

## ESSAYS

# THE FEDERAL DEATH PENALTY, TRUMPISM, AND CIVIL RIGHTS ENFORCEMENT

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*This Essay focuses on the role of the federal death penalty in the national debate over capital punishment, and in particular, the use of the federal death penalty in the Trump Administration. The election of Donald Trump to the presidency will likely have the effect of not simply preserving, but of potentially strengthening, the federal government's use of capital punishment for certain serious federal offenses. Two primary factors bolster this assertion. First, the President has employed, and will likely continue to employ, strong rhetoric that advocates capital punishment in appropriate situations. And second, the President has appointed, and will likely continue to appoint, high-level prosecutors who will be committed to federal death penalty enforcement and judges, like Neil Gorsuch, who will be unlikely to support abolition through adjudication. This Essay cautions, however, that some forms of presidential rhetoric could also have the effect of undermining or weakening the legitimacy of the federal system. This Essay therefore urges the President to take a more cautious rhetorical approach, one that supports the death penalty generally but that also defers in specific cases to the informed judgments of professional prosecutors in the Department of Justice, thus enhancing public confidence in the fairness and objectivity of federal death penalty review. This Essay then argues that Congress, along with federal prosecutors, can also strengthen the federal death penalty system by giving new attention to civil rights violations as a basis for*

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*pursuing capital punishment. By amplifying the connection in existing law between the federal death penalty and civil rights, Congress and the Justice Department can help to demonstrate that the death penalty can be consistent with—and an important part of—a robust regime of civil rights enforcement.*

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#### INTRODUCTION

Conversations about capital punishment, like many political debates on matters of public importance today, are too often characterized by an unhelpful absolutism. In these moments, the conversation proceeds as if our only choices are either abolition or mandatory executions. Nuance is sacrificed in pursuit of simplicity. Tribalism and partisanship often prevail over considerations that might sensibly steer the conversation away from the extremes. The reality of capital punishment in America, however, requires a far more complex conversation.

Of course, there are useful debates to be had over whether any American jurisdiction should have a death penalty at all. In recent years, a few jurisdictions have successfully abolished their capital punishment systems, a trend that could be cited as evidence of the death penalty's uncertain future.<sup>1</sup> But recent efforts at abolition have

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1. See Jaime Fuller, *How Many States Have Abolished the Death Penalty Since 2000?*, WASH. POST (May 14, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/14/how-many-states-have-abolished-the-death-penalty-since-2000> (reporting that eighteen states have abolished the death penalty).

failed in other jurisdictions, including California,<sup>2</sup> New Hampshire,<sup>3</sup> Colorado,<sup>4</sup> and Nebraska.<sup>5</sup> Moreover, in Delaware, the State Supreme Court ruled in 2016 that the State's capital sentencing procedures violated the Sixth Amendment, and, thus, the court invalidated the practice. In response to the court's ruling, the Delaware House of Representatives passed legislation that would reinstate the capital sentencing procedures. Moreover, in Delaware, the State Supreme Court ruled in 2016 that the State's capital sentencing procedures violated the Sixth Amendment, and, thus, the court invalidated the practice.<sup>6</sup> In response to the court's ruling, the Delaware House of Representatives passed legislation that would reinstate the capital sentencing procedures.<sup>7</sup> Furthermore, public support for capital

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2. Associated Press, *Death Penalty Repeal Effort Fails Again in California*, NBC BAY AREA (Nov. 9, 2016, 10:04 AM), <https://www.nbcbayarea.com/news/local/Californians-Favoring-Death-Penalty-Reform-Rather-Than-Repeal-400496811.html> (describing how ballot measures to repeal the death penalty failed twice in four years); see Mike McPhate, *California Today: Why Californians Kept the Death Penalty*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/11/us/california-today-death-penalty-vote.html> (suggesting that the second rejection of the death penalty repeal in California was potentially caused by the country's political climate and confusion caused by dueling capital punishment measures on the ballot).

3. See Mark Berman, *New Hampshire Won't Repeal the Death Penalty*, WASH. POST (Apr. 17, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/04/17/new-hampshire-wont-repeal-the-death-penalty> (pointing out that New Hampshire is the only remaining New England state to still have the death penalty).

4. See Bente Birkeland, *An Effort to Repeal Colorado's Death Penalty Fails*, ASPEN PUB. RADIO (Feb. 16, 2017, 11:02 AM), <http://aspennpublicradio.org/post/effort-repeal-colorados-death-penalty-fails> (reporting on Colorado's failed fifth attempt within a single decade at repealing the death penalty); see also George Brauchler & Rich Orman, *Lies, Damn Lies, and Anti-Death Penalty Research*, 93 DENV. L. REV. 635, 640 (2016) (rebutting recent scholarly research that suggested Colorado's death penalty prosecutions were marred with racial bias).

5. See Aliyah Frumin, *Election 2016: Nebraska, Oklahoma Vote in Favor of Death Penalty*, NBC NEWS (Nov. 9, 2016, 12:45 PM), <https://www.nbcnews.com/storyline/2016-election-day/election-2016-nebraska-oklahoma-vote-favor-death-penalty-n681301> (describing how Nebraska's death penalty remained in force after citizenry overwhelmingly rejected its unicameral legislative repeal effort). Oklahomans also overwhelmingly approved a ballot measure that said the death penalty is not cruel and unusual punishment and amended the state constitution to say that any method of execution is acceptable unless forbidden by the Federal Constitution. *Id.*

6. See *Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016) (holding that Delaware's death penalty statute violates the Sixth Amendment's jury requirement because it allows a sentencing judge to weigh "any aggravating circumstance" in the selection phase of a death penalty sentencing, independent of the jury).

7. See Randall Chase, *Delaware House Votes to Reinstate Death Penalty*, U.S. NEWS &

punishment remains high,<sup>8</sup> and may even be understated once one accounts for the facts and circumstances of a particular case.<sup>9</sup>

Moreover, the recent decline in executions is often cited as evidence of the death penalty's impending demise.<sup>10</sup> But perhaps it is simply evidence that death penalty jurisdictions are becoming more cautious in how and when they employ their death penalties. Perhaps America is simply moving toward a more limited death penalty. A limited death penalty system, though, is not the same as an abandoned one. And if this is so, then employing the death penalty only on rare occasions and in especially deserving cases should, by itself, hardly be an argument for its invalidity.

Finally, there remains the contention that America's moral evolution should lead inexorably to its wholesale abandonment of capital punishment, constitutionally and politically.<sup>11</sup> But perhaps

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WORLD REP. (May 9, 2017, 6:15 PM), <https://www.usnews.com/news/best-states/delaware/articles/2017-05-09/delaware-house-votes-on-reinstating-death-penalty> (describing how the decision to pass legislation reinstating the death penalty, despite the state Supreme Court's ruling, may have been influenced by the killing of two law enforcement officers earlier in the year).

8. See Jeffrey Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP (Oct. 26, 2017), <http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx> (admitting that even though support for the death penalty is at its lowest level since 1972, fifty-five percent of the public supports the death penalty).

9. See J. Richard Broughton, *Hate Crimes, the Death Penalty, and Criminal Justice Reform*, 37 *HAMLIN J. PUB. L. & POL'Y* 185, 204–05 (2016) (explaining that current public opinion polling on the death penalty does not inform respondents of particular facts and circumstances that could affect a decision whether to support its application in a specific case); see also Stephen F. Smith, *Has the "Machinery of Death" Become a Clunker?*, 49 *U. RICH. L. REV.* 845, 869–70 (2015) (expressing caution in relying on polling-based measures of public support for the death penalty because past polling results have been unpredictable and often unaffected by events likely to have "[swung] the pendulum radically," such as the September 11, 2001 terrorist attacks).

10. See Richard C. Deiter, *The Future of the Death Penalty in the United States*, 49 *U. RICH. L. REV.* 921, 921, 925–26 (2015) (citing the emergence of DNA testing technology as an exoneration tool; the emergence of life without parole as a cheaper, alternative sentencing arrangement; and the drop in the nationwide murder rate as reasons for the decline in the use of the death penalty); Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 *J. CRIM. L. & CRIMINOLOGY* 561, 563–64 (2017) (highlighting how the administration of the death penalty has declined dramatically based on a county level review of death sentencing data across the country).

11. This is reflected in the effort to apply the Eighth Amendment's "evolving standards of decency" interpretation against capital punishment. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 269–81 (1972) (Brennan, J., concurring); cf. Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 *HARV. L. REV.* 1773, 1778, 1784 (1970) (arguing that what constitutes cruel and unusual punishment should be evaluated according to "evolving standards of decency" and suggesting that

there remains a place in the moral universe for a limited system of capital punishment. Perhaps there is some space for the belief that reasoned moral judgment may actually require at least the option of a death penalty, one placed within the framework of limited government power and protection for rights—with requirements of proof beyond a reasonable doubt and trial by jury, multiple layers of prosecutorial and judicial review, and the opportunity for executive mercy.

Once we consider what legal punishments should at least remain an option—for example, someone who masterminds the killing of nearly 3000 people on September 11, 2001<sup>12</sup> or who intentionally detonates a bomb at a large office building<sup>13</sup> or at a crowded and popular sporting event<sup>14</sup>—perhaps we can conclude that a morally serious, morally confident political community can locate in the reasoned moral judgment of its citizenry a narrow space for the death penalty, as a just and proportional punishment option in a few especially deserving cases.

These are worthy conversations. But in many places throughout America, the weight of arguments in favor of abolition simply does not appear to have garnered the support of political majorities who are willing to wholly abolish capital punishment in all of its forms.<sup>15</sup> Perhaps

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an Eighth Amendment standard that forbids punishments that are “‘degrading’ in their severity and ‘wantonly imposed’” is better).

12. See Indictment at 12–13, *United States v. Mohammed*, No. 93-cr-180 (S.D.N.Y.) (filed Dec. 14, 2009), <https://www.justice.gov/archive/opa/documents/ksm-indictment.pdf> (charging the defendant with conspiracy to commit terrorism, conspiracy to commit violent acts and destroy aircraft, conspiracy to commit aircraft piracy, murder, and the destruction of the Twin Towers). The indictment of Khalid Sheikh Mohammed was eventually dismissed pursuant to a *nolle prosequi* order, after Congress deprived the Justice Department of funding for a civilian prosecution of Mohammed and the other September 11 defendants. See Robert Chesney, *AG Holder’s Statement on the Prosecution of the 9/11 Conspirators, and Link to the SDNY Indictment and Nolle Prosequi Filing*, LAWFARE (Apr. 4, 2011, 2:28 PM), <https://www.lawfareblog.com/ag-holders-statement-prosecution-911-conspirators-and-link-sdny-indictment-and-nolle-prosequi-filing> (providing Attorney General Holder’s statement about the proceedings against the September, 11 conspirators).

