The Trump Executions

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Introduction

At 8:07 a.m. on July 14, 2020, Daniel Lewis Lee expired after receiving two intravenous doses of pentobarbital and some saline.[1] About six hours earlier, the Supreme Court had issued the orders necessary for the Bureau of Prisons (BOP) to carry out the first federal execution in seventeen years.[2] That morning now marks the dawn of a particularly violent period in American penal history. Over the next six months—the end of Donald Trump's presidential Administration—the BOP executed thirteen people.[3] For perspective, there had been three federal executions during the prior fifty-seven years.[4]

A body of academic work on the *federal* death penalty exists but is surprisingly thin.[5] Death penalty scholarship has focused almost entirely on the capital punishment practices of *states*, for reasons that are fair enough: before the second half of 2020, the federal government had barely executed anyone.[6] The "Trump Executions," however, ensure that the federal death penalty's days as an afterthought are over. This Article is the first legal

1. Ariane de Vogue, Chandelis Duster & David Shortell, *Daniel Lewis Lee Executed after Supreme Court Clears the Way for First Federal Execution in 17 Years*, CNN, https://www.cnn.com/2020/07/14/politics/daniel-lewis-lee-supreme-court-rule-execution/index.html [https://perma.cc/Q8MP-VBDB] (July 14, 2020, 12:11 PM); *see also In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 215–16 (D.D.C.) ("The 2019 Protocol provides for three injections, the first two containing . . . pentobarbital . . . and the third containing . . . saline."), *vacated sub nom*. Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

2. de Vogue, *supra* note 1.

3. *See Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR. [hereinafter *DPIC Federal Executions Log*], https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty [https://perma.cc/6ZAL-BUR5] (providing list of federal executions that took place in the last six months of the Trump Administration).

4. *See id.* (listing the three federal executions that took place in the fifty-seven years prior to the Trump Administration). The last execution before 2001 was in 1963. Carey Goldberg, *Federal Executions Have Been Rare but May Increase*, N.Y. TIMES (May 6, 2001), https://www.nytimes.com/2001/05/06/us/federal-executions-have-been-rare-but-may-increase.html [https://perma.cc/22PM-8MMA].

5. For perhaps the best history of the federal death penalty see Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347 (1999). *See also* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611 (2018) (focusing on the role of the death penalty in the Trump Administration but before the 2020–2021 executions); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 445 (2010) (linking racially disparate application of federal death penalty to jury vicinage practices); Jon B. Gould & Kenneth Sebastian Leon, *A Culture That Is Hard to Defend: Extralegal Factors in Federal Death Penalty Cases*, 107 J. CRIM. L. & CRIMINOLOGY 643, 646 (2017) (conducting an empirical analysis that suggests that extralegal factors throttle defense resources, which in turn increase the likelihood of federal death sentences).

6. *See DPIC Federal Executions Log*, *supra* note 3 (showing only three federal executions from 1988 to 2020); *Federal Executions 1927 – 1988*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/federal-executions-prior-to-1988 [https://perma.cc/6TYH-U2C5] (listing the thirty-four federal executions from 1927 to 1963).

scholarship to comprehensively document and evaluate these executions—to understand why they happened, explore the complex legal issues they presented, and explain the lasting effects they might have on American law.

I proceed in three parts. In Part I, I put the Trump Executions in historical perspective. I tender a brief history of the federal death penalty, with an emphasis on the modern era—the period following the Supreme Court's 1976 determination that the U.S. Constitution still permitted capital punishment.[7] What materialized near the close of the Trump Administration was, from the perspective of politicians and bureaucrats who embrace the death penalty, a once-in-a-generation opportunity. I catalogue the BOP's lengthy struggle to identify and implement a lawful execution protocol—a struggle that was largely responsible for the growth of federal death row and responsible for the desire to clear it. I also present a half-year timeline of the Trump Executions, which grounds the balance of the Article.

In Part II, I organize the Trump Execution activity into four primary legal categories. First, there were statutory and constitutional challenges to the pentobarbital-only lethal injection sequence.[8] Second, judges were forced to interpret a statutory "parity" provision requiring that implementation of the federal death penalty mirror that of the state where the court sentenced the prisoner.[9] Third, courts struggled with a statutory "savings clause" allowing federal prisoners to bypass otherwise-applicable restrictions on post-conviction relief.[10] Finally, the Trump Executions took place in the midst of the COVID-19 pandemic, thereby testing broader institutional commitments to the capital punishment process.[11] There were other issues too—including claims that typically arise during any post-conviction litigation—although I give the residual category necessarily abbreviated treatment.

In Part III, I consider the implications of the Trump Executions. The Supreme Court used its so-called "shadow docket" to ensure that all of the Administration's desired executions would take place before the Trump-to-Joe Biden presidential transition.[12] And the Court's belief that the transition would imperil the executions was well taken.[13] The Trump Executions went forward on the backs of political and bureaucratic outliers that coincide infrequently, and the Biden Administration announced an execution

7. *See infra* notes 24–34 and accompanying text.
8. *See infra* subpart II(A).
9. *See infra* subpart II(B).
10. *See infra* subpart II(C).
11. *See infra* subpart II(D).
12. *See infra* subpart III(A).
13. *See infra* subpart III(B).

moratorium within six months of President Trump's departure.[14] Ironically, the Trump Executions will have the most durable effects on *other* institutional practices that are sensitive to emergency adjudication, including capital punishment in the states.[15]

The Trump Executions smashed into the legal landscape like thirteen hurricanes, each spinning out multiple bands of bureaucratic experimentation, litigation, and adjudication. This Article operates as, among other things, a historical record compiled from primary-source documents. The aftermath, however, discloses much more than just thirteen discrete case resolutions. The Trump Execution activity was also a complex institutional settlement—both across and within the federal branches—so this Article documents that settlement and explains its consequences.

I. Historical Context

A. Pre-Trump History

The modern history of the federal capital punishment scheme is particularly important because it helps explain how federal death row ballooned, which in turn explains two other things: (1) the frustration fueling the political and bureaucratic will[16] necessary to carry out so many executions so suddenly, and (2) the Trump Administration's ability to choose several notably aggravated cases from a pool of prisoners convicted for murders of varying severity.

1. Statutory History.—No express reference to the death penalty appears in the Constitution's original articles, but Article III does mention punishment for treason,[17] which was broadly understood to be a capital offense.[18] The Fifth Amendment, moreover, explicitly references a death penalty.[19] There is, therefore, no reason to doubt that the Framers contemplated capital punishment. And Congress codified a federal death

14. Sarah N. Lynch & Eric Beech, *U.S. Attorney General Imposes Moratorium on Federal Executions*, REUTERS (July 1, 2021, 7:28 PM), https://www.reuters.com/world/us/us-attorney-general-imposes-moratorium-federal-executions-2021-07-01/ [https://perma.cc/YUR9-FC5W].

15. *See infra* subpart III(C).

16. *See* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEXAS L. REV. 1869, 1873 (2006) (questioning whether differing execution rates are traceable to political will).

17. *See* U.S. CONST. art. III, § 3 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

18. *See* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 210 (2009) (discussing historical sources that accepted treason as a capital offense).

19. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

penalty from the get-go. The 1789 Judiciary Act specified procedure for use in capital cases,[20] and the 1790 criminal code required death sentences for roughly twelve federal offenses.[21] The federal death penalty statute remained largely untouched for more than a century, until 1897 legislation ended mandatory capital sentencing and shrank the category of death-eligible offenses.[22] Shortly thereafter, the Supreme Court interpreted the statute to require complete jury discretion to refuse a death sentence.[23]

Such discretion remained a staple of federal death penalty trials from the 1897 Act until 1972, when *Furman v. Georgia*[24] invalidated capital punishment as practiced across all American jurisdictions.[25] *Furman* was the most important constitutional moment of American death penalty law. It was a short per curiam opinion invalidating, under the Eighth Amendment, every state and federal death-sentencing statute.[26] Each Justice then wrote an auxiliary opinion, forming an opinion set that was, for some time, the longest in the U.S. Reporter.[27] *Furman*'s exact meaning is indeterminate, given the decision's structural irregularity and the logical tension between the median positions, but its gist was that capital sentencing was too arbitrary.

The next significant federal death penalty statutes appeared in 1988 and 1994, but understanding them requires some familiarity with the constitutional law that the Supreme Court announced right after *Furman*. In 1976, the Court moved past the *Furman*-based moratorium, deciding five cases collectively establishing that the Eighth Amendment permitted an appropriately constrained death penalty.[28] One of these "1976 Cases,"

20. Judiciary Act of 1789, ch. 20, §§ 29, 33, 1 Stat. 73 (repealed 1874).

21. *See* Little, *supra* note 5, at 361–65 (explaining counting of capital offenses in the 1790 Act).

22. Act of Jan. 15, 1897, ch. 29, 2 Stat. 487 (repealed 1909); *see also* Little, *supra* note 5, at 368 (discussing 1897 legislation).

23. Winston v. United States, 172 U.S. 303, 313 (1899).

24. 408 U.S. 238 (1972).

25. Little, *supra* note 5, at 369; *Furman*, 408 U.S. at 239–40.

26. *See Furman*, 408 U.S. at 239–40 ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."); Jeffrey J. Pokorak, *"Death Stands Condemned:" Justice Brennan and the Death Penalty*, 27 CAL. W.L. REV. 239, 258 n.129 (1991) (noting that the decision's practical effect was to invalidate capital punishment laws in thirty-nine states and the District of Columbia).

27. *See* Pokorak, *supra* note 26 ("With all Justices issuing opinions *seriatim*, *Furman* was the longest Supreme Court decision, spanning 232 pages in the *United States Reporter*.").

28. *See* Roberts v. Louisiana, 428 U.S. 325, 333–34 (1976) (holding that mandating the death penalty for certain crimes fails to give juries the constitutionally required opportunity to consider mitigating factors); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (concluding that mandatory death sentences are unconstitutional); Jurek v. Texas, 428 U.S. 262, 276 (1976) (holding that "Texas' capital-sentencing procedures . . . do not violate the [U.S. Constitution]" because they provide for appropriate jury discretion and because they narrow the category of first-degree murderers eligible for the death penalty); Proffitt v. Florida, 428 U.S. 242, 259–60 (1976) (holding

Woodson v. North Carolina,[29] held that mandatory death sentencing was unconstitutional.[30] A 1977 case, *Coker v. Georgia*,[31] called into question capital sentences for any offense that did not result in a killing.[32] And in 1987, the Supreme Court decided *McCleskey v. Kemp*,[33] holding that capital sentences tainted by what we would now call systemic racism are constitutionally permitted.[34]

Among other things, *McCleskey* removed a major source of constitutional doubt around a federal death penalty statute.[35] In 1988, Congress passed a narrow death penalty provision applicable to a Continuing Criminal Enterprise (CCE) offense.[36] The CCE statute reflected the constitutional constraints appearing in the 1976 Cases[37] and included other statutory items that endure as important features of the federal death penalty.[38] In what later became a crucial omission, the 1988 statute provided no statutory guidance as to the manner of execution.[39]

A more important statute followed six years later: the 1994 Federal Death Penalty Act (FDPA).[40] The FDPA permitted death sentences for many offenses that resulted in killings[41] and so-called drug-kingpin offenses that

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that, under certain conditions, the Constitution permitted judges to be the capital sentencers); Gregg v. Georgia, 428 U.S. 153, 188 (1976) (holding that the death penalty was not per se illegal).

29. 428 U.S. 280 (1976).

30. *Id.* at 305. *Woodson* mooted a 1974 statute requiring mandatory death sentences for airplane hijackings. Antihijacking Act of 1974, Pub. L. No. 93-366, sec. 105, § 903(c)(5), 88 Stat. 409, 412.

31. 433 U.S. 584 (1977).

32. *See id.* at 592 (concluding that the death sentence is an unconstitutional punishment for rape because it is disproportionate and excessive).

33. 481 U.S. 279 (1987).

34. *See id.* at 291–99 (declining to infer a discriminatory purpose from the discriminatory impact of capital sentencing provisions).

35. *McCleskey* is firmly ensconced in the anti-canon. *See, e.g.*, Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 733 (2003) (comparing *McCleskey* with several notorious cases); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (same).

36. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387–4388.

37. *See* Little, *supra* note 5, at 381–82 (discussing how the 1988 statute reflected Supreme Court precedent).

38. For example, it required that juries receive an anti-racism instruction and imposed certain notice requirements when prosecutors decided they were going to seek death penalties. 21 U.S.C. § 848(h), (o) (repealed 2006). Originally set forth in 21 U.S.C. § 848(q), it also included right-to-counsel provisions now codified at 18 U.S.C. § 3599.

39. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387–4391 (providing rules for death penalty notice, hearing, and sentencing but not prescribing the manner in which a person will be executed).

40. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified as amended in scattered sections of 18 U.S.C.).

41. These remain codified as amended at 18 U.S.C. § 3591(a)(1)–(2).

did not.[42] Tracking constitutional constraints announced in the 1976 Cases, the FDPA also required that federal death penalty trials be separated into distinct liability and punishment phases.[43] It contained guidance as to the method of execution that the 1988 statute omitted, including a parity provision requiring that a U.S. marshal "supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed."[44] If the "State in which the sentence is imposed" is not a death penalty state, then a federal court must "designate" a practicing state for implementation-parity purposes.[45]

The FDPA sets the legislative parameters for the modern federal death penalty, and the Department of Justice (DOJ) promulgated implementing regulations. In an attempt to make good on constitutional norms against arbitrary enforcement, the "DOJ Protocols"[46] require that, before capitalizing the prosecution, a U.S. Attorney must secure pre-authorization from the Attorney General (AG).[47] The DOJ Protocols also require that the prosecuting U.S. Attorney provide the defendant with notice regarding any request for authorization,[48] thereby ensuring that the defense is able to provide to the U.S. Attorney any information that might dissuade the prosecutor from seeking the death penalty.[49]

Finally, because the *federal* death penalty exists alongside *state* capital punishment schemes potentially applicable to the same offense, the DOJ Protocols require the presence of some special federal interest to justify federal death penalty prosecutions in retentionist states, as well is in states that have abolished capital punishment.[50] The DOJ Protocol drafters doubtlessly thought they were making good on congressional intent, insofar as the substantial-federal-interest rule seemed likely to ensure a manageably sized death row for which the pace of executions roughly tracked the pace of sentencing. As explained below, things did not work out that way.

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42. These remain codified as amended at 18 U.S.C. § 3591(b)(1)–(2).

43. *See* 18 U.S.C. § 3593(b) (requiring that, if the defendant is found guilty, the judge "shall conduct a separate sentencing hearing to determine the punishment to be imposed").

44. 18 U.S.C. § 3596(a).

45. *Id.*

46. *See* U.S. Dep't of Just., Just. Manual § 9-10.020 (2018) [hereinafter DOJ Protocols], available at https:/www.justice.gov/jm/justice-manual [https://perma.cc/C459-KSSQ] (stating that "[f]ederal death penalty procedure is based on the Federal Death Penalty Act of 1994"); *see also* Little, *supra* note 5, at 407–19 (giving account of DOJ Protocols partially based on first-person experience).

47. DOJ Protocols, *supra* note 46, §§ 9-10.040–9-10.060.

48. *Id.* § 9-10.080.

49. *Id.*

50. *Id.* § 9-10.110; *see also id.* § 9-27.230 (setting forth substantial federal interest rule referenced in DOJ Protocols § 9-10.110).

2. Sentencing and Execution.—Between *Furman* and the 1988 provisions for CCE prosecutions, there were no death sentences because there was no federal statute under which to prosecute.[51] Even after the 1976 Cases established that certain capital sentencing practices were constitutionally permissible, there was simply no legislative authorization to seek that sentence in federal court.[52]

In the first three years after Congress ratified the CCE provisions, there were only seven capital prosecutions, which resulted in a single death sentence (1991).[53] One of the first such post-*Furman* prosecutions was authorized by someone who would later become a pivotal figure in the Trump Executions: William Barr, in his capacity as Attorney General for then-President George H.W. Bush (Bush I).[54] Capital CCE prosecutions became more frequent over time, and they produced an alarming racial skew. Thirty-three out of the first thirty-seven *capital* CCE prosecutions were against people of color.[55] Under the *noncapital* CCE provisions, by contrast, only one-quarter were against non-white defendants.[56]

The CCE prosecutions eventually combined with FDPA prosecutions to produce more federal death sentences: a total of six by 1993, twenty-three by

51. *See* Little, *supra* note 5, at 373–80 (discussing why there were no federal statutes under which to use the death penalty). I relegate pre-*Furman* sentencing practice to this footnote. In 1825, Congress first required the President to report on capital punishment activity, including capital sentences. H. Journal, 18th Cong., 2d Sess. 129 (1825) (requiring the President to communicate to the House all capital punishment activity). At that time, there had been 118 convictions. H.R. Exec. Doc. No. 20-146 (1829), *reprinted in* H.R. Rep. No. 53-545, app. at 6, tbl. 1. The aggregated data on early federal death sentences is not terribly reliable, although one post-Civil War abolitionist-turned-congressman, Newton Curtis, claimed that the capital-sentence-to-prosecution ratio had dropped from about 85% at the beginning of the nineteenth century to about 20% after the Civil War. Little, *supra* note 5, at 368. Throughout the twentieth century, federal death sentences slowed to a trickle in the run-up to *Furman*. *See Historical Information: Capital Punishment*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/history/federal_executions.jsp [https://perma.cc/Q4BG-7X4H] (showing the number of federal executions that took place in each decade).

52. *See Historical Information: Capital Punishment*, *supra* note 51 (stating that there were no federal executions between the 1970s and the 1990s).

53. *Racial Disparities in Federal Death Penalty Prosecutions 1988–1994*, DEATH PENALTY INFO. CTR. (Mar. 1, 1994) [hereinafter *DPIC Racial Disparities*], https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/racial-disparities-in-federal-death-penalty-prosecutions-1988-1994 [https://perma.cc/4SMY-32TT]. This death sentence was later commuted. Rob Warden & John Seasly, *David Chandler: Evidence of Innocence Moves Him Off Death Row, but Not Out of Prison*, INJUSTICE WATCH (Nov. 4, 2019), https://www.injusticewatch.org/projects/unrequited-innocence/2019/david-chandler-evidence-of-innocence-moves-him-off-death-row-but-not-out-of-prison/ [https://perma.cc/AY84-2ALP].

54. Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 531 (2000).

55. *DPIC Racial Disparities*, *supra* note 53.

56. *Id.*

2000, and sixty-nine by 2010.[57] By 2015, however, federal death sentencing slowed considerably, producing less than three death sentences per year through 2020.[58] From the passage of the 1988 CCE provisions until the end of 2020, there were eighty-one federal defendants sentenced to death, for an average of 2.45 per year.[59]

Although federal death sentences were only a small fraction of American capital punishment activity,[60] the federal government was still unable to stabilize the size of its death row because it struggled to execute *anyone*. Gaps between death-sentencing and execution rates are inevitable,[61] but the gap for federal prisoners centered idiosyncratically on problems with the BOP's execution protocols—problems that ultimately dominated the Trump Execution litigation. The story of those problems starts in the 1930s.

Before 1937, the statutorily prescribed method of federal execution was hanging.[62] In 1937, Congress enacted the precursor to the FDPA parity provision, requiring that the federal method be the "manner prescribed by the laws of the State within which the sentence is imposed."[63] Congress eventually repealed the parity-provision precursor, along with the rest of the 1937 statute, in 1984[64]—but did not replace it with anything. The 1988 CCE legislation also omitted any method-of-execution provisions. The DOJ therefore promulgated a 1993 regulation implementing a uniform lethal injection protocol.[65] Presiding over that administrative effort was then-and-future AG, William Barr.[66]

Congress imperiled the DOJ's uniform protocol a year later. When Congress passed the FDPA in 1994, it included the modern parity provision—modeled on the 1937 statute—providing that a U.S. marshal

57. *Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year [https://perma.cc/B252-WDQ5]. These numbers do not include military death sentences.

58. *Id.*

59. *Id.*

60. From 1988 to 2020, there were 5,259 death sentences handed down by state courts. *Id.* Federal death sentences therefore account for about 1.5% of American death sentences since 1988.

61. Death-sentenced prisoners can exit death row in any number of other ways. They might commit suicide, die of natural causes while awaiting execution, be discharged by judicial order, or receive a commutation.

62. Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119 (repealed 1909).

63. An Act To Provide for the Manner of Inflicting the Punishment of Death, Pub. L. No. 75-156, ch. 367, § 323, 50 Stat. 304, 304 (1937) (repealed 1984).

64. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987 (repealing the 1937 Act without instituting a comparable manner of execution provision).

65. 28 C.F.R. § 26.3(a)(4) (1993).

66. *See* Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898 (Jan. 19, 1993) (to be codified at 28 C.F.R. pt. 26) (promulgated by the DOJ one day before Bush I left office and therefore while Barr was still the Attorney General).

"shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed."[67] DOJ mobilized to secure statutory changes necessary to resolve the friction between its internal provisions (uniformity) and the FDPA (parity), but it was unable to get the necessary legislation through Congress.[68]

When George W. Bush (Bush II) became President in 2001, there had not been a federal execution for thirty-eight years.[69] There were, however, three executions in the first two years of the Bush II presidency—including Timothy McVeigh, the mastermind of the Oklahoma City bombing.[70] The BOP carried out all three lethal injections at the U.S. Penitentiary in Terre Haute, Indiana (Terre Haute-USP)—which had been selected as the site for federal executions in 1993.[71] (Terre Haute-USP is the site of federal death row and is part of a larger federal correctional complex, "FCC Terre Haute."[72]) After the 2003 execution, the federal death chamber remained unused for seventeen years.[73]

So why did the federal executions stop? I have written at length about how death penalty jurisdictions struggle to move people through the final phases of the capital punishment sequence and why those difficulties produce both attrition and delay.[74] There is a general norm against setting execution

67. 18 U.S.C. § 3596(a).

68. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 2, 9 (D.D.C. Nov. 20, 2019), ECF No. 50 (stating that the DOJ supported bills amending the FDPA that were never enacted).

69. *See Historical Information: Capital Punishment*, *supra* note 51 (showing that the last federal execution before the Bush II Presidency was in 1963). I relegate the pre-*Furman* history of federal executions to this footnote. Recall that, in 1825, Congress required the President to issue a report on the death penalty. *See supra* note 51. The 118 convictions under the 1790 statute resulted in, according to the President's response, forty-two executions. Little, *supra* note 5, at 366. Federal executions became less-and-less frequent during the early- and mid-twentieth century. The Bureau of Prisons indicates that there were only twenty-four federal executions between 1927 and when the final pre-*Furman* prisoner was executed in 1963. *Historical Information: Capital Punishment*, *supra* note 51.

70. In June of 2001, the federal government executed Timothy McVeigh and Juan Raul Garza. Eli Hager, *McVeigh, Garza, Jones, Tsarnaev: A Closer Look at the Three Federal Inmates Who Have Been Executed Since the 1960s*, THE MARSHALL PROJECT (May 15, 2015), https:/www.themarshallproject.org/2015/05/15/mcveigh-garza-jones-tsarnaev [https://perma.cc/DWM7-7RDN]. In March of 2003, the federal government executed Louis Jones, Jr. *Id.*

71. *See* Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898, 4902 (Jan. 19, 1993) (to be codified at 28 C.F.R. pt. 26) (providing that the place of execution is "[a]t a federal penal or correctional institution designated by the Director of the Federal Bureau of Prisons").

72. *See* Caroline Lester, *The Lightning Farm*, HARPER'S MAG., May 2021, https://harpers.org/archive/2021/05/death-penalty-under-trump-dustin-higgs/ [https://perma.cc/ZJN3-2EUT] (describing the history of Terre Haute, which is the sole federal execution chamber in the United States).

73. *DPIC Federal Executions Log*, *supra* note 3.

74. *See generally* Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163 (2019) (scrutinizing the process by which American jurisdictions select death-sentenced prisoners for execution).

dates while post-conviction litigation remains pending,[75] and post-conviction litigation over federal sentences—which takes place under 28 U.S.C. § 2255—takes a long time. Section 2255 litigation in death penalty cases is particularly protracted, in part because capital trials are subject to more constitutional constraints than noncapital ones.[76] Even under normal circumstances, it takes elevated levels of political and bureaucratic will to overcome institutional friction working against executions.[77]

For federal death cases, the friction between 2003 and 2020 was especially high because of problems surrounding the lethal injection protocol. The three Bush II executions involved no method-of-execution challenges, but other death-sentenced federal prisoners stepped into that breach. In 2005, and in a case captioned *Roane v. Gonzales*,[78] three capitally sentenced federal prisoners challenged the BOP's lethal injection protocols on statutory and constitutional grounds.[79] The D.C. District Court stayed those executions[80] to permit resolution of *Hill v. McDonough*,[81] a 2006 Supreme Court decision ultimately holding that 42 U.S.C. § 1983 was a permissible vehicle for method-of-execution claims.[82] Three other federal prisoners intervened in the *Roane* litigation during 2007.[83]

75. *See id.* at 1174 ("Many jurisdictions would refrain from executing inmates while certain appellate and postconviction processes were pending.").

76. *See id.* (discussing the effect that the new body of substantive constitutional law had in extending capital litigation).

77. *See* Steiker & Steiker, *supra* note 16, at 1918 (stating that "the flow of executions . . . can be disrupted, reduced, and even halted entirely" due to low "degree of integration or political cohesion").

78. Roane v. Gonzales, No. 05-cv-02337 (D.D.C. Feb. 27, 2006), ECF No. 5 (order).

79. The three original plaintiffs were James H. Roane, Jr., Cory Johnson, and Richard Tipton. Complaint for Injunctive & Declaratory Relief ¶ 1, Roane v. Gonzales, No. 05-cv-02337 (D.D.C. Dec. 6, 2005), ECF No. 1.

80. Roane v. Gonzales, No. 05-cv-02337, at 1 (D.D.C. Feb. 27, 2006), ECF No. 5 (order).

81. 547 U.S. 573 (2006).

82. *See id.* at 576 (holding that Hill's claim may proceed as an action for relief under 28 U.S.C. § 1983, and thus, is not subject to dismissal).

83. The 2007 intervenors were Bruce Webster, Orlando Hall, and Anthony Battle. Roane v. Gonzales, No. 05-cv-02337 (D.D.C. June 4, 2007) (minute order) (granting motion to intervene for Battle and Hall); Roane v. Gonzales, No. 05-cv-02337 (D.D.C. Feb. 14, 2007) (minute order) (granting motion to intervene for Webster). Jeffrey Paul intervened in 2014. Roane v. Leonhart, No. 05-cv-02337, at 1 (D.D.C. Mar. 24, 2014), ECF No. 333 (order).

The *Roane* litigation was further stayed pending,[84] among other things, *Baze v. Rees*,[85] which was the 2008 case in which the Supreme Court considered the constitutionality of Kentucky's lethal injection method.[86] Then, in 2011, the original *Roane* plaintiffs, the *Roane* intervenors, and the United States jointly moved to stay the litigation indefinitely, pending the BOP revisions to its lethal injection protocol.[87] Specifically, the BOP had been struggling to secure an adequate supply of sodium thiopental, the anesthetic agent that almost every American jurisdiction (including the federal government) then used in three-drug execution sequences.[88] The BOP needed time to secure a supply of usable chemical compound, or to revise the protocols.

For the next eight years, the *Roane* parties entered joint status reports informing the court that there was still no lawful protocol.[89] Problems with the lethal injection protocols, which have been the subject of some thoughtful academic analysis,[90] are but one piece of a much more complex federal abstention puzzle. The fact that the BOP was struggling to obtain sodium thiopental affected not just the parties to the *Roane* litigation, but all death-sentenced federal prisoners. Even in the waning days of the Bush II Administration, there seemed to be insufficient political and bureaucratic will to push any execution through baseline levels of friction, let alone the

84. The 2006 preliminary injunction remained in place as to the original parties, but the district court ordered the cases of the intervenors stayed pending the Supreme Court litigation. Roane v. Gonzales, No. 05-cv-02337, at 1 (D.D.C. June 11, 2007), ECF No. 68 (order) (enjoining defendants from scheduling Hall's execution); Roane v. Gonzales, No. 05-cv-02337, at 1 (D.D.C. June 11, 2007), ECF No. 67 (order) (enjoining defendants from scheduling Battle's execution); Roane v. Gonzales, No. 05-cv-02337, at 1 (D.D.C. Feb. 21, 2007), ECF No. 27 (order) (enjoining defendants from scheduling Webster's execution).

85. 553 U.S. 35 (2008).

86. *Id.* at 40–41.

87. Parties' Joint Motion to Continue the Aug. 2, 2011 Status Conf. & Briefing Schedule Governing the Above-Captioned Case, Roane v. Holder, No. 05-cv-02337, at 2 (D.D.C. July 28, 2011), ECF No. 288.

88. Deposition of Brad Weinsheimer, *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, at 26–28, 40–41, 94 (D.D.C. Jan. 29, 2020) [hereinafter Weinsheimer Dep.]. Weinsheimer was an associate Deputy Attorney General and the senior-most career official—i.e., non-political appointee—at DOJ. *Id.* at 13.

89. *See* Court Docket, Roane v. Gonzales, No. 05-cv-02337 (D.D.C.) (filing status reports from September 1, 2011, to August 1, 2019). *See, e.g.*, Defendants' Status Rep. at 1, Roane v. Holder, No. 05-cv-02337 (D.D.C. Jan. 10, 2012), ECF No. 295 (stating that there has been "no change to the status of the Federal Bureau of Prisons' lethal injection protocol").

90. *See generally, e.g.*, Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367 (2014) (exploring constitutional problems associated with failure of states to disclose information about execution protocols); Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331 (2014) (surveying post-*Baze* method-of-execution questions); Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427 (2015) (arguing that more effective defense-side strategy is to attack notice and adversarial-testing opportunities rather than to out and shame suppliers).

elevated levels created by the shortage of drug supply. And everything changed in January 2009—the Obama Administration was considerably less committed to the death penalty than were the Bush and Clinton Administrations before it.[91]

B. The Trump Executions

In January 2017, the Trump Administration swept into power. Jeff Sessions became President Trump's first Attorney General, and Sessions' Justice Department both prioritized review of the federal execution protocol and began exploring a pentobarbital-only lethal injection sequence.[92] Pentobarbital is a sedative that throttles the functioning of the brain and central nervous system, and it is lethal in higher doses.[93] The BOP spent several years trying to nail down a workable pentobarbital supply, struggling to find and sufficiently protect the identities of vendors concerned about public relations fallout.[94] The crucial breakthrough happened when the BOP was able to secure a viable domestic source, to be synthesized for executions by a compounding pharmacy not subject to ordinary health-and-safety oversight.[95] Finally, on July 24, 2019, President Trump's second Attorney General, the aforementioned William Barr, directed the acting BOP Director to adopt the pentobarbital-only protocol that the BOP had been developing for some time.[96]

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91. *See* Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309, 316 (2017) (showing the Obama Administration filed far fewer notices of intent than its predecessors); Steven Mufson & Mark Berman, *Obama Calls Death Penalty 'Deeply Troubling,' but His Position Hasn't Budged*, WASH. POST (Oct. 23, 2015) https://www.washingtonpost.com/news/post-politics/wp/2015/10/23/obama-calls-death-penalty-deeply-troubling-but-his-position-hasnt-budged/ [https://perma.cc/9V8M-NZW7] (reporting that President Obama called the death penalty "deeply troubling" and raised expectations about possible changes).

92. *See* Weinsheimer Dep., *supra* note 88, at 27–28, 30–31 (stating that AG Sessions wanted to look into the issue with the lethal injection drugs); Isaac Arnsdorf, *Inside Trump and Barr's Last-Minute Killing Spree*, PROPUBLICA (Dec. 23, 2020, 5:53 PM), https://www.propublica.org/article/inside-trump-and-barrs-last-minute-killing-spree [https://perma.cc/5MWC-58NG] (reporting that AG Sessions pushed to resolve the lethal injection drug issues so that the BOP could resume executions).

93. *See Nembutal*, RXLIST, https://www.rxlist.com/nembutal-drug.htm [https://perma.cc/7BF9-3TTS] (listing the side effects and consequences of overdose of pentobarbital).

94. *See* Weinsheimer Dep., *supra* note 88, at 44–46, 62, 66–67, 81, 227 (testifying that there was an effort throughout "to make sure that the lethal substance to be used in federal executions was available and could be obtained through a reliable supplier"); Arnsdorf, *supra* note 92 (reporting the struggles faced by the BOP in its plan to use pentobarbital in executions).

95. *See* Weinsheimer Dep., *supra* note 88, at 81, 223–24 (testifying that "[t]he DOJ has reached the conclusion that the FDA has no jurisdiction over execution drugs").

96. *Id.* at 74. In 2004, the DOJ had published a fifty-page protocol for federal execution procedures, and it published addenda in 2007, 2008, and 2019. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, 2019 WL 6691814, at *2 (D.D.C. Nov. 20, 2019), *vacated and remanded sub nom. In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106 (D.C. Cir. 2020). The 2019 protocols largely replaced the 2004 iteration. *Id.*

The next day, July 25, 2019, AG Barr announced publicly that he had approved an execution sequence consisting of two 2.5 gram doses of pentobarbital, followed by a syringe of saline.[97] On that same day, the Justice Department filed a notice in the *Roane* litigation regarding the pentobarbital-only protocol[98] and started to set execution dates.[99] At AG Barr's direction, the BOP scheduled the executions of five federal prisoners: Daniel Lee (for December 9, 2019), Lezmond Mitchell (December 11, 2019), Wesley Purkey (December 13, 2019), Alfred Bourgeois (January 13, 2020), and Dustin Honken (January 15, 2020).[100] These five prisoners became known as the "First Five."

The DOJ culled the First Five from a list of the fourteen federal death-row prisoners whom the BOP believed to have no post-conviction litigation pending.[101] According to the senior-most career attorney at the DOJ, AG Barr personally oversaw the selection of the First Five, and wanted to announce their executions himself.[102] Barr had been in search of some common denominator allowing him to isolate a subset of the fourteen prisoners that the BOP had identified as having no outstanding post-conviction litigation.[103] The denominator ended up being the vulnerability of the victims.[104] In its press release, the DOJ described the First Five as having been "convicted of murdering, and in some cases torturing and raping, the most vulnerable in our society—children and the elderly."[105]

Several other things about the First Five are noteworthy. Despite the racialized pattern of federal death sentences, only one of the First Five was Black (Bourgeois). Three others were white (Lee, Purkey, Honken), and one was Native American (Mitchell).[106] None were among those who were

97. *See* Press Release, Off. of Pub. Affs., Dep't of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse: Attorney General William P. Barr Directs the Federal Bureau of Prisons to Adopt an Addendum to the Federal Execution Protocol and Schedule the Executions of Five Death-Row Inmates Convicted of Murdering Children (July 25, 2019) [hereinafter DOJ First Five Execution Announcement], https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [https://perma.cc/RM8H-MN4N] (announcing the replacement of "the three-drug procedure previously used in federal executions with a single drug—pentobarbital").

98. Notice of Adoption of Revised Protocol at 1, Roane v. Barr, No. 05-cv-02337 (D.D.C. July 25, 2019), ECF No. 385.

99. DOJ First Five Execution Announcement, *supra* note 97.

100. *Id.*

101. Weinsheimer Dep., *supra* note 88, at 117.

102. *See id.* at 116 (testifying that AG Barr ultimately selected the first five individuals to be scheduled for execution).

103. *Id.* at 122.

104. *Id.*

105. DOJ First Five Execution Announcement, *supra* note 97.

106. The career DOJ official deposed in the *Roane* litigation denies that race figured at all in the selection of the First Five. Weinsheimer Dep., *supra* note 88, at 126.

original plaintiffs or intervenors in the *Roane* litigation.[107] Neither the BOP nor the DOJ considered the mental health of the prisoners in the selection process.[108] Finally, notwithstanding the public relations emphasis on victim interests, the federal agencies did not actually communicate with the victims' families when deciding whether to schedule the executions.[109]

A brief timeline of the Trump Executions follows, and I explore the legal issues affecting that timeline more fully in Part II. On November 20, 2019, and based on an FDPA parity challenge to the lethal injection protocol, the D.C. District Court preliminarily enjoined the executions of four of the First Five: Bourgeois, Honken, Lee, and Purkey.[110] Neither the D.C. Circuit nor the Supreme Court disturbed that preliminary injunction.[111] (The Ninth Circuit stayed Mitchell's execution on unrelated grounds a few weeks later.[112]) The scheduled execution dates came and went while the stays and preliminary injunctions remained active. As a result, the BOP was unable to meet its original execution calendar for the First Five.

When the FDPA parity challenge reached the D.C. Circuit on the merits, however, the panel sided with the United States and vacated the injunction on April 7, 2020.[113] The Supreme Court declined certiorari.[114] On June 15, the BOP announced four new execution dates, three of which were for prisoners belonging to the First Five.[115] After rounds of litigation for each prisoner, much of which is recounted in Part II, the BOP began carrying out the executions in July of 2020. A visual summary of the execution scheduling appears in Table 1 below.

The BOP executed Lee on July 14, Purkey on July 16, and Honken on July 17.[116] The next month it executed Mitchell on August 26 and Keith Nelson on August 28.[117] Before the BOP finished the first volley of

107. *See supra* notes 78–89 and accompanying text.

108. *See* Weinsheimer Dep., *supra* note 88, at 128 ("I'm unaware of any review of mental health.").

109. *See id.* at 123–24 ("I'm not aware of any specific efforts by the Department to reach out to the victims' families of these 5 in particular.").

110. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 2 (D.D.C. Nov. 20, 2019), ECF No. 50.

111. *See* Barr v. Roane, 140 S. Ct. 353 (2019) (denying application for stay or vacatur); Roane v. Barr, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (per curiam) (order) (denying same).

112. Mitchell v. United States, No. 18-17031, at 1 (9th Cir. Oct. 4, 2019) (order).

113. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 108 (D.C. Cir. 2020).

114. Bourgeois v. Barr, 141 S. Ct. 180 (2020) (mem.).

115. These dates were for Lee, Honken, Purkey, and Keith Nelson. Press Release, Off. of Pub. Affs., Dep't of Just., Executions Scheduled for Four Federal Inmates Convicted of Murdering Children (June 15, 2020), https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children [https://perma.cc/B8NK-GMKD].

116. *DPIC Federal Executions Log*, *supra* note 3.

117. *Id.*

executions, it began scheduling more. On July 31, 2020, it scheduled the executions of William LeCroy for September 22 and Christopher Vialva for September 24.[118] The executions of Vialva and LeCroy were the only remaining executions to take place before the November 2020 presidential election. On September 30, the BOP scheduled the execution of Orlando Hall (November 19).[119] On October 16, it scheduled executions for Lisa Montgomery (December 8) and Brandon Bernard (December 10).[120] On November 20, it scheduled executions for Alfred Bourgeois (December 11), Corey Johnson (January 14, 2021), and Dustin Higgs (January 15).[121] All of those executions were carried out on schedule, except for that of Lisa Montgomery—which was stayed and reset on November 23, 2020, and then carried out on January 13, 2021.[122]

When all was said and done, the Trump Administration set nineteen execution dates in order to kill thirteen prisoners. Twelve of the thirteen were men.[123] Six were Black,[124] six were white,[125] and one was Native American.[126] Although the DOJ announced that it had selected the First Five because the victims were juveniles or elderly,[127] that focus diminished as 2020 wore on. Every murder is an unspeakable tragedy, but not all of those towards the end of the Trump Execution queue committed murders that fit the profile of the First Five—victims who were especially old, or especially young. LeCroy's

118. Press Release, Off. of Pub. Affs., Dep't of Just., Executions Scheduled for Two Federal Inmates (July 31, 2020), https://www.justice.gov/opa/pr/executions-scheduled-two-federal-inmates [https://perma.cc/N99L-4J9E].

119. Press Release, Off. of Pub. Affs., Dep't of Just., Execution Scheduled for Federal Death Row Inmate Convicted of Murdering a Child (Sept. 30, 2020), https://www.justice.gov/opa/pr/execution-scheduled-federal-death-row-inmate-convicted-murdering-child [https://perma.cc/6SB2-S7D4].

120. Press Release, Off. of Pub. Affs., Dep't of Just., Executions Scheduled for Two Federal Inmates Convicted of Heinous Murders (Oct. 16, 2020), https://www.justice.gov/opa/pr/executions-scheduled-two-federal-inmates-convicted-heinous-murders [https://perma.cc/7GA3-UU6N].

121. Press Release, Off. of Pub. Affs., Dep't of Just., Executions Scheduled for Inmates Convicted of Brutal Murders Many Years Ago (Nov. 20, 2020), https://www.justice.gov/opa/pr/executions-scheduled-inmates-convicted-brutal-murders-many-years-ago [https://perma.cc/4DND-MJZ8].

122. *See* Montgomery v. Barr, No. 20-cv-03261, at 1 (D.D.C. Nov. 19, 2020), ECF No. 20 (order) (staying Montgomery's execution); Montgomery v. Rosen, No. 20-5379, 2021 WL 22316, at *1 (D.C. Cir. Jan. 1, 2021) (per curiam) (order) (noting that Montgomery's execution was reset on November 23); *DPIC Federal Executions Log*, *supra* note 3 (noting date on which Montgomery's execution was carried out).

