Playing Politics with Executions: Abuse of Executive Discretion

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Introduction

On July 25, 2019, Attorney General (AG) William P. Barr announced that the United States government would resume executing federal death row inmates after a sixteen-year hiatus.[1] Once one of the hottest political issues,[2] capital punishment has somewhat faded into the background as other issues dominate the political landscape. Although the announcement provoked predictable reactions by the core proponents and critics of capital punishment,[3] the rest of the nation seemed to shrug and return to daily life.

Upon closer inspection, although Barr's announcement proclaimed that "the Justice Department upholds the rule of law,"[4] it conspicuously pandered to the demands of this political time. Instead of demonstrating that the Executive Branch is subject to and accountable to the law that is fairly applied and enforced, the decree essentially conceded that personal preference prevailed, and the worst of the worst death row inmates, in Barr's personal opinion, have been selected for execution.[5] Barr directed the Bureau of Prisons "to schedule the executions of five death-row inmates convicted of murdering, and in some cases torturing and raping, the most vulnerable in

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1 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.

2 Alexander Nguyen, *Bill Clinton's Death Penalty Waffle,* The Am. Prospect (Dec. 19, 2001), https://prospect.org/article/bill-clintons-death-penalty-waffle.

3 *See* Devlin Barrett & Mark Berman, *Justice Department plans to restart capital punishment after long hiatus*, Wash. Post (July 25, 2019 7:49 PM), https://www.washingtonpost.com/national-security/justice-department-plans-to-restart-capital-punishment-after-long-hiatus/2019/07/25/f2cc6402-aee5-11e9-bc5c-e73b603e7f38_story.html.

4 Press Release, Office of the Att'y Gen., *supra* note 1.

5 *See* discussion *infra* Part III.

our society—children and the elderly."[6] The startling aspect of this declaration was Barr's revelation that he followed no particular protocol in deciding whom from a pool of defendants already sentenced to die will actually be executed.[7] Barr revealed that prosecutorial discretion—already used in deciding against whom to charge a capital offense—also applies to the signing a death warrant and thus ensuring an execution.[8]

The power of prosecutorial discretion is often touted in political campaigns. Politicians of both parties highlight their past death penalty credentials,[9] or their strategies to enforce, expand, and execute more frequently[10] to increase their electability. Some politicians solemnly proclaim to set aside personal, deeply-rooted religious or other opposition to capital punishment and nonetheless endorse the death penalty to "respect the rule of law," or to listen to the "voice of the people."[11] These politicians appear to endorse the death penalty to profit from a voter's fear that a political opponent will fail to protect the citizenry from the criminal acts of others.

American politicians focus on the death penalty to demonstrate crime fighting credentials in an effort to win elections.[12] However, this type of political use differs from the historical use of the death penalty for killing political rivals or political enemies.[13] Unlike in other countries, when new administrations in America obtain power,

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6 Press Release, Office of the Att'y Gen., *supra* note 1.

7 *See id.*

8 *See id.*

9 Robert Barnes, *Rick Perry Holds the Record on Executions*, WASH. POST (Aug. 23, 2011), https://www.washingtonpost.com/politics/rick-perry-holds-the-record-onexecutions/2011/08/17/gIQAMvNwYJ_story.html?utm_term=.e10e003d29a5. Rick Perry, former governor of Texas from 2000 to 2015, oversaw over 234 executions, more than any other governor in recent times. In his 2012 presidential campaign, he defended his pro-death penalty stance by saying that he will work "a whole lot harder" on finding solutions to the nation's budget than he will to end the death penalty.

10 *See infra* Part I.

11 Steven Mufson & Mark Berman, *Obama Calls Death Penalty 'Deeply Troubling,' but His Position Hasn't Budged*, WASH. POST (Oct. 23, 2015 12:52 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/10/23/obama-calls-death-penalty-deeply-troubling-but-his-position-hasnt-budged/?noredirect=on&utm_term=.0279c2f37861 ("This is something that I've struggled with for quite some time.").

12 Noah Redlich, *When Politics Turn Deadly: The Democrats' Move Away from "Tough on Crime,"* HARV. POL. REV. (May 15, 2018), https://harvardpolitics.com/columns-old/when-politics-turn-deadly-the-democrats-move-away-from-tough-on-crime/.

13 *See* Michael Slackman, *Iran's Death Penalty Is Seen as a Political Tactic*, N.Y. TIMES (Nov. 22, 2009), https://www.nytimes.com/2009/11/23/world/middleeast/23iran.html.

they never use the death penalty to violently suppress political opposition.[14] From the very beginning, the United States rejected the overtly political use of the death penalty to eliminate past regimes, and instead relegated the death penalty to a traditional punishment role for non-political criminals.[15]

This Article first describes the executive abuse of discretion when exploiting death row inmates as political pawns. Secondly, the article examines the historical use of the death penalty in the United States. Finally, the article concludes that even though the United States does not execute political enemies, politics nonetheless corrupts the death penalty process to an extent that renders executions unfair.

BACKGROUND

I. PLAYING POLITICS

On both the federal and state level, the process of execution begins and ends with the Executive Branch's power. Individual prosecutors have the discretion to decide whether to charge a crime as a capital offense.[16] If the prosecutor declines to do so, even in the most brutal case, then the death penalty is not a sentencing option.[17] Similarly, once a defendant is sentenced to death, the Executive Branch representative possesses clemency power prior to the execution.[18]

If clemency is granted, it can take effect as a pardon, a reprieve, or a commutation.[19] If a pardon is given, the prisoner's criminal conviction is dropped and her sentence is terminated.[20] A reprieve acts to

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14 *See* Maureen MacDonald, *Peaceful Transition of Power: American Presidential Inaugurations*, 32 PROLOGUE MAG., no. 2, Winter 2000, https://www.archives.gov/publications/prologue/2000/winter/inaugurations.

15 *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

16 John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2573 (1997).

17 *See id.*

18 *See* U.S. CONST. art. II., § 2.; *see also, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 42A.701 (West 2019). Clemency power is set by state law. Texas governor must have such a recommendation from Clemency board. Yet, the governor appoints the Clemency Board in Texas. *See* Jolie McCullough, *In Rare Move, Texas Parole Board Recommends Clemency for Death Row Inmate Thomas Whitaker*, TEX. TRIB. (Feb. 20, 2018 6:00 PM), https://www.texastribune.org/2018/02/20/rare-move-texas-parole-board-recommends-clemency-death-row-inmate-thom/.

19 Elena Michael, *Pardons, Commutations, and Moratoria Defined*, DEATH PENALTY BLOG (Jan 11, 2019), https://deathpenalty.org/blog/the-focus/pardons-commutations-moratoria-defined/.

20 *Id.*

delay a sentence so a prisoner can find a way to have her sentence reduced.[21] Finally, a commutation reduces either the term or the gravity of a prisoner's sentence and its accompanying punishment.[22] Thus, the Executive has discretion both to select which cases will be charged as a capital offense and to grant clemency or commute a death sentence after a defendant has been sentenced to death.

Modern Supreme Court decisions mandate an individualized determination as to whether certain crimes should be death penalty eligible[23] and as to whether a specific defendant should be sentenced to death.[24] Additionally, the Court requires that capital punishment must be one of at least two sentencing options—it can never be the only option and there must be an option for a sentence less than death.[25]

Even for the most brutal crimes, the Executive always has the option to decline to seek the death penalty.[26] Prosecutorial discretion, the function of when and if to charge a case as capital, rests solely with the Executive.[27] Prosecutorial discretion at the beginning of the case controls against whom to bring charges that carry the possibility of

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[21] *Id.*

[22] *Id.*

[23] Only crimes that result in death or crimes against the state can expose a criminal defendant to capital punishment. *See* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that the death penalty for rape of a child was unconstitutional); *see also* Coker v. Georgia, 433 U.S. 584, 587, 600 (1977) (holding that the death penalty for rape of an adult woman was unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison terms differs from one of only a year or two. Because of that qualitative different, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

[24] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it is unconstitutional to execute a defendant who was under the age of 18 at the time of the offense); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that it is unconstitutional to execute an individual with mental retardation); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that the death penalty is unconstitutional for defendant with no intent to kill); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that mitigating factors must be considered in determining penalty); Gregg v. Georgia, 428 U.S. 153, 207 (1976).

[25] *Woodson*, 428 U.S. at 305 (holding that mandatory sentences are unconstitutional).

[26] However, members of the executive branch may disagree on an appropriate situation to seek the death penalty. For example, a prosecutor and governor, both of whom belong to the executive branch, sparred over the prosecutorial discretion to seek the death penalty when the prosecutor declined to seek the death penalty but was overruled by the Governor who reassigned the case. *See* Deirdra Funcheon, *With Challengers in the Wings, Florida Prosecutor who Stood Against Death Penalty Won't Seek Reelection*, POLITICO (May 28, 2019 4:51 PM), https://www.politico.com/states/florida/story/2019/05/28/with-challengers-in-the-wings-florida-prosecutor-who-stood-against-death-penalty-wont-seek-reelection-1030026.

[27] Horowitz, *supra* note 16, at 2573.

a death sentence.[28] In the federal system and in many states, prosecutorial discretion also controls who actually gets moved from death row to execution.[29]

Thousands of people, mostly men, currently await execution.[30] The numbers are staggering,[31] despite the relative rarity of actual executions.[32] The routine explanations for the backlog of executions include lack of available drugs for lethal injections,[33] moratoriums,[34] and the slow, winding appeals and clemency application processes.[35] Although these explanations account for a portion of the waiting time, a large number of the condemned await execution long after exhausting their legal remedies.

In many states and the federal government, the selection of a particular inmate for execution follows no logical, predictable format.[36] Instead, the prosecutor or the governor must initiate the process of the issuance of the death warrant, setting the time and date of execution.[37] Until a death warrant is signed, the inmates wait.[38] No one knows in what order they will be executed, or, if they will be executed

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[28] *Id.*

[29] Compare this process to what occurs in Texas, where the governor must receive a clemency recommendation by the clemency board. However, even if a recommendation is given, the governor may accept or reject it. *See* Brandi Grissom, *Scrutinizing Perry's Extensive Execution Record*, N.Y. TIMES (Sept. 1. 2011), https://www.nytimes.com/2011/09/02/us/02ttdeathpenalty.html.

[30] NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A: WINTER 2020 1 (2020) (listing 2,620 prisoners on death row as of January 1, 2020, of which 53 are women).

[31] *Id.* ("Around 2,500 prisoners currently face execution in the United States. The national death-row population has declined for 18 consecutive years, as sentence reversals, executions, and deaths by other causes are outpacing new death sentences.").

[32] As of March 5, 2020, there have been five executions. *See Execution List 2020*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2020 (last visited Apr. 18, 2020).

[33] Glossip v. Gross, 135 S. Ct. 2726, 2733 (2015) ("But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug.").

[34] *E.g.*, Press Release, Death Penalty Info. Center, Illinois Governor Signs Bill Ending Death Penalty, Marking the Fewest States with Capital Punishment since 1978 (Mar. 9, 2011), https://files.deathpenaltyinfo.org/legacy/documents/ILRepealPR.pdf.

[35] Adam Liptak, *Lifelong Death Sentences*, N.Y. TIMES (Oct. 31, 2011), https://www.nytimes.com/2011/11/01/us/death-row-inmates-wait-years-before-execution.html.