13. See *United States v. McVeigh*, 153 F.3d 1166, 1176 (10th Cir. 1998) (affirming the application of the death penalty for Timothy McVeigh, the man convicted of the 1995 Oklahoma City bombing).

14. See Indictment at 1–2, *United States v. Tsarnaev*, 157 F. Supp. 3d 57 (D. Mass. 2016) (No. 13-cr-10200), 2013 WL 3215742, at \*1–2 (charging Dzhokhar Tsarnaev with offenses related to the 2013 Boston Marathon bombing).

15. See Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 141–42 (2017) (noting that abolitionists are unlikely to prevail “anytime soon given [the death penalty’s] continued popularity

someday it will. For the foreseeable future, though, and short of judicial abolition by the Supreme Court—which is certainly possible, though unlikely for the moment<sup>16</sup>—both abolitionists and supporters should acknowledge that many American jurisdictions are likely to continue enforcing and employing a death penalty, even if capital prosecutions and executions become increasingly rare. The key law and public policy challenge, then, is to determine how best to design and administer it, where it exists.<sup>17</sup> Of course, this challenge extends with special force to supporters of the death penalty. Designing and applying a modern, limited, but effective death penalty requires an appreciation of the historical shortcomings and critiques of capital punishment’s administration in America.<sup>18</sup> There are realities, therefore, that both sides of the abolition debate must come to accept.

Consequently, rather than treading again the well-worn ground of political, philosophical, religious, and economic arguments for and against capital punishment, and accepting the reality of capital punishment’s near-term continuation—as well as the need to ensure its harmony within a regime committed to rights, social justice, and equality—this Essay has a more modest focus. It evaluates the underappreciated place of the federal death penalty in American law and politics and makes two modest observations about the roles of the political branches of government in the federal death penalty’s scope and enforcement. It then combines those observations with two modest suggestions for both the President and the Congress regarding federal

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among legislatures and the general public”).

16. See *infra* Section I.B. For an argument that the Supreme Court should be willing to act “against public opinion” on the death penalty and engage in judicial abolition, see Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 533–34 (2017), which states that any justices appointed by President Trump are not likely to support judicial abolition of the death penalty.

17. See Thaxton, *supra* note 15, at 141–42 (advocating for a system that reduces constitutional errors to improve fairness in death penalty sentencing).

18. Those criticisms and critiques are too many to enumerate here. But among the more powerful recent ones are BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 2* (2017), which argues that the demise of the death penalty will allow society to “focus on remedying inept lawyering, overzealous prosecution, inadequate mental health treatment, race discrimination, wrongful convictions, and excessive punishments”; and CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 2–5* (2016), which argues that the attempt by courts to reform death penalty practices by constitutional regulation has created a more confusing, unworkable framework for its application.

death penalty practice and reform.

First, I observe that the federal death penalty represents a useful model for systemic enforcement and administration of capital punishment, and one that is likely to be preserved (even strengthened) in the Trump administration through a combination of prosecutorial policy and judicial selection. I contend, however, that the very source of this preservation—President Trump—also threatens the federal death penalty’s legitimacy. Second, I observe the flaw in the narrative that the death penalty is incompatible with a regime of racial and social justice. Rather, examining the federal death penalty and federal criminal law, I argue that a limited and effective death penalty can form an important part of a robust scheme of civil rights enforcement. Finally, I suggest a few modest ways in which Congress can strengthen that connection.

#### I. THE PRESIDENCY AND THE FEDERAL DEATH PENALTY IN THE TRUMP ADMINISTRATION

Legitimacy is critical to a system of criminal justice generally. But in a time when capital punishment is increasingly under fire, even from American conservatives,<sup>19</sup> it is particularly important that capital

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19. See, e.g., *Why We’re Concerned*, CONSERVATIVES CONCERNED ABOUT DEATH PENALTY, <https://conservativesconcerned.org/why-were-concerned> (last visited June 1, 2018) (lamenting that, after decades of trying, there is likely no way to make the death penalty “fair, accurate, and effective”). For some notable commentary on the “conservative case,” see Mary Kate Cary, *The Conservative Case Against the Death Penalty*, U.S. NEWS & WORLD REP. (Mar. 30, 2011, 3:28 PM), <http://www.usnews.com/opinion/articles/2011/03/30/the-conservative-case-against-the-death-penalty>, which argues that “[p]ro-life means pro-life in all things, not just abortion”; S.E. Cupp, *The Conservative Case Against the Death Penalty*, N.Y. DAILY NEWS (May 6, 2014, 2:14 PM), <http://www.nydailynews.com/opinion/conservative-case-death-penalty-article-1.1781639>, which argues that everyone should question their beliefs about the death penalty, especially conservatives; Leon Neyfakh, *The Conservative Case Against the Death Penalty*, BOS. GLOBE (May 25, 2014), <https://www.bostonglobe.com/ideas/2014/05/24/the-conservative-case-against-death-penalty/6NsOMqKbpJfIVMlyneICIM/story.html>, which profiles the growing number of conservatives opposing the death penalty due to reasons such as their religious affiliation and general distrust of the government; and George F. Will, Opinion, *Capital Punishment’s Slow Death*, WASH. POST (May 20, 2015), [http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d\\_story.html](http://www.washingtonpost.com/opinions/capital-punishments-slow-death/2015/05/20/f3c14d32-fe4f-11e4-8b6c-0dcce21e223d_story.html), which highlights that the conservative case against the death penalty is based on three main premises: first, that the “power to inflict death” gives the government too much power, which is “discordant with conservatism”; second, that administering the death penalty is irreversible and cannot be corrected if new evidence comes to light; and third, that the death penalty’s ability to deter crime is ineffective because it is applied so

punishment be—and be perceived as—legitimate. Consequently, those who wish to protect the death penalty in America must keep it respectable and responsible. Public support will broadly wane if the public senses that capital punishment is illegitimate: if it is applied foolishly, if it appears generally arbitrary or unfair, or if its financial cost is not exceeded by its capacity for doing justice. Despite a prevailing narrative among abolitionists that capital punishment in America is hopelessly flawed and inconsistent with human dignity, there are reasons to think that the federal death penalty system offers at least some reason to remain confident that a narrowly-tailored, deliberate, and objective death penalty process can exist. Although federal death row inmates account for a small percentage of total death row inmates across the country,<sup>20</sup> the federal death penalty system has shown that it can be compatible with our humanity and moral agency.

#### A. *Federal Death Penalty Review and the Age of Trumpism*

Apart from the provisions of substantive federal criminal law that provide for imposition of the death penalty for certain serious offenses, the procedures for seeking and imposing the death penalty in federal court are governed by the Federal Death Penalty Act (FDPA)<sup>21</sup> and by the lesser-known—but critically important—internal policies at the Department of Justice that bind federal prosecutors and Department leadership.<sup>22</sup>

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sporadically.

20. See *Federal Death Row Prisoners*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/federal-death-row-prisoners> (last updated July 25, 2017) (illustrating how, as of July 2017, there are only sixty-one federal inmates currently sitting on death row).

21. 18 U.S.C. § 3591 (2012). See generally Christopher Q. Cutler, Comment, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 SEATTLE U. L. REV. 1189, 1191 (2000) (discussing history of the federal death penalty and evaluating its expansion via the FDPA). Enacted in 1994, the FDPA expanded the federal government's ability to seek the death penalty. See David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C. L. REV. 645, 645 (1999). It did so by allowing federal prosecutors to seek the death penalty for a wider number of crimes. *Id.* Moreover, it provided for a new system to review the death penalty. See John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 940–41 (1998) (describing how the FDPA expanded prosecution of death penalty cases by increasing the number of eligible crimes to sixty).

22. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-10.010 to -10.200 (2016) [hereinafter U.S. ATTORNEYS' MANUAL], <https://www.justice.gov/usam>. For a thorough discussion of the protocol, see Rory K. Little, *The Federal Death Penalty: History and*



The FDPA, enacted in 1994, sets forth the relevant procedural framework for federal death penalty cases. It includes eligibility factors, relevant lists of aggravators and mitigators, the standard for determining whether a death sentence can be imposed, and various other provisions that govern federal capital litigation.<sup>23</sup> It does not, however, make judgments about when a death sentence should be sought against a federal defendant. Those judgments rest entirely with the Department of Justice and, more precisely, the Attorney General.

At the initial stages of pursuing a federal death penalty case, as set forth in the Department's death penalty review protocol, the decision whether to ultimately seek the death penalty belongs solely to the Attorney General.<sup>24</sup> But, that decision is informed by advice and recommendations from others within the Department, and from the United States Attorney's Office (which could even have its own internal death penalty review procedures with respect to making its initial recommendations in the case) to the Capital Case Section, to the Attorney General's Review Committee for Capital Cases, to the Office of the Deputy Attorney General and, finally, to the Office of the Attorney General.<sup>25</sup>

Within this multi-layered review process, decision makers consider the nature of the crime, the strength of the evidence, aggravating and mitigating circumstances, among other aspects of the case.<sup>26</sup> The process does not consider the race or ethnicity of either the defendant or the victim,<sup>27</sup> nor does it depend upon geography.<sup>28</sup> It is popular today to claim that the death penalty generally has a geographic bias,<sup>29</sup> but the

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*Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 406–19 (1999).

23. See 18 U.S.C. §§ 3591–3593.

24. U.S. ATTORNEYS' MANUAL, *supra* note 22, § 9-10.050 (“[T]he Attorney General will make the final decision whether to seek the death penalty.”).

25. *Id.* §§ 9-10.040, -10.050, -10.130.

26. *Id.* § 9-10.140.C–D (listing factors that should be considered when seeking the death penalty).

27. *Id.* § 9-10.140.A (“[B]ias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty.”).

28. *Id.* § 9-10.140.B (describing the multi-tiered review process used to achieve more uniform results across districts). For commentary that offers both praise and criticism for the protocol's treatment of geographic uniformity, see Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 *J. CRIM. L. & CRIMINOLOGY* 149, 157–60 (2010), which lauds the Department's goal of geographic uniformity in bringing death penalty prosecutions, but points out how this is hindered by a lack of federal resources.

29. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2755–62 (2015) (Breyer, J., dissenting)

federal death penalty has been applied with geographic diversity, including—somewhat controversially—in jurisdictions that do not have the death penalty as a matter of state law.<sup>30</sup> Moreover, capital defendants

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(suggesting that geography affects who is sentenced to death based on the power of local prosecutors, the availability of resources for public defenders, the racial composition within a county, and the political pressures faced by judges seeking reelection); *see also* John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 544–46 (2017) (describing how death penalty adjudications still suffer from geographic bias, particularly in the “states of the old Confederacy” like Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, which “account for the vast number of executions carried out since 1976”); Garrett et al., *supra* note 10, at 563–64; Evan J. Mandery, *Gregg at 40*, 46 SW. L. REV. 275, 286 (2017) (describing geographic disparities in administering death penalty).

30. *See* Libby Sander, *Judge Imposes Death in Killing of North Dakota Student*, N.Y. TIMES (Feb. 9, 2007), <http://www.nytimes.com/2007/02/09/us/09sentence.html> (reporting that the death penalty was imposed on a sex offender convicted in federal court of abducting and murdering a college student despite the fact that North Dakota no longer has the death penalty). At least one scholar has argued that this practice is unconstitutional pursuant to the Eighth Amendment. *See* Michael J. Zydney Mannheimer, *When the Federal Death Penalty Is “Cruel and Unusual,”* 74 U. CIN. L. REV. 819, 821 (2006) (arguing that the sentencing of five federal defendants in states that do not authorize the death penalty violates the Eighth Amendment’s ban on “cruel and unusual punishments”); *cf.* Eric A. Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 U. PA. J. CONST. L. 57, 63–65 (2009) (discussing Department of Justice approaches to death penalty prosecutions under various Attorneys General). For interesting research on how geography and race may affect federal capital sentencing decisions, *see* G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 429–33 (2010), which argues that racial distortions in the application of the federal death penalty are caused by the use of jury pools drawn from federal districts instead of at the county level.

One concern is that death qualification of juries contributes to geographic biases in application of the death penalty. Death-qualification of capital juries has its critics. *See, e.g.,* Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 770–71 (2006) (arguing that “the practice of death-qualifying capital juries . . . [lays] a thumb on the prosecutor’s side of the scale”). But death-qualification, which the Supreme Court has upheld against Sixth Amendment challenges, *see* *Lockhart v. McCree*, 476 U.S. 162, 165 (1986), is based on the premise that a prospective juror who categorically refuses to impose the death penalty has a bias against the law, and is excusable on that basis. The juror is, by definition, not impartial, as the Sixth Amendment contemplates jurors will be in federal criminal trials. *See* *Wainwright v. Witt*, 469 U.S. 412, 423–24 (1985) (holding that jurors who oppose the death penalty can be struck for impartiality because not doing so allows people onto a jury who will likely be biased against finding for a defendant). Imagine, for example, that the government brings a drug trafficking prosecution in a jurisdiction in which a substantial majority of citizens oppose criminal drug laws. Now imagine that

in the federal system are represented by learned counsel, who are experts in death penalty matters,<sup>31</sup> and have the opportunity to present arguments through counsel to the Department's leadership, making their case for why the Attorney General should not authorize the death penalty.<sup>32</sup> The decision whether to seek the death penalty is therefore informed, deliberative, and thorough. It is objective and apolitical. It should inspire public confidence.

Whether it will remain so during the current presidential administration is a separate matter. The election of Donald Trump to the presidency could be significant for the American death penalty and, in particular, the federal death penalty. Most immediately, it seems clear that the Trump Administration will seek to preserve, if not affirmatively strengthen, the federal government's use of capital punishment.<sup>33</sup> This has been, and likely will continue to be, reflected in his political appointments to leadership posts at the Justice Department, as well as appointments to the federal courts.<sup>34</sup> But it remains to be seen whether the President—constantly embroiled in scandal and controversy, and with a penchant for speaking publicly in ways that have been critical of the Justice Department,<sup>35</sup> and specifically of Attorney General Jeff

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a prospective juror says during voir dire that he opposes all criminal drug laws and would not vote to convict or impose any legally proscribed punishment upon any person who is prosecuted pursuant to those laws. There seems to be little question that this prospective juror would be excusable for cause. Should it matter that the prospective juror's views are shared by fifty-one, sixty, seventy, or even eighty percent of the state's citizens? No. A juror with a bias against the law should not become immune from for-cause removal simply because his bias is shared by others, even a substantial number of others. The same principle of demanding impartiality with respect to the law ought to apply to capital jury selection. See *McCree*, 476 U.S. at 178.

31. See 18 U.S.C. § 3005 (2012) (providing that defendants charged with capital crimes shall have access to counsel "learned in the law applicable to capital cases").

32. See U.S. ATTORNEYS' MANUAL, *supra* note 22, § 9-10.130 (describing the Capital Review Committee's process for reviewing death penalty recommendations).

33. See Ian Eppler, *The Federal Death Penalty Under Trump*, TAKE CARE (Apr. 27, 2017), <https://takecareblog.com/blog/the-federal-death-penalty-under-trump> (suggesting that President Trump could strengthen the federal government's use of capital punishment by encouraging prosecutors to seek more death penalty prosecutions or by "carry[ing] out the executions of the [sixty-two] individuals currently on federal death row").

34. See *infra* Section I.B.

35. On November 3, 2017, the President told a group of reporters, "a lot of people are disappointed in the Justice Department, including me." Avery Anapol, *Trump: Many People Are Disappointed in the Justice Department, "Including Me,"* HILL (Nov. 3, 2017, 10:01 AM), <http://thehill.com/homenews/administration/358600-trump-lots-of>

Sessions<sup>36</sup>—will undermine the Justice Department’s efforts to keep the federal death penalty respectable and responsible.

As a presidential candidate, and even before, Donald Trump made no secret of his affinity for the death penalty. Where a President supports the death penalty generally, there is nothing inherently wrong with publicly expressing that support in appropriate circumstances. But there is a difference between expressing support for the death penalty generally, on the one hand, and calling for it in specific cases, on the other hand. Trump’s calls for its imposition often have been controversial, reckless, and at odds with applicable law.

In May 1989, Trump gained notoriety by publicly supporting the death penalty in a full-page advertisement that ran in New York newspapers shortly after the notorious rape of a jogger in Central Park.<sup>37</sup> The advertisement did not specifically reference the group of teens aged fourteen to sixteen that eventually would become known as the Central Park Five, all of whom were convicted of the rape and later exonerated.<sup>38</sup>

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people-are-disappointed-in-justice-department-including.

36. See Donald J. Trump (@realDonaldTrump), TWITTER (July 25, 2017, 3:12 AM), <https://twitter.com/realDonaldTrump/status/889790429398528000> (accusing Sessions of being “VERY weak” on Hillary Clinton’s potential criminal activity); Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 5:49 AM), <https://twitter.com/realDonaldTrump/status/889467610332528641> (referring to Sessions as “our beleaguered A.G.”); see also Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html> (reporting that the President berated Sessions and “said he should resign” after Sessions recused himself from the investigation into the possible Russian interference with the 2016 U.S. presidential election).

37. See Matt Ford, *Donald Trump’s Racially Charged Advocacy of the Death Penalty*, ATLANTIC (Dec. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/12/donald-trump-death-penalty/420069>.

38. *Id.* The ad read:

Mayor [Ed] Koch has stated that hate and rancor should be removed from our hearts. I do not think so. I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, should be executed for their crimes. They must serve as examples so that others will think long and hard before committing a crime or an act of violence. Yes, Mayor Koch, I want to hate these murderers and I always will. I am not looking to psychoanalyze them or understand them, I am looking to punish them. If punishment is strong, the attacks on innocent people will stop. I recently watched a newscast trying to explain “the anger in these young men.” I no longer want to understand their anger. I want them to understand our anger. I want them to be afraid. How can our great society tolerate the continued brutalization of its citizens by crazed misfits? Criminals must be told that their CIVIL

In 2014, they received a \$40 million settlement in their suit for wrongful prosecution against the City of New York.<sup>39</sup> In light of their ages and the nature of the offense, none of the teens could have received the death penalty for the offense even if one of them had committed it.<sup>40</sup>

During the 2016 campaign, Bowe Bergdahl, an Army Sergeant who was held captive by the Taliban and charged with desertion in 2015, became yet another example of Trump's public support for the death penalty.<sup>41</sup> After the charges against Bergdahl were announced, Trump tweeted that he should "face the death penalty for desertion."<sup>42</sup> During campaign rallies, Trump referred to Bergdahl as a "traitor" and explicitly stated that he "should have been executed."<sup>43</sup> Under the Uniform Code of Military Justice, desertion is punishable by death if it occurs "in time of war."<sup>44</sup> In 2017, however, when Bergdahl faced sentencing, he received a substantially reduced sentence, with legal experts suggesting that this was in part because of the prejudicial statements made by the new commander-in-chief.<sup>45</sup>

Also while a candidate, the President explicitly discussed the death penalty at a campaign fundraiser in New Hampshire, where he

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LIBERTIES END WHEN AN ATTACK ON OUR SAFETY BEGINS.

*Id.*

39. In response to the settlement award, Trump ridiculed the City's decision to pay and stated that the exonerated men did "not exactly have the pasts of angels." *Id.*

40. *See id.* (pointing out that the Central Park Five were both too young to qualify for the death penalty and that, in 1977, the Supreme Court invalidated the death penalty for the rape of an adult woman).

41. *See* Richard A. Oppel Jr., *Bowe Bergdahl Avoids Prison for Desertion; Trump Calls Sentence a "Disgrace,"* N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/us/bowe-bergdahl-sentence.html> (describing how President Trump repeatedly denounced Sergeant Bergdahl during campaign speeches and called for him to receive the death penalty).

42. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 26, 2015, 4:45 AM), <https://twitter.com/realDonaldTrump/status/581059354511671296>.

43. *See* Meghan Keneally, *Donald Trump Has Condemned Bowe Bergdahl and His Taliban Release from the Beginning,* ABC NEWS (Oct. 16, 2017, 1:19 PM), <http://abcnews.go.com/US/donald-trump-condemned-bowe-bergdahl-taliban-release-beginning/story?id=50509168> (highlighting Donald Trump's displeasure about the retrieval of Sergeant Bergdahl from Afghanistan after he was captured by the Taliban and ultimately exchanged for five other prisoners).

44. *See* 10 U.S.C. § 885 (2012) (stating that "[a]ny person found guilty of desertion . . . shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion . . . occurs at any other time, by such punishment, *other than death*, as a court-martial may direct" (emphasis added)).

