the death penalty has a long, tumultuous history within the United States, clashing opinions about the implementation of capital sentencing have recently come to a head.[4]

Well over two hundred years ago, the federal government made a vow to defendants to protect them from inappropriate government action.[5] This vow is known as the Due Process Clause.[6] The Due Process Clause is the only constitutional "command" that appears twice within the pages of the Constitution, and its magnitude is worthy of such commendation.[7] The clause affords all defendants, no matter the

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[1] Antonin Scalia Law School, J.D. expected, 2021. This Comment is dedicated to those who have suffered from the profound injustice of the death penalty. The relentless fight for merciful and unwavering justice is for you.

[2] *See* Press Release, Office of the Att'y Gen., Executions Scheduled for Four Federal Inmates Convicted of Murdering Children (June 15, 2020), https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children [hereinafter June 15, 2020 Press Release]; Press Release, Office of the Att'y Gen., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [hereinafter July 25, 2019 Press Release]; *See* Federal Execution Updates, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/stories/federal-execution-updates.

[3] *Id.*

[4] *See, e.g.,* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 Am. U. L. Rev. 1611, 1622 (2018).

[5] *See* U.S. Const. amends. V, XIV.

[6] *Id.*

[7] *Id.*

nature of their crime, equal protection under the law.[8] This vow, placed at the heart of our criminal justice system, protects those presumed innocent from over-vigorous prosecutions and ensures that convictions stand strong against strict scrutiny.[9]

As the years have passed, the Due Process Clause's protection has wavered.[10] When a defendant faces death, the Due Process Clause's vow becomes strained.[11] The federal government made this clear on July 25, 2019.[12] The Department of Justice (DOJ) announced that the federal government would resume capital punishment after an almost twenty-year hiatus.[13] The DOJ's announcement claimed it was "bringing justice to victims of the most horrific crimes . . . the most vulnerable in our society—children and the elderly."[14] However, the result harms another class of vulnerable individuals, death row inmates, whose Due Process rights are eviscerated and whose lives are put on the line.[15]

At the Attorney General's direction, the Acting Director of the Bureau of Prisons adopted the Federal Execution Protocol Addendum to the Federal Execution Protocol and, in accordance with 28 C.F.R. Part 26, scheduled executions.[16] As of August of 2020, Daniel Lewis Lee, Wesley Ira Purkey, and Dustin Lee Honken have been executed, with more inmates scheduled to follow throughout 2020.[17]

This Comment examines whether there is a due process challenge to the federal death penalty on the basis that the federal government discriminatorily seeks capital punishment against certain classes of defendants and whether these classes of defendants are more vulnerable for execution. Parts I and II of this Comment provide a general

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[8] *Id.*

[9] *See, e.g.,* Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1883 (2004) (". . . a flexible Due Process Clause that is specially attuned to the interest at issue during capital proceedings — the individual defendant's life — and protects that interest from excessive legislative and executive authority.").

[10] *See, e.g.,* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

[11] *See, e.g.,* Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

[12] *See* July 25, 2019 Press Release, *supra* note 1.

[13] *Id.*

[14] *Id.*

[15] *See, e.g.,* Herman, *supra* note 8, at 1883.

[16] July 25, 2019 Press Release, *supra* note 1.

[17] *See* Federal Execution Updates, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/federal-execution-updates.

overview of modern death penalty jurisprudence and a brief history of the Federal Death Penalty Act (FDPA) and its current use. Part III addresses the command of the Due Process Clause and prior due process challenges to the federal death penalty. Part IV explores the current composition of the federal death row, comparing it to Uniform Crime Reporting Data and illuminating troubling cases.

In its analysis section, this Comment examines the composition of federal death row and how a successful due process challenge may arise. This Comment argues that the federal death penalty is unconstitutional because the current framework does not protect from discriminatory application of capital punishment. Furthermore, this Comment will argue that there is a valid due process challenge to the federal death penalty because the federal government seeks capital punishment disproportionately against certain classes of defendants. Additionally, this Comment will argue that the FDPA lacks appropriate guidelines for the enforcement of executions, thereby violating Due Process. This Comment concludes with a recommendation that a death penalty moratorium needs to be put in place until there is an amendment to the FDPA.

BACKGROUND

I. MODERN DEATH PENALTY JURISPRUDENCE

A. Furman v. Georgia*: "Unconstitutional"*

In 1972, the death penalty was found to be unconstitutional in select cases in *Furman v. Georgia*.[18] The Supreme Court in *Furman* addressed three consolidated capital cases.[19] The majority of the Supreme Court was splintered, leaving only an incredibly brief *per curiam* opinion and multiple separate published opinions.[20]

The vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments was the central holding in

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[18] *See Furman*, 408 U.S. at 239-40.

[19] *Id.*

[20] *See id.; see also* Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 15 (2002).

the brief *Furman* opinion.[21] Although *Furman* did not hold that the death penalty was unconstitutional per se, many justices recognized that the death penalty is different from any other punishment imposed under our system of criminal justice.[22] *Furman* stood for the proposition that the death penalty could not be imposed under sentencing procedures that created a "substantial risk" that the extraordinary power of the death penalty would be inflicted in an arbitrary manner.[23] Justice White concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[24] The justices in *Furman* recognized the principle that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[25] Justice Douglas, concurring in judgment in *Furman*, stated that,

> There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty. . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily" . . . "(the) extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness" . . . "Finally, there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor . . . and the members of unpopular groups."[26]

Although the Supreme Court agreed the cases violated the Eighth and Fourteenth Amendments, it could not agree on a ratio-

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[21] *Woodson*, 428 U.S. at 302 (citing *Furman,* 408 U.S., at 309-10 (Stewart, J., concurring); *id.,* at 313 (White, J., concurring); *cf. id.,* at 253-57 (Douglas, J., concurring); see also *id.,* at 398-99 (Burger, C. J., dissenting)).

[22] Gregg v. Georgia, 428 U.S. 153, 188 (1976); *see Furman*, 408 U.S. at 310-11 (White J., concurring).

[23] Gregg, 428 U.S. at 188. *See Furman*, 408 U.S. at 313 (White J., concurring).

[24] *Id.*

[25] *Id.* at 310 (Stewart, J., concurring).

[26] *Furman*, 408 U.S. at 249-50 (citing Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790, 1792 (1970); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

nale.[27] Federal and state governments were left with a splintered decision that effectively placed a moratorium on all executions of death row prisoners in the United States at the time.[28]

B. *Striking Down Mandatory Death Penalty Statutes*

Furman was not the end of the Supreme Court's death penalty jurisprudence.[29] On July 2, 1976, the Supreme Court decided two mandatory death penalty cases in *Woodson v. North Carolina* and *Roberts v. Louisiana*.[30] These decisions helped clarify the disjointed opinion in *Furman*, giving legislatures and courts alike more clarity on how to handle death penalty cases.[31]

Following the *Furman* decision, North Carolina enacted a new statute that made the death penalty mandatory for first- and second-degree murder.[32] Under this statute, petitioners in *Woodson v. North Carolina* were convicted and sentenced to death for first-degree murder stemming from an armed robbery.[33] The Supreme Court noted that the post-*Furman* enactments reflected attempts by the states to retain the death penalty in a constitutionally-accepted form, rather than a renewed societal acceptance of mandatory death sentencing.[34]

In *Woodson*, the Supreme Court made clear that, "the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense."[35] In establishing this standard, the Supreme Court held that North Carolina's mandatory death penalty statute could not comply with the Due Process Clause's requirement "that the State's power to punish be exercised within the limits of civilized standards."[36] The Supreme Court held that mandatory death penalty cases do not allow the individual character of the offender or crime-specific circum-

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27 *See* Kirchmeier, *supra* note 19, at 15.

