

President Biden's Criminal Justice: Death to Death Penalty!

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Abstract: La giustizia penale sotto la Presidenza Biden: a morte la pena di morte! - Capital punishment is one of the most contentious and debated problems in the United States, both at institutional level and among civil society. In contrast with previous Presidents' retentionist attitudes, Joe Biden has been the first candidate to openly campaign for the abolition of death penalty. In July 2021, the U.S. Attorney General issued a memorandum imposing a moratorium on federal executions. This article provides a general picture of the legal regime of the federal capital punishment, with a review of the major decisions of the U.S. Supreme Court that contributed to shaping the actual constitutional status of the penalty. Only a Congressional act could officially outlaw the federal death penalty with a certain degree of stability. Nonetheless, by reviewing gubernatorial moratorium strategies among some States, the present article suggests that Biden's promises could potentially lead to a complete abolition of capital punishment at the federal level, with possible positive implications in retentionist States as well.

Keywords: Joe Biden; Criminal Justice; Federal Death Penalty; Moratorium; United States of America.

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1. The capital punishment barometer in the U.S.: the interplay between different legal formants

In contrast with the declining tendency in the federal practice of death penalty in the post-*Furman* era,¹ the administration of former President Donald J. Trump has reversed this trend. After the reinstatement of federal capital punishment in 1988,² sixteen death row inmates have been executed. Thirteen of these federal executions were carried out under Trump's tenure between July 2020 and January 2021,³ with a rush to execute six prisoners after Biden's victory in the 2020 presidential

¹ After 1977, there has been no federal execution until 2001 (two executions) and 2003 (one execution). Then, for seventeen years there was a *de facto* moratorium at federal level, until the federal execution spree during the last months of the Trump administration.

² The penalty was reinstated by federal statute in 1988 for a narrow class of crimes. See *Anti-Drug Abuse Act of 1988*, Pub. L. No. 100-690, 102 Stat. 4181.

³ R. Stetler, *Death Penalty Keynote: Why Mitigation Matters, Now and for the Future*, 61 *Santa Clara L. Rev.* 3, 699-744 (2021).

elections.⁴ Not only the former is the highest number of federal executions under a Presidency,⁵ but the latter also represents the highest number of executions carried out during a presidential transition period.⁶ In the attempt to contextualize the applications of death penalty under the former administration into a broader picture, it seems evident that Trump's execution spree is neither aligned with the current state of capital punishment in the United States, both at federal and at State level, nor with the (un)popularity that this penalty is facing among the public opinion, at least when compared with other penalties such as life imprisonment.⁷ In the U.S. landscape there has been a remarkable shift towards the abolition of the death penalty, which simultaneously mirrors and is influenced by a global movement in this regard.⁸ A gradual detachment can be underscored in different circumstances, such as the successful election of a presidential candidate running on an explicit anti-death penalty ground, the march against capital punishment carried out at the State level (where, at present, 23 States have abolished the death penalty), and the all-time low support for death penalty among the public opinion.⁹

As for the first circumstance, Biden's campaign website contained his programme to strengthen the United States' criminal justice, which read as follows: «Over 160 individuals who've been sentenced to death in this country since 1973 have later been exonerated. Because we cannot ensure we get death penalty cases right every time, Biden will work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government's example. These individuals should instead serve life sentences without probation or parole».¹⁰ This extract is important as support for death penalty has traditionally proved to be crucial in American politics, especially in

⁴ The executions of death row prisoners Lisa Montgomery, Corey Johnson and Dustin Higgs were carried out in January 2021, only few days before President Biden took his oath of office.

⁵ This affirmation holds true at least in the last century, since there has been official data. See Federal Bureau of Prisons, Department of Justice, Capital Punishment, available at https://www.bop.gov/about/history/federal_executions.jsp (last visited Dec 16, 2022).

⁶ H. Honderich, *In Trump's final days, a rush of federal executions*, in *BCC News*, January 16th, 2021. Available at: <https://www.bbc.com/news/world-us-canada-55236260> (last visited Dec. 13th, 2022).

⁷ See J.M. Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP, Nov. 25th, 2019.

⁸ For an inquiry on the influence of international law on the death penalty debate in the United States, especially in the U.S. Supreme Court's Justices arguments, see R. G. Murphy, *Executing the Death Penalty: International Law Influences on United States Supreme Court Decision-Making in Capital Punishment Cases*, in *32 Suffolk Transnational Law Review* 3, 599-630 (2009).

⁹ Death Penalty Information Center, *Polls: Death Penalty Support Remains Near 50-Year Low Despite Record-High Perception that Crime Has Increased*, November 15th, 2022, available at <https://deathpenaltyinfo.org/news/oregon-closes-death-row-joins-national-trend-away-from-automatic-solitary-confinement> (last visited Dec. 13th, 2022).

¹⁰ "The Biden Plan for Strengthening America's Commitment to Justice" (undated), available online at: <https://joebiden.com/justice/#> (last visited Dec. 13th, 2022).

presidential election.¹¹ Therefore, a candidate who based part of his campaigning efforts on promising to use its term to work, among all, towards the abolition of the federal death penalty is singular. His election as the 46th President of the United States of America is at least exceptional for these abolitionist remarks.

