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**Death by Discretion:
Executive Power and the Arbitrary
Machinery of Federal Capital Punishment**

Reem Haikal

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Death by Discretion: Executive Power and the Arbitrary Machinery of Federal Capital Punishment

*Reem Haikal**

*This Article argues that the federal death penalty is not merely at risk of being cruel; it is increasingly at risk of becoming arbitrary and lawless. Despite the procedural safeguards embedded in the Federal Death Penalty Act (FDPA), executive practices have reintroduced many of the same constitutional flaws that the Supreme Court identified in *Furman v. Georgia*. Through detailed analysis of the FDPA's structure, this Article shows that the statute fails to meaningfully constrain the Attorney General's charging discretion, allowing life-and-death decisions to hinge on opaque and often politicized processes. The Trump administration's revival of federal executions, culminating in sweeping executive orders and policy memoranda, demonstrates how prosecutorial independence can collapse under political pressure, while the Biden administration's later reversal underscores how the death penalty's implementation now depends more on presidential ideology than on law. The result is a capital punishment regime defined not by uniform standards, but by partisan fluctuation and institutional instability.*

This Article critiques the constitutional inadequacy of relying on internal Department of Justice protocols and discretionary judgment in matters of irreversible punishment. It examines the erosion of due process under the FDPA, the judiciary's limited ability to enforce executive restraint, and the broader implications of permitting death sentences to be shaped by electoral outcomes rather than legal principle. As a solution, this Article calls for legislative intervention, drawing on Congress's prior responses to systemic dysfunction in federal sentencing and national security prosecutions. Specifically, it proposes the establishment of a politically independent federal death penalty commission, modeled after the U.S. Sentencing Commission, to promote transparency, consistency, and proportionality. Without institutional reform, the federal death penalty will continue to defy constitutional expectations and remain vulnerable to the very arbitrariness the Eighth Amendment was intended to prevent.

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I. INTRODUCTION

The federal death penalty has grown increasingly unstable, not because of new legal developments or scientific breakthroughs, but due to abrupt ideological shifts within the executive branch. Federal execution policy has veered sharply with each administration, moving from revival to restraint and back again, revealing a system driven more by presidential preference than consistent legal principle. This volatility revives the constitutional concerns that animated *Furman v. Georgia* and underscores the urgent need for institutional safeguards.¹

This Article argues that the federal capital punishment regime is at risk of becoming not just cruel, but arbitrary and lawless. It attributes this instability to unchecked executive discretion, insufficient legislative oversight, and the absence of structural mechanisms to ensure fair and principled enforcement. Without institutional restraints, including renewed congressional action and structural reforms, capital punishment at the federal level will continue to defy constitutional guarantees of due process, equal protection, and fairness. What should be a domain governed by calibrated legal reasoning and scientifically informed medical protocols has instead become a political instrument, vulnerable to executive whim.

Part II traces the evolution of federal death penalty policy across the last four administrations. It begins with the Obama administration, which maintained the federal death penalty in a state of dormancy without abolishing it, reflecting moral discomfort and procedural caution.² That caution gave way to the Trump administration's aggressive revival, marked by a rapid expansion of executions, a new protocol using pentobarbital, and a retributive philosophy that culminated in thirteen executions within six months.³ President Biden's subsequent moratorium⁴

¹ 408 U.S. 238 *passim* (1972).

² See Madeleine Carlisle, *In a Year Marked By Death, the Trump Administration Cements a Legacy of Unprecedented Executions*, TIME (Dec. 30, 2020, at 9:48 ET), <https://time.com/5923973/trump-executions-death-penalty-covid-19/> [https://perma.cc/A38G-7BDK]; Peter Baker, *Obama Orders Policy Review on Executions*, N.Y. TIMES (May 2, 2014), <https://www.nytimes.com/2014/05/03/us/flawed-oklahoma-execution-deeply-troubling-obama-says.html> [https://perma.cc/YY7G-HNV3].

³ Carlisle, *supra* note 2.

⁴ See Memorandum from Merrick B. Garland, Att'y Gen., to Deputy Att'y Gen. et al., *Moratorium on Federal Executions Pending Reviews of Policies and Procedures 1* (July 1, 2021) [hereinafter *Garland Memorandum*], https://www.justice.gov/d9/2022-12/attorney_general_memorandum_july_1_2021.pdf [https://perma.cc/L9YV-NRY2].

and clemency efforts,⁵ though framed as a return to fairness and restraint,⁶ relied on executive discretion rather than structural reform.⁷ The executions resumed with even greater force following President Trump's return to office in 2025.⁸ This Part highlights how life-and-death decisions have increasingly reflected political ideology, not legal continuity.

Part III revisits *Furman v. Georgia*, where the Supreme Court condemned the arbitrary and inconsistent imposition of the death penalty.⁹ It argues that the same defects, disparity, inconsistency, and unchecked discretion¹⁰ have resurfaced in the modern federal framework. But unlike the jury-driven arbitrariness of *Furman*,¹¹ the new form stems from executive decision-making, especially the Attorney General's broad charging discretion¹² and the ideological posture of the presidency.¹³ By revisiting *Furman*'s key concurrences, the discussion underscores that arbitrariness now takes a new form—not through unguided jury sentencing, but through the unbounded discretion of the Attorney General and the ideological volatility of the executive branch. Despite Congress's attempt to codify due process protections

⁵ See Presidential Statement on Fed. Death Row Commutations, 2024 DAILY COMP. PRES. DOC. 202401099 (Dec. 23, 2024) [hereinafter Biden Statement]; Press Release, The White House, Fact Sheet: President Biden Commutes the Sentences of 37 Individuals on Death Row (Dec. 23, 2024) [hereinafter White House Fact Sheet], <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/23/fact-sheet-president-biden-commutes-the-sentences-of-37-individuals-on-death-row/> [https://perma.cc/2XCH-7WV3].

⁶ Garland Memorandum, *supra* note 4.

⁷ See *id.*; CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 278–84 (2016) (discussing the fragility of death penalty reform and its dependency on political leadership); LISA N. SACCO, CONG. RSCH. SERV., IN11474, THE FEDERAL DEATH PENALTY: RECENT DEVELOPMENTS 2 (2020).

⁸ Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463–64 (Jan. 20, 2025); Alanna Durkin Richer, *Trump Signs Death Penalty Order Directing Attorney General to Help States Get Lethal Injection Drugs*, AP NEWS (Jan. 20, 2025, at 19:10 PT), <https://apnews.com/article/federal-executions-trump-d9b15ffc1db366a717f2f605330999e8> [https://perma.cc/Z6JT-Y85C].

⁹ See 408 U.S. 238, 239–40 (1972) (per curiam).

¹⁰ See *id.* at 248–49 (Douglas, J., concurring).

¹¹ *Id.* at 246–47.

¹² See *United States v. Purkey*, 428 F.3d 738, 748–49 (8th Cir. 2005); *but see United States v. Frank*, 8 F. Supp. 2d 253, 264 (S.D.N.Y. 1998).

¹³ See Baker, *supra* note 2; Rebecca Morin, *They Admitted Their Guilt: 30 Years of Trump's Comments About the Central Park Five*, USA TODAY (June 20, 2019, at 6:14 ET), <https://www.usatoday.com/story/news/politics/2019/06/19/what-trump-has-said-central-park-five/1501321001/> [https://perma.cc/6NLZ-P7BV]; J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1621 (2018); Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 622, 623–24 (2022); Garland Memorandum, *supra* note 4.

through the Federal Death Penalty Act of 1984 (FDPA),¹⁴ meaningful review of death-seeking decisions remains absent, resulting in irrational disparities by race, geography, and prosecutorial preference.¹⁵ As Justice Stewart once warned, the death penalty cannot be imposed so “wantonly and so freakishly” that it resembles being struck by lightning.¹⁶ That warning now echoes through a system where the imposition of death reflects not the facts of a case, but the will of the President.

Part IV shifts focus to the structural deficiencies that permit federal executions to proceed with minimal checks on executive power. It identifies two central flaws: (1) the erosion of prosecutorial independence under political pressure,¹⁷ and (2) the FDPA’s delegation of authority without sufficient legislative oversight.¹⁸ This Part begins by exploring how unchecked discretion, particularly when driven by presidential demands, undermines the objectivity and fairness required by due process.¹⁹ It then turns to the statutory structure of the FDPA, demonstrating how gaps in its design allow the executive branch to impose and implement the death penalty without meaningful accountability.²⁰ In doing so, this Part exposes how federal capital punishment has been permitted to drift from its constitutional moorings, not through defiance of law, but through exploitation of its silences.

Part V concludes by proposing legislative reform, drawing on the Sentencing Reform Act of 1984 and the Military Commissions Act of 2006 to illustrate Congress’s capacity to construct stable, principled frameworks in high-stakes areas of criminal law.

¹⁴ See *United States v. Catalan Roman*, 376 F. Supp. 2d 108, 111 (D.P.R. 2005).

¹⁵ See *Glossip v. Gross*, 576 U.S. 863, 918–19 (2015) (Breyer, J., dissenting); *The 2% Death Penalty: The Geographic Arbitrariness of Capital Punishment in the United States*, DEATH PENALTY INFO. CTR. [hereinafter *2% Death Penalty*], <https://deathpenaltyinfo.org/stories/the-clustering-of-the-death-penalty> [<https://perma.cc/F843-E7AT>].

¹⁶ *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

¹⁷ See Garland Memorandum, *supra* note 4; Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463 (Jan. 20, 2025).

¹⁸ See Federal Death Penalty Act, 18 U.S.C. §§ 3591–98; see also *United States v. Purkey*, 428 F.3d 738, 748–50 (8th Cir. 2005) (demonstrating litigation resulting from the questions of law presented by the unclear constitutionality and scope of authority delegated to the executive branch by the FDPA); *Mitchell v. United States*, 140 S. Ct. 2624, 2625 (2020) (questioning whether the “manner prescribed” by the FDPA includes procedures set forth by a state agency’s execution protocol and remarking that clarification of the FDPA is needed).

¹⁹ See Garland Memorandum, *supra* note 4; Exec. Order No. 14164, 90 Fed. Reg. at 8463–64.

²⁰ See *Mitchell*, 140 S. Ct. at 2625; *Purkey*, 428 F.3d at 748.

These statutes serve as workable models, having been structured to reduce disparity, enhance accountability, and reassert constitutional consistency.²¹

II. THE COLLAPSE OF STABILITY

This Part traces the shifting trajectory of federal capital punishment across recent presidential administrations. It begins by examining President Obama's cautious approach, characterized by dormancy without abolition, then turns to Trump's first term, which aggressively revived and expanded federal executions. It next considers Biden's moratorium and limited clemency, revealing the fragility of reforms rooted in executive action alone, before addressing Trump's second term, which formalized and reinforced capital enforcement policies. Together, these case studies illustrate how the federal death penalty has become a volatile, politically driven system, dependent not on consistent legal principles but on the ideology of whoever holds the presidency.

A. Obama: Dormancy Without Abolition

During Obama's presidency from 2008 to 2016, the federal death penalty remained legally in place but dormant, as no executions were carried out during his administration.²² The last federal execution before Obama's presidency occurred in 2003, and the long hiatus stemmed in part from litigation surrounding the government's execution protocols.²³ In 2014, following a botched state execution in Oklahoma,²⁴ Obama called the inci-

²¹ See 28 U.S.C. § 991(b)(1)(B); U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENT'G COMM'N 2021); *Hamad v. Gates*, 732 F.3d 990, 998–99 (9th Cir. 2013); *In re Al-Nashiri*, 835 F.3d 110, 115 (D.C. Cir. 2016); *Boumediene v. Bush*, 553 U.S. 723, 738–39 (2008).

²² Carlisle, *supra* note 2.

²³ *Id.*

²⁴ *Oklahoma Botches Execution of Clayton Lockett*, DEATH PENALTY INFO. CTR.: NEWS (Mar. 14, 2025), <https://deathpenaltyinfo.org/oklahoma-botches-execution-of-clayton-lockett> [https://perma.cc/PQ4E-A4RF]. On April 29, 2014, Oklahoma inmate Clayton Lockett suffered a fatal heart attack roughly forty minutes after officials began carrying out a revised lethal injection protocol. *Id.* Lockett was given midazolam, the initial drug in a three-drug sequence, at 6:23 p.m. *Id.* Although he was declared unconscious by 6:33 p.m., witnesses soon noticed him moving, mumbling, and reacting on the execution table just minutes later, with some observers comparing his motions to a seizure. *Id.* Lockett was pronounced dead from a severe heart attack at 7:06 p.m. *Id.* A spokesperson for the Oklahoma Department of Corrections, Jerry Massie, explained that it appeared a vein had ruptured or collapsed, preventing the drugs from properly entering Lockett's bloodstream. *Id.* In response, Governor Mary Fallin put a temporary halt on the execution of Charles Warner, which had been set for later that evening, and requested a full investigation into the execution process to understand what went wrong. *Id.*

dent “deeply disturbing” and directed the Department of Justice (DOJ) to review the administration of capital punishment.²⁵ While Obama continued to support the death penalty in extreme cases,²⁶ he raised concerns about racial disparities, wrongful convictions, and the reliability of lethal injection—reinforcing a cautious, restrained federal approach during his presidency.²⁷ Then-Attorney General Eric Holder, though personally opposed to the death penalty, acknowledged that his views did not represent the official position of the Obama administration.²⁸ In his 2013 American Bar Association address, Holder expressed broader concerns about punitive excess, mass incarceration, and racial disparities in sentencing.²⁹ His emphasis on proportionality, systemic fairness, and moral restraint reflects a deeper skepticism of capital punishment as consistent with a just and modern criminal justice system.³⁰ In contrast to Holder’s more critical perspective, his successor, Attorney General Loretta Lynch, maintained a more conventional approach to the federal death

²⁵ Baker, *supra* note 2 (reporting that Obama initiated a DOJ review following a botched execution in Oklahoma, expressing concerns about racial disparities and wrongful convictions while maintaining support for the death penalty in extreme cases).

Senior DOJ officials explored declaring a formal moratorium due to medical uncertainty surrounding lethal injection drugs, but the proposal ultimately stalled due to political caution and internal disagreement. *Id.* The administration also faced logistical concerns about what to do with inmates already on federal death row, and some advisors warned that a sweeping policy change might provoke backlash and undermine growing bipartisan opposition to the death penalty at the state level. *Id.*

²⁶ Mark Berman, *The Justice Dept. Is Seeking Its First Federal Death Sentences Under Sessions and Expects More to Follow*, WASH. POST (Jan. 9, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/01/09/the-justice-department-is-seeking-its-first-federal-death-sentences-under-sessions-and-expects-more-to-follow/> [<https://perma.cc/9XET-RQMU>] (clarifying that the Obama administration nonetheless pursued and secured death sentences in prominent cases including those of Dzhokhar Tsarnaev, responsible for the Boston Marathon bombing, and Dylann Roof, who carried out the mass shooting at a Charleston, South Carolina church).

²⁷ Baker, *supra* note 2.

²⁸ Josh Gerstein, *Holder Backs Death Penalty Moratorium*, POLITICO: UNDER THE RADAR (Feb. 18, 2015, at 9:06 ET), <https://www.politico.com/blogs/under-the-radar/2015/02/holder-backs-death-penalty-moratorium-202716> [<https://perma.cc/A94D-ETFP>].

²⁹ Eric H. Holder, Jr., U.S. Dep’t of Just., Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <https://www.justice.gov/archives/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<https://perma.cc/YZ7A-XYPE>].

³⁰ *See id.* (calling for sweeping criminal justice reform, criticizing mass incarceration as unsustainable, and denouncing racial disparities in sentencing as “shameful”).

