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New York City Bar Association Statement Regarding the Recent Federal Executions

In the early hours of January 13, 2021, the Trump administration killed Lisa Montgomery, the first woman to be executed on federal death row in 7 decades. Montgomery had been transferred from an all-women’s facility in Texas to FCC Terre Haute,¹ where she was the only woman on death row. She lived her final days in complete isolation, suffering further from severe psychosis, and intellectually unable to comprehend the ultimate fate she was facing. Montgomery survived a lifetime of physical and sexual harm; she was, among many other horrible abuses, sex trafficked by her own mother.² Montgomery’s death is the latest in an outrageous and unrelenting spree of federal executions that is, especially in the midst of a global pandemic, an unconscionable exercise of state power used against some of the most marginalized people in American society.

Since the initial stages of its revival of the federal death penalty, the Department of Justice (DOJ) has sought to subvert both the laws of the United States and its long-standing norms and principles. Attorney General William Barr’s 2019 announcement unilaterally changing DOJ’s lethal injection protocol to use only the drug pentobarbital was a contravention of the Administrative Procedures Act (APA).³ Even amid the slate of executions at the close of 2020, the Department of Justice rushed to publish rules that further concentrate power over the administration of executions within the DOJ.⁴ In late November 2020, the Justice Department issued a rule that, among other things, allows the Attorney General to: depart from regulations governing the implementation of the death penalty if he deems it “necessary to comply with applicable law”; negate regulations that require the government to obtain approval from a federal court regarding the date, time and method of execution; and delegate power to the Bureau of

¹ Federal Correctional Complex, Terre Haute (“FCC Terre Haute”), located in Indiana, is the primary site for federal executions in the United States.

² *The Case of Lisa Montgomery*, CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE (Jan. 12, 2021), <https://deathpenaltyworldwide.org/project/savelisa/>. (All websites cited in this letter were last visited on January 13, 2021.)

³ Mark Berman, Meagan Flynn, *Judge Blocks Trump Administration’s Plans to Resume Executions*, THE WASHINGTON POST (Nov. 21, 2019), <https://www.washingtonpost.com/nation/2019/11/21/william-barr-death-penalty-halted-federal-judge/>.

⁴ *See*, 85 Fed. Reg. 75,846 (Nov. 27, 2020)

Prisons, instead of the U.S. Marshal, to oversee executions.⁵ Litigation challenging the lawfulness of this rule is currently pending in the U.S. District Court in the District of Columbia.⁶

Moreover, the Justice Department hastily and eagerly pursued the execution of several men on federal death row with reckless disregard for the constitutionality of their convictions or the propriety of their sentences. Wes Purkey, one of the first men the federal government executed since 2003, was litigating a well-developed competency claim that would have rendered his execution unconstitutional.⁷ Lezmond Mitchell, a Native American man, was executed over the repeated objections of the Navajo Nation and the victims' family.⁸ Mitchell was sentenced to death in a 2003 capital case in which federal prosecutors circumvented a provision in the Federal Death Penalty Act that required consent from the Navajo Nation for any capital prosecution of a crime occurring on Navajo land.⁹ Brandon Bernard, who the government executed in December 2020, was unable to present a claim that the prosecutors in his case suppressed crucial expert testimony in violation of *Brady v. Maryland*.¹⁰ No matter the cost, whether the ever-eroding legitimacy of our criminal justice system or the lives of the 10 executed men and many others who are similarly situated, the administration's singular concern appears to be its own fantastical conception of "the rule of law."¹¹

The decision to perform these executions during the ongoing and deadly COVID-19 pandemic is emblematic of an administration that has leveraged state power to achieve its own agenda at the expense of the safety of the millions of people living in this country. Like many jails and prisons across the U.S., the Bureau of Prisons has significantly failed to protect incarcerated individuals, corrections staff, advocacy teams, and all other visitors from the spread of COVID. Two individuals currently facing federal execution dates have been diagnosed with COVID.¹¹ Additionally, two attorneys representing Lisa Montgomery also contracted COVID in December 2020.¹²

With close quarters, narrow halls, inadequate protective equipment, and poor contact tracing systems, prisons are chief superspreader facilities. Similarly, executions are highly primed to facilitate COVID spread; they require additional staff, often traveling from other states, and are