Yet, the historic pledge and the exceptionality of an abolitionist President at the White House seem to lose momentum *vis-à-vis* two considerations. Firstly, in the first two years of his presidency, Biden has undertaken few criminal justice reforms.¹² With specific regard to capital punishment, the U.S. Attorney General has issued a moratorium on federal executions while reviews on policies and procedures are pending.¹³ Secondly, the Department of Justice (DOJ) is showing contradictory signals, since it is opposing relief to inmates currently on federal death row, moving them closer to execution.¹⁴

After a brief description of federal death penalty in the United States and an assessment of its constitutional contours, as shaped by legal doctrines outlined in relevant caselaw (par. 2), this study will offer a picture of possible paths that could lead to abolition (par. 3), specifically focusing on investigating the moratorium on federal executions issued by the Attorney General (par. 4). Subsequently, an analysis of gubernatorial moratorium strategies (par. 5) is carried out to assess whether and how they have proven successful for the abolition of capital punishment at State level. Using State examples as case-studies, the present article suggests that the first steps taken by the Biden administration, even if not entirely satisfactory, could potentially be effective in drawing an era of complete abolition of the capital punishment at federal level closer, as well as planting the seed for its gradual abandonment also in retentionist States (par. 5).

¹¹ G.L. Pierce, M.L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, in 18 *N.Y.U. Rev. L. & Soc. Change* 3, 711-728 (1990).

¹² J.B. Gould, *Biden's First 100 Days: Putting the Federal Death Penalty on Life Support*, in *U. Ill. L. Rev. Online* 73, 73-76 (2021).

¹³ On July 1st, 2021, the United States Attorney General Merrick B. Garland issued a memorandum imposing a moratorium on federal executions. While the reviews of the Justice Department's policies and procedures are pending, federal executions are inhibited. The Attorney General's memorandum is available at the following url: <https://www.justice.gov/opa/page/file/1408636/download> (last visited Dec. 13th, 2022).

¹⁴ During the oral argument of *United States v. Tsarnaev* in October 2021, the U.S. Supreme Court Justice Amy Coney Barrett underlined the paradox of an administration declaring a moratorium on executions but defending death sentences before the Court.

2. The capital punishment in the United States and the Eight Amendment: a fluctuating interpretation of the “cruel and unusual”

The federal death penalty has been part of the United States’ structure since its earliest roots.¹⁵ Its modern era began in the 1960s,¹⁶ when the marked trend in rethinking the position of capital punishment within the U.S. criminal justice system first emerged. In this period, death sentences and executions started to decrease, and there was strong opposition towards this penalty among social and political forces. This trend took root at sub-national level as well. While Alaska and Hawaii were admitted to the Union as abolitionist states in 1959,¹⁷ numerous other States either outlawed the death penalty for ordinary murder or provided for total abolition.¹⁸

Even if not all the repeals were stabilized in the States’ legal frameworks, these new political progresses spurred some developments within the other branches. In a case before the U.S. Supreme Court over the compatibility of capital punishment for the crime of rape,¹⁹ three Justices,²⁰ dissenting from the majority, argued for the necessity of a federal constitutional regulation. This was an initial turn in the Supreme Court’s caselaw, which started to play a more active role in overseeing state criminal processes.²¹ In this context, by 1967 the American organization Legal Defense Fund had succeeded in temporarily freezing federal executions by pursuing the strategy of challenging capital sentences on all constitutional grounds and in every jurisdiction.

The modern history of U.S. capital punishment is marked by a momentous constitutional step with *Furman v. Georgia* in 1972.²² Through this landmark decision, the U.S. Supreme Court invalidated capital statutes on the grounds that, by offering little guidance, the legal discipline contained therein granted a wide margin of discretion in the administration of capital punishments. For the first time, the highest Court found the death penalty framework unconstitutional in light of its arbitrariness, which violated the Eight Amendment. In this regard, the

¹⁵ For a picture of the pre-*Furman* capital punishment in the U.S., see R.K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice’s Role*, in 26 *Fordham Urb. L.J.* 3, 347-508 (1999).

¹⁶ J.M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, in 67 *U. Miami L. Rev.* 2, 338 (2013).

¹⁷ The two States abolished death penalty two years before entering the Union and gaining statehood. For a database of each State, see <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Dec. 13th, 2022).

¹⁸ W.J. Bowers, *Executions in America*, Lexington (MA), 1974.

¹⁹ *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963).

²⁰ Dissenting from denial of certiorari, Justice Goldberg, joined by Justices Douglas and Brennan.

²¹ On the Warren Court’s doctrinal legacy for criminal justice, see C.S. Steiker, *The Warren Court and Criminal Justice: Some Lasting Legacies and Unfinished Business*, 49 *Stetson Law Review* 223, 237 (2020).

²² *Furman v. Georgia*, 408 U.S. 238 (1972).

majority's opinions over the grounds of unconstitutionality were deeply divergent and this profile has possibly weakened the impact of the decision and its subsequent developments.²³ While Justices Brennan and Marshall argued that, according to the evolving standards of decency, death penalty was in all cases unconstitutional and in violation of the Eighth Amendment, the remaining three Justices held the unconstitutionality of the punishment on different grounds: the arbitrariness of its concrete application, the discriminatory nature of the legal rules on capital punishment,²⁴ the unpredictability of the infliction of the punishment,²⁵ and its infrequent imposition which could have resulted in loss of effectiveness.²⁶

Instead of contributing to a stable abolition of the capital punishment in the U.S. constitutional framework, the Court's decision in *Furman* influenced a swinging public opinion towards retentionist positions.²⁷ Moreover, as a reaction to the Supreme Court's decision, the concrete effect at State level was that legislatures started to pass capital laws that would abolish or at least minimize sentencer discretion in the attempt to provide for death penalty in compliance with the Supreme Court's requirements of a non-arbitrary sentencing framework.²⁸ As a consequence, the Supreme Court's attempt towards abolition ended up being vain.

