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January 12, 2021

Acting Attorney General Jeffrey A. Rosen  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**Re: Federal Executions Scheduled for January 12-15, 2021**

Dear Acting Attorney General Rosen:

I write as President of the American Bar Association to express our urgent concern over the federal government's plan to move forward with three executions this week, despite a continuing surge in COVID-19 cases nationwide and the recent confirmation by a federal court in Indiana that executions carried out at the Federal Correctional Complex (FCC) Terre Haute create a substantial risk of COVID-19 case transmission at the prison and in the surrounding communities.

As you know, executions remain scheduled at this facility for January 12, 14, and 15. In light of the district court's recent findings and our ongoing concern over the due process issues attendant to pursuing executions during a pandemic, we respectfully urge you to exercise your authority as Acting Attorney General to postpone those executions until they can be safely conducted without risking the lives and health of innocent people.

On November 12, 2020, I wrote to President Trump on behalf of the ABA asking him to delay executions scheduled for later in November and December because the COVID-19 pandemic was preventing defense attorneys from providing effective representation.<sup>1</sup> Because of the pandemic, attorneys for the condemned prisoners were unable to travel safely, conduct critical investigations, or speak with their clients or other important witnesses in person. Unfortunately, with the exception of Lisa Montgomery,<sup>2</sup> those executions proceeded as scheduled.

On the day that letter was transmitted, three inmates at United States Penitentiary (USP) Terre Haute, where federal death row is housed, were tested positive with COVID-19.<sup>3</sup> On December

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<sup>1</sup> See Letter from Patricia Lee Refo, ABA President, to Donald J. Trump, President of the United States ( ABA COVID-19 Letter) (Nov. 12, 2020), *available at* [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/fed-executions-letter-111220.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fed-executions-letter-111220.pdf).

<sup>2</sup> Lisa Montgomery was originally scheduled for execution on December 12, 2020. As detailed in our ABA COVID-19 Letter, counsel for Mrs. Montgomery contracted COVID-19 as a result of visiting her once her execution date was set. A federal court in the District of Columbia stayed her execution through December 31, 2020 to allow her attorneys sufficient time to recover and prepare a petition for executive clemency on her behalf. The BOP then reset her execution date for January 12, 2021. See Bryan Pietsch, *Ruling on Woman on Death Row Puts Her Execution in Doubt*, N.Y. Times (Dec. 25, 2020), <https://www.nytimes.com/2020/12/25/us/lisa-montgomery-execution.html>.

<sup>3</sup> See ABA COVID-19 Letter at 3.

28, 2020, following the execution of Orlando Hall on November 19, 2020, and Brandon Bernard on December 10, 2020, the number of positive cases at the facility had risen to 410—more than at any other Bureau of Prisons (BOP) facility in the country on that date.<sup>4</sup> According to recent court filings, at least eight BOP employees tested positive for COVID-19 following their involvement in the executions, as did a religious advisor for Orlando Hall who was present at his November 19 execution.<sup>5</sup>

In an opinion released last week, the U.S. District Court for the Southern District of Indiana found that conducting executions in the midst of the COVID-19 global pandemic creates serious health risks and jeopardizes the constitutional rights of non-condemned inmates by increasing the likelihood of their contracting COVID-19.<sup>6</sup> The court enjoined the DOJ from moving forward with the executions unless it complies with a series of basic precautionary measures, consistent with guidance from the Centers for Disease Control and Prevention (CDC): enforce mask requirements, maintain contact logs for all FCC Terre Haute staff members involved in the executions, require all impacted FCC Terre Haute employees to produce daily negative COVID-19 results for 14 days before returning to their duties, and conduct adequate contact tracing once an individual involved in the federal execution efforts has tested positive.<sup>7</sup> While complying with these measures will hopefully reduce the continued spread of COVID-19 through the prison complex, there is no way, short of postponing the executions, to eliminate the risk of increased transmission entirely. As the court found, executions require scores of people to gather together in indoor spaces where social distancing may not be possible.<sup>8</sup> The court, however, felt that absent ordering the executions be halted altogether, it was constrained in the degree to which it could eliminate the risk of increased transmission.<sup>9</sup>

You are not similarly constrained. As Acting Attorney General, you have the power both to protect the public health and to ensure due process of law simply by decreeing that **now is not the time to conduct further federal executions because of the significant health risks they present to inmates, BOP staff and their families, and the general public.** That would be a very powerful and positive message.<sup>10</sup> Regardless of one's views on the death penalty – and, as you know, the ABA takes no position on the morality of the death penalty – these executions should not be carried out during this public health catastrophe.