⁵ See, Compl. for Declaratory and Injunctive Relief at 2, *Federal Capital Habeas Project v. Barr*, No. 20-cv-03742 (D.D.C. Dec. 18, 2020). Available at https://ecf.dcd.uscourts.gov/cgi-bin/show_multidocs.pl?caseid=225223&arr_de_seq_nums=8&magic_num=&pdf_header=&hdr=&pdf_toggle_possible=&caseid=225223&zipit=&magic_num=&arr_de_seq_nums=8&got_warning=&create_roa=&create_appendix=&bates_format=&dkl=&got_receipt=

⁶ *Id.*

⁷ *U.S. Government Hurriedly Executes Wesley Purkey After Overnight Rulings by U.S. Supreme Court Vacate Two Injunctions and a Stay of Execution*, DEATH PENALTY INFORMATION CENTER, Jul. 16, 2020, <https://deathpenaltyinfo.org/news/u-s-government-hurriedly-executes-wesley-purkey-after-overnight-rulings-by-u-s-supreme-court-vacate-two-injunctions-and-a-stay-of-execution>.

⁸ Liliana Segura, *Over the Objections of the Navajo Nation, Trump Prepares to Execute Lezmond Mitchell*, THE INTERCEPT (Aug. 25, 2020), <https://theintercept.com/2020/08/25/lezmond-mitchell-execution-navajo-nation/>.

⁹ Hailey Fuchs, *Justice Dept. Execute Native American Man Convicted of Murder*, THE NEW YORK TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html>.

¹⁰ Christina Carrega, *Brandon Bernard Executed After Supreme Court Denies Request a Delay*, CNN

¹¹ Madeleine Carlisle, *In a Year Marked by Death, the Trump Administration Cements a Legacy of Unprecedented Executions*, TIME (Dec. 30, 2020), <https://time.com/5923973/trump-executions-death-penalty-covid-19/>.

¹² Jonathan Allen, *Lawyers for Only Woman on Federal Death Row Have COVID-19, Ask U.S. Judge to Delay Execution*, REUTERS (Nov. 12, 2020), <https://www.reuters.com/article/us-usa-executions/lawyers-for-only-woman-on-federal-death-row-have-covid-19-ask-u-s-judge-to-delay-execution-idUSKBN27S3CN>.

also attended by family members, protestors, and the media. Although individuals entering FCC Terre Haute are subject to temperature checks and are required to wear masks, they are not required to quarantine prior to arriving at the facility, and are not subject to mandatory COVID testing.¹³ In fact, after Orlando Hall's execution, his religious advisor and eight Bureau of Prison employees tested positive for COVID-19.¹⁴ For an administration that predicates its use of capital punishment on the idea that it protects people and promotes safety, President Trump and the Department of Justice are deliberately putting many individuals directly in harm's way and costing people their lives.

Above all, President Trump, former Attorney General Barr, and Acting Attorney General Jeffrey Rosen have chosen to end their terms by perpetuating one of the country's most cruelly arcane government powers. The death penalty is a mechanism rooted in the extrajudicial killings and lynching of Black individuals, dating back to and extending well beyond the time of slavery. Capital punishment is disproportionately applied to people of color, and disproportionately employed in cases where the victim was White. Many individuals facing execution, both in the state and federal systems, were convicted by juries in which prosecutors prevented Black people from serving. By all measures, and especially in light of current standards of decency, the death penalty is the essence of "cruel and unusual."

The New York City Bar Association forcefully condemns the death penalty and remembers the individuals who the Trump administration executed:

Daniel Lewis Lee
Wesley Ira Purkey
Dustin Lee Honken
Lezmond Charles Mitchell
Keith Dwayne Nelson
William Emmet LeCroy, Jr.
Christopher Andre Vialva
Orlando Cordia Hall
Brandon Bernard
Alfred Bourgeois
Lisa Montgomery

Currently, executions for Corey Johnson and Dustin Higgs, both Black men, are scheduled for January 14th and January 15th, respectively. Both executions are, for the moment, stayed due to the fact that Johnson and Higgs both have COVID. We respectfully urge that the incoming Biden-Harris administration, should they have the opportunity, immediately halt the executions scheduled for Johnson and Higgs, commute their death sentences, and end the federal death penalty.

¹³ *Federal Execution Team Members Test Positive for COVID*, DEATH PENALTY INFORMATION CENTER (Dec. 10, 2020), <https://deathpenaltyinfo.org/news/federal-execution-team-members-test-positive-for-covid-19-after-orlando-hall-execution>.

¹⁴ *Id.*

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org.

The Capital Punishment Committee (Alexis J. Hoag and Michael E. Onah, co-chairs) largely focuses its work on educating the general public and the legal community about issues related to capital punishment.