

Federal Capital Punishment: Recent Executive Action

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On January 20, 2025, President Trump issued an executive [order](#) addressing pursuit of the death penalty as a sentencing possibility in federal capital cases. Attorney General Pamela Bondi released a [memorandum implementing President Trump’s order](#) on February 5, 2025, lifting a moratorium that then-Attorney General Merrick Garland had [ordered](#) on federal executions on July 1, 2021. Then-President Joe Biden had [commuted](#) to life imprisonment the sentences of the federal prisoners then on death row under the custody of the Bureau of Prisons. Most death penalty cases are state criminal cases. [As of](#) January 1, 2025, there were three civilian inmates and four inmates in military custody on federal death row, while the state death row population consisted of 2,088 inmates.

Background

The death penalty has been a feature of federal criminal law from the beginning. The [first](#) Congress designated murder within federal enclaves, treason, piracy, forgery, and counterfeiting of federal certificates as capital offenses. Treason and murder under various federal jurisdictional circumstances remain federal capital offenses, and 27 [states](#) also currently authorize the death penalty for at least one offense. Over the course of time, the federal government and the states have used a range of methods of execution—from [hanging](#), to firing squads, [electrocution](#), lethal gas, and lethal injection.

The U.S. Supreme court decision in [Furman v. Georgia](#), which held that imposition of capital punishment under the then-applicable laws in Georgia and Texas would constitute unconstitutional cruel and unusual punishment, cast doubt on the constitutionality of the sentencing procedures used in state and federal capital cases. In a series of subsequent [cases](#), the Court found constitutionally acceptable a process under which the death penalty was reserved for the most serious offenses and for the most egregious offenders, identified by balancing the aggravating and mitigating circumstances in a particular case.

Following *Furman* and subsequent cases, Congress enacted the [Federal Death Penalty Act](#), under which espionage, treason, and murder under various jurisdictional circumstances were revived as federal capital offenses or became federal capital offenses.

The path from sentence to execution often features pauses for the resolution of process-related issues by the courts. The elapsed time between sentence and execution recently [stood](#) at over 19 years, on average.

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Under Justice Department instructions, federal prosecutors are required to secure the [approval](#) of the Attorney General in order to seek the death penalty in a federal capital case. A federal prosecutor in a capital case must [submit](#) a recommendation to the Justice Department’s Capital Review Committee, which in turn submits its recommendation to the Attorney General. The [standards](#) that must be considered during the course of the process include (1) “whether a substantial federal interest justifies charging a federal capital crime”; (2) “whether the applicable aggravating factors sufficiently outweigh the mitigating factors”; and (3) “legitimate law enforcement and prosecutorial considerations,” for and against.

Execution by lethal injection is the required, or permissible, [method](#) of execution in every U.S. capital punishment jurisdiction. Early on, 30 of the 36 capital punishment states [opted](#) for a three-drug protocol under which the first drug administered, sodium thiopental, “induce[d] a deep, comalike unconsciousness.” The second, pancuronium bromide, “stop[ped] respiration.” The third, potassium chloride, “induce[d] cardiac arrest.” When sodium thiopental became unavailable, some capital punishment states [switched](#) from sodium thiopental to pentobarbital, and subsequently abandoned use of the three-drug approach for [use](#) of pentobarbital alone.

The Executive Order and the Attorney General’s Memorandum

President Trump’s [Executive Order](#) addressing the death penalty as a federal sentencing option instructs the Attorney General to take a number of actions in service of a stated policy “to ensure that the laws that authorize capital punishment are respected and faithfully implemented.” The order directs the Attorney General to:

- pursue the death penalty for all crimes of a severity demanding its use;
- consistent with applicable law, pursue federal jurisdiction and seek the death penalty regardless of other factors for every federal capital crime involving murder of a law-enforcement officer or a capital crime committed by an alien illegally present in the United States;
- encourage state capital prosecutions in such cases notwithstanding the outcome in any parallel federal cases;
- recommend for state capital prosecution under state charges, where possible, those prisoners whose federal capital sentences then-President Biden commuted to life imprisonment;
- ensure that state authorities have sufficient supplies to carry out executions by lethal injection;

- act upon state requests for certification of assistance-of-counsel procedures in state capital cases that would activate state-friendly habeas corpus provisions when the U.S. Attorney General certifies that the state complies with requirements to provide counsel for indigent defendants in capital cases;
- seek to obtain reassessment of Supreme Court precedents that limit state or federal authority in capital cases; and
- dismantle transnational criminal activity in the United States by coordinated state and federal efforts.

The Attorney General's implementing [memorandum](#):

- lifts the moratorium on executions for federal capital offenses;
- establishes an expectation, "absent significant mitigating circumstances," that federal prosecutors will seek the death penalty for the murder of law enforcement officers or for capital crimes committed by aliens illegally present in the U.S.;
- encourages the prosecution of drug-related and other capital offenses committed by cartels, international criminal organizations, and unlawfully present aliens; lists several specific federal capital offenses as part of that encouragement and pledges to support state efforts to seek capital punishment in comparable state capital cases;
- directs a review of federal capital-eligible cases pending subsequent to Jan. 20, 2021, with particular attention to cases involving cartels, transnational criminal organizations, and capital crimes committed by illegally present aliens or in Indian Country or the federal special maritime and territorial jurisdictions;
- directs an evaluation of federal capital-punishment related policies and procedures, including those for executions;
- instructs Justice Department officials to take appropriate action to seek to cabin or obtain reassessment of Supreme Court precedents limiting state and federal imposition of the death penalty;
- orders the Federal Bureau of Prisons to work to ensure sufficient state supplies and resources to conduct executions; and
- demands prompt certification action on state assistance-of-counsel requirements in capital cases to ensure the application of state-friendly habeas provisions in state capital cases when counsel-assistance requirements for indigent capital defendants have been met.

Congressional Considerations

Subject to [constitutional limitations](#), Congress is free to choose which federal crimes, if any, shall be capital offenses, as well as the procedures that must attend imposition and execution of the ultimate punishment. Legislative capital-punishment-related proposals vary greatly. Some have advocated abolition (S. 2299/H.R. 4633, 118th Cong.). Others, such as a House bill in the current Congress, would expand the list of aggravating factors that must be considered before the penalty is imposed (H.R. 378, 119th Cong.). Still others have sought to ease restrictions on post-conviction relief for capital defendants who assert a claim of actual innocence (H.R. 9868, 118th Cong.).

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