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<sup>4</sup> Jim Monk, *COVID-19 Cases Surge at Federal Death Row Prison in Indiana*, KVRN Local News (Dec. 28, 2020), <https://www.kvrr.com/2020/12/28/covid-19-cases-surge-at-federal-death-row-prison-in-indiana/>.

<sup>5</sup> *Federal Execution Team Members Test Positive for COVID-19 After Orlando Hall Execution*, Death Penalty Information Center (Dec. 10, 2020), <https://deathpenaltyinfo.org/news/federal-execution-team-members-test-positive-for-covid-19-after-orlando-hall-execution>.

<sup>6</sup> Order Granting in Part and Denying in Part Plaintiffs' Second Motion for Preliminary Injunction (Dkt. 55), *Smith v. Rosen, et al*, No. 2:20-cv-00630-JMS-DLP (S.D. Ind.) (COVID-19 Order). A copy of the court's opinion is attached for your convenience and is available online at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/court-documents/smith-v-barr-ecf-55-pi-ruling.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/court-documents/smith-v-barr-ecf-55-pi-ruling.pdf).

<sup>7</sup> COVID-19 Order at 20-21.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 20 (“These extensive precautions (or a vaccination of the full inmate population) might constitute best practices from an epidemiological perspective, but the Eighth Amendment does not require defendants to eliminate all additional risk.”).

<sup>10</sup> The Bureau of Prisons via the Department of Justice has authority to withdraw or reset the scheduled execution dates pursuant to the authority to issue the execution dates in the first instance. 28 C.F.R. § 26.3(a)(1) (2020).

### **The Recent Holding by the U.S. District Court in Indiana**

The district court's order provides a detailed account of the COVID-19 risks involved in proceeding with the federal executions at present. As noted by the court, each execution brings 50-125 outside individuals into the prison.<sup>11</sup> That includes an execution team of at least 40 BOP employees who must travel from out of state to participate in the execution.<sup>12</sup> Once at the prison, the team interacts regularly with FCC Terre Haute prison personnel, approximately 70 of whom are involved in assisting with execution security and escorting witnesses.<sup>13</sup> The influx of additional staff, many of whom have traveled to Indiana to participate in the execution preparations and process, and their intermingling with other staff members at FCC Terre Haute, creates an obvious increased risk for COVID-19 transmission into the prison.

Despite this increased risk, the BOP execution team does not quarantine upon arriving in Indiana and is not subject to mandatory testing.<sup>14</sup> Nor are there quarantine or testing requirements for media and other witnesses who will enter into the prison complex to attend the executions.<sup>15</sup> (Though the BOP reports that it has a mandatory mask requirement, pleadings before the district court demonstrated that the requirement often goes unenforced. And, while the district court order now requires mask rules to be enforced, there have been problems in the past regarding compliance, as the court has noted.) The BOP also does not require mandatory testing for other FCC Terre Haute staff who participate in executions. Furthermore, the BOP has not systematically conducted contact tracing after staff tested positive, despite representations by the Warden that this would be done.<sup>16</sup> After the execution in November, eight execution team members tested positive.<sup>17</sup> Nevertheless, after the December executions, only three of the more than forty team members elected to be tested.<sup>18</sup>

The court found that conducting the executions during the pandemic created a “substantially increased risk of conducting COVID-19” for *all* the prisoners housed at FCC Terre Haute, including those not sentenced to death.<sup>19</sup> And, given the regular contact between prison employees and the outside community, this risk clearly exists beyond the prison walls. The evidence before the district court demonstrates that CDC guidance for prisons is not being fully followed at FCC Terre Haute, either as a general proposition or when holding executions. A reasonable reading of the court's findings is that conducting executions without implementing additional safety measures puts the health and lives of not only inmates and BOP staff (from FCC Terre Haute and those on the execution team) at risk, but also people in the surrounding communities in Indiana and in the states to which the 40+ members of the execution team eventually return.

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<sup>11</sup> COVID-19 Order at 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> COVID-19 Order at 3.

<sup>15</sup> *Id.* at 17.