28 *See id*.

29 *See id.*

30 *Woodson*, 428 U.S. 280 (1976); *Roberts*, 428 U.S. 325 (1976).

31 *See Woodson*, 428 U.S. at 288; *Roberts*, 428 U.S. at 333-34.

32 *See Woodson*, 428 U.S. at 286.

33 *See id.* at 284.

34 *Id.* at 298.

35 *Id.* at 301.

36 *Id.* (internal citations and quotation marks omitted).

stances to be taken into account for punishment purposes.[37] Mandatory death sentences were therefore ruled unconstitutional because they "treat[ed] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[38]

Woodson, therefore, became a crucial case as the Supreme Court noted a state's "failure to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences."[39] The Supreme Court chastised legislatures across the country, as it was "evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion."[40]

Similar to its decision in *Woodson*, the Supreme Court in *Roberts* held that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments.[41] Although Louisiana had adopted a narrower definition of first-degree murder than North Carolina had in *Woodson*, the Supreme Court held the difference was not of constitutional significance.[42] The Louisiana statute imposing mandatory death sentences was ruled invalid for substantially the same reasons as the Supreme Court detailed in *Woodson*.[43] The *Woodson* and *Roberts* decisions made clear that mandatory death sentences violated the Supreme Court's mandate in *Furman*.[44] This left state legislatures to grapple with how to implement constitutional death penalty statutes.

C. *The Reinstitution of the Death Penalty*

The Supreme Court's aversion to the death penalty did not last long.[45] In the same term as *Woodson* and *Roberts*, the Supreme Court upheld a "guided discretion" death penalty statutory structure

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[37] *See id.* at 303-04.

[38] *Woodson,* 428 U.S. at 304.

[39] *Id.* at 302.

[40] *Id.*

[41] *See Roberts*, 428 U.S. at 336.

[42] *See id.* at 332.

[43] *See id.* at 332-33.

[44] *See Woodson*, 428 U.S. at 303-04; *see also Roberts*, 428 U.S. at 334-35.

[45] *See* Raymond J. Pascucci, et al., *Special Project: Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*., 69 Cornell L. Rev. 1129, 1135 (1984).

in *Gregg v. Georgia*.[46] The Supreme Court held in *Gregg* that a carefully drafted statute that ensured the sentencing authority was given adequate information and guidance assuaged *Furman's* concerns.[47] Suggesting which system to deal with these concerns, the Supreme Court noted that, as a general proposition, "a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information" is best.[48]

II. THE FEDERAL DEATH PENALTY'S EXPANSION AND REIMPLEMENTATION

Unlike the states, the federal government had a slow response to the *Furman* decision.[49] From the *Furman* decision in 1972 until 1988, there were no constitutional federal death penalty provisions.[50] In 1988, Congress enacted statutory procedures for imposing the death penalty for certain violations of the Continuing Criminal Enterprise (CCE) statute, also known as the Super-Drug Kingpin Act.[51] However, defendants were infrequently charged under the CCE, and it did little to reinvigorate the federal death penalty.[52] Thus, the federal death penalty was not fully resumed and reinforced under the *Furman* standard until 1994 with the enactment of the FDPA,[53] which extended the federal death penalty to over forty federal offenses and generalized federal death penalty procedures.[54]

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46 *See* Rory K. Little, *Foreword: The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 374-75 (1999).

47 *Gregg*, 428 U.S. at 195.

48 *Id.*

49 *See* Little, *supra* note 45, at 385-87.

50 *See Furman,* 408 U.S. at 238; *see also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 7701, 102 Stat. 4181, 4387-95, (codified at 21 U.S.C. § 848(e)-(r)).

51 *See* Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e)-(r) (1998).

52 *See id.; see also* Little, *supra* note 45, at 349-50.

53 *See* Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 60002(a) (1994) (codified at 18 U.S.C. § 3591-99).

54 *See* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132 (1996).

A. *Expanding the Federal Death Penalty: The Federal Death Penalty Act of 1994*

1. History of the Federal Death Penalty Act

The FDPA was a source of contention within Congress, as it would implement the federal death penalty for the first time in over thirty years.[55] Although the Senate was able to pass new federal death penalty legislation post-*Furman*, the House consistently refused to act in previous Congresses.[56]

Before the enactment of the FDPA, in 1993, the House Judiciary Committee was met with strong Republican opposition in its first attempt to write a crime bill that did not address the federal death penalty.[57] As a result, in March 1994, the Judiciary Committee reported two bills, H.R. 4031 and 4035.[58] These crime bills were met with opposition.[59] Members of both parties felt the bill did not go far enough, in either direction, regarding the death penalty.[60]

The Senate had less misgivings, as it had overwhelmingly passed its own distinctive version of the bill.[61] To reach a compromise, the Racial Justice Act provisions passed by the House were eliminated on threat of a Republican filibuster in the Senate in August of 1994.[62] Given party tension, the FDPA was plainly enacted as a compromise between moderate Democrats and Republicans.[63] On September 13, 1994, the FDPA became law.[64] In 1996, Congress added another four federal offenses to the death-eligible list.[65]

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55 *See* Little, *supra* note 45, at 386-87.

56 *See id.*

57 *See id.*

58 *Id*.

59 *Id.*

60 *See, e.g.,* 140 Cong. Rec. H2601 (daily ed. April 21, 1994) at 8129-30 (Rep. Collins (D-Mich.) opposed bill because it includes death penalty and does not sufficiently address racial concerns); *see id.* at 8130 (Reps. Dolittle (R-Cal.) and Dornan (R-Cal.) opposed bill because it included the Racial Justice Act).

61 *See* Little, *supra* note 45, at 387-88.

62 *Id.*

63 *Id.*

64 *See* Federal Death Penalty Act, 18 U.S.C. § 3591-99.

65 *See* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 1286, 1292, 1296, 1330 (1996).

2. The FDPA's Areas of Expansion

The FDPA expanded the federal death penalty to over forty federal offenses.[66] Section 60003 of the FDPA also applied its new procedures to fifteen existing federal statutory sections that already contained the death penalty.[67] Alarmingly, Section 60002 of the FDPA authorized imposition of the death penalty in two new non-homicide situations: large-scale drug dealing and major "super drug kingpin" offenders who *attempt* to kill.[68] The unusualness of this provision should not be understated, as the Supreme Court had never previously approved the death penalty for a defendant who had "not take[n a] human life," after ruling the death penalty was unconstitutional for rape in *Coker v. Georgia*.[69]

3. The FDPA's Procedural Protections

The FDPA also expanded procedural protections for defendants facing possible death sentences.[70] The FDPA states that its procedures apply generally to "any offense for which a sentence of death is provided."[71] This language causes tension when addressed with the CCE, as the CCE death-eligible cases were not expressly repealed in the 1994 Act.[72] If the CCE procedures were repealed by implication, this would cause worrisome procedural concerns, as the 1988 statute included important provisions such as mandatory appointment of habeas counsel and investigative and expert services that were not replicated in the FDPA.[73] However, Congress never expressly or impliedly repealed CCE procedures.[74] This caused tension as the FDPA could be interpreted as either upholding these important protections or erasing them.[75]