Holder emphasized that the system too often imposes harsh punishments—including long prison terms—for reasons unrelated to public safety, and urged a shift toward fairness, proportionality, and rehabilitation. *Id.* His framing reflects deep skepticism of extreme punishments like the death penalty in a system he viewed as morally and structurally compromised. *Id.*

penalty, affirming its use in high-profile cases where the facts, in her words, “compelled” such action.³¹

B. Trump I: Policy Revival and Expanded Use

It is no secret that Trump is an advocate for the death penalty.³² From the outset of his first presidency, Trump’s administration signaled a likely expansion of the federal death penalty, with expectations that it would preserve, and possibly strengthen, capital punishment through strategic appointments to the DOJ and the federal judiciary.³³ Legal scholars widely predicted that his presidency would halt any momentum toward judicial abolition and entrench capital punishment as a political and punitive tool.³⁴ His long-standing and vocal support, rooted in populist appeal, dehumanizing rhetoric, and distrust of experts, stood in sharp contrast to the constitutional principles of individualized sentencing, scientific credibility, and fundamental human dignity underlying the Eighth Amendment.³⁵ Prior to Trump’s presidency, federal executions had been extremely rare: only three were carried out since the federal death penalty’s reinstatement in 1988—all under President George W. Bush—including the execu-

³¹ Press Release, U.S. Dep’t of Just., Attorney General Loretta E. Lynch Statement on the Case of Dylann Roof (May 24, 2016), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-case-dylann-roof> [<https://perma.cc/4AHP-AXG8>] (“Following the department’s rigorous review process to thoroughly consider all relevant factual and legal issues, I have determined that the Justice Department will seek the death penalty. The nature of the alleged crime and the resulting harm compelled this decision.”); see Luke C. Beasley & William D. Ferraro, Note, *How the Obama Administration Used Retroactivity to Advance Its Sentencing Priorities*, 53 HARV. C.R.-C.L. L. REV. 259, 262–63 (2018) (illuminating how Holder viewed mandatory minimums as contributing to unjust and excessive sentences and how he instructed that recidivist enhancements be avoided except in extreme circumstances).

Beasley and Ferraro note that these reforms were broadly implemented within the DOJ and aligned with the Obama administration’s “smart on crime” agenda, which the President credited to Holder’s leadership. *Id.*

³² See Morin, *supra* note 13. Donald Trump’s one-page advertisement about the Central Park Five serves as a well-documented illustration of his advocacy for the death penalty going back to 1989. *Id.* Following the attack on a jogger in Central Park, Trump paid for full-page ads in major New York newspapers, explicitly urging the return of capital punishment in New York State. *Id.* The ads, titled “BRING BACK THE DEATH PENALTY,” pushed for severe punishment of the accused. *Id.* Even though DNA evidence and a confession from the true perpetrator later cleared the five teenagers, Trump has never apologized for these ads and, even decades later, continues to defend his position and assert the guilt of the Central Park Five, despite their exoneration. *Id.*

³³ Broughton, *supra* note 13.

³⁴ See Chance Meyer, *Death Penalty “Trump Effect,”* 9 LAW J. FOR SOC. JUST. 65, 70 (2018).

³⁵ See *id.* at 76.

tion of the Oklahoma City Bomber, Timothy McVeigh.³⁶ From 2003 until 2020, no federal executions occurred at all.³⁷ This punitive orientation would soon take clearer shape through official policy initiatives. One of the earliest and most prominent initiatives came in the context of the opioid crisis.³⁸ Trump declared the opioid epidemic “the worst drug crisis in American history,” framing it as both a “public health emergency” and a national tragedy that warranted aggressive federal enforcement and punishment.³⁹ Echoing this punitive stance, Trump told supporters at a 2018 rally in Pennsylvania that drug dealers “kill thousands of people” and often “go to jail for 30 days,” suggesting that the country should “start thinking about” the death penalty for such crimes.⁴⁰ He praised countries like Singapore and China for their tough drug policies and insisted that “the only way to solve the drug problem is through toughness.”⁴¹ His preference for swift and severe punishment extended beyond drug crimes. Following the 2017 New York City truck attack, Trump tweeted that the suspect, Sayfullo Saipov, “SHOULD GET DEATH PENALTY!” and later added, “Should move fast. DEATH PENALTY!”⁴²

That broader retributive posture was reflected in then-Attorney General Jeff Sessions’ Memorandum (Sessions Memorandum), which encouraged federal prosecutors to pursue capital

³⁶ Holly Honderich, *In Trump’s Final Days, a Rush of Federal Executions*, BBC (Jan. 15, 2021), <https://www.bbc.com/news/world-us-canada-55236260> [<https://perma.cc/J8UY-CL55>].

³⁷ *Id.*

³⁸ See Remarks on Signing a Memorandum on Combatting the National Drug Demand and Opioid Crisis, 2017 DAILY COMP. PRES. DOC. 201700787 (Oct. 26, 2017).

³⁹ *Id.* In his public remarks, Trump emphasized the devastating scale of the crisis, noting that drug overdoses had become the leading cause of unintentional death in the United States. *Id.* He called the epidemic a “national shame” and stated, “We must stop the flow of all types of illegal drugs into our communities.” *Id.* He praised the DOJ for indicting major traffickers and asserted that “illegal drug use is not a victimless crime,” pledging to pursue “very major lawsuits” against companies and individuals fueling the epidemic. *Id.* These statements aligned with the administration’s retributive posture and its emphasis on capital prosecution in drug-related cases. *See id.*

⁴⁰ Lizzie Dearden, *Donald Trump Says US Should Consider Giving Drug Dealers Death Penalty in Pennsylvania Speech*, INDEP. (Mar. 11, 2018, at 14:06 GT), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-drug-dealers-death-penalty-speech-saccone-north-korea-steel-a8250076.html> [<https://perma.cc/DC68-G6GB>].

⁴¹ *Id.*

⁴² Benjamin Weiser, *In Truck Attack Case, an Unlikely Complication: Trump’s Tweets*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/nyregion/truck-attack-trump-tweets.html> [<https://perma.cc/7YF5-9XB8>].

punishment in certain drug-related cases.⁴³ Sessions framed the opioid crisis as a “deadly epidemic” and cast “[d]rug traffickers, transnational criminal organizations, and violent street gangs” as central contributors to the devastation.⁴⁴ He called on federal prosecutors to deploy “every lawful tool at their disposal,” including enhanced coordination, data-driven enforcement, and both civil and criminal remedies against opioid manufacturers and distributors.⁴⁵ The Sessions Memorandum referenced several federal statutes: 18 U.S.C. § 1959, which authorizes the death penalty for murder committed to gain entrance to, maintain, or advance position in a racketeering enterprise;⁴⁶ 18 U.S.C. § 924(j)(1), which permits capital punishment when death results from the use of a firearm during a drug trafficking crime or crime of violence;⁴⁷ 21 U.S.C. § 848(e)(1)(A), which authorizes the death penalty for intentional killings committed in furtherance of a continuing criminal enterprise involving drug trafficking;⁴⁸ and 18 U.S.C. § 3591(b)(1), which allows for capital punishment in drug offenses involving exceptionally large quantities of controlled substances where the defendant acted with specific intent.⁴⁹ Despite public perception, the Sessions Memorandum did not alter the formal process for pursuing capital punishment.⁵⁰ Under the DOJ’s death penalty protocol, only the Attorney General may authorize the government to seek the death penalty; U.S. Attorneys are limited to making recommendations following the Capital Review Committee submission.⁵¹ Thus, while the Sessions Memorandum encouraged greater attention to existing capital statutes, it did not confer unilateral authority.⁵² Instead, it reflected the administration’s broader commitment to more aggressive use of the federal death penalty.⁵³ The Congressional Research Service (CRS) confirms that the DOJ’s use of the feder-

⁴³ See Memorandum from Jefferson Sessions, Att’y Gen., U.S. Dep’t of Just., to U.S. Att’y’s 1 (Mar. 20, 2018) [hereinafter Sessions Memorandum], <https://www.justice.gov/archives/opa/press-release/file/1045036/dl?inline> [<https://perma.cc/LSD8-A78S>].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 18 U.S.C. § 1959.

⁴⁷ § 924(j)(1).

⁴⁸ 21 U.S.C. § 848(e)(1)(A).

⁴⁹ 18 U.S.C. § 3591(b)(1).

⁵⁰ See J. Richard Broughton, *The Opioid Crisis and the Federal Death Penalty*, 70 S.C. L. REV. 611, 617 (2019).

⁵¹ U.S. Dep’t of Just., U.S. Att’y’s Manual § 9-10.130 (2020) [hereinafter U.S. Att’y’s Manual].

⁵² See Broughton, *supra* note 50, at 618.

⁵³ *Id.*

al death penalty is governed by the FDPA and the internal protocol of the DOJ, including the Attorney General's final authority.⁵⁴ As such, no statutory amendments were required to activate this shift in federal executions, underscoring how dependent federal death enforcement remains on executive discretion rather than legislative reform.⁵⁵

That commitment to reviving the federal death penalty culminated formally in July 2019, when Attorney General William Barr announced the resumption of federal executions after a nearly two-decade lapse.⁵⁶ Citing Congress's express authorization of capital punishment and emphasizing the need to "carry forward the sentence imposed by our justice system," Barr directed the Federal Bureau of Prisons to adopt a revised federal execution protocol.⁵⁷ This revision, formalized in a 2019 Addendum to the protocol (2019 Addendum), replaced the prior three-drug procedure with a single-drug method using pentobarbital, a change modeled on practices in several death penalty states and upheld by federal courts as consistent with the Eighth Amendment.⁵⁸ As noted in the administrative record, the new protocol specified three injections: two syringes containing 2.5 grams of pentobarbital in 50 milliliters of diluent each, followed by a 60 milliliter saline flush.⁵⁹ However, the protocol made no mention of the drug's form or source, nor did it include any quality control measures.⁶⁰ It also gave broad discretion to the Bureau of Prisons Director to determine the method of venous access, stating only that if peripheral access is used, two separate lines must be inserted and determined to be patent by qualified personnel.⁶¹

Barr also ordered the scheduling of executions for five death-row inmates⁶² convicted of especially brutal crimes, describing

⁵⁴ LISA N. SACCO, CONG. RSCH. SERV., IN11474, *THE FEDERAL DEATH PENALTY: RECENT DEVELOPMENTS 2* (2020).

⁵⁵ *See id.*

⁵⁶ Press Release, U.S. Dept. of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019) [hereinafter Cap. Punishment Press Release], <https://www.justice.gov/archives/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [https://perma.cc/V648-GQ5C].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *In re Fed. Bureau of Prisons' Execution Protocol Cases (Fed. Bureau II)*, 471 F. Supp. 3d 209, 215–16 (D.D.C. 2020), *vacated*, 591 U.S. 979 (2020).

⁶⁰ *Id.* at 216.

⁶¹ *Id.* at 215–16.

⁶² Tessa Stuart, *William Barr Orders Executions for 5 Prisoners, First Use of Federal Death Penalty in 16 Years*, ROLLING STONE (July 25, 2019),

them as “the most horrific,” including murders involving children, the elderly, and acts of sexual violence and torture.⁶³ Each of the inmates, the DOJ noted, had exhausted legal remedies, clearing the way for executions to begin at the federal facility in Terre Haute, Indiana.⁶⁴ That announcement laid the groundwork for what followed in 2020, when the Trump administration carried out the first federal executions in seventeen years.⁶⁵ With the revised protocol in place, the government implemented the use of single-drug pentobarbital and proceeded to execute ten individuals over the course of six months—more than in any year since 1896.⁶⁶ The first of these, Daniel Lewis Lee, was executed on July 14, 2020.⁶⁷ His execution marked the beginning of an unprecedented and intensely active period in modern federal death penalty history. By the end of Trump’s term, the federal government had executed thirteen people—a total surpassing the number of federal executions carried out in the previous five decades combined.⁶⁸

Lee’s execution also marked the start of a troubling procedural trend: the Supreme Court repeatedly intervened to lift stays of execution and allow the government to carry out sentences before the legal claims had been fully adjudicated.⁶⁹ In Lee’s case, the U.S. District Court for the District of Columbia found that he and several others were likely to succeed on their Eighth Amendment claims challenging the use of compounded pentobarbital and issued a preliminary injunction.⁷⁰ The D.C. Circuit declined to lift the injunction, acknowledging the constitutional issues were novel and serious.⁷¹ But just hours before the scheduled execution, the Supreme Court summarily vacated the injunction in a brief order, emphasizing that pentobarbital had been used in prior executions without incident.⁷² The Court

<https://www.rollingstone.com/politics/politics-news/william-barr-orders-executions-first-use-of-federal-death-penalty-in-16-years-862464/> [<https://perma.cc/T88L-WLH3>].

⁶³ Cap. Punishment Press Release, *supra* note 56.

⁶⁴ *Id.*

⁶⁵ See Carlisle, *supra* note 2.

⁶⁶ *Id.*

⁶⁷ Kovarsky, *supra* note 13, at 622.

⁶⁸ *Id.*

⁶⁹ See Dan Noble, *Thirteen Federal Executions Under the Trump Administration: What Was the Constitutional Price?*, 37 W. MICH. U. COOLEY L. REV. 15, 29–30 (2022).

⁷⁰ See *Fed. Bureau II*, 471 F. Supp. 3d 209, 219 (D.D.C. 2020), *vacated*, 591 U.S. 979 (2020).

⁷¹ Josh Gerstein, *Trump Administration Carries Out First Federal Execution in 17 Years*, POLITICO (July 14, 2020, at 07:13 ET), <https://www.politico.com/news/2020/07/14/supreme-court-federal-execution-injunction-360490> [<https://perma.cc/WWQ4-656A>].

⁷² See *Barr v. Lee*, 591 U.S. 979, 980–81.

acknowledged conflicting expert testimony about the drug's effects, particularly whether it causes pulmonary edema while the prisoner is still conscious, but deemed those disputes insufficient to block the government's request.⁷³ Lee was executed shortly after the decision was issued.⁷⁴ What followed was a surge culminating in a controversial string of executions carried out during the presidential transition, departing from a 130-year tradition of pausing executions during changes in administration.⁷⁵ These executions—many conducted under accelerated timelines—raised significant concerns about due process, mental competency, and public health risks during the COVID-19 pandemic.⁷⁶ The CRS also notes that in late 2020, the DOJ expanded methods of execution to include alternatives such as electrocution, lethal gas, and firing squad, illustrating the administration's willingness to broaden federal enforcement tools far beyond lethal injection alone.⁷⁷

In *United States v. Higgs*, Justice Sotomayor, in her dissent, condemned the Supreme Court for facilitating the government's unprecedented rush to carry out executions.⁷⁸ She argued that the Court repeatedly shut down credible legal challenges from prisoners and actively dissolved stays imposed by lower courts, ensuring that inmates were denied any real chance to have their claims properly heard.⁷⁹ These sweeping, life-or-death decisions were made on an emergency basis, with little briefing or deliberation, often in a matter of hours, and almost never with a meaningful explanation.⁸⁰ Sotomayor charged that the Court went even further, blocking lower courts from addressing critical legal questions.⁸¹ She pointed to the case of Lisa Montgomery, whose stay of execution granted by the D.C. Circuit was vacated without explanation, leading to her execution only hours later.⁸² Sotomayor stressed it was the government, not the prisoners, that had manufactured a false sense of urgency by pushing forward with executions under a contested protocol, manipulating the

⁷³ *Id.* at 981.

⁷⁴ See Kovarsky, *supra* note 13, at 622.

⁷⁵ See Honderich, *supra* note 36.

⁷⁶ See Carlisle, *supra* note 2.

⁷⁷ See LISA N. SACCO, CONG. RSCH. SERV., IN11474, THE FEDERAL DEATH PENALTY: RECENT DEVELOPMENTS 2 (2020).

⁷⁸ 141 S. Ct. 645, 647 (2021) (Sotomayor, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 649.

⁸² *Id.*

process to shut down standard judicial review, a strategy the Court permitted without hesitation.⁸³ Sotomayor also highlighted the disturbing evidence of Montgomery's dissociative psychotic state, so severe that she could not comprehend why she was being executed.⁸⁴ According to Sotomayor, these grave constitutional concerns would never be resolved because the Court signed off on the government's relentless timetable.⁸⁵ Sotomayor concluded: "[T]he Court has allowed the United States to execute thirteen people in six months under a statutory scheme and regulatory protocol that have received inadequate scrutiny, without resolving the serious claims the condemned individuals raised. Those whom the Government executed during this endeavor deserved more from this Court."⁸⁶

C. Biden: Moratorium and Limited Review

Despite the unprecedented pace of executions carried out under Trump's first administration following the 2019 Addendum to the Federal Execution Protocol, that resurgence in federal capital punishment proved short-lived. Within six months of Trump's departure, the Biden administration announced a pause on federal executions, halting the use of capital punishment at the federal level.⁸⁷ In July 2021, then-Attorney General Merrick Garland issued a memorandum (Garland Memorandum) formally imposing a moratorium and suspending use of the Barr Addendum pending review.⁸⁸ Garland's directive marked a stark institutional shift: while not repudiating capital punishment outright, Garland emphasized the DOJ's duty to "treat individuals humanely and avoid unnecessary pain and suffering."⁸⁹ It acknowledged that although the use of pentobarbital had been upheld by the Supreme Court, it still raised "important questions about our responsibility" to ensure humane treatment.⁹⁰

The Garland Memorandum also acknowledged widespread concerns about the fairness and reliability of the federal death penalty, citing "arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in

⁸³ *Id.* at 650.