[36] *See, e.g.*, Alan M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 73 (2007).

[37] Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1177-78 (2019).

[38] *See id.* at 1178.

at all.[39] There is simply no rule, no timetable, and no standard controlling the order of execution.[40] Instead, the determining factor in whether a death row inmate is executed appears to be the Executive's whim, which could be a decision based on a calculation of the most opportune political moment to execute.

Thus, every death penalty case must begin with the prosecutor choosing to charge a capital crime, and end with the prosecutor or other executive requesting a death warrant. Politicians exploit the execution of death row inmates in two ways, both in which the judiciary and the legislature lack oversight. First, politicians highlight their support of executions to demonstrate tough-on-crime credentials. Secondly, death warrants are issued on a schedule designed to enhance political goals. Such exploitation of executions reduces these condemned human beings, as well as those who mourn the victims, to political pawns.

A. *Political Campaigns*

Worldwide, regime-changing executions have been overtly political.[41] In those situations, the ruling class and political rivals are put to death.[42] In contrast, the overtly political aspect of executions in the United States does not result from the political affiliation or political role of the condemned. Instead, the execution focuses on the identity of the Executive ordering, requesting, or presiding over the execution. The individual identity of the executed human being, and even the individual identity of his victims, are secondary to the political spectacle of carrying out an execution.

Historically, executions followed specific rituals, including a public procession, crowds chanting, the hooding of the condemned, dipping garments in the blood of the executed, and the issue of who

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39 *See* 18 U.S.C. § 3596 (2020).

40 *See id.*

41 Manuel Eisner, *Killing Kings: Patterns of Regicide in Europe, AD 600-1800*, 53 BRIT. J. CRIMINOLOGY 556 (2011). Specifically, when a new regime took over, it violently eliminated the former one, such as in 1918, when the Supreme Soviet in Moscow ordered the execution of the entire Russian Imperial family, including the children, to prevent its members from being used by the opposition in the Russian Revolution. *See* Toby Saul, *Death of A Dynasty: How the Romanovs Met Their End*, NAT'L GEOGRAPHIC (July 20, 2018), https://www.nationalgeographic.com/history/magazine/2018/07-08/romanov-dynasty-assassination-russia-history/.

42 Eisner, *supra* note 41.

received the deceased's body.[43] Modern sensibilities squirm at such blood-thirsty spectacles. Yet the current execution ritual of selecting witnesses, the last meal, final visits with family and clergy, new clothes, the countdown clock, curtained windows, and the last words,[44] retains the medieval drama without the resulting public gruesomeness.

In January 1992, then Governor of Arkansas William J. Clinton struggled for endorsements in a crowded political field of potential presidential nominees for the Democratic Party.[45] Caught up in various scandals concerning marital infidelity,[46] Clinton fought to focus attention on his political campaign. Clinton took advantage of the opportunity to demonstrate his commitment to the death penalty the day after claims of an extramarital affair surfaced.[47] He was eager to display both his executive abilities as well as his strong support of both prosecutors and the death penalty. He touted himself as "among three of the five Democratic presidential candidates who say they support the death penalty, a position that could help pre-empt Republican attacks on the crime issue."[48]

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43 *See* John Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J.L. & SOC. POL'Y 195, 218 (2009).

44 Jane Fritsch, *Word for Word/Execution Protocol; Please Order Your Last Meal Seven Days in Advance*, N.Y. TIMES (Apr. 22, 2001), https://www.nytimes.com/2001/04/22/weekinreview/word-for-word-execution-protocol-please-order-your-last-meal-seven-days-advance.html (quoting the Bureau of Prisons Execution Protocol).

45 Other potential nominees included Paul Tsongas of Massachusetts, Governor Doug Wilder of Virginia, Senator Bob Kerrey of Nebraska, Senator Tom Harkin of Iowa, and former California governor Jerry Brown. *See* Michael Levy, *United States presidential election of 1992*, ENCYCLOPEDIA BRITANNICA (Oct. 27 2019), https://www.britannica.com/event/United-States-presidential-election-of-1992.

46 The Gennifer Flowers story was printed by the Star tabloid on January 23, 1992. *See* Larry J. Sabato, *Bill Clinton and Gennifer Flowers – 1992*, WASH. POST (1998) (last visited May 5, 2020), https://www.washingtonpost.com/wp-srv/politics/special/clinton/frenzy/clinton.html; *see also* Megan Twohey, *How Hillary Clinton Grappled With Bill Clinton's Infidelity, and His Accusers*, N.Y. TIMES (Oct. 2, 2016), https://www.nytimes.com/2016/10/03/us/politics/hillary-bill-clinton-women.html (describing the initial accusation and ensuing action of Gennifer Flowers' allegations).

47 Ron Fournier, *The Time Bill Clinton and I Killed a Man*, THE ATLANTIC (May 28, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-time-bill-clinton-and-i-killed-a-man/460869/ ("Earlier that day, January 24, 1992, then-Arkansas Gov. Bill Clinton had left the presidential campaign trail to be home for Rector's execution.").

48 Peter Applebomejan, *THE 1992 CAMPAIGN: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), https://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html.

Intent on demonstrating his crime fighting credentials while also deflecting attention away from his personal life,[49] then Governor Clinton interrupted his presidential campaign to fly back to his home state of Arkansas and preside over the execution of a brain-damaged Black criminal defendant.[50] In 1982, Ricky Ray Rector murdered two people in separate incidents, one of whom was Police Officer Bob Martin.[51] After shooting Officer Martin, Mr. Rector turned the gun on himself, destroying part of his brain.[52] His lawyers said that even though he could speak, his mental capacities were so impaired that he did not know what death was or understand that the people he shot were no longer alive.[53] This cognitive impairment was demonstrated the day of his execution, when Rector saved the dessert from his last meal for "later," not realizing that he was about to be killed.[54] Despite his cognitive difficulties,[55] Rector lost his appeals and Governor Clinton denied a clemency petition.[56]

More than merely denying the clemency petition, Governor Clinton left the campaign trail prior to the crucial New Hampshire primary and flew back to Arkansas for the execution despite his presence being completely unnecessary.[57] Although Clinton's pro-death penalty posture in the 1992 presidential campaign differed from his early years as Arkansas governor, Clinton's manipulation of executions for his own political advantage remained constant. In his early years as governor, prosecutors had to pressure Clinton into scheduling execu-

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[49] Mr. Clinton was harshly criticized as being soft on crime in 1980 when he was defeated by Frank White, his Republican opponent, in his first re-election bid. Mr. Clinton defeated Mr. White two years later and has been reelected three more times. *Id.*

[50] James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 200-01 (2000), https://files.deathpenaltyinfo.org/legacy/documents/AckerClemency.pdf.

[51] Rector v. State, 659 S.W.2d 168, 169 (Ark. 1983); *see also* Fournier, *supra* note 47.

[52] *See* Fournier, *supra* note 47.

[53] *Id.*

[54] Marshall Frady, *Death in Arkansas*, THE NEW YORKER (Feb. 22, 1993), https://archives.newyorker.com/newyorker/1993-02-22/flipbook/104.

[55] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding that executing a mentally impaired defendant violates the Constitution).

[56] For a discussion surrounding the circumstances of Rector's execution, *see* Marc Bookman, *With the Death Penalty Debate, It's Back to Arkansas Again*, THE CENTURY FOUND. (April 7, 2017), https://tcf.org/content/commentary/death-penalty-debate-back-arkansas/?session=1.

[57] *See* ARK. CODE ANN. § 5-4-617 (2020); *see also* Richard Cohen, *The Execution of Rickey Ray Rector*, WASH. POST (Feb. 23, 1993), https://www.washingtonpost.com/archive/opinions/1993/02/23/the-execution-of-rickey-ray-rector/120a086b-97d2-4d64-a2bb-8059ac6e39fe/.

tions.[58] Yet when his avoidance of executions harmed his political ambitions, Clinton abandoned any reluctance to execute for political gain.

Clinton set his first execution just before he left office in 1980, so he could later say he had done so, but the order was entirely premature and was immediately stayed.[59] Then, when he was re-elected Governor, he "would set new execution dates at just about every stage, every tick in the process of a case, though the parties were nowhere near exhausting their remedies, and the execution dates were almost always stayed. But it enabled Clinton to say, 'Look, see how many executions I've ordered.'"[60] Rector's execution appeared to be yet another political manipulation by Clinton, who had been honing his pro-death penalty credentials ever since his earlier campaign loss for the governorship.

Governor Clinton repeated his flamboyantly dramatic return to Arkansas to preside over another execution during his presidential candidacy.[61] Despite Clinton never granting clemency to a death row inmate, he intentionally highlighted his review of the clemency petitions prior to denial. In May 1992, Clinton denied clemency to Steven Hill,[62] amid widespread speculation that his support for the death penalty was completely driven by his political ambitions.[63]

Similarly, during his presidential candidacy in 2000, then Governor of Texas George W. Bush emphasized his support for capital punishment while simultaneously insisting that his executive clemency power was limited.[64] Despite such claims, the structure of the Texas

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[58] *See* Nguyen, *supra* note 2.

[59] *See* Cohen, *supra* note 57.

[60] Justin Hayford, *American Apartheid*, CHI. READER (July 27, 1995), https://www.chicagoreader.com/chicago/american-apartheid/Content?oid=888051.

[61] The Associated Press, *Killer Executed After Clinton Denies Clemency*, N.Y. TIMES (May 8, 1992), https://www.nytimes.com/1992/05/08/us/killer-executed-after-clinton-denies-clemency.html.

[62] *Clinton Denies Clemency; Officer's Killer is Executed*, DESERET NEWS (May 8, 1992 12:00 AM), https://www.deseretnews.com/article/225409/CLINTON-DENIES-CLEMENCY-OFFICERS-KILLER-IS-EXECUTED.html; Cathleen Decker, *Inmate Is Executed After Clinton Denies Clemency Plea*, L.A. TIMES (May 8, 1992 12:00 AM), https://www.latimes.com/archives/la-xpm-1992-05-08-mn-1915-story.html.

[63] DESERET NEWS, supra note 62. ("[Clinton is] not dying to be president, but he is killing to be president.").

[64] Jim Yardley, *ON THE RECORD/Bush and the Death Penalty; Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. TIMES (Jan. 7, 2000), https://www.nytimes.com/2000/01/07/us/record-bush-death-penalty-texas-busy-death-chamber-helps-define-bush-s-tenure.html.

clemency process demonstrates that the Governor maintains control.[65] Texas clemency petitions must be approved by the clemency board before the Governor may grant petitions: "The Governor has the authority to grant clemency upon the written recommendation of a majority of the Texas Board of Pardons and Paroles ("Board") . . . In capital cases, clemency includes a commutation of sentence to life in prison and a reprieve of execution."[66] Significantly, the Governor selects the members of the Board: "By law, the governor cannot unilaterally commute a death sentence . . . . But [Governor Bush had] appointed every member of the parole board that can make that decision."[67] Such a system allows the Governor to both manipulate the clemency process by appointing board members who will vote his way, and also to maintain plausible deniability of responsibility when the Board refuses to grant clemency in controversial cases.