The FDPA's trial-related procedures are widely familiar, and comparable to most post-*Gregg* capital punishment statutes.[76] To seek

66 *See* Federal Death Penalty Act, 18 U.S.C. § 3591-99.
67 *See* 108 Stat. 1968-70 (1994).
68 *See* Federal Death Penalty Act, 18 U.S.C. § 3591(b)(1)-(2).
69 *See* Coker v. Georgia, 433 U.S. 584, 598 (1977); *see also* Little, *supra* note 45, at 389.
70 *See* Federal Death Penalty Act, 18 U.S.C. § 3591(a) .
71 *See id.*
72 *See* Little, *supra* note 45, at 392.
73 *See* 21 U.S.C. § 848(q) (1995); Little, *supra* note 45, at 392-93.
74 *See* Little, *supra* note 45, at 392.
75 *See id.*
76 *See id.*

the death penalty within a reasonable time before trial, the government must have previously served a defendant with written notice of intent to seek the death penalty.[77] The notice must specify the aggravating factors the government will attempt to prove at sentencing to impose the death penalty and limits the government in seeking those aggravating factors only.[78] However, the notice may be amended with a showing of good cause.[79]

The FDPA's procedure requires a separate, or "bifurcated," sentencing hearing after a guilty verdict is returned.[80] This hearing typically occurs before the same jury or judge that heard the trial or "guilt-phase" evidence.[81] At the sentencing hearing, both sides are permitted to present evidence and arguments.[82] The jury typically has three basic determinations to make: (1) Whether the defendant acted with death-eligible mens rea, and, if so, (2) whether other aggravating and mitigating factors are present, and, if so, (3) whether a death sentence is "justified."[83]

4. Inadequacies of the FDPA

Although the FDPA sets standards for many portions of death penalty proceedings, the FDPA does not make judgments about when a death sentence should be sought against a federal defendant.[84] That power rests entirely with the DOJ, specifically the Attorney General.[85]

> The Attorney General's decision is informed by advice and recommendations from others within the Department, and from the United States Attorney's Office (which could even have its own internal death penalty review procedures with respect to making its initial recommendations in the case) to the Capital Case Section, to the

77 *See* Federal Death Penalty Act, 18 U.S.C. § 3593(a).

78 *See id.*

79 *See id.*

80 *See* 18 U.S.C. § 3593.

81 *See* 18 U.S.C. § 3593(b). Exceptions are made if the defendant waives a sentencing jury and the government agrees, if the parties waived a guilt jury but the defendant requests a sentencing jury, if the defendant entered a guilty plea, or if the defendant is being re-sentenced after the original jury has been dismissed. *Id*.

82 *See* 18 U.S.C. § 3593(d).

83 *See id.*

84 *See* Broughton, *supra* note 3, at 1619.

85 *See id.*

> Attorney General's Review Committee for Capital Cases, to the Office of the Deputy Attorney General and, finally, to the Office of the Attorney General.[86]

The FDPA notably lacks any requirement that the Attorney General abide by or comply with these recommendations.[87]

The FDPA also does not provide any specific requirements as to how the death penalty sentence should be implemented.[88] Section 3596 governs the general implementation of the death penalty and sets forth minimal "guidelines" for the enforcement of death sentences.[89] This section of the FDPA is incredibly bare—it merely provides that a defendant found guilty and sentenced to death must be committed to the custody of the Attorney General until the exhaustion of their appeal process.[90] If the defendant does not challenge, or does not prevail in staying, the execution of a death sentence, the defendant is released into the custody of the United States Marshal Service.[91] A United States Marshal implements the sentence in the manner prescribed by the law of the state in which the sentence is imposed, or, if the state has no death penalty system, the appropriate court designates another state.[92] In doing so, Section 3596 of the FDPA leaves all execution powers to the United States Marshal Service.[93] The FDPA has no further mandates to ensure executions are followed under due process standards.[94]

5. Recent Litigation Involving the FDPA

There has yet to be a successful challenge to Section 3596(a) of the FDPA.[95] The Fifth Circuit held that Mr. Alfred Bourgeois, a federal death row inmate with a looming execution date, failed to successfully argue that the district court erred in delegating power to the Director of the Federal Bureau of Prisons (BOP) to determine the

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86 *Id.*
87 *See id.*
88 *Cf.* Federal Death Penalty Act, 18 U.S.C. § 3591-99.
89 *See* 18 U.S.C. § 3596.
90 *See* 18 U.S.C. § 3596(a).
91 *Id.*
92 *Id.*
93 *See* 18 U.S.C. § 3596.
94 *See id.*
95 *See, e.g.,* United States v. Bourgeois, 423 F.3d 501 (5th Cir. 2005).

time, place, and manner to carry out federal executions.[96] Mr. Bourgeois' challenge was that Congress did not delegate any power to the judicial branch to make such determinations, because the FDPA expressly delegated this power to the Executive Branch.[97] The Fifth Circuit held that the district court simply acknowledged that Congress had validly delegated requisite authority to the DOJ, of which the BOP was an agency.[98] In doing so, the Fifth Circuit held that the district court did not act inconsistently with state law nor was there any information to suggest that the Director of BOP was not the equivalent of Attorney General, DOJ, or a state equivalent.[99] Therefore, there was nothing to indicate that that difference affected the defendant's substantial rights.[100] More importantly, there has yet to be a challenge directed at whether the Attorney General, or an equivalent Director, applies arbitrary discretion in seeking the implementation of death sentences.[101]

All defendants named in the June 2019 DOJ Press release, with the exception of Lezmond Mitchell, filed complaints against the DOJ and BOP alleging that the 2019 Protocol commenced by the DOJ is unconstitutional.[102] The death row inmates argue that the 2019 Protocol exceeds statutory authority under the Administrative Procedure Act by establishing a single procedure for all federal executions rather than applying the FDPA's state-prescribed procedure, and accord-

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96 *Id.* at 509-10.

97 *Id.*

98 *Id.*

99 *Id.* (Holding that "the only difference between the Texas law and the district court's acknowledgment is that the district court recognized Congress's delegation to the Department of Justice when the court turned over Bourgeois to the Director of the Federal Bureau of Prisons and not to the Director of the Institutional Division of the Texas Department of Criminal Justice. There is nothing before us, however, to suggest that the Director of the Federal Bureau of Prisons is not the equivalent of (1) the Attorney General, (2) the Department of Justice, or (3) the Director of the Institutional Division of the Texas Department of Criminal Justice. Therefore, even if the district court's purported 'delegation' of power to the Director of the Federal Bureau of Prisons were error (which it was not), such error would not have been plain.")

100 *Id.* at 510.

101 *Cf. Bourgeois,* 423 F.3d 501 (5th Cir. 2005); Jackson v. United States, 638 F. Supp. 2d 514 (W.D.N.C. 2009); United States v. Fell, No. 5:01-cr-12-01, 2016 U.S. Dist. LEXIS 51340 (D. Vt. Apr. 18, 2016).