123. The only woman executed was Lisa Montgomery. *Id.*

124. The executed Black prisoners were Christopher Vialva, Orlando Hall, Brandon Bernard, Alfred Bourgeois, Corey Johnson, and Dustin Higgs. *Id.*

125. The executed white prisoners were Daniel Lee, Wesley Purkey, Dustin Honken, Keith Nelson, William LeCroy, and Lisa Montgomery. *Id.*

126. The executed Native American prisoner was Lezmond Mitchell. *Id.*

127. *See supra* note 105 and accompanying text.

victim was a thirty-year-old nurse;[128] Vialva shot two ministers,[129] and Higgs killed three adult women.[130]

Execution Scheduling[131]

Last Name	Date Scheduled	Result	Execution Date
Bourgeois	07/25/19	Stayed	N/A
Lee	07/25/19	Stayed	N/A
Honken	07/25/19	Stayed	N/A
Mitchell	07/25/19	Stayed	N/A
Purkey	07/25/19	Stayed	N/A
Lee	06/15/20	Executed	07/14/20[132]
Purkey	06/15/20	Executed	07/16/20[133]
Honken	06/15/20	Executed	07/17/20
Nelson	06/15/20	Executed	08/28/20
Mitchell	07/29/20	Executed	08/26/20
Vialva	07/31/20	Executed	09/24/20
LeCroy	07/31/20	Executed	09/26/20
Hall	09/30/20	Executed	11/19/20
Montgomery	10/16/20	Stayed	N/A
Bernard	10/16/20	Executed	12/10/20
Bourgeois	11/20/20	Executed	12/11/20
Johnson	11/20/20	Executed	01/14/21
Higgs	11/20/20	Executed	01/15/21
Montgomery	11/23/20	Executed	01/13/21

One execution stood out as particularly puzzling: that of Brandon Bernard. Bernard had been capitally sentenced for a secondary role in the murder of the same two ministers for which Vialva was given the death penalty.[134] Vialva had been the principal offender, having shot both victims in the head.[135] Bernard lit the victims' car on fire thinking both people inside were dead, although a subsequent autopsy showed that one victim seemed to have survived the head shot and that she later died of smoke inhalation.[136]

128. Executions Scheduled for Two Federal Inmates, *supra* note 118.

129. *Id.*

130. Executions Scheduled for Inmates Convicted of Brutal Murders Many Years Ago, *supra* note 121.

131. The information for this table was taken from the series of DOJ Press Releases cited in notes 100–121, *supra*, and from the *DPIC Federal Executions Log*, *supra* note 3.

132. This execution was formally scheduled for July 13. *See* note 115, *supra*.

133. This execution was formally scheduled for July 15. *See* note 115, *supra*.

134. Executions Scheduled for Two Federal Inmates Convicted of Heinous Murders, *supra* note 120.

135. United States v. Bernard, 299 F.3d 467, 472–73 (5th Cir. 2002).

136. *Id.* at 473.

The prosecution argued that Bernard, by igniting the car, killed that victim.[137] At trial, federal prosecutors portrayed Bernard as an ambitious shot-caller in a frightening criminal enterprise.[138] But by the time it scheduled his execution, the DOJ knew that Bernard had been on the lowest rung of a local gang ladder.[139] Bernard, moreover, was just eighteen at the time of the crime.[140] In terms of his age at the time of his offense, he became the youngest federal prisoner executed in nearly seventy years.[141]

* * *

The Trump Executions felt so jarring because the federal government had barely used the death penalty since 1963. Ironically, the extended periods of inactivity made the executions easier for DOJ to present to the public. The death-row backlog allowed the DOJ to hand-pick an execution queue that the public was likely to accept—starting with five prisoners who had finished their post-conviction litigation and killed vulnerable victims, and whose demographic makeup obscured a clear racial skew in favor of white defendants. The recent execution inactivity, due largely to bureaucrats' struggle to implement a lawful lethal injection protocol, also helps explain the unusual political and administrative motivation necessary to push the executions through.

II. The Legal Terrain

Throughout the last six months of the Trump Administration, the federal judiciary measured the fates of the thirteen federal prisoners condemned to death. These were thirteen fact-bound cases requiring concrete resolution, but they also exposed unsettled constitutional law, statutory meaning, and institutional practice. In Part II, I organize, into meaningful units of study, the legal disputes touching specifically on the federal death penalty. In mapping these zones of legal conflict and change, I zoom in on specific pieces of litigation as my (substantial) explanatory needs dictate.

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137. *See id.* at 482 (explaining how Bernard "set the car ablaze"). Bernard insisted that, although he doused the inside of the car with lighter fluid while the victims were alive in the trunk, he did not know that Vialva intended for the victims to die. *See* Petition for Clemency Seeking Commutation of Death Sentence at 2–3 (Nov. 10, 2020), https://eji.org/wp-content/uploads/2020/12/brandon-bernard-clemency-petition.pdf [https://perma.cc/NH6E-JY3P] ("Up until that point, Brandon never fully comprehended that the Bagleys were not going to be released.").

138. *See* Bernard v. Watson, No. 20-cv-00616, 2020 WL 7230886, at *2 (S.D. Ind. Dec. 8, 2020) (order) (denying motion to stay execution) (referencing suggestion by prosecutor that Mr. Bernard wanted to be a "top dog").

139. *See id.* at *3 (describing a gang's organizational chart, with Bernard at the bottom).

140. Erik Ortiz, *U.S. Executes Brandon Bernard, Who Was 18 at the Time of His Crime, Despite Appeals*, NBC NEWS, https://www.nbcnews.com/news/us-news/u-s-set-execute-brandon-bernard-who-was-18-time-n1250748 [https://perma.cc/X6AD-5XVN] (Dec. 10, 2020, 9:06 PM).

141. *Id.*

Setting aside more exotic questions of Supreme Court procedure, which I tackle in Part III, legal disputes over the Trump Executions break naturally into four categories. They forced courts to confront: (1) questions about the federal lethal injection protocol; (2) the meaning of the FDPA parity provision requiring that the manner of federal execution mimic that of the state in which the sentencing court sits; (3) the breadth of a federal safety valve provision allowing federal prisoners to circumvent otherwise-applicable limits on post-conviction relief; and (4) the implications of COVID-19, given the unique problems the pandemic posed for carrying out the federal executions. What stands out after scrutinizing these categories is *how little* the judiciary actually decided about the federal death penalty.

At this juncture, I want to flag for non-specialist readers an important procedural point about death penalty litigation. A death verdict does not automatically trigger an execution.[142] In virtually every capital case, there will often be years of appeals and post-conviction litigation around the guilt- and sentencing-phase determinations. Because there is no reliable post-conviction calendar upon which to premise a statutory execution schedule, the execution of a death-sentenced prisoner requires a subsequent decision to set an execution date.[143] "End-stage" activity is the litigation that occurs between the date-setting and the execution. End-stage litigation produced most of the decision-making discussed below.

A. Lethal Injection Challenges

With respect to the Trump Executions, the most widespread end-stage litigation challenged the use of pentobarbital. In addition to Eighth Amendment claims, there were also method-of-execution challenges under at least four different federal statutes: the FDPA;[144] the Food, Drug, and Cosmetics Act (FDCA);[145] the Controlled Substances Act (CSA);[146] and the Administrative Procedure Act (APA).[147] All of this litigation passed through the courtroom of U.S. District Court Judge Tanya Chutkan, to whom the *Roane* litigation had been reassigned in 2016.[148] Judge Chutkan, who was to become a major figure in the Trump Executions, thereafter ordered all the

142. *See* Kovarsky, *supra* note 74, at 1174–76 ("[M]odern capital punishment has effectively decoupled the death sentence from the execution.").

143. *See id.* at 1177–78 (detailing the process necessary to set an execution date).

144. Federal Death Penalty Act of 1994, Pub. L. No. 103-322, 108 Stat. 1959 (codified as amended at 18 U.S.C. §§ 3591–3599).

145. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399i).

146. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971).

147. Administrative Procedure Act, Pub. L. No 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 561–570a, 701–706).

148. Docket Notation, Roane v. Gonzales, No. 05-cv-02337 (D.D.C. Apr. 6, 2016).

lethal injection litigation touching on the federal executions and pending in the D.C. district court consolidated.[149]

1. The First Phase: The FDPA.—In November 2019, with fourteen months left in the Trump presidency, Judge Chutkan issued a preliminary injunction in what became known as the BOP Execution Protocol Cases, on the basis of the FDPA parity claim: that the BOP's protocol deviated from the "manner prescribed by the state of conviction."[150] The D.C. Circuit and the Supreme Court refused to vacate the preliminary relief pending appeal,[151] and so the executions initially scheduled for the First Five never took place. The Supreme Court order refusing to vacate the preliminary injunction, however, auspiciously admonished the D.C. Circuit: "We expect that the Court of Appeals will render its decision with appropriate dispatch."[152]

The early returns on FDPA litigation looked good for the death-sentenced prisoners, but the tide turned. The D.C. Circuit reversed on the merits in April 2020,[153] and the Supreme Court denied certiorari in June.[154] The D.C. Circuit's per curiam opinion lacked a consensus rationale.[155] The early litigation therefore produced no authoritative decision explaining why the federal executions complied with the FDPA.[156] The D.C. Circuit also rejected an APA claim that Judge Chutkan had not decided, and also did so without a precedential rationale.[157]

2. The Second Phase: The Eighth Amendment.—When the FDPA parity and APA challenges to the lethal injection sequence concluded, the BOP began resetting execution dates. A new announcement came on June 15, 2020.[158] On that day, the BOP scheduled the Lee execution for July 14, and

149. *See* Consolidation Order at 2, Roane v. Gonzales, No. 05-cv-02337 (D.D.C. Aug. 20, 2019), ECF No. 392 (consolidating four pending cases regarding lethal injection litigation).

150. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 2, 7–8 (D.D.C. Nov. 20, 2019), ECF No. 50.

151. *See supra* note 111.

152. Barr v. Roane, 140 S. Ct. 353, 353 (2019).

153. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 108 (D.C. Cir. 2020) (per curiam).

154. Bourgeois v. Barr, 141 S. Ct. 180, 180 (2020) (mem.).

155. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d at 113.

156. The death-sentenced prisoners pressed two FDPA claims on appeal. For the first claim, Judge Katsas would have held that the FDPA requires parity only as to "top-line choice among execution methods, such as the choice to use lethal injection instead of hanging or electrocution." *Id.* at 112. Judge Rao would have held that federal officials have to comply with all formally enacted state laws and regulations, but not procedures set forth in less formal state protocols. *Id.* For the second FDPA claim, Judge Katsas would have rejected it on the merits, and Judge Rao would have held that it was forfeited. *Id.*

157. *See id.* (describing conflicting views as to how to resolve the APA claim).

158. *See* Executions Scheduled for Four Federal Inmates Convicted of Murdering Children, *supra* note 115 (announcing execution schedule of four federal inmates).

the fight over the Eighth Amendment claims accelerated in the thirty-six hours before that deadline. On July 13, Judge Chutkan issued a second preliminary injunction against the executions of Daniel Lee, Wesley Purkey, Dustin Honken, and Keith Nelson, on the ground that the BOP's pentobarbital-only protocols likely violated the Eighth Amendment.[159] Judge Chutkan underscored that the claimants bore no responsibility for the last-minute quality of the litigation, as the BOP announced the executions and set an aggressive calendar while the claims were still pending in her court.[160]

Judge Chutkan's decision-making took place in the immediate wake of *Bucklew v. Precythe*,[161] a 2019 decision in which the Supreme Court liquidated substantial uncertainty about method-of-execution challenges that had lingered in the aftermath of *Baze v. Rees* and *Glossip v. Gross*.[162] In *Bucklew*, the Court held that an Eighth Amendment claimant had to allege some feasible and readily-implemented alternative execution method, and also had to show that the challenged method unnecessarily "superadd[ed]" pain relative to the alternative.[163] After *Bucklew*, several Justices issued opinions highly critical of the timing of lethal injection challenges, often accusing prisoners and their lawyers of strategically abusing legal process to secure delay.[164]

Judge Chutkan structured the Eighth Amendment inquiry around whether the plaintiffs had shown a "substantial risk of serious harm"[165]—that is, likelihood of "extreme pain and needless suffering during their executions"[166]—as well as whether they had shown the presence of known and available execution alternatives.[167] The prisoners adduced expert testimony showing that they would experience flash pulmonary edemas, which interfere with respiratory function and result in "extreme pain, terror and panic."[168] The BOP largely conceded the risk of flash pulmonary edemas but argued that the prisoners would be insensate when they occurred.[169] Judge

159. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 217, 222–23, 225 (D.D.C.), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

160. *Id.* at 214.

161. 139 S. Ct. 1112 (2019).

162. 576 U.S. 863 (2015).

163. *Bucklew*, 139 S. Ct. at 1119, 1125.

164. *See, e.g.*, Murphy v. Collier, 139 S. Ct. 1475, 1478 (2019) (Alito, J., dissenting) ("[I]nexcusably late stay applications present a recurring and important problem . . . .").

165. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 217 (D.D.C.), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

166. *Id.* at 218.

167. *See id.* at 217, 219 (requiring plaintiffs to "identify an alternative method of execution that will significantly reduce the risk of serious pain and that is feasible and readily implemented").

168. *Id.* at 218.

169. *Id.* at 219.

Chutkan ultimately credited the prisoners' allegations and enjoined the executions.[170]

With respect to the readily-implemented-alternative requirement, the plaintiffs asked for essentially the same protocol, but with additional procedural safeguards—including peripheral IV lines, bedside administration, and implementing procedures responsive to unexpected toxicological events.[171] They also asked for pre-pentobarbital doses of opioids, such as morphine or fentanyl, to lessen pain.[172] Finally, they proposed, as a readily implemented alternative method of execution, a firing squad.[173] The BOP argued that the Supreme Court had already held that the availability of safeguards like the ones proposed by the plaintiffs did not satisfy the readily-implemented-alternative requirement, and Judge Chutkan agreed.[174] But she disagreed with the BOP on the two other readily-implemented-alternative positions, holding that the plaintiffs had satisfied the requirement by proffering the availability of opioids and a firing squad.[175] The BOP sought a stay pending appeal, which is an extraordinary remedy.[176] The D.C. Circuit voted three-to-zero to deny the BOP's request but set an expedited eleven-day briefing schedule.[177]

The next thirty-six hours revealed just how frustrated the Supreme Court had become with execution delays. It voted five-to-four to vacate the district court's preliminary injunction—thereby paving the way for the BOP to execute Lee.[178] The per curiam opinion in *Lee* called pentobarbital a "mainstay" of execution method,[179] noting that a pentobarbital-only protocol was used by five death penalty states, had been used to carry out over 100 executions "without incident," was frequently invoked by Eighth Amendment claimants as the less painful alternative to other contested execution methods, had been upheld as-applied in *Bucklew*, and had been sustained by "numerous Courts of Appeals."[180] The Court also seemed to say that the presence of expert disagreement—in this case, disagreement over

170. *Id.* at 219, 225.

171. *Id.* at 219–20.

172. *Id.* at 220.

173. *Id.* at 221.

174. *Id.* at 220.

175. *Id.* at 221–23.

176. Defendants' Motion to Stay Preliminary Injunction Pending Appeal at 1, *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145 (Nov. 21, 2019), ECF No. 53; *see* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 130 (2019) (noting that stays are only meant to be granted in extraordinary cases).

177. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5199 (D.C. Cir. July 13, 2020) (order).

178. Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam).

179. *Id.* at 2591.

180. *Id.*

whether the flash pulmonary edemas happened before the prisoner was dead or insensate—was enough to foreclose relief.[181]

Lee positioned its emergency relief as a straightforward application of *Bucklew*, but its discussion of the merits suggested new hurdles for lethal injection claimants—especially claimants challenging pentobarbital protocols. True, *Bucklew* had involved a pentobarbital protocol, but the question in the case centered on the constitutionality of that scheme *when nitrogen hypoxia was pleaded as an alternative method of execution*.[182] *Bucklew* held that nitrogen hypoxia was not feasible enough to satisfy the readily-implemented-alternative prong of lethal injection claims[183] and that the existing record did not demonstrate a sufficient difference in pain between the incumbent method (pentobarbital) and the alternative (nitrogen hypoxia).[184]

The four condemnees in *Lee*, however, had proffered as an alternative not just some wholly separate execution procedure—although they had done that, too—but the administration of pentobarbital *following the admission of an opioid*.[185] In what seemed to be an attempt to disconnect the status of pentobarbital-only executions from the availability of alternatives, *Lee* simply made no mention of the alternatives. Therefore, it failed to stay in the lane defined by *Bucklew*, which would have required it to assess whether the opioid precursor was feasible and, if so, whether it sufficiently reduced pain. Instead, the Court appeared to ground its vacatur in the idea that pentobarbital-only executions were always consistent with the Eighth Amendment.

Lee also set forth what future state litigants will surely position as a rule of evidence for the challenges. The Supreme Court appeared to hold that, for lethal injection challenges raised in an end-stage posture, stays are inappropriate when there is "competing expert testimony."[186] If taken seriously, such a rule would essentially foreclose relief based on the Eighth Amendment. The Court styled the rule as applicable only when there is a

181. *See id.* (noting the presence of competing expert testimony and subsequently holding that the plaintiffs have not made "the showing required to justify last-minute intervention").

182. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1129 (2019) (holding that appellant's proposed alternative to the State's pentobarbital lethal-injection protocol—nitrogen hypoxia—was inadequate because it failed to present a triable question as to its viability).

183. *See id.* at 1129–30 (stating that appellant's proposed alternative failed the feasible-alternative test for two reasons: it could not be readily implemented, and "the State had a 'legitimate' reason for declining to switch from its current method of execution as a matter of law").

184. *Id.* at 1130–33.

185. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 220 (D.D.C.) ("Plaintiffs have demonstrated that a pre-dose of certain opioid pain medication drugs, such as morphine or fentanyl, will significantly reduce the risk of severe pain during the execution."), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

186. *Lee*, 140 S. Ct. at 2591.

request for "last-minute" intervention,[187] but virtually all method-of-execution litigation takes place at the last minute.[188] After all, claimants cannot know what method a jurisdiction will use to execute them until their execution is announced.[189]

3. The Third Phase: The FDCA and CSA.—The treatment of the Eighth Amendment claims in *Lee* was the first data point in a pattern. Wesley Purkey was scheduled for execution two days after Lee.[190] The morning after the BOP put Lee to death (July 15, 2020), Judge Chutkan issued a third preliminary injunction against the next several executions.[191] She refused to stay the executions under the APA, the CSA, and a constitutional right to counsel.[192] She did, however, preliminarily enjoin the executions on the ground that the new protocols were likely to violate FDCA, which (she held) requires that executions use prescribed pentobarbital.[193]

When the Government sought to stay the preliminary injunction pending appeal, the D.C. Circuit once again refused to award the extraordinary relief.[194] It also ordered briefing on a highly condensed schedule, as it had done in *Lee*.[195] When the case reached the Supreme Court, the Solicitor General understood which way the wind was blowing—boldly requesting that the Supreme Court bar Judge Chutkan from entering any further injunctions without the Court's preclearance.[196] The Court did not go that far, but again awarded emergency relief to the government.[197] This time the order vacating the preliminary injunction was unreasoned.[198] The BOP executed Purkey on July 16, just after the order.

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187. *Id.*

188. *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1368 (2020) (explaining that "[m]ost method-of-execution challenges simply cannot be raised before an execution date is set, because until that time a prisoner does not know the applicable execution protocol or the administrative procedure for selecting it").

189. *See id.* at 1365 (explaining that "a prisoner cannot know a jurisdiction's intended execution method until she knows what law prescribes at the moment that the jurisdiction schedules it").

190. Executions Scheduled for Four Federal Inmates Convicted of Murdering Children, *supra* note 115.

191. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 474 F. Supp. 3d 171, 185 (D.D.C.), *vacated sub nom.* Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.).

192. *Id.* at 180–83.

193. *Id.* at 181–82.

194. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5206, at 1 (D.C. Cir. July 15, 2020) (order).

195. *See id.* at 4 (setting a briefing schedule to be finished within one month of the order's issuance).

196. *See* Application for a Stay or Vacatur of the Injunction Issued by the U.S. Dist. Ct. for the D.C. at 8, Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.).

197. *See* Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.) (vacating the district court's July 2020 order granting a preliminary injunction).

198. *Id.*

The Supreme Court's message to the lower federal courts was becoming clearer, even as the fight spilled into Dustin Honken's end-stage litigation. Honken was scheduled for execution on July 17, 2020—the day after the BOP had executed Purkey. Recall that, in the order granting the third preliminary injunction (in Purkey's case), Judge Chutkan had refused to order relief based on the APA, the CSA, and a right-to-counsel theory.[199] On July 16, Judge Chutkan refused to stay the execution so as to allow Honken to appeal her order denying relief on the non-FDCA challenges.[200] The D.C. Circuit followed suit the next day.[201] This time, there was no need for Supreme Court intervention.