⁸⁴ *Id.* at 651.

⁸⁵ *Id.* at 652.

⁸⁶ *Id.*

⁸⁷ See Kovarsky, *supra* note 13, at 623–24.

⁸⁸ Garland Memorandum, *supra* note 4.

⁸⁹ *Id.*

⁹⁰ *Id.*

capital and other serious cases.”⁹¹ Beyond the protocol itself, the same memorandum called for reassessment of the November 2020 regulation changes and the late-stage amendments to the Justice Manual, both of which had been used to expand methods of execution and accelerate the pace of federal killings in the final months of the Trump administration.⁹²

Although framed as a principled stand, the Garland Memorandum did not represent a permanent resolution, nor did it dismantle the machinery of execution reactivated under Trump. Instead, it highlighted the deep political contingency at the heart of federal death penalty enforcement. One administration reignited executions after a nearly two-decade hiatus; the next halted them within months. Nothing, legally or structurally, prevents a future administration from reversing course yet again. In this way, the moratorium served less as a durable reform than as a reminder of how profoundly the administration of death now depends on who holds executive power. The policy lacks coherence and constitutional evolution; it is a reactive and reversible system shaped less by principled reform than by the ideological orientation of the executive branch. Garland’s call for review may have been framed as a return to “fairness and humane treatment,”⁹³ but absent structural reform, it risks becoming a temporary deviation rather than a meaningful reckoning.⁹⁴ Notably, the Garland Memorandum does not call for the abolition of capital punishment, nor does it recommend legislation to repeal the FDPA,⁹⁵ leaving the future of federal executions subject to executive discretion. That very dependence underscores the arbitrariness of the system: its operation fluctuates not through constitutional guidance or legislative consensus, but through administrative preference.

Biden’s April 2024 decision to commute the sentences of thirty-seven of the forty individuals on federal death row⁹⁶ highlights the ongoing volatility in the administration of federal capital punishment. The commutations came shortly before President-

⁹¹ *Id.*

⁹² *Id.* at 2.

⁹³ *Id.* at 1.

⁹⁴ See STEIKER & STEIKER, *supra* note 7 (discussing the fragility of death penalty reform and its dependency on political leadership); LISA N. SACCO, CONG. RSCH. SERV., IN11474, THE FEDERAL DEATH PENALTY: RECENT DEVELOPMENTS 2 (2020) (noting policy shifts between administrations).

⁹⁵ See Garland Memorandum, *supra* note 4.

⁹⁶ Biden Statement, *supra* note 5; White House Fact Sheet, *supra* note 5.

elect Trump, an advocate for expanding capital punishment, was set to take office.⁹⁷ While consistent with the Biden administration's earlier moratorium,⁹⁸ the commutations, issued by executive action alone, reflect the same structural fragility: they can be reversed as easily as they were imposed. Biden acknowledged the severity of the crimes and expressed sympathy for the victims but declared that "we must stop the use of the death penalty at the federal level" and that he could not "stand back and let a new administration resume executions that [he] halted."⁹⁹

Like presidents before him, Biden turned to his clemency power, a tool historically capable of stopping individual executions.¹⁰⁰ Article II, Section 2 of the United States Constitution provides, "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."¹⁰¹ This expansive clemency power permits presidents to unilaterally reduce or eliminate federal sentences,¹⁰² but it remains a discretionary act of mercy, not a durable safeguard against the arbitrary and reversible nature of federal capital punishment. In contrast, the authority to enact lasting reform lies with Congress.¹⁰³ As the CRS notes, Congress retains the authority to modify, reaffirm, or repeal capital stat-

⁹⁷ Will Weissert & Darlene Superville, *Biden Gives Life in Prison to 37 of 40 Federal Death Row Inmates Before Trump Can Resume Executions*, AP NEWS (Dec. 23, 2024, at 15:11 PT), <https://apnews.com/article/biden-death-row-commutations-trump-executions-f67b5e04453cd1aa6383c516bc14f300> [<https://perma.cc/W95A-D95E>]. The individuals spared had been convicted of a range of federal killings, including the murders of law enforcement and military personnel, killings on federal property, and deaths resulting from violent drug or robbery-related crimes. *Id.* Three inmates remain on federal death row: Dylann Roof, responsible for the racially motivated murder of nine churchgoers in Charleston in 2015; Dzhokhar Tsarnaev, the Boston Marathon bomber; and Robert Bowers, who committed the 2018 Pittsburgh synagogue shooting—the deadliest antisemitic attack in U.S. history. *Id.* Biden's decision followed growing pressure from advocacy groups urging him to act preemptively to limit Trump's capacity to revive the federal death penalty. *Id.* The announcement also came days after Biden issued a record-setting single-day clemency order, commuting the sentences of roughly 1,500 individuals released during the COVID-19 pandemic and thirty-nine others convicted of nonviolent offenses. *Id.* It also followed his post-election pardon of his son, Hunter Biden, a move that generated political controversy and sparked speculation about the potential for broader preemptive pardons ahead of Trump's return to office. *Id.*

⁹⁸ Biden Statement, *supra* note 5; White House Fact Sheet, *supra* note 5.

⁹⁹ Biden Statement, *supra* note 5; White House Fact Sheet, *supra* note 5.

¹⁰⁰ See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010).

¹⁰¹ U.S. CONST. art. II, § 2, cl. 1.

¹⁰² See *Schick v. Reed*, 419 U.S. 256, 266 (1974).

¹⁰³ LISA N. SACCO, CONG. RSCH. SERV., IN11474, THE FEDERAL DEATH PENALTY: RECENT DEVELOPMENTS 2 (2020).

utes,¹⁰⁴ and proposals have been introduced both to abolish the death penalty and to expand it, including adding fentanyl-related offenses and killings of first responders as capital crimes.¹⁰⁵ Yet none of these efforts has resolved the broader question of consistency or constitutional stability. But in the absence of congressional action, federal execution policy remained vulnerable to political reversal.

D. Trump II: Formal Reinstitution and Enforcement

Trump was elected to a second term as President in November 2024.¹⁰⁶ His campaign had centered on restoring the death penalty and reversing what he described as a collapse of law and order under the prior administration.¹⁰⁷ Trump's 2025 Executive Order, *Restoring the Death Penalty and Protecting Public Safety (Trump Order)*,¹⁰⁸ illustrates with unusual clarity the instability at the core of the modern federal capital punishment regime. Signed on the first day of his return to office,¹⁰⁹ the *Trump Order* declares that capital punishment is "an essential tool for deterring and punishing" violent crime and laments that "politicians and judges who oppose capital punishment have defied and subverted the laws of our country."¹¹⁰ The *Trump Order* directs the Attorney General to "pursue the death penalty for all crimes of a

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2–3.

¹⁰⁶ Donald J. Trump, WHITE HOUSE, <https://www.whitehouse.gov/administration/donald-j-trump/> [<https://perma.cc/EYR9-GAE3>] (last visited Sep. 25, 2025).

¹⁰⁷ Erik Ortiz, *Trump Wants to Expand the Federal Death Penalty, Setting Up Legal Challenges in Second Term*, NBC NEWS (Nov. 9, 2024, at 04:00 PT), <https://www.nbcnews.com/politics/2024-election/trump-wants-expand-federal-death-penalty-setting-legal-challenges-seco-rcna178979> [<https://perma.cc/HU5D-FZVG>].

¹⁰⁸ Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463–64 (Jan. 20, 2025). The *Trump Order* is divided into six substantive sections. *Id.* Section 1 defends capital punishment as a traditional and essential tool for punishing and deterring the most serious crimes, while condemning politicians, judges, and the prior administration for obstructing its use. *Id.* at 8463. Section 2 establishes a federal policy of fully enforcing the death penalty and resisting efforts to weaken it. *Id.* Section 3 directs the Attorney General to aggressively pursue capital punishment in all eligible cases, especially those involving the murder of law enforcement officers or committed by undocumented immigrants, and to reexamine the conditions and potential further prosecution of the thirty-seven individuals whose sentences were commuted by Biden. *Id.* at 8463–64. Section 4 instructs the Attorney General to ensure states have adequate lethal injection supplies and to manage requests for execution procedure approvals. *Id.* at 8464. Section 5 requires the Attorney General to seek the overruling of Supreme Court precedents that restrict federal or state use of the death penalty. *Id.* Finally, Section 6 emphasizes prioritization of violent crime prosecutions and encourages state and local prosecutors to adopt parallel policies, while coordinating with federal law enforcement to combat transnational crime. *Id.*

¹⁰⁹ Richer, *supra* note 8.

¹¹⁰ Exec. Order No. 14164, 90 Fed. Reg. at 8463.

severity demanding its use,” to revise the Justice Manual, and to explore whether individuals whose sentences were previously commuted can be subject to “State capital crimes.”¹¹¹ It further mandates efforts to “seek the overruling of Supreme Court precedents that limit the authority of State and Federal governments to impose capital punishment.”¹¹² Notably, the *Trump Order* also directs the Attorney General to “take all necessary and lawful action” to assist states in acquiring the drugs needed for lethal injection.¹¹³ These provisions collectively signal an intent to consolidate executive influence over the death penalty, not only at the federal level but through coordinated engagement with state systems.¹¹⁴ Consequently, in this increasingly politicized environment, the continuation of executions is now tied directly to the results of an election.

The DOJ appeared to extend that same philosophy internally. On January 21, 2025, just one day after the *Trump Order* reinstating federal executions,¹¹⁵ Acting Deputy Attorney General Emil Bove issued a memorandum (Bove Memorandum) titled *Interim Policy Changes Regarding Charging, Sentencing, and Immigration Enforcement*, pending confirmation of the Attorney General.¹¹⁶ Framed as a response to transnational cartels, violent crime by undocumented immigrants, and the fentanyl crisis, the Bove Memorandum signals a renewed commitment to aggressive enforcement and immediate implementation of the President’s Executive Orders.¹¹⁷ At its core, the Bove Memorandum reaffirms the DOJ’s commitment to pursuing “the most serious, readily provable offenses,” including those punishable by death and those carrying significant mandatory minimum sentences.¹¹⁸ Prosecutorial discretion is expressly narrowed: any departure from this approach must be justified by “significant extenuating

¹¹¹ *Id.* at 8463–64.

¹¹² *Id.* at 8464.

¹¹³ *Id.*; see Richer, *supra* note 8.

¹¹⁴ See Exec. Order No. 14164, 90 Fed. Reg. at 8463–64; see also Ayden Runnels, *Texas Legislators Seek More Protections for Death Penalty Defendants in Wake of Trump Executive Order*, TEX. TRIB. (Jan. 30, 2025, at 05:00 CT), <https://www.texastribune.org/2025/01/30/trump-texas-death-penalty-executive-order/> [<https://perma.cc/6NNP-QCZ9>] (noting that Executive Order 14164 provides states with a pathway to more executions).

¹¹⁵ See Exec. Order No. 14164, 90 Fed. Reg. at 8463.

¹¹⁶ See Memorandum from Emil Bove, Acting Deputy Att’y Gen., U.S. Dep’t of Just., to All Dep’t Emps., U.S. Dep’t. of Just. 1 (Jan. 21, 2025) [hereinafter Bove Memorandum], <https://www.fd.org/sites/default/files/public/News/memorandum-from-the-acting-deputy-attorney-general-01-21-2025.pdf> [<https://perma.cc/NGS7-YPD8>].

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2.

circumstances.”¹¹⁹ It simultaneously rescinds any prior policy inconsistent with this standard,¹²⁰ effectively displacing the discretion-oriented guidance issued under Attorney General Merrick Garland.¹²¹ While not mentioning capital punishment directly, the Bove Memorandum’s emphasis on charging the most serious provable offenses narrows discretion in a way that may increase the likelihood of pursuing death-eligible charges when applicable.¹²² In doing so, it complements the *Trump Order* issued the previous day¹²³ by creating a prosecutorial culture centered on maximum punishment and completing the structure necessary for restoring executions.

While the Bove Memorandum revived a punitive charging philosophy by narrowing prosecutorial discretion and emphasizing the “most serious, readily provable offenses,”¹²⁴ Attorney General Pam Bondi’s February 5, 2025, memorandum (Bondi Memorandum) transformed that philosophy. The Bondi Memorandum, titled *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions*,¹²⁵ implemented Trump’s Order by rescinding prior DOJ policies and mandating a comprehensive return to federal executions.¹²⁶ It explicitly lifted the moratorium imposed by Attorney General Merrick Garland in his July 1, 2021, memorandum, stating that “[w]hen a death sentence is imposed by a federal court, the Department will carry out its mandate to implement that sentence consistent with the

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.* See generally Memorandum from Merrick Garland, Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors, U.S. Dep’t of Just. (Dec. 16, 2022), <https://www.justice.gov/archives/ag/file/1265326/dl?inline> [<https://perma.cc/D4SB-MJE6>] (emphasizing individualized judgment, proportionality, and restraint in federal prosecutions).

The memorandum reaffirmed that prosecutors must conduct an “individualized assessment” of charges based on factors including culpability, deterrent effect, personal circumstances, and available alternatives to federal prosecution. *Id.* at 1–2. It also cautioned against automatic use of charges carrying mandatory minimums, stating they should be pursued only when other charges “would not sufficiently reflect the seriousness of the defendant’s criminal conduct.” *Id.* at 3. Additionally, it instructed that prosecutors consider whether a sentence would be “sufficient, but not greater than necessary” under 18 U.S.C. § 3553(a), and required supervisory approval for mandatory minimum charges, plea agreements, and sentencing variances. *Id.* at 3–4.

¹²² Bove Memorandum, *supra* note 116, at 2.

¹²³ *See id.*; Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463 (Jan. 20, 2025).

¹²⁴ Bove Memorandum, *supra* note 116, at 2.

¹²⁵ Memorandum from Pamela Bondi, Att’y Gen., U.S. Dep’t of Just., to All Dep’t. Empls., U.S. Dep’t of Just. 1 (Feb. 5, 2025) [hereinafter Bondi Memorandum], https://www.justice.gov/ag/media/1388561/dl?inline=&utm_medium=email&utm_source=govdelivery [<https://perma.cc/FMW8-LL3X>].

¹²⁶ *Id.* at 2.

law.”¹²⁷ Bondi directed that federal prosecutors “shall seek the death penalty . . . for the most serious, readily provable offenses,” particularly in cases involving the murder of law enforcement officers or capital crimes committed by undocumented immigrants, absent significant mitigating circumstances.¹²⁸ The directive that prosecutors “shall seek the death penalty”¹²⁹ removes case-by-case judgment and effectively eliminates individualized prosecutorial discretion. If the Attorney General and federal prosecutors feel obligated to pursue the death penalty whenever the President demands it publicly, the internal review process loses credibility and becomes merely performative.¹³⁰ The Sessions Memorandum was reinstated and its scope expanded by Bondi to include not only drug-related prosecutions but also capital crimes committed by cartels, transnational criminal organizations, and individuals unlawfully present in the United States.¹³¹ The Bondi Memorandum also directed a review of all no-seek decisions made between January 20, 2021, and January 19, 2025, with a focus on offenses tied to cartels, immigration status, and crimes within federal or tribal jurisdictions.¹³² Bondi suspended all Justice Manual revisions made under the Biden administration for a forty-five day review and rescinded Garland’s January 15, 2025, memorandum, which had directed the Bureau of Prisons to revoke the 2019 Barr Addendum to the federal execution protocol.¹³³ Additional directives called for strengthening internal capital enforcement mechanisms, accelerating finality in death cases, and seeking judicial reconsideration of “precedents that limit the authority of state and federal governments to impose capital punishment.”¹³⁴ Bondi also instructed the Bureau of Prisons to coordinate with states in implementing executions and supplying lethal injection drugs.¹³⁵ Describing the Garland-era as one that “betrayed our sacred duty,” the Bondi Memorandum re-framed prosecutorial discretion as a threat to justice and restored

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Broughton, *supra* note 13, at 1626.