102 In re Fed. Bureau of Prisons' Execution Protocol Cases v. Barr This Document Relates, 2019 U.S. Dist. LEXIS 213130, 2019 WL 6691814 (D.D.C. Nov. 20, 2019). *See also* Mitchell v. United States, No. 18-17031, 2019 U.S. App. LEXIS 29975 (9th Cir. Oct. 4, 2019). Lezmond Mitchell's execution was stayed on separate grounds than the rest of the defendants currently facing federal executions. *Id*. Mitchell's appeal seeks to reopen a prior motion to investigate whether jurors were biased against him because he is a member of the Navajo Nation. *Id.*

ingly, must be invalidated.[103] The district court found that the inmates are likely to succeed on the merits of this claim, as the FDPA expressly requires the federal government to implement executions in a manner prescribed "by the state of conviction."[104] Therefore, the FDPA expressly gives authority regarding the "implementation" of death sentences to the states, not the federal government, and the 2019 Protocol "very likely exceeds the authority provided by the FDPA."[105] The court accordingly ordered a stay of execution for Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Ira Purkey.[106]

Following this decision, the DOJ filed an emergency application in the United States Court of Appeals for the District of Columbia Circuit requesting that the court vacate or stay enforcement of the injunction.[107] The court unanimously denied the preliminary injunction, stating that the DOJ had not "satisfied the stringent requirements for a stay pending appeal."[108] The DOJ appealed this decision to the Supreme Court.[109] The Supreme Court allowed the court of appeals order to stand in a short, unsigned order.[110] Even conservative, pro-death penalty Justice Alito stated, "in light of what is at stake, it would be preferable for the district court's decision to be reviewed on the merits" by the D.C. Circuit prior to the defendants' executions.[111]

The D.C. District Court issued a subsequent second preliminary injunction on July 13, 2020.[112] The injunction temporarily halted the executions of Daniel Lee, Wesley Purkey, Dustin Honken, and Keith Nelson, finding that on the limited record then before it, the prisoners had demonstrated a substantial likelihood that they will succeed in their claim that executing them with pentobarbital violates the Eighth

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103 *In re Fed. Bureau of Prisons' Execution Protocol Cases*, at *14-15.

104 *Id*.

105 *Id*. at *16.

106 *Id*. at *26.

107 *See* Roane v. Barr, 2019 U.S. App. LEXIS 39259, *3 (D.C. Cir. Dec. 2, 2019).

108 *Id.*

109 *See* Amy Howe, *Justices refuse to allow federal government to carry out executions for now*, SCOTUSBLOG (Dec. 6, 2019, 8:15 PM), https://www.scotusblog.com/2019/12/justices-refuse-to-allow-federal-government-to-carry-out-executions-for-now/.

110 *Id*.; *see also* Barr v. Roane, 140 S. Ct. 353 (Dec. 6, 2019) (order denying the application for vacatur).

111 *Id.*

112 ECF No. 135, Mem. Op. (2020 Order) *available at* https://files.deathpenaltyinfo.org/documents/Execution-Protocol-Preliminary-Injunction-DDC-2020-07-13.pdf.

Amendment's prohibition against cruel and unusual punishments.[113] The D.C. Circuit Court denied a motion filed by federal prosecutors to stay enforcement of the district court injunction later that same day.[114] The Supreme Court, following rare overnight emergency litigation, granted the federal prosecutors' motion to vacate the second district court injunction, allowing Daniel Lee to be executed that day.[115]

III. DUE PROCESS AND THE DEATH PENALTY

A. *Due Process' Promise of Protection*

The Constitution states only one "command" twice, and this command is due process.[116] Due process protects every criminal defendant, no matter how "horrific" their crimes, with equal protection of the laws.[117] Due process ensures that, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . *nor be deprived of life, liberty, or property, without Due Process of law.*"[118]

B. *Evaluating Due Process Challenges to the Federal Death Penalty*

Prior to *Furman*, the Due Process Clause was applied in capital cases because of the Supreme Court's refusal to entertain Eighth Amendment challenges.[119] The Supreme Court's application of the Due Process Clause in early cases such as *Furman, Woodson,* and *Roberts* was limited to using the Due Process Clause of the Fourteenth Amendment to apply the Eighth Amendment's Cruel and Unusual Punishment Clause to the states.[120] From these earlier cases, the Supreme Court has expanded the Due Process Clause to extend to procedural errors and other constitutional violations, including the prevention of capital defendants from confronting, denying, or

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113 *Id.* at 22.

114 *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5199 (D.C. Cir. July 13, 2020).

115 Barr v. Lee, No. 20A8, 2020 U.S. LEXIS 3571, 2020 WL 3964985 (July 14, 2020).

116 *See* U.S. CONST. amends. V, XIV.

117 *See, e.g.,* Herman, *supra* note 8, at 1883 (". . .the flexible Due Process Clause that is specially attuned to the interest at issue during capital proceedings – the individual defendant's life – and protects that interest from excessive legislative and executive authority").

118 *See* U.S. CONST. amend. V (emphasis added).

119 *See* Herman, *supra* note 8, at 1822.

120 *See id.* at 1822-23.

explaining information presented by the prosecution or considered by the judge.[121] The seminal case on this area of expansion is *Gardner v. Florida*.[122]

In *Gardner*, a jury found that mitigating evidence outweighed aggravating evidence and suggested life imprisonment instead of the death penalty.[123] However, the trial judge, relying on information from a confidential presentence investigation, overrode the jury and sentenced the defendant to death.[124] The Supreme Court held that the "petitioner was denied Due Process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[125] The Supreme Court emphasized that procedural due process concerns were of the utmost importance in concluding that "the procedure d[id] not satisfy the constitutional command that no person shall be deprived of life without Due Process of law."[126] The due process violation was intolerable, as it reduced the reliability of trial.[127] *Gardner* established a new role for due process in capital cases by blending Eighth Amendment and due process concerns for both heightened reliability and procedural fairness.[128]

The Eighth Amendment is not the exclusive means of challenging a death penalty statute when coupled with the Due Process Clause.[129] In *Ring v. Arizona*, the Supreme Court held that Arizona's death penalty statute violated the Sixth Amendment and Due Process Clause.[130] The law overturned in *Ring* required the finding of at least one aggravating factor before the death penalty could be imposed.[131] This law allowed a judge, sitting alone, to find that factor and subsequently impose the death penalty.[132] Justice Scalia's concurrence emphasized

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121 *See id.* at 1823.

122 *See id.*; *see also* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding that the trial court, when excluding relevant mitigating evidence, "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender").

123 Gardner v. Florida, 430 U.S. 349, 352-53 (1977).

124 *Id.* at 362.

125 *Id.*

126 *See id.* at 351.

127 *See* Herman, *supra* note 8, at 1823-24.

128 *Id.* at 1824.

129 *See id.* at 1797-98.

130 *See* Ring v. Arizona, 536 U.S. 584, 606-09 (2002).

131 *See id.* at 593.

132 *See id.* at 592.

that it is possible to successfully challenge the death penalty without utilizing the Eighth Amendment.[133] Justice Scalia argued that the Eighth Amendment was not relevant as it did not mandate jury sentencing.[134]

Successful due process challenges are not limited to those involving the ability to present specific information at trial.[135] In *Lankford v. Idaho*, the state failed to give proper notice to the defendant, resulting in a due process violation and the Court vacated the death sentence.[136] In *Presnell v. Georgia*, the Supreme Court vacated a death sentence when the sentence was based on underlying charges upon which the jury had improperly convicted the defendant.[137] In *Green v. Georgia*, the trial judge violated the defendant's due process when he excluded exculpatory hearsay evidence that would have established the defendant's innocence.[138] In *Morgan v. Illinois*, the Court vacated a defendant's death sentence on due process grounds because the trial judge prevented the defense from *voir dire* questioning of whether the jury would impose the death penalty regardless of the facts of the case.[139]

Defendants challenging their death sentence solely on Eighth Amendment grounds fail when their arguments are based on the FDPA's potentially arbitrary application.[140] The government's decision to seek the death penalty is within a prosecutor's discretion and that decision will not be disturbed unless a defendant provides evidence that it was based on arbitrary classification of an unjustifiable factor, such as race or religion.[141] A defendant only has the constitutional right to a proportionality review that compares the prosecutorial decision to seek death penalty in his case to others indicted of the same crime if an unjustifiable factor is shown.[142] Consequentially, even when a defendant demonstrates that an unjustifi-

133 *See* Herman, *supra* note 8, at 1798.