Governor Bush claimed that Texas law prohibited him from intervening in one of the most controversial executions to occur during his tenure.[68] Karla Faye Tucker's execution attracted world-wide attention, not only because she was the first woman to be executed in Texas since the Civil War, but also because of the broad coalition supporting her clemency bid.[69] Even ardent death penalty supporters[70] asked that her life be spared because of both her religious conversion and her evangelism while awaiting her execution. Governor Bush insisted that he was powerless to grant clemency without a recommendation from the Board.[71]

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65 Alan Berlow, *The Texas Clemency Memos*, THE ATLANTIC (July/Aug. 2003), https://www.theatlantic.com/magazine/archive/2003/07/the-texas-clemency-memos/302755/.

66 *Clemency*, TEX. BD. OF PARDONS AND PAROLES, https://www.tdcj.texas.gov/bpp/exec_clem/exec_clem.html (last visited Apr. 18, 2020) ("The governor may also grant a one-time reprieve of execution, not to exceed 30 days, without a Board recommendation.").

67 Yardley, *supra* note 64.

68 *Karla Faye Tucker: Born Again on Death Row*, CNN (Mar. 26, 2007 4:53 PM), https://www.cnn.com/2007/US/03/21/larry.king.tucker/ ([T]hen-Texas Gov. George W. Bush denied Tucker a . . . reprieve, saying her cause had been thoroughly reviewed by appellate courts.").

69 Mary Sigler, Symposium, *Mercy, Clemency, and the Case of Karla Fay Tucker,* 4 OHIO ST. J. CRIM. L. 455, 483 (2007) (arguing that "Tucker's race, gender, good looks, and Christian faith seemed to bring unprecedented attention to her plight," especially when compared with others with similar transformation stories).

70 Michael Graczyk, *Texas Executes Karla Faye Tucker*, ASSOCIATED PRESS (Feb. 4, 1998), https://apnews.com/5d3f370507c09aaa8f97a1db75094e86 ("This thing is vengeance,? said [TV evangelist Pat] Robertson, normally a death penalty supporter. "It makes no sense. This is not the same woman who committed those crimes.?).

71 Berlow, *supra* note 65.

However, there is evidence that Governor Bush strongly influenced, if not controlled, the Board. For example, in the case of Henry Lee Lucas, "Bush intervened with the [B]oard before it had a chance to make a recommendation to him."[72] Because of his concerns that the inmate was factually innocent, Governor Bush ensured that the Board recommended clemency, which he could then authorize.[73]

After the 1984 trial at which Lucas was sentenced to death, it became apparent that he was not in Texas when the murder occurred; investigations by two successive state AGs subsequently concluded that Lucas was wrongly convicted.[74] Concerned that Lucas would be executed for a crime he did not commit, Bush's office let the Board know that Bush was unwilling to see that happen.[75] The Board, by a 17-1 vote, soon recommended commutation to life in prison, which Bush then approved."[76] Once Governor Bush's personally selected Board ruled the way he wanted, he was able to commute Lucas' death sentence.[77] Such manipulation of the Board demonstrates the governor's ability to impact, if not control, results of the clemency petition.

Similar to Governor Clinton, the drama surrounding executions during Governor Bush's presidential campaign included his returns to Texas.[78] For the execution of 62-year-old Betty Lou Beets, Governor Bush returned from California to make an official statement denying clemency, stating, "After careful review of the evidence in the case, I concur with the jury that Betty Lou Beets is guilty of this murder . . . I concur with the recommendation of the Texas Board of Pardons and Parole and will not grant a 30-day delay."[79]

However, for the unusual execution of two death row inmates in one day, Governor Bush remained on the campaign trail and distanced himself from the controversy surrounding the execution of a mentally disabled defendant.[80] Oliver David Cruz was executed in

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Berlow, *supra* note 65.

[78] *Bush Rejects Reprieve for Woman on Death Row*, THE GUARDIAN (Feb. 24, 2000 9:12 PM), https://www.theguardian.com/world/2000/feb/25/1.

[79] *Texas Executes Betty Lou Beets*, CBS NEWS (Feb. 24, 2000 7:07 AM), https://www.cbsnews.com/news/texas-executes-betty-lou-beets/.

[80] Maria F. Durand, *Texas Executes Two Inmates*, ABC NEWS (Aug. 10, 2000), https://abcnews.go.com/US/story?id=96212&page=1 (last updated Jan. 7, 2006 9:41 AM).

August 2000, two years before the Supreme Court ruled executions of the mentally disabled to be unconstitutional.[81] Governor Bush demonstrated that he could intervene with the Board's process and influence the outcome, if desired, or he could claim to be powerless when the Board made controversial decisions.

Although neither Governor Clinton nor Governor Bush presided over executions of their political rivals, both exploited the spectacle and drama of executions to further their political ambitions. Their positions as governors[82] gave both Clinton and Bush the opportunity to emphasize their pro-death penalty beliefs by calling attention to executions when it served their political ambitions. Both men continued using the death penalty as a political tool when they became President.

B. *The Death Warrant*

Today, twenty-nine states, the United States military, and the federal government retain capital punishment as a potential sentence for select crimes.[83] Once an individual is sentenced to death, a date of execution is typically set by the trial court judge. That date is immediately stayed pending appeals.[84] Once appeals and clemency requests are exhausted, there is no legal impediment to execution.[85] The next step is the issuance of the death warrant.[86] A death warrant is not

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[81] *Id.; see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[82] Presidential candidates who had not been governors did not have the opportunity to preside over executions. However, the issue remained relevant during every presidential campaign. In THE AUDACITY OF HOPE, former President Barack Obama explained, "While the evidence tells me the death penalty does little to deter crime, I believe there are some crimes—mass murder, the rape and murder of a child—so heinous, so beyond the pale, that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment." *See* BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 90 (1st ed. 2006).

[83] *Facts About the Death Penalty*, DEATH PENALTY INFO CTR., https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1585003454.pdf (last updated Mar. 23, 2020).

[84] *See, e.g.*, OFF. OF ALA. ATT'Y GEN., ALABAMA'S DEATH PENALTY PROCESS, https://www.alabamaag.gov/Documents/Files/File-Death-Penalty-Appeals-Process.pdf (last visited Apr. 18, 2020); *see also* Ana M. Otero, *Tinkering With the Machinery of Death in Texas: A Chronicle of Unbridled Justice*, 16 GEO. MASON U. CIV. RTS. L.J. 183, 201-204 (2006).

[85] *Id.*

[86] *See, e.g.*, Fla. Stat. Ann. § 922.052 (2013) ("When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the Governor and the clerk of the Florida Supreme Court . . . the sentence shall not be executed until the Governor issues a warrant, attaches it to the copy of

automatic. Instead, individuals sentenced to death wait on death row until a government official, typically the trial prosecutor, the chief prosecutor in the jurisdiction, or another executive requests or signs a death warrant.[87] The death warrant authorizes the prison department or warden to execute the defendant.[88]

For a defendant to be sentenced to death, he must violate a statute that provided the option of capital punishment. In 2019, when Barr announced federal executions would resume, the vast majority of individuals were on death row for aggravated murder.[89] The constitutionality of statutes, the trial procedures, and the sentencing hearings must comply with modern Supreme Court capital punishment jurisprudence dating from the 1972 ruling in *Furman v. Georgia*.

1. *Furman v. Georgia*

In 1972, the Supreme Court held that select capital punishment statutes violate the Eighth Amendment.[90] In his concurring opinion, Justice White wrote, "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."[91] Justice White was referring to the verdict of death, not to the infrequency of executions. As a direct result of *Furman*, over 500 death row inmates[92] had their sentences converted to life in prison. The ruling did not disturb the convictions but instead prevented the executions of everyone on death row.[93]

State legislatures immediately redrafted capital punishment statutes to comply with the Court's requirements. Four years later, the

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the record, and transmits it to the warden, directing the warden to execute the sentence at a time designated in the warrant.").

87 *Id.*

88 *Id*.

89 Press Release, Office of the Att'y Gen., *supra* note 1; *see also List of Federal Death-Row Prisoners*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Apr. 18, 2020).

90 *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).

91 *Id.* at 313 (White, J., concurring).

92 David Beasley, *Georgia Inmate in Historic Death Penalty Case Gains Perspective*, REUTERS (Apr. 2016, 8:35 PM), https://www.reuters.com/article/us-usa-georgia-furman/georgia-inmate-in-historic-death-penalty-case-gainsperspective-idUSKCN0XO2FM.

93 Jeffery L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73. COLO. L. REV. 1, 15 (2002).

Supreme Court upheld these new death penalty statutes.[94] Thirty-seven states reenacted the death penalty during the four years between *Furman* and *Gregg v. Georgia*.[95] In reasserting the constitutionality of the death penalty in *Gregg*, the Court stated:

> Indeed, the death sentences examined by the Court in *Furman* were cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of capital crimes, many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . . 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.[96]

In *Gregg*, the Court specifically approved a death penalty process that requires a bifurcated structure and clear statutory guidelines for determining the existence of aggravating and mitigating circumstances during jury deliberations.[97] The Court explained that, "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."[98]

The *Gregg* Court focused specifically on two aspects of capital punishment: (1) for which crimes would the death penalty be appropriate, and (2) which defendants should be eligible for a death sentence.[99] The Court required the states to specifically define both. For the crime, the Court required that statutes specifically define limitations on what type of crime could result in a death sentence.[100] For the

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94 *See* Gregg v. Georgia, 428 U.S. 153, 207 (1976) (plurality opinion).

95 McCleskey v. Kemp, 481 U.S. 279, 301 n.23 (1987).

96 *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring)).

97 *Id.* at 190-92.

98 *Id.* at 206-07.

99 *See McCleskey* 481 U.S. at 305-06 (1987) ("In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.").

100 *Id.*

defendant, the Court required that individualized determinations be made by the sentencing body, whether judge or jury.[101] The legislation must provide the fact-finder with specific factors that show how bad the crime is in relation to other crimes.[102] Also required are mitigating factors—any reason that the jury should consider in rendering a sentence less than death.[103]

The Court did not consider—and has not considered—the issue that arises after a death verdict is rendered. All three branches of government have extensively reviewed the procedural and substantive appeals process.[104] Review has also included the execution itself, with a progression from firing squads, gas chambers, and electric chairs to the modern lethal injection.[105] Copious amounts of legislative drafting and appellate reviews surrounding lethal injections exist.[106] Further, states implement both de facto moratoriums when the "killing drugs" are not available, and executive moratoriums for political reasons.[107] States have also granted individual commutations[108] and wholesale commutations of everyone on death row's death sentences.[109] With the scarcity of execution drugs, some legislatures have proposed bills to reinstitute firing squads and bring back the electric chair.[110] The combined efforts of all three branches of government have produced a

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101 *See id.* at 303.

102 *See id.*

103 *See id.* at 302-03 ("The procedures also require a particularized inquiry into 'the circumstances of the offense, together with the character and propensities of the offender.' Thus, 'while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards, so as to produce nondiscriminatory application.'" (internal citations omitted)).

104 Kirchmeier, *supra* note 93, at 57.

105 Richard C. Dieter, *Methods of Execution and Their Effect on the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 791, 792 (2008).

106 *See* Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).

107 *See id.* at 2733 ("But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug.").

108 *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976 (last visited Apr. 18, 2020).

109 *See, e.g.,* Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), https://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html.