4. The Follow-Through.—The frenzy of lethal injection adjudication that took place between July 13 and July 17 of 2020 set a tone for subsequent end-stage litigation. In Lezmond Mitchell's case (August 26), the Ninth Circuit turned back an FDPA parity claim.[202] Just before Keith Nelson's execution (August 28), the D.C. Circuit vacated a stay that had been granted on the basis of an FDCA claim.[203] Federal courts thereafter refused to stay executions on the basis of lethal injection challenges every time the federal prisoners made them—for William LeCroy (September 22),[204] Orlando Hall

199. *See supra* notes 192–195 and accompanying text.

200. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145 (D.D.C. July 16, 2020), ECF No. 166 (order).

201. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5206 (D.C. Cir. July 17, 2020) (order) (denying Honken's stay of execution because he failed to make "a strong showing" that he is "likely to succeed on the merits" on his claim under the APA).

202. United States v. Mitchell, 971 F.3d 993, 994–95 (9th Cir. 2020).

203. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5260 (D.C. Cir. Aug. 27, 2020) (order) (vacating permanent injunction because there were "insufficient findings and conclusions that irreparable injury [would] result from the statutory violation found by the district court"). The D.C. Circuit also denied a stay pending appeal. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5252 (D.C. Cir. Aug. 25, 2020) (order).

204. LeCroy's challenges were rejected by both Judge Chutkan and the D.C. Circuit. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 1 (D.D.C. Sept. 20, 2020), ECF No. 263 (denying motion for preliminary injunction); *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5285 (D.C. Cir. Sept. 21, 2020) (order) (denying motion for stay pending appeal).

(November 19),[205] Brandon Bernard (December 10),[206] Corey Johnson (January 14, 2021),[207] and Dustin Higgs (January 16).[208]

Not all of these end-stage scenarios were straightforward, as evident in the litigation over the Hall execution. There, Judge Chutkan had actually taken the Supreme Court's hint, but the D.C. Circuit overturned her holding that *Lee* foreclosed Eighth Amendment challenges to pentobarbital.[209] *Lee*, the D.C. Circuit emphasized, simply denied a preliminary injunction against a pending execution and did not decide the merits.[210] The appeals court also held that the non-prescribed use of pentobarbital plainly violated the FDCA.[211] When the case returned to Judge Chutkan, she enjoined Hall's execution, citing the FDCA violation and the D.C. Circuit's insistence that the complaint plausibly alleged harm amounting to torture.[212] Before the D.C. Circuit could review Judge Chutkan's injunction, an unreasoned Supreme Court order vacated it.[213] The BOP executed Hall shortly before midnight that evening.[214]

The lethal injection litigation continued, in slightly altered form, until the very end of the Trump Execution window. As the execution dates for Dustin Higgs and Corey Johnson approached, they contracted COVID-19.[215] They alleged that, before they lost consciousness, flash pulmonary edemas would cause them to experience the executions as drownings.[216] Judge Chutkan issued a limited injunction sufficient for Higgs and Johnson to

205. I discuss the end-stage litigation around the Hall execution in more detail below. *See infra* notes 209–214 and accompanying text.

206. Bernard asked the Supreme Court to stay his execution on largely the same grounds asserted by Hall, which are discussed in *infra* notes 209–214 and accompanying text, and the Supreme Court refused to stay the execution on the basis of lower court findings that the executions violated the FDCA. *See* Hall v. Barr, 141 S. Ct. 869 (2020) (mem.) (denying Hall's application for a stay of execution).

207. I discuss the end-stage Eighth Amendment litigation over the Johnson execution in notes 215–219, *infra*, and accompanying text.

208. I discuss the end-stage Eighth Amendment litigation over the Higgs execution in notes 215–219, *infra*, and accompanying text.

209. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 980 F.3d 123, 126 (D.C. Cir. 2020).

210. *Id.* at 134.

211. *Id.* at 136.

212. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 10 (D.D.C. Nov. 19, 2020), ECF No. 322.

213. Barr v. Hall, 141 S. Ct. 869 (2020) (mem.). Three Justices would have denied the application, but offered no reasons. *Id.*

214. Press Release, Off. of Pub. Affs., Dep't of Just., Orlando Cordia Hall Executed for 1994 Kidnapping and Murder of 16-Year-Old Girl (Nov. 19, 2020), https://www.justice.gov/opa/pr/orlando-cordia-hall-executed-1994-kidnapping-and-murder-16-year-old-girl [https://perma.cc/2XXF-NCKD].

215. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 1–2 (D.D.C. Jan. 12, 2021), ECF No. 394.

216. *Id.* at 2.

recover[217]— a stay that would have probably pushed the executions into the beginning of the Joe Biden Administration—but the D.C. Circuit vacated it.[218] (The Supreme Court refused, on a six-to-three vote, to reinstate Judge Chutkan's stay.[219])

By the conclusion of the Trump Executions, the Supreme Court established that it would intervene aggressively against method-of-execution claims, using procedural vehicles ordinarily reserved for emergencies.[220] Because the emergency intervention was so often unreasoned, however, the Court's collected work product reads more as a primal scream than as meaningful judicial guidance. Nor did substantial clarity emerge from the decision-making of the D.C. Circuit. It concluded *without majority reasoning* that FDPA and APA permitted the 2019 BOP protocol and addendum.[221] It held that unprescribed use of pentobarbital violated the FDCA but not the CSA,[222] although the Supreme Court ordered a stay on FDCA grounds vacated.[223] And the D.C. Circuit determined (notwithstanding *Lee*) that an Eighth Amendment objection to the pentobarbital-only protocol could survive a pleading-sufficiency challenge.[224] The Trump Execution litigation therefore seems to have established very little about the lethal injection protocol other than the Supreme Court's contempt for method-of-execution challenges.

B. Other FDPA Parity Litigation

In addition to litigation contesting the pentobarbital-only injection sequence, there were two *other* sources of parity challenges under the FDPA. First, federal courts had to decide straightforward FDPA parity claims involving elements *other than* the use of pentobarbital in executions. Second, the judiciary had to interpret the FDPA requirement that, in the event the sentencing court sat in an abolitionist state, it must designate a practicing jurisdiction for parity purposes.

1. Other Parity Litigation.—Recall the FDPA provision at issue in the lethal injection parity litigation: "[The U.S. marshal] shall supervise implementation of the sentence in the manner prescribed by the law of the

217. *Id.* at 3.

218. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 21-5004, 2021 WL 164918, at *1 (D.C. Cir. Jan. 13, 2021) (order).

219. Johnson v. Rosen, 141 S. Ct. 1233 (2021) (mem.).

220. I discuss the Court's shadow-docket activity in subpart III(A), *infra*.

221. *See supra* section II(A)(1).

222. *See supra* section II(A)(3).

223. *See supra* note 213 and accompanying text.

224. *See supra* section II(A)(2).

State in which the sentence is imposed."[225] The provision requires federal–state parity not just for lethal injection protocols but for "implementation of the sentence." Several other prisoners made parity claims other than those centered on the lethal injection sequence. Christopher Vialva made one such argument—that the BOP violated the parity provision by failing to observe the date-setting and notice requirements specified by Texas law.[226] The district court refused to enjoin the proceeding,[227] and the Fifth Circuit affirmed, declaring that the statutory reference to the "implementation of the sentence" did not "extend to pre-execution date-setting and warrants."[228]

In *Vialva*,[229] the Fifth Circuit was not writing on a blank slate. In one of the early FDPA parity opinions out of the D.C. Circuit, the appeals court used language suggesting that the parity provision might be applied only to procedures that are auxiliary to the moment of execution itself.[230] A decision out of the Ninth Circuit in the Lezmond Mitchell case held, in response to an argument that BOP protocols were inconsistent with elements of Arizona execution procedure, that "procedures that do not effectuate death fall outside the scope of" § 3596(a).[231] In the run-up to the Daniel Lee execution, the Seventh Circuit rejected the argument that the federal–state parity rule covered the treatment of execution witnesses.[232]

Vialva apparently failed to settle the question entirely, however. Brandon Bernard and Alfred Bourgeois made similar arguments to the D.C. district court—specifically, that the FDPA parity provision required that they receive at least ninety days of notice before execution, as Texas law requires.[233] Judge Chutkan disagreed with the Fifth Circuit, reading the statute to cover "details such as the time, date, place and method of execution."[234] She nonetheless refused to stay the execution, having

225. 18 U.S.C. § 3596(a).

226. United States v. Vialva, No. w-99-cr-070(1), at 1, 8 (W.D. Tex. Sept. 11, 2020), ECF No. 690 (order on motion for injunctive relief).

227. *Id.* at 9.

228. United States v. Vialva, 976 F.3d 458, 462 (5th Cir. 2020).

229. United States v. Vialva, 976 F.3d 458 (5th Cir. 2020).

230. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 112 (D.C. Cir. 2020) (noting Judge Rao's concurring view that the FDPA requires the federal government to follow "execution procedures set forth in state statutes and regulations" but not "less formal state execution protocols"); *id.* at 130–31 (Rao, J., concurring) (noting that federal and state courts have interpreted the word "manner" within statutes and judicial opinions broadly beyond just the method of execution). *But see id.* at 133 (suggesting "implementation" includes procedures and safeguards surrounding executions).

231. United States v. Mitchell, 971 F.3d 993, 996 (9th Cir. 2020).

232. Peterson v. Barr, 965 F.3d 549, 551, 554 (7th Cir. 2020).

233. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 1 (D.D.C. Dec. 6, 2020), ECF No. 345.

234. *Id.* at 12 (quoting *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d at 134 (Rao, J. concurring)).

discerned the Supreme Court's pronounced hostility to stays—even in cases where the executions were unlawful.[235] (The D.C. Circuit denied a stay pending appeal thereafter.[236]) Lisa Montgomery, however, *did obtain* a stay on the notice-parity argument from an en banc panel of the D.C. Circuit,[237] which ordered a briefing schedule that would have taken the litigation past the Biden Inauguration.[238] To the surprise of few who had been following the litigation closely, the Supreme Court voted, six to three, to vacate the D.C. Circuit's stay—in an unreasoned order.[239]

2. The Designation Power.—Section 3596(a) of Title 18 contemplates that a federal court sitting in an abolitionist state might impose death and provides a mechanism for the sentencing court to designate a practicing state for parity purposes: "[T]the court shall designate another State, . . . and the sentence shall be implemented in the latter State in the manner prescribed by such law."[240] The designation mechanism produced what might have been the period's most shocking moment, which was during the end-stage litigation of Dustin Higgs.

Higgs received a federal death sentence from a Maryland district court in 2001. The sentencing court made no designation at sentencing because, in 2001, Maryland was a capital punishment state. In 2013, however, the state legislature abolished the death penalty.[241] The federal government conceded that the district court lacked authority to amend its original judgment but asked the court either to designate a practicing state as a "supplement" to its judgment or to make a designation without any reference to the judgment whatsoever.[242] The district court refused, concluding that such an order would be ultra vires.[243]

235. *See id.* at 1, 14 (noting the Supreme Court's pattern of vacating prior injunctions and the D.C. Circuit's finding that plaintiffs failed to demonstrate injunctive relief despite violations of federal law).

236. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5361 (D.C. Cir. Dec. 10, 2020) (per curiam) (order).

237. Montgomery v. Rosen, No. 21-5001, 2021 WL 112524, at *1 (D.C. Cir. Jan. 11, 2021) (per curiam) (order), *vacated*, 141 S. Ct. 1232 (2021) (mem.).

238. *See id.* (setting briefing dates after President Biden's inauguration on January 20, 2021).

239. Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.).

240. 18 U.S.C. § 3596(a).

241. Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013, 3:42 PM), https://www.reuters.com/article/us-usa-maryland-deathpenalty/maryland-becomes-latest-u-s-state-to-abolish-death-penalty-idUSBRE9410TQ20130502 [https://perma.cc/X4DD-SH5D].

242. *See* United States v. Higgs, No. 98-cr-00520, at 6, 9 (D. Md. Dec. 29, 2020), ECF No. 657 (describing the Government's request to supplement or clarify the original judgment or, alternatively, provide a new order that would not contradict the court's original order).

243. *Id.* at 12.

The federal government, however, had not waited for the district court to rule on the motion and had put Higgs on the BOP's execution calendar while the motion was pending.[244] The Fourth Circuit stayed the execution to permit the Government to appeal,[245] but the Supreme Court was having none of it. In an unprecedented maneuver, it granted a petition for certiorari before lower-court judgment, reversed the federal district court without providing reasoning, and remanded the case for the lower courts to designate Indiana (the site of Terre Haute-USP).[246] The Supreme Court's decision to bypass the Fourth Circuit and issue a merits ruling in such a posture—without plenary review—appears to be without precedent.[247]

* * *

As with the lethal injection litigation, the FDPA parity litigation clarified very little. Questions about whether the provision required federal–state alignment in date-setting and notice remained unsettled across the federal circuits.[248] In the only case that might have been a decisional vehicle for a major issue—*Higgs*[249]—the Supreme Court required the federal district court to designate a practicing state for parity purposes but specified no ground.[250]

C. Savings Clause Litigation

The Trump Executions also surfaced crucial statutory and constitutional questions about the appropriate vehicles for post-conviction litigation. Much of the end-stage litigation I have discussed thus far—including the lethal injection and parity litigation—took place under federal law permitting parties to seek injunctions against unconstitutional action contemplated by

244. Executions Scheduled for Inmates Convicted of Brutal Murders Many Years Ago, *supra* note 121.

245. *See* United States v. Higgs, No. 20-18 (4th Cir. Jan. 13, 2021) (per curiam) (order) ("For reasons appearing to the court, the court grants a stay of execution pending further order of the court.").

246. *See* United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.). Justices Breyer, Sotomayor, and Kagan would have dissented. *See id.* at 645, 647 (documenting dissenting votes).

247. *Case Selection and Review at the Supreme Court*: *Hearing Before the Presidential Comm'n on the Sup. Ct. of the U.S.* 9, 16 (June 30, 2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. Tex. Sch. L.), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf [https://perma.cc/Q7SH-G2X5].

248. *See supra* section II(B)(1).

249. United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.).

250. *See supra* section II(B)(2).

federal officials.[251] The more typical post-conviction vehicle for federal prisoners, however, is 28 U.S.C. § 2255. Congress passed § 2255, which permits post-conviction litigation to proceed in the place of conviction,[252] as an alternative to habeas corpus litigation, which generally proceeds in the place of confinement.[253]

But there is a catch. Section 2255 includes a savings clause permitting a federal prisoner to file a habeas petition under 28 U.S.C. § 2241 if the § 2255 "motion is inadequate or ineffective to test the legality of his detention."[254] The applicability of the savings clause matters a great deal to end-stage litigants because § 2241 escapes the limitations in § 2255—a statute of limitations,[255] prohibitions on successive litigation,[256] and so forth. And because the applicability of the savings clause is so important, end-stage litigants have invited the federal courts to define adequacy and effectiveness in ways that permit less restricted federal post-conviction litigation.[257] The judiciary has generally declined the invitation, which would permit habeas litigation whenever § 2255 bars a remedy.[258] Instead, courts have typically activated the savings clause only when there exists some more systemic barrier to § 2255 relief.[259]

The end-stage litigation over the Trump Executions tested the savings clause. If the savings clause activates § 2241, then among the federal courts with power to hear the post-conviction litigation are the courts with territorial power over Terre Haute-USP. As a result, the Southern District of Indiana and the Seventh Circuit were especially significant sources of law about the line separating §§ 2255 and 2241. And because some jurisdictions were friendlier than others—the Fifth Circuit is a notoriously inhospitable forum for post-conviction litigants—the forum-shopping effects were potentially enormous.

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251. *Cf.* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 948 (2019) (observing that it has been "widely accepted that a party suffering from or threatened with a constitutional violation by federal officials had a federal cause of action for injunctive relief").

252. *See* 28 U.S.C. § 2255(a) (allowing prisoners in custody to move the sentencing court to "vacate, set aside or correct the sentence").

253. *See* 28 U.S.C. § 2241(a) (stating that orders pertaining to writs of habeas corpus "shall be entered in the records of the district court of the district wherein the restraint complained of is had").

254. 28 U.S.C. § 2255(e).

255. 28 U.S.C. § 2255(f).

256. *See* 28 U.S.C. § 2255(h) (requiring a subsequent motion under § 2255 to contain either new evidence or a new constitutional rule).

257. *See, e.g.*, *infra* notes 260–261 and accompanying text (describing Wesley Purkey's argument along such lines).

258. *See* McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1084–85 (11th Cir. 2017) (collecting precedent).

259. *See id.* (allowing savings-clause litigation in cases of legal errors, actual innocence, constitutional claims, and procedural obstructions to bringing the claim).

The end-stage litigation around Wesley Purkey's execution is an accessible example and set the early course. Purkey alleged that his prior § 2255 counsel was inadequate, procedurally defaulting claims for which § 2255 thereafter foreclosed relief.[260] Purkey argued that the § 2255 restrictions made the remedy inadequate within the meaning of the savings clause.[261] The Seventh Circuit rejected that argument, drawing largely on its own precedent for the proposition that, in order to show that § 2255 is "inadequate or ineffective," a prisoner must show more than just a lack of success.[262] It emphasized that all the restrictions on § 2255 relief applied unless there was something "*structurally* inadequate or ineffective" about the § 2255 vehicle.[263] That § 2255 would foreclose relief for forfeited ineffective assistance of counsel claims was not such a structural defect.[264] (The Supreme Court denied the subsequent stay application and certiorari petition.[265])

The Seventh Circuit continued to deploy the concept of "structural" deficiency in the end-state litigation around the Alfred Bourgeois execution. Bourgeois claimed that he was intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia*.[266] He had raised and lost his *Atkins* claim in a first § 2255 motion and then made a losing request that the Fifth Circuit authorize relitigation based on new Supreme Court precedent.[267] A month after the BOP set his execution date, Bourgeois filed a § 2241 petition in the Southern District of Indiana,[268] invoking the savings clause.[269] The Seventh Circuit eventually held that "savings-clause relief" was unavailable because the § 2255 restrictions on successive *Atkins* litigation were not qualifying "structural defects."[270]

By the end of the Trump Executions, the Seventh Circuit had entertained § 2241 petitions from at least seven of the thirteen death-sentenced prisoners. In addition to those of Purkey and Bourgeois, they heard savings-clause

260. Purkey v. United States, 964 F.3d 603, 608–09, 614 (7th Cir. 2020).

261. *Id.* at 608, 614.

262. *Id.* at 615.

263. *Id.* at 617 (emphasis added).

264. *See id.* at 615 (suggesting that if the court did determine that foreclosing relief for a forfeited assistance of counsel claim was a structural defect, then Purkey could be entitled to an endless string of § 2255 motions based on any newly discovered examples of ineffective assistance of counsel).

265. Purkey v. United States, 141 S. Ct. 196, 196 (2020) (mem.).

266. 536 U.S. 304 (2002); *In re* Bourgeois, 902 F.3d 446, 447 (5th Cir. 2018).

267. *In re* Bourgeois, 902 F.3d at 447.

268. Bourgeois v. Watson, 977 F.3d 620, 627 (7th Cir. 2020).

269. *Id.*

270. *Id.* at 638.

arguments from Dustin Higgs (twice),[271] Lisa Montgomery,[272] Orlando Hall (twice),[273] Christopher Vialva,[274] and Daniel Lee.[275] In every case except for Montgomery's—in which the Seventh Circuit reached an execution competency claim on the merits[276]—the appeals court refused to find § 2255 structurally inadequate or ineffective.[277] Most significantly, the federal judiciary would not allow prisoners to activate the savings clause when some prior § 2255 counsel deficiently forfeited arguments.[278]

Unlike the other categories I have discussed in Part II, the Supreme Court did not intervene in the savings-clause litigation. It did not need to; the Seventh Circuit had rejected all claims made in that posture. Unlike the other Part II categories, the circuit law on savings-clause interpretation remained reasonably clear. And clarity on Seventh Circuit law is particularly important for federal death penalty litigation, because the site of federal confinement—death row—is in that jurisdiction.

D. COVID-19 Litigation

The BOP executed the thirteen federal prisoners in the middle of a lethal, once-in-a-century pandemic. The public and prisoners alike were subject to innumerable health-and-safety restrictions designed to mitigate viral transmission. AG Barr first announced the resumption of executions in July 2019—about a half-year before the pandemic got a foothold in the United States. The 2019 order staying the executions of the First Five,[279] however, pushed the executions into the middle of the pandemic surge

271. *See* Higgs v. Watson, 841 F. App'x 995, 996 (7th Cir. 2021) (relying on a *Brady* claim); Higgs v. Watson, 984 F.3d 1235, 1236–37 (7th Cir. 2021) (relying on an unconstitutional provision of the Armed Career Criminal Act (ACCA)).