134 *See Ring*, 536 U.S. at 612-13 (Scalia, J., concurring).

135 *See, e.g.,* Morgan v. Illinois, 504 U.S. 719, 728-29 (1992); Lankford v. Idaho, 500 U.S. 110, 126-27 (1991); Green v. Georgia, 442 U.S. 95, 97 (1979); Presnell v. Georgia, 439 U.S. 14, 15-16 (1978).

136 *See Lankford*, 500 U.S. at 126.

137 *See Presnell*, 439 U.S. at 15-16.

138 *See Green*, 442 U.S. at 97.

139 *See Morgan*, 504 U.S. at 728-29.

140 *See, e.g.,* United States v. Regan, 221 F. Supp. 2d 661, 662 (E.D. Va. 2002).

141 *Id.*

142 *See id.*

able factor has been used in his case, he is only entitled to a proportionality review—despite demonstrating the death penalty has been sought *unjustifiably.*[143] This is despite the Supreme Court's emphasis that the Equal Protection Clause of the Fifth Amendment's Due Process Clause demands that a prosecutorial decision cannot be based on an impermissible factor such as race, religion, or any arbitrary classification.[144] This discrepancy causes tension and has the potential to result in a successful challenge utilizing the Eighth Amendment and Due Process Clause, as in *Furman*.[145]

Each of these cases demonstrate that the Due Process Clause can be successfully used to challenge death sentences.[146] These cases also show the limits of the applicability of the clause.[147] The Supreme Court has never declared an entire capital punishment statute unconstitutional solely on due process grounds.[148] The death penalty is not per se unconstitutional, and invalidating statutes and declaring classes of people ineligible for the death penalty is still under province of the Eighth Amendment.[149] Although due process challenges in the capital context is limited, "Due Process imports the central tenets of the Eighth Amendment, namely the concern for heightened reliability in capital sentencing and the evolving standards analysis."[150]

IV. THE CURRENT FEDERAL DEATH PENALTY AND DEATH ROW

A. *The Department of Justice's 2019 Announcement*

The DOJ announced on July 25, 2019 that the federal government was to resume capital punishment after an almost twenty-year hiatus.[151] The DOJ made clear in its announcement that it is, "bringing justice to victims of the most horrific crimes . . . the most vulnera-

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143 *See, e.g., id.*

144 *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); *see also* United States v. Hastings, 126 F.3d 310, 313 (4th Cir. 1997).

145 *See, e.g., Furman,* 408 U.S. at 239.

146 *See* Herman, *supra* note 8, at 1826.

147 *See id.*

148 *See id.* at 1826-27.

149 *See id.*at 1827.

150 *Id.*

151 *See* July 25, 2019 Press Release, *supra* note 1.

ble in our society—children and the elderly."[152] In doing so, the DOJ set the execution dates for five men.[153]

B. *Composition of the Current Federal Death Row*

There are currently fifty-nine individuals on "active" federal death row.[154] While some crimes overlap, the decedent's relationship to the defendant is used as the main identifier.[155] Five of the individuals on federal death row committed mass crimes against others, such as acts of terrorism or serial killings.[156] Nine are incarcerated for committing homicides against vulnerable populations, such as the elderly, children, or students.[157] The three most recently executed men were defendants in this category.[158] Eight committed crimes against rival narcotic syndicates or committed homicides related to or involving narcotics.[159] Six committed homicides against police officers, service members, correctional officers, or federal employees.[160] Two committed homicides against witnesses in their cases.[161] Nine committed homicides against fellow inmates while already incarcerated.[162] Two committed homicides against others while attempting to escape custody.[163] Five committed homicides in the course of a bank robbery.[164]

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152 *See id.*

153 *See id.*

154 *See* List of Federal Death-Row Prisoners, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (While there are technically 59 men currently on death row, one man's death sentence reversal is still subject to possible appeal.) (last visited August 16, 2020) [hereinafter List of Federal Death-Row Prisoners].

155 For example, Kenneth Barret was convicted and sentenced to death for the fatal shooting of a state police officer who was serving a "no-knock" warrant on his house for suspected drug activity. Although this crime technically involved or related to narcotics, the decedent's relationship to the defendant was categorized under "police officer." *Id.*

156 *See id.* (Dustin Higgs, Jurijus Kadamovas, Iouri Mikhel, Dylann Roof, and Dzhokhar Tsamaev).

157 *Id.* (Alfred Bourgeois, Joseph Duncan, Lezmond Mitchell, Lisa Montgomery, Keith D. Nelson, Alfonso Rodriguez, Jr., Ricardo Sanchez, Jr., Thomas Sanders, and Daniel Troya).

158 *Id.*

159 *Id.* (Thomas Hager, Orlando Hall, Corey Johnson, Kenneth Lighty, James Roane, Jr., Julius Robinson, Kaboni Savage, and Richard Tipton).

160 *Id.* (Kenneth Eugene Barrett, Anthony Battle, Meier Jason Brown, Daryl Lawrence, David Runyan, and Jorge Torrez).

161 List of Federal Death-Row Prisoners, *supra* note 154. (Len Davis and Ronald Mikos).

162 *Id.* (Shannon Agofsky, Carlos Caro, Wesley Coonce, Christopher Cramer, Joseph Ebron, Ricky Fackrell, Edgar Garcia, Charles Hall, and Mark Snarr).

163 *Id.* (Brandon Basham and Chadrick Fulks).

Two committed homicides against their current or previous intimate partners.[165] Five committed homicides in the course of a carjacking.[166] Five committed miscellaneous "general" homicides on federal land, typically while in commission of a separate felony.[167]

C. *An Unequal Partnership: The Current Federal Death Row Compared to Uniform Crime Reporting Statistics*

The Uniform Crime Reporting (UCR) data collected by the FBI demonstrates that the federal death penalty is sought more often in low frequency crimes.[168] The UCR statistics contain flaws, such as data that has been classified as "indeterminate" as related to both circumstances and decedent-defendant relationships.[169] Setting aside these flaws, the available data shows clear discrepancies when compared to the defendants currently on death row.[170]

According to UCR, "institutional killings" have accounted for less than one percent, or 192, homicides in the United States over the past ten years.[171] Roughly fifteen percent of federal death row consists of defendants who have committed institutional killings.[172] Similarly, homicides involving "motor vehicle thefts" have accounted for 327 homicides, less than one percent of total homicides, whereas roughly eight percent, or five of fifty-nine inmates, of federal death row committed a homicide in the course of a carjacking.[173] UCR data also demonstrates that 4,383 killings, or roughly three percent, are related to narcotics over the past ten years.[174] Incorporating "gan-

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164 *Id.* (Billie Jerome Allen, Robert Bolden, Odell Corley (Nasih Ra'id), Brandon Council, and Norris Holder).

165 *Id.* (Marcivicci Aquilia Barnette & Sherman Lamont Fields).

166 *Id.* (Brandon Bernard, William LeCroy, Jr., Gary Sampson, Rejon Taylor, and Christopher Vialva).