110 Tom Barton, *SC senators resurrect bill to bring back the electric chair, add firing squad*, THE STATE (Jan. 30, 2019, 6:16 PM), https://www.thestate.com/news/politics-government/article225312765.html.

system with thousands of defendants sentenced to death,[75] but almost nobody is executed.[111]

Thus, despite extensive litigation, revision of death penalty statutes, judicial review, and executive action, executions continue to occur in an arbitrary and capricious manner. Forty-seven years of fine-tuning the capital punishment rules has ceded power over life and death to politicians.

2. Federal Executions

The 1972 *Furman v. Georgia* ruling also essentially rendered all federal capital punishment statutes unconstitutional.[112] In his dissent, Justice Blackmun emphasized these perhaps unintended consequences:

> I trust the Court fully appreciates what it is doing when it decides these cases the way it does today. Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided. No longer is capital punishment possible, I suspect, for, among other crimes, treason, 18 U.S.C. § 2381; or assassination of the President, the Vice President, or those who stand elected to those positions, 18 U.S.C. § 1751; or assassination of a Member or member-elect of Congress, 18 U.S.C. § 351; or espionage, 18 U.S.C. § 794.[113]

The military death penalty sentencing procedures were also held unconstitutional for failing to require a finding of individualized aggravating circumstances.[114] However, President Ronald Reagan reinstated the military death penalty in 1984.[115]

When Barr announced federal executions would resume in 2019, there were four men on military death row.[116] Two of them are eligi-

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111 As of March 5, 2020, there have been five executions. *See Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2020 (last visited Apr. 18, 2020).

112 Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam); *see also* Kirchmeier, *supra* note 93, at 15.

113 *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting).

114 United States v. Matthews, 16 M.J. 354, 380 (C.M.A. 1983).

115 *See* 51 C.F.R. § 6497 (1986).

116 Kyle Rempfer, *What death row executions may mean for these four soldiers at Leavenworth,* ARMY TIMES (July 30, 2019), https://www.armytimes.com/news/your-army/2019/07/30/what-death-row-executions-may-mean-for-these-four-soldiers-at-leavenworth/.

ble for execution, but no death warrant has issued. As it stands, Ronald R. Gray, a former Army private convicted in 1988 of multiple murders and rapes, appears to be the closest to being put to death.[117] Gray was initially given an execution date in 2008 after then-President George W. Bush approved it, but a stay was granted less than a week afterwards.[118] That stay of execution was lifted in 2016, but he still does not face an immediate execution date.[119] For Private Gray and the other three men on military death row, a pending execution rests on executive action. It is the executive's responsibility to carry out their death sentences, but instead of acting pursuant to their responsibility, the executives have abused their discretion and chosen to do nothing.

Unlike the majority of state legislatures, Congress did not quickly revise capital punishment statutes after *Furman*. In fact, there was no federal statute authorizing a possible death sentence until 1988, and even then, it only included a narrow set of possible crimes.[120] However, Governor Clinton rode into office on the executions of Rector and Hill and brought with him strong support for the death penalty. Under his administration, Congress passed the Federal Death Penalty Act of 1994, which greatly expanded the number of eligible offenses and expanded capital punishment to crimes that traditionally were left to state law.[121]

Beginning with President Clinton's administration, and consequently those of President George W. Bush and President Barack Obama, the Department of Justice has sought the death penalty in a wide variety of cases, resulting in sixty-two inmates currently awaiting execution. Yet, only three men have been executed since 1961: (1) Timothy McVeigh, a White man, for the 1995 Oklahoma City bombing that killed 168 people, executed on June 11, 2001, after waiving his collateral appeals; (2) Juan Raul Garza, a Latino man, for the killing of three drug dealers and running a marijuana drug ring in Texas, executed on June 19, 2001; and (3) Louis Jones, a Black man, for the kidnapping and murder of 19-year-old Army Private Tracie McBride,

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117 *Id.*

118 *Id.*

119 *Id.*

120 Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (codified at 21 U.S.C. § 1501) (amending scattered statutes).

121 Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 (1995).

executed on March 18, 2003.[122] With Barr's announcement, the Trump administration began executing the defendants sentenced to death during the terms of his predecessors.

Barr's July 2019 directive highlights his power to choose which death row inmates to execute first. He ordered the Federal Bureau of Prisons to "Schedule the Executions of Five Death-Row Inmates Convicted of Murdering Children [and the elderly]."[123] By focusing on the specific victims murdered by the convicts, Barr's announcement suggests that he selected the most egregious criminals to execute, according to his own evaluation.[124] Yet, such a claim implies that he has a choice—that the executive is not required to follow any protocols or time table when scheduling executions. Additionally, Barr indicated that he alone is empowered to determine which inmate is most deserving of execution.[125]

However, that claim is flawed in two ways. First, the legislature has already defined that the crimes committed deserve the punishment of execution, and a jury has determined that the defendant deserves the death penalty.[126] No provision exists for the executive to second-guess those decisions and create his own hierarchy of who deserves execution. As Justice Marshall stated in *Furman*, "The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized."[127] Yet, this is always the case. Every defendant sentenced to death has committed an ugly, vicious, and reprehensible crime—typically murder.[128] There is no executive power authorizing Barr to review each inmate and select who he finds to be the worst. Yet, Barr assumes a power no executive has been given, and carves out his own new rule: he claims that he is selecting those who killed the most vulnerable in society.

Second, the facts suggest that political calculations underlie Barr's selection. Even if he has the power to assign a hierarchy as to

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122 *Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty (last visited Apr. 18, 2020).

123 Press Release, Office of the Att'y Gen., *supra* note 1.

124 *Id.*

125 *Id.*

126 *Cf.,* Federal Death Penalty Act of 1994, 18 U.S.C. § 3591.

127 Furman v. Georgia, 408 U.S. 238, 315 (1972) (Marshall, J., concurring) (per curiam).

128 *See, e.g.,* 18 U.S.C. § 3592(c)(6) (using "heinous, cruel, or depraved manner of committing offense" as a federal death penalty aggravating factor).

whom is most deserving of execution, his reasoning underlying who he has chosen, as compared to the others similarly situated, appears disingenuous. Similar to the startling evidence discussed *infra*, indicating that the states have taken race into consideration when resuming executions post *Furman*, Barr has clearly taken race and geography into consideration for his announcement. As of April of 2019, there are sixty-two inmates on federal death row.[129] The racial breakdown is twenty-seven White, twenty-six Black, seven Latino, one Asian, and one Native American.[130] Although almost an even number of Black and White prisoners await execution on federal death row,[131] Barr selected three White men, one Native American man, and one Black man for imminent execution. These inmates, their race, the state in which the sentence was imposed, and the dates of their respective death sentences are as follows: (1) Alfred Bourgeois, Black, Texas, 2004; (2) Dustin Lee Honken, White, Iowa, 2004; (3) Daniel Lewis Lee, White, Arkansas, 2002; (4) Lezmond Mitchell, Native American, Arizona, 2003; and (5) Wesley Ira Purkey, White, Missouri, 1998.[132]

Barr explained, "Each of these inmates has exhausted their appellate and post-conviction remedies, and currently no legal impediments prevent their executions."[133] These men were not chosen because they have been on federal death row the longest. Three Black co-defendants from Virginia have been on federal death row since 1993—five years longer than Purkey.[134] The five men on Barr's list are not the only individuals who have exhausted their appeals.[135] The three co-defendants from Virginia have also exhausted their

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129 *See* Press Release, Office of the Att'y Gen., *supra* note 1.

130 *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.

131 *Id.*

132 *See* Press Release, Office of the Att'y Gen., *supra* note 1. *But see* The Associated Press, *3 Sentenced to Death Under U.S. Drug Law*, N.Y. TIMES (Feb. 19, 1993), https://www.nytimes.com/1993/02/19/us/3-sentenced-to-death-under-us-drug-law.html. Corey Johnson, James H. Roane, Jr., and Richard Tipton were convicted and sentenced to death in 1993 for participating in a series of drug-related killings. *Id.*

133 *See* Press Release, Office of the Att'y Gen., *supra* note 1.

134 *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.

135 Pete Williams & Daniel Arkin, *AG Barr orders reinstatement of the federal death penalty*, NBC NEWS (July 25, 2019, 10:40 AM), https://www.nbcnews.com/politics/justice-department/ag-barr-orders-reinstatement-federal-death-penalty-n1034451.

appeals.[136] However, it appears that Barr did not wish to revive memories of the worst historical abuses of the death penalty and resume executions by first selecting three Black men from a former slave state.

Everything about the selection of the five men suggests political advantages were the driving force. Barr may want to minimize the backlash of opening up the execution chamber by selecting men whose crimes are the most horrific to the sensibilities of 2019. He may want to avoid the criticism that he has racist motivations by selecting mostly White men to execute. He may want to avoid geographic objections by selecting defendants sentenced to death in five different states. However, whatever Barr's motivation, it is clear he is not following any rule of law in making his decision. There is no law that allows him such discretion and Barr's personal choice should not supplant the rule of law. Once sentenced to death, the executive should either pardon or execute—those are the only choices. The executive should not select who dies and let others, similarly situated, live until their executions would be more politically acceptable. The men and women of death row are sentenced not only to death but also to a life awaiting their usefulness to the current political regime.

3. State Executions

States differ in how an inmate's death sentence reaches the execution stage once appeals are exhausted. In some states, the prosecutor at trial must request a death warrant.[137] In some states, the governor issues the death warrant.[138] In other states, the death warrant is issued by the AG.[139] Yet, whichever process is followed, the executive power moves the defendant from death row to the execution chamber.

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136 Frank Green, *Richmonder on federal death row reacts to plan to resume executions: 'We were all really surprised'*, THE ROANOKE TIMES (Aug. 12, 2019), https://www.roanoke.com/z-no-digital/richmonder-on-federal-death-row-reacts-to-plan-to-resume/article_90e4192d-266b-5ba6-b620-64eff19e1f1b.html.

137 *See, e.g.*, CAL. PENAL CODE § 190.3 (Deering 2020).

138 *See, e.g.*, FLA. STAT. ANN. § 922.052 (LexisNexis 2019).

139 *See, e.g.*, Kimberlee Kruesi, *Tennessee Seeks Execution Dates for 9 Death Row Inmates*, ASSOCIATED PRESS (Sept. 24, 2019 3:39 PM), https://apnews.com/3b981053c12449358c01004424f63b1d (describing Tennessee's Attorney General's attempts to reactivate death warrants).

One constant concern is the impact of racial disparity on capital punishment. Justices on the *Furman* Court specifically mentioned concerns about the execution of minorities.

> For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.[140]

After *Furman*, challenges to the death penalty continue to raise the issue of the disparate racial impact of death sentences,[141] an issue that the Court addressed in *McCleskey v. Kemp* in 1986.[142] Although the Supreme Court found no racially discriminatory intent in *McCleskey*, Justice Brennan noted the long history of racial discrimination in his dissent.[143] Thus, sensitivity that capital punishment and executions not be tainted by racial discrimination appears throughout the scholarship, as well as the briefs filed in the *Furman* and *Gregg* cases.[144]

Although the Supreme Court rejected the statistical evidence in *McCleskey*, there remains evidence that the race of the victim impacts which defendants are sentenced to death. The vast majority of

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140 Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (per curiam).

141 *See* Carol S. Steikerf & Jordan M. Steik, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 286-88 (2015).