¹³¹ Bondi Memorandum, *supra* note 125, at 2.

¹³² *Id.* at 3.

¹³³ *Id.*; Memorandum from Merrick Garland, Att’y Gen., U.S. Dep’t of Just., to the Dir., Fed. Bureau of Prisons 2 (Jan. 15, 2025), <https://www.justice.gov/archives/media/1384571/dl> [<https://perma.cc/VUP5-8QJV>].

¹³⁴ Bondi Memorandum, *supra* note 125, at 3–4.

¹³⁵ *See id.* at 4.

capital punishment.¹³⁶ That recommitment to aggressive capital enforcement swiftly materialized. On April 1, 2025, Bondi directed federal prosecutors to seek the death penalty in *United States v. Luigi Mangione*, a politically charged homicide case involving the December 4, 2024, killing of UnitedHealthcare executive Brian Thompson.¹³⁷ In her public statement, Bondi called it a “cold-blooded assassination” and emphasized that pursuing the death penalty was aligned with Trump’s broader agenda to “Make America Safe Again.”¹³⁸ The decision to seek capital punishment in such high-profile, politically symbolic cases exemplifies the administration’s swift operationalization of its revised death penalty policies and illustrates how prosecutorial directives are now tightly synchronized with executive ideology. Yet Mangione is charged with the murder of a single victim and had no criminal record at the time of the alleged homicide,¹³⁹ in sharp contrast to other recent federal capital cases involving mass casualties, such as Sayfullo Saipov, who killed eight people but did not receive a death sentence,¹⁴⁰ and Payton Gendron, who killed

¹³⁶ *Id.* at 1.

¹³⁷ See Press Release, Pamela Bondi, Att’y Gen., U.S. Dep’t of Just., Attorney General Pamela Bondi Directs Prosecutors to Seek Death Penalty for Luigi Mangione (Apr. 1, 2025) [hereinafter Mangione Death Penalty Press Release], <https://www.justice.gov/opa/pr/attorney-general-pamela-bondi-directs-prosecutors-seek-death-penalty-luigi-mangione> [https://perma.cc/2X9X-CTAH]; see also Madeline Halpert & Mike Wendling, *Who Is Luigi Mangione, CEO Shooting Suspect?*, BBC (Apr. 25, 2025), <https://www.bbc.com/news/articles/cp9nxee2r0do> [https://perma.cc/5P6S-9LCG] (providing background on Mangione’s identity and role as the alleged shooter).

¹³⁸ Mangione Death Penalty Press Release, *supra* note 137.

¹³⁹ Press Release, U.S. Att’y’s Office, S. Dist. of N.Y., Luigi Mangione Charged With the Stalking and Murder of UnitedHealthcare CEO Brian Thompson and Use of a Silencer in a Crime of Violence (Dec. 19, 2024) [hereinafter Mangione Charged Press Release], <https://www.justice.gov/usao-sdny/pr/luigi-mangione-charged-stalking-and-murder-unitedhealthcare-ceo-brian-thompson-and-use> [https://perma.cc/X7WB-LBSW]; Andrew Hay, *Luigi Mangione: What We Know About Suspect in UnitedHealth CEO Shooting*, REUTERS (Dec. 9, 2024, at 18:23 PT), <https://www.reuters.com/world/us/what-we-know-about-suspect-killing-unitedhealthcare-ceo-2024-12-10/> [https://perma.cc/F938-X487]. An Ivy League-educated defendant from a prominent Maryland family faces state murder charges for allegedly shooting a UnitedHealthcare executive outside a Manhattan hotel during the company’s annual investor conference. Halpert & Wendling, *supra* note 137. In addition, Pam Bondi directed federal prosecutors to seek the death penalty, marking the first capital case initiated by the DOJ since Trump returned to office and renewed his push to resume federal executions. *Id.*; Kristin Wright, *Luigi Mangione’s Case Marks a Shift in Politics of the Death Penalty in the U.S.*, NPR (Apr. 25, 2025, at 15:04 ET), <https://www.npr.org/2025/04/25/g-s1-62736/luigi-mangione-death-penalty-white-house-capital-punishment> [https://perma.cc/JN9N-2Q3N].

¹⁴⁰ Press Release, U.S. Dept. of Just., Judge Imposes Eight Consecutive Life Sentences Plus 260 Years in Prison for ISIS-Inspired 2017 Murder of Eight Victims and Attempted Murder of 18 Others in NYC Truck Attack (May 17, 2023), <https://www.justice.gov/archives/opa/pr/judge-imposes-eight-consecutive-life-sentences-plus-260-years-prison-isis-inspired-2017> [https://perma.cc/4U62-FGUV]. Saipov, an ISIS-

ten and awaits trial.¹⁴¹ The choice to seek death against Mangione nonetheless underscores the administration's willingness to pursue capital punishment even in single-victim homicides¹⁴² if the crime carries sufficient political or symbolic weight,¹⁴³ raising questions about proportionality and consistency in federal death penalty enforcement.

This aggressive approach also reflects Bondi's deeper, longstanding philosophy on capital punishment.¹⁴⁴ Bondi's support for Florida's Timely Justice Act¹⁴⁵ highlights her commitment to minimizing delay in capital cases: the Act expedites executions by requiring the Governor to sign a death warrant within 30 days of final review and carry out the execution within 180 days.¹⁴⁶ That same commitment was evident throughout her ear-

inspired terrorist who was convicted on twenty-eight federal counts for a 2017 truck attack on a Manhattan bike path, killed eight people and injured over twenty others. *Id.* The charges included murder and attempted murder in aid of racketeering, material support to a terrorist organization resulting in death, and destruction of a motor vehicle causing death. *Id.* The court imposed eight consecutive life sentences, two concurrent life terms, and an additional 260 years in prison. *Id.*

¹⁴¹ Press Release, U.S. Dept. of Just., Federal Grand Jury Indicts Accused Tops Shooter on Federal Hate Crimes and Firearms Charges in Buffalo, New York (July 14, 2022) [hereinafter Accused Tops Shooter Press Release], <https://www.justice.gov/archives/opa/pr/federal-grand-jury-indicts-accused-tops-shooter-federal-hate-crimes-and-firearms-charges> [https://perma.cc/33XF-QT3K]; Aaron Katersky & Bill Hutchinson, *Gunman in 2022 Buffalo Mass Shooting Wants Federal Trial Moved to NYC*, ABC NEWS (Apr. 1, 2025, at 10:15 PT), <https://abcnews.go.com/US/buffalo-mass-shooting-trial-payton-gendron-nyc-move/story?id=120374663> [https://perma.cc/C4P9-E54H]. On May 14, 2022, Payton Gendron allegedly carried out a racially motivated mass shooting at a Tops grocery store in Buffalo, New York, killing ten Black individuals and injuring three others. Accused Tops Shooter Press Release, *supra*. A federal grand jury later returned a twenty-seven-count indictment charging him with hate crimes and firearms offenses, including fourteen counts under the Shepard-Byrd Hate Crimes Prevention Act and thirteen related to firearm use. *Id.* The indictment cites substantial planning and premeditation, and the charges carry a potential sentence of life imprisonment or the death penalty, pending the Attorney General's decision. *Id.*

¹⁴² See Mangione Charged Press Release, *supra* note 139.

¹⁴³ See Halpert & Wendling, *supra* note 137.

¹⁴⁴ See Bondi Memorandum, *supra* note 125; Adolfo Pesquera, *Pam Bondi Opposes Petition Against Timely Justice Act*, LAW.COM (July 23, 2013, at 19:00 PT), <https://www.law.com/dailybusinessreview/almID/1202611887362/> [https://perma.cc/G5A5-LPUV]; see also *Abdool v. Bondi*, 141 So. 3d 529, 536 (Fla. 2014) (illustrating Pam Bondi's long history of supporting the death penalty through her prior efforts to uphold Florida's accelerated capital punishment regime under the Timely Justice Act); JLPP, *Executive Overreach: Executive Orders and the Death Penalty in Florida*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Apr. 10, 2017), <https://journals.law.harvard.edu/crcl/executive-overreach-executive-orders-and-the-death-penalty-in-florida/> [https://perma.cc/3B4A-F5N7].

¹⁴⁵ Pesquera, *supra* note 144.

¹⁴⁶ *Abdool*, 141 So. 3d at 536. Florida's Timely Justice Act of 2013 "was enacted to reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved as soon as possible after the date a sentence of death is imposed

lier career.¹⁴⁷ Bondi's support for capital punishment long predates her tenure as U.S. Attorney General.¹⁴⁸ As Florida's Attorney General, Bondi publicly criticized State Attorney Aramis Ayala's announcement that she would not seek the death penalty in any case within her jurisdiction, describing Ayala's position as "a categorical policy decision" rather than a legitimate exercise of discretion.¹⁴⁹ Bondi framed Ayala's refusal as incompatible with Florida law and contrary to the will of voters, who had recently reaffirmed capital punishment through new legislation.¹⁵⁰ Her stance in that controversy¹⁵¹ echoes the tone of her memorandum.¹⁵² In this light, Bondi's federal directive mandating capital enforcement in all provable cases is not a departure, but a national extension of her long-standing legal and political philosophy.

III. *FURMAN*'S WARNING AND DUE PROCESS

This Part examines how the constitutional concerns first articulated in *Furman v. Georgia* remain relevant today, particularly regarding the arbitrary and inconsistent administration of federal capital punishment. It explores how modern executive practices have reintroduced discretionary distortions that undermine due process and fair application of the death penalty. By revisiting *Furman*'s emphasis on guided discretion, and evaluating the FDPA's procedural guarantees, this Part highlights how the federal death penalty has become increasingly vulnerable to

in the circuit court." *Id.* (citing Florida's Timely Justice Act of 2013, ch. 2013-26, Fla. Laws, 1, 16). To achieve this purpose, the Act amended provisions across chapters 27, 922, and 924 of the Florida Statutes. *Id.*; see FLA. STAT. § 922.052(2)(a) (2023). Under the Act, once a prisoner has completed all direct appeals, state postconviction proceedings, and federal habeas review or has allowed the federal habeas deadline to lapse—the clerk of the Florida Supreme Court must notify the Governor by certifying that the individual has satisfied the statutory criteria. *Id.*; see also FLA. STAT. § 922.052(2)(b) (2023) (requiring that within thirty days of receiving the certification, and provided that the clemency process has concluded, the Governor must issue a death warrant directing the warden to carry out the execution within 180 days). *But see* Susanna Bagdasarova, *Florida Accelerates Death Penalty Process with "Timely Justice Act,"* A.B.A. (June 1, 2013), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2013/summer/florida-accelerates-death-penalty-process-with-timely-justice-act/ [<https://perma.cc/VD3S-5TT3>] (criticizing the Act for exacerbating systemic flaws in Florida's capital system, including high error rates, inadequate counsel, and racial disparities; noting that the law accelerates executions without addressing these foundational problems).

¹⁴⁷ See Pesquera, *supra* note 144; JLPP, *supra* note 144.

¹⁴⁸ See JLPP, *supra* note 144.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Bondi Memorandum, *supra* note 125, at 3.

political shifts and ideological preferences rather than neutral, consistent application of law.

A. *Furman* Revisited: Executive Discretion as the New Arbitrariness

The Supreme Court held in *Furman* that the imposition and execution of the death penalty in the three cases before it, one for murder and two for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁵³ Among the concurring opinions,¹⁵⁴ Justice Douglas offered a particularly influential analysis of why such punishment was unconstitutional in practice. In his concurrence, Douglas emphasized that a punishment may be unconstitutional not because of how the law is written, but because of how it is applied.¹⁵⁵ He argued that the death penalty becomes “unusual” when it is used in a way that reflects discrimination based on race, religion, wealth, or social class.¹⁵⁶ Drawing on the English Bill of Rights of 1689, he noted that the historical purpose of the Cruel and Unusual Punishments Clause was to prohibit arbitrary and irregular applications of severe penalties.¹⁵⁷ Douglas also discussed how American criminal law evolved to give juries discretion in capital cases.¹⁵⁸ Originally, lawmakers tried to address concerns about mandatory death sentences by narrowing the definitions of capital crimes.¹⁵⁹ But juries often resisted those laws by refusing to convict when a death sentence was mandatory.¹⁶⁰ To resolve this, legislatures chose to give juries the discretion they were already using in practice.¹⁶¹ Although this approach was upheld in *McGautha v. California*, Douglas remained concerned that discretion, when left unchecked, could result in arbitrary decisions.¹⁶² He further observed that when death sentences are rarely imposed under laws that authorize them, it strongly suggests that the punishment is being applied in a selective and unpredictable way.¹⁶³ In his view, a legal system that leaves the deci-

¹⁵³ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

¹⁵⁴ *See id.* at 240–57 (Douglas, J., concurring).

¹⁵⁵ *See id.* at 242.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 246–47.

¹⁵⁹ *Id.* at 246.

¹⁶⁰ *Id.* at 246–47.

¹⁶¹ *Id.* at 247.

¹⁶² *Id.* at 248.

¹⁶³ *Id.* at 249.

sion between life and death entirely to the unregulated judgment of judges or juries, without guiding standards, allows outcomes to be driven by personal inclination.¹⁶⁴ In such a system, a person's life may depend not on law, but on the will of a single judge or a group of jurors.¹⁶⁵

Stewart turned his attention to the unique severity of the death penalty itself and the moral consequences of its irreversible nature.¹⁶⁶ Stewart, in his concurrence, emphasized that the death penalty is fundamentally different from all other forms of punishment.¹⁶⁷ He described it as distinct not merely in severity but in nature.¹⁶⁸ It is permanent and cannot be undone.¹⁶⁹ It rejects any possibility of rehabilitating the offender.¹⁷⁰ And it represents a complete denial of the principles that define humane treatment in the justice system.¹⁷¹

While Stewart's concurrence highlighted the death penalty's absolute finality,¹⁷² Justice White's concurrence shifted the focus to the death penalty's practical operation, examining whether capital punishment actually served its intended social purposes.¹⁷³ White focused on the extreme infrequency with which the death penalty was imposed.¹⁷⁴ He argued that when the punishment is used so rarely, it becomes doubtful that it serves any meaningful purpose.¹⁷⁵ He explained what he believed to be "a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."¹⁷⁶ In his view, punishment can influence behavior only

¹⁶⁴ *Id.* at 253.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 306 (Stewart, J., concurring); *see also* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

¹⁶⁷ *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 311–12 (White, J., concurring).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 311.

¹⁷⁶ *Id.*

when it is applied with enough consistency to be seen as a real possibility.¹⁷⁷ A rarely enforced death penalty, he explained, fails to function as a credible threat and does little to deter serious crime.¹⁷⁸ While he accepted that punishment can deter and did not reject the death penalty in theory, he maintained that laws that are almost never enforced lose their effectiveness.¹⁷⁹ For White, the death penalty's constitutional justification depended on its social utility, but that utility disappears when it is applied so sporadically that it cannot meaningfully influence conduct.¹⁸⁰ He emphasized that there is no consistent or principled way to distinguish between the few individuals who receive death sentences and the many who do not, despite similar offenses.¹⁸¹ The delegation of sentencing authority to juries—intended to temper the harshness of the law and reflect community sentiment—produced such inconsistent results that, in practical terms, capital punishment under the statutes then in effect had nearly ceased to function.¹⁸² He added that legislative support for the death penalty is weakened by the continued practice of assigning sentencing discretion to juries.¹⁸³ Since a jury may refuse to impose the death penalty in any case, regardless of the crime and without violating any statute or duty, the actual effect of the law is shaped not by what legislatures authorize, but by how that discretion is exercised.¹⁸⁴ In his view, what occurred in these cases violated the Eighth Amendment.¹⁸⁵

The arbitrariness identified in *Furman* reflected the broader concern that the death penalty, without meaningful standards to guide its application, left life-and-death decisions to the unstructured judgments of individual decision-makers.¹⁸⁶ In response to *Furman*, more than thirty-five states enacted new laws specifying the circumstances and crimes for which the death penalty could be applied.¹⁸⁷ One of these revised statutes was reviewed in *Gregg v. Georgia*, where the Supreme Court upheld sentencing procedures that weigh aggravating and mitigating factors to

¹⁷⁷ *Id.* at 312.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 313.