<sup>16</sup> *Id.* at 17-18.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 18 (“It is telling that Warden Watson acknowledged that one of the reasons visitors are not tested is because ‘some visitors are legal or spiritual advisors, as well as members of the media and witnesses whose presence is authorized by 28 C.F.R. § 26.4.’ . . . His statement reveals a concern that denying entrance to one of these visitors could create a legal impediment to the execution, so the defendants prefer not to know if they are COVID-19 positive.”).

As the court repeatedly noted, BOP compliance with safety precautions poses a significant concern. In the words of the court: “The defendants know what safety measures are necessary to reduce the spread of COVID-19 within the prison, and claimed they would follow many of them, but their conduct instead demonstrates willful disregard of the risks posed when the measures aren’t implemented.”<sup>20</sup> For example, the Warden appears to have suggested that the prison decided not to test certain witnesses because a positive result would mean denying their entry, which could have impeded carrying out the executions on the government’s preferred timetable.<sup>21</sup> While this may be true, this is obviously not an appropriate reason to neglect or fail to implement critical health and safety guidelines. Even more troubling, the court found that while the Warden stated that BOP would conduct contact tracing whenever someone involved in an execution tested positive, the record indicates that they failed to conduct such tracing.<sup>22</sup> These findings call into question the degree to which the BOP will be able to comply with the additional safety measures the court has now deemed essential to be put into place so as to reduce the risk of further transmission within and outside of the facility.

### **Attorney Obligations and the COVID-19 Crisis**

As detailed in my November 12, 2020, letter, the ABA remains gravely concerned that pursuing any executions during the present crisis threatens defendants’ rights to effective assistance of counsel and imperils attorneys’ ability to carry out their professional and ethical obligations at this most critical time in a death penalty case. As the ABA COVID-19 letter stated, while the ABA does not take a position on the morality or legality of the death penalty itself, we remain steadfastly committed to ensuring that no death sentence is carried out without due process of law and zealous representation by counsel throughout every stage of the legal proceedings, including in applications for executive clemency.<sup>23</sup> In death-penalty cases, effective representation requires that attorneys visit with their clients regularly<sup>24</sup> and undertake an intensive investigation at every stage of the case.<sup>25</sup> Counsel’s responsibilities become especially weighty when an execution date is set. This event triggers counsel’s professional and ethical duty to seek a stay in “all available fora,”<sup>26</sup> including via executive clemency, and is necessarily the most pivotal period in a death penalty case. At this critical time, counsel must also redouble efforts to “keep the client whole,” as the imminence of execution can cause mental deterioration rendering the execution unconstitutional.<sup>27</sup> This obligation is especially significant in cases

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<sup>20</sup> *Id.* at 17.

<sup>21</sup> COVID-19 Order at 17.

<sup>22</sup> *Id.* at 18.

<sup>23</sup> See Guideline 1.1(B), ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter “ABA Guidelines” or “Guidelines”), 31 Hofstra L. Rev. 913 (2003), available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2003guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf).

<sup>24</sup> ABA Guideline 4.1, note 98 (“Effective representation requires ongoing interactive contact with the client— [including] in person, by mail, on the telephone, and in other ways... To the extent that jurisdictions impede such contact [...] they jeopardize the provision of high quality legal representation in accordance with these Guidelines.”).

<sup>25</sup> See ABA Guideline 10.15.1, Duties of Post-Conviction Counsel; ABA Guideline 10.15.2, Duties of Clemency Counsel.

<sup>26</sup> See ABA Guideline 10.15.1 (B). See also Guideline 10.15.1, note 335, at 1081 (“When a capital case enters a phase of being ‘under warrant’ – i.e., when a death warrant has been signed—time commitments for counsel increase ‘due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts.’”).

<sup>27</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

where the defendant has a serious mental illness, as is the case with Lisa Montgomery, who is scheduled to be executed tomorrow. Effective advocacy during this time can literally mean the difference between life and death.

Although every federally death-sentenced prisoner has a right to seek and present evidence in support of executive clemency,<sup>28</sup> as well as the right to effective representation in connection with those efforts,<sup>29</sup> circumstances due to the COVID-19 pandemic have made a nullity of those rights. The United States remains in the grip of a global pandemic, with warnings from the CDC that we are in a critical phase in which all possible steps should be taken to prevent further spread of the disease.<sup>30</sup> The entire federal prison system has seen a significant degree of COVID-19 transmission and infection since executions resumed in the fall.<sup>31</sup> As you know, two of the three inmates scheduled for execution this week—Dustin Higgs and Corey Johnson—have both also recently tested positive for COVID-19.<sup>32</sup> While the BOP maintains that they are no longer infectious and thus can be executed this week, it is unclear whether they have been retested.<sup>33</sup>

In continuing to press forward with executions, the federal government remains an outlier. While only two executions have been carried out by the individual states since March 2020,<sup>34</sup> more than a dozen state-level executions have been stayed on account of the pandemic, including executions scheduled for early 2021.<sup>35</sup> At a time of national crisis such as this, justice and the public interest are not served by rushing forward with executions at the expense of due process, fundamental fairness, and threats to the health and safety of countless impacted individuals.