45. *See* Oppel, *supra* note 41.

announced that one of his first executive orders would involve the death penalty for those who kill members of law enforcement.<sup>46</sup> According to news reports, the President agreed to push the idea after meeting with members of the Association.<sup>47</sup> But it was unclear exactly what this promise meant.<sup>48</sup>

As President, Trump has not wavered in his support for capital punishment.<sup>49</sup> Still, although he has not acted on the campaign promise regarding police officer killings, and although it is entirely possible that the Portsmouth statement was simply a political appeal to this unique audience with no intention of fulfilling the promise, it would be difficult to imagine such a promise coming to fruition. Mandatory death penalties have been unconstitutional for over forty years.<sup>50</sup> Moreover, although an executive order cannot alter state criminal law, if Trump simply meant that he would direct federal prosecutors to seek the death penalty in cases involving the killing of federal law enforcement officers, then this might come closer to an appropriate use of a presidential order. But it would raise serious questions about the prosecutorial independence of the Justice Department and the power of the president to direct the charging

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46. See Jenna Johnson, *Donald Trump Wants the Death Penalty for Those Who Kill Police Officers*, WASH. POST (Dec. 10, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/10/donald-trump-wants-the-death-penalty-for-those-who-kill-police-officers>. On December 9, 2016, speaking to the New England Police Benevolent Association in Portsmouth, Trump stated, “One of the first things I’d do in terms of executive orders, if I win, will be to sign a strong, strong statement that will go out to the country, out to the world, that anybody killing a policeman, a policewoman, a police officer, anybody killing a police officer: Death penalty is going to happen, okay?” *Id.*

47. *Id.*

48. See *id.* (questioning how Donald Trump promised he would issue an executive order imposing the death penalty on those who kill law enforcement officials when he “provided no details of how such an executive order would work or its legality”).

49. See Mark Berman, *Trump Remains a Staunch Supporter of the Death Penalty, but Many Americans Are Souring on It*, WASH. POST (Nov. 2, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/11/02/trump-remains-a-staunch-supporter-of-the-death-penalty-but-many-americans-are-souring-on-it> (describing how President Trump advocated that the suspected attacker behind the 2017 New York City terrorist attack, Sayfullo Saipov, should receive the death penalty).

50. See *Sumner v. Shuman*, 483 U.S. 66, 67, 85 (1987) (invalidating a Nevada statute that imposed a mandatory death penalty sentence upon prisoners serving life sentences without parole who commit murder in prison); *Woodson v. North Carolina*, 428 U.S. 280, 301, 303–05 (1976) (requiring individualized sentencing determinations under the Eighth Amendment).

decisions of federal prosecutors.<sup>51</sup> And it would plainly infringe the death penalty protocol, the point of which is to make individualized judgments based on the facts and circumstances of each case—a process designed to function objectively and without political influence.<sup>52</sup>

The President's willingness to interfere with internal Justice Department deliberations in capital cases became even more pronounced and problematic in the fall of 2017. On November 1, 2017, the President issued a statement via his Twitter account calling multiple times for the death penalty for Sayfullo Saipov,<sup>53</sup> who is accused of killing eight people in New York City when he drove a rental truck onto a crowded bike path.<sup>54</sup> The Government alleges that Saipov's act was inspired by the Islamic State.<sup>55</sup> The initial criminal complaint cited a capital offense,<sup>56</sup> and the Government subsequently obtained an indictment charging Saipov with multiple capital crimes, including committing a violent crime in aid of racketeering, and using a motor vehicle to cause death.<sup>57</sup>

Shortly after the President issued his tweets, some commentary focused on the so-called Nixon/Manson principle, recalling a public statement by President Nixon that the notorious Charles Manson was

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51. See Sally Q. Yates, Opinion, *Protect the Justice Department from President Trump*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/opinion/sally-yates-protect-the-justice-department-from-president-trump.html> (describing how President Trump's intrusion into Department affairs may irreversibly harm the agency and mar its perceived independence).

52. See U.S. ATTORNEYS' MANUAL, *supra* note 22, § 9-10.030 ("The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.").

53. See Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 2, 2017, 1:54 AM), <https://twitter.com/realDonaldTrump/status/926054936718307328> ("There is also something appropriate about keeping him in the home of the horrible crime he committed. Should move fast. DEATH PENALTY!"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 1, 2017, 5:43 PM), <https://twitter.com/realDonaldTrump/status/925931294705545216> ("NYC terrorist was happy as he asked to hang ISIS flag in his hospital room. He killed [eight] people, badly injured [twelve]. SHOULD GET DEATH PENALTY!").

54. Indictment at 7–12, *United States v. Saipov*, No. 1:17-cr.-00722 (S.D.N.Y.) (filed Nov. 21, 2017) [hereinafter Saipov Indictment], <https://www.courtlistener.com/recap/gov.uscourts.nysd.484263/gov.uscourts.nysd.484263.8.0.pdf>.

55. *Id.*

56. Complaint at 1–2, *United States v. Saipov*, No. 17 mag 8177 (S.D.N.Y.) (filed Nov. 1, 2017), <https://assets.documentcloud.org/documents/4165614/U-S-v-Sayfullo-Saipov-Complaint.pdf>.

57. See Saipov Indictment, *supra* note 54, at 7–12.

guilty after having been accused of involvement in multiple horrific murders in California.<sup>58</sup> Manson's lawyers moved for a mistrial, citing prejudice created by President Nixon's statement.<sup>59</sup> President Nixon subsequently withdrew the remark.<sup>60</sup> But the real problem with the President's tweets has nothing to do with the Nixon/Manson principle. The real problem is that President Trump's tweets—which are official public statements of the President<sup>61</sup>—could undermine perceptions about the objectivity of the internal review process at the Justice Department.

If federal prosecutors, and the Attorney General in particular, sense that they must seek the death penalty whenever the President publicly calls for it, then the protocol review process effectively becomes a sham. That sensibility could be especially strong in an Administration where public disagreement with the President is seen as problematic, and where both the Attorney General and the Justice Department generally have already been subjected to the President's scorn.<sup>62</sup> And

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58. See Joan Biskupic, *Did Donald Trump Subvert the Case Against New York City Terror Suspect?*, CNN (Nov. 2, 2017, 4:33 PM), <http://www.cnn.com/2017/11/02/politics/trump-new-york-city-death-penalty/index.html> (discussing the parallels between Trump's tweets and President Nixon's public comments that could have tainted the government's case against Charles Manson); see also Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 351 n.198 (2012) (explaining that President Nixon, while talking to a reporter in 1970, referred to Manson as "a man who was guilty, directly or indirectly, of eight murders without reason," a comment that Nixon's press secretary quickly walked back).

59. See Robert B. Semple, *Nixon Calls Manson Guilty, Later Withdraws Remark*, N.Y. TIMES (Aug. 4, 1970), <http://www.nytimes.com/1970/08/04/archives/nixon-calls-manson-guilty-later-withdraws-remark-refers-to-coast.html>.

60. *Id.* (quoting President Nixon) ("To set the record straight, . . . I do not know and did not intend to speculate as to whether the Tate defendants are guilty, in fact, or not. All of the facts in the case have not yet been presented. The defendants should be presumed to be innocent at this stage of their trial.").

61. See Andrew Blake, *DOJ: Trump's Tweets Are "Official Statements of the President"*, WASH. TIMES (Nov. 14, 2017), <https://www.washingtontimes.com/news/2017/nov/14/doj-donald-trump-tweets-are-official-statements-of> (noting that in response to a request for clarification regarding the status of President Trump's tweets from Judge Mehta of the U.S. District Court for the District of Columbia, the Department of Justice declared that "the government is treating the President's statements . . . —whether by tweet, speech[,] or interview—as official statements of the President of the United States").

62. See Schmidt & Haberman, *supra* note 36 (reporting that after hearing that the FBI had appointed a special counsel to investigate Russian election interference and conspiracy, President Trump berated Attorney General Jeff Sessions, calling him an "idiot" and telling him he should resign).



while the death penalty protocol does not create enforceable rights,<sup>63</sup> and while the separation of powers would ordinarily protect the protocol review process from judicial inquiry,<sup>64</sup> one can at least imagine a scenario in which defense lawyers for Saipov question in court the fairness and legitimacy of the decision-making process in light of the President's tweets. Even if Saipov were to lose on such a claim (as he should), it would be unfortunate if the President's tweets led to such litigation and placed this unusual burden on federal prosecutors and courts.<sup>65</sup>

*B. Judicial Selection and the Preservation of Capital Punishment*

These stumbles aside, though, the Trump Administration will likely keep the federal death penalty robust. One way of doing so, as previously discussed, will be to appoint high-level prosecutors who will be committed to enforcement of the federal death penalty. Another

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63. See *United States v. Lee*, 274 F.3d 485, 496 (8th Cir. 2001) (concluding that the defendant had “no enforceable rights under the death penalty protocol and that any violation of it would not entitle him to a new penalty trial”).

64. See *United States v. Slone*, 969 F. Supp. 2d 830, 833–34 (E.D. Ky. 2013) (explaining that federal courts do not have the authority to instruct the Executive Branch in its exercise of prosecutorial discretion, including “the decision whether to seek the death penalty”); *United States v. McVeigh*, 944 F. Supp. 1478, 1483 (D. Colo. 1996) (holding that the Department of Justice’s decision to file death penalty notices according to the death penalty protocol “is not judicially reviewable”); cf. *United States v. Shakir*, 113 F. Supp. 2d 1182, 1188 (M.D. Tenn. 2000) (citing separation of powers in denying defense requests to order pre-authorization discovery and to prohibit death penalty authorization).