Only four years later, in a quintet of cases,²⁹ the Supreme Court started to review five of the abovementioned capital statutes, passed by the States to comply with the Supreme Court's requirement. The Court, in its new composition,³⁰ upheld three of the scrutinized regimes, whose rules provided for the possibility to impose capital punishment only for aggravated murder and in specific circumstances. Conversely, the Court struck down two statutes that envisioned death penalty as mandatory for certain offenses.

The following Supreme Court's caselaw elaborated a series of doctrines that contributed to outline the constitutional status of death penalty in the U.S. framework. Even if certain aspects of the capital punishment have been modified, its legitimacy has not been questioned in principle. The U.S. Supreme Court outlined the necessity for States to limit the cluster of death-eligible offences through the means of at least one non-vague aggravating factor³¹ and indicated that the defendant's mitigating evidence should be adequately presented to the jury for full consideration.³²

²³ L. Novak, *The Precedential Value of Supreme Court Plurality Decisions*, in 80 *Colum. L. Rev.* 4, 756 (1980).

²⁴ Justice Douglas.

²⁵ Justice Stewart.

²⁶ Justice White.

²⁷ M.D. Smith, J. Wright, *Capital Punishment and Public Opinion in the Post-Furman Era: Trends and Analyses*, 12 *Sociological Spectrum* 2, 127-144 (1992).

²⁸ C.S. Steiker, J.M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, in 109 *Harv. L. Rev.* 355, 363 (1995); M.C. Dorf, *Majoritarian Difficulty and Theories of Constitutional Decision Making*, in 13 *U. Pa. J. Const. L.* 2, 296 (2010).

²⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

³⁰ By 1975, Justice Douglas, one of the five majority justices in the *Furman* case, had been replaced by Justice Stevens, who had different views on capital punishment.

³¹ *Zant v. Stephens*, 462 U.S. 862, 876-78 (1983).

³² *Tennard v. Dretke*, 542 U.S. 274, 283-88 (2004).

Moreover, States could not impose death penalty on certain categories of defendants, such as juveniles,³³ defendants with mental disabilities,³⁴ defendants sentenced for rape or non-homicidal ordinary crimes,³⁵ and persons convicted not as the principal perpetrator of the offense.³⁶ Those doctrines also extended towards the mechanisms of selection and exclusion of jurors,³⁷ the requirements for effective capital defense representation, including admissible prosecutorial arguments,³⁸ the conditions to raise newly discovered evidence of an inmate's innocence,³⁹ and the requirements of inmates' mental health at the execution.⁴⁰ Therefore, while some decisions have attempted to suspend the concrete enforcement of capital punishment, other decisions concerned exclusively specific issues, such as the subjective or objective scope of said punishment, and procedural limitations of imposition or execution.

While States had enacted several capital statutes, the U.S. Congress did not rush to enact a law in pursuance of the requirements set forth by the Supreme Court until 1988 with the Anti-Drug Abuse Act,⁴¹ which identified only certain drug-related crimes as eligible for capital sentences. The Federal Death Penalty Act (FDPA) of 1994⁴² then enlarged the death-eligible list to over forty federal offences,⁴³ which were later complemented by four additional ones in 1996.⁴⁴

The post-*Furman* era shows that time was not ripe. This represented a missed opportunity to stabilize a framework that outlaws the capital punishment; indeed, the decision had instead strengthened the death penalty system. At federal level, though, even if the death penalty had been reinstated through the legislative path, this circumstance did not shape an extremely active execution system. Indeed, the fact that there had been no federal execution since 2003 proves that the federal government had a *de facto* moratorium in place.⁴⁵ This held true until the federal execution spree under former President Trump.

3. Paths towards abolition: lights and shadows of President Biden's promise

³³ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

³⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³⁵ *Kennedy v. Louisiana*, 554 U.S. 407, 446-47 (2008).

³⁶ *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

³⁷ *Morgan v. Illinois*, 504 U.S. 719, 728-29, 735, 739 (1992); *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968).

³⁸ *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985).

³⁹ *Herrera v. Collins*, 506 U.S. 390, 400, 404, 411 (1993).

⁴⁰ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

⁴¹ P.L. 100-690.

⁴² P.L. 104-132.

⁴³ R.K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role*, in 26 *Fordham Urb. L.J.* 3, 347-508 (1999).

⁴⁴ P.L. 103-322.

⁴⁵ Execution Database, *Death Penalty Information Center*, available at: <https://deathpenaltyinfo.org/executions/execution-database?filters%5Bfederal%5D=Yes> (last visited Dec. 13th, 2022).

In the United States' constitutional framework, the dynamics shaping the capital punishment system and its strengthened reinstatement after *Furman* show how the debate on capital punishment is intensely politicized at two different levels. On one hand, different moral and political arguments divide the American public opinion on the matter. On the other, this has also implications at institutional level, since many actors involved in the administration of death penalty are popularly elected.

The history of federal capital punishment briefly outlined above shows that this penalty has been defined by competing formants: Congress and the Supreme Court. Generally, the executive branch has exercised a marginal role in shaping the framework of the death penalty, intervening exclusively in its enforcement - given that each federal death penalty case must be authorized by the Department of Justice - and in commuting or reducing the defendant's sentence, as well as granting a pardon or imposing a moratorium on federal executions. To date, no President has openly opposed the death penalty. Therefore, to correctly put into context Biden's agenda, it is important to detect the legal strategies that could be undertaken to pursue the complete abolition of the capital punishment in the U.S. framework also by looking at what the Executive could concretely do.