### **DOJ Should Postpone This Week's Executions in Light of the Court's Findings that They Will Likely Lead to Increased COVID-19 Transmission**

The simplest, most appropriate way for DOJ to *eliminate* the increased risk of COVID-19 transmission created by conducting executions during the pandemic is to delay them until they can be safely conducted. The delay could remain in place until FCC Terre Haute has vaccinated the prison population (inmates and staff), a task that the BOP has already begun in recognition of the disease crisis unfolding throughout the federal prison system.<sup>36</sup> Alternatively, DOJ could delay the executions until a more comprehensive set of safety precautions can be put into place than the minimum additional measures ordered by the district court. While BOP has objected to

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<sup>28</sup> 28 C.F.R. § 1.10.

<sup>29</sup> 18 U.S.C. § 3599(e); *see also Harbison v. Bell*, 556 U.S. 180 (2009).

<sup>30</sup> *Things to Know About the COVID-19 Pandemic*, Ctrs. for Disease Ctrl. (updated Jan. 5, 2021),

<https://www.cdc.gov/coronavirus/2019-ncov/your-health/need-to-know.html>.

<sup>31</sup> *See, e.g., Michael Balsamo and Michael R. Sisak, Execution Staff Have COVID-19 After Inmate Put to Death*, Associated Press (Dec. 8, 2020), <https://apnews.com/article/prisons-coronavirus-pandemic-executions-terre-haute-indiana-e80af6a566bbff50ed5e9a097c305dbb>; *see also COVID-19 Cases*, Fed. Bureau of Prisons (updated Jan. 11, 2021), <https://www.bop.gov/coronavirus/>.

<sup>32</sup> Annie Johnston, *Two Death Row Inmates Set to be Executed Cleared from Isolation Status*, WTHI (Dec. 29, 2020), <https://www.wthitv.com/content/news/Two-death-row-inmates-set-to-be-executed-cleared-from-isolation-status-573497221.html>.

<sup>33</sup> *Id.*

<sup>34</sup> Walter Barton was executed on May 17 in Missouri, and Billy Wardlow was executed on July 8 in Texas.

*See* Executions Database, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020> (last visited Jan. 11, 2021).

<sup>35</sup> *See* Stays of Execution in 2020, Death Penalty Info. Ctr., <https://deathpenaltyinfo.org/executions/upcomingexecutions#stays2020> (last visited Jan. 11, 2021).

<sup>36</sup> COVID-19 Order at 4 (noting that, as of December 30, 2020, 206 staff and 355 high-risk prisoners had received an initial vaccination, with 709 staff and 2228 prisoners remaining to be vaccinated).

implementing more extensive safety protocols, arguing that additional measures would be very costly, cost concerns are surely offset by the higher costs associated with testing and treating increasing numbers of prisoners and staff who contract COVID-19 as a result of the executions scheduled this week. Moreover, it is impossible to weigh the broader costs to society of another potential COVID-19 super-spreader event.

While the court did not require implementation of the more stringent measures recommended by the plaintiffs and their infectious disease expert, as Acting Attorney General, you have the discretion to reschedule these executions until such a time as implementation is feasible. Notably, as the court observed, the risk of COVID-19 spread within the prison is increased when community spread is higher.<sup>37</sup> Presently, community spread is at its highest since the beginning of the pandemic. More than 90 million people have contracted COVID-19 worldwide and almost 2 million have died.<sup>38</sup> In the United States, more than 22 million people have tested positive and more than 370,000 have died. **This is an increase of 130,000 deaths since I first wrote to President Trump with concern over these executions on November 12, 2020.** There were 302,502 new cases in the United States on January 2, 2021, a record high, and roughly 3,175 Americans died *every day* last week—one death every 30 seconds of the day.<sup>39</sup>