272. *See* Montgomery v. Watson, 833 F. App'x 438, 439 (7th Cir. 2021) (relying on a *Ford* claim).

273. *See* Hall v. Watson, 829 F. App'x 721, 721 (7th Cir. 2020) (relying on a *Batson* claim); Hall v. Watson, 829 F. App'x 719, 720 (7th Cir. 2020) (basing his claim on an unconstitutional provision of the ACCA).

274. *See* Vialva v. Watson, 975 F.3d 664, 665 (7th Cir. 2020) (relying on multiple claims).

275. *See* Lee v. Watson, 964 F.3d 663, 667 (7th Cir. 2020) (relying on an ineffective assistance of counsel claim and a *Brady* claim).

276. Montgomery, 833 F. App'x at 439–40.

277. *See, e.g.*, Higgs v. Watson, 984 F.3d 1235, 1236 (7th. Cir 2021) (stating principle); Higgs v. Watson, 841 F. App'x 995, 998 (7th Cir. 2021) (same); *Hall*, 829 F. App'x at 721 (same); Bourgeois v. Watson, 977 F.3d 620, 636 (7th Cir. 2020) (same); Purkey v. United States, 964 F.3d 603, 617 (7th Cir. 2020) (same); *Vialva*, 975 F.3d at 665 (same); *Lee*, 964 F.3d at 667 (same).

278. *See supra* notes 262–265 and accompanying text.

279. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 2 (D.D.C. Nov. 20, 2019), ECF No. 50.

experienced during the second half of 2020.[280] Federal judges nonetheless established, quickly, that they would not allow the novel coronavirus to derail the executions.

The judiciary's refusal to allow a COVID-19 disruption was evident from the July 2020 executions: Daniel Lee (July 14), Wesley Purkey (July 16), and Dustin Honken (July 17). The judiciary refused COVID-based stays from every conceivable angle. Lee asked a district court to reset the execution date on the grounds that COVID-19 interfered with his statutory right to counsel—and the district court denied it.[281] The family of Lee's victims sought to delay his execution, asking that they not be forced to incur COVID-19 risk in order to attend.[282] The district court granted the stay, but the Seventh Circuit vacated it.[283] Spiritual advisors to Honken and Purkey sought stays on the theory that the decision to move forward with the executions during the pandemic interfered with rights to religious association,[284] which the district court denied.[285] (There was no appeal.)

After the trio of July 2020 executions, the COVID-19 litigation shifted emphasis. The American Civil Liberties Union (ACLU) sued under the Freedom of Information Act, seeking an order requiring the BOP to release records about the incidence of COVID-19 at FCC Terre Haute.[286] In early September, the district court granted a partial preliminary injunction requiring the BOP to produce testing and contact tracing data, running from July 1, involving FCC Terre Haute prisoners.[287] After the BOP produced responsive material, the ACLU claimed that the data showed a massive COVID-19 outbreak at the facility, that the BOP was insufficiently testing and contact tracing, and that the executions accelerated viral transmission.[288]

280. *See* Press Release, Off. of Pub. Affs., Dep't of Just., Statement by Attorney General William P. Barr on the Execution of Daniel Lewis Lee (July 14, 2020), https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-execution-daniel-lewis-lee [https://perma.cc/6BC6-2NY6] (announcing Lee's execution on July 14, 2020).

281. United States v. Lee, No. 97-cr-00243, 2020 WL 3921174, at *5 (E.D. Ark. July 10, 2020).

282. Peterson v. Barr, 965 F.3d 549, 551 (7th Cir. 2020).

283. *Id.* at 551, 554.

284. Hartkemeyer v. Barr, No. 20-cv-00336, at 1 (S.D. Ind. July 14, 2020), ECF No. 84 (order denying motion for preliminary injunction).

285. *Id.* at 6.

286. Complaint for Injunctive & Declaratory Relief at 1, 3, ACLU v. Fed. Bureau of Prisons, No. 20-cv-02320 (D.D.C. Aug. 21, 2020).

287. ACLU v. Fed. Bureau of Prisons, No. 20-cv-02320, at 1 (D.D.C. Sept. 4, 2020) (order).

288. Press Release, ACLU, BOP Data Show Federal Executions Likely Caused COVID-19 Spike (Sept. 21, 2020), https://www.aclu.org/press-releases/bop-data-show-federal-executions-likely-caused-covid-19-spike [https://perma.cc/7CSR-63FM]. I have been unable to confirm the ACLU claim with publicly available data, but the claim that there was a substantial outbreak and insufficient testing was not vigorously disputed, and the findings in the litigation discussed below are consistent with such events. *See infra* notes 294–295 and accompanying text.

The next cluster of COVID-19 litigation, initiated after Trump lost the November 2020 election, centered around the pandemic threat to the community affected by the executions.[289] Noncapital prisoners housed at FCC Terre Haute filed class action litigation to enjoin the executions on the ground that each execution was a super-spreader event.[290] Indeed, each federal execution brought nearly one hundred out-of-town BOP employees to FCC Terre Haute and required that they work closely with the some one hundred local BOP staff.[291] The one hundred out-of-town personnel included a forty-member "execution team," which had to be in a small, close-quartered "death house" with up to twenty-four witnesses and the condemned prisoner.[292] Media and demonstrators descended on Terre Haute for each execution *en masse* and were funneled through various choke points requiring them to be in close contact with one another.[293] Approximately a week after Orlando Hall's execution, which took place on November 19, 2020, Hall's spiritual advisor and six members of the execution team tested positive for COVID-19.[294] The available evidence showed that the BOP was not following guidelines about, among other things, contact tracing.[295]

The plaintiffs asked for the judiciary to hit pause on the executions throughout December 2020 and January 2021,[296] but everyone understood that the executions would be unlikely to resume after the Biden Administration took over at the end of January. The district court denied the initial motion for a preliminary injunction largely because the noncapital prisoners had shown insufficient linkage between the execution-created COVID-19 risk and their own personal health.[297] Once more data became available, however, the noncapital prisoners made a second motion for a preliminary injunction.[298] On that second motion, the district court granted

289. I discuss the November and December 2020 executions here. William LeCroy, who was executed on September 22, did unsuccessfully seek to delay his execution on the theory that COVID-19 interfered with his statutory right to counsel under 18 U.S.C. § 3599. LeCroy v. United States, 975 F.3d 1192, 1197–98 (11th Cir. 2020).

290. *See* Class Action Complaint for Declaratory & Injunctive Relief at 1, 3, Smith v. Barr, No. 20-cv-00630 (S.D. Ind. Nov. 25, 2020) ("The upcoming execution events are putting the individually named Plaintiffs and all other incarcerated people at FCC Terre Haute at significant risk of serious illness or even death, for no good reason.").

291. *Id.* at 12.

292. *Id.* at 13.

293. *Id.*

294. Smith v. Barr, No. 20-cv-00630, 2020 WL 7239527, at *5 (S.D. Ind. Dec. 8, 2020) (order denying motion for preliminary injunction).

295. *Id.*

296. *Id.* at *1.

297. *Id.* at *7.

298. Smith v. Barr, 512 F. Supp. 3d. 887, 889 (S.D. Ind. Jan. 7, 2021) (order granting in part and denying in part plaintiffs' second motion for preliminary injunction).

narrow relief, barring the BOP from executing prisoners unless it complied with specified safety practices.[299]

Among the Terre Haute prisoners who contracted COVID-19 in late 2020 were Dustin Higgs and Corey Johnson, who were the last two prisoners the BOP had scheduled for execution before President Trump left office.[300] As recounted above, Higgs and Johnson fought for stays based on the ground that their COVID-19 made them especially vulnerable to flash pulmonary edemas, which would make them feel as though they were drowning.[301] And, as explained above, the D.C. Circuit vacated district court stays that had been entered on that basis.[302] By early January 2021, all inferior federal courts understood that the Supreme Court did not want medical concerns regarding pentobarbital to interfere with the execution timetable.

The resistance to COVID-based emergency relief was evident throughout the judicial hierarchy—not just in the behavior of Supreme Court Justices. One might neatly explain such resistance as part of the broader refusal to let medical risks to death-sentenced prisoners interfere with the Trump Executions, but the judiciary also ignored collateral health risks to *other people*. The executions indisputably posed super-spreader risk, and were staged in particularly vulnerable environments. The judiciary *still* believed that the balance of interests required those risks, and whatever third-party harm they entailed, to be incurred so that the executions could proceed as calendared.

* * *

Covering all the legal issues that the Trump Executions presented in this space-limited format is impossible, so I devote only abbreviated attention to claims sitting outside the above-specified categories. There are ultimately fewer clear inferences to be drawn from the litigation and decision-making around these other issues. First, there were end-stage claims common to any post-conviction litigation.[303] Second, there were end-stage claims that might

299. *Id.* at 901.

300. *Id.* at 890.

301. *See supra* notes 215–219 and accompanying text.

302. *See supra* notes 217–218 and accompanying text.

303. Almost all post-conviction claimants will include allegations, under *Strickland v. Washington*, 466 U.S. 668 (1984), that trial counsel was constitutionally ineffective. For examples during the Trump Executions, see Vialva v. Watson, 975 F.3d 664, 665 (7th Cir. 2020) (per curiam); Lee v. Watson, 964 F.3d 663, 665 (7th Cir. 2020); and Purkey v. United States, No. 19-cv-00414, 2019 WL 6170069, at *3 (S.D. Ind. Nov. 20, 2019) (order denying petition for a writ of habeas corpus). To a lesser extent, post-conviction petitions frequently include claims that the prosecution unconstitutionally suppressed defense-favorable information. These are claims most frequently associated with *Brady v. Maryland*, 373 U.S. 83 (1963). For examples during the Trump Executions, see Higgs v. Watson, 841 F. App'x 995, 996–97 (7th Cir. 2021) (order); Bernard v. Watson, No. 20-

be specific to the federal death penalty, but that were not common enough to warrant extended discussion.[304] Third, there was end-stage litigation common to any death penalty case, state or federal—including claims that prisoners were death-ineligible because they were intellectually disabled (under *Atkins v. Virginia*[305]) or were incompetent at the time of execution (under *Ford v. Wainwright*[306]). Unlike *Atkins* claims, *Ford* claims necessarily appear in end-

cv-00616, 2020 WL 7230886, at *6 (S.D. Ind. Dec. 8, 2020) (order denying motion to stay execution); Lee v. Warden USP Terre Haute, No. 19-cv-00468, 2020 WL 1317449, at *1 (S.D Ind. Mar. 20, 2020) (order denying petition for a writ of habeas corpus); and United States v. Lee, No. 97-cr-00243-02, 2020 WL 3618709, at *1 (E.D. Ark. July 2, 2020).

304. These challenges included unsuccessful arguments that stays were necessary to facilitate presidential clemency consideration (*Mitchell* and *Hall*), that the U.S. marshal was not involved enough to satisfy the statutory requirement that it "supervise implementation of the sentence" (*Hall*), that the BOP lacked authority to unilaterally set execution dates (*Lee*), and that provisions of the 2018 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, permitted a federal judge to revise a capital sentence downward (*Bernard* and *Johnson*). *See* Hall v. Barr, 830 F. App'x 8, 10–11 (D.C. Cir. 2020) (rejecting both appellant's clemency argument and appellant's U.S. marshal supervision argument); Mitchell v. Barr, No. 20-cv-02331, 2020 WL 5062952, at *2 (D.D.C. Aug. 27, 2020) (denying plaintiff's petition because his claim that twenty-eight days' notice of his execution "hindered the President's ability to review [his] clemency petition and thus . . . deprived him of due process" was unlikely to succeed on the merits); United States v. Lee, No. 97-cr-00243, 2020 WL 3921174, at *1, *5 (E.D. Ark. July 10, 2020) (asserting that the DOJ had the authority to implement plaintiff's death sentence); United States v. Bernard, No. W-99-cf-070(2), 2020 WL 7249139, at *2 (W.D. Tex. Dec. 9, 2020) (order on motion to modify sentence and motion for stay of execution) (finding, among other considerations, that the First Step Act's compassionate release statute concerned only prison sentences, not capital sentences); United States v. Johnson, No. 92-cr-00068, slip op. at 6, 14 (E.D. Va. Nov. 19, 2020), ECF No. 75 (finding that defendant's convictions "do not constitute covered offenses under the First Step Act").

305. 536 U.S. 304, 321 (2002). In addition to *Atkins*, there is a federal *statutory rule* against such sentences in federal cases. 18 U.S.C. § 3596(c). A district court stayed the execution scheduled for Alfred Bourgeois under the statute, but the Seventh Circuit vacated the stay on the grounds that Bourgeois would not qualify to litigate under the savings clause. Bourgeois v. Warden, No. 19-cv-00392, 2020 WL 1154575, at *1 (S.D. Ind. Mar. 10, 2020) (order staying execution of Alfred Bourgeois), *rev'd and remanded sub nom*. Bourgeois v. Watson, 977 F.3d 620, 639 (7th Cir. 2020). The Supreme Court refused a stay by a vote of seven to two. *See* Bourgeois v. Watson, 141 S. Ct. 507 (2020) (noting the dissent of Justices Sotomayor and Kagan). There was also unsuccessful end-stage *Atkins* litigation initiated just before Corey Johnson's execution, in which a panel judge expressed extreme frustration with the claim's delayed presentation. *See* United States v. Johnson, 838 F. App'x 765, 766–67 (4th Cir. 2021) (order) (opinion of Wilkinson, J.) (referring to the defendant's filings as "dilatory tactics," "betray[ing] a manipulative intention," and a form of "procedural gamesmanship").

306. 477 U.S. 399, 401 (1986). There was *Ford* litigation for both Wesley Purkey and Lisa Montgomery, both of whom courts would later accuse of gamesmanship. Judge Chutkan issued a *Ford*-based preliminary injunction in Purkey's case. *See* Purkey v. Barr, 474 F. Supp. 3d 1, 11, 12 (D.D.C. 2020) (order) (holding that the plaintiff "made the substantial threshold showing required by *Ford*"), *vacated*, 140 S. Ct. 2594 (2020). The Supreme Court ultimately vacated the stay without an opinion (at 2:45 AM), provoking a four-Justice dissent. Barr v. Purkey, 140 S. Ct. 2594, 2595, 2597. After the Court's order, Purkey tried unsuccessfully to obtain a stay by litigating the claim through the Southern District of Indiana. That court denied relief (3:35 AM), remarking that "counsel's procedural gamesmanship may have prevented a substantive review of Mr. Purkey's *Ford* claim as it should have been presented." Purkey v. Warden, No. 20-cv-00365, 2020 WL

stage postures because the legal issue turns on mental functioning at the time of execution[307]—a crucial point that underscores the harshness of developing presumptions against certain end-stage relief.[308]

The need to briefly describe a residual category highlights a more important observation. No summary can capture the scope and pace of end-stage litigation in a death penalty case—let alone the scope and pace of end-stage litigation around thirteen executions. The challenges notwithstanding, it is important to look *across* the Trump Executions to understand the few legal issues that the cases forced to resolution, as well as the many legal issues that remain shrouded in doubt. That exercise builds the foundation for the inferences that I draw in Part III.

III. Implications

In Part III, I sketch the major implications of the Trump Executions. Most of the disputes reached judicial resolution in skeletal or unreasoned dispositions on the Supreme Court's shadow docket, which refers to the body of sometimes-irregular orders and summary decisions that the Justices generate without plenary, time-consuming review.[309] The shadow-docket activity plainly discloses that the timing of the Trump-to-Biden presidential transition—what I call the "inaugural margin"—substantially affected the Court's decision-making. Setting aside the legitimacy of that extralegal consideration, the Court was correct to perceive a fleeting window of execution opportunity. The Trump Executions went forward by dint of political and bureaucratic outliers, the coincidence of which repeats very infrequently. And for precisely that reason, the more lasting effects of the

8879062, at *1 (S.D. Ind. July 16, 2020) (order denying motion for preliminary injunction). In Lisa Montgomery's case, the district court granted a stay pending a hearing on the issue. Montgomery v. Warden of USP Terre Haute, No. 21-cv-00020, at 1 (S.D. Ind. Jan. 11, 2021), ECF No. 17 (order granting motion to stay execution pending a competence hearing). However, the Seventh Circuit vacated it. Montgomery v. Watson, 833 F. App'x 438, 440 (7th Cir. 2021). The panel chastised Montgomery for "strategic" delay because her legal team waited until four days before the execution date to file the claim, but in the next breath faulted her for not having submitted newer mental health evaluations that would have caused further delay. *Id.* at 439–40. The Supreme Court denied Montgomery's request for a stay without comment, over a three-Justice dissent. *See* Montgomery v. Watson, 141 S. Ct. 1232 (2021) (mem.) (noting that Justice Breyer, Justice Sotomayor, and Justice Kagan would have granted the application).

307. *See* Panetti v. Quarterman, 551 U.S. 930, 947 (2007) (asserting that "claims of incompetency to be executed remain unripe at early stages of the proceedings"); Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998) (stating that because an execution "was not imminent . . . competency to be executed could not be determined at that time").

308. *See infra* section III(C)(1).

309. *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (coining the term and arguing that shadow-docket practice lacks transparency sufficient to evaluate fairness of decision-making, with particular attention to summary reversals); Vladeck, *supra* note 176, at 132–34 (documenting the rise of shadow-docket practice in the Trump Solicitor General's office).

Trump Executions will not be on the federal death penalty. Instead, the episode will most affect *other* laws and institutional practices—like state executions—similarly sensitive to the Court's willingness to dictate preliminary relief.

A. Emergency Relief and the Shadow Docket

There is end-stage litigation around virtually every execution because many claims remain unripe until the state sets a date,[310] and because the structure of appointed legal representation can delay claim development.[311] Some argue that end-stage litigation also happens because prisoners "sandbag" courts by deliberately withholding claims from prior rounds of litigation,[312] although there is no empirical evidence to support that claim and the incentives for such behavior are (grossly) overstated.[313] The important point, however, is that a flurry of litigation takes place right before an execution, which in turn generates requests for emergency relief designed to protect the interests of moving parties.

The thirteen subjects of the Trump Executions asked for various forms of emergency relief necessary to allow courts to adjudicate their legal challenges, and the Government asked for emergency orders whenever some lower court interfered with its preferred execution calendar.[314] The precise requirements for emergency relief varied somewhat by the form requested—whether preliminary injunction, stay pending appeal, or something else operating as a stay of execution—but each generally required some showing of merit, irreparable harm to the movant in the absence of relief, and lesser harm to the counter-party.[315]

End-stage postures place courts in a predicament. Judges must choose between, on the one hand, uncomfortably accelerated adjudication, and, on the other, a delay necessary to permit more orderly consideration. For most

310. Kovarsky, *supra* note 188, at 1364–65, 1368.

311. *Id.* at 1371–72.

312. *See, e.g.*, Henderson v. United States, 568 U.S. 266, 286 (2013) (Scalia, J., dissenting) ("The happy-happy thought that counsel will not 'deliberately forgo objection' is not a delusion that this Court has hitherto indulged, worrying as it has . . . about counsel's 'sandbagging the court' . . . ." (internal quotations omitted) (quoting Puckett v. United States, 556 U.S. 129, 134 (2009))); Engle v. Isaac, 456 U.S. 107, 129 n.34 (1982) ("[A] defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off.").

313. *See* Kovarsky, *supra* note 188, at 1341–56 (analyzing the incentives experienced by condemned prisoners and concluding that "the better return comes from immediate litigation because the decline in procedural viability swamps other effects").

314. *See supra* Part II for a discussion of the various requests for emergency relief in the doctrinal context.

315. *See* Nken v. Holder, 556 U.S. 418, 434 (2009) (noting standard for stays pending appeal); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (noting standard for preliminary injunctions); Hill v. McDonough, 547 U.S. 573, 584 (2006) (noting standard for stay of execution).

end-stage litigation over the last twenty years—almost all of which grew out of state executions—federal courts simply decided claims on the merits on the abbreviated schedule. To the extent appellate courts denied emergency relief to end-stage prisoner litigants, the relief was almost always denied at the same time that the appellate courts decided the merits.[316]

When it came to the Trump Executions, the Supreme Court broke with established practice. It dissolved lower-court stays at an unprecedented rate, and did so *without* contemporaneous merits dispositions.[317] As a result, the BOP simply executed prisoners while their claims were pending.[318] The available record suggests (overwhelmingly) that the Justices were using the shadow docket to police the inaugural margin, presumably because they believed that executions scheduled beyond the margin would not take place.

1. By the Numbers.—Historically, the Supreme Court has not used its shadow docket to vacate lower-court execution stays. When it has done so, there is almost always some judgment against the prisoner-claimant in place. Take the Supreme Court's end-stage adjudication during calendar year 2018. The states executed twenty-five prisoners that year,[319] and seventeen of them requested emergency relief from the Justices.[320] Those seventeen cases generated (by my count) thirty-three prisoner-requested stays that the Court denied in orders simultaneously denying underlying relief.[321] There were two

316. *See* cases cited *infra* note 321.