142 McClesky v. Kemp, 481 U.S. 279 (1987).

143 *McCleskey,* 481 U.S. at 329-30 (Brennan, J., dissenting) ("Although Justice Stewart declined to conclude that racial discrimination had been plainly proved, he stated that '[m]y concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.'") *Id*. at 310 (concurring opinion). In dissent, Chief Justice Burger acknowledged that statistics "suggest, at least as a historical matter, that Negroes have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape." *Id*. at 289 n.12 (Burger, C.J., dissenting). Finally, also in dissent, Justice Powell intimated that an Equal Protection Clause argument would be available for a black prisoner "who could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense." *Id*. at 449. The Court regarded the opportunity for the operation of racial prejudice a particularly troublesome aspect of the unbounded discretion afforded by the Georgia sentencing scheme. *Id.* at 332.

144 Steikerf & Steik, *supra* note 141, at 224 ("During this time, the litigants and their amici consistently thrust the issue of race to the forefront, and nobody with even a modicum of historical awareness could have missed the salience of race to the American practice of capital punishment.").

defendants have received a death sentence for killing a White victim.[145] Coincidentally, the same racial disparity is revealed by who is executed.

Beginning in 1977, executions resumed in a racially charged atmosphere.[146] Although there is no evidence that race factored into the decision of what order inmates would be executed, many states lack rules controlling the order of execution. Therefore, the racial breakdown of who each state executed first should be random, or reflective of the racial make-up of the individuals on death row in that particular state.

For example, South Carolina's first post-*Gregg* execution occurred in 1985.[147] At that time, South Carolina's death row contained sixteen White men and nineteen Black men.[148] South Carolina executed Joseph Shaw,[149] a White man. Subsequently, South Carolina executed an additional three White men in 1986,[150] 1990,[151] and 1991.[152] Not until eleven years later did South Carolina execute a Black man, Sylvester Adams, in 1995.[153] In fact, out of the thirty-four states that resumed executions post-*Gregg*, thirty-one of those states

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145 *See* Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions 1976–2013*, 3 J. POLS., GROUPS, AND IDENTITIES 1, 1-2 (2015).

146 *See Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Apr. 18, 2020).

147 *State and Federal Info: South Carolina*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Apr. 18, 2020).

148 *See* U. S. DEPT. OF JUST., BUREAU OF JUST. STATS., CAPITAL PUNISHMENT 1984, at 18 https://www.bjs.gov/content/pub/pdf/cp84nps.pdf (Apr. 18, 2020).

149 *See South Carolina Executes Killer: Age Stirs Protest*, N.Y. TIMES (Jan. 11, 1986), https://www.nytimes.com/1986/01/11/us/south-carolina-executes-killer-age-stirs-protest.html.

150 *Id.* South Carolina executed James Roach, the codefendant of Shaw. *Id.* This was a particularly controversial execution because Roach was only 17 years old at the time of the murders for which he was ultimately executed. On the eve of his execution Roach suggested a socio-economic bias in capital punishment, saying "Don't nobody get the death penalty for killing poor people. *Id.*

151 *See 'I'm Sorry,' Says a Killer of 4 Just Before He's Put to Death*, N.Y. TIMES (Apr. 28, 1990), https://www.nytimes.com/1990/04/28/us/i-m-sorry-says-a-killer-of-4-just-before-he-s-put-to-death.html (describing the execution of Ronald Woomer).

152 *See* Margaret N. O'Shea, *Wherever he lived, 'Pee Wee' Gaskins never left death behind*, THE STATE (Sept. 1, 1991 2:19 PM), https://www.thestate.com/news/local/crime/article183476256.html.

153 The controversy surrounding Sylvester Adams' execution was his mental disability. *See* John H. Blume & Lindsey S. Vann, *Forty Years Of Death: The Past, Present, And Future Of The Death Penalty In South Carolina (Still Arbitrary After All These Years)* 11 DUKE J. OF CONST. L. & PUB. POL'Y 184, 200 n.120 (2016).

executed a White man first.[154] Post-1976, only three states executed a Black man first.[155] The victims of those defendants first to be executed also reveal a racial imbalance. Of the first defendants executed in each state, thirty-three of them killed a White victim, and only one of them killed a Black victim.[156] Louisiana is the only state that executed a Black defendant for killing a Black victim. None of the White prisoners among this group had killed a minority victim.[157]

By selecting a White inmate as the first execution, almost every state had plausible deniability that its death penalty was racially discriminatory. At minimum, such states could demonstrate that minorities were not targeted for execution. Yet, by selecting one race instead of another to prove a lack of discriminatory intent, the states have proven exactly the opposite.

4. Death Row

As of April 1, 2019, there were 2,673 men and women in the United States sentenced to death and awaiting execution.[158] California accounts for the greatest number, with 737 inmates on death row.[159] In March 2019, Governor Gavin Newsom released an executive order announcing a moratorium on the death penalty.[160] Governor Newsom prefaced his decision by stating that, "California's death penalty system is unfair, unjust, wasteful, protracted and does not

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154 The following states executed White men for their first post-Gregg executions: Alabama (1983); Arkansas (1990), Arizona (1992), California (1992), Colorado (1997), Connecticut (2005), Delaware (1992), Florida (1979), Georgia (1983), Idaho (1994), Illinois (1990), Indiana (1981), Kentucky (1997), Maryland (1994), Mississippi (1983), Missouri (1989), Montana (1995), Nevada (1979), New Mexico (2001), North Carolina (1984), Ohio (1999), Oklahoma (1990), Oregon (1996), Pennsylvania (1995), South Carolina (1984), South Dakota (2007), Tennessee (2000), Utah (1977), Virginia (1982), Washington (1993), and Wyoming (1992). *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executiondatabase.

155 *Id.* The following states executed black men for their first post-Gregg executions: Nebraska (1994), Louisiana (1983), and Texas (1982). *Id.*

156 *See Execution by Race and Race of Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim (last visited Apr. 18, 2020).

157 *Id.*

158 *See Death Penalty Fact Sheet*, Death Penalty Info. Ctr., https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf (last visited Apr. 18, 2020).

159 *Id.*

160 EXEC. DEPT' OF THE STATE OF CALIFORNIA, Exec. Order No. N-09-19, https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf [*hereinafter* Exec. Order No. N-09-19] (last visited Apr. 18, 2020).

make our state safer."[161] For these reasons, Governor Newsom initially appears to be commuting the death sentences, declaring that "an executive moratorium on the death penalty shall be instituted in the form of a reprieve for all people sentenced to death in California."[162] However, the second sentence of his order makes it clear that the death sentences stand: "This moratorium does not provide for the release of any person from prison or otherwise alter any current conviction or sentence."[163] Essentially, Governor Newsom prevents executions but not death sentences.

The order prevents executions because it further states, "California's lethal injection protocol shall be repealed . . . [and] The Death Chamber at San Quentin shall be immediately closed."[164] The order does not prevent state prosecutors from continuing to seek the death penalty in current or future cases. The order does not prevent jurors from sentencing defendants to death. The order also does not prevent the courts from upholding the validity of death sentences. The order merely prevents executions so long as Governor Newsom is governor.[165] This allows Governor Newsom to claim credit for reform, without actually reforming the current law, processes, or outcomes for those facing a death sentence.

Even more startling than the low number of executions is the low number of inmates eligible for an execution date—there are twenty-five California death row inmates who have exhausted their state and federal appeals.[166] Thus, according to Governor Newsom, even if he did not suspend the death penalty, there are only twenty-five death row inmates, or 3.4 percent of death row inmates, eligible for execution.

Governor Newsom explained his moratorium by emphasizing that "since 1978, California has spent $5 billion on a death penalty system that has executed 13 people." This statement implies that the moratorium will reduce the costliness of California's death penalty system. However, "[m]uch of California's death row costs, from hous-

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161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.*

165 Sophia Bollag, *'Ineffective, irreversible and immoral:' Gavin Newsom halts death penalty for 737 inmates*, THE SACRAMENTO BEE (March 12, 2019 7:24 PM), https://www.sacbee.com/news/politicsgovernment/capitol-alert/article227489844.html.

166 EXEC. DEPT' OF THE STATE OF CALIFORNIA, *supra* note 160.

ing to medical care, will continue under Newsom's moratorium."[167] Governor Newsom claims credit for stopping unfair, unjust, wasteful executions without following the legal process available to him as executive to grant clemency to the 737 individuals who will continue to wait on California's death row.

California law affords Governor Newsom a process that he could follow to address the "unfair, unjust, wasteful, protracted and useless death penalty system."[168] He could grant pardons or commute the sentences of the 737 death row inmates, thus protecting them from any future governor's decision to reopen the execution chamber. Article 5, Section 8 of the California Constitution states:

> (a) Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence . . . . The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it. The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.[169]

In many of the cases, Governor Newsom could grant the commutation himself. In others, he would need a recommendation from four concurring judges of the California Supreme Court. Either way, there are rules that Governor Newsom could follow if his true goal was to prevent these executions, instead of exploiting these lives for political gain.

Unfortunately, Governor Newsom has a history of politically exploiting the death penalty. In 2016, while campaigning for the death penalty repeal measure, he promised to "be accountable to the will of the voters" with regard to the death penalty.[170] Death penalty proponents interpreted such comments as Governor Newsom's intention to follow the will of the voters when the death penalty measure went on

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[167] Chris Nichols, *Fact-checking Gavin Newsom's claims on California's death penalty*, POLITIFACT.COM (March 19th, 2019), https://www.politifact.com/california/article/2019/mar/19/factchecking-gavin-newsoms-claims-californias-dea/.

[168] *Id.*

[169] CAL. CONST. art. 5, § 8(b).

[170] Bollag, *supra* note 165.

the ballot.[171] However, Governor Newsom declared a moratorium despite the 2016 death penalty repeal measure failing.

Essentially, Governor Newsom has simply called attention to himself without impacting the lives of the death row inmates. Based on the explanations in his executive order, Governor Newsom's moratorium does not have a substantive impact, because executions were already stayed pending a ruling from the California Supreme Court, and no executions have occurred since 2006 "because California's execution protocols have not been lawful."[172] Sometimes moratoriums are utilized as a first step in abolishing a state's death penalty. However, because California requires a voter referendum to repeal laws, Governor Newsom's executive order does not enable either the Governor or the state legislature to abolish the death penalty.[173] Abolition in California must result from popular vote.

Other Governors have issued death penalty moratoriums that eventually led to abolition.[174] After initially declaring a death penalty moratorium in 2000, Illinois Governor George Ryan went further, "determin[ing] that the death penalty was 'fraught with error' and commuted the sentences of all 167 death row inmates to life terms."[175] Governor Ryan waited until two days before leaving office to make his announcement, and emphasized his conversion from supporting to opposing capital punishment.[176] That more death row inmates in Illinois had left death row because of exonerations than had been executed shook his faith that the death penalty could ever be applied fairly.[177]

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171 *See Gov. Gavin Newsom Suspends Death Penalty In California,* NPR (March 12, 2019 11:25 PM), https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california.

172 *Id.*

173 *California Proposition 62—Repeal Death Penalty—Results: Rejected*, N.Y. TIMES (Aug. 1, 2017 11:24 AM), https://www.nytimes.com/elections/2016/results/california-ballot-measure-62repeal-death-penalty ("Voters rejected Proposition 62—Repeal Death Penalty—in California on Tuesday. The proposition called for making life without possibility of parole the strongest punishment under California law. Attempts to pass a similar measure in 2012 also failed.").