The situation is equally dire in Indiana. Almost 560,000 people in the state have tested positive, more than 8,966 people have died, and thousands more are testing positive every day.<sup>40</sup> In December, the number of cases has been “significantly and steadily increasing,” prompting Governor Holcomb to impose stricter measures to “counter the spread” of COVID-19, including “social distancing” requirements and limits on how many people may convene “in a single space.”<sup>41</sup> Hospitalizations are “at an all-time high,”<sup>42</sup> threatening the overall healthcare system in Indiana and taking a heavy mental and physical toll on doctors, nurses, and other frontline responders who are literally begging for others to recognize the urgency of the present situation and take action to deal with it.<sup>43</sup>

In Vigo County, which houses FCC Terre Haute, almost 11,500 people have tested positive (including numerous staff and inmates from the prison), but the actual number of infections is likely much higher.<sup>44</sup> At least 199 Vigo County residents have already died.<sup>45</sup> There have also been at least four COVID-19 inmate deaths at the prison, including an inmate who died the first week of December after spending a week in a local hospital.<sup>46</sup> That hospital is already

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<sup>37</sup> *Id.* at 6.

<sup>38</sup> See Johns Hopkins University & Medicine Coronavirus Resource Ctr., <https://coronavirus.jhu.edu/> (last visited Jan. 11, 2021).

<sup>39</sup> See United States, Johns Hopkins University & Medicine Coronavirus Resource Ctr., <https://coronavirus.jhu.edu/region/united-states> (last visited Jan. 11, 2021).

<sup>40</sup> See Indiana, Johns Hopkins University & Medicine Coronavirus Resource Ctr., <https://coronavirus.jhu.edu/region/us/indiana> (last visited Jan. 11, 2021).

<sup>41</sup> See Executive Order 20-50 at 2, 6, 8-9, <https://www.in.gov/gov/files/Executive-Order-20-50-Continuation-of-Color-Coded-County-Assessments.pdf>.

<sup>42</sup> *Id.*

<sup>43</sup> *Indiana Hospitals Warn COVID-19 Surge Could Overwhelm Them*, Associated Press (Dec. 15, 2020) <https://www.whitv.com/content/news/Indiana-hospitals-warn-COVID-19-surge-could-overwhelm-them-573400511.html>.

<sup>44</sup> See Indiana COVID-19 Data and Map, <https://www.coronavirus.in.gov/2393.htm> (last visited Jan. 11, 2021).

<sup>45</sup> *Id.*

<sup>46</sup> See Press Release, Federal Bureau of Prisons, Inmate Death at FCI Terre Haute (Dec. 8, 2020) available at [https://www.bop.gov/resources/news/pdfs/20201208\\_press\\_release\\_thx.pdf](https://www.bop.gov/resources/news/pdfs/20201208_press_release_thx.pdf).



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overwhelmed by COVID-19 cases, and any personnel and equipment resources devoted to avoidable prison-related COVID-19 cases of course come at the expense of what the hospital can do for others who already have or soon will contract the potentially fatal disease.

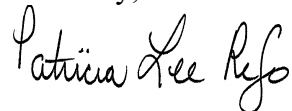
BOP staff are also experiencing enormous pressures because of COVID-19, as you already know. In addition to well-founded fears for their safety and the safety of their families (thousands of staff have already contracted COVID-19 according to the BOP's website, and several have died), there are also staff shortages due to illness and attendant concerns. Every facet of our society is now feeling the strain of COVID-19, and it is incumbent upon all of us who have the power to arrest the increased spread and transmission in any way to do so.

While the ABA respects and understands the need to bring these difficult cases to a close, it bears mention that the three prisoners presently slated for execution have been on death row for decades now without presenting additional significant risk to the people or communities around them. Ironically, however, proceeding with these executions is far more likely to imperil public health and safety than withdrawing these execution dates and resetting them for another time. There is simply no compelling reason to hold these executions now, given the risks involved. Very few people in our country have the ability to do something meaningful about the frightening statistics and personal anguish that we now see on a daily basis. You are one of them.

### **Conclusion**

In light of the dire health crisis facing this country and the State of Indiana, I respectfully request that you postpone the three federal executions still scheduled for this week. Doing so is the only way to protect the due process rights of these defendants and the best way to reduce the risk of further COVID-19 transmission in a community and a country at large that has already been devastated by this virus.

Sincerely,

A handwritten signature in black ink that reads "Patricia Lee Refo". The signature is written in a cursive style with a large, stylized initial "P".

Patricia Lee Refo