As a matter of course, the complete abolition of death penalty would require an act of the Congress. On January 4th, 2021, a repeal bill authored by Rep. Adriano Espaillat was introduced. The Federal Death Penalty Abolition Act of 2021⁴⁶ provides for the prohibition to issue a death penalty sentence for violation of federal laws. Moreover, the bill also abolishes statutory authority for capital punishment as a sentencing possibility for federal offences and it requires for the necessary resentencing for all inmates sentenced to death before its enactment. Furthermore, a similar bill has also been introduced in the U.S. House of Representatives, prohibiting the imposition of a death penalty sentence for a violation of federal law, and providing for the necessary resentencing of previous condemnations.⁴⁷ Along with Representative Ayanna Pressley, this bicameral bill is cosponsored by Senator Richard Durbin, whose role as the Chairman of the Senate Judiciary Committee and as the Majority Whip could provide for a strong political cachet to the pro-abolition bill. Indeed, many members of the Democratic party are consistently showing support to repealing capital punishment, while at present there has been no support among Republicans towards the above-mentioned bills. Yet, this remark requires further explanation as different trends at State level must be considered. Indeed, by looking at numerous legislative activities at State

⁴⁶ H.R. 97 – 117th Congress (2021-2022): Federal Death Penalty Abolition Act of 2021, <https://www.congress.gov/bill/117th-congress/house-bill/97> (last visited Dec. 13th, 2022).

⁴⁷ The Federal Death Penalty Prohibition Act has been co-sponsored by Representative Ayanna Pressley and Senator Dick Durbin. H.R. 262 – 117th Congress (2021-2022): Federal Death Penalty Prohibition Act, <https://www.congress.gov/bill/117th-congress/house-bill/262> (last visited Dec. 13th, 2022). S. 582, – 117th Congress (2021-2022): Federal Death Penalty Prohibition Act, <https://www.congress.gov/bill/117th-congress/senate-bill/582> (last visited Dec. 13th, 2022).

level, it is possible to detect some splits in the Grand Old Party over the issue of capital punishment.⁴⁸

Even if an act of Congress would result in a permanent abolition of death penalty, the actions of the executive branch could nonetheless have implications in ending federal capital punishment. The question remains as to exactly which strategies the Biden administration can undertake to pursue the abolition of capital punishment. Firstly, President Biden could exercise the executive power of clemency, which encompasses the possibility to commute the capital sentences of the 48 prisoners currently on death row⁴⁹ to imprisonment without parole. Secondly, the President could withdraw the government's execution protocol and proceed with dismantling the execution chamber. Lastly, the President could declare a moratorium on all federal executions through an executive order. These last two options would have effects only within Biden's term.

In the U.S. constitutional framework, the power of clemency follows two separate axes: the federal one and the States' one. The federal clemency power finds its historical roots in the royal prerogatives of the British system of the clemency power⁵⁰ that the King delegated to colonial governors. Through Art. 2, Sec. 2, U.S. Constitution, the Founding Fathers vested in the President the clemency power to «grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment». Courts defined it as a power of an absolute nature and extended its exercise even beyond the boundaries set by the English common law tradition.⁵¹ While numerous challenges have been brought and judicial review of the clemency power has occurred, the overall Supreme Court's caselaw found no particular interpretative issues,⁵² outlining the presidential clemency power as unlimited, extended to every offence, and enforceable at any stage after the crime's commission, either before or during legal proceedings, or after conviction and judgment. At the same time, this power was found to be untied by the legislature as well, in the sense that Congress can neither restrict the effect of a pardon, nor exclude its exercise for certain offences.⁵³

⁴⁸ For an analysis over the rise of several reforms against death penalty in red States, see B. Jones, *The Republican Party, Conservatives, and the Future of Capital Punishment*, in 108 *J. Crim. L. & Criminology*, 223 (2018), available at <https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss2/1> (last visited Dec. 13th, 2022).

⁴⁹ For statistics on capital punishment in the United States, see Death Row U.S.A., Spring 2022, NAACP Legal Defense and Educational Fund, Inc., available at: <https://www.naacpldf.org/wp-content/uploads/DRUSASpring2022-22.pdf> (last visited Dec. 13th, 2022).

⁵⁰ D.T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 *Tex. L. Rev.* 3, 569-589 (1991); D.G. Adler, *The President's Recognition Power: Ministerial or Discretionary?*, in 25 *Presidential Studies Quarterly* 2, 267-286 (1995).

⁵¹ G.C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, in 67 *Missouri Law Review* 1, 22 (2002): «The clemency authority is unique among the enumerated powers conferred upon the President by the Constitution in that it falls within undivided executive control and is not subject to any direct check or balance by another branch of government».

⁵² A.S. Miller, *Presidential Power in a Nutshell*, St. Paul (MN), 1977, 307 ff.

⁵³ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867).

The clemency powers at the State level have a different historical evolution. Before the American revolution, the so-called royal colonies⁵⁴ vested the Governors with a pardoning power for all criminal offences, except for treason and intentional murder. The other colonies, instead, placed this power in the executive together with other entities or authorities. After the American Revolution, numerous restrictions on the clemency power of the executive have been introduced, either constitutionally or legislatively, at the state level.⁵⁵ Indeed, in some States the application of clemency is limited by statute and administrative policy. The President of the United States has the power to suspend the death penalty only at the federal level, while he has no competence in intervening at the State level, where only Governors and States' legislators could. Within this power rests the possibility to remove prisoners from the death row, by commuting the pending death sentences to life imprisonment without parole.