174 *See States and Capital Punishments*, NAT'L CONF. OF STAT. LEGIS. (March 24, 2020), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

175 *History of the Death Penalty,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/Illinois (last visited Apr. 18, 2020).

176 *See id.*

177 *See* Ken Armstrong, *Ryan Suspends Death Penalty*, CHI. TRIB. (Jan. 31, 2000), https://www.chicagotribune.com/news/ct-xpm-2000-01-31-0002010058-story.html.

However, some doubted Governor Ryan's motives for the mass commutation. Family and friends of some of the victims believed the Governor was using the commutations as a means of shifting attention "from the corruption scandal that plagued his administration and led to criminal charges against top aides."[178] Governor Ryan was under federal investigation at the time of the announcement and was eventually indicted in December of 2003.[179] Skeptics speculated that his last-minute order was designed to influence his own political future.

The current death penalty system violates the *Furman* arbitrary and capricious standard because "[t]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[180] There is also no meaningful basis, or at least no defensible explanation, for the manner in which inmates are selected for execution. On federal death row, Barr selects inmates for execution based on his personal opinion, rather than the rule of the law. The same personal selection is repeated by the states. Finally, the selection of the few inmates for execution, when compared to the number of eligible death row inmates, demonstrates executive abuse. By lacking any legal standards for which death row inmates will be executed, the current death penalty system is simply as arbitrary and capricious as were the statutes struck down by *Furman*.

II. AVOIDING POLITICS

Throughout history, political regimes came into power by force and subsequently executed political rivals. Examples include ancient Chinese dynasties,[181] Oliver Cromwell's administration,[182] numerous

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178 Monica Davey, *Governor Commutes Ill. Death Sentences*, DAILY PRESS (Jan. 12, 2003), https://www.dailypress.com/news/dp-xpm-20030112-2003-01-12-0301120263-story.html.

179 Press Release, Patrick J. Fitzgerald, U.S. Att'y, N.D. Ill., U.S. Dep't of Just., U.S. Indicts Former Illinois Gov. George Ryan For Alleged Public Corruption During Terms As Secretary Of State And Governor (Dec. 17, 2003), https://www.justice.gov/archive/usao/iln/chicago/2003/pr121703_01.pdf.

180 Furman v. Georgia, 408 U.S. 238, 355 (1972) (Marshall, J., concurring) (per curiam).

181 MARK LEWIS, THE EARLY CHINESE EMPIRES 122 (Harvard Univ. Press 2009).

182 *See Death Warrant of King Charles,* U.N. EDUC., SCI., AND CULTURAL ORG. (Jan. 30, 1649), https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/collections/deathwarrant/ ("This evocative document, a flat parchment containing seals and signatures, is handwritten in iron gall ink and led to the execution of Charles I and subsequent rule of Oliver Cromwell, one of the 59 signatories. Charles was tried in the House of Commons and executed on 30 January 1649, outside Banqueting House in Whitehall. Following the Restoration of the monarchy in 1660, the Death Warrant was used to identify the

South American Military juntas,[183] and the Bolshevik revolution.[184] In fact, sometimes opposition leaders went from the executioners to the executed, such as Julius Caesar[185] and Robespierre.[186]

Modern international cooperation movements recognize this history. In 1994, the United Nations debated a resolution to abolish the death penalty.[187] The Chair of the Third Committee summarized the arguments for and against abolition. Among other arguments for abolition,[188] the report stated that "the death penalty sometimes veiled a desire for vengeance or provided an easy way of eliminating political opponents."[189] In contrast, such a concern has never been voiced by the abolition movement in the United States, simply because such an idea seems unfathomable to both the American public and American politicians. Culturally and historically, there exists no example of using capital punishment to eliminate political opponents in the United States.

From the beginning and by design, the United States intentionally avoided political executions. The framers of the United States Consti-

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commissioners who had signed it (the 'regicides') and prosecute them for treason. Even the signatories, who had died, including Cromwell, were dug up and their bodies hanged. The House of Lords ordered the return of the Death Warrant from Charles' executioner who was imprisoned in the Tower of London.").

183 *See The Age of Spanish American Revolutions: Formation of Local Juntas and the Spanish Attempt to Retain Control*, THE JOHN CARTER BROWN LIBRARY, https://www.brown.edu/Facilities/John_Carter_Brown_Library/exhibitions/spanishage/pages/juntas.html (last visited Apr. 18, 2020).

184 Simon Sebag Montefiore, *The Devastating True Story of the Romanov Family's Execution*, TOWN & COUNTRY MAG. (OCT. 12, 2018), https://www.townandcountrymag.com/society/tradition/a8072/russiantsar-execution/.

185 *The Ides of March*, HISTORY (Feb. 9, 2010), https://www.history.com/this-day-in-hisotry/the-ides-of-march.

186 *Robespierre Overthrown in France*, HISTORY (Feb. 9, 2010), https://www.history.com/this-day-in-history/reobspierre-overthrown-in-france.

187 *See* U.N. GAOR, 49th Sess., at 1-4, U.N. Doc. A/49/234 (1994), A/49/234/Add.1, A/49/234/Add.2, *amended by* U.N. GAOR 3d Comm., 49th Sess., at 1-2, U.N. Doc. A/C.3/49/L.32/Rev.1 (1994); *see also* Stephen Norris, *United Nations Moratorium on The Death Penalty*, 3 JOURNEYS INTO THE PAST (May 24, 2018), https://blogs.miamioh.edu/hst-journeys/2018/05/united-nations-moratorium-on-the-death-penalty/.

188 Including: the lack of evidence of deterrent effect, the right to life is the most basic human right, the irreversibility of a death sentence, the rejection of the death penalty by international tribunals. *See* G.A. Res. 62/70(b), Moratorium on the Use of the Death Penalty (Nov. 1, 2007).

189 WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 201 (3d ed. 2002).

tution were aware of the historical persecutions against political opponents:

> The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments. But in the polemics that led to the various guarantees of freedom, it had no place compared with the tremendous thrust of the trial and execution of Sidney. The hundreds of judicial murders committed by Jeffreys and his fellow judges were totally inconceivable in a free American republic, but any American could imagine himself in Sidney's place—executed for putting on paper, in his closet, words that later on came to express the basic principles of republican government. Unless barred by fundamental law, the legal rulings that permitted this result could easily be employed against any person whose political opinions challenged the party in power.[190]

Thus, the framers of the Constitution intentionally avoided suppressing political speech through executions.

Certainly, the death penalty was an acceptable form of punishment for other forms of conduct at the United States' founding:

> It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes.[191]

Since the founding, legislation provided for the death penalty for treason, murder, and other serious felonies.[192] Additionally, the Constitution also granted the President the "[p]ower to grant Reprieves and Pardons for Offenses against the United States."[193] However, the new

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190 Furman v. Georgia, 408 U.S. 238, 254-55 (1972) (Marshall, J., concurring) (per curiam).

191 Gregg v. Georgia, 428 U.S. 153, 177 (1976) (plurality opinion).

192 Crimes Act of 1790, C. 9, 1 Stat. 112. Dissection after execution was included in possible penalties. "SEC. 4. And be it also enacted, That the court before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection . . . ."

193 U.S. CONST. art. II, § 2.

government intentionally avoided both establishing capital punishment for political enemies as well as exacting revenge against political enemies of the Revolutionary War.[194] A review of the political history following the war demonstrates that the United States came close, but never indulged, in the execution of political opposition.

Despite acrimonious political debates and armed rebellion during the Civil War, the death penalty has never been used to suppress political ideology in the United States.[195] When de Tocqueville "described the 'benign' character of American criminal justice . . . in his *Democracy in America*, the prime piece of evidence that he offered was that America had no political prisoners."[196] Political dissenters are protected by the First Amendment to the United States Constitution.[197] The history of the United States consistently demonstrates that even when a political group fails to gain power, the members of that group live out their natural lives after the new regime takes office. From the founding of the United States, there has been an emphasis on a legal, orderly transfer of power.

A. *Nation Building*[198]

At the completion of the Revolutionary War, the newly formed United States of America signed the Treaty of Paris of

194 *See* discussion *infra* Part II.A.

195 Although designed to suppress political ideologies, the Alien and Sedition Acts of 1798 did not include execution as a penalty. *See* An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," https://avalon.law.yale.edu/18th_century/sedact.asp (last visited Apr. 18, 2020).

196 JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 125 (2003) (quoting de Tocqueville 2:209).

197 U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

198 This section focuses on the Revolutionary War. Compare with the aftermath of World War II. The United States participated in Nazi war trials and the executions of those convicted. After the defeat of Japan, the United States General McArthur stripped the Japanese Emperor and government of all power, and arranged for the International Military Tribunal for the Far East drawn from the Allied forces to prosecute the Japanese military leaders. *See The International Military Tribunal for the Far East*, U. VA. DIGITAL COLLECTION, http://imtfe.law.virginia.edu (last visited Apr. 18, 2020). Seven of the twenty-eight convicted military leaders were executed in 1948. *Id.* General McArthur also executed a Japanese military leader in Manila. *See United States of America v. Tomoyuki Yamashita. Record of Trial*, LIBR. OF CONGRESS, MIL. LEGAL RESOURCES, https://www.loc.gov/rr/frd/Military_Law/Yamashita_trial.html (last visited Apr. 18, 2020).

1783[199] (the Treaty) with Great Britain. Not only did the Treaty protect those who had opposed the revolution, it went even further and restored confiscated property. Contrary to some popular sentiments, Article V of the Treaty stated:

> It is agreed that Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights, and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights, and Properties of Persons resident in Districts in the Possession on his Majesty's Arms and who have not borne Arms against the said United States. And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve Months unmolested in their Endeavors to obtain the Restitution of such of their Estates—Rights & Properties as may have been confiscated.[200]

The remainder of Article V provided that Congress would encourage individual state governments to pass similar laws to protect the property and liberty rights of those who had supported the King.[201] Additionally, Article VI protected all former rivals against prosecution or property confiscation:

> That there shall be no future Confiscations made nor any Prosecutions commenced against any Person or Persons for, or by Reason of the Part, which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage, either in his Person, Liberty, or Property; and that those who may be in Confinement on such Charges at the Time of the Ratification of the Treaty in America shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.[202]

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199 Treaty of Paris, art. V, U.S.-France, Sept. 3, 1783, https://www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0008.pdf (last visited Apr. 18, 2020).

200 *Id.*

201 *Id.* ("And that Congress shall also earnestly recommend to the several States a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent not only with Justice and Equity but with that Spirit of Conciliation which on the Return of the Blessings of Peace should universally prevail. And that Congress shall also earnestly recommend to the several States that the Estates, Rights, and Properties of such last mentioned Persons shall be restored to them . . . .").

202 U.S. CONST. art. VI.

The Treaty ensured that Royalists, Tories, or Loyalists—those colonists who supported the King during the Revolutionary War—were free to remain in the United States. After the war, these individuals were entitled to become Untied States citizens and obtain all rights of such citizenship. Supporters of the King were neither forced back to England nor were they executed at the end of the War. Any property seized during the war was returned, and those who opposed the revolution were not imprisoned.