167 List of Federal Death-Row Prisoners, *supra* note 154. (Edward Fields, Marvin Gabrion, Richard Allen Jackson, Jeffery Williams Paul, and Alejandro Umana).

168 *See Crime Reporter Explorer*, FEDERAL BUREAU OF INVESTIGATION (Oct. 27, 2019, 12:44 PM) https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/shr. (All United States Data from the previous 10 years).

169 *Id.*

170 *Compare Crime Reporter Explorer*, *supra* note 167, *with* List of Federal Death Row Prisoners, *supra* note 154.

171 *Crime Reporter Explorer*, *supra* note 167.

172 List of Federal Death Row Prisoners, *supra* note 154.

173 *Compare Crime Reporter Explorer*, *supra* note 167, *with* List of Federal Death Row Prisoners, *supra* note 154.

174 *See Crime Reporter Explorer, supra* note 167.

gland killings," which could potentially be drug-related, would raise the number of killings to 6,617, or roughly five percent.[175] Roughly fourteen percent, or eight of fifty-nine inmates on federal death row are incarcerated for drug-related killings.[176]

D. *Arbitrary: Where Co-Defendants and Those with Similar Crimes Are Not Facing Death*

Of the fifty-nine defendants currently on federal death row, fourteen have co-defendants who did not receive a death sentence.[177] There are cases such as David Runyon's in which the prosecutor chose not to seek the death penalty for the co-defendants.[178] Runyon was convicted, along with Catherina Voss and Michael Draven, in a murder-for-hire plot organized by Voss and Draven to kill Voss' husband.[179] Voss hoped to gain her husband's Navy benefits and life insurance proceeds in lieu of a divorce to be with Draven, Voss' extramarital boyfriend.[180] Runyon and Draven were both involved in the shooting death of Voss' husband.[181] Voss pleaded guilty and was sentenced to life imprisonment, and Draven was tried as a co-defendant with Runyon.[182] However, the government chose not to pursue the death penalty against Draven, despite all parties sharing eligibility under the same aggravating factors.[183]

There are far more defendants on federal death row that have remarkably similar crimes to those who are not on death row.[184] Lezmond Mitchell is one of the defendants scheduled to be executed in the upcoming months.[185] Along with three co-defendants, Mitchell

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175 *Id.* (2,234 deaths are categorized as "gangland killings," "juvenile gangland killings" are omitted given juveniles are ineligible for the death penalty).

176 List of Federal Death Row Prisoners, *supra* note 154.

177 *Id.* (Robert Bolden, Odell Corley, Len Davis, Joseph Ebron, Sherman Fields, Thomas Hager, Dustin Higgs, Dustin Honken, Daniel Lee, Kenneth Lighty, Lezmond Mitchell, Julius Robinson, David Runyon, Kaboni Savage, Rejon Taylor, and Alejandro Umana).

178 United States v. Runyon, 707 F.3d 475, 485 (4th Cir. 2013).

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id*.

183 *Id*.

184 *Compare* Mitchell v. United States, No. 18-17031, 2019 U.S. App. LEXIS 29975 (9th Cir. Oct. 4, 2019), *with* United States v. Bullcoming, No. CR-18-86-G, 2019 U.S. Dist. LEXIS 172300 (W.D. Okla. Oct. 3, 2019).

185 July 25, 2019 Press Release, *supra* note 1.

carjacked an older woman on tribal land, stabbed her and then had her nine-year-old granddaughter sit beside her body for a thirty to forty mile drive.[186] Mitchell then slit the young girl's throat twice and severed and buried both victims' heads and hands.[187] Mr. Mitchell was only twenty years old at the time and had no criminal history.[188] Mitchell was sentenced to death whereas his co-defendants were not deemed to be death-eligible.[189] Eerily similar to the case of Mitchell is the case of Tommy Dean Bullcoming.[190] Bullcoming beat his ex-girlfriend, Zotigh, in her home, bound her with duct tape, stole her vehicle, and drove her to a field on tribal land.[191] Bullcoming then made Zotigh walk fifty yards from the road, where he stabbed her almost fifty times and then slit her throat.[192] Bullcoming then returned to Zotigh's home, which he set on fire.[193] Bullcoming was arrested after failing to appear on a charge of trafficking in controlled dangerous substances.[194] However, unlike in Mitchell's case, prosecutors did not seek the death penalty in Bullcoming's case.[195]

ANALYSIS

I. FDPA SILENCE FUELS ARBITRARY SELECTION OF DEATH-ELIGIBLE CASES

The FDPA does not make conclusions about when a death sentence should be sought against a federal defendant.[196] That power

186 *See id.*; *see also* Nicolas Bogel-Burroughs, *These Are the 5 Men the Federal Government Plans to Execute*, N.Y. TIMES (July 25, 2019).

187 *See* July 25, 2019 Press Release, *supra* note 1.

188 *See* Christie Thompson, *The Navajo Nation Opposed His Execution. The U.S. Plans to Do It Anyway.*, THE MARSHALL PROJECT (Aug. 17, 2019, 6:00 AM), https://www.themarshallproject.org/2019/09/17/the-navajo-nation-opposed-his-execution-the-u-s-plans-to-do-it-anyway.

189 *See id.*

190 *Compare Mitchell*, 2019 U.S. App. LEXIS 29975 *with*, Press Release, U.S. Dep't of Justice, Jury Returns Conviction for Murder in Indian Country (Nov. 22, 2019), https://www.justice.gov/usao-wdok/pr/jury-returns-conviction-murder-indian-country [hereinafter Nov. 22, 2019 Press Release].

191 Nov. 22, 2019 Press Release, *supra* note 189.

192 *Id*.

193 *Id*.

194 *Id.*

195 *See id.*

196 *See, e.g.,* Broughton, *supra* note 3, at 1619.

rests entirely with the DOJ, specifically the Attorney General.[197] The Attorney General's decision is informed by advice from numerous offices and committees, and although this seems like sufficient protection, there is no guarantee the Attorney General adheres to the advice he receives.[198]

In the DOJ's efforts to "bring justice to the most vulnerable of populations," it breaks its vows to protect defendants' rights—it breaks one of the Constitution's most important commands, the Due Process Clause.[199] The Due Process Clause explicitly mentions "capital crime," meaning that even death-eligible defendants must be given equal protection under our nation's laws.[200] Instead, under the FDPA, the Attorney General can utilize precipitous discretion in seeking the death penalty.[201] While the FDPA mandates some procedural safeguards, there are no requirements that the death penalty be sought proportionally amongst aggravating factors or common underlying crimes, such as rape, robbery, and drug trafficking.[202] The Due Process Clause acts as a safeguard against the arbitrary deprivation of life, and the clause should protect against the arbitrary selection of death-eligible defendants.[203] However, under the FDPA, arbitrary selection remains unchecked.