¹⁸² *Id.*

¹⁸³ *Id.* at 314.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* at 249, 253 (Douglas, J., concurring).

¹⁸⁷ *Gregg v. Georgia*, 428 U.S. 153, 179–80 (1976).

bitrary imposition of the death penalty.¹⁸⁸ Throughout the 1970s, courts affirmed that the death penalty was not inherently unconstitutional, and state-chosen methods would be presumed valid unless shown to be inhumane or arbitrarily applied.¹⁸⁹ Interest in the federal death penalty remained limited until the 1990s, when Congress enacted the Federal Death Penalty Act (FDPA) to address concerns about arbitrariness by clearly listing the federal crimes for which execution could be imposed.¹⁹⁰

B. Due Process and the FDPA Undermined

The Due Process Clause prohibits the federal government from depriving individuals of life, liberty, or property without fair procedures.¹⁹¹ Congress enacted the FDPA, codified at 18 U.S.C. § 3591, to ensure an individualized sentencing process for capital cases, aligning with constitutional requirements.¹⁹² This was influenced by the Supreme Court's decision in *Gregg v. Georgia*.¹⁹³ The FDPA mandates such procedures, requiring the government to notify defendants of aggravating factors justifying a death sen-

¹⁸⁸ See *id.* at 196–98. In this case, the Court upheld Georgia's revised capital sentencing scheme as a constitutionally permissible response to *Furman v. Georgia*. *Id.* The Court explained that *Furman's* central concern was that the death penalty had been imposed “in an arbitrary or capricious manner.” *Id.* at 195. The Court concluded that it was “possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns.” *Id.* To remedy these concerns, Georgia created a structured system requiring that at least one of ten statutory aggravating factors be found beyond a reasonable doubt before a death sentence could be imposed. *Id.* at 196–97. As a result, Georgia's statute narrowed the class of death-eligible defendants. *Id.* The jury was also permitted to consider any mitigating evidence and was required to assess both “the circumstances of the crime” and “the characteristics of the person who committed the crime.” *Id.* at 197. The Court emphasized that a death sentence must not be left to the uncontrolled discretion of a jury and that *Furman* had condemned the imposition of death “without guidance or direction.” *Id.* It explained that Georgia's new procedure directed the jury's attention to “specific circumstances of the crime” (e.g., whether the killing occurred during another felony or involved particular cruelty), as well as to mitigating factors such as the defendant's age, mental state, or cooperation with law enforcement. *Id.* As the Court stated, “[T]he discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.” *Id.* at 198 (quoting *Coley v. State*, 231 Ga. 829, 834 (1974)). Additionally, the Court noted that Georgia's post-*Furman* procedures included a proportionality review by the Georgia Supreme Court to ensure that death sentences were not imposed in a manner that was out of step with outcomes in similar cases. *Id.* This further protection addressed the concern that, without a meaningful basis to distinguish the few cases in which death is imposed from the many in which it is not, capital punishment would continue to operate arbitrarily. *Id.*

¹⁸⁹ Noble, *supra* note 69, at 21.

¹⁹⁰ *Id.*

¹⁹¹ U.S. CONST. amend. V.

¹⁹² *United States v. Catalan Roman*, 376 F. Supp. 2d 108, 111 (D.P.R. 2005).

¹⁹³ *Id.*

tence and ensuring that the jury considers these factors before imposing the death penalty.¹⁹⁴

Enacted in 1994, the FDPA dramatically expanded the number of federal offenses eligible for the death penalty while simultaneously establishing a federal framework to impose and review death sentences, reflecting Congress's intent to meet the constitutional safeguards articulated in *Gregg v. Georgia*.¹⁹⁵ Among its key features, the FDPA spelled out the precise manner of implementing a federal death sentence, including requirements that the prisoner remain in the Attorney General's custody during appeals and then be transferred to a U.S. Marshal for supervision of the execution under the law of the sentencing state, with fallback provisions if that state lacks a death penalty.¹⁹⁶ Congress also included procedural protections to minimize discrimination in federal capital cases, such as explicit jury instructions prohibiting consideration of race, sex, or other protected categories.¹⁹⁷ Congress further exempted pregnant women, individuals with intellectual disabilities, and those incompetent to understand their punishment from execution eligibility.¹⁹⁸

The FDPA does not itself create capital crimes but instead governs the procedures that must be followed once a death-eligible offense is charged under a substantive federal statute.¹⁹⁹

The authority to impose a death sentence comes from the underlying criminal statutes, which define specific crimes and include the death penalty as a potential punishment.²⁰⁰ These statutes apply uniformly across all federal jurisdictions,²⁰¹ including jurisdictions like Puerto Rico, where local laws may prohibit the death penalty.²⁰² The FDPA's role is to ensure procedural con-

¹⁹⁴ *Id.*

¹⁹⁵ See John P. Cunningham, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 952–53, 957 (1998); 18 U.S.C. §§ 3591–3593.

¹⁹⁶ Cunningham, *supra* note 195, at 957 (citing § 3596(a)).

¹⁹⁷ *Id.* at 958 (citing § 3593(f)).

¹⁹⁸ *Id.* at 958 (citing § 3596(b)–(c)).

¹⁹⁹ *United States v. Acosta-Martinez*, 252 F.3d 13, 19 (1st Cir. 2001).

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² See *id.* The First Circuit addressed whether the FDPA applies to federal prosecutions in Puerto Rico. *Id.* at 15. The defendants were indicted on multiple charges, including count two, which alleged that they committed an intentional crime of violence resulting in death by firearm in violation of 18 U.S.C. § 924(j), and count three, which alleged that they killed an individual in retaliation for providing information to law enforcement, in violation of 18 U.S.C. § 1513(a)(1)(B). *Id.* Both statutes authorize the imposition of the death penalty and expressly apply to offenses committed in Puerto Rico. *Id.* The govern-

sistency wherever they are enforced.²⁰³ The statute does not specify geographic limits because its purpose is not to regulate where the death penalty may be applied, but rather how it may be imposed.²⁰⁴ Under the FDPA, a defendant may be sentenced to death only if specific intent elements are met and the sentencing procedures under sections 3592 and 3593, including the required aggravating and mitigating factor analysis, are properly followed.²⁰⁵ Before imposing a federal death sentence, the sentencing body must consider any mitigating factors relevant to the defendant's background, role, or mental state, including a broad range of individualized circumstances.²⁰⁶ Although section 3593 outlines a formalized sentencing process requiring notice, jury findings, and individualized consideration of aggravating and mitigating factors,²⁰⁷ the statute vests broad charging discretion in the Attorney General, who decides whether to seek the death penalty even before these safeguards apply.²⁰⁸ This decision may

ment filed a notice of intent to seek the death penalty pursuant to 18 U.S.C. § 3593(a), part of the FDPA. *Id.* The district court struck the notice, holding that the FDPA was inapplicable in Puerto Rico because Congress had not explicitly extended its procedural provisions to the territory and, even if it had, Congress lacked the authority to override Puerto Rico's constitutional ban on capital punishment. *Id.* On appeal, the First Circuit reversed, holding that the FDPA does apply in federal cases arising in Puerto Rico and that the death penalty could be pursued under federal law regardless of local constitutional prohibitions. *Id.* at 16. The court also confirmed its jurisdiction to hear the government's appeal and reinstated the death penalty notice, allowing capital sentencing to proceed if the defendants were convicted on the relevant charges. *Id.* at 16–17.

²⁰³ See *id.* at 19.

²⁰⁴ See *id.*

²⁰⁵ See 18 U.S.C. § 3591(a). This statute provides that a death sentence may be imposed for certain federal offenses only if the defendant is found, beyond a reasonable doubt, to have met one of four intent thresholds: (A) intentionally killing the victim; (B) intentionally inflicting serious bodily injury resulting in death; (C) participating in a life-threatening act with intent to use lethal force; or (D) committing a violent act with reckless disregard for human life. *Id.* § 3591(a)(2)(A)–(D). The sentence must also comply with the aggravating and mitigating factor analysis required under 18 U.S.C. §§ 3592 and 3593. *Id.* No individual may be sentenced to death under this statute if they were under the age of eighteen at the time of the offense. *Id.*

²⁰⁶ See *id.* § 3592(a). The statute enumerates several mitigating factors that must be considered by the finder of fact, including impaired capacity, duress, minor participation, disparate sentencing of equally culpable defendants, lack of prior criminal history, emotional or mental disturbance, the victim's consent, and any other relevant factors concerning the defendant's character, background, or the offense itself. *Id.* § 3592(a)(1)–(8). These factors are intended to ensure that the decision to impose death is individualized and proportional.

²⁰⁷ *Id.* § 3593.

²⁰⁸ See U.S. Att'ys' Manual, *supra* note 51, §§ 9-10.010 to -10.200.

be based solely on the belief that death is justified.²⁰⁹ While this decision is informed by a multi-layered internal review process meant to ensure objectivity,²¹⁰ its actual implementation often lacks transparency and consistency.²¹¹ Capital defendants are represented by specialized counsel and have the opportunity to present mitigating arguments to DOJ leadership, reinforcing the idea that the process is meant to be deliberative, objective, and non-political.²¹² However, defendants with similar or greater culpability often receive vastly different treatment, with no clear reason why capital charges are pursued in some cases and not others.²¹³ Even when aggravating factors are present across co-defendants, only one may face death.²¹⁴

Congress's enactment of the FDPA demonstrates its willingness to create comprehensive, constitutionally guided standards for federal capital punishment,²¹⁵ rather than allowing the administration of death sentences to vary across presidential administrations. Yet, the statute's careful design has not prevented troubling inconsistencies in how federal capital cases are initiated and pursued, in part because the FDPA's structured sentencing procedures do not constrain the Attorney General's broad discretion at the charging stage.²¹⁶ As a result, the most consequential decision, whether to pursue the death penalty at all, remains largely immune to meaningful constraint or review. This concern is not theoretical. Justice Breyer, dissenting in *Glossip v. Gross*,²¹⁷ found

²⁰⁹ See *id.* § 9-10.140(C) (requiring a qualitative weighing of aggravating and mitigating factors to determine whether death is justified and noting that "a single, sufficiently strong aggravating factor may outweigh several mitigating ones").

²¹⁰ See Broughton, *supra* note 13, at 1619.

²¹¹ See Ryanne L. Wright, *Until Death Due Us Part: The Due Process Clause's Broken Vow to Protect Against Arbitrary and Discriminatory Enforcement of Federal Capital Punishment*, 31 GEO. MASON U. C.R. L.J. 1, 20–21 (2020).

²¹² Broughton, *supra* note 13, at 1620–21.

²¹³ See Wright, *supra* note 211, at 20–21. Wright highlights how prosecutorial discretion in federal capital cases can lead to stark disparities: despite similar crimes, such as the cases of Lezmond Mitchell and Tommy Dean Bullcoming—both involving violent homicides on tribal land—only Mitchell, who had no prior record and acted with co-defendants, was sentenced to death. *Id.* In contrast, Bullcoming, who acted alone and had a criminal history, was not. *Id.* at 21. Wright argues this inconsistency exemplifies arbitrary punishment that undermines due process. *Id.* at 22.

²¹⁴ See *id.* at 24.

²¹⁵ See Cunningham, *supra* note 195, at 957.

²¹⁶ See 18 U.S.C. §§ 3591–99.

²¹⁷ 576 U.S. 863, 867 (2015) (upholding Oklahoma's three-drug lethal injection protocol of using midazolam as first drug).

The Court held that prisoners challenging a method of execution under the Eighth Amendment must identify a known and available alternative that entails a lesser risk of

“no rational explanation” for the discrepancies in who is sentenced to death and who is not.²¹⁸ Breyer cited a comprehensive study of Connecticut’s capital punishment system, which revealed that only one of nine executed individuals ranked among the “most egregious” offenders, while dozens of equally or more culpable defendants were spared.²¹⁹ This undermines any argument that the federal system functions as a rational or principled mechanism for selecting the “worst of the worst.” Even more troubling, the very factors that should never influence death decisions—race, gender, and geography—often do.²²⁰ Breyer’s dissent in *Glossip* pointed to studies confirming that defendants accused of killing white victims were far more likely to face capital charges than those accused of killing Black or Latino victims.²²¹ Other research confirms that geography plays a decisive role.²²² Fewer than 2% of counties have produced all federal death sentences, a pattern driven not by case facts but by the political posture and priorities of local prosecutors.²²³ These outcomes are not consistent with the constitutional values of equal protection or due process.²²⁴ The arbitrary and racially biased application of the

pain. *Id.* It further concluded that the district court did not clearly err in finding midazolam did not create a substantial risk of severe pain. *Id.*

²¹⁸ *Id.* at 922 (Breyer, J., dissenting).

²¹⁹ *Id.* at 917–18 (citing John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities*, 11 J. EMPIRICAL LEGAL STUD. 637, 641, 643–45, 678–79 (2014)).

²²⁰ *Glossip*, 576 U.S. at 918–19.

²²¹ *Id.* at 918.

²²² *Id.* at 918–19.

²²³ *See id.* at 919; 2% *Death Penalty*, *supra* note 15.

²²⁴ *See* Jay Inslee, *Governor Inslee’s Remarks Announcing a Capital Punishment Moratorium*, OFF. OF THE GOVERNOR OF WASH. STATE (Feb. 11, 2014), https://governor.wa.gov/sites/default/files/2023-01/20140211_death_penalty_moratorium.pdf [<https://perma.cc/R62P-S7S8>]. Following an internal review of Washington’s capital punishment system, Governor Jay Inslee declared in 2014, “I have decided to impose a moratorium on executions while I’m Governor of the state of Washington.” *Id.* His decision rested on fundamental concerns about fairness and systemic integrity. *Id.* “Equal justice under the law is the state’s primary responsibility. And in death penalty cases, I’m not convinced equal justice is being served,” Inslee stated. *Id.* He emphasized that the death penalty was “unequally applied, sometimes dependent on the budget of the county where the crime occurred.” *Id.* Beyond geographic disparity, he cited deeper structural failings: “There are too many flaws in the system. And when the ultimate decision is death there is too much at stake to accept an imperfect system.” *Id.* Data from Washington reinforced his concern; since 1981, 60% of capital sentences had been overturned, with one man exonerated and eighteen others resentenced to life imprisonment. *Id.* “When the majority of death penalty sentences lead to reversal, the entire system itself must be called into question.” *Id.* Inslee also highlighted the extreme cost burden: “[c]ounties spend hundreds of thousands of dollars – and often many millions – simply to get a case to trial,” followed by decades of appellate expenses. *Id.* He noted that capital trials are “more expensive than keeping someone in prison for the rest of their lives – even if they live to be 100 years of

death penalty defies the evolving standards of decency that shape a just and maturing society,²²⁵ making such disparities even more constitutionally intolerable.²²⁶ As Stewart emphasized in *Furman*, and as Breyer later echoed in *Glossip*, capital punishment has too often been imposed in a random and capricious fashion;²²⁷ Stewart even likened it to “being struck by lightning,”²²⁸ underscoring the intolerable unpredictability of who receives a death sentence. As Stewart further warned in *Furman*, the Constitution cannot tolerate a death penalty system “so wantonly and so freakishly imposed.”²²⁹ That warning remains just as urgent today. The federal death penalty no longer reflects the gravity of the crime or uniform legal standards but fluctuates with the ideological inclinations of each administration. When Attorney General Barr resumed federal executions in 2019 after a seventeen-year pause, no formal justification was provided beyond a vague reference to “uphold[ing] the rule of law.”²³⁰ Similarly, the *Trump Order* reinstated the federal death penalty through sweeping administrative directives, grounded in the belief that capital punishment is not only a historical and constitutional practice, but also the only fitting and effective response to the “most heinous crimes,” essential for deterring violence, delivering justice, and restoring public order.²³¹ Attorney General Bondi’s Memorandum went even further, eliminating case-by-case discretion by requiring federal prosecutors to pursue capital charges in all eligible cases unless “significant mitigating circumstances” exist;²³² a standard left undefined. This concentration of unchecked authority violates the core tenet of due process: that life-taking decisions must follow fair, consistent, and transparent procedures.²³³ A punishment as irreversible as death

age.” *Id.* Moreover, he rejected deterrence as a justification, citing national studies: “there is no credible evidence that the death penalty is a deterrent to murder.” *Id.* Inslee ultimately concluded that Washington’s system failed to target the worst offenders and fell far short of its constitutional promise. *Id.* “That is a system that falls short of equal justice under the law and makes it difficult for the State to justify the use of the death penalty.” *Id.*

²²⁵ See *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958).

