

The Federal Death Penalty: Recent Developments

July 28, 2020

In July 2019, under [U.S. Attorney General Barr's direction](#), the Bureau of Prisons (BOP) adopted a revised [Federal Execution Protocol Addendum](#) and promptly scheduled the executions of five federal death row inmates. The addendum replaced the previous three-drug protocol used in federal executions with a single-drug procedure. Five death row inmates, who were sentenced to death in 1999, 2003, and 2004, were scheduled to be executed at U.S. Penitentiary Terre Haute, IN. After delay due to [ongoing appeals](#), the [execution of Daniel Lewis Lee on July 14, 2020](#), ended a 17-year moratorium on the federal death penalty.

This Insight focuses on federal death penalty policy in the context of death penalty practice in the country overall.

Capital Punishment Policy

The federal government practiced capital punishment from the country's beginning until 1972, when the U.S. Supreme Court (in [Furman v. Georgia](#)) found particular applications of capital punishment [to be unconstitutional](#) under the Eighth and Fourteenth Amendments of the Constitution. In 1976, the Supreme Court considered revised state statutes (in [Gregg v. Georgia](#) and several other decisions), and held that the death penalty was constitutional under certain, limited circumstances. From 1976 through July 27, 2020, the federal government executed six individuals, including three in July 2020. As of July 28, 2020, there are 59 individuals on [federal death row](#). While the U.S. military justice system has capital punishment as a sentencing option, it has not executed anyone since 1961. As of January 2020, [four individuals reside on the military's death row](#).

Since the *Gregg* decision in 1976, [most executions in the United States have been carried out by the states](#); from 1976 through July 28, 2020, states have executed 1,516 individuals. Over [2,500 individuals currently reside on death row](#) across 30 states, including one inmate in New Hampshire even though it abolished the death penalty in 2019. Twenty-two states and the District of Columbia do not have the death penalty.

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Methods of Execution

Lethal injection is the only method of execution used by the federal government and U.S. military. While 28 states use lethal injection as their primary method, some also have alternative methods including electrocution, lethal gas, hanging, and firing squad. In some states, inmates may choose the method of execution, depending on the circumstances.

Criminal Procedure and Federal Crimes Punishable by Death

Department of Justice (DOJ) death penalty procedure is based on the Federal Death Penalty Act of 1994 (FDPA), and is codified at 18 U.S.C. Sections 3591 to 3599. The decision to seek or not seek the death penalty must be considered by the Attorney General's Review Committee on Capital Cases with input from the DOJ, [Capital Case Section](#), and approved by the Attorney General. As outlined in U.S. Code, [murder is a federal capital offense if committed under a number of jurisdictional and/or aggravating circumstances](#). A few federal capital crimes, including espionage and treason, do not (necessarily) involve an individual causing the death of another, but DOJ has not sought the death penalty for a crime other than murder since enactment of the FDPA.

All [current federal death row inmates](#) were sentenced to death for murder of varying degrees and types, the most common being drug-related killings. Two comparatively recent additions to federal death row are [Dzhokhar Tsarnaev](#), one of two perpetrators convicted of crimes surrounding the Boston Marathon bombing in 2013, and [Dylann Roof](#), who killed nine parishioners at a Charleston, SC, church in 2015. Tsarnaev, among other crimes, was convicted of use of a weapon of mass destruction resulting in death and conspiracy; bombing of a place of public use resulting in death and conspiracy; malicious destruction of property resulting in death and conspiracy; and use of a firearm during and in relation to a crime of violence causing death, with all of these crimes being punishable by death. Roof, among other crimes, was convicted of nine counts of using a firearm to commit murder and nine counts of obstruction of religious exercise resulting in death, both of which are punishable by death.

Public Opinion of the Death Penalty

Americans' responses to public opinion polling questions about capital punishment vary depending on how the questions are framed. In 2019, [approximately 56% of Gallup survey respondents](#) reported that they were in favor of the death penalty when asked "are you in favor of the death penalty for a person convicted of murder?" When respondents were asked in the same poll, "if you could choose between the following two approaches, which do you think is the better penalty for murder—[... the death penalty (or) life imprisonment, with absolutely no possibility of parole]?", 36% of Gallup respondents reported that they think the death penalty is better, and 60% chose life imprisonment with no possibility of parole.

Considerations for Congress

Given the recent resumption of federal executions, Congress may seek to reexamine or reaffirm the death penalty as a punishment for certain crimes. Congress could choose to conduct oversight of how DOJ carries out executions. Congress could review, add, or remove crimes that are punishable by death, subject to constitutional limitations, among other legislative options.

In the 116th Congress, various bills have been introduced that would change federal capital punishment. For example, H.R. 4022 and H.R. 4052/S. 2390 would abolish the death penalty in U.S. Code. H.R. 4022 would also abolish the military death penalty. H.R. 7120, as passed by the House, and H.R. 7315 would eliminate the death penalty as a penalty option if death results while depriving an [individual rights under the color of law](#). Alternatively, some bills would

expand the death penalty. For example, H.R. 99 and S. 1508 would expand the list of aggravating factors in death penalty determinations to include killing or targeting first responders, while H.R. 1655 would add the death penalty as a penalty option for [certain drug offenses](#) involving fentanyl. This section does not provide an exhaustive list of bills, but rather provides examples that illustrate ways in which Congress may amend the death penalty.

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