Another option would be to dismantle federal death row and repurpose it. The President has the power to dismantle the federal government's death row facility (Federal Correctional Complex) in Terre Haute, Indiana. This strategy has been sought by Governor Gavin Newsom, who announced the complete dismantling of California's death row in the next two years.⁵⁶ Similarly, in 2020 Oregon announced the closing of its death row and its conversion to a disciplinary unit for prisoners sentenced for certain offences.⁵⁷

Lastly, President Biden could declare a moratorium on all federal executions via an executive order. A moratorium implies a suspension of execution, allowing for a temporary halt of the criminal justice system before a death sentence is carried out. Through this strategy, it is possible to stop carrying out a statutorily authorized penalty, recommended unanimously by a jury and approved by courts. Some authors have identified it as a mere period of delay that has no concrete implication towards abolition.⁵⁸ Indeed, there had been a *de facto* moratorium, started under the George W. Bush Administration in 2003,⁵⁹ which has not prevented the Trump Administration's executions' spree. Others, however,

⁵⁴ Virginia, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina.

⁵⁵ For an overview, see P.S. Ruckman, *Executive Clemency in the United States: Origins, Development and Analysis*, in 27 *Presidential Studies Quarterly* 2, 1997.

⁵⁶ Death Penalty Information Center, *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, February 1st, 2022, available at <https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row> (last visited Dec. 13th, 2022).

⁵⁷ Death Penalty Information Center, *Oregon Closes Death Row, Joins National Trend Away from Automatic Solitary Confinement*, May 19th, 2020, available at <https://deathpenaltyinfo.org/news/oregon-closes-death-row-joins-national-trend-away-from-automatic-solitary-confinement> (last visited Dec. 13th, 2022).

⁵⁸ R.K. Little, *Why a Federal Death Penalty Moratorium Commentary*, in 33 *Conn. L. Rev.* 3, 791-818 (2001).

⁵⁹ R.J. Tabak, *Capital Punishment*, in *The State of Criminal Justice 2022*, July 18th, 2022, available at: <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2022/ch11-scj-death-penalty.pdf> (last visited Dec. 13th, 2022).

consider the moratorium strategy as a disguised means for abolition.⁶⁰ As it will be discussed, some examples from numerous States in the U.S. seem to show evidence for this latter conclusion.

4. The Attorney General Moratorium on Federal Executions Pending Review of Policies and Procedures

On July 1st, 2021, the Attorney General Merrick Garland announced the reinstatement of a moratorium on the federal death penalty,⁶¹ stating that the Department of Justice is under the legal obligation to provide for a criminal justice system in which everyone is afforded the rights safeguarded under the US Constitution and is treated fairly and humanely. Interestingly, but not surprisingly, under the moratorium this requirement is not linked to a perception of such penalty as unconstitutional *per se*. Yet, it is directly connected with the drawbacks of the capital punishment system, encompassing its arbitrary application, its disproportionate impact on minorities (especially with regard to race), and the data over subsequent exonerations.

In the two previous years, under the direction of former Attorney General William Barr, the Department changed several policies and procedures that allowed for the execution spree in the last six months of the previous administration. Therefore, the above-mentioned moratorium states that the Department must carry out and supervise the reviews, which have to focus mainly on three policies as amended by the former Administration.

Firstly, the DOJ must carry out a review of the Federal Execution Protocol Addendum. The latter has been adopted by the Federal Bureau of Prisons under the direction of the former Attorney General, providing for the replacement of the three-drug procedure that had been previously carried out with a single drug (*i.e.*, pentobarbital sodium).⁶² This procedure had unveiled problematic profiles with regard to some medical investigation, whose results suggest that the injection of pentobarbital may cause a flash pulmonary edema. In the capital litigation within Trump's

⁶⁰ R.J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 *Conn. L. Rev.* 3, 733-764 (2001).

⁶¹ Memorandum from Merrick Garland, Attorney General, U.S. Department of Justice on the Moratorium on Federal Executions Pending Review of Policies and Procedures to the Department of Justice, U.S. Department of Justice, July 1st, 2021, available at <https://www.justice.gov/opa/page/file/1408636/download>.

⁶² See Press Release, Department of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25th, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>; Memorandum for the Attorney General, The Federal Bureau of Prisons' Federal Execution Protocol Addendum (July 24th, 2019); Memorandum for the Attorney General, Summary of the Federal Bureau of Prisons' Federal Execution Protocol Addendum (July 24th, 2019); see also Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures (Effective July 25th, 2019), available at https://www.supremecourt.gov/DocketPDF/19/19-1348/145068/20200605210117775_2020%2006%2005%20Appendix.pdf (at 210a).

execution spree, this argument has been used to contend that the use of this single-drug procedure would have likely resulted in a cruel and unusual punishment, thus violating the Eighth Amendment. The Supreme Court has nonetheless concluded that this possibility was not sufficient to halt the executions⁶³ shortly before their scheduling through a «last-minute intervention by a Federal Court».⁶⁴

In issuing the moratorium, the DOJ highlighted that for such relief to be granted, the risk shall not be weighted with the Court's threshold or violate the Eighth Amendment. These technicalities shall not prevent considerations to be raised on whether prisoners are treated humanely and are prevented from suffering unnecessary pain. On these grounds, the Attorney General has suspended the use of the Addendum until a further review – coordinated by the Office of Legal Policy and supervised by the Deputy Attorney General⁶⁵ – is carried out concerning the risks of pain connected with the use of pentobarbital.