²²⁶ See *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018).

²²⁷ *Furman v. Georgia*, 408 U.S. 238, 309–10 (Stewart, J., concurring); *Glossip*, 576 U.S. at 922–23 (Breyer, J., dissenting).

²²⁸ *Furman*, 408 U.S. at 309.

²²⁹ *Id.* at 310.

²³⁰ See Cap. Punishment Press Release, *supra* note 56.

²³¹ Exec. Order No. 14164, 90 Fed. Reg. 8463, 8463–64 (Jan. 20, 2025).

²³² Bondi Memorandum, *supra* note 125, at 2.

²³³ See U.S. CONST. amend. V.

cannot rest on silence or ambiguity. Although the Supreme Court responded to *Furman* by requiring guided discretion in jury sentencing,²³⁴ the constitutional concern animating that decision—arbitrary and capricious enforcement—has returned in a new form. Today, the federal death penalty does not hinge on the facts of a case or the neutral application of law, but on the ideological orientation of the executive branch. Whether the government seeks, pauses, or resumes executions is no longer determined by constitutional consistency or legislative reform. It is determined by who holds the presidency.

IV. CAPITAL PUNISHMENT AND THE ABSENCE OF EXECUTIVE RESTRAINT

This Part analyzes two structural flaws in the federal death penalty framework. First, it examines how unchecked prosecutorial and presidential discretion can undermine individualized, objective decision-making, threatening the constitutional promise of due process and impartial enforcement. Second, it explores how the FDPA's delegation of authority, combined with limited legislative oversight, creates gaps that allow executive power to operate with minimal accountability. Together, these dynamics expose the persistent risk of arbitrary and politically driven capital punishment within the federal system.

A. Unchecked Discretion

The Trump administration signaled a clear intent to preserve and possibly expand the federal government's use of capital punishment, as reflected in political appointments to the DOJ and the federal judiciary.²³⁵ Presidential demands for the death penalty risk turning the DOJ's internal protocol review into a mere formality.²³⁶ When federal prosecutors—particularly the Attorney General—feel pressured to follow public statements by the President, prosecutorial discretion collapses into political obedience.²³⁷ This dynamic raises serious concerns about prosecu-

²³⁴ See *Gregg v. Georgia*, 428 U.S. 153, 196–98 (1976).

²³⁵ See Broughton, *supra* note 13, at 1621. The Trump administration appeared committed to preserving—and potentially expanding—the federal government's use of capital punishment. *Id.* This agenda was reflected in political appointments to top positions at the DOJ and in judicial nominations, reinforcing an institutional alignment with capital enforcement that extended beyond any single memo or case. *Id.*; see Bove Memorandum, *supra* note 116; Bondi Memorandum, *supra* note 125.

²³⁶ See Broughton, *supra* note 13, at 1626–27.

²³⁷ See *id.* As argued by Richard Broughton, this concern is particularly acute in administrations where public disagreement with the President is perceived as disloyalty and

torial independence and the President's power to dictate federal charging decisions, plainly undermining a process intended to produce individualized, objective judgments free from political influence.²³⁸ Yet even when prosecutorial discretion is distorted by ideology or executive pressure, courts remain constitutionally barred from intervening, for, as the Fifth Circuit put it, "[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."²³⁹

Courts have made clear that internal DOJ policies, including the Death Penalty Protocol, create no enforceable rights for defendants.²⁴⁰ Even under their supervisory authority, judges may not interfere with the executive branch's exclusive discretion to decide whether and how to pursue the death penalty.²⁴¹ The DOJ's Death Penalty Protocol and related guidelines confer no enforceable rights and are beyond the reach of judicial enforcement.²⁴² Judicial intervention in capital charging decisions is

where DOJ officials have been subject to presidential criticism. *Id.* at 1626. In such an environment, the Attorney General may feel obligated to pursue capital charges regardless of the outcome of internal deliberation. *Id.* at 1627. Although the DOJ's death penalty protocol does not create enforceable rights and is generally shielded from judicial review, Broughton warns that presidential pressure can undermine the legitimacy of prosecutorial decisions and distort the separation of powers by subordinating legal discretion to political signaling. *Id.*

²³⁸ See *id.* at 1624–25. Broughton argues that allowing the President to steer charging decisions undermines the very purpose of the DOJ's death penalty protocol, which is intended to ensure individualized, fact-based determinations free from political pressure. See *id.* at 1625. Such interference compromises the structural integrity of the DOJ and blurs the constitutional line between executive oversight and prosecutorial independence. See *id.* at 1624–25.

²³⁹ *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965); see also *United States v. Slone*, 969 F. Supp. 2d 830, 838–39 (E.D. Ky. 2013) (“The Constitution leaves implementation of the Death Penalty Protocol to the sound discretion of the Department of Justice. And a heavy judicial hand might actually do more harm to capital defendants than good. Intrusive micromanagement of the Justice Department might deter the development of policies like the Protocol or even cause DOJ to abandon it altogether.”).

²⁴⁰ See *Slone*, 969 F. Supp. 2d at 833.

²⁴¹ See *id.* at 833–34. The court held that the Death Penalty Protocol and the Judicial Conference's Criminal Justice Act (CJA) Guidelines are merely internal guidance documents and do not create substantive or procedural rights. *Id.* at 833. The court emphasized that while it has inherent power to manage its docket, the separation of powers bars judicial direction over how the executive branch carries out prosecutorial functions—particularly in capital cases. *Id.* at 833–34. The authority to decide whether a death sentence is appropriate, or to implement internal protocol steps, lies solely with the DOJ. *Id.* at 834. Judicial Conference recommendations, even when urging courts to control litigation costs in capital cases, remain advisory and cannot override the DOJ's discretion. *Id.*

²⁴² See *id.* at 833–35. The Death Penalty Protocol, as part of the U.S. Attorneys' Manual, is expressly characterized as internal guidance with no intent to create legal rights—substantive or procedural—for defendants. *Id.* at 832–33. According to the Manual's own disclaimer, it is

constitutionally barred, as the separation of powers protects the executive branch's discretion from court-imposed procedures.²⁴³

The Constitution grants the President sweeping clemency authority over federal offenses, including full and unconditional pardons that eliminate all legal consequences and restore civil rights, an authority that remains supreme within the federal sphere and cannot be restricted by state governments.²⁴⁴ Although clemency was intended as a safeguard against disproportionate punishment, its modern use has revealed the dangers of unconstrained presidential authority.²⁴⁵ During his first term in office, Trump frequently used the pardon power not as a mechanism of mercy, but as a tool for advancing personal and political interests.²⁴⁶ Trump's approach to executive clemency reflected a broader pattern of institutional bypass, driven by personal loyalty, media exposure, and disregard for established DOJ procedures.²⁴⁷ His use of the pardon power underscored the risks of

not enforceable in court and exists solely to guide prosecutorial discretion. *Id.* at 834. The court emphasized that policies like the Death Penalty Protocol and the Judicial Conference's CJA Guidelines are merely advisory tools designed to aid internal DOJ management and not to constrain it. *Id.* Courts across all circuits have recognized that even if such policies are not followed, defendants have no recourse to enforce them. *Id.* The court reaffirmed that courts may not impose remedies for any alleged deviation from DOJ policy, because suspects and defendants are on notice that they hold no enforceable interest in such internal procedures. *Id.* Judicial Conference guidance is similarly nonbinding, lacking the statutory authority to carry the force of law and existing only as policy recommendations. *Id.* at 834–35.

²⁴³ *See id.* at 836–38. The court held that any attempt by the judiciary to control or direct how the DOJ applies its Death Penalty Protocol would violate the Constitution. *Id.* at 836. Even a well-intentioned use of judicial supervisory power cannot override constitutional boundaries. *Id.* Prosecutorial discretion—including the decision to seek capital punishment—falls squarely within the executive branch's authority and is not subject to judicial oversight. *Id.* at 837. Courts may not encroach upon this core executive function, nor may they impose timelines or processes requiring DOJ consideration of mitigating evidence. *Id.* at 837–38. The decision to pursue death is akin to any other charging choice regarding punishment severity and remains unreviewable by the courts. *Id.* at 837. Any interference by the judiciary would improperly intrude upon the structural role assigned to prosecutors in the constitutional order. *Id.*

²⁴⁴ *See Bradford v. Cardoza*, 240 Cal. Rptr. 648, 649–50 (Ct. App. 1987) (citing *Bjerkman v. United States*, 529 F.2d 125, 127, 129 (7th Cir. 1975)).

²⁴⁵ *See Rachel E. Barkow & Mark Osler, Clemency*, 7 ANN. REV. CRIMINOLOGY 311, 313, 320 (2024).

²⁴⁶ *See id.* at 319–20. Trump's clemency record in his first term was limited in volume yet marked by controversy, with a significant number of grants issued to politically connected individuals and public speculation over whether he would pardon himself. *See id.* Unlike the structured review process managed by the Office of the Pardon Attorney, Trump often relied on television reports, media headlines, and personal advocates within his circle to identify clemency candidates. *See id.* at 320. Of the 238 clemency grants issued during his presidency, only about 11% had the Pardon Attorney's support. *Id.*

²⁴⁷ *See id.* at 319–20.

unreviewable executive discretion and renewed calls for structural limits on presidential clemency.²⁴⁸ On August 25, 2017, Trump issued a pardon to former Maricopa County Sheriff Joe Arpaio, who had been convicted of criminal contempt for defying a federal court order to cease racial profiling of Latinos.²⁴⁹ Framing the conviction as unjust, Trump tweeted that Arpaio was “an American patriot.”²⁵⁰ Trump also extended clemency to close allies, including Charles Kushner,²⁵¹ the father of his son-in-law Jared Kushner.²⁵² In December 2020, Trump similarly granted pardons to four Blackwater contractors involved in the 2007 Nisour Square massacre, where they killed seventeen Iraqi civilians while guarding a U.S. diplomatic convoy.²⁵³ That episode had triggered criminal convictions, global outrage, and intense scrutiny of Blackwater’s practices, while raising broader concerns about accountability, legal jurisdiction, and the role of private military companies in modern warfare.²⁵⁴ On the first day of his second presidency in January 2025, Trump issued a sweeping proclamation pardoning all individuals convicted of offenses related to the January 6 Capitol attack, ordering their immediate release, and directing the dismissal of all pending related charges.²⁵⁵

²⁴⁸ See *id.* Legal scholars and commentators proposed various mechanisms to curb abuse, including constitutional amendments, statutory limits, and reinterpretations of the Pardon Clause. See *id.* Although most proposals were seen as unlikely or constitutionally strained, they reflected growing alarm over the unchecked nature of presidential clemency, particularly when used as a shield against accountability. See *id.*

²⁴⁹ *Id.* at 319; S.A. v. Trump, 363 F. Supp. 3d 1048, 1060 (N.D. Cal. 2018).

²⁵⁰ S.A., 363 F. Supp. 3d at 1060.

²⁵¹ See Press Release, The White House, Statement from the Press Secretary Regarding Executive Grants of Clemency (Dec. 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-122320/> [<https://perma.cc/M3BN-8X68>]; Sudiksha Kochi, *Who Did Donald Trump Pardon? What to Know About Charles Kushner, Steve Bannon, Other Top Allies*, USA TODAY (Dec. 2, 2024, at 14:52 ET), <https://www.usatoday.com/story/news/politics/elections/2024/12/02/trump-pardoned-during-first-term/76705964007/> [<https://perma.cc/NC8Y-ZX85>]; *Pardons Granted by President Donald J. Trump (2017–2021)*, U.S. DEPT. OF JUST. (Oct 23, 2024), <https://www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021> [<https://perma.cc/9Z6T-DM2W>]. Charles Kushner was convicted on sixteen counts of fraud and false statements, as well as charges of witness retaliation and making false entries. *Id.*

²⁵² Kochi, *supra* note 251.

²⁵³ Eric Tucker, *Trump Pardons Security Contractors in Deadly Iraq Shooting*, AP NEWS (Dec. 22, 2020, at 21:01 PT), <https://apnews.com/article/donald-trump-politics-iraq-baghdad-massacres-371cbf4b621ee8a08c30777c29abc14> [<https://perma.cc/EN6Y-UF62>]; see also Casper Alexander Daugaard, *Blackwater and Private Military Contractors*, 2 YALE REV. INT’L STUD. 83, 85 (2012) (detailing the events and actions of the contractors immediately preceding the massacre).

²⁵⁴ See Daugaard, *supra* note 253, at 85–86.

²⁵⁵ See Proclamation No. 10887, 90 Fed. Reg. 8331 (Jan. 20, 2025). On his first day back in office, Trump issued a sweeping executive proclamation granting a “full, complete

Likewise, Biden exercised his clemency power to pardon his son, Hunter Biden, shortly before leaving office.²⁵⁶ Representative James Comer criticized Biden's pardon of his son as an attempt to avoid accountability, calling the charges "just the tip of the iceberg" and accusing the Biden family of decades of wrongdoing.²⁵⁷

and unconditional pardon" to all individuals convicted of offenses stemming from the January 6, 2021, Capitol attack. *Id.* The directive instructed the Attorney General to issue immediate certificates of pardon and to ensure the release of all such individuals who remained incarcerated. *Id.* Additionally, the DOJ was ordered to seek dismissal with prejudice of all pending indictments related to January 6. *Id.* The Bureau of Prisons was directed to immediately carry out these orders. *Id.* This reflects an extraordinary and controversial use of presidential clemency powers aimed at absolving participants in a violent attack on the legislative branch. Joyce Vance, writing for the Brennan Center for Justice, warned that Trump's campaign pledge to pardon January 6 defendants, announced as beginning "in the first hour . . . [m]aybe the first nine minutes" of his presidency, represented not an act of mercy, but a transactional abuse of the clemency power. Joyce Vance, *Trump Pardoning Jan. 6 Insurrectionists Would Endorse Attacks on Democracy*, BRENNAN CTR. FOR JUST. (Jan. 21, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/trump-pardoning-jan-6-insurrectionists-would-endorse-attacks-democracy> [<https://perma.cc/VX79-U3WW>]. Trump repeatedly referred to the rioters as "political prisoners" and "great patriots," despite convictions by juries and guilty pleas for violent conduct, including the use of weapons and participation in seditious conspiracy. *Id.* Vance emphasized that such sweeping pardons would not only undermine the rule of law but also mark an unprecedented misuse of Article II authority—rewarding loyalty to the President over fidelity to the Constitution. *Id.* By signaling clemency as a political payoff, Trump sent a chilling message: violence in service of his power would be sanctioned, not punished. *See id.*

²⁵⁶ Zeke Miller, Alanna Durkin Richer & Colleen Long, *Biden Pardons His Son Hunter Despite Previous Pledges Not To*, AP NEWS (Dec. 2, 2024, at 04:49 PT), <https://apnews.com/article/biden-son-hunter-charges-pardon-pledge-24f3007c2d2f467fa48e21bbc7262525> [<https://perma.cc/EMH2-T5YN>]. Despite repeated public assurances that he would not use the powers of the presidency to aid his son, Biden issued a sweeping pardon for Hunter Biden shortly before leaving office. *Id.* The pardon came after Hunter was convicted in a federal gun case and pleaded guilty to tax offenses, and just weeks before he was scheduled to be sentenced. *Id.* The pardon reversed Biden's prior statements that he would respect the jury's verdict and refrain from granting clemency. *Id.* In his statement, the President claimed that "raw politics" had tainted the prosecution and led to a miscarriage of justice. *Id.* The pardon extended beyond the known charges to cover any federal offenses committed or participated in by Hunter Biden between January 1, 2014, and December 1, 2024, casting a shadow over Biden's legacy and his prior commitment to restoring norms following Trump's presidency. *Id.*

