
BIDEN'S FIRST 100 DAYS: PUTTING THE FEDERAL DEATH PENALTY ON LIFE SUPPORT

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In the 78 days between Election Day and when left office, Donald Trump presided over the execution of six defendants on federal death row.¹ So hurried was his administration to see the final three executed that officials repeatedly appealed stays and preliminary injunctions by lower courts to ensure that the death warrants were carried out before control of the U.S. Department of Justice was turned over to Joe Biden and his appointees.²

Biden now has an opportunity not only to stem this mad tide but also to effectively end the federal death penalty. It is long past time to remove the United States from the list of pariah nations that rely so heavily on capital punishment. In 2019 alone, under Trump's watch, the U.S. joined just China, Egypt, Iran, Iraq, and Saudi Arabia in executing more than 20 people in a single year. With the stroke of a pen, Biden can halt federal executions. By lending his credibility to the cause, he might well convince the states to abandon capital punishment, too.

Multiple studies have shown that the death penalty is not cost effective,³ that it does not deter crime,⁴ and that it is disproportionately exercised against people of color.⁵ I led or participated in three studies that examined the nature of

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1. *Outcomes of Death Warrants in 2020*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2020> (last visited Apr. 22, 2021) [<https://perma.cc/6K3J-886W>]; *Outcomes of Death Warrants in 2021*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2021> (last visited Apr. 22, 2021) [<https://perma.cc/VU7Z-BPDM>].

2. *Federal Execution Updates*, DEATH PENALTY INFO. CTR. (Jan. 16, 2021, 1:35 AM), <https://deathpenaltyinfo.org/stories/federal-execution-updates> [<https://perma.cc/R2P2-GJ7J>].

3. Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498 (2009).

4. NAT'L RSCH. COUNCIL, DIV. OF BEHAV. & SOC. SCIS. & EDUC., COMM. ON L. & JUST., COMM. ON DETERRENCE & THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin & John V. Pepper eds. 2012).

5. DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

legal representation in federal capital cases,⁶ and the results are alarming. First, there is tremendous disparity in the resources that capital defendants receive to defend themselves and mitigate their sentence.⁷ In some cases, defendants are granted excellent attorneys who, working with investigators, psychologists, or mitigation experts, undercover key evidence. In too many other cases, however, the attorneys reject expert assistance, which the courts do not require.⁸

Second, these resource differences are largely independent of the facts of the case. Attorneys do not seem to work hard on the “good” cases and give up on the “tough” ones. Instead, federal judges serve as the gatekeepers to quality defense. Jurists in conservative communities, appointed by Republican presidents, and presiding in districts with heavy felony caseloads are more likely than their brethren to appoint inexperienced defense lawyers considered less competent by their peers. It is a two-step process: judges appoint less skilled lawyers, who fail to employ as many resources in defending their clients.⁹

The result, unfortunately, is a federal system of capital defense in which those suspects receiving the least-resourced defense face twice the risk of being sentenced to death at trial. As we found, just 19% of federal defendants were sentenced to death when the resources for their defense rose above the 30th percentile. However, when defense expenditures fell below this floor, a defendant’s risk of a death sentence jumped to 44%.¹⁰ The greatest predictors for these results were the location and identity of the presiding judge who chose the defense attorneys.¹¹ In fact, 40% of all federal death sentences have been imposed by federal courts in just four states, Louisiana, Missouri, Texas and Virginia.¹²

It’s not as if the federal courts are unaware of these deficiencies. They have studied the issue multiple times, each time confronting the reality that *they*, in fact, are partially accountable for the unfairness in the process.¹³ Federal judges are responsible for the selection of capital defense attorneys and authorize the resources allowed to the defense. But, even after multiple reports and warnings, the judges refuse to address, let alone acknowledge in places, the problem. When the judiciary will not act to preserve equal justice under law, then the President, and the prosecutors who answer to him, must respond.