A. *Disparate Data on Federal Death Row*

Even with the limited data that the UCR contains, there is a shocking disparity when one compares this data to the defendants on federal death row.[204] The federal death penalty is arbitrarily and discriminatorily implemented depending on the underlying felonious act, particularly the defendant's relationship to the decedent, when compared to UCR statistics.[205] For example, "institutional killings" account for less than one percent of total homicides, amounting to only 192 in 129,209 homicides in the United States from 2008 to

197 *See id.*
198 *See id.*
199 *See* July 25, 2019 Press Release, *supra* note 1.
200 U.S. CONST. amend. V.
201 *See* Federal Death Penalty Act, 18 U.S.C. § 3591-99.
202 *See id.*
203 *See* U.S. CONST. amend. V.
204 *Compare Crime Reporter Explorer*, *supra* note 167, *with* List of Federal Death Row Prisoners, *supra* note 154.
205 *See id.*

2018.[206] However, nine of the fifty-nine individuals on death row were convicted for institutional homicides committed against their fellow inmates while already incarcerated.[207] Thus, fifteen percent of the federal death row was convicted for institutional homicides despite these homicides consisting of less than one percent of total homicides in the United States.[208] Furthermore, any argument that these inmates demonstrate a higher risk of violence and are therefore more "worthy" of a death sentence is statistically unfounded and is, therefore, not a compelling counterargument supporting the disproportionate institutional-homicide defendants on federal death row.[209]

The available data is far from perfect, but it is an intriguing start that deserves further exploration. Although there is an argument to be made that the crimes society perceives as the "most serious" crimes, such as terrorism, occur with less frequency, the Attorney General has yet to explain or defend why there is such a disproportionate focus on homicides with certain aggravating factors currently on death row, such as those involving institutional violence, drug-related homicides, and carjackings.[210] These infrequent crimes do not fit the same prosecutorial motivation as crimes that the public would consider the "most serious." In fact, institutional violence does not pose any danger to the public the way many other violent crimes do, as all institutional violence is contained within prison walls.

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206 *See Crime Reporter Explorer*, *supra* note 167.

207 List of Federal Death Row Prisoners, *supra* note 154.

208 *Compare Crime Reporter Explorer*, *supra* note 167, *with* List of Federal Death Row Prisoners, *supra* note 154.

209 *See* Mark D. Cunningham & Mark P. Vingen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of Literature*, 20 BEHAV. SCI. L. 191, 203 (2002) ("An expectation then that death row inmates will invariably commit assaults in prison because they have 'nothing to lose' appears to be unfounded. . . Specifically, Sorensen and Wrinkle (1996) found that 80% of Missouri murderers committed no acts of violence across 15 years of prison follow-up regardless of whether they were sentenced to death, life with-parole, or life-without-parole. . . The cumulative 15-year prevalence rate of inmate-on-inmate murder/manslaughter was 1.2%, and again did not significantly differ for the three groups. Institutional homicidal violence characterizes a very small fraction of the death row population (.012) and incarcerated murderers (.002), though these rates are higher than those observed in the general inmate population. There is additional support for the hypothesis that the majority of death row inmates do not exhibit serious violence within the structured context of institutional confinement. Briefly, a number of studies have followed the violence rates of former death row inmates in the general prison population after their death sentences were vacated by commutation or other relief. The findings of these studies are remarkably consistent, even across varying historical periods and jurisdictions.") (internal citations omitted).

210 *Compare Crime Reporter Explorer*, *supra* note 167, *with* List of Federal Death Row Prisoners, *supra* note 154.

B. *Equal Culpability, Arbitrary Punishment*

Defendants are often left without an explanation as to why they are selected to be tried under the FDPA.[211] Although defendants are given notice of the government's intent to seek the death penalty as well as the aggravating factors present in their case, this does not always protect defendants from arbitrary selection of death-eligibility.[212] Defendants like David Runyon, who have equally *culpable* co-defendants, often do not have equally *punished* co-defendants.[213] In Runyon's case, the government based its decision to seek the death penalty on two aggravating factors.[214] The first aggravating factor was that the offense was committed as consideration for the "receipt, or in the expectation of the receipt, of anything of pecuniary value."[215] The second aggravating factor was that the offense was "committed after substantial planning and premeditation."[216] Given the facts of the case, both Voss and Draven would have also been eligible for the death penalty under these aggravating factors, but the prosecutor decided only to seek the death penalty in Runyon's case.[217] When looking at multiple defendants, all of whom satisfy the same aggravating factors, there is no reason as to why one defendant should be death-eligible and the others not.[218]

The arbitrariness in seeking death sentences is further illuminated when comparing homicides that have nearly identical circumstances but result in different prosecutorial-driven punishments.[219] The cases of Lezmond Mitchell and Tommy Dean Bullcoming are shockingly similar; both men committed violent carjackings and stabbings on tribal land that were followed by additional violence and destruction.[220] Mitchell did kill two individuals, however, he had no criminal history and committed the crime along with co-defendants, none of whom

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211 *See, e.g., Runyon,* 707 F.3d at 485.

212 *See* 18 U.S.C. § 3593.

213 *See, e.g., Runyon,* 707 F.3d at 485.

214 *Id*. at 486-87.

215 *Id*.

216 *Id*.

217 *Id.*; *see also* United States v. Draven, 417 F. App'x 363 (4th Cir. 2011) (reasoning that after the murder, Draven "shared Catherina's final reward received by virtue of a death benefit.").

218 *Cf. Runyon,* 707 F.3d at 486-87.

219 *Compare Mitchell*, 2019 U.S. App. LEXIS 29975, at *2, *with* Nov. 22, 2019 Press Release, *supra* note 189.

220 *See id.*

received the death penalty.[221] Bullcoming was awaiting trial for another felony charge at the time of the homicide and acted alone.[222] Prosecutors sought the death sentence against Mitchell, a young man who shared culpability in the crime with others, and did not seek death against Bullcoming, a man with a demonstrated criminal background and full culpability.[223] One could argue that Bullcoming met more aggravating factors to be death-eligible than Mitchell, but prosecutors chose not to seek a death sentence in Bullcoming's case.[224] Even the most similar of crimes can result in dissimilar sentences due to the arbitrary nature in which prosecutors choose to seek death sentences.[225] This results in an arbitrary deprivation of life and liberty, thereby shattering due process protections.[226]

II. THE CURRENT FEDERAL EXECUTION PROCESS VIOLATES DUE PROCESS BECAUSE DEFENDANTS ARE SELECTED DISCRIMINATORILY FOR EXECUTION BY THE ATTORNEY GENERAL

When a defendant is facing execution, due process protections are not abandoned.[227] The current method that the Attorney General employs in seeking executions on federal death row is a violation of due process because the FDPA lacks thorough procedural protections for executions. This violation occurs because the Attorney General is arbitrarily selecting to execute men who have committed homicides under one aggravating factor—the vulnerability of the victim[228]—rather than executing the men in order that they arrived on federal death row after their respective appeals have been exhausted.[229] The

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221 *See* Bogel-Burroughs, *supra* note 185.

222 *See* Nov. 22, 2019 Press Release, *supra* note 189.

223 *Compare Mitchell*, 2019 U.S. App. LEXIS 29975, *with* Nov. 22, 2019 Press Release, *supra* note 189.

224 In addition to shared aggravating factors, Bullcoming also likely satisfies the requirements for "conviction for serious federal drug offenses" as well as "substantial planning and premeditation." *See* 18 U.S.C. § 3592(c). Furthermore, Bullcoming has no mitigating factors, whereas Mitchell had no prior criminal record and equally culpable defendants. *See* 18 U.S.C. § 3592(a).

225 *See id.*

226 *See* U.S. CONST. amend. V.

227 *See id.*

228 *See* July 25, 2019 Press Release, *supra* note 1.