317. *See infra* notes 325–331 and accompanying text.

318. For example, Wesley Purkey had filed a *Ford* claim in the Southern District of Indiana. After the district court denied relief and a stay, Purkey sought a stay pending appeal from the Seventh Circuit. Petitioner's Motion for Stay of the July 16, 2020 Execution While Pending Appeal at 1, 2, Purkey v. Warden of USP Terre Haute, No. 20-2280 (7th Cir. July 16, 2020), ECF No. 4. The BOP executed Purkey without notice to counsel, while the appeal and stay request were pending. The Seventh Circuit thereafter issued the order dismissing all pending matters, because Purkey was dead. Purkey v. Warden, USP Terre Haute, No. 20-2280, at 1 (7th Cir. July 16, 2020), ECF No. 5 (order).

319. *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report [https://perma.cc/TRT8-DPJ4] (July 2019).

320. *See* cases cited *infra* note 321.

321. Jimenez v. Florida, 139 S. Ct. 659 (2018) (mem.) (denying application for stay and petition for writ of certiorari); Jimenez v. Jones, 139 S. Ct. 659 (2018) (mem.) (same); Miller v. Parker, 139 S. Ct. 626 (2018) (mem.) (same); Miller v. Parker, 139 S. Ct. 399 (2018) (mem.) (same); Garcia v. Davis, 139 S. Ct. 626 (2018) (mem.) (same); Garcia v. Jones, 139 S. Ct. 626 (2018) (mem.) (same); Garcia v. Collier, 139 S. Ct. 625 (2018) (mem.) (same); Garcia v. Texas, 139 S. Ct. 625 (2018) (mem.) (same); *In re* Garcia, 139 S. Ct. 625 (2018) (mem.) (denying application for stay and petition for writ of habeas corpus); Ramos v. Texas, 139 S. Ct. 499 (2018) (denying application for stay and petition for writ of certiorari); Ramos v. Davis, 139 S. Ct. 499 (2018) (mem.) (same); Zagorski v. Mays, 139 S. Ct. 450 (2018) (mem.) (same); Zagorski v. Haslam, 139 S. Ct. 20 (2018) (mem.) (same); Zagorski v. Parker, 139 S. Ct. 11 (2018) (mem.) (same); *In re* Acker, 139 S. Ct. 52 (2018) (mem.) (denying application for stay and petition for writ of habeas corpus); Acker v. Texas, 139

Supreme Court orders that denied a stay pending a prisoner's state-court appeals.[322] There was a single Supreme Court order vacating a lower-court stay, which the Sixth Circuit had entered so as to allow a prisoner to appeal a trial-court order denying post-judgment relief.[323] In none of these cases, then, was an execution permitted to proceed in the absence of some final judicial order denying relief on the merits. Starting in early 2019, however, the Court started to experiment with more aggressive shadow-docket practices in capital cases, expressing frustration with what it believed to be the end-stage gamesmanship of death-sentenced prisoners.[324]

That experimentation blossomed into a full-fledged Court practice by the end of the Trump Executions. Depending on how one counts consolidated motions, the Supreme Court entertained some twenty-five requests for

S. Ct. 52 (2018) (mem.) (denying application for stay and petition for writ of certiorari); *In re* Irick, 139 S. Ct. 4 (2018) (mem.) (denying application for stay and petition for writ of habeas corpus); Bible v. Davis, 138 S. Ct. 2700 (2018) (mem.) (denying application for stay and petition for writ of certiorari); Butts v. Georgia, 138 S. Ct. 1975 (2018) (mem.) (same); Butts v. Sellers, 138 S. Ct. 1975 (2018) (mem.) (same); Davila v. Texas, 138 S. Ct. 1611 (2018) (mem.) (same); Moody v. Stewart, 138 S. Ct. 1590 (2018) (mem.) (same); *In re* Moody, 138 S. Ct. 1590 (2018) (mem.) (denying application for stay and petition for writ of mandamus); *In re* Rodriguez, 138 S. Ct. 1347 (2018) (mem.) (denying application for stay and petition for writ of habeas corpus); *In re* Gary, 138 S. Ct. 1278 (2018) (mem.) (same); Eggers v. Alabama, 138 S. Ct. 1278 (2018) (mem.) (denying application for stay and petition for writ of certiorari); Gary v. Georgia, 138 S. Ct. 1278 (2018) (mem.) (same); Branch v. Florida, 138 S. Ct. 1164 (2018) (mem.) (same); Branch v. Florida, 138 S. Ct. 1164 (2018) (mem.) (same); Battaglia v. Davis, 138 S. Ct. 943 (2018) (mem.) (same); Battaglia v. Texas, 138 S. Ct. 943 (2018) (mem.) (same); Rayford v. Davis, 138 S. Ct. 943 (2018) (mem.) (same); *In re* Rayford, 138 S. Ct. 943 (2018) (mem.) (denying application for stay and petition for writ of habeas corpus).

322. *See* Irick v. Tennessee, 139 S. Ct. 1, 1–2 (2018) (mem.) (denying application for stay with issue pending in state court); Moody v. Alabama, 138 S. Ct. 1590 (2018) (mem.) (denying application for stay); Opposition to Moody's Application for Stay of Execution at 2, Moody v. Alabama, 138 S. Ct. 1590 (2018) (No. 17A1150) (noting issue is still under review in state court).

323. *See* Mays v. Zagorski, 139 S. Ct. 360 (2018) (mem.) (granting application to vacate a Sixth Circuit stay of execution); Zagorski v. Mays, 906 F.3d 414, 416 (6th Cir. 2018) (noting that a stay was necessary to allow for review of trial court order).

324. In *Dunn v. Ray*—decided at the beginning of February—the Court vacated a stay that the Eleventh Circuit had entered on religious liberty grounds. 139 S. Ct. 661 (2019) (mem.). The district court had ruled against the prisoner, but the appellate panel held that the prisoner was likely to prevail on appeal. Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 695 (11th Cir. 2019). The Supreme Court therefore offered as its reason only that the prisoner had waited until only ten days before his execution to argue that the exclusion of his Muslim spiritual advisor was unlawful. *Ray*, 139 S. Ct. at 661. The four-Justice dissent accused the majority of "short-circuit[ing] . . . ordinary process . . . just so the State can meet its preferred execution date." *Id.* at 662 (Kagan, J., dissenting from grant of application to vacate stay). Less than two months later, in *Murphy v. Collier*, the Court permitted a stay in a similar scenario. 139 S. Ct. 1475 (2019). This decision drew a terse dissent from three Justices complaining about the timing of the prisoner's litigation. *Id.* at 1478 (Alito, J., dissenting from grant of application for stay). The Court announced *Bucklew v. Precythe* on April 1. 139 S. Ct. 1112 (2019). Eleven days later, it vacated two lower court stays in *Dunn v. Price*, 139 S. Ct. 1312 (2019), even as both lower courts had concluded that the prisoners were likely to succeed on the merits of their lethal-injection challenges. Price v. Comm'r, Ala. Dep't of Corr., 2019 WL 1591475, at *1 (11th Cir. Apr. 11, 2019).

emergency relief, touching on all of the executions.[325] The Supreme Court granted no emergency relief to prisoners, but published shadow-docket orders granting emergency relief to the U.S. Solicitor General in *seven of the thirteen cases*.[326] To put those outcomes in perspective, the Solicitor General *sought* such relief only three times during the Obama Administration, and only five times during the Administration of George W. Bush.[327] Over that timeframe, the Court *granted* such relief only four times.[328]

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325. *See* United States v. Higgs, 141 S. Ct. 645 (2021) (mem.) (granting application 20A134 to vacate a stay of execution); Johnson v. United States, 141 S. Ct. 1233 (2021) (mem.) (denying application 20A130 for a stay of execution); Johnson v. Rosen, 141 S. Ct. 1233 (2021) (mem.) (denying application 20A131 for a stay of execution); Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (granting application 20A122 for stay or vacatur); Montgomery v. Watson, 141 S. Ct. 1232 (2021) (mem.) (denying application 20A124 for stay of an execution); United States v. Montgomery, 141 S. Ct. 1233 (2021) (mem.) (granting application 20A125 for stay or vacatur); Montgomery v. Rosen, 141 S. Ct. 1144 (2021) (mem.) (denying application 20A121 for stay of execution); Bourgeois v. Watson, 141 S. Ct. 507 (2020) (mem.) (denying application 20A104 for stay of execution); Bernard v. United States, 141 S. Ct. 504 (2020) (mem.) (denying application 20A110 for stay of execution); Barr v. Hall, 141 S. Ct. 869 (2020) (mem.) (granting application 20A102 to vacate a stay of execution); Hall v. Barr, 141 S. Ct. 869 (2020) (mem.) (denying application 20A99 for stay of execution); Hall v. Barr, 141 S. Ct. 869 (2020) (mem.) (denying application 20A100 for stay of execution); Hall v. Watson, 141 S. Ct. 870 (2020) (mem.) (denying application 20A101 for stay of execution); Vialva v. United States, 141 S. Ct. 221 (2020) (mem.) (denying application 20A49 for stay of execution); LeCroy v. United States, 141 S. Ct. 220 (2020) (mem.) (denying application 20A52 for stay of execution); Mitchell v. United States, 140 S. Ct. 2624 (2020) (mem.) (denying application 20A32 for stay of execution); Mitchell v. United States, 141 S. Ct. 216 (2020) (mem.) (denying application 20A30 for stay of execution); Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.) (granting application 20A10 for stay or vacatur); Purkey v. United States, 141 S. Ct. 196 (2020) (mem.) (denying application 20A12 for stay of execution); Hartkemeyer v. Barr, 141 S. Ct. 196 (2020) (mem.) (denying application 20A11 for stay of execution); United States v. Purkey, 141 S. Ct. 195 (2020) (mem.) (granting application 20A4 to vacate a stay of execution); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (granting application 20A8 for stay or vacatur); Lee v. Watson, 141 S. Ct. 195 (2020) (mem.) (denying application 20A7 for stay of execution); Bourgeois v. Barr, 141 S. Ct. 180 (2020) (mem.) (denying application 19A1050 for stay of the mandate pending the disposition of the petition for writ of certiorari); Peterson v. Barr, 141 S. Ct. 195 (2020) (mem.) (denying application 20A6 for stay).

326. *See Higgs*, 141 S. Ct. at 645 (granting petition of certiorari before judgment, reversing D.C. Circuit, and vacating lower-court stay); Rosen v. Montgomery, 141 S. Ct. at 1232 (vacating D.C. Circuit stay); United States v. Montgomery, 141 S. Ct. at 1233 (vacating Eighth Circuit stay); Barr v. Hall, 141 S. Ct. at 869 (granting motion to vacate lower court stay entered by a D.C. district court, without waiting for D.C. Circuit to rule); Barr v. Purkey, 140 S. Ct. at 2594–95 (vacating D.C. district court injunction). The Court vacated a lower court stay entered in the lethal-injection litigation, reversing a D.C. district court injunction, and that Court order ran against Daniel Lee, Wesley Purkey, Dustin Honken, and Keith Nelson. Barr v. Lee, 140 S. Ct. at 2590.

327. *See* Vladeck, *supra* note 176, at 162 app. tbl. 3 (listing applications for stays and applications to vacate stays during the relevant time period).

328. *Id.* Nor is the increased emergency relief simply the result of the Solicitor General's more frequent requests for it. The increased willingness of the Solicitor General to ask is itself a function of the Court's receptivity. *See* Vladeck, *supra* note 247, at 4–5 (discussing the rise of the shadow docket and the Court's increased use of the practice). Moreover, the Court is simply more willing

During the Trump Execution litigation, the emergency relief came in different forms—orders dissolving lower court injunctions, vacating lower court stays pending appeal, reversing lower courts on the merits, and so forth—although all such relief had the effect of clearing roadblocks for federal executions.[329] Some of these emergency orders were historically rare, even when measured against the unusual category's baseline. In the Dustin Higgs case, the Supreme Court granted a petition for certiorari before judgment—that is, while the case was still pending in a court of appeals—and resolved a difficult question of statutory interpretation summarily and without an opinion.[330] There appears to be not a single other case in which the Supreme Court has issued a summary merits disposition using a certiorari-before-judgment vehicle.[331]

2. Policing the Inaugural Margin.—One does not have to squint to see that the inaugural margin distorted the Supreme Court's ordinary decision-making. Recall that the Court left Judge Chutkan's summer 2019 injunction in place, giving some berth for ordinary process necessary to resolve the FDPA challenge to the pentobarbital-only injection sequence.[332] Even the Court's order on the first preliminary injunction, however, admonished the circuit panel below to "render its decision with appropriate dispatch."[333] And the Court shut the lights after that. The D.C. Circuit denied relief on the FDPA claim in April 2020,[334] and the Justices systematically voided all subsequent stays that threatened to extend timelines past the presidential transition.

Keep in mind the distinction between preliminary injunctions and stays pending appeal. A preliminary injunction would pause an execution pending the full-blown merits process, including hearings, in a trial court. Policing the inaugural margin required the avoidance of such injunctions at all costs, because the merits process would substantially extend any execution timeline. Although a stay pending appeal involves a far shorter pause, the threat to the inaugural margin was still substantial. If an execution date came and went while the stay was operative, then the setting of a new execution would invite all the margin-threatening litigation around notice and date-

to settle divisive cases on that docket. Compare the raft of shadow-docket dissents cited *supra* Part II with the fact that only *one* of the eight shadow-docket grants of emergency relief during the Bush and Obama Administrations provoked a public dissent. *Id.* at 4.

329. *See* examples collected *supra* note 326.

330. *See supra* section II(B)(2) for a timeline of the *Higgs* order.

331. *See* Vladeck, *supra* note 247, at 9, 16 (positing that the *Higgs* disposition appears to be without precedent).

332. Barr v. Roane, 140 S. Ct. 353, 353 (2019) (mem.).

333. *Id.*

334. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 108 (D.C. Cir. 2020) (per curiam).

setting.[335] And if a stay pending appeal prevented an execution, then the BOP would also face COVID-driven uncertainty about whether it could carry out deferred procedure.[336] Defending the margin therefore required not only that the Court disable plain-old injunctions, but also that it vacate any stay pending appeal that risked taking execution timelines past the BOP-specified dates. That is exactly what the Court did.

After the D.C. Circuit's split decision against the FDPA challenge to the pentobarbital-only sequence, the BOP started resetting execution dates in the summer of 2020.[337] Judge Chutkan entered her second preliminary injunction on July 13, the date of Daniel Lee's execution.[338] The D.C. Circuit set a lightning briefing schedule (eleven days),[339] but the Supreme Court vacated the injunction through a shadow-docket order—the only meaningful explanation the Court ever gave for any of its decision-making during the Trump Executions.[340] Even the *Lee* order, which included a slapdash Eighth Amendment discussion, was formally based on the claimants' failure to show sufficient harm.[341] That order cleared the way for Lee's execution and also removed delay-based threat from several other prisoners.

The *Lee* order was specific to a facial Eighth Amendment claim, but that limitation was not evident in the subsequent behavior of the Supreme Court. The Court used its shadow docket to vacate two different injunctions based on the FDCA, notwithstanding a precedential holding that executions using unprescribed pentobarbital were unlawful.[342] The only logical basis for an order vacating the district court's injunctions was disagreement around the harm showings, although the Court offered no reasoning in either order. In Purkey's litigation, the Court vacated the injunction notwithstanding an expedited appellate schedule consuming less than a month. In Hall's litigation, the Supreme Court did not even wait for an appellate order spoiling

335. *See* discussion *supra* section II(B)(1) of the timeline of the *Vialva* litigation over the issues of date-setting and notice requirements specified by Texas law.

336. *See supra* subpart II(D).

337. Executions Scheduled for Four Federal Inmates Convicted of Murdering Children, *supra* note 115.

338. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 214, 225 (D.D.C.), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam).

339. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5199, at 3 (D.C. Cir. July 13, 2020) (order).

340. Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam). *See* cases cited *supra* note 325.

341. *Id.* at 2591.

342. Barr v. Hall, 141 S. Ct. 869 (2020) (mem.), *vacating In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 1–2 (D.D.C. Nov. 19, 2020), ECF No. 322; Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.), *vacating In re* Fed. Bureau of Prisons' Execution Protocol Cases, 474 F. Supp. 3d 171, 181–82, 185 (D.D.C. July 15, 2020).

the BOP's execution timeline before vacating the district-court stay. Hall became the first lame-duck federal execution in over a century.[343]

The use of the shadow docket eventually ranged far beyond challenges to pentobarbital, shutting down margin-threatening litigation about uncertain legal questions—for example, the authority of a district court to facilitate parity-state designation by amending a long-final judgment (*Higgs*),[344] whether the FDPA parity provision applies to notice requirements (*Montgomery*),[345] whether the BOP could set execution dates while stays were in place (*Montgomery*),[346] and the appropriate forum for execution-competency litigation (*Purkey*).[347] As with the lethal injection litigation, the Supreme Court used shadow-docket orders to void even abbreviated appellate calendaring that compromised the BOP's ability to conduct executions on preferred dates, or that otherwise threatened the inaugural margin.[348]

The exception proves the rule. After the FDPA challenges to the lethal injection sequence ended in April 2020, the only delay the Supreme Court permitted was a short reprieve necessary to allow Lisa Montgomery's two lead lawyers to recover from severe cases of coronavirus—which they had each contracted in the course of representing Montgomery.[349] The incapacitated lawyers had represented Montgomery for almost a decade, so an eleventh-hour substitution posed problems for the preparation of a clemency petition.[350] The judge issuing that order was careful to protect the inaugural margin, staying Montgomery's December 8 execution date only until December 31.[351] The judge also required the sick attorneys to seek new counsel if they anticipated being unable to file the clemency petition by

343. Liliana Segura, *Trump Presses Forward with Execution of Man Convicted by All-White Jury*, THE INTERCEPT (Nov. 18, 2020, 8:27 AM), https://theintercept.com/2020/11/18/death-penalty-execution-orlando-hall/ [https://perma.cc/8YJM-R435].

344. United States v. Higgs, 141 S. Ct. 645 (2021) (mem.), *rev'g* United States v. Higgs, 2020 WL 7707165, at *1 (D. Md. Dec. 29, 2020).

345. Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.), *vacating* Montgomery v. Rosen, 2021 WL 112524, at *1 (D.C. Cir. Jan. 11, 2021).

346. United States v. Montgomery, 141 S. Ct. 1233 (2021) (mem.), *vacating* United States v. Montgomery, No. 21-1074, at 1 (8th Cir. Jan. 12, 2021) (order); Appellant's Motion for Stay of Execution Pending Appeal at 12–16, United States v. Montgomery, No. 21-1074 (8th Cir. Jan. 11, 2021).

347. Barr v. Purkey, 140 S. Ct. 2594 (2020), *vacating* Purkey v. Barr, 474 F. Supp. 3d 1, 12 (D.D.C. 2020).

348. *See, e.g.*, Montgomery v. Rosen, No. 21-5001, at 1 (D.C. Cir. Jan. 11, 2021) (order) (setting expedited calendar with reply brief due after inaugural margin); United States v. Higgs, No. 20-18, at *1 (4th Cir. Jan. 8, 2021) (order) (threatening margin by refusing to expedite briefing schedule).

349. Montgomery v. Barr, No. 20-cv-03261, slip op. at 14–15, 23–24 (D.D.C. Nov. 19, 2020), ECF No. 19.

350. *Id.* at 5–6.

351. Montgomery v. Barr, No. 20-cv-03261, at 1 (D.D.C. Nov. 19, 2020), ECF No. 20 (order).

December 24.[352] Given that the delay affected only the timing of clemency, and that a delay in clemency process was extremely unlikely to result in a deferred execution, the COVID-based stay simply did not threaten the margin in the same way that the other proposed relief had.

3. A Concluding Note.—The Supreme Court's increased use of the shadow docket is worthy of intense normative scrutiny.[353] Others have pointed out that shadow-docket adjudication suppresses the publication of legal reasoning, permits problematic Justice anonymity, creates

352. *Id.* at 2.