Secondly, the DOJ proposed to review the Manner of Execution Regulations. The procedures of federal executions are governed by the Federal Death Penalty Act, 18 U.S.C. § 3596. In 2020, the DOJ had revised the regulations providing for the manner of federal executions, introducing amendments that would have provided the federal Government with a great margin of flexibility,⁶⁶ expanding the possible methods to «any other manner prescribed by the law of the State in which the sentence was imposed».⁶⁷ The regulations were revised as to permit the use of state facilities and personnel to carry out federal executions. Moreover, the amendments also encompassed procedural transformations, allowing the Attorney General to «make exceptions to the regulations and to delegate duties within the Department».⁶⁸

Thirdly, the DOJ compelled for a review of Justice Manual Provisions, whose Title 9, Chapter 10 was amended in 2020 in order to accelerate capital sentences' executions.⁶⁹

The federal government had not executed any prisoner since 2003, mainly due to concerns over the security of lethal injection drugs. Since this *de facto* moratorium did not legally prevent the Trump Administration to resume executions in July 2020 and to speed them up after the defeat at the presidential elections over an anti-death penalty candidate, the

⁶³ For the Supreme Court's role in the federal executions under the Trump administration developing a standard that disfavors a judicially imposed last minute delay, see I. Green, *A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution*, 16 *Harv. L. & Pol'y Rev.*, 623-674 (2022).

⁶⁴ *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam).

⁶⁵ Under the moratorium, «[t]he review should include consultation with all relevant Department components, including the Bureau of Justice Statistics, Bureau of Prisons, Drug Enforcement Administration, Civil Division, Civil Rights Division, Criminal Division, National Institute of Justice, and U.S. Marshals Service; other state and federal agencies, including the Department of Health and Human Services; medical experts; experienced capital counsel; and other relevant stakeholders, including members of the public, as appropriate».

⁶⁶ 85 Fed. Reg. 75,846 (Nov. 27th, 2020).

⁶⁷ *Id.* at 75,854.

⁶⁸ *Id.* at 75,854-75,855.

⁶⁹ See, e.g., J.M. §§ 9-10.190(8), 9-10.210.

moratorium on federal execution issued by the U.S. Attorney General is a first step halting executions under Biden's term. Nonetheless, Biden's administration has undertaken contradictory actions.⁷⁰ In a capital case before the Supreme Court⁷¹ as the Petitioner, the Biden Justice Department argued that the Court of Appeals for the First Circuit erroneously overturned the defendant's capital sentence, seeking for the reinstatement of the death penalty.⁷² The argument of the Government was twofold: on one hand, it stressed the issue of pretrial publicity, focusing on the extensiveness of the *voir dire* that had been carried out by the pretrial court to ensure the jurors' impartiality. On the other, the Government relied on the Federal Death Penalty Act to argue that the district court had not abused its discretion when it did not allow the defendant's lawyers to admit the Waltham evidence. During oral arguments, Justice Coney Barrett questioned the federal Government's will to reinstate the capital sentence, which would have resulted in placing the respondent on death row likely until the moratorium is revoked.⁷³

5. Gubernatorial moratorium strategies as case studies: a successful strategy to end capital punishment?

State legislatures have shown to be consistently moving to abolish capital punishment. At present, twenty-three States and the District of Columbia have repealed their capital statutes. Half of such repeals have occurred since 2000.⁷⁴ Moreover, execution moratoriums have been issued by the State governors of California,⁷⁵ Pennsylvania⁷⁶ and Oregon,⁷⁷ who then went on to win reelection. The use of moratorium strategies has been

⁷⁰ For some considerations in this regard, see A. DaBiere, *Protecting Procedural Safeguards in Federal Capital Trials: United States v. Tsarnaev*, in 17 *Duke J. Const. L. & Pub. Pol'y Sidebar*, 169-194 (2021-2022).

⁷¹ *United States v. Tsarnaev*, 595 US ____ (2022).

⁷² The defendant, along with his brother and co-defendant, was sentenced to death in 2015 for terrorism for the acts committed during the Boston Marathon on April 15th, 2013. The death sentence was then overturned on appeal by the U.S. Court of Appeals for the First Circuit in July 2020, finding that the trial judge had failed to question jurors regarding their pretrial media exposure and that the judge has prevented the defendant from presenting mitigating evidence.

⁷³ Oral Argument, *U.S. v. Tsarnaev*, No. 20-443 (argued Oct. 13th, 2021), <https://www.c-span.org/video/?514693-1/justices-hear-case-boston-marathon-bombers-deathsentence>.

⁷⁴ Death Penalty Information Center, *State by State*, available at: <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Dec. 13th, 2022).

⁷⁵ Cal. Exec. Order. No. 09-19 (Mar. 13th, 2019).

⁷⁶ Memorandum available at: <https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration> (last visited Dec. 13th, 2022).

⁷⁷ The first moratorium issued was then extended by Governor Kate Brown. Recently, under Article V, Section 14, of the Oregon Constitution, the Governor has commuted the death sentence of each inmate to life imprisonment without the possibility of parole. The Governor's order takes effects on December 14th, 2022. Available online at: <https://drive.google.com/file/d/1dzTQ8axbJXWmAo-VmvKQsReRSrp4B4Un/view>.

recurring at State level, making it interesting to detect whether they proved to be successful in the path towards abolition.

