

Congress of the United States
Washington, DC 20510

November 28, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Manner of Execution Regulations (Docket No. OLP 171)

Dear Attorney General Garland:

We urge you to rescind all of the Department of Justice's (DOJ) November 27, 2020 amendments to the regulations governing the manner of federal executions. We further urge you to continue the moratorium on federal executions which you put in place July 1, 2021.

The November 27, 2020 amendments were adopted in the middle of an alarming rush of executions by the previous administration. Ending a 17-year moratorium on the federal death penalty, the prior administration executed 12 men and one woman in the space of six months—exceeding the number of individuals who had been executed under the federal death penalty over the prior seven decades. The November 27, 2020 amendments—promulgated by an outgoing administration in the middle of a surge of executions—were clearly part of an effort to facilitate that surge, and as such the amendments as a whole are so irreparably tainted that they should not remain in place.

While all of the amendments should be rescinded, three in particular are especially troubling. The first is the addition of 28 C.F.R. 26.1(b), which states “Where applicable law conflicts with any provision of this part [i.e. Part 26, Death Sentences Procedures], the Attorney General may vary from that provision to the extent necessary to comply with the applicable law.” This provision inappropriately vests the Attorney General with an unsupervised, purportedly unreviewable power to disregard any regulation involving the federal death penalty when, in his or her sole determination, such deviation is “necessary” to comply with “applicable law.”

The second is the addition of 28 C.F.R. 26.1(c), which states that any task or duty assigned to any officer or employee of DOJ under Part 26 may be delegated by the Attorney General to any other DOJ officer or employee. This directly conflicts with 18 U.S.C. §§ 3596(a) and 3597(a), through which Congress vested exclusive authority for the implementation of death sentences and supervision of executions in a United States Marshal.

The third is the repeal of former 28 C.F.R. 26.2, which required the government to submit a proposed Judgment and Order containing specified provisions. Among other matters, it was this Judgment and Order which, when entered by the sentencing court, authorized the Director of the Bureau of Prisons (BOP) to set an execution date. BOP's authority to set an execution date derives solely from a federal court's exclusive authority to impose and implement a death sentence. Allowing BOP to set an execution date on its own, free from judicial oversight, violates the separation of powers between the Judicial and Executive branches of government. Such judicial oversight is of particular importance because, under 18 U.S.C. § 3596(a), "A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence." Repeal of § 26.2 eliminated judicial oversight over the determination of whether an individual sentenced to death has in fact exhausted judicial remedies such that an execution date can be set. Instead, the Attorney General may now make that determination unilaterally and without oversight.

All of the November 27, 2020 amendments—including the three aforementioned ones—should be rescinded.

Last year, we commended you for your decision to impose a moratorium on federal executions while the current review of death penalty policies and procedures is pending. As your memorandum announcing the moratorium recognized, there are serious concerns about arbitrariness in the application of the death penalty, the disparate impact of the death penalty on people of color, and the alarming number of exonerations of individuals previously sentenced to death.

These concerns justified halting the use of the death penalty during the review process. They equally support halting its use permanently. In addition to rescinding the November 27, 2020 amendments, we urge you to keep in place the current moratorium on federal executions, including withdrawing all pending death notices and authorizing no new death notices. The time for this action has come.

Thank you for your consideration of this comment.

Sincerely,



Richard J. Durbin
United States Senator



Ayanna Pressley
Member of Congress