The Treaty provoked controversy, and some Americans urged violating Articles V and VI.[203] In support of the Treaty, Alexander Hamilton wrote his *Letters From Phocion*.[204] These letters urged respect for the treaty for practical, philosophical, and moral reasons. From a practical perspective, Hamilton emphasized the great benefits of the Treaty provisions to the new government,[205] as well as the ease of the concessions:

> [A]nd what do we give in return? We stipulate that there shall be no future injury to her adherents among us. How insignificant the equivalent in comparison with the acquisition! A man of sense would be ashamed to compare them; a many of honesty, not intoxicated with passion, would blush to lisp a question of the obligation to observe the stipulation on our part.[206]

Hamilton asserted that much was gained and almost nothing was required of the Americans by the Treaty except to refrain from treating loyalists to the King as enemies in the newly recognized United

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[203] Alexander Hamilton, Letter from Phocion to the Considerate Citizens of New York (Jan. 1794), *in* THE PAPERS OF ALEXANDER HAMILTON 484 (Columbia Univ. Press 1962) (1784) [hereinafter Letter from Phocion I].

[204] *Id.*; *see also* Alexander Hamilton, A Second Letter from Phocion to the Considerate Citizens of New York (Apr. 1794), *in* THE PAPERS OF ALEXANDER HAMILTON 530 (Columbia ed. 1962) (1784) [hereinafter Letter from Phocion II]. "What is the equivalent given to Great Britain for all the important concessions she has made? She has surrendered the capital of this State and its large dependencies. She is to surrender our immensely valuable posts on the frontier; and to yield to us a vast tract of western territory, with one half of the lakes, by which we shall command almost the whole fur trade. She renounces to use her claim to the navigation of the Mississippi, and admits us to share in the fisheries, even on better terms that we formerly enjoyed it. As she was in possession, by right of war, of all these objects, whatever may have been our original pretentions to them, they are, by the laws of nations, to be considered as so much given up on her part." Letter from Phocion I, *supra* note 203, at 489-90.

[205] *Id.*

[206] *Id.* at 490.

States. Accepting these former opponents as full citizens would benefit the new country more than exacting revenge.

From a philosophical perspective, Hamilton responded to concerns that allowing supporters of the King to remain in the United States would undermine the legitimacy of the new republic:

> But, say some, to suffer these wealthy disaffected men to remain among us, will be dangerous to our liberties. Enemies to our government, they will be always endeavoring to undermine it, and bring us back to the subjection of Great Britain. The safest reliance of every government is on men's interests. This is a principle of human nature, on which all political speculation, to be just, must be founded.[207]

Hamilton reasoned that fair treatment of the King's supporters would transform these supporters into good citizens of the new country, explaining, "[m]ake it in the interest of those citizens who, during the Revolution, were opposed to us, to be friends to the new government, by affording them not only protection, but a participation in its privileges, and they will undoubtedly become its friends."[208] Treating the former opponents equally and with dignity would produce valuable citizens and would increase respect for the new country.

Finally, from a moral perspective, Hamilton urged that the new government refrain from exacting violent revenge on the Tories:

> Viewing the subject in every possible light, there is not a single interest of the community but dictates moderation rather than violence. That honesty is still the best policy; that justice and moderation are the surest supports of every government; are maxims which, however they may be called trite, are at all times true: though too seldom regarded, but rarely neglected with impunity. Were the people of America, with one voice, to ask, What shall we do to perpetuate our liberties and secure our happiness? The answer would be, "Govern well," and you have nothing to fear, either from internal disaffection or external hostility.[209]

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207 *Id*. at 494.

208 *Id.*

209 *Id.* at 495.

Hamilton argued that moral treatment of these former enemies would produce, at a minimum, respect for the government:[210]

> Abuse not the power you possess, and you need never apprehend its diminution, or loss. But if you make a wanton use of it; if you furnish another example, that despotism may debase the government of the many as well as the few; you, like all others that have acted the same part, will experience that licentiousness is the forerunner to slavery.[211]

If instead of treating the Tories respectfully, the victors abused them, hostility to the government would result. In further support of the importance of acting morally, Hamilton evoked the images of Roman Emperor Augustus and Queen Elizabeth I as examples of effective rulers who forgave their enemies and their tormentors, thus triumphing during their successful reigns.[212]

Alexander Hamilton's sentiments prevailed, and both the citizens and the newly formed government adhered to the Treaty of Paris. Even those Loyalists who had actively supported the King against the Revolutionaries kept their property, their liberty, and their lives. Indeed, the treatment of political rivals in the United States during this time period stands in stark contrast to the fate of supporters of the French King less than ten years later during the French Revolution, whose heads were paraded through the streets of Paris as trophies.[213]

B. *Ex Parte Milligan*[214]

During the Civil War, President Lincoln attempted to apply the death penalty to quash political opposition to the war, but the Supreme Court prevented the attempted execution. Despite current

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[210] Respect for government also prompts Hamilton to compare the concept of violating the Treaty to historic abuses: "Can we then do, by act of legislature, what the Treaty disables us from doing by due course of law? This would be to imitate the Roman General, who, having promised Antiochus to restore half his vessels, caused them to be sawed in two before their delivery; of the Plataea, who, having promised the Thebans to restore their prisoners, had them first put to death, and returned them dead." Letter from Phocion I, *supra* note 203, at 495.

[211] *Id.*

[212] *Id.* at 496.

[213] *See infra* Part II.B; *see also* HANS-JÜRGEN LÜSEBRINK & ROLF REICHARDT, THE BASTILLE: A HISTORY OF A SYMBOL OF DESPOTISM AND FREEDOM 44 (Norbert Schürer, trans., Duke University Press) (1997).

[214] *Ex parte* Milligan, 71 U.S. 2 (1866).

perceptions,[215] President Lincoln did not have universal support in the Northern states for the Civil War, and some of his harshest critics were from Indiana.[216] In Fort Wayne, Indiana, Lambdin Milligan spoke to an audience in public and said, "The crimes and all of the horrible sins that are attendant upon the prosecution of an unjust and unnecessary war could be tied to Lincoln's practices."[217] Soldiers arrested Milligan and charged him with inciting insurrection.[218] Over his objection to its legitimacy, the military commission convicted Milligan and sentenced him to be put to death on May 19, 1865.[219] President Lincoln reviewed and approved Milligan's death sentence.[220]

Lincoln's approval of Milligan's death sentence reflected his endorsement of the political application of the death penalty. Lincoln advocated prosecution and execution as a deterrent to suppress political speech not only in the rebellious South, but also among any southern sympathizers or war objectors in the loyal North.[221] Lincoln explained the rationale of executing those who object to the war by analogizing it to military deserters:

> Long experience has shown that armies cannot be maintained unless desertions shall be punished by the severe penalty of death. The case requires, and the law and the Constitution sanction, this punishment. Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is none the less injurious when effected by getting a father, or brother, or friend, into a public meeting, and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked Administration of a contemptible Government, too weak to arrest and punish him if he shall desert. I think that in

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215 *See* Jennifer L. Weber, *Lincoln's Critics: The Copperheads*, 32 J. OF THE ABRAHAM LINCOLN ASS'N 33 (2011), https://www.jstor.org/stable/41342650?seq=1#metadata_info_tab_contents.

216 *See* MAROUF HASIAN, JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 86 (2005) ("States like Indiana—and people like Milligan—drove Lincoln crazy.").

217 *Id.*

218 *Milligan*, 71 U.S. at 6.

219 *Id.* at 7.

220 *Id.* ("[W]ith a statement of fact that the sentence was approved by the President of the United States, who directed that it should be 'carried into execution without delay;' all 'by order of the Secretary of War.'").

221 John Yoo, *Lincoln at War*, 38 VT. L. REV. 3, 40 (2013).

> such a case to silence the agitator, and save the boy, is not only constitutional, but withal a great mercy.[222]

In this passage, President Lincoln clearly sanctions the political use of the death penalty against United States citizens and political rivals who objected to his authorization of the Civil War.

Milligan's prosecution demonstrated Lincoln's intention to use the death penalty to suppress political opposition. In support of the charges against Milligan, the prosecutors claimed that Milligan participated in a secret society, the goals of which "involved the overthrowing of the United States government."[223] Milligan objected to the trial as a violation of the Constitution.[224] He insisted that there was no such authority to prosecute him in a military commission because Indiana had not been invaded nor was it a rebellious state.[225] Additionally, the federal courts in Indiana were open and functioning, and thus military courts could not replace civil courts.[226] As a resident of Indiana, Milligan was not a resident of a rebellious state "nor a prisoner of war, nor a person in the military or naval service."[227] Thus, no military tribunal had authority over his actions and he was only answerable to the federal civil court that had declined to indict him.[228]

Milligan appealed his conviction to the United States Supreme Court.[229] Milligan's attorney "vilified those who were willing to treat 'political errors' as crimes that were punishable by military commissions, and he read from a recent Attorney General report that claimed the military could 'take and kill, try and execute'" civilians.[230] Another of Milligan's attorneys argued that because Congress did not establish military commissions, the President acted without authority.[231] He described the issue presented to the Supreme Court as: "Has the President, in time of war, upon his own mere will and judg-

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222 Abraham Lincoln, *Letter to Erastus Corning and Others*, COLLECTED WORKS OF ABRAHAM LINCOLN (June 12, 1863), https://quod.lib.umich.edu/l/lincoln/lincoln6/1:569?rgn=div1;view=fulltext.

223 *Ex parte* Milligan, 71 U.S. 2, 6 (1866).; *see also* HASIAN, *supra* note 216, at 98.

224 *Milligan*, 71 U.S. at 114.

225 *Id.* at 119.

226 *Id.* at 121.

227 *Id.* at 107.

228 *Id.* at 136.

229 *Ex parte* Milligan, 71 U.S. 2, 22 (1866).

230 HASIAN, *supra* note 216, at 105.

231 *Milligan*, 71 U.S. at 33.

ment, the power to bring before his military officers any person in the land, and subject him to trial and punishment, even to death?"[232] This stark presentation of the issue underlines the political nature of the prosecution.

Emphasizing that the United States, in contrast to the tyrannical governments of Europe, did not allow the use of the death penalty to punish political speech, Milligan's attorneys argued:

> All history proves that public officers of any Government, when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit toward actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason . . . ."[233]

In such passages, Milligan's attorneys distinguished the government of the United States from its predecessors, explaining:

> Much confusion of ideas has been produced by mistaking executive power for kingly power. Because in monarchial countries the kingly office includes the executive, it seems to have been sometimes inferred that, conversely, the executive carries with it the kingly prerogative. Our executive is in no sense a king, even for four years.[234]

This argument highlights that the president does not have the power to override the other two branches of government. Presidential power is expressly defined in and limited by Article II of the United States Constitution.

Additionally, Milligan's attorneys traced the military's subservience to civil courts back to the Revolutionary War, arguing that the revolution was a protest to military usurpation of civil power.[235] The framers of the Constitution insisted on the right to trial by jury specifically to prevent the conviction and execution of an individual simply because he offends the government.[236]

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232 *Id.* at 30.

233 *Id.* at 64.

234 *Id.* at 32.

235 *Id.* at 37.

236 *Id.* at 74 ("Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the judge-advocate, or the head of a department. Shall this inestimable privilege be

Although the prosecutors argued that the necessities of the war supported Milligan's prosecution,[237] the Supreme Court disagreed. Specifically addressing the attempt to use a military court to suppress political opposition, the Supreme Court noted that the drafters of the Constitution prevented such a use:

> Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealably law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.[238]

The Supreme Court found that Milligan's conviction violated the Constitution by trying him in a military court when the civil courts were open and functioning by denying him his Sixth Amendment right to trial by jury, and by failing to discharge him from custody.[239] The Supreme Court granted Milligan's *habeas corpus* petition, found him to be unlawfully held, and released him.[240] In so doing, the Court overruled President Lincoln's attempt to have Milligan executed for his political views.