Even if within different jurisdictions, a brief investigation of the abolition of capital punishment at State level can be deemed important for different reasons. Given that the moratorium is the only step undertaken in the first two years of Biden's presidency, analyzing gubernatorial moratorium strategies and their role in the abandonment of capital punishment could prove useful in inferring some trends and drawing conclusions on the potential implications for the end of capital punishment in the U.S. Moreover, the numbers of executions and death row inmates are extremely higher at State level than at the federal one.

Since the beginning of the century, States have increasingly engaged in rethinking the capital punishment system as a reflection of the emerging awareness of its administration flaws in terms of fairness, accuracy, and effectiveness.⁷⁸ Indeed, challenges against death penalty have focused on procedural drawbacks of the capital punishment system (*e.g.*, juries' selection, the right of indigent defendants to a lawyer, arbitrary application of the death penalty, methods of execution). Little attention has been paid to human rights' concerns or to the cruelty and inhumanity of the penalty *per se*.

Nonetheless, even if twenty-seven States are still retaining death penalty, some of them have managed to reach its complete abolition, while some have been progressively showing an uninterrupted intention to outlaw capital punishment. At present, 23 States and the District of Columbia have abolished the death penalty, while three States have declared a moratorium on executions (California, Oregon, and Pennsylvania). Focusing exclusively on the legal frameworks of the States in which abolition has occurred in last two decades, it must be noted how these changes have differently come about among States, firstly emerging within different legal formants and involving them to a different extent.

In 1972, the U.S. Supreme Court invalidated the existing capital punishment laws. As seen, this decision proved insufficient to prevent States from approving new statutes compatible with the new requirements laid down in the judgement, or the federal Government from later reinstating the federal death penalty by an act of the Congress in 1988. Nonetheless, in a minor number of States, complete abolition was achieved through the action of the judiciary.

In the State of New York, it was a decision by the Court of Appeals which found a portion of its death penalty statute unconstitutional,⁷⁹ and the State's legal framework has not had a valid death penalty statute since. This event proved to be important, and the two other branches upheld this sensitivity. In 2005, a bill was introduced to allow for the death penalty for first degree murder of a police officer, peace officer or correction officer,⁸⁰ and the Legislature did not reinstate the capital punishment. Moreover, in 2008 the then-Governor David Paterson ordered the dismantling of New

⁷⁸ C.S. Steiker, J.M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, in 109 *Harv. L. Rev.*, 355 (1995).

⁷⁹ *People v. LaValle*, 817 N.E.2d.

⁸⁰ S 6771, Death Penalty and Life Imprisonment Bill.

York's execution apparatus.⁸¹ In 2016, the Delaware Supreme Court found the State's death penalty procedures unconstitutional, and it struck down the State's capital statute.⁸² That same year, the Supreme Court held that its ruling in *Rauf* applied also to the other thirteen remaining inmates on death row.⁸³ Two years later, after a moratorium had been in place since 2014,⁸⁴ the Washington Supreme Court declared the State's capital punishment statute unconstitutional, holding that its arbitrary and racially discriminatory application failed to attend any legitimate penological aim, thus violating article I, section 14, Washington Constitution.⁸⁵

Several States have managed to reach a broader consensus within their legislatures to definitively outlaw capital punishment through wholesale repeal. New Jersey and New Mexico passed legislation in this sense in 2007 and 2009, respectively. In New Jersey, the State Senate and the General Assembly passed a statute to officially abolish the death penalty and replace it with life without parole.⁸⁶ In New Mexico, the capital punishment was abolished, and life imprisonment without possibility of release or parole was provided as the penalty for capital felonies.⁸⁷ Yet, this repeal only applied prospectively to crimes committed after the enactment of the statute, leaving two inmates on the State's death row until 2019, when the New Mexico Supreme Court ordered that they would be resentenced to life imprisonment.⁸⁸ Similarly, the Connecticut legislature voted to abolish its capital punishment in 2012, leaving 11 prisoners on death row until 2015, when the State's Supreme Court found the death penalty in violation of the State constitutional ban on excessive and disproportionate punishment, holding its prospective abolition to be applied also to death penalty sentences already imposed.⁸⁹ Similarly, Maryland's legislature passed a capital punishment repeal statute in 2013⁹⁰ with no retroactive effects and two years later the Governor commuted the capital sentences of the five inmates who were still on death row in life imprisonment. In New Hampshire, the bill repealing the death penalty approved by the State's two chambers in 2019 was vetoed by Governor Sununu. The veto was overridden by the Legislature and the statute became law.⁹¹ Virginia repealed its death penalty in March 2021, becoming the first State of the former confederacy to abolish capital punishment under its state criminal law.⁹² As the State with the highest number of

⁸¹ Governor Paterson Padlocks New York's Death Chamber, N.Y. OBSERVER, July 29th, 2008, available at <https://observer.com/2008/07/governor-paterson-padlocks-new-yorks-death-chamber/> (last visited Dec. 13th, 2022).

⁸² *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016).

⁸³ *Powell v. State*, 153 A.3d 69 (Del. 2016).

⁸⁴ The Governor's remarks are available at: https://www.governor.wa.gov/sites/default/files/documents/20140211_death_penalty_moratorium.pdf.

⁸⁵ *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

⁸⁶ P.L. 2007, c.204 (S171 SCS).

⁸⁷ H.B. No. 285 § 6 (N.M. 2009).

⁸⁸ *Fry v. Lopez*, 447 P.3d 1086, 1092 (N.M. 2019).

⁸⁹ *State v. Santiago*, 318 Conn. 1, A.3d (2015).

⁹⁰ S.B. 276, 433rd General Assembly, Regular Session (Md. 2013).

⁹¹ H.B. 455 Relative to the penalty for capital murder (NH 2019).