229 *See* 28 C.F.R. § 26.2(a) ("[T]he attorney for the government shall *promptly* file with the sentencing court a proposed Judgment and Order) (emphasis added); *See also* 28 C.F.R. § 26.3

date of execution should be appropriately matched with a defendant's sentencing date after all appeals have been exhausted, not with the will of the Attorney General.[230] However, the Attorney General has provided no *legal* explanation as to why he wants to execute only inmates whose crimes contain this aggravating factor, when there are numerous other men on death row who were sentenced prior to the defendants named for execution.[231]

While the vulnerability of the victim can be considered as an aggravating factor during the trial process under the FDPA, the FDPA does not explicitly permit the consideration of aggravating factors when implementing the execution of a defendant.[232] The FDPA's failure to set forth detailed execution procedures allows the Attorney General to select death row defendants at his will for execution.[233]

It is likely that given the recent tumultuous litigation surrounding the federal death row inmates currently scheduled for execution, the Attorney General's ability to discriminatorily select inmates for execution is an unconstitutional delegation of power.[234] The FDPA explicitly conditions that *states*, not the federal government, have the authority to establish an execution procedure.[235] The current litigation also illuminates a glaring problem with the FDPA—it lacks enforcement standards for the executions themselves.[236] Therefore, if the current litigation results in a favorable disposition for the government, inmates will have little to no guaranteed protections for the execution process as none are federally codified.[237]

("On a date and at a time designated by the Director of the Federal Bureau of Prisons, which date shall be no sooner than 60 days from the entry of the judgment of death. If the date designated for execution passes by reason of a stay of execution, then a new date shall be designated *promptly* by the Director of the Federal Bureau of Prisons when the stay is lifted") (emphasis added).

230 28 C.F.R § 26.3(a)(1).

231 *Cf.* July 25, 2019 Press Release, *supra* note 1.

232 *Cf.* 18 U.S.C. §?3592(c)(11).

233 *Cf.* 18 U.S.C. § 3591-99; *see also* July 25, 2019 Press Release, *supra* note 1.

234 *See, e.g., In re Fed. Bureau of Prisons' Execution Protocol Cases*, 2019 U.S. Dist. LEXIS 213130 at *15-16.

235 *Id*.

236 *See, e.g.,* Broughton, *supra* note 3, at 1619.

237 *See id*.

III. REVISITING THE DICTA IN *FURMAN*, THE RIGHT CASE AT THE RIGHT TIME

Justice Douglas, concurring in judgment in *Furman*, stated that, "the extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness . . . there is evidence that the imposition of the death sentence . . . follow[s] discriminatory patterns. The death sentence is disproportionately imposed and carried out . . . [on] members of unpopular groups."[238] Although Justice Douglas's thoughts in *Furman* were not central to the holding of the case, they are central to the fight against the death penalty, as the Constitutional demand of the Due Process' Equal Protection Clause has grown increasingly important in death penalty litigation.[239]

Given the current issues plaguing the federal death penalty, there should be a moratorium put in place, like the moratorium in place after *Furman*.[240] This moratorium should remain in place until Congress can amend the FDPA to give clear guidelines for both when the death penalty is sought and how the executions should be authorized. Unfortunately, unless another case like *Furman* arises, Congressional action is doubtful.

The Supreme Court needs to grant certiorari in a case where the defendant was targeted for execution because of an overrepresented-aggravating factor. This is crucial in ensuring the sanctity of human life and upholding due process. It will ensure a reasonable review of the Attorney General's decision to discriminatorily seek the death penalty based off a handful of arbitrary aggravating factors, such as the vulnerability of the victim, and whether the FDPA's failure to lay out explicit enforcement guidelines for executions violates due process. If one of the men currently scheduled for an execution had the

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238 *Furman*, 408 U.S. at 249-50 (J. Douglas, concurring) (citing Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790, 1792; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, The Challenge of Crime in a Free Society 143 (1967)) (internal citations omitted).

239 *See, e.g., Woodson*, 428 U.S. 280 (1976); *Roberts*, 428 U.S. 325 (1976). The Fifth Amendment contains no equal protection clause; however, the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to run against the federal government through the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (maintaining that the holding of Brown v. Board of Education, 347 U.S. 483 (1954), was enforceable against schools run by the federal government in the District of Columbia through the operation of the Fifth Amendment's Due Process Clause).

240 *See* Kirchmeier, *supra* note 19, at 15.

ability to appeal on these grounds, the Supreme Court would be able analyze due process under two separate arguments. First, the defendant could argue that the victim vulnerability aggravating factor is overrepresented on federal death row, thereby showing it is discriminatorily sought. Second, the defendant could argue that the execution itself is a violation of due process because the Attorney General has unbridled discretion in selecting which men will be executed.

Regardless of whether a person supports or opposes the death penalty, the FDPA needs to be amended to ensure it complies with the Constitution's Due Process command. The FDPA was first enacted under political compromise, potentially leading to some of the Act's downfalls.[241] The amendments to the FDPA need to be free of compromise to guarantee due process protections. Any amendment to the FDPA needs to provide more than a "paper[ing] over the problem of unguided and unchecked" discretion.[242] For the traditionally conservative, this ensures that the constitutionality of the death penalty is upheld. For those opposing the death penalty, it means that, if there must be a death penalty, it must not only be more difficult to seek, but require the highest procedural safeguards possible throughout the process. To do so, there should be amendments made to the FDPA setting forth detailed procedures for the enforcement of death sentences. Additionally, a careful review should be conducted of the composition of federal death row to ensure there is no discrimination by arbitrarily seeking certain aggravating factors more than others.

Almost fifty years ago, Justice Douglas in *Furman* recognized that the death penalty's frequent implementation against "members of unpopular groups," constituted discrimination and was therefore unconstitutional.[243] There is no question that the five men currently facing execution dates on federal death row are members of such a group, having committed crimes that a majority of the population would find repulsive.[244] However, the Due Process Clause of the Fifth

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241 *See, e.g.,* Little, *supra* note 45, at 386-87.

242 *See, e.g., Woodson*, 428 U.S. at 302. Although *Woodson* was a response to unchecked jury discretion, amendments to the FDPA would require a response to unchecked Government action by the Department of Justice, Attorney General, and U.S. Marshal Service.

243 *Furman*, 408 U.S. at 249-50 (J. Douglas, concurring) (citing Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790, 1792; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, The Challenge of Crime in a Free Society 143 (1967)) (internal citations omitted).

244 *See* July 25, 2019 Press Release, *supra* note 1.

and Fourteenth Amendments does not abandon protection in cases of a repulsive crime, extreme danger, or a horrific act.[245] The Due Process Clause protects every defendant, both on and off death row, and no legislation should be permitted to divorce such protections.[246]

CONCLUSION

In sum, with the rising issues surrounding the federal death penalty, a successful due process challenge is undoubtedly on the horizon. The DOJ's recent announcement makes one thing clear: the federal death penalty is being discriminatorily sought against defendants who commit crimes against the "most vulnerable populations." In doing so, the DOJ illuminated a glaring flaw with the FDPA—its failure to provide detailed protections for the execution process itself. Under this announcement, defendants are subject to execution without proper due process considerations.

Due process does not turn a blind eye because defendants are members of an unpopular group. In seeking executions against individuals simply because their crimes make them members of an unpopular group, the federal government is breaking its constitutional vow that it provided to defendants over 200 years ago. When faced with death under the FDPA, due process protections part.

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245 *See* U.S. CONST. amends. V, XIV.

246 *See, e.g.,* Herman, *supra* note 8, at 1883 (2004) (". . .the flexible Due Process Clause that is specially attuned to the interest at issue during capital proceedings – the individual defendant's life – and protects that interest from excessive legislative and executive authority").