



**JOINT STATEMENT BY CRIMINAL JUSTICE AND LAW ENFORCEMENT
LEADERS IN OPPOSITION TO APPLICATION OF THE FEDERAL DEATH
PENALTY**

December 2020

We are a group of nearly 100 current and former elected prosecutors, Attorneys General, and law enforcement leaders, and former United States Attorneys and Department of Justice officials writing in opposition to the application of the death penalty, and in support of clemency, for those individuals scheduled for federal execution in the coming months. Case after case has revealed that our nation's long experiment with the death penalty has failed. The process is broken, implicates systemic racism and constitutional concerns, and distinguishes our country from many other democratic nations in the world. If ever there were a time to revisit this practice, that time is now.

Many have tried for over forty years to make America's death penalty system just. Yet the reality is that our nation's use of this sanction cannot be repaired, and it should be ended. The death penalty raises serious concerns in tension with the constitutional ban against cruel and unusual punishment and the guarantees of due process and equal protection under the law.¹ It is unequally and arbitrarily applied, ineffective at improving public safety, and a waste of taxpayer resources; and its use presents the perilous risk of executing an innocent person.²

We also now know that we have not executed the worst of the worst, but often instead put to death the unluckiest of the unlucky – the impoverished, the poorly represented, and the most broken. Time and again, we have executed individuals with long histories of debilitating mental illness, childhoods marred by unspeakable physical and mental abuse, and intellectual disabilities that have prevented them from leading independent adult lives. We have executed individuals with trial lawyers so derelict in their duties and obligations that they never bothered to uncover long histories of illness and trauma. We have also likely executed the innocent.³

Race also plays a deeply disturbing and unacceptable role in the application of the death penalty. Studies have documented that defendants of color are disproportionately likely to be sentenced to die – this is particularly and uniquely true when the victim is white.⁴ The pernicious and racially disparate legacy of the death penalty is incontrovertible: people of color have accounted for a disproportionate 43% of executions in the United States since 1976, and 55% of defendants

¹ ACLU, The Case Against the Death Penalty (available at <https://www.aclu.org/other/case-against-death-penalty>).

² *Id.*

³ Andrew Cohen, Yes, America, We Have Executed an Innocent Man, *The Atlantic*, May 14, 2012 (available at <https://www.theatlantic.com/national/archive/2012/05/yes-america-we-have-executed-an-innocent-man/257106/>).

⁴ ACLU, Race and the Death Penalty (available at <https://www.aclu.org/other/race-and-death-penalty>).

currently awaiting execution are people of color.⁵ Moreover, there are stark disparities in executions relative to the race of the victim: since 1976, a total of 21 white defendants were executed for crimes perpetrated against a Black victim; in contrast, in that same time period, 296 Black defendants were executed for crimes perpetrated against a white victim. Strikingly, while 80% of all death penalty cases involve white victims, only one-half of all murder victims are white.⁶ This research underscores the systemic racism evident throughout our justice system.

The federal government should not ignore these issues in the best of times, but these concerns are especially acute in the midst of a global pandemic and calls for racial justice that have led to an ever-deepening erosion of trust in government and our criminal legal system. Moreover, rushing through executions during a surge in COVID-19 infections also implicates Sixth Amendment right to counsel concerns. The COVID-19 pandemic is at its peak; in mid-November there were 140,000 new cases in the nation, with these numbers continuing to grow.⁷ It is impossible for attorneys to effectively represent their clients during this time, either in clemency or in their motions to stay or reverse the sentence of death. There are many things that attorneys must do in the weeks and days leading up to an execution, including investigating last minute leads, helping their clients prepare for any religious counseling (and litigating any barriers to receiving that counseling), making decisions about what proceedings to file and in what court, selecting the facts to highlight in petitions for clemency, and deciding whose voices to elevate in those petitions and in supporting affidavits. Right now, attorneys cannot visit those awaiting execution, making it extremely difficult to consult with their client about legal or factual strategies. Indeed, some counsel are suffering from illness themselves.⁸ At a time when the country is struggling through a deadly pandemic, spending scarce resources to carry out federal executions and forcing defense lawyers to risk their lives to defend clients on death row is simply unthinkable.

Our nation's use of the death penalty separates us from many other democratic nations. Germany abandoned the death penalty after the Holocaust and enshrined protecting human dignity as a core value of its justice system. Italy abolished the death penalty to reckon with the horrors of fascism. Abolition of the death penalty was part of how these nations said "never again" to atrocity and oppression – and it is time for our nation to revisit its place in this history.

For all these reasons, we support clemency for those individuals that the Department of Justice is seeking to execute over the coming two months that remain in this administration.⁹ Life

⁵ Death Penalty Information Center, Executions by Race and Race of Victim (*available at* <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim>).

⁶ *Id.*

⁷ Tracking the Coronavirus, New York Times, Nov. 14, 2020 (*available at* <https://www.nytimes.com/live/2020/11/14/world/covid19-coronavirus-updates>).

⁸ See Anne E. Marimow and Spencer Hsu, Death row inmate's lawyers suffering from coronavirus, seek delay in execution, Washington Post, Nov. 13, 2020 (*available at* https://www.washingtonpost.com/local/legal-issues/death-row-inmate-lawyers-covid/2020/11/13/44bcc97a-252b-11eb-a688-5298ad5d580a_story.html). Describing the harrowing ordeal faced by death row inmate Lisa Montgomery, who faces execution in December. Ms. Montgomery's attorneys cannot meaningfully help her in that they have COVID-19. They are experiencing "debilitating fatigue that prevents them from working on Mrs. Montgomery's clemency application," along with "headaches, chills, sweats, gastrointestinal distress, inability to focus, and impaired thinking and judgment."

imprisonment without parole – which is the sentence these individuals would receive if the President grants clemency – is an extreme punishment, commensurate with the most egregious of crimes. It protects public safety and can adequately vindicate society’s interest in punishing even the most serious wrongdoing.

Failing to grant clemency and rushing forward with executions in the midst of a pandemic, and in the waning days of this administration, will undermine public trust and thus compromise public safety. As current and former elected prosecutors, Attorneys General, and law enforcement leaders, and former United States Attorneys and Department of Justice officials who have been empowered with promoting safe communities, we know our tasks become increasingly difficult when people do not believe that the legal system is operating fairly. Public safety is inextricably tied to the community’s trust in the fairness and moral authority of our justice system. When people believe the state is executing a person, or applying the death penalty, unjustly – as do many in our nation who oppose the death penalty in increasing numbers – their trust in our system of government and law enforcement is undermined. Our jobs get harder, as do the jobs of others who seek to keep our communities safe.

Clemency is appropriate for a sentence of death in normal times; for all of the reasons discussed above, it is especially fitting right now. This President can set an example by showing mercy and converting the pending death sentences into sentences of life in prison without the opportunity for parole. Granting clemency will not only help restore public trust in the legal system, but will also show the public that compassion is never the wrong choice.

Respectfully,

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