353. Hashim Moopan, one of the DOJ officials who litigated against the federal prisoners, has publicly argued that there was nothing irregular about the Court's shadow-docket behavior during the Trump Executions. *See* Testimony to the Presidential Comm'n on the Sup. Ct. of the U.S., by Hashim Moopan, Couns. to the Solic. Gen. (Sept. 15, 2021) [hereinafter Moopan Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf [https://perma.cc/UB5P-G3BR]. The Supreme Court did nothing unusual, he reasons, because the lower courts that entered stays had done so in error—and the Supreme Court was simply correcting those decisions through de novo review of the emergency relief awarded by the judges below. *See id.* at 1–2. Moopan's argument is problematic, eliding the difference between the lower-court standards for emergency relief and the Supreme Court standards for *appellate review* of the lower-court decisions. His argument falls apart if the Justices do not review lower court stays *de novo*, and available precedent quite clearly establishes that they do not. *See, e.g.*, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 571 U.S. 1061, 1061 (2013) (mem.) (Scalia, J., concurring and joined by Thomas, J. and Alito, J.) (explaining that a lower court stay cannot be dissolved unless the lower court clearly and demonstrably erred); Doe v. Gonzales, 546 U.S. 1301, 1308–09 (2005) (Ginsburg, J., in chambers) (rejecting de novo review); CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) ("[A] single Justice may stay a lower court order only under extraordinary circumstances . . . ."); W. Airlines, Inc. v. Int'l Bhd. of Teamsters, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (holding that Justices can vacate a lower court stay only if it is demonstrably wrong); Garcia-Mir v. Smith, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers) (explaining that a lower-court stay is due "great deference"); Certain Named & Unnamed Non-Citizen Child. & Their Parents v. Texas, 448 U.S. 1327, 1330–31 (1980) (Powell, J., in chambers) (listing ways in which an applicant seeking to dissolve a lower court stay must meet an "augmented burden"); Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (highlighting presumption of correctness that attaches to lower court emergency relief); Commodity Futures Trading Comm'n v. Brit. Am. Commodity Options Corp., 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (stating that a lower court stay should only be overturned due to abuse of discretion); Coleman v. PACCAR Inc., 424 U.S. 1301, 1303–04 (1976) (Rehnquist, J., in chambers) (explaining that a Justice can vacate a stay when the lower court is "demonstrably wrong"); Holtzman v. Schlesinger, 414 U.S. 1304, 1315 (1973) (Marshall, J., in chambers) ("In light of the complexity and importance of the issues posed, I cannot say that the Court of Appeals abused its discretion."); New York v. Kleppe, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (emphasizing that only after the weightiest considerations could a stay be disturbed); O'Rourke v. Levine, 80 S. Ct. 623, 623–24 (1960) (Harlan, J., in chambers) (same). Moopan neither cites nor acknowledges *any* of this law. The only authority he invokes is a notation that the Court has equitable power to narrow a preliminary injunction—a proposition that has little, if anything, to do with the distinct question about what *standard of review* a court would use to wipe away a lower-court stay. *See* Moopan Testimony at 17 (citing Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam)). *But see* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE § 18.7, at 936 (10th ed. 2013).

unpredictable timing, curtails rights to and the benefits of broad participation, encourages premature and unnecessary resolution of constitutional questions, distorts the Supreme Court's workload, and generally undermines the Court's legitimacy.[354] As Professor Will Baude quipped, "[T]his is no way to run a railroad."[355] There are, moreover, important normative questions directed to the more specific use of the shadow docket to dictate the presidential administration that implements punishment. Does this practice reinforce or usurp the supremacy of the political branches? Are lasting doctrinal distortions worth it? Should courts address the arbitrariness of executive enforcement by skimping on judicial process? And so forth.

Although that normative discussion is terribly important—and an inquiry that I hope this Article facilitates—it is a set of questions largely beyond the scope of this space-limited project.[356] Here, I want to establish and defend the descriptive proposition that, in the face of meritorious legal challenges, the Supreme Court made unprecedented use of its shadow docket to ensure that the executions took place and that the Biden Administration would not have input. That proposition invites the questions that I consider in the balance of Part III—whether the Court correctly estimated the likelihood of future federal executions and the more general impact of the Trump Executions on other areas of law.

B. The Court's Estimate

The Supreme Court was protecting the inaugural margin because a sufficient number of Justices believed that the presidential transition threatened the federal government's ability to carry out the executions. Those Justices were right. The political and bureaucratic will to complete the capital punishment process was fragile and fleeting. (The Biden Administration announced a federal death penalty moratorium less than six months after President Trump's term ended.[357]) The Trump Executions were historically aberrant and do not represent some new, muscular federal death penalty.

Before I set forth my argument about political and bureaucratic outliers, I want to explain briefly why politics and bureaucracy matter. After all, none of the Trump Executions involved prisoners sentenced during the Trump Administration. Among the ways that the death penalty is unique among

354. *See, e.g.*, Vladeck, *supra* note 247, at 18–22 (succinctly articulating criticisms). *See* sources collected *supra* note 309 for an identification of leading early work on the problem.

355. Will Baude, *Death and the Shadow Docket*, REASON: THE VOLOKH CONSPIRACY (Apr. 12, 2019, 3:30 PM), https://reason.com/2019/04/12/death-and-the-shadow-docket/ [https://perma.cc/W5N8-6JL8].

356. A forthcoming student note addresses some of the normative issues specific to the shadow-docket activity in the Trump Execution cases, and offers suggestions for addressing them. *See generally* Isaac Green, A Cruel and Unusual Docket (unpublished manuscript) (on file with author).

357. Lynch & Beech, *supra* note 14.

punishments is that it requires elevated levels of political and bureaucratic commitment in order to carry out the punishment.[358] A term of years requires a carceral facility and the resources necessary to meet prisoner needs, but a death sentence requires that and far more. An execution does not follow immediately from a death sentence, and it requires that the sentencing jurisdiction maintain a lawful protocol, set a date, and have institutional litigators committed to fighting whatever legal roadblocks appear.[359]

An economist might say that there are unique collective action problems threatening the ability of governments to carry out death sentences. The specific challenges vary by jurisdiction, but converting death sentences into executions requires the state to overcome multiple potential vetoes: politicians whose electoral interests do not align with the executions; administrators who must collectively acquire sufficient quantities of usable lethal injection compounds, update complex protocols, and retain personnel capable of fulfilling various professional roles; and judges with varied commitment to carrying out sentences.[360] Surmounting these collective action problems requires substantially elevated political and bureaucratic will—and those are unlikely to coincide in the foreseeable future.

1. Outlier Politics.—The first reason why the Trump Executions are unlikely to foreshadow some renewed federal death penalty involves the uniqueness of Trumpism itself. Certain elements of what we call Trumpism might survive President Trump's political life, but there are reasons to believe that Trump's use of the death penalty is among those qualities more unique to the man than to the movement. (I assume for the purposes of this argument that Trump does not recapture the presidency in some subsequent national election, in which case federal executions become more likely.)

President Trump's political and governance strategies centered capital punishment in ways that other administrations, Democratic and Republican, are unlikely to reproduce. Most people are familiar with the idea of *virtue* signaling,[361]—engaging in supportive expression for the sake of establishing the speaker's good character—but Trump used the death penalty for signaling

358. *See* Kovarsky, *supra* note 74, at 1176–77 ("[E]xecuting a death row inmate usually requires extreme institutional coordination, but jurisdictions are unable to mobilize the political capital to overcome the collective-action problems inherent in the dispersed execution power."); Steiker & Steiker, *supra* note 16, at 1872–73 ("High execution rates require a 'perfect storm,' because there are numerous independent opportunities for delay or defeat and no single mechanism that can radically accelerate executions.").

359. *See supra* notes 142–143 and accompanying text.

360. Kovarsky, *supra* note 74, at 1175–81.

361. Most credit British writer James Bartholomew with popularizing the term, starting in 2015. *See* James Bartholomew, *Easy Virtue*, THE SPECTATOR (Apr. 18, 2015), https://www.spectator.co.uk/article/easy-virtue [https://perma.cc/C8JB-3CUJ] (using the term to decry symbolic gestures calculated to demonstrate the actor is "kind, decent and virtuous").

vice.[362] "Virtue signaling" is a sneering pejorative, so I mention it only as a descriptive reference point to readers. I intend "vice signaling" as a non-pejorative description of the way Trump used capital punishment rituals to constitute and nurture his political community.

That vice-signaled worldview opposes the virtue-signaled cosmopolitanism and equivocation of death penalty skeptics.[363] In the community that the vice signal helps define and cohere, righteous state killings represent strength and resolve, a clear line separating good and evil, and belief in free will over structural disadvantage.[364] Indeed, that worldview—with its emphasis on public displays of statist strength—is a hallmark of President Trump's campaigning and political positioning across issues.[365]

Even within the institutional landscape that capital punishment defines, the embrace of executions is an especially strong vice signal. The death penalty is unique among American punishments in that the penalty is carried out long after it is announced.[366] Executions are opportunities to spread constitutive ideas across communities, concluding dramatic arcs of transgression and revenge that saturate media and captivate the public. There can be tension between the subsequent political community required to bring a punishment to violent completion and the prior political community that first decided that it should be completed. Vice signals are effective means of expressing solidarity under such circumstances.

Using the death penalty as a vice signal came naturally to President Trump.[367] During the 1980s, he took out full-page advertisements in all four major New York City newspapers urging the death penalty for the "Central

362. *See, e.g.*, Noah Berlatsky, *As Bethany Mandel's 'Grandma Killer' Tweet Proves, Vice-Signaling Is the Right's Newest and Most Toxic Trend*, THE INDEPENDENT (May 7, 2020, 4:46 PM), https://www.independent.co.uk/voices/bethany-mandel-grandma-killer-tweet-coronavirus-lockdown-protest-a9504391.html [https://perma.cc/6RJL-SWQN] (defining vice signaling as "a public display of immorality, intended to create a community based on cruelty and disregard for others, which is proud of it at the same time").

363. *See* Steiker & Steiker, *supra* note 16, at 1912 (identifying the link between cosmopolitan political values and capital punishment opposition).

364. *Cf. generally* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 285–301 (2010) (setting forth a more rigorous sociological theory of how political figures make use of the expressive signals associated with the death penalty).

365. President Trump embraced several practices that the political left regarded as cruel, often casting the practices as the "toughness" that defined his political community. *See, e.g.*, Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2369 (2019) (discussing the phenomenon with respect to Trump asylum policy).

366. *See, e.g.*, *Execution List 2020*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2020 [https://perma.cc/7TWD-2H3H] (showing time-to-execution spans for the prisoners executed in 2020).

367. *See generally* J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611, 1622–25 (2018) (considering how President Trump used the death penalty before his Administration announced the executions).

Park Five"—five Black teenagers later exonerated for the outrage-provoking rape of a white woman.[368] He enthusiastically touted the death penalty on the campaign trail, announcing plans to issue an executive order providing for the death sentences in cases with law-enforcement victims.[369] After he became President, he made the death penalty a piece of his governance strategy. He broke with presidential norms against commenting on cases in which the DOJ was seeking a capital sentence.[370] In the midst of the opioid epidemic, he called for aggressive use of the death penalty against drug dealers.[371] He once praised China for the way it executed people convicted of selling narcotics.[372]

That a Republican would oppose death penalty abolition is unsurprising, and future Republican presidents are likely to take that position. For that reason, they will appoint judges and prosecutors that view the death penalty as an acceptable part of American punishment practice.[373] Trump was unique not because he had atypical Republican punishment preferences but because his voluble enthusiasm for the death penalty was such an essential part of his

368. Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty over Central Park Five*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html [https://perma.cc/3LHH-SVN3].

369. Jeremy Diamond, *Trump: Death Penalty for Cop Killers*, CNN, https://www.cnn.com/2015/12/10/politics/donald-trump-police-officers-death-penalty/index.html [https://perma.cc/VMH2-DYPW] (Dec. 11, 2015, 9:25 AM). (The order would have been unlawful if it required the death penalty for anything beyond what U.S. Code already specified.) The nexus between the death penalty and his political style was also evident in the case of Bowe Bergdhal. The Taliban had captured Bergdahl in Afghanistan, and the Pentagon later claimed that Bergdahl deserted. After the military secured Bergdhal's release through a prisoner exchange, the military announced desertion charges in 2015; then-candidate Trump thereafter called Bergdahl a "traitor" and tweeted that Bergdahl should "face the death penalty." At campaign rallies, Trump would say that Bergdhal "should have been executed." (Bergdahl later received a sentence that included no prison time.) Broughton, *supra* note 367, at 1623.

370. Sayfullo Saipov drove a truck through a crowded New York City pedestrian and bike path, killing eight people. The prosecution alleges that he carried out the attack in the name of the Islamic State of Iraq and the Levant. (Sayfullo's trial remains incomplete at this time.) Press Release, Off. of Pub. Aff., Dep't of Just., Sayfullo Saipov Charged with Terrorism and Murder in Aid of Racketeering in Connection with Lower Manhattan Truck Attack (Nov. 21, 2017), https://www.justice.gov/opa/pr/sayfullo-saipov-charged-terrorism-and-murder-aid-racketeering-connection-lower-manhattan [https://perma.cc/75DE-RWTZ]. President Trump repeatedly called for Saipov to receive the death penalty, breaking Presidential norms tracing back to at least the Nixon Administration. Broughton, *supra* note 367, at 1625–26.

371. Dan Merica, *Trump Pushes Death Penalty for Some Drug Dealers*, CNN, https://www.cnn.com/2018/03/19/politics/opioid-policy-trump-new-hampshire/index.html [https://perma.cc/SW63-BJPA] (Mar. 19, 2018, 6:23 PM).

372. Aaron Rupar, *Trump Is Running on Criminal Justice Reform but Just Praised China's Execution of Drug Dealers*, VOX (Feb. 10, 2020, 5:00 PM), https://www.vox.com/2020/2/10/21131863/trump-china-executions-drug-dealers [https://perma.cc/XYG9-48DT].

373. *See* David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict over Judicial Appointments*, 39 U. RICH. L. REV. 923, 934 (2005) (discussing presidents' preference for appointing "ideologically sympathetic" judges rather than "centrist" judges).

political signaling and community building. Celebrating the unique violence of capital punishment affirmed membership parameters for a community that organized around the rejection of mercy and moral indeterminacy.

2. The Bureaucracy.—The BOP was able to carry out the executions due in substantial part to the unique composition of President Trump's subordinate bureaucracy. His BOP leadership immediately committed the Bureau to finding lethal injection drugs necessary to administer a lawful protocol and maintained lists of prisoners with no pending litigation.[374] His first Attorney General, Jeff Sessions, was an avid supporter of the death penalty[375] and worked with the BOP to kickstart new protocols in the spring of 2017.[376] But the pivotal bureaucratic figure, and the biggest administrative outlier, was Trump's second Attorney General, William Barr. The Trump Executions might have stalled somewhere along the way were it not for Barr's bureaucratic initiative, honed over the course of some forty years.

AG Barr was the official who supervised and announced the roll out of the 2019 execution protocol—personally declaring that "we owe it to the victims and their families" to execute the designated offenders.[377] Barr and his close subordinates personally made the decisions about whom to schedule and what the tactics for securing public acceptance would be.[378] Barr was also the public face of the litigation; for example, after Judge Chutkan stayed the executions to permit FDPA parity litigation, he told the press that he would have the Justice Department take the issue to the Supreme Court.[379] In his public remarks throughout the litigation, Barr continued to emphasize the victim-debt principle he identified in his First Five announcement.[380]

374. *See* Weinsheimer Dep., *supra* note 88, at 39, 131–32 (describing effort to secure reliable supply for lethal injection drugs and practice of maintaining list of those individuals on federal death row who had exhausted all appeals processes and for whom the BOP could set execution dates).

375. After President Trump called for more aggressive use of the death penalty against drug dealers, Sessions released an implementing memorandum. Press Release, Off. of Pub. Affs., Dep't of Just., Attorney General Sessions Issues Memo to U.S. Attorneys on the Use of Capital Punishment in Drug-Related Prosecutions (Mar. 21, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related [https://perma.cc/9QZM-NHYV].

376. Weinsheimer Dep., *supra* note 88, at 32–33 (discussing spring 2017 conversations between Attorney General and BOP about the new lethal injection protocol).

377. DOJ First Five Execution Announcement, *supra* note 97.

378. *See* Weinsheimer Dep., *supra* note 88, at 116–18, 134–36 (explaining that AG Barr and several others chose five individuals to execute from the BOP's list, specifically noting that the individuals were chosen due to the heinous nature of their crimes and sympathetic nature of their victims).

379. Michael Balsamo & Colleen Long, *AP Exclusive: The DOJ Would Take Halted Executions to High Court*, ASSOCIATED PRESS (Nov. 21, 2019), https://apnews.com/d0ddb30f2b214bc19da9a03305ac44de [https://perma.cc/NB3M-KF32].

380. *See, e.g.*, *id.* ("There are people who would say these kinds of delays are not fair to the victims, so we can move forward with our first group[.]").

AG Barr was an able bureaucrat with a long history of federal service, including his prior stint in the Bush I Administration. He was generally associated with a constellation of tough-on-crime practices, and capital punishment was one of the brightest stars.[381] As the first President Bush's Attorney General, he released a 1992 report entitled "The Case for More Incarceration," in which he and his Justice Department argued that the best way to attack America's crime problem was to build more prisons and to send more people to them.[382] Even when a chunk of the conservative coalition defected from mass incarceration as a crime-control strategy, Barr held the line. In 2015, he joined a high-profile cohort of ex law-enforcement officials to oppose bipartisan federal sentencing reform.[383]

AG Barr was also intimately involved in the initialization of the modern federal death penalty—at levels of both policy and implementation. In a list of twenty-four recommendations that he made to the first President Bush, recommendation five stated: "The death penalty has an important role to play in deterring and punishing the most heinous violent crimes. . . . It reaffirms society's moral outrage . . . and assures the family and other survivors of murder victims that society takes their loss seriously."[384] As Bush I's Attorney General, Barr personally approved the capital prosecution of Juan Garza,[385] who became the third person capitally sentenced under modern federal death penalty statutes.[386]

But perhaps the most important piece of AG Barr's bureaucratic history centered on his role in promoting a uniform execution protocol during the waning days of the Bush I Administration. Recall that, beginning in 1937, Congress had required federal death penalty implementation to mirror that of the state in which the prisoner had been sentenced.[387] When Congress passed

381. *See* Jon Schuppe, *William Barr Was Confirmed as U.S. Attorney General. Here's What to Expect on Crime, Immigration and Marijuana*, NBC NEWS (Feb. 14, 2019, 8:00 PM), https://www.nbcnews.com/news/us-news/william-barr-was-confirmed-u-s-attorney-general-here-s-n971066 [https://perma.cc/3LX6-JHK4] (predicting Barr's policy stances on immigration, criminal justice reform, and marijuana based on his past).

382. OFF. OF POL'Y AND COMMC'NS, U.S. DEP'T OF JUST., THE CASE FOR MORE INCARCERATION, at v (1992), https://www.ojp.gov/pdffiles1/Digitization/139583NCJRS.pdf [https://perma.cc/ZAA3-2642].

383. Letter to Mitch McConnell, Senate Majority Leader, and Harry Reid, Senate Minority Leader (Dec. 10, 2015), http://nafusa.org/wp-content/uploads/2016/01/Sentencing-Dear-Colleague-Letter-with-Attachment.pdf [https://perma.cc/D6PZ-49MT].

384. OFF. OF THE ATT'Y GEN., U.S. DEP'T OF JUST., COMBATING VIOLENT CRIME: 24 RECOMMENDATIONS TO STRENGTHEN CRIMINAL JUSTICE 16–17 (1992), https://www.ojp.gov/pdffiles1/Digitization/137713NCJRS.pdf [https://perma.cc/9CDN-92KV].

385. Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 531 (2000).

386. *Id.*

387. An Act To Provide for the Manner of Inflicting the Punishment of Death, Pub. L. No. 75-156, ch. 367, § 323, 50 Stat. 304, 304 (1937) (repealed 1984).

the CCE statute in 1988, it provided for a federal death penalty but did not include implementing specifications along the lines of those present in the 1937 legislation.[388] Barr tried to fill that void, helming an effort to specify a uniform execution protocol, which culminated in a 1993 final regulation.[389] The 1994 FDPA, however, reinstated the parity principle,[390] clouding substantially the legality of the 1993 rule. For Barr, then, the 2019 execution protocols were some unfinished business.

Put simply, AG Barr had outlier levels of bureaucratic commitment to federal executions. Such commitment from a single administrator is not alone sufficient to facilitate federal executions, but it is necessary. In combination with the administrative determination of people at the BOP, the unprecedented Solicitor General commitment to seeking emergency relief from the Supreme Court, and the unique politics of Trumpism, it furnished the institutional will necessary to overcome collective action problems that would otherwise preclude the completion of the capital punishment sequence.

C. Spillover Effects

There is more than a touch of irony surrounding the flurry of Trump Execution litigation, as the federal judiciary resolved very few legal questions. The Supreme Court's insistence on using shadow-docket orders vacating preliminary relief means that, for most issues, one cannot know whether the rulings were based on the merits, a harm assessment, an evolving presumption against end-stage relief, or something else.[391] Like the Court, the circuits were operating largely through orders respecting requests for

388. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001, 102 Stat. 4181 (including "may be sentenced to death" as sentencing options but not detailing how the death sentence would be implemented).

389. *See* 58 Fed. Reg. 4898 (1993) (codified at 28 C.F.R. pt. 26) (announcing the DOJ's final rule regarding the implementation of death sentences in federal cases).

