



# American College of Trial Lawyers

## **Statement of the Federal Criminal Procedure Committee of the American College of Trial Lawyers Regarding Access to Justice Issues Arising From Recent and Planned Federal Executions<sup>1</sup>**

The Mission Statement of the American College of Trial Lawyers (ACTL) states our “...strong support for access to justice, and fair and just representation of all parties to legal proceedings.” ACTL Fellows include prosecutors, defense counsel, and members of the judiciary, and work on all sides of the capital punishment issue. Without commenting on the constitutionality of the death penalty or the merits of any of the cases for which people are scheduled for execution, and consistent with the ACTL’s commitment to access to justice and fair representation, the ACTL Federal Criminal Procedure Committee calls for a moratorium on federal executions until the end of the pandemic in order to ensure that those scheduled to be executed during the pandemic have the same access to counsel and to justice as existed before the pandemic.

Starting in July 2019, the Department of Justice resumed capital punishment after a nearly two-decade lapse. (<https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>). Since July of this year, eight individuals have been executed, with another scheduled for today, one more for tomorrow, and three more before mid-January 2021. The speed of these executions is unprecedented for the federal government.

Combined with the effects of the pandemic, this speed impacts access to justice for death row defendants and raises a question of fundamental fairness in the imposition of the ultimate criminal sanction. The deadly impact of the pandemic on the federal prison system has resulted in severe limitations on the ability of defense counsel to confer with and advocate on behalf of clients. According to the Bureau of Prisons, USP Terre Haute in Terre Haute, Indiana -- where every federal execution has taken place since July 14, 2020, and where the remaining scheduled executions are set to take place -- reports that 202 inmates and 19 staff members have tested positive for Covid-19 as of December 9, 2020. (<https://www.bop.gov/coronavirus/>)<sup>2</sup>. Attorneys therefore take significant health risks by entering prisons to meet with clients. Illustrative of the difficulties faced by defense counsel during the pandemic, both attorneys for one of the individuals scheduled to be executed next month contracted Covid-19.

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<sup>1</sup> Four members of the Federal Criminal Procedure Committee are currently employed by the Department of Justice. Each of those members has abstained from joining this statement.

<sup>2</sup> Coronavirus rates in federal and state prisons are more than four times the national average, and the mortality rate (adjusted for age) more than double, according to a [study](https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html) prepared for the [National Commission on Covid-19 and Criminal Justice](https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html). ([https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc\\_story.html](https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html)). The [UCLA Law Covid-19 Behind Bars Data Project](https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html) reported that as of November 11, 2020, more than 173,000 inmates nationwide have contracted the coronavirus, and almost 1,300 have died. At least 37,000 corrections workers have tested positive and 78 have died.

The ACTL's Task Force on Advocacy in the 21st Century, which issued Interim Guidelines on Constitutional Protections Implicated by the Reopening of Criminal Courts in the Face of the COVID-19 Pandemic ("[Interim Guidelines](#)"), has already noted the severe impairment on the ability of defense counsel to "effectively perform many of the tasks required in order to meet professional and constitutional standards," and has explained that the "adverse impact of the pandemic is most worrisome for incarcerated clients." (Interim Guidelines at 8). These issues even more critically affect the representation of defendants on death row.

For example, defense counsel representing defendants whose date of execution has been scheduled and who have exhausted all appeals typically file petitions for clemency with the President of the United States. As the Supreme Court has noted:

Clemency is deeply rooted in our Anglo-American tradition of law and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. ... ([Herrera v. Collins, 506 U.S. 390, 415 \(1993\)](#)).

Preparing a clemency petition is a time-intensive process that involves in-person meetings with the defendant and potential witnesses in order to bring to the President's attention information that may result in a decision to change the sentence of death to one of life imprisonment without the possibility of parole. The pandemic materially disrupts counsel's ability to engage in a proper investigation that may make all the difference in a clemency petition. In non-capital federal criminal cases, courts around the country, recognizing the significant impact of the pandemic on the ability of the criminal justice system to operate, have ordered wide scale courthouse closures, adjournment of trials, sentencing, and surrender dates, among other things. (<https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>). There does not appear to be any sound reason why the remaining executions, whose outcome is irreversible, cannot be allowed this same flexibility and be stayed until such time as it is again safe for defense counsel to meet in person with their clients on death row and with witnesses whose sworn statements may be sufficient to convince the President to spare their lives.

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#### **About the [American College of Trial Lawyers](#)**

The American College of Trial Lawyers is composed of preeminent members of the trial bar from the United States and Canada and is recognized as the leading trial lawyer's organization in both countries. Founded in 1950, the College is an invitation only fellowship. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism, and collegiality. The College is dedicated to maintaining and seeking to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings. For more information about the College, visit its website at [www.actl.com](http://www.actl.com).

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