²⁵⁷ *Id.*; see James Comer, *Rep. James Comer: Biden Family Pardons a Confession to Selling Out America*, FOX NEWS (Jan. 25, 2025, at 08:28 ET), <https://www.foxnews.com/opinion/rep-james-comer-biden-crime-family-pardons-were-just-cover-up-30-million-dirty-deeds> [<https://perma.cc/EV54-Y3DG>]. In a public letter, Representative James Comer sharply criticized Biden's unprecedented pardon of his son and what he described as preemptive pardons for other family members, framing them as an implicit confession of wrongdoing. *Id.* Citing DOJ precedent that accepting a pardon implies guilt, Comer argued that the pardons signal that the Biden family "sold out the American people to enrich themselves." *Id.* He referenced bank records obtained during the House Oversight Committee's investigation, which, according to Comer, revealed over \$30 million in payments from foreign entities and individuals in countries including China, Russia, and Ukraine. *Id.* These payments allegedly flowed through a network of more

B. The Lack of Legislative Oversight Under the FDPA

The death penalty is fundamentally different from other punishments, not simply because of its severity but because of its final, irreversible nature.²⁵⁸ Its unique gravity demands a correspondingly heightened standard of reliability in deciding whether death is appropriate.²⁵⁹ That need for reliability in capital sentencing makes the absence or vagueness of legislative safeguards particularly troubling. Although democratically enacted statutes may reveal evolving social standards, they do not define the boundaries of the Eighth Amendment, which is meant to protect against legislative failures or excesses.²⁶⁰ The FDPA delegates substantial authority to prosecutors,²⁶¹ making this concern particularly salient in the federal context, where legislative silence has enabled executive discretion to expand with limited oversight.²⁶² Under the FDPA, capital sentencing proceeds in a separate penalty phase after a defendant is convicted under 18 U.S.C. § 3591.²⁶³ In homicide cases, the jury must make three findings to impose a death sentence: (1) unanimously and beyond a reasonable doubt, that the defendant had the required mental state under 18 U.S.C. § 3591(a)(2); (2) that at least one statutory aggravating factor exists under 18 U.S.C. §§ 3592(c) and 3593(d); and (3) that the aggravating factors sufficiently outweigh the mitigating factors, or alone justify the sentence if no mitigation is found, as required by 18 U.S.C. § 3593(e).²⁶⁴ Under the FDPA, prosecutors have significant authority to identify non-statutory aggravating factors.²⁶⁵ Courts have generally upheld the FDPA against such challenges to prosecutorial discretion, emphasizing the procedural safeguards embedded in the statute.²⁶⁶ However, uncer-

than twenty shell companies tied to Hunter Biden, James Biden, and other associates, with incremental distributions made to at least ten Biden family members—some of which, Comer claimed, were sent directly to Joe Biden’s Delaware residence. *Id.* He concluded that the family’s business was the sale of access to Biden’s influence, a charge he says was confirmed by Biden associate Devon Archer, who testified that foreign oligarchs attended private dinners with then-Vice President Biden. *Id.*

²⁵⁸ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²⁵⁹ *Id.*

²⁶⁰ See *Weems v. United States*, 217 U.S. 349, 370–373 (1910).

²⁶¹ See *United States v. Purkey*, 428 F.3d 738, 748 (8th Cir. 2005).

²⁶² See *Mitchell v. United States*, 140 S. Ct. 2624, 2625 (2020) (Sotomayor, J., concurring).

²⁶³ *Purkey*, 428 F.3d at 749.

²⁶⁴ *Id.*

²⁶⁵ See *id.* at 748–49; *United States v. Frank*, 8 F. Supp. 2d 253, 264 (S.D.N.Y. 1998).

²⁶⁶ See *Purkey*, 428 F.3d at 748; *Frank*, 8 F. Supp. 2d at 266.

tainties remain in its implementation.²⁶⁷ For instance, in *Mitchell v. United States*, Sotomayor noted the uncertainty surrounding the interpretation of the FDPA's requirement to implement death sentences "in the manner prescribed by the law of the State."²⁶⁸ This lack of clarity, according to Sotomayor, has led to differing judicial opinions on the scope of the FDPA, further emphasizing the need for legislative guidance to resolve these ambiguities.²⁶⁹

Similarly, in *In re Federal Bureau of Prisons' Execution Protocol Cases*, the D.C. Circuit panel produced three conflicting readings of that same provision ("in the manner prescribed by the law of the State"); each judge diverged on what constitutes the relevant "manner" of execution and whether federal authorities must follow state protocols in method, procedure, or merely substance.²⁷⁰ The circuit court determined that the 2019 execution protocol and its addendum qualify as internal agency rules concerning organization, procedure, or practice.²⁷¹ As such, the 2019 execution protocol and its addendum are exempt from the Administrative Procedure Act's notice-and-comment requirements.²⁷²

²⁶⁷ See *Mitchell*, 140 S. Ct. at 2624–25.

²⁶⁸ *Id.* at 2624. As Justice Sotomayor noted in her concurrence, the FDPA's requirement that executions be carried out "in the manner prescribed by the law of the State in which the sentence is imposed" remains unsettled. *Id.* In the most detailed analysis to date, three D.C. Circuit judges offered three conflicting interpretations of the term "manner" and its source in state law. *Id.* Although the Ninth Circuit assumed a reading favorable to the petitioner and still denied relief, the lack of definitive guidance from the Supreme Court persists. *Id.* at 2624–25.

²⁶⁹ See *id.* at 2625. With additional executions scheduled, Justice Sotomayor emphasized the urgent need for the Court to clarify this ambiguity. *Id.*

²⁷⁰ *In re Fed. Bureau of Prisons' Execution Protocol Cases (Fed. Bureau I)*, 955 F.3d 106, 108, 110–11 (D.C. Cir. 2020). This appeal stems from a consolidated set of cases in which twelve federal death-row inmates challenged the government's execution procedures. *Id.* at 110. The litigation began in 2005 but was repeatedly stayed due to pending Supreme Court cases (*Hill v. McDonough* and *Baze v. Rees*) and, later, the government's inability to obtain the required lethal injection drugs. *Id.* For several years, the DOJ reported that it was revising the federal execution protocol. *Id.* at 110–11. In 2019, the DOJ finalized a revised protocol based on a single-drug method using pentobarbital and scheduled executions for four inmates: Daniel Lee, Wesley Purkey, Dustin Honken, and Alfred Bourgeois. *Id.* at 111. The inmates filed motions for a preliminary injunction, arguing that the new protocol violated the FDPA, the Administrative Procedure Act (APA), the Federal Food, Drug, and Cosmetic Act (FDCA), the Controlled Substances Act (CSA), and several constitutional provisions, including the First, Fifth, Sixth, and Eighth Amendments. *Id.* The district court granted the injunction, finding that the plaintiffs were likely to succeed on their FDPA claim. *Id.* Specifically, the district court held that the FDPA requires the federal government to carry out executions according to the state's method and procedures—not through a uniform federal protocol—and that the new protocol exceeded the DOJ's statutory authority. *Id.*

²⁷¹ *Id.* at 112.

²⁷² *Id.*

Based on this conclusion, the circuit court found in favor of the government on this issue.²⁷³ In his concurrence, Judge Katsas emphasized that “a death sentence is of course serious business,”²⁷⁴ a premise that underscores the stakes of judicial and executive fidelity to statutory text. He dismissed reliance on failed legislative proposals as an unreliable guide to statutory meaning and reinforced that the DOJ has the authority to implement execution protocols through the Attorney General’s statutory powers.²⁷⁵ Katsas further observed that the federal execution protocol was neither promulgated through notice-and-comment rulemaking nor published in the Code of Federal Regulations.²⁷⁶ Rather, the federal execution protocol was framed as a procedural manual that “does not create any legally enforceable rights or obligations,” and explicitly allows deviations at the discretion of the Bureau of Prisons’ Director or Warden.²⁷⁷ This structural leeway, while legally permissible, illustrates how significantly the procedural implementation of the death penalty under the FDPA can shift in the absence of meaningful legislative oversight. In their respective concurrences, both Katsas and Judge Rao cautioned that courts must enforce statutes as written rather than based on policy goals, or risk overriding the legislative compromises that enabled their passage.²⁷⁸ According to Rao, even under the DOJ’s interpretation, the FDPA permits flexibility in execution methods only when state law is silent—limits that reflect Congress’s deliberate choices.²⁷⁹

Additionally, in *United States v. Purkey*, the Eighth Circuit addressed a challenge to the FDPA’s delegation of authority to prosecutors to charge aggravating factors without presenting them to a grand jury.²⁸⁰ The court upheld the FDPA, noting that while the statute does not mandate grand jury review of aggravating factors, it does not preclude such review, and the statute’s framework remains constitutionally valid.²⁸¹ The FDPA also

²⁷³ *Id.*

²⁷⁴ *Id.* at 128 (Katsas, J., concurring).

²⁷⁵ *See id.* at 122, 125.

²⁷⁶ *Id.* at 126.

²⁷⁷ *Id.*

²⁷⁸ *See id.* at 126 n.12; *id.* at 129, 140–41 (Rao, J., concurring).

²⁷⁹ *See id.* at 135, 141–142.

²⁸⁰ 428 F.3d 738, 748 (8th Cir. 2005). To comply with the Fifth Amendment, a prosecution under the FDPA requires that both the mens rea element and at least one statutory aggravating factor be found by a grand jury and included in the indictment. *Id.* at 749.

²⁸¹ *See id.* at 748–50. To make a defendant eligible for the death penalty under the FDPA, the indictment must include at least one statutory aggravating factor ultimately

permits a broad scope of admissible evidence during capital sentencing, setting minimal restrictions on what may be presented to the jury.²⁸²

Likewise, in *United States v. Frank*, the District Court for the Southern District of New York addressed the argument that the FDPA violates the nondelegation doctrine by granting prosecutors broad discretion to define non-statutory aggravating factors.²⁸³ In *Frank*, the defendant argued that the FDPA's allowance for undefined, case-specific aggravating factors invites arbitrary outcomes and grants prosecutors broad discretion unmoored from clear constitutional limits.²⁸⁴ The district court disagreed, finding that this discretion is constrained by the Supreme Court's death penalty jurisprudence, the statutory notice requirement, and judicial review, ensuring that the factors are relevant to the sentencing decision.²⁸⁵ The district court held that the FDPA does not violate the nondelegation doctrine because it does not give prosecutors unchecked authority to invent aggravating factors. Rather, Congress defined the initial class of death-eligible offenders by specifying qualifying crimes and mental states under 18 U.S.C. § 3591.²⁸⁶ That class is then narrowed further by requiring the jury to unanimously find the existence of at least one statutory aggravating factor beyond a reasonable doubt.²⁸⁷ Still, this combination of prosecutorial discretion²⁸⁸ and ambiguous procedural constraints²⁸⁹ risks the kind of arbitrary

found by the jury, as this elevates the possible sentence from life imprisonment to death. *Id.* at 749.

²⁸² *Id.* at 756 (citing *United States v. Lee*, 274 F.3d 485, 494 (8th Cir. 2001)).

²⁸³ 8 F. Supp. 2d 253, 264–67 (S.D.N.Y. 1998). The defendant argued that the FDPA fails to meet constitutional standards because it permits prosecutors to invent and introduce non-statutory aggravating factors that vary by case, resulting in the kind of arbitrary and inconsistent application of the death penalty denounced in *Furman v. Georgia*. *Id.* at 264. The statute allows the government to propose “any other aggravating factor,” without offering meaningful guidance on how such factors should be selected or defined. *Id.* This broad discretion risks verdicts based not on “clear and objective” criteria, as required by *Gregg v. Georgia*, but on the prosecutor's own subjective judgment. *See id.* Combined with the expansive scope of admissible evidence at the penalty phase, this standardless framework fosters a constitutionally impermissible risk that capital sentencing will be driven by prosecutorial imagination rather than principled limitations—inviting precisely the arbitrary and capricious outcomes the Eighth Amendment was intended to prevent. *See id.*

²⁸⁴ *See id.* at 260.

²⁸⁵ *See id.* at 261–66.

²⁸⁶ *See id.* at 266.

²⁸⁷ *See id.*

²⁸⁸ *See id.* at 264; *United States v. Purkey*, 428 F.3d 738, 748–49 (8th Cir. 2005).

²⁸⁹ *See Mitchell v. United States*, 140 S. Ct. 2624, 2624–25 (2020).

enforcement the Eighth Amendment was designed to prevent. As Douglas emphasized in *Furman*, the Eighth Amendment obliges legislatures to create laws that are fair, consistent, and nonarbitrary, and demands that judges ensure those laws are applied evenly and without favoritism.²⁹⁰

These shortcomings do not mean that the FDPA should be discarded. Rather, they demonstrate the urgent need to revisit and strengthen it. Just as *Furman* exposed how unguided discretion in capital sentencing could lead to arbitrary and capricious outcomes,²⁹¹ and *Gregg* validated structured discretion,²⁹² promoting a congressional response in the form of the FDPA,²⁹³ the moment now demands a renewed legislative response. The FDPA provides a foundational framework, one that reflects Congress's capacity to craft detailed, constitutionally guided procedures. But its original design now needs adaptation, not abandonment. The following Part is a look at how past legislative interventions can serve as a guide for restoring fairness and stability to the federal death penalty system.

V. PAST CONGRESSIONAL RESPONSES AS A BLUEPRINT FOR FUTURE REFORM

The need for uniform, evidence-based execution standards is underscored by the DOJ Office of Legal Policy's (OLP) 2025 Review of the federal lethal injection protocol.²⁹⁴ The OLP 2025 Review revealed deep scientific uncertainty about pentobarbital's risks,²⁹⁵ including its potential to cause flash pulmonary edema and severe pain through high-alkaline injection, particularly if

²⁹⁰ See *Furman v. Georgia*, 408 U.S. 238, 249, 256 (1972) (Douglas, J., concurring).

²⁹¹ See *id.* at 253.

²⁹² See *Gregg v. Georgia*, 428 U.S. 153, 195–98 (1976).

²⁹³ See *United States v. Catalan Roman*, 376 F. Supp. 2d 108, 111 (D.P.R. 2005).

²⁹⁴ Bondi Memorandum, *supra* note 125, at 1, 3. The OLP was tasked with evaluating whether to reinstate pentobarbital as the primary method of execution and whether to expand authorized methods under 18 U.S.C. § 3596(a). *Id.* at 3.

²⁹⁵ OFF. OF LEGAL POL'Y, U.S. DEP'T. OF JUST., REVIEW OF THE FEDERAL EXECUTION PROTOCOL ADDENDUM AND MANNER OF EXECUTION REGULATIONS 2, 6–7 (2025), <https://www.justice.gov/archives/ag/media/1384566/dl> [<https://perma.cc/MJ2R-FY29>]. Pentobarbital is an FDA-approved barbiturate used in humans for emergency seizure treatment, short-term sedation for insomnia, and as a pre-anesthetic agent, typically in therapeutic doses between 150 and 200 milligrams. *Id.* at 6. Toxic effects generally occur around one gram, with death reported between two and ten grams. *Id.* While the FDA has approved pentobarbital for animal euthanasia and it has been used in physician-assisted dying under state regulatory frameworks, the FDA has not reviewed or approved pentobarbital's use in high doses for the purpose of intentional human execution. *Id.*

improperly administered.²⁹⁶ Compounded pentobarbital, sourced outside traditional FDA oversight, heightens the unpredictability,²⁹⁷ as it remains scientifically unclear whether a five-gram dose of pentobarbital truly renders individuals unconscious or merely unresponsive yet still able to feel suffering.²⁹⁸ The OLP ultimately concluded that these unresolved concerns warranted halting pentobarbital's use until more rigorous, scientifically validated procedures could be developed.²⁹⁹ The same OLP Review further highlighted that under the FDPA, federal executions are tied to the method of execution specified by the law of the state where the federal court imposed the sentence,³⁰⁰ whether that means lethal injection, electrocution, or another method. The FDPA also authorizes federal authorities to use state or local facilities and personnel to carry out the execution, allowing federal officials to rely on state prison staff as needed.³⁰¹ This way, the FDPA locks the federal government into following state execution methods.³⁰² As a result, the federal government is exposed to the volatility of evolving state practices. Because state protocols continue to shift, uncertainty persists, particularly as federal courts begin to scrutinize the constitutionality of new methods such as nitrogen hypoxia.³⁰³ In anticipation of potential legal disputes arising from this framework, the DOJ in 2020 amended its regulations³⁰⁴ to essentially mirror the FDPA's language.³⁰⁵ This revi-

²⁹⁶ *See id.* at 11–12.