65. Most recently, President Trump has publicly advocated the death penalty in some drug trafficking cases. See Tessa Berenson, *President Trump Outlines Death Penalty for “Big Pushers” in Opioid Plan*, Time (Mar. 19, 2018), <http://time.com/5206107/donald-trump-new-hampshire-opioids>. For now, the White House’s position appears to be to encourage the use of death penalty for traffickers “where appropriate under current law,” rather than to create a new capital statute for death resulting from drug transactions. See *Fact Sheets: President Donald J. Trump’s Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand*, WHITE HOUSE (Mar. 19, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-initiative-stop-opioid-abuse-reduce-drug-supply-demand>. Attorney General Sessions has also directed federal prosecutors to consider the death penalty in appropriate drug-related cases. See *Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions*, Memorandum to U.S. Attorneys from the Attorney General (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download>. This rhetoric has been somewhat less problematic than that in the Saipov case because the President appears to be advocating the death penalty generally, rather than in a specific case and without all available evidence.

will be through the appointment of judges who will not use constitutional adjudication to abolish capital punishment. Perhaps most importantly, President Trump's appointment of Neil Gorsuch to the Supreme Court—filling the Seat left vacant for nearly 300 days after Justice Antonin Scalia's death—has significantly reduced the chances of judicial abolition of all death penalties by the Court on Eighth Amendment grounds.<sup>66</sup>

Justice Scalia openly rejected categorical challenges to the death penalty's constitutionality.<sup>67</sup> And he was consistently critical of judicial abolitionism.<sup>68</sup> The vacancy created by his February 2016 death created the possibility that President Obama, or the next President, could fill the seat with someone who would be more open to arguments against the death penalty's constitutionality. When it became clear that President Obama's nomination of Judge Merrick Garland would not be considered by the Republican-controlled Senate,<sup>69</sup> the focus then shifted to potential appointment in either a Trump- or Hillary Clinton-led administration. Clinton had spoken publicly about her support for capital punishment (notably, for preserving the federal death penalty), but had also indicated her view that the Supreme Court should consider the continued vitality of state death penalty systems.<sup>70</sup> Trump's election, though, and his subsequent

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66. See J. Richard Broughton, *The Death Penalty and Justice Scalia's Lines*, 50 AKRON L. REV. 203, 220–21 (2016) (arguing that a potential liberal replacement for Justice Scalia could join Justices Breyer, Ginsburg, Kagan, and Sotomayor in abolishing the death penalty under Eighth Amendment grounds, but that outcome became far less likely after Donald Trump won the presidential election). Justice Gorsuch's decisions in the Tenth Circuit seem to indicate he would not favor abolition of the death penalty. See, e.g., *Eizember v. Trammell*, 803 F.3d 1129, 1138 (10th Cir. 2015) (explaining that federal courts owe a duty of "double deference" to a state trial court judge's decision not to strike jurors in capital cases who may be biased in favor of the death penalty).

67. See, e.g., Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002) <https://www.firstthings.com/article/2002/05/gods-justice-and-ours> ("[T]he constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted . . . . And so it is clearly permitted today."); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (rebutting constitutional concerns raised by Justice Breyer's dissent).

68. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring) ("It is no proper part of the business of this Court, or of its Justices, to second-guess [the judgment of the people to have capital punishment].").

69. See Ariane de Vogue, *Remember Merrick Garland? Supreme Court Nominee Waits (and Waits)*, CNN (Sept. 6, 2016, 7:22 PM), <http://www.cnn.com/2016/09/06/politics/merrick-garland-supreme-court-wait/index.html>.

70. See Daniel Strauss, *Clinton Lays Out Rationale for Death Penalty Support*, POLITICO

appointment of Justice Gorsuch have created a greater likelihood that Scalia's position will endure on the Court.

Justice Gorsuch has not publicly indicated any support for arguments against the death penalty's constitutionality generally.<sup>71</sup> And in his short time on the Court, he has voted to sustain death sentences against constitutional challenges, or otherwise deny certiorari in several capital cases brought by inmates, refusing to join calls for judicial reexamination of capital punishment more broadly.<sup>72</sup>

Justice Gorsuch voted on the merits to uphold the death sentences in *Davila v. Davis*<sup>73</sup> and *McWilliams v. Dunn*.<sup>74</sup> He did not join the dissent from the denial of certiorari by Justice Breyer in *McGehee v. Hutchinson*,<sup>75</sup> in which Justice Breyer desired review of an issue that raised questions about the constitutionality of the death penalty.<sup>76</sup> He did not join the statement of Justices Breyer and Sotomayor respecting denial of certiorari in *Floyd v. Alabama*,<sup>77</sup> arguing for review of a *Batson v. Kentucky*<sup>78</sup> claim arising from capital jury selection.<sup>79</sup> Nor did he join Justices Ginsburg and Sotomayor in dissenting from denial of

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(Feb. 4, 2016, 10:55 PM), <https://www.politico.com/blogs/new-hampshire-primary-2016-live-updates/2016/02/2016-democratic-debate-hillary-clinton-death-penalty-218798> (quoting Clinton's statements at the Democratic primary debate: "I have much more confidence in the federal system[,] and I do reserve it for really heinous crimes in the federal system, like terrorism.").

71. See Mark Joseph Stern, *Neil Gorsuch Is Not a Villain*, SLATE (Jan. 31, 2017, 10:14 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/01/neil\\_gorsuch\\_is\\_not\\_a\\_villain.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/neil_gorsuch_is_not_a_villain.html) ("[Gorsuch] has issued few death penalty decisions but divulged no qualms about its constitutionality and will probably resist efforts to limit its application.").

72. See, e.g., *McGehee v. Hutchinson*, 137 S. Ct. 1275, 1276 (2017) (voting with the majority to deny a stay of execution and deny a writ of certiorari for an inmate alleging that "Arkansas' [s] current lethal-injection protocol posed a substantial risk of severe pain" in violation of the Eighth Amendment).

73. 137 S. Ct. 2058 (2017).

74. 137 S. Ct. 1790 (2017); see *Davila*, 137 S. Ct. at 2062 (joining the opinion of Justice Thomas that held that federal courts hearing federal habeas challenges cannot hear a defaulted claim of ineffective assistance of appellate counsel, where the claim was not raised by state post-conviction counsel); *McWilliams*, 137 S. Ct. at 1801–02 (Alito, J., dissenting) (arguing that the State had not deprived capital defendant of rights to access mental health experts to assist with evaluation, preparation, and presentation of his defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985)).

75. 137 S. Ct. 1275 (2017) (mem.).

76. *Id.* at 1276 (Breyer, J., dissenting from denial of application for stay of execution).

77. 138 S. Ct. 311 (2017) (mem.).

78. 476 U.S. 79 (1986).

79. *Floyd*, 138 S. Ct. at 311 (Sotomayor, J., respecting denial of certiorari).

certiorari and stay in *Otte v. Morgan*,<sup>80</sup> concerning denial of a trial on the validity of Ohio's execution protocol.<sup>81</sup> On this record, then, there is every reason to believe that Justice Gorsuch's position will be consistent with that of Justice Scalia on the larger questions about the death penalty's constitutionality and the role of the Court.

This does not mean that the move for judicial abolition will quietly fade away. Rather, the focus now will likely be on Justice Kennedy, and whether he will join the forces against the death penalty before he leaves the Court. There is some support for this theory, but as I have explained elsewhere, one should not overstate the case.<sup>82</sup> Justice Kennedy has not demonstrated the kind of hostility toward the death penalty that others like Justice Breyer have shown.<sup>83</sup> And even though he has voted to invalidate death penalty practices on categorical grounds,<sup>84</sup> he has never expressed a view that the death penalty per se violates the Constitution, nor joined Justice Breyer's calls for granting review on the question.<sup>85</sup>

It is therefore likely that the Trump Administration will be committed to a robust federal death penalty, and that President Trump's appointees to the Court will protect the death penalty against per se constitutional challenges. Moreover, unless Justice Kennedy is persuaded to join the chorus advocating judicial abolition, it is also likely that efforts to judicially kill capital punishment will flounder on the current Supreme Court. But merely keeping capital punishment barely breathing is not good enough.

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80. 137 S. Ct. 2238 (2017).

81. *Id.* at 2238 (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari).

82. See Broughton, *supra* note 9, at 221–26; see also Barry, *supra* note 16, at 533 (expressing skepticism that Justice Kennedy would join four other justices for abolition).

83. See, e.g., *McGehee v. Hutchinson*, 137 S. Ct. 1275, 1276 (2017) (Breyer, J., dissenting from denial of application for stay of execution); *Tucker v. Louisiana*, 136 S. Ct. 1801, 1801 (2016) (Breyer, J., dissenting from denial of certiorari); *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

84. See *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008) (holding that the Eighth Amendment forbids the death penalty for aggravated rape of a child); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the Eighth Amendment forbids the death penalty for those whose crime is committed before age eighteen); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment forbids the death penalty for mentally disabled persons).

85. See, e.g., *McGehee*, 137 S. Ct. at 1277 (Breyer, J., dissenting from denial of application for stay of execution) (arguing that the Court should address the question of “whether the death penalty is consistent with the Constitution”).

Its protectors must keep it legitimate and strive to maintain public confidence in it. One way to do that is to ensure a thorough, deliberate, objective, and apolitical system of deciding who should be subject to, and administering, the death penalty—a point that President Trump would do well to observe. No matter how satisfying to his admirers and political base, thoughtless and indiscriminate calls for the death penalty in ongoing cases are neither necessary nor useful.<sup>86</sup> The judgment of professional prosecutors at the Justice Department will be far more valuable to the federal system of capital punishment, and far more confidence-inspiring, given what we know about the President's history of public remarks on death penalty matters. Demagoguery will do nothing to help the modern death penalty.

Another way of enhancing legitimacy is to demonstrate that a system of capital punishment can be consistent with a regime of civil and constitutional rights. The next Part explores this connection in federal criminal law.

## II. CONGRESS, THE FEDERAL DEATH PENALTY, AND CIVIL RIGHTS ENFORCEMENT

In the minds of many critics, capital punishment enjoys an uneasy—if not hostile—connection to civil rights and civil liberties.<sup>87</sup> One could hardly imagine, based on the sentiment of abolitionists and other critics, that the death penalty could ever serve the interests of a nation committed to civil and constitutional rights. Nevertheless, despite the narrative that holds that the death penalty is incompatible with a regime of racial and social justice, this narrative is flawed. The relationship of capital punishment to civil rights is not only possible but fully in force today through the federal criminal law of civil rights enforcement. Moreover, there are compelling reasons for maintaining, or even strengthening, those connections. First, deprivations of constitutional and civil rights undermine the political community's

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86. See *supra* note 53 (citing President Trump's tweets demanding the death penalty for Sayfullo Saipov).

87. See *infra* note 114 (describing then-Senator Jeff Session's proposed amendment to a federal hate crime bill mandating the death penalty for certain hate crime offenses); see also Mark J. MacDougall & Karen D. Williams, *The Federal Death Penalty Scheme Is Not a Model for State Reform of Capital Punishment Laws*, 67 AM. U. L. REV. 1647, 1670–71 (2018). Often, the death penalty is also alleged to be inconsistent with human rights. See Barry, *supra* note 16, at 526–27 (surveying the opinions of judges who have advocated for the abolition of the death penalty in the United States).

security in ways similar to crimes against the person, with which capital punishment is ordinarily associated. Second, where the crimes are motivated by animus based on personal or religious identity, there are sound reasons for treating such motives as especially aggravating. And finally, civil rights offenses may involve serious abuses of government power, which create special dangers to the personal and political security of the community by threatening the rule of law. By ensuring a robust connection between serious punishments, including capital punishment, and the enforcement of civil rights, the Government can mitigate some of the concerns about whether the death penalty is applied evenhandedly. It can also inspire greater confidence that the death penalty can be consistent with the interests of groups that have historically been subjected to both and state and private violence and that have not historically enjoyed political power.