390. *See* 18 U.S.C. § 3596(a) ("When the [death] sentence is to be implemented . . . [a U.S. marshal] shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.").

391. *See, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020) (per curiam) (vacating district court injunction that had been entered on ground that execution method violated the Eighth Amendment and was likely to cause prisoner irreparable harm). The Supreme Court's order in *Higgs*, which was a grant of certiorari before judgment and a reversal of a district court result, was the exception. *See supra* section II(B)(2). Of course, the absence of a Supreme Court opinion makes it difficult to discern on what theory of power such authority might be exercised.

emergency relief.[392] In such postures, isolating precedential merits holdings is nigh impossible.[393]

Because the Trump Execution litigation resulted in so little precedent about the federal death penalty, and because the federal government's resolve to carry out death sentences will almost certainly dissipate, the longer term influence of the Trump Executions will be in other institutional contexts—including *state* death penalty practices (which usually involve federal adjudication) and other settings generating conflict that is meaningfully resolved through emergency judicial relief.

1. State Capital Punishment Spillover.—The Trump Executions might not signify that much about the future of the federal death penalty, but there were elements of the end-stage litigation that were extraordinarily significant for capital punishment administered by states. Specifically, the Supreme Court continued to raise the bar for challenges to lethal injection protocols, and its decisions projected a spiking hostility to end-stage litigation of all kinds—even when the prisoner is largely blameless for the eleventh-hour activity.

a. Lethal Injection Protocols.—Consider first the Supreme Court's reaction—whether expressed through formal opinions or unreasoned orders on its shadow docket—to the lethal injection litigation. The Court was formally adjudicating the federal pentobarbital-only sequence, but the generality of the Justices' decision-making necessarily affects constraints on state executions. After all, virtually every state still uses lethal injection to execute its death-row prisoners.[394]

Going into the Trump Executions, a claimant mounting an Eighth Amendment objection to a lethal injection sequence already faced daunting challenges. Among other things, they had to show that some feasible and readily-implementable alternative was available, and that the planned execution method "superadded" pain.[395] Judge Chutkan's second preliminary

392. To the degree that one can read anything into the merits decisions at the circuit level, the circuits were in conflict—for example, over whether the FDPA parity provision requires compliance with state notice requirements. *See* discussion of legal disagreement *supra* section II(B)(1). And even in cases where only one jurisdiction made pronouncements on a particular rule of law, there were decisions commanding no single rationale for the court. *See, e.g.*, *In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 108, 112 (D.C. Cir. 2020) (per curiam) (failing to reach consensus on FDPA and APA claims). The only clear legal rules seemed to be that the unprescribed use of pentobarbital violated the FDCA but not the CSA. *See supra* section II(A)(3).

393. *Cf.* Nken v. Holder, 556 U.S. 418, 426 (2009) (setting forth merits and harm as elements of stays pending appeal); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (holding the same for preliminary injunctions).

394. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/EC82-HY4Q].

395. *See supra* notes 161–164 and accompanying text.

injunction was based on an Eighth Amendment claim.[396] In vacating Judge Chutkan's injunction, *Lee* came close to suggesting that *any* challenge to pentobarbital-only executions should fail—without the need to compare the planned and alternative methods.[397]

After *Lee*, the Supreme Court continued to send hostile messages to prisoners challenging lethal injection protocols. For example, it shut down litigation over whether the FDCA barred the use of unprescribed drugs in executions. Judge Chutkan's third preliminary injunction was based on a finding that the executions would likely violate the FDCA. The D.C. Circuit left it in place, but the Supreme Court vacated it on the shadow docket, without a reasoned opinion.[398] Four months later, after the D.C. Circuit formally held that the FDCA indeed barred the use unprescribed pentobarbital and that the prisoner-plaintiffs had plausibly argued that they would experience torture, Judge Chutkan stayed Orlando Hall's execution.[399] At that point, only the speed of the Supreme Court's response was surprising: it vacated the stay without even waiting for the D.C. Circuit to rule.[400]

The Supreme Court's decision-making was formally addressed only to the BOP's 2019 protocol and associated addenda, but ignoring its implications for other jurisdictions would be obtuse. The tone and posture of its shadow-docket orders unmistakably communicate to the states that they need not fear method-of-execution challenges. And so does the analysis in *Lee*—which includes hastily-drafted language that casually but substantially overstates the holding in *Bucklew*.[401]

b. End-Stage Litigation.—In fact, the decisional law coming out of the Trump Executions bodes poorly for any state prisoner in an end-stage posture. The major Trump Execution shift was to deemphasize the inquiry into prisoner fault—that is, when contemplating a presumption against otherwise meritorious claims presented in end-stage postures, does prisoner fault even matter?

There are many reasons for prisoners to be faultlessly engaged in end-stage litigation. *Ford* claims challenging a prisoner's execution competency, which involve mental functioning *at the time of execution*, are unripe until an execution date is set.[402] The same is true of method-of-execution challenges; a death-sentenced prisoner can hardly challenge an execution method before they know how the state intends to kill them. Moreover, prisoners might

396. *See supra* notes 165–177 and accompanying text.
397. *See supra* notes 178–189 and accompanying text.
398. *See supra* notes 190–198 and accompanying text.
399. *See supra* note 212 and accompanying text.
400. *See supra* note 213 and accompanying text.
401. *See supra* notes 178–189 and accompanying text.
402. *See supra* note 307.

faultlessly assert claims that formally ripen before a date-setting because of the way a jurisdiction structures indigent representation—prisoners are often without qualified attorneys between the moment their first federal habeas proceedings conclude and the moment the execution is scheduled.[403]

Supreme Court language from the Trump Execution cases seems to suggest that the last-minute status of litigation would weigh heavily against a death-sentenced prisoner, without respect to fault. The Court's pique, which crescendoed in *Lee*, had been growing for several years. Traces of the frustration have been around for decades,[404] but it started to bubble over more publicly around the time it was deciding *Bucklew*. In the context of explaining why courts needed to police "*unjustified* delay," the *Bucklew* majority declared that "[l]ast-minute stays should be the extreme exception, not the norm."[405] Various justices expressed similar sentiments in auxiliary opinions around that time, usually—but not always—in lethal injection cases.[406]

The quotation about "last-minute stays" from *Bucklew* made an appearance in *Lee*—the only reasoned Supreme Court opinion that the Trump Executions produced—but *Lee* makes no reference to whether the delay was justified or not.[407] Indeed, in *Lee*, there could be no serious argument that the end-stage posture of the litigation was the prisoners' fault. The *Roane* litigation had been pending against the BOP for well over a decade, and the claimants in *Lee* had joined it during the FDPA challenge that stalled the executions of the First Five.[408] The BOP rescheduled the executions against the *Lee* claimants in the summer of 2020, *while their Eighth Amendment claims were already pending*.[409]

The principal dissent therefore accused the Justices joining the unsigned order of "rush[ing] to dispose of [the] litigation in an emergency posture," which eliminated "meaningful judicial review of the grave, fact-heavy [Eighth Amendment] challenges."[410] Underscoring the Supreme Court's prior decision to refuse the Government's request to vacate a stay in the

403. Kovarsky, *supra* note 188, at 1371–85.

404. *See, e.g.*, Nelson v. Campbell, 541 U.S. 637 (2004) (holding for the first time that there be a presumption against last-minute stays for otherwise meritorious claims in cases where prisoner was responsible for delay).

405. Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019).

406. *See* decisional thread cited *supra* note 324.

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

408. *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-00145, slip op. at 3 n.3 (D.D.C. July 13, 2020), ECF No. 135 (noting that "[t]hree Plaintiffs filed complaints shortly after the DOJ announced the 2019 Protocol . . . and Nelson filed his complaint before Defendants even announced his execution date").

409. *See id.* at 3 (indicating that the Government set short execution dates even though many claims were pending).

410. *Lee*, 140 S. Ct. at 2593 (Sotomayor, J., dissenting).

FDPA-parity litigation, the dissent highlighted shadow-docket receptivity to emergency motions that were formerly disfavored—noting that the practice was being used to resolve fact-intensive constitutional questions in a procedural posture ill-suited to careful deliberation.[411]

The Supreme Court's disdain for end-stage litigation seeped into the decision-making of lower federal courts, too—including in cases where the eleventh-hour quality of the proceedings was not clearly the fault of the prisoner. For example, the Seventh Circuit chastised Daniel Lee for initiating his *Brady* litigation too long after discovering the offending material.[412] Lee, however, *had* initiated timely *Brady* litigation. The Seventh Circuit failed to mention that the BOP set Lee's execution date while the *Brady* litigation was pending in another circuit.[413] The Seventh Circuit proceedings were the *savings-clause* litigation triggered by the other circuit's determination that it could not reach the underlying merits of the claim. And Lee filed in the Seventh Circuit before the Eighth Circuit proceedings had even concluded.[414] Reviewing the procedural history of the case, the district court held that "[m]uch of the twenty-year delay in proceeding with the judgment is attributable to the United States . . . ."[415]

A concurring circuit judge in Corey Johnson's case accused Johnson of a "manipulative intention" to delay, giving appellate judges "just a few days before the scheduled execution date."[416] Among the claims covered by the statement was a challenge under the First Step Act,[417] which only went into effect on December 21, 2018. In fact, the First-Step-Act claim was actually unavailable until just several months before Johnson filed, when a court finally decided the Act covered Johnson's offense conduct.[418] Johnson, moreover, had filed that claim not "days before" January 14, 2021, but on August 19, 2020.[419] And the reason that the Fourth Circuit heard the issue in

411. *See id.* at 2594 (explaining that overriding the lower court's stay forecloses any review of a novel challenge to the federal protocol).

412. *See* Lee v. Watson, No. 19-3399, 2019 WL 6718924, at *2 (7th Cir. Dec. 6, 2019) (highlighting that Lee waited more than four years after he obtained the "newly discovered" evidence necessary to use § 2241).

413. *See* Lee v. Warden USP Terre Haute, No. 19-cv-00468, 2019 WL 6608724, at *2 (S.D. Ind. Dec. 5, 2019) (reciting procedural history).

414. *See id.* (indicating that the Eighth Circuit issued a decision on November 4, 2019).

415. *Id.* at *9.

416. United States v. Johnson, 838 F. App'x 765, 766 (4th Cir. 2021) (Wilkinson, J., concurring).

417. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

418. *See* Emergency Petition for Rehearing En Banc at 18, United States v. Johnson, No. 21-1, (4th Cir. Jan. 13, 2021) (indicating that "Johnson sought relief under the First Step Act in August 2020, just months after courts determined in non-capital cases that 21 U.S.C. § 848 was a covered offense").

419. Motion for a Reconsideration of Sentence Hearing Pursuant to the First Step Act of 2018 at 1, Johnson v. United States, No. 92-cr-00068 (E.D. Va. Aug. 19, 2020).

an end-stage posture was not because Johnson jammed the judges with it, but because the BOP announced Johnson's execution while the appeal was pending there.[420]

The Seventh Circuit commented that Lisa Montgomery had engaged in delay that "appeare[d] strategic" because she filed her *Ford* litigation four days before her announced execution date.[421] Again, the brief accusation elides a much more complicated timeline. Recall that COVID-19 had incapacitated Montgomery's counsel[422] and that *Ford* claims remain unripe until execution dates are set.[423] The execution date had actually been stayed within a month of the announcement setting it, and so Montgomery's lawyers believed that the execution was unlikely to take place.[424] It was not until January 1, 2021, because of an appellate order vacating the stay, that the January 12 execution date was "relatively set in stone."[425] Moreover, because the *Ford* inquiry centers on mental functioning at the moment of execution, the crucial fact development takes place *after* the date of execution is known—requiring social histories and prisoner contact visits that the pandemic made nearly impossible.[426] The Seventh Circuit's breezy procedural history glosses over the fact that meaningful enforcement of the Eighth Amendment right requires some time, even after the execution date is announced.

In sum, and with *Lee* as a north star, lower courts are beginning to apply a context-free presumption against all end-stage claims, irrespective of prisoner fault. After all, how can courts otherwise justify the presumption in cases where the end-stage scenarios resulted from the BOP's decision to schedule executions during pending litigation? What remains to be seen is how seriously federal courts carry this practice forward. A fault-independent presumption would substantially degrade enforcement of constitutional rights even in cases where claims ripen *before* the state schedules the execution—let alone in cases where claims do not ripen until the end-stage window begins.

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420. *Compare* Executions Scheduled for Inmates Convicted of Brutal Murders Many Years Ago, *supra* note 121 (announcing execution on November 20, 2020), *with* Notice of Appeal at 1, United States v. Johnson, No. 92-cr-00068 (E.D. Va. Nov. 20, 2020), ECF No. 77 (noticing appeal).

421. Montgomery v. Watson, 833 F. App'x 438, 439 (7th Cir. 2021).

422. *See supra* notes 349–352 and accompanying text.

423. *See supra* note 307.

424. *See* Montgomery v. Warden USP Terre Haute, No. 21-cv-00020, at 20 (S.D. Ind. Jan. 11, 2021), ECF No. 17 (order granting motion to stay execution pending a competence hearing) (indicating that Montgomery's execution was stayed within a month after the execution date was announced and that her counsel believed the execution date was unlawful).

425. *Id.*

426. *See* Kovarsky, *supra* note 188, at 1363–65 (explaining that a *Ford* claim often requires mental health professionals to perform in-person evaluations).

2. Upward Redistribution of Judicial Power.—The Trump Executions normalized emergency relief from the Supreme Court,[427] accelerating a noteworthy trend: the Court's expanding role in politically charged cases with high-stakes preliminary relief.[428] Those backing laws and practices that address short-term risks and gains, and who do so under threat of litigation, will have to think more carefully about the Court's ideological composition—at least for the foreseeable future. And the opaque, abbreviated quality of shadow-docket activity in divisive cases will doubtlessly raise even more questions about the Court's neutrality and legitimacy.

There are a few recent examples of the Supreme Court's newfound affinity for shadow-docket resolution of controversial, time-sensitive disputes.[429] The first involves COVID-protective rules affecting religious gatherings. After the Trump Executions, the Court used its shadow docket (five times) to go after California restrictions.[430] In what most call *South Bay II*,[431] the Court issued an unsigned and unreasoned order enjoining California from enforcing time-sensitive limitations on indoor religious gatherings.[432] In the weeks that followed, the Court granted emergency (shadow-docket) relief against two other California restrictions, directing lower courts to abide by *South Bay II*—even though *South Bay II* was unreasoned.[433] Two months later, in *Tandon v. Newsom*,[434] the Court enjoined pending appeal a California Health Department regulation that limited home

427. *Cf.* Vladeck, *supra* note 247, at 13 (observing that incidence of emergency shadow-docket relief normalizes the practice going forward).

428. *See id.* at 7 (noting that the shadow docket has become more publicly divisive and that a majority of the applications from the Trump Administration provoked at least one public dissent).

429. I do not mean to suggest that shadow-docket orders have *never* been used in high-profile or politically divisive cases, just that it was exceedingly rare. *See id.* at 3 (collecting examples, including orders respecting the execution of the Rosenbergs, President Nixon's bombing of Cambodia, and the initial Florida recount in the 2000 presidential election).

430. I only discuss the California cases below, but there were other emergency shadow-docket rulings against New York. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (ruling in consolidated cases).

431. S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021) (mem.).

432. *Id.* at 716. The Supreme Court granted functionally identical relief in a companion case on the same day. Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289, 1289–90 (2021) (mem.).

433. *See* Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.) (dictating injunctive relief based on the Court's decision in *South Bay II*); Gish v. Newsom, 141 S. Ct. 1290, 1290 (2021) (mem.) (remanding the case for further consideration in light of *South Bay II*). For a brief discussion of how to analyze the precedential value of unreasoned orders, see Judge McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays [https://perma.cc/J9AG-YRXX] (sorting shadow-docket orders into three categories representing a spectrum of precedential force).

434. 141 S. Ct. 1294 (2021) (per curiam).

gatherings to three families, expressing frustration with California's failure to abide by four of the Court's earlier, unreasoned orders.[435]

The second example involves efforts to clear American detention facilities dealing with COVID-19 outbreaks. In *Barnes v. Ahlman*,[436] adjudicated shortly after *Lee*, the Supreme Court stayed pending appeal a district court injunction requiring a county jail to meet certain health-and-safety benchmarks.[437] (A single month of testing had turned up COVID-19 in 10% of the jail's 3,000 prisoners, and the district court found the jail's health-and-safety practices to be grossly negligent.[438]) The Ninth Circuit had twice refused to stay the injunction, which was based on likely violations of the Eighth Amendment and federal disability statutes.[439] On a five-to-four vote breaking across ideological lines, the Court enjoined enforcement during pendency of the appeal.[440]

The COVID-19 examples nicely illustrate time-sensitive scenarios in which the preliminary relief, rather than the ultimate merits determination, is the high-stakes outcome. The timelines necessary to reach final judgment mean that a final judgment would materialize long after the litigants cared. But the COVID-19 cases are not the *only* prominent examples. Many readers recall when the Supreme Court stayed lower-court injunctions against early iterations of President Trump's so-called "Travel Ban," which had been directed against people from majority-Muslim countries (or, consider elections).[441] The point is not *just* that the Justices are using the shadow docket to decide winners and losers by adjudicating preliminary relief—it is that they are picking winners in politically divisive cases[442] without observing procedural norms that constrain decision-making in more regular postures.

I do not suggest the Supreme Court's shadow-docket practice during the Trump Executions was strict proximate cause for subsequent shadow-docket activity discussed above. Both the Trump Execution practice and the above-

435. *See id.* at 1296–97 ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise.").

436. 140 S. Ct. 2620 (2020) (mem.).

437. *Id.* at 2620.

438. *See* Ahlman v. Barnes, 445 F. Supp. 3d 671, 679–80, 694–95 (C.D. Cal. 2020) (noting that at least 369 inmates have been infected with COVID-19 and requiring basic mitigation measures).

439. *See* Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *1 (9th Cir. June 17, 2020) (explaining that inmates asserted Eighth Amendment, Fourteenth Amendment, and statutory claims against Orange County Jail, and denying the motion to stay the district court's preliminary injunction order); Ahlman v. Barnes, No. 20-55568, at 1 (9th Cir. June 29, 2020) (order) (denying the motion to stay the district court's preliminary injunction order due to lack of jurisdiction).

440. *See Ahlman*, 140 S. Ct. at 2620 (showing that Justice Breyer, Justice Kagan, Justice Sotomayor, and Justice Ginsburg did not support the grant of stay).

441. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2082–83 (2017) (per curiam) (granting stay applications in part).

442. *See* Vladeck, *supra* note 247, at 10 (remarking that "it is no longer possible for any reasonable observer to dispute" this conclusion).

cited examples likely trace to the same shifts in the Court's ideological and jurisprudential concentration. But the Supreme Court's aggressive use of its shadow docket to protectively grant emergency relief in the federal government's favor has normalized a formerly exotic practice. The result is that time-sensitive institutional behavior in socially contentious cases will be increasingly resolved through opaque Supreme Court process—process that is several degrees removed from the fact-finding that ordinarily dictates preliminary adjudication. Again, I embark on no lengthy normative analysis of that development here.[443] I simply want to call attention to the pivotal role the Trump Executions have played in normalizing the practice.

Conclusion

The Trump Executions were historically aberrant, landing in federal courts because of outlier political and bureaucratic behavior. The judiciary green-lighted the entire slate in large part because the Supreme Court had reached its breaking point with time-consuming post-conviction litigation and had grown especially hostile to execution-method claims. Because the thirteen federal executions took place under such unusual circumstances, one might hastily discount their legal significance—losing sight of their (potentially substantial) atmospheric and structural effects.

After all, the Trump Executions generated federal death penalty precedent that looks thin from any angle. The only formal merits dispositions came from intermediate appellate courts, and many of those decisions disclose little binding precedent. When the Supreme Court made its presence felt, it did so through shadow-docket orders respecting emergency relief. Conceivably based on its harm assessment, an evolving presumption against end-stage relief, or something else unstated, the Supreme Court's orders left other institutions without clear guidance as to the merits of the underlying disputes. Whatever the legacy of the Trump Executions, it is not a treatise-ready body of decisional law.

Instead, and because of their atmospheric and structural effects, the lasting legal impact of the Trump Executions will be on areas of law *other than the federal death penalty*. There is overwhelming evidence that the Supreme Court used its shadow docket to favor one administration's implementing prerogative over another's. The Court sent signals that states need not fear execution-method litigation in virtually any form, and that all end-stage claims—without respect to prisoner fault—might be subject to presumptions against relief. And the Court normalized a shadow-docket practice through which the Justices inject themselves into high-profile and divisive cases with high-stakes preliminary remedies.

443. In certain cases—like when a lower court issues a nationwide injunction against the United States—redistribution of power up the judicial hierarchy might strike many as entirely appropriate.