Of course, had Milligan been originally arrested for violation of a criminal law and tried in a civilian court and subsequently sentenced

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extended only to men whom the administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of [political offences] . . . ").

237 They defended this use of military power under the law of necessity. "In time of war, to save the country's life, you send forth your brothers, your sons, and put them under the command, under the arbitrary will of a general to dispose of their persons and lives as he pleases; but if, for the same purpose, he touches a Milligan, a Son of Liberty, the Constitution is invoked in his behalf – and we are told that the fabric of civil government is about to fall! We submit that if he is entrusted with the power, the will, the authority to act in the one case, he ought to have sufficient discretion to death with the other; and that the country will not be so much endangered from the use of both, as it would be if he used the first and not the last." *See Ex parte* Milligan, 71 U.S. 2, 92 (1866).

238 *Id.* at 120-21.

239 *Id.* at 122-23.

240 *Id.* at 134-35.

to death, his conviction and death sentence would have complied with the Constitution. It was the political use of the death penalty, as well as replacing the civil court system with a military court, that rendered his death sentence unconstitutional.[241] Thus, the Constitution does not protect individuals from the death penalty. Instead, it protects individuals from execution because they may be a rival of or critical of the current political power.

III. ELIMINATING POLITICS

The *Furman* Court did not distinguish between the capital punishment verdict and the execution, likely because execution followed methodically after a defendant was sentenced to death.

> Executions . . . generally occurred within a year of sentencing into the early 20th century. The average delay between the imposition of a death sentence and execution grew to approximately three years between 1930 and the mid-1960s. The country's last pre-Furman execution occurred in 1967. Luis Jose Monge had remained under sentence of death for roughly 3½ years before dying in Colorado's gas chamber.[242]

Since the 1970s, the time lapse between a verdict of death and the execution has greatly expanded. The average length an inmate waits on death row as of 2019 exceeds ten years.[243]

A. *Executive Power*

In upholding the revised capital punishment statutes, the Supreme Court required legislative guidance for the sentencing decision, stating that "*Furman* mandates that, where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[244] The Court's concern was that the

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241 *Id.* at 122-23.

242 HANS TOCH ET AL., LIVING ON DEATH ROW: THE PSYCHOLOGY OF WAITING TO DIE (APA 2018), https://www.apa.org/pubs/books/Living-on-Death-Row-Intro-Sample.pdf.

243 *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row (last visited Apr 18, 2020).

244 Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

verdict of death would be applied arbitrarily and capriciously. The Court did not consider whether the timing of executions was arbitrary or capricious.

Additionally, the abuse of the Executive's discretion in scheduling executions was not before the *Furman* Court. However, now, while death sentences are imposed fairly routinely but executions are rare, it is obvious that the executive power over executions is being used in an arbitrary and capricious manner. The ability to leave inmates on death row for years, even decades, exploits political power and undermines the separation of powers doctrine. Once the judicial power has upheld the validity of a death sentence and appeals are exhausted, execution should follow. There should be no ability to delay the execution simply on the executive's whim. Politics should have no part in executions, and the Executive Branch should not have the power to manipulate the timing of executions.

Allowing the Executive to decide when—and if—an inmate is executed invades the province of the jury by undermining the verdict. The Supreme Court explained the importance of the jury:

> Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense.[245]

In accordance with the Supreme Court's rulings, the legislature has limited the imposition of capital punishment to specific parameters. Subsequently, the Executive has exercised its power to decide if a specific case will be charged as a capital case, establishing the option of capital punishment. The sentencing body, either judge or jury, makes an individualized decision as to whether to impose the death penalty on the specific defendant. All death sentences are automatically reviewed by appellate courts. There comes a point at which the death sentence is finalized: when all appeals are exhausted and clemency has been denied. Execution should be the next step.

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[245] McClesky v. Kemp, 481 U.S. 279, 294 (1987) (citing Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Lockett v. Ohio, 438 U.S. 586, 602-05 (1978) (plurality opinion).

However, execution does not follow appeals exhaustion. Instead of a process in which the first defendant whose appeals are exhausted is executed, the current system provides that every inmate with exhausted appeals is waiting to essentially lose the lottery. The power of execution does not lie in the hands of the legislature that authorized the death penalty. It does not lie in the hands of the jury that determined the aggravating and mitigating factors and sentenced the defendant to death. It further does not lie in the hands of the judges who imposed the sentence and reviewed the sentence. Instead, the power to decide who lives and dies lies in the hands of an Executive who follows no set rules.

Left twisting in this political wind are also those who mourn the victims. Execution ends a life, but it is often imposed because another life or lives have already ended. For a system that is increasingly concerned about victims over the past thirty years,[246] executions are the one area in which the victims are of no more importance than their impact on poll numbers. The lack of a rule of law renders executions even more arbitrary than the previous pre-*Furman* process. Although there are indications that nothing would make the death penalty less popular than executing inmate after inmate in quick succession, allowing politicians to manipulate the death penalty for their political gain is a travesty.

B. *Equal Protection*

There remains uncontroverted evidence that race is a factor in the death penalty, particularly the race of the victim.[247] The Supreme Court considered and rejected defendant McCleskey's Fourteenth Amendment equal protection violation argument, requiring "that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'"[248] Many scholars have noted the near impossibility of proving purposeful discrimination, especially as the Court held that, "McCleskey must prove that the decision makers in his case acted with discriminatory purpose. He

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[246] Michael Laurence Goodwin, *An Argument Against Allowing the Families of Murder Victims to View Executions*, PBS FRONTLINE (1997), https://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/against.html.

[247] *See Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim.

[248] *McCleskey*, 481 U.S. at 292 no.10 (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[249] Such evidence either rarely exists or is too ambiguous to conclusively prove intent.[250]

Although it remains difficult to prove that a particular defendant has been targeted for a death sentence because of race,[251] evidence of juror discrimination persists. In 1986, the Supreme Court ruled that striking jurors based on race violates the Equal Protection Clause.[252] The Court reaffirmed *Batson* in 2019 when it found that purposeful discrimination in the jury selection of a death penalty case:[253]

> The State employed its peremptory strikes to remove as many black prospective jurors as possible. The State appeared to proceed as if Batson had never been decided. The State's relentless, determined effort to rid the jury of black individuals strongly suggests that the State wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury.[254]

In reversing and remanding the *Flowers* case, the Court reaffirmed its procedures designed to combat purposeful discrimination in jury selection.[255] However, no such limitations exist to curtail the purposeful abuse of discretion in selecting death row inmates for executions.

The selection of inmates for execution based on personal whim might seem unimportant because of the inmates' status. As the Court previously indicated, although race might have impacted a death sentence, "a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."[256] Each of the thousands of inmates on death row

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249 *Id.* at 292-93.

250 *See* Miller-El v. Dretke, 545 U.S. 231, 238-40 (2005) (finding use of peremptory strikes on minority jurors was discriminatory and a violation of Batson v. Kentucky, 476 U.S. 79 (1986)).

251 As opposed to because of the victim's race, which has been well documented. *See Executions by Race and Victim*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim.

252 Batson v. Kentucky, 476 U.S. 79, 88-89 (1986).

253 Flowers v. Mississippi, 139 S. Ct. 2228, 2246 (2019).

254 *Id.*

255 *Flowers*, 139 S. Ct. at 2228 (2019); *see also Miller-El*, 545 U.S. at 238-40.

256 McClesky v. Kemp, 481 U.S. 279, 297 (1987).

have been sentenced to death for committing acts that, under law, may result in a death sentence. However, that should not excuse executive abuse of discretion.

More disturbing, the actions of executives scheduling executions strongly suggest purposeful discrimination. As noted above, when executions resumed post-1972, the federal government and almost every state first selected a White defendant to execute despite death row having a very narrow White majority. Additionally, in July 2019, Barr selected three White prisoners, one Black prisoner, and one Native American prisoner to execute, despite the near equal number of White and Black prisoners on federal death row.

The numbers clearly suggest that to preclude charges of racism and to avoid repeating the ugly history of the death penalty being used disproportionately against Black prisoners, the executives chose a larger proportion of White prisoners to execute.

CONCLUSION

Through countless cases, procedures, limitations, restrictions, expansions, and revisions, who gets sentenced to death has been meticulously and thoughtfully narrowed, focused, reviewed, and judicially approved.[257] The process for getting sent to death row is controlled by procedures and protections, making ending up on death row no accident.

In contrast, when it comes to which of the thousands of condemned are in fact executed, Justice Stewart's 1972 description in *Furman v. Georgia* still holds true today. The death penalty is "wantonly and freakishly imposed."[258] Although freakishness may have been somewhat eliminated for the sentencing decision, wantonness still exists in the execution process. In many states and in the federal government, there is simply no governing law that requires an Executive to request a death warrant. Inmates can languish on death row until their natural deaths,[259] yet the government will not have violated the law by failing to execute.

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[257] *See*, *e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

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

[259] *Examples of Long-Serving Death-Row Prisoners*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/examples-of-long-servingdeath-row-prisoners (last visited Apr. 18, 2020).

In announcing his moratorium, California Governor Newsom alluded to the squeamishness that somewhat explains the lack of executions. He explained that California is "considering executing more people than any other state in modern history—to line up human beings, every day, for executions for two-plus years."[260] Newsom's reluctance to preside over such a bloodbath reflects the historical evolution of executions. Officials moved executions in public squares to behind prison walls, not to spare the public a grisly spectacle but rather to prevent the public from reveling in the bloodshed.[261] Additionally, execution methods evolved from gruesome hangings, violent firing squads, Nazi-reminiscent gas chambers, and sometimes appalling electrocutions[262] to the almost clinical lethal injection.[263] Governor Newsom's aversion to executing everyone currently on California's death row seems reflected by the fact that our current system rarely executes.

In the absence of procedures, rules, or guidelines, the men and women of death row await–not the slowly grinding wheels of justice—but the sporadic, inflamed, histrionic actions of politicians. In acting thusly, these politicians demonstrate not only that they care not for the condemned, but also that they care not for the victims of the condemned. Politicians demonstrate repeatedly that the death penalty, the victims, and the condemned are each available merely to be exploited as political pawns.

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260 Scott Shafer & Marisa Lagos, *Calif Gov. Gavin Newsom Orders Moratorium on Death Penalty*, NPR (Mar. 12, 2019, 11:25 PM), https://www.npr.org/2019/03/12/702873258/gov-gavin-newsom-suspends-death-penalty-in-california.

261 Michael H. Reggio, *History of the Death Penalty*, PBS FRONTLINE, https://www.pbs.org/wgbh/frontline/article/history-of-the-death-penalty/ (last visited Apr. 18, 2020).

262 *Condemned Man's Mask Bursts Into Flame During Execution*, N.Y. TIMES (Mar. 26, 1997), https://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html.

263 *See, e.g.*, Lindsey Bever, *Lethal Injection Delayed after Execution Team Couldn't Find Convicted Killer's Vein*, WASH. POST (Nov. 15, 2017, 3:34 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/11/15/lethal-injection-delayed-after-execution-team-couldnt-find-convicted-killers-vein/.