#### A. *Existing Criminal Statutes*

Federal criminal law already provides for the possibility of a death sentence in cases involving violations of civil rights.<sup>88</sup> This is perhaps the most glaring difficulty with the contention that civil rights and an effective death penalty are incompatible. Not only is the death penalty possible in such cases, it has actually been employed.<sup>89</sup> Chapter 13 of Title 18, United States Code, supplies the relevant statutory framework.<sup>90</sup> In particular, four statutes, 18 U.S.C. §§ 241, 242, 245, and 247, criminalize acts of interference with a person's constitutional rights or other designated activities and prohibits depriving constitutional rights on the basis of race. All four statutes provide for the death penalty.

Section 241 makes it a crime to engage in a conspiracy to "injure, oppress, threaten, or intimidate" a person in any American jurisdiction "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his

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88. See 18 U.S.C. §§ 241, 242, 245, 247 (2012).

89. See Khushbu Shah et al., *Dylann Roof Jury: Death Penalty for Charleston Church Shooter*, CNN (Jan. 10, 2017, 7:52 PM), <https://www.cnn.com/2017/01/10/us/dylann-roof-trial/index.html> (reporting that Dylann Roof, who killed nine people in a 2015 massacre at a historically black church in Charleston, South Carolina will "become the first federal hate crime defendant to be sentenced to death").

90. 18 U.S.C. §§ 241, 242, 245, 247. The only civil rights statutes in Chapter 13 that proscribe violent conduct and that do not contain a death penalty are the freedom of access to clinic entrances statute (§ 248), and the hate crimes enforcement statute (§ 249). *Id.* §§ 248–249.

having so exercised the same.”<sup>91</sup> It further forbids going “in disguise on the highway, or on the premises of another, with intent to prevent or hinder [a person’s] free exercise or enjoyment of any right or privilege so secured.”<sup>92</sup> If death results from the underlying offense, or if the perpetrators attempt to kill, the offense may be punished by death.<sup>93</sup> The statute does not require state action or action under color of law.<sup>94</sup>

Section 242 makes it a crime for anyone, “under color of any law,” to willfully deprive a person of constitutional or legal rights or to subject someone to different punishments on account of race or alienage.<sup>95</sup> This is the statute that federal prosecutors typically use to punish law enforcement officers who use excessive force against suspects or detainees.<sup>96</sup> Prosecutions pursuant to this statute are often complicated by the high bar that the statute sets for proof of the willfulness *mens rea*, a subject with which the Supreme Court and lower courts have repeatedly grappled.<sup>97</sup> Assuming that its elements are satisfied, though, it provides for the death penalty if death results from the commission of the offense or where there is an attempt to kill.<sup>98</sup>

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91. § 241.

92. *Id.*

93. *Id.* (stating that the offense may be punished by death if death results from any acts enumerated in “violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, . . . or an attempt to kill”).

94. *Id.*

95. § 242 (“Whoever, under color of any law . . . willfully subjects any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race [shall be subject to criminal punishment].”).

96. *See Koon v. United States*, 518 U.S. 81, 88 (1996) (noting that the four Los Angeles police officers involved in the beating of Rodney King in 1991 were indicted under 18 U.S.C. § 242 for “violating King’s constitutional rights under color of law”).

97. *See Screws v. United States*, 325 U.S. 91, 101 (1945) (holding that “willfully” in § 242’s predecessor statute should be construed to mean “connoting a purpose to deprive a person of a specific constitutional right”); *United States v. Bradley*, 196 F.3d 762, 769 (7th Cir. 1999) (“A defendant need not ‘have been thinking in constitutional terms’ to willfully violate a constitutional right.” (quoting *Screws*, 325 U.S. at 106)); *United States v. Johnstone*, 107 F.3d 200, 208–09 (3d Cir. 1997) (recognizing that “*Screws* is not a model of clarity” and holding that § 242 liability is triggered “if it can be proved—by circumstantial evidence or otherwise—that a defendant exhibited reckless disregard for a constitutional or federal right”); *see also* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2213, 2179–93 (1993) (discussing *Screws* and the problems created by the statutory language of § 242).

98. § 242.

Another death penalty provision exists in the federally protected activities statute, § 245.<sup>99</sup> This statute criminalizes, whether under color of law or not, willful injury, intimidation, or interference with the exercise of certain designated activities (such as voting, participation in or enjoyment of an activity administered by a federal agency, jury service), or on account of race, color, religion, or national origin where the victim is engaged in federally protected designated activities.<sup>100</sup> As in previous statutes, the death penalty provision becomes available where death results from the underlying offense or where there is an attempt to kill.<sup>101</sup>

Finally, the death penalty applies for violations of the religious obstruction statute, § 247, that result in death, or where there is an attempt to kill.<sup>102</sup> This law makes it a crime to intentionally “deface[], damage[], or destroy[] any religious real property” on account of its religious character, or to use force or the threat of force to obstruct any person’s free exercise of religious beliefs.<sup>103</sup> It is also an offense to deface, damage, or destroy any religious real property “because of the race, color, or ethnic characteristics of any individual associated with that religious property.”<sup>104</sup>

Congress has taken an active role in the judicial determination of whether to seek capital punishment. Specifically, 18 U.S.C. § 3592 provides a non-exclusive list of mitigating factors that must be considered when the finder of fact is determining whether to seek capital punishment.<sup>105</sup> While no one mitigating factor is dispositive, and the list is not exhaustive, § 3592 requires that factors such as the defendant’s impaired capacity, possibility of duress, and lack of prior criminal record be considered.<sup>106</sup>

As I have explained elsewhere, there is some history behind the choice to forego a death penalty provision in the hate crimes law.<sup>107</sup> It

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99. § 245.

100. *Id.* (“Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from [engaging in various public activities is guilty of a crime].”).

101. *Id.*

102. *Id.* § 247.

103. *Id.*

104. *Id.*

105. *Id.* § 3592.

106. § 3592(a)(1)–(8).

107. *See* Broughton, *supra* note 9, at 192–96.



is useful here to summarize again that history. The law makes it a federal crime to willfully cause, or attempt to cause, bodily injury through the use of fire, firearm, dangerous weapon, or explosive or incendiary device “because of the actual or perceived race, color, religion, or national origin of any person.”<sup>108</sup> The same conduct is unlawful where it is done “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person,”<sup>109</sup> where the conduct bears a statutorily defined connection to interstate commerce.<sup>110</sup> The maximum punishment is ten years in prison,<sup>111</sup> though if death results or the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, the maximum punishment is life in prison.<sup>112</sup> Although the original House version of the bill did not contain a death penalty provision,<sup>113</sup> then-Senator Jeff Sessions offered one as an amendment during Senate consideration.<sup>114</sup> Senator Ted Kennedy of Massachusetts, though he opposed a final bill with a death penalty provision, nonetheless offered an amendment that would have established specific standards for seeking the death penalty in a hate crimes case, should the Sessions Amendment remain intact.<sup>115</sup> Some supporters of the hate crime legislation viewed the Sessions

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108. § 249(a)(1).

109. § 249(a)(2)(A).

110. § 249(a)(2)(B).

111. § 249(a)(1)(A), (a)(2)(A)(i).

112. § 249(a)(1)(B), (a)(2)(A)(ii).

113. *See* H.R. 1913, 111th Cong. (2009).

114. *See* 155 CONG. REC. S7683 (2009) (considering Amendment No. 1615 as modified); *see also* S. Amend. 1615 to S.1390, 111th Cong. (2009). The Amendment provided that the defendant “shall be subject to the penalty of death in accordance with chapter 228 (if death results from the offense), if—(i) death results from the offense; or (ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.” 155 CONG. REC. S7683.

115. *See id.* The Kennedy Amendment (Amendment No. 1614) would have required the Attorney General to certify that the defendant was among the “worst of the worst,” as Senator Kennedy described it, and would have required federal courts to conduct proportionality review to make sure that the case was like other cases where the federal government had sought and received the death penalty more than half of the time. *Id.* at S7683–84 (statement of Sen. Kennedy) (stating that “this amendment adds appropriate safeguards in cases where the federal government seeks the ultimate—and irreversible—penalty of death,” and that the amendment’s “requirements are a significant improvement over existing [f]ederal practice in death penalty cases”); *see* S. Amend. 1614 to S.1390, 111th Cong. (2009).

Amendment as an effort to kill the legislation, knowing that those in Congress who favored it would not do so if it imposed a death penalty.<sup>116</sup> Of course, the final version of the bill provided that life in prison would be the most severe punishment available.<sup>117</sup>

This history of the hate crimes law is also instructive because opponents of the Sessions Amendment further argued that it expanded the federal death penalty and was inconsistent with a commitment to civil rights.<sup>118</sup> As demonstrated above, the force of that argument is diminished once one realizes that the federal death penalty already extends to cases involving violations of civil rights. Put another way, the federal death penalty can be, and has been, used to vindicate—rather than oppress—civil and constitutional rights.

Consider, for example, the recent case of Dylann Roof, who was convicted of civil rights and gun crimes after he shot and killed nine African Americans during Bible study in a historic African-American church in Charleston, South Carolina.<sup>119</sup> There was no question that

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116. See Advocacy Letter from the Leadership Conference on Civil Rights et al., to the U.S. Senate, Oppose the Sessions Amendments to the Matthew Shepard Hate Crimes Prevention Act, (July 20, 2009), <https://civilrights.org/oppose-the-sessions-amendments-to-the-matthew-shepard-hate-crimes-prevention-act> (criticizing Senator Sessions's proposed amendments as they could lead to politically motivated and unconstitutional applications of the new hate crime law); Letter from Am. Civil Liberties Union to the U.S. Senate, ACLU Urges NO Vote on SA 1615—Sessions Death Penalty Amendment to Hate Crimes Amendment in Defense Authorization Bill (S. 1390); Sessions Amendment is Unconstitutional, (July 20, 2009) [hereinafter ACLU Letter], [https://www.aclu.org/sites/default/files/field\\_document/asset\\_upload\\_file\\_483\\_40374.pdf](https://www.aclu.org/sites/default/files/field_document/asset_upload_file_483_40374.pdf) (expressing concerns that the Sessions Amendment would expand the death penalty to include non-homicide offenses); Editorial, *A Deadly Amendment to the Hate-Crimes Bill*, L.A. TIMES (Aug. 7, 2009), <http://articles.latimes.com/2009/aug/07/opinion/ed-hate7> (“Republican strategists apparently see [the Sessions Amendment] as a kind of poison pill—they’re hoping that when a conference committee meets to reconcile the House and Senate defense bills, it will discard the Shepard Act rather than be sidetracked by a debate over capital punishment . . .”).