6. JON B. GOULD & LISA GREENMAN, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2010), <https://www.uscourts.gov/sites/default/files/fdpc2010.pdf> [<https://perma.cc/CRZ5-L2ZC>]; Jon B. Gould and Kenneth S. Leon, *A Culture That is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643 (2017); AD HOC COMM. TO REVIEW THE CRIM. JUST. ACT, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (2017), <https://cjastudy.fd.org/> [<https://perma.cc/8WXT-HQHF>] [hereinafter Cardone Report].

7. GOULD & GREENMAN, *supra* note 6.

8. Cardone Report, *supra* note 6, at 21.

9. Gould & Leon, *supra* note 6, at 649.

10. GOULD & GREENMAN, *supra* note 6, at 44.

11. Gould & Leon, *supra* note 6, at 647.

12. *Id.* at 650.

13. Cardone Report, *supra* note 6, at XXI; JUD. CONFERENCE COMM. TO REV. THE CRIM. JUST. ACT, SUMMARY REPORT (Mar. 1993), [http://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20\(Jan%201993\).pdf](http://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20(Jan%201993).pdf) [<https://perma.cc/RX96-D9FY>].

Federal capital cases are brought by the U.S. Department of Justice, which as of January 20th now reflects Biden's priorities. Biden has said he "will work to pass legislation that eliminates the death penalty at the federal level."¹⁴ However, legislatures are unlikely avenues for reform. In 2013, Congress instituted sequestration that starved the federal courts – and with it capital defense services – of resources,¹⁵ and state legislatures are presently reeling from COVID. It is difficult under the circumstances to see legislators take up the repeal of the death penalty, especially when "criminal defendants are hardly a powerful political constituency."¹⁶ The accused, particularly those alleged to have committed the most serious crimes, are the "least politically powerful [group] in the country, and political actors . . . are not highly motivated to make . . . decisions that would benefit them."¹⁷ Even in an era when the new watchword is being "smart on crime," too many legislators fear being tagged as "soft on crime" and mistakenly associate capital punishment with tough and effective law enforcement.

Biden is said to be a "creature of the Senate" and necessarily looks for comity between the executive and legislative branches.¹⁸ However, if he is serious about ending the federal death penalty, he has the power to act unilaterally. The Department of Justice controls the spigot of federal capital cases, and Biden can halt the federal apparatus of death by simply refusing to carry out further executions on his watch and ending the practice of capital charges in federal cases. Ideally, as Biden himself acknowledges, this decision might "incentivize states to follow the federal government's example."¹⁹

We all deserve a criminal justice system that keeps us safe, treats us equally, uses fair processes, spends money wisely, and arrives at accurate results. This is especially true when crimes are heinous and when punishment is irreversible. However, the federal death penalty resembles a game of Russian Roulette, where a defendant's risk of execution turns as much on the resources he is given to defend himself as on the nature of the crime and the strength of the evidence.

President Biden has promised to end this practice. With no federal executions currently scheduled, it may seem that he has the luxury of time to focus on other priorities. But, the process of charging and preparing cases continues unabated. If Biden is serious about ending the death penalty, it is important that he act now to prevent the further charging of federal capital cases and halt the progression of cases through the federal courts to the execution chamber. Biden has

14. *The Biden Plan for Strengthening America's Commitment to Justice*, JOE BIDEN FOR PRESIDENT: OFF. CAMPAIGN WEBSITE, <https://joebiden.com/justice/> (last visited Apr. 22, 2021) [<https://perma.cc/2GW3-LSRV>] [hereinafter Biden].

15. See Cardone Report, *supra* note 6, at XXIX.

16. Erwin Chemerinsky, *Lessons from Gideon*, 122 *Yale L.J.* 2676, 2686 (2013) (published remarks).

17. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 459 (1995).

18. Lindsey McPherson, *President Biden Arrives with Negotiator-in-Chief Credentials*, *ROLL CALL* (Jan. 20, 2021, 1:56 PM), <https://www.rollcall.com/2021/01/20/president-biden-arrives-with-negotiator-in-chief-credentials/> [<https://perma.cc/5GZW-KBQW>] (internal quotation marks omitted).

19. Biden, *supra* note 14.

this power. May he use it to fulfill his campaign promise and further bolster the equitable rule of law in America.