²⁹⁷ *See id.* at 7–8.

²⁹⁸ *See id.* at 15–16.

²⁹⁹ *Id.* at 16–17.

³⁰⁰ *Id.* at 18–19.

³⁰¹ *See id.*

³⁰² *See id.*

³⁰³ *See Hoffman v. Westcott*, No. 25-169-SDD-SDJ, 2025 U.S. Dist. LEXIS 43627, at *6–12 (M.D. La. Mar. 11, 2025); Sara Cline, *A Federal Judge Has Halted Louisiana's First Nitrogen Gas Execution. The State Says It Will Appeal*, AP NEWS (Mar. 11, 2025, at 16:03 PT), <https://apnews.com/article/louisiana-execution-nitrogen-468b8b1d56b0f3bbb394259a35bf20f8> [<https://perma.cc/XY6S-46WN>]. In addressing whether nitrogen hypoxia constitutes cruel and unusual punishment under the Eighth Amendment, U.S. District Court Judge Shelly Dick issued a preliminary injunction to halt what would have been Louisiana's first execution in fifteen years. *Id.* She emphasized that the public has a strong interest in preventing potential constitutional violations and noted that the question before the court is not whether Hoffman will be executed, but how. *Id.* Following the ruling, Louisiana announced it would appeal the decision. *Id.*

³⁰⁴ 28 C.F.R. §§ 26.1–.5 (2025). In 2020, the DOJ proposed amendments to 28 C.F.R. part 26 to expand federal flexibility in carrying out executions by permitting any method authorized under 18 U.S.C. § 3596(a), and to effectuate the statutory authority under § 3597(a) allowing use of state or local facilities and personnel. *See id.* The proposed rule further included technical updates to streamline procedures, such as eliminating redundant requirements for filing a judgment and order with the sentencing court, and modernizing administrative authority by permitting the Director of the Bureau of Prisons or a

sion was intended to safeguard federal flexibility by confirming that executions could proceed under any method permitted by the relevant state,³⁰⁶ including alternatives such as a firing squad or nitrogen hypoxia. The DOJ also explained that if a state had a different execution method, the “most expedient means” would be to work directly with the state’s personnel and facilities to carry out the execution quickly.³⁰⁷ The following Part draws on several examples of how Congress has acted in the past to curb excessive discretion and promote consistent, constitutionally sound criminal justice policy. By examining the Sentencing Reform Act of 1984 and the Military Commissions Act of 2006, this discussion highlights potential models and lessons for designing a more stable, fair, and principled framework for imposing the federal death penalty.

A. The Sentencing Reform Act of 1984 as a Framework

An example of Congress’s efforts to promote fair and consistent criminal policy can be seen in the Sentencing Reform Act of 1984 (SRA), which was upheld in *Mistretta v. United States*.³⁰⁸ In *Mistretta*, the Supreme Court affirmed that “Congress . . . has the power to fix the sentence for a federal crime” and that judicial sentencing discretion “is subject to congressional control.”³⁰⁹ Historically, sentencing judges had enjoyed broad discretion, including the authority to suspend sentences and impose probation.³¹⁰ But Congress determined that this indeterminate system produced “unjustified” and “shameful” consequences: substantial disparities among similarly situated offenders and serious uncer-

designee to make certain decisions, rather than limiting that authority to the warden of the designated facility. *See id.*

³⁰⁵ REVIEW OF FED. EXECUTION PROTOCOL, *supra* note 295, at 1.

³⁰⁶ *See id.*

³⁰⁷ *Id.* at 19.

³⁰⁸ 488 U.S. 361, 412 (1989). In 1987, John M. Mistretta was indicted in federal court in Missouri on three cocaine-related charges. *Id.* at 370. He pleaded guilty to one count—conspiracy to distribute cocaine—and was sentenced under the newly established Sentencing Guidelines to eighteen months in prison, three years of supervised release, a \$1,000 fine, and a \$50 special assessment. *Id.* at 370–71. Mistretta challenged the constitutionality of the Sentencing Guidelines, arguing that the Sentencing Commission violated the separation of powers and involved an excessive delegation of congressional authority. *Id.* at 370. The district court rejected these claims, and both parties petitioned for certiorari before judgment due to the issue’s national importance. *Id.* at 370–71.

³⁰⁹ *Id.* at 364. The issue before the Court was whether the Sentencing Guidelines, promulgated by the United States Sentencing Commission under the Sentencing Reform Act of 1984, violated the Constitution by infringing on the separation of powers or by involving an improper delegation of legislative authority. *Id.* at 362.

³¹⁰ *See id.* at 364.

tainty regarding the time actually served.³¹¹ As the Court noted in *Mistretta*, these features had been a “serious impediment” to the fair and effective operation of the criminal justice system.³¹² Through the SRA, Congress aimed to enhance the criminal justice system’s fairness and effectiveness by ensuring honesty, uniformity, and proportionality in sentencing.³¹³ First, Congress sought to eliminate confusion and misleading practices associated with indeterminate sentencing and parole, which often led to defendants serving far less time than courts initially imposed.³¹⁴ Second, Congress addressed unreasonable disparities in sentences for similar crimes and similar offenders, creating a more predictable and even-handed system.³¹⁵ Third, Congress aimed to promote proportionality, matching punishment severity more closely to the seriousness of the offense.³¹⁶ As Congress once acted to constrain judges,³¹⁷ it should now intervene to stabilize the standards for imposing the federal death penalty, which today swing dramatically with each administration.

Congress also created the United States Sentencing Commission (the Commission) as part of the Sentencing Reform Act.³¹⁸ The Commission is comprised of seven voting members, appointed by the President with Senate confirmation after consultation with judges, prosecutors, defense counsel, crime victims, and other stakeholders, and one non-voting member.³¹⁹ At least three members must be federal judges recommended by the Judicial Conference, and no more than four voting members may belong to the same political party.³²⁰ Of the three Vice Chairs, no more than two may share the same party affiliation.³²¹ The Attorney General, or a designee, serves as a nonvoting ex officio member.³²² Members may only be removed by the President for cause,³²³ further reinforcing the Commission’s independent character. The Commission, housed within the judicial branch,³²⁴ was

³¹¹ *See id.* at 366.

³¹² *Id.*

³¹³ U.S. SENT’G GUIDELINE MANUAL § 1A3 (U.S. SENT’G COMM’N 2021).

³¹⁴ *See id.*

³¹⁵ *See id.*

³¹⁶ *See id.*

³¹⁷ *See Mistretta*, 488 U.S. at 364–65.

³¹⁸ *Id.* at 361; 28 U.S.C. § 991(b)(1)(A).

³¹⁹ § 991(a).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

created to promote fairness and certainty in sentencing outcomes.³²⁵ Its mandate includes reducing unwarranted disparities among similarly situated defendants, yet preserving enough flexibility to allow individualized sentences based on unique aggravating or mitigating factors.³²⁶ Additionally, the Commission is tasked with incorporating advances in behavioral and criminal justice research,³²⁷ and with developing ways to measure how effective sentencing and correctional practices achieve their intended purposes.³²⁸ The Commission does far more than merely draft guidelines; it systematically collects, analyzes, and publishes extensive data on federal crime and sentencing practices.³²⁹ By gathering case-level data from courts nationwide, the Commission produces public reports on sentencing patterns and provides research-based advice to the judiciary, Congress, and the executive branch.³³⁰

In this light, a politically independent federal death penalty commission could serve the same stabilizing function as the Sentencing Commission, ensuring that ultimate life-and-death decisions do not fluctuate with presidential priorities. By drawing on rigorous evidence, public data reporting, and transparent analyses, such a commission could help bring the “administrative law” values of expertise, proportionality, and accountability into

³²⁵ *Id.* § 991(b)(1)(B).

³²⁶ *Id.*; see also *Neal v. United States*, 516 U.S. 284, 290–91 (1996) (discussing the identical goal and similar flexibility based on specified factors).

³²⁷ § 991(b)(1)(C).

³²⁸ *Id.* § 991(b)(2).

³²⁹ See generally *Research*, U.S. SENT’G COMM’N, <https://www.ussc.gov/research> [<https://perma.cc/T4YB-FQMA>] (last visited July 3, 2025) (displaying the Commission’s quarterly sentencing updates, annual federal sentencing statistics, and compassionate release data reports).

The Commission also analyzes retroactivity motions and performs sentencing and prison impact reports, guideline application frequency studies, and research reports on topics such as overdoses in drug trafficking crimes, cybercrime, and methamphetamine trafficking. See *Data Reports*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/data-reports> [<https://perma.cc/TD7H-HHJB>] (last visited Oct. 15, 2025); *Research Reports*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/research-reports> [<https://perma.cc/RA7S-QUSL>] (last visited Oct. 15, 2025). In addition, the Commission provides datafiles on sentenced individuals and organizations, and releases data briefings to support public comment on guideline amendments, including recent briefings on prison contraband, drug offenses, and machinegun conversion devices. See *Data Briefings*, U.S. SENT’G COMM’N, <https://www.ussc.gov/topic/data-briefings> [<https://perma.cc/V2HS-ELT9>] (last visited Oct. 15, 2025).

³³⁰ *Research*, *supra* note 329.

the federal capital punishment system.³³¹ At present, criminal law often departs from these principles of sound governance, favoring gut reactions and emotionally charged, high-profile cases instead of reasoned, evidence-based policymaking.³³² These dynamics allow policy to swing wildly with political cycles or media outrage, rather than remain anchored in principled, fair criteria.³³³ Like the Sentencing Commission, which was created to promote fairness,³³⁴ a dedicated federal death penalty commission could help counter these pressures by establishing consistent standards for imposing capital punishment, thereby reducing arbitrary enforcement.

B. The Military Commissions Act of 2006 as a Framework

The pattern of congressional intervention to constrain problematic executive practices is not unique to judicial sentencing. After Congress passed the Authorization for Use of Military Force (AUMF) in response to the September 11 attacks, President George W. Bush initiated the detention of enemy combatants at Guantánamo Bay.³³⁵ He sought to prosecute them through military commissions, including the defendant in *In re Al-Nashiri*, who was charged with capital offenses such as terrorism and murder in violation of the law of war.³³⁶ The Supreme Court, however, in *Hamdan v. Rumsfeld*, determined that the President's military commissions did not comply with procedural protections set out in the Uniform Code of Military Justice and the Geneva Conventions.³³⁷ In direct response to *Hamdan*, Congress passed the Military Commissions Act of 2006 (MCA).³³⁸ 28 U.S.C. § 2241(e)³³⁹ was amended by the MCA to explicitly strip federal courts of jurisdic-

³³¹ Cf. Rachel E. Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, 104 MINN. L. REV. 2625, 2627 (2020) (contrasting how policy is created in administrative law versus criminal law).

³³² See *id.* at 2627–28.

³³³ See *id.* at 2627.

³³⁴ 28 U.S.C. § 991(b)(1)(B); see also *Neal v. United States*, 516 U.S. 284, 290–91 (1996) (highlighting the Commission's goal of eliminating sentencing disparities).

³³⁵ *In re Al-Nashiri*, 835 F.3d 110, 114 (D.C. Cir. 2016).

³³⁶ *Id.*

³³⁷ 548 U.S. 557, 567 (2006). Justice Kennedy, concurring, emphasized that because Congress had prescribed those procedural limits on presidential authority, only Congress could change them. *Id.* at 653 (Kennedy, J., concurring).

³³⁸ *Hamad v. Gates*, 732 F.3d 990, 998 (9th Cir. 2013).

³³⁹ *Id.*; see also § 2241(e) (restricting federal court jurisdiction over habeas petitions filed by non-citizens detained as enemy combatants).

Unless otherwise authorized by the Detainee Treatment Act of 2005, courts may not hear such petitions or related legal challenges concerning the detention, transfer, treatment, or trial of these individuals. *Id.* § 2241(e)(2).

tion to hear habeas petitions filed by Guantánamo detainees held after September 11, 2001—even those already pending in court.³⁴⁰ The MCA created a new military commission system, exempted it from many of the previous procedural limits, and established a Court of Military Commission Review.³⁴¹ When the MCA was challenged in *Boumediene v. Bush*, the Court concluded that Congress had indeed expressed a clear and unmistakable intent to bar federal court review of these cases.³⁴²

This history suggests that Congress is fully capable of stepping in to correct flawed or overly discretionary executive frameworks in matters of grave consequence, even when those frameworks affected noncitizens detained abroad.³⁴³ By establishing new military commissions,³⁴⁴ clarifying jurisdiction,³⁴⁵ and replacing inadequate executive procedures with a legislated system,³⁴⁶ Congress showed its willingness to stabilize processes critical to due process. In the same way, Congress today should exercise its constitutional authority to prevent arbitrary swings in how and when the federal death penalty is imposed, and adopt uniform standards that guard against inconsistent or politically driven decision-making.

VI. CONCLUSION

The modern federal death penalty no longer functions as a stable or principled system of justice. Over the past four administrations, capital punishment has shifted in response to presidential ideology rather than constitutional consistency. What remained dormant under Obama was aggressively revived by Trump, paused under Biden, and reinstated with sweeping mandates during Trump's second term. These reversals demonstrate that federal capital punishment now operates less as a legal institution and more as a political instrument, vulnerable to partisan cycles and executive priorities.

The constitutional concerns first raised in *Furman v. Georgia*, such as arbitrariness, inconsistency, and the unchecked use

³⁴⁰ See *Hamad*, 732 F.3d at 998; § 2241(e)(1).

³⁴¹ *In re Al-Nashiri*, 835 F.3d at 115.

³⁴² See 553 U.S. 723, 738–39 (2008).

³⁴³ See *Hamad*, 732 F.3d at 998; *In re Al-Nashiri*, 835 F.3d at 114–15; *Hamdan v. Rumsfeld*, 548 U.S. 557, 558–59 (2006).

³⁴⁴ See *In re Al-Nashiri*, 835 F.3d at 115.

³⁴⁵ See *Hamad*, 732 F.3d at 997–98; *In re Al-Nashiri*, 835 F.3d at 115–16; *Boumediene*, 553 U.S. at 738–39.

³⁴⁶ See *In re Al-Nashiri*, 835 F.3d at 115.

of discretion, have resurfaced through the unbounded authority of the executive branch. While the FDPA introduced procedural safeguards at the sentencing stage, those protections are undercut by the Attorney General's unilateral charging power. Who faces death can depend more on political ideology than on law or fact. These vulnerabilities are compounded by patterns of racial and geographic disparity, confirming that the imposition of death is still shaped by forces external to justice.

The structural weaknesses within the FDPA itself further entrench these problems. Courts have recognized the broad scope of executive and prosecutorial discretion and have largely refrained from imposing procedural limits. DOJ protocols lack legal enforceability, and judicial review remains minimal. The result is a regime where life-and-death decisions can be shaped by political allegiance, personal loyalty, or media attention, rather than by objective standards. Ambiguities in the statute have led to divergent interpretations, exposing capital enforcement to uncertainty and inconsistency across administrations.

Yet this state of instability is not inevitable. Congress has intervened before to bring fairness and structure to areas of criminal law prone to abuse. The Sentencing Reform Act and the Military Commissions Act reflect a legislative capacity to craft principled, enduring frameworks that resist executive overreach. Similar reform is both possible and necessary for the federal death penalty. A politically independent commission, grounded in data, transparency, and constitutional principle, could restore credibility to a system now marked by volatility.

Without such institutional safeguards, the federal death penalty remains at risk, not merely of being cruel, but of becoming wholly arbitrary and lawless. The Constitution demands more than procedural formality. It requires a system where the gravest punishment is imposed through fair, consistent, and accountable processes. That demand remains unmet. The time for legislative recalibration is now.