117. See H.R. REP. NO. 111-288, at 661–62 (2009) (Conf. Rep.).

118. See 155 CONG. REC. S7695 (2009) (statement of Sen. Leahy) (asserting that it would be unconstitutional to expand the federal death penalty to apply to certain hate crimes, such as kidnapping, where the victim’s life was not taken); ACLU Letter, *supra* note 116 (arguing that it would be a violation of civil rights to expand the federal death penalty, since it is disproportionately imposed on black defendants); Press Release, Am. Civil Liberties Union, Senate Adopts Death Penalty Amendment to Hate Crimes Provision (July 21, 2009), <https://www.aclu.org/news/senate-adopts-death-penalty-amendment-hate-crimes-provision>.

119. See Maya Rhodan, *Dylann Roof Found Guilty of All Charges in Charleston Church Shooting*, TIME (Dec. 15, 2016, 4:37 PM), <http://time.com/4603863/dylann-roof>

Roof perpetrated the crime (and thus no reasonable possibility of an actual innocence claim), nor was there any question that the crime was a capital one.<sup>120</sup> Although Roof was also charged in federal court with violating the hate crimes statute, his death-eligibility was based on his use of a firearm during a crime of violence, as well as the religious obstruction statute.<sup>121</sup> Notably, Roof's capital trial was authorized by Attorney General Loretta Lynch.<sup>122</sup> Using its *Petite* Policy, the Justice Department could have deferred all prosecution to South Carolina.<sup>123</sup> But it did not, because the Department had a substantial federal interest in civil rights enforcement that would not have been uniquely vindicated by the state prosecution.<sup>124</sup> Of course, the mere fact that the Department used the case to vindicate its interest in civil rights enforcement did not *require* that it seek the death penalty. But that decision is significant because it demonstrates how the federal death penalty can be used in a case that also vindicates the protection of civil rights—where there was no serious question of guilt, where the aggravation evidence was overwhelming and the mitigation weak, and where the victims were targeted based on their race.

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verdict-guilty (reporting that a jury took less than two hours to find Roof guilty of all thirty-three charges of murder, attempted murder, and federal hate crimes).

120. *See id.* (explaining that, because Roof had confessed to the crime and two of the adult survivors of the incident testified, the only remaining questions were whether Roof's act was a hate crime and whether it impeded on the church members' religious freedom).

121. *Id.*; *see* Indictment at 15, United States v. Roof, 252 F. Supp. 3d 469 (D.S.C. 2017) (No. 2:15-cr-472-RMG), 2015 WL 4461565, at \*15 [hereinafter Indictment of Dylann Roof] (charging Dylann Roof under 18 U.S.C. § 247(a)(2)).

122. *See* Press Release, U.S. Dep't of Justice, Attorney General Loretta E. Lynch Statement on the Case of Dylann Roof (May 24, 2016), <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-statement-case-dylann-roof> (authorizing the Government to seek the death penalty).

123. *See* U.S. ATTORNEYS' MANUAL, *supra* note 22, §§ 9-2.031, -10.110 (referencing *Petite v. United States*, 361 U.S. 529 (1960), as the common-law source of dual and successive prosecution policy).

124. *See id.* § 9-27.230 (instructing attorneys for the government to use a balancing test to determine whether a substantial federal interest exists, which considers “[(1)] Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities; [(2)] The nature and seriousness of the offense; [(3)] The deterrent effect of prosecution; [(4)] The person's culpability in connection with the offense; [(5)] The person's history with respect to criminal activity; [(6)] The person's willingness to cooperate in the investigation or prosecution of others; [(7)] The interests of any victims; and [(8)] The probable sentence or other consequences if the person is convicted”); *see also* Broughton, *supra* note 9, at 199–200 (discussing application of the *Petite* Policy in the Roof case).

Consider also the case of Len Davis, an officer in the New Orleans Police Department who, with the help of two other men, planned and executed the murder of Kim Groves.<sup>125</sup> Groves alleged that she saw Davis's police partner, Sammie Williams, pistol-whip her nephew and filed a police brutality complaint against Davis.<sup>126</sup> Davis then conspired with two other men—Paul Hardy, a New Orleans drug dealer, and Damon Causey—to kill Groves.<sup>127</sup> Davis and Williams drove to Groves's neighborhood, searched for her, and when they found her, contacted the triggerman.<sup>128</sup> Later that night, the triggerman shot and killed Groves.<sup>129</sup> At the time, Davis was also the subject of an ongoing Federal Bureau of Investigation (FBI) investigation into police corruption in New Orleans.<sup>130</sup> The FBI conducted surveillance and captured phone conversations involving the plot to kill Groves.<sup>131</sup> Davis was convicted of multiple civil rights offenses and, on both his original sentencing and on resentencing, was sentenced to death.<sup>132</sup> The Fifth Circuit eventually affirmed his convictions and death sentence.<sup>133</sup>

*Roof* and *Davis* are significant not simply because they were high-profile cases in which the Government sought the death penalty.<sup>134</sup> Rather, the Government's decision to seek the death penalty also demonstrated that the most serious punishment would remain available to vindicate civil and constitutional rights.

That decision has important normative value. Federal criminal law

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125. See *United States v. Davis*, 609 F.3d 663, 670–71 (5th Cir. 2010) (finding an aggravating factor of “future dangerousness” sufficient to trigger the federal death penalty).

126. *Id.* at 670.

127. *Id.*

128. *Id.* at 670–71.

129. *Id.* at 671.

130. *Id.*

131. *Id.*

132. *Id.* at 671–73. Davis was originally charged with conspiracy in violation of 18 U.S.C. § 241 (2012), deprivation of rights under color of law in violation of 18 U.S.C. § 242, as well as with 18 U.S.C. § 1512(a)(1)(C), making it a crime to kill another person in an attempt to prevent that person from communicating with law enforcement. *Id.* at 671. The Fifth Circuit had earlier held that the evidence was legally insufficient on the latter charge and ordered resentencing based on a defect in the jury's original penalty recommendations. See *United States v. Causey*, 185 F.3d 407, 421–23 (5th Cir. 1999). Davis was therefore resentenced to death on the civil rights convictions. *Davis*, 609 F.3d at 672–73.

133. *Id.* at 670.

134. See *id.*; Indictment of Dylann Roof, *supra* note 121, at 1.

distinguishes crimes against the person (e.g., murder<sup>135</sup> or kidnapping<sup>136</sup>) and crimes against the state (e.g., espionage<sup>137</sup> and bribery<sup>138</sup>). Sometimes, those distinct forms of criminality intersect—for example, killing a Member of Congress<sup>139</sup> or assassinating the President.<sup>140</sup> The civil rights crimes that implicate the federal death penalty also fall at a critical intersection of distinct kinds of crimes. They are violent crimes against the person, but they are also political crimes, in the sense that they undermine the legal protections of the citizenry and the institutional interests of the Government in safeguarding rights, which simultaneously helps both to limit Government power and better allow the Government to maintain tolerable order and legal equality. Indeed, the federal Government has a unique role in protecting rights and that role has been a defining feature of our constitutional system since the post-Civil War period.<sup>141</sup> These civil rights crimes are therefore worthy of serious punishment not simply because they result in death, but because they undermine both the personal and political security of the citizenry.

In conducting protocol review, the Justice Department should give substantial weight to any underlying facts that show beyond a reasonable doubt that the offense deprived, or endeavored to deprive, any person of civil or constitutional rights. Although the FDPA already helps to facilitate review of a defendant's culpability, Congress could also help to facilitate a civil-rights-specific review and better allow juries to weigh a capital defendant's culpability for civil rights offenses that result in death.

#### *B. Amending the FDPA*

Congress can further facilitate a review of a capital defendant's culpability by amending the FDPA to include a greater emphasis on civil rights-based offenses. Although the existing list of aggravators supplies a basis for possibly seeking the death penalty in some cases involving civil rights-based offenses, none of them are directed specifically at civil rights violations or bias-motivated conduct.

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135. See 18 U.S.C. § 1111.

136. See *id.* § 1201.

137. See *id.* § 794.

138. See *id.* § 201.

139. See *id.* § 351(a).

140. See *id.* § 1751(a).

141. See U.S. CONST. amend. XIII, § 2; *id.* Amend. XIV, § 5; *id.* amend. XV, § 2.

Aggravating factors, one of which must be proven beyond a reasonable doubt to render the defendant eligible for the death penalty,<sup>142</sup> must narrow the class of death-eligible defendants.<sup>143</sup> It is in this way that aggravators help to channel juror discretion.<sup>144</sup> Aggravators may not be vague,<sup>145</sup> and the jury cannot be allowed to weigh invalid factors.<sup>146</sup> But aggravators are also tools for demonstrating the nature of the crime, which can be a critical factor in the jury's selection decision as to punishment. That is, they help the jury to frame the selection decision not simply in terms of whether the elements of the crime were satisfied, but in a normative way that aids the jury in reaching a reasoned moral judgment about the appropriate penalty.<sup>147</sup> They help the jury to distinguish those who deserve to die for the crime, and those who do not.<sup>148</sup> Aggravators thus play a critical role in both the eligibility and selection decisions in capital sentencing.

First, as I have suggested previously, Congress could amend 18 U.S.C. § 3592(b)'s list of statutory aggravating factors to include killings based on the types of animus described in the hate crimes statute.<sup>149</sup> Other jurisdictions enforce similar aggravators.<sup>150</sup> By adopting such a provision and making the FDPA consistent with the practices of these other jurisdictions, the Government could amplify the interests that motivated the creation of the substantive offense statute initially. It would also add to the FDPA's scheme of statutory

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142. See 18 U.S.C. § 3593(d).

143. See *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (stating that capital sentencing schemes may only apply to a narrow class of persons in order to pass constitutional muster).

144. See *id.*

145. See *Arave v. Creech*, 507 U.S. 463, 471 (1993) (cautioning that if aggravators are too vague, they cannot properly inform the sentencing authority).

146. See *Jones v. United States*, 527 U.S. 373, 398 (1999) (explaining that factors that would impermissibly skew the perception of the sentencing jury are invalid factors).

147. See *United States v. McVeigh*, 944 F. Supp. 1478, 1488 (D. Colo. 1996) (discussing the role of aggravators in selecting punishment).

148. See *Creech*, 507 U.S. at 474 (explaining that a list of aggravating factors helps juries be principled in their calculations, rather than simply characterizing every murder as "outrageously or wantonly vile, horrible[,] and inhuman").

149. See Broughton, *supra* note 9, at 198–99. For additional commentary on FDPA aggravator reform, see Robert Steinbuch, *Reforming Federal Death Penalty Procedures: Four Modest Proposals to Improve the Administration of the Ultimate Penalty*, 40 IND. L. REV. 97, 108–15 (2007).