⁹² H.B. 2263, Regular Session (VA 2021).

executions in American history, this development may exercise a great impact on retentionists States.

Lastly, Illinois and Colorado are two interesting cases within the cluster of States that have abolished death penalty through an act of the Legislature, given that moratoria on executions had been in place prior to abolishing their capital statutes. In Illinois, on January 31st, 2000, Governor Ryan issued a moratorium with the aim of ensuring that no wrong executions would be carried out in the State and appointed a Commission on Capital Punishment to investigate the drawbacks of the state's death penalty system. Later, the Governor issued a blanket clemency to commute the sentences of all death row inmates.⁹³ It took a decade for the legislature to definitively outlaw death penalty, yet the positive effects of a moratorium for the abolitionist cause were evident to the point that even the pro-capital punishment Governor Rod Blagojevich kept the moratorium in place using the impending study's results as a justification to sidestep the politically volatile matter.⁹⁴ In 2011, the bill providing for the abolition of death penalty was finally approved by the Legislature, and eventually signed by the Governor Pat Quinn, who also commuted the death penalty sentences of fifteen inmates to life imprisonment without parole. Similarly, in 2013 Colorado's Governor Hickenlooper issued the moratorium on executions in light of the fallacy of the capital punishment system as well as the abolitionist trend that was developing at national level.⁹⁵ After years of a moratorium on executions, in 2020 Colorado became the twentieth-second State to outlaw capital punishment when Governor Jared Polis signed the bill and commuted the sentences of death-row inmates to life without possibility of parole.

Gubernatorial moratoria have proved to drive in the direction of abolition. At State level, the gubernatorial moratoria in Illinois, Colorado, and Washington eventually moved the sensitivity of other legal formants, leading to abolition, in 2011 and 2020 respectively, by the State Legislatures, and in 2018 through the Washington Supreme Court's decision that declared the state's capital punishment unconstitutional as applied.⁹⁶ Another point to raise is that the importance of moratorium lies in the influence of its effects. By halting executions, post moratorium conditions generally prove to the public the uselessness of death penalty for any penological purpose, as well as its inefficiencies. The capital punishment proves to be neither an effective deterrence method nor a cost-saving alternative, but rather a tool disproportionately exercised against

⁹³ Art. V, § 12 of the Illinois Constitution vests the governor with the unbridled power to «grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper».

⁹⁴ R. Warden, *How and Why Illinois Abolished the Death Penalty*, in 30 *Law & Ineq.*, 245, 271 (2012).

⁹⁵ Executive Order D 2013-006, Death Sentence Reprieve, available at: https://drive.google.com/file/d/1LuC5ERUdOcC75m3FY1Lkv_zY5k2_MjUc/view (last visited Dec. 13th, 2022).

⁹⁶ *State v. Gregory*, 192 Wash. 2d 1, 427 P.3d 621 (2018).

minorities and in flagrant violation of human rights.⁹⁷ Moreover, moratoria are generally followed by in-depth governmental studies on the overall system of capital punishment. These investigations, like the ones underway at state and federal level, represent a chance of comparing different views and a stage where the abolitionist case can be argued within governmental actors.

6. Concluding remarks

The outcomes of this analysis, as well as the brief assessment of the processes through which different States have accomplished to permanently abolish the death penalty, offer some conclusions.

As shown throughout the analysis, the system of capital punishment is markedly politicized, and it is shaped by a multifaceted interaction among different actors. Consequently, a multiplicity of converging factors – involving the executives, legislatures, courts, and civil society – is essential to abolition. While it would be difficult to isolate one prevailing element, the cases where the issue was addressed at State level showed that this approach does not yield the desired results. Generally, legislature's statutes, judicial reversals, the absence of executions for several years, and gubernatorial moratoria are drivers that altogether foster a particular cultural sensitivity against capital punishment.

The political discourse surrounding death penalty in the United States has started to gradually change, even if not yet considerably. The public is increasingly exposed to the systemic failures of the capital punishment framework and a greater sensitivity towards abolition is arising. Polls on public opinion show that support for capital punishment is currently at its historic low.⁹⁸ In this political climate, President Biden's pro-abolition support is historic and could prove crucial in bringing the end of capital punishment closer.

Even if not definitive, the moratorium initiative could have significant implications in shaping public consciousness, highlighting the broader criticalities of the existence of this penalty in the criminal justice system. Public awareness is essential on a sharply politicized issue and, as State examples prove, it can be bolstered in the aftermath of a moratorium, also in light of subsequent governmental studies and reviews. This could spur the Congress to pass the bill seeking for the abolition of capital punishment, which has been recently sponsored. At the same time, States' Legislatures could follow the political development and outlaw such penalty. Within a reasonable time, the consequence could be a rising trend toward moratorium strategies at national level and the intensification of an abolitionist trend in the United States. While there are some signals that

⁹⁷ M. Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, in *American Journal of Comparative Law* (2022 Forthcoming), available at <http://dx.doi.org/10.2139/ssrn.3733016> (last visited Dec. 13th, 2022).

⁹⁸ See <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls> (last visited Dec. 13th, 2022).

seem to be putting an agonizing death penalty on life support,⁹⁹ the changes in the U.S. constitutional legal framework and in the political debate have the potential to exercise a positive impact in drawing capital punishment nearer to its death.

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⁹⁹ *E.g.*, the DOJ's position in the *Tsarnaev* case before the Supreme Court. Petition for Writ of Certiorari, *U.S. v. Tsarnaev*, No. 20-443 (filed Oct. 6th, 2020).