150. See, e.g., CAL. PENAL CODE § 190.2(a)(16) (West 2013); COLO. REV. STAT. § 18-1.3-1201(5)(n) (2017); NEV. REV. STAT. § 200.033(11) (2017).

aggravators that specifically relate to the motives of the defendant.<sup>151</sup>

Second, Congress could add aggravating factors that either enumerate a violation of § 242 or that specifically state that the death resulted from the willful deprivation of rights under color of law. In addition to aggravators that focus on the motivations of the defendants, the FDPA recognizes statutory aggravators that relate to the particular offense committed or to previous convictions for other serious offenses.<sup>152</sup> If death results from the commission or attempted commission of a specific offense, the FDPDA permits the fact that death occurred to be considered as an aggravating factor to determine whether a “sentence of death is justified.”<sup>153</sup> The specific offenses include destruction of an aircraft or motor vehicle; violence against a Member of Congress or Supreme Court Justice; espionage; certain uses of explosives; killings by prisoners serving life sentences; hostage-taking; treason; and aircraft piracy.<sup>154</sup> In total, this aggravator lists twenty-one federal crimes that could serve as predicates for death-eligibility if death results from the commission or attempted commission of the offense.<sup>155</sup> Yet in neither § 3592(c)(1) nor in any of the prior conviction aggravators<sup>156</sup> does the aggravator specifically relate to conduct under color of law or to bias-motivation. As the Supreme Court held in *Lowenfield v. Phelps*,<sup>157</sup> so long as the aggravator genuinely narrows the class of death-eligible defendants, it is constitutionally permissible for an aggravator to duplicate the elements of the underlying offense.<sup>158</sup> In this instance, there is no question that these proposed aggravators would perform the constitutionally required narrowing function, as they would capture only a small category of murders and therefore apply only to a subclass of capital defendants.<sup>159</sup>

Consider, for example, the case of Officer Michael Slager, a police officer in North Charleston, South Carolina. Following a mistrial in state court, Slager pleaded guilty to federal civil rights charges after evidence showed Slager shooting unarmed motorist Walter Scott in the back five

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151. See 18 U.S.C. § 3592(c)(7)–(8) (2012).

152. See § 3592(c)(1)–(4), (10), (12)–(13), (15).

153. § 3592(c).

154. See § 3592(c)(1).

155. *Id.*

156. See § 3592(c)(2)–(4), (10), (12)–(13), (15).

157. 484 U.S. 231 (1988).

158. *Id.* at 244.

159. See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (requiring aggravating factors to apply in narrowly tailored situations, such as certain subsets of murder cases).

times, killing him.<sup>160</sup> The shooting occurred after a traffic stop for a defective break light.<sup>161</sup> In December 2017, Slager was sentenced to twenty years in prison, after a proceeding in which the federal district court determined that Slager's conduct amounted to second-degree murder rather than manslaughter.<sup>162</sup> Neither South Carolina nor the federal government sought the death penalty in the case.

Although it is likely that a variety of factors influenced the Justice Department's decision against the death penalty, it is worth noting that the Department may have believed that it could not make Slager eligible for the federal death penalty because none of the existing aggravators applied.<sup>163</sup> Perhaps Slager's case would not have ultimately merited capital punishment. But Slager's conviction and sentencing established that he did not act in self-defense, that he acted with malice, and that he willfully used excessive force against his victim, all based on the authority of his position as a police officer.<sup>164</sup>

The *Davis* case discussed above is also useful here.<sup>165</sup> The Government proved only a single statutory aggravator—that the crime involved substantial planning and premeditation.<sup>166</sup> That was enough to obtain a death sentence, presumably because the jury gave that factor substantial weight in relation to the mitigating evidence that Davis proffered.<sup>167</sup> But had the jury not assigned such weight to the single aggravator, Davis would have avoided a death sentence because

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160. See Press Release, U.S. Dep't of Justice, Former North Charleston, South Carolina, Police Officer Michael Slager Pleads Guilty to Federal Civil Rights Offense (May 2, 2017) [hereinafter Michael Slager Pleads Guilty], <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-pleads-guilty-federal>. The shooting was caught on mobile phone video. See Matt Zapotosky & Wesley Lowery, *Former S.C. Police Officer Pleads Guilty in Fatal Shooting Caught on Video*, WASH. POST (May 2, 2017), [https://www.washingtonpost.com/world/national-security/former-sc-police-officer-to-plead-guilty-in-fatal-shooting-caught-on-video/2017/05/02/9a235afe-2f35-11e7-9534-00e4656c22aa\\_story.html](https://www.washingtonpost.com/world/national-security/former-sc-police-officer-to-plead-guilty-in-fatal-shooting-caught-on-video/2017/05/02/9a235afe-2f35-11e7-9534-00e4656c22aa_story.html).

161. See Michael Slager Pleads Guilty, *supra* note 160.

162. See Press Release, U.S. Dep't of Justice, Former North Charleston, South Carolina, Police Officer Michael Slager Sentenced to 20 Years in Prison for Federal Civil Rights Offense (Dec. 7, 2017) [hereinafter Michael Slager Sentenced to 20 Years in Prison], <https://www.justice.gov/opa/pr/former-north-charleston-south-carolina-police-officer-michael-slager-sentenced-20-years>.

163. See 18 U.S.C. § 3592(c) (2012) (listing aggravating factors).

164. See Michael Slager Sentenced to 20 Years in Prison, *supra* note 162.

165. See *supra* notes 125–33 and accompanying text.

166. See *United States v. Davis*, 609 F.3d 663, 672 (5th Cir. 2010).

167. See 18 U.S.C. § 3593(e) (requiring jury to find that aggravating factors sufficiently outweighs mitigating factors).



no other statutory aggravators applied.

In light of recent national debates about officer-involved shootings, particularly of unarmed citizens,<sup>168</sup> and the related concern that those shootings may (in some cases) constitute excessive uses of force in violation of the Fourth Amendment,<sup>169</sup> there are reasons for Congress to consider a capital sentencing scheme that allows capital juries to focus specifically on violence that is perpetrated by government actors who use their authority to kill without any legal justification. To be sure, a violation of § 242 resulting in death, or the use of a firearm during the commission of a federal crime of violence (such as a hate crime or a willful deprivation of rights),<sup>170</sup> is enough to implicate the federal death penalty protocol. But the mere fact of committing a capital offense is not enough to render the defendant death-eligible in the federal system. The Government must also prove one of the mental state factors in the FDPA and at least one statutory aggravating factor, and these will be key considerations in the Justice Department's review.<sup>171</sup> Adding aggravators that specifically target abuses of governmental power that violate constitutional rights and result in death would ensure that capital punishment could at least remain available as a possibility for those who engage in the most oppressive of official acts, where they might otherwise escape the possibility of a capital trial pursuant to the existing scheme of statutory aggravators. It is true that the Government could allege such conduct as a non-statutory aggravator without the need to amend the FDPA.<sup>172</sup> But an amendment would have the virtue of

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168. For a recent timeline of controversial police encounters, see *Controversial Police Encounters Fast Facts*, CNN (Dec. 8, 2017, 1:34 PM), <http://www.cnn.com/2015/04/05/us/controversial-police-encounters-fast-facts/index.html>.

169. See *Graham v. Connor*, 490 U.S. 386, 388 (1989) (holding that a citizen's claim that a police officer used excessive force is properly analyzed under the Fourth Amendment's reasonableness standard); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (noting that when a police officer restrains a person using deadly force, that seizure is subject to the Fourth Amendment's reasonableness standard). See generally Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 216–17 (2017) (discussing differing interpretations of the use-of-force doctrine in the context of police conduct); John P. Gross, *Judge, Jury, and Executioner: The Excessive Use of Force by Police Officers*, 21 TEX. J. ON C.L. & C.R. 155, 156 (2016) (arguing that the gross imbalance between the number of persons shot by police officers versus the number of police officers shot suggests that many law enforcement officers use deadly force before threats materialize).

170. See 18 U.S.C. § 924(c), (j).

171. See *id.* §§ 3591(a)(2), 3593(c).

172. See *id.* § 3593(d) (requiring that a “finding with respect to any aggravating

allowing the factor to serve both eligibility and selection purposes.<sup>173</sup>

Reforming the FDPA's aggravation scheme in these ways therefore would not only be consistent with the constitutionally acceptable uses of aggravators, it would help to give jurors the opportunity to consider—and assign weight to—the fact that the defendant committed a serious abuse of governmental power or targeted the victim because of the defendant's invidious bias or prejudice, either (or perhaps even both) of which resulted in the victim's death. Providing this information to the jury specifically in the form of an aggravating factors at the punishment phase would assist the jury in better understanding the nature of the crime and how the violations of civil and constitutional rights bear on the defendant's culpability and death-worthiness.<sup>174</sup> It is also consistent with a scheme of aggravators that targets conduct committed against the institutions and mechanisms of government. Just as the existing list of aggravators includes a provision allowing jurors to give special weight to violence committed against high government officials,<sup>175</sup> so, too, should aggravators reflect the harm done to the political community and to constitutional government by violence against rights. In doing so, and by allowing the jury to weigh these factors, Congress can strengthen the relationship between imposition of the death penalty and vindication of civil and constitutional rights, beyond what is accomplished by the guilt phase in a civil rights prosecution.

#### CONCLUSION

No system of punishment is perfect or immune from serious criticism, and the federal death penalty is no exception to that truism. Despite apolitical enforcement, federal actors—from the President to federal prosecutors to the Congress—must remain aware of the political environment in which the federal death penalty exists. Its critics, and its threats, come from left, right, and center. Still, there is ample reason to view the federal death penalty charging process as fair, objective, deliberate, and informed. And although the existing connection between the federal death penalty and civil rights

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factor must be unanimous”).

173. *See id.*

174. *See United States v. McVeigh*, 944 F. Supp. 1478, 1488 (D. Colo. 1996) (“The aggravating factors function to focus the jury’s attention on the particular facts and circumstances pertinent to each defendant found guilty of an offense punishable by death in the context of mitigating factors unique to him as an individual human being.”).

175. *See* 18 U.S.C. § 3592(c)(14).

enforcement is neither a necessary one, nor one that will persuade abolitionists or critics to support it, that connection is nevertheless worthy of being preserved and strengthened both by Justice Department review and congressional action. Civil rights crimes, no less than national security crimes or traditional crimes against the person, reflect important national values that deserve vindication in the procedures that enable the most severe punishments. These aspects of the federal death penalty, then, while only a small part of death penalty practice, at least offer reasons for public confidence.