

PUBLIC SAFETY

DOJ amendment opens the door to use of firing squad, gas chamber in Terre Haute executions

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As federal executions continue to be carried out in Terre Haute, the government will soon have access to more options for putting prisoners to death.

Starting Dec. 24, an amendment made to the nation's federal execution protocols by the Department of Justice will no longer limit the method to lethal injection. Instead, the federal government will be permitted to use "any other manner prescribed by the law of the state in which the sentence was imposed."

If a state does not permit the death penalty in the jurisdiction a defendant is convicted, the statute directs the court to designate another state whose law does "provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter state in the manner prescribed by such law."

That legally opens the door for the authorized use of firing squads, electrocution or the gas chamber at the federal penitentiary in western Vigo County where executions take place. The rule states that alternative methods may be used if lethal injection is found to be "unconstitutional or otherwise unavailable."

However, the likelihood is slim that any of the three people scheduled to die before the end of President Donald Trump's time in office will be executed by anything other than lethal injection. The federal government has already announced that two of the inmates, Lisa Montgomery and Corey Johnson, will be put to death by lethal injection, just like the 10 inmates executed in Terre Haute throughout 2020.

Montgomery's execution is scheduled for Jan. 12, while Johnson will be put to death on Jan. 14.

The government has not announced an execution method for Dustin John Higgs who is scheduled to be executed on Jan. 15. Higgs was sentenced to death in the U.S. District Court for the District of Maryland, a state where the death penalty was abolished in 2013.

IndyStar has reached out to the Department of Justice and the Federal Bureau of Prisons to comment on the rule change and if there are any plans to use alternative execution methods. Those calls and emails have gone unanswered.

Lethal injection and other methods

All states that use the death penalty allow lethal injection. It is also the primary method in all states where other methods are allowed, according to Death Penalty Information Center data.

As lethal injection drugs become difficult to obtain, some states have begun looking at alternative methods for carrying out death sentences. Alabama joined Oklahoma and Mississippi in 2018 approving the use of nitrogen gas to execute prisoners, allowing the state to asphyxiate condemned inmates in some cases.

In some states, inmates can choose the method of their execution. Florida allows inmates to specifically ask to be put to death by electrocution. In Washington state, inmates can ask to be put to death by hanging.

In Utah, prisoners sentenced before May 2004 can choose to be killed by a firing squad. The state law there also authorizes the use of a firing squad if lethal injection drugs aren't available.

The last time a firing squad entered the discussion at Terre Haute was in July before Daniel Lewis Lee became the first man executed in nearly two decades.

Lee and other plaintiffs raised concerns about the effects experienced after the drug used in lethal injection is administered.

The injection of pentobarbital — which some scientists say causes pulmonary edema and a drowning sensation during death — violates their Eighth Amendment rights and constitutes cruel and unusual punishment, they argued.

The pitched death by firing squad as an alternative they said was likely to reduce the risk of experiencing severe pain. The Bureau of Prisons rejected the appeal.

Aggressive execution schedule

Ngozi Ndulue, senior director of research and special projects for the nonprofit Death Penalty Information Center, could not directly speak to the mindset behind the DOJ's order.

"What I will say that Attorney General William Barr has really been aggressively pursuing executions, and part of that aggressive pursuit is this amendment," Ndulue said.

She added that further evidence of Barr's stance is the fact that the nation has seen federal executions return and be prioritized in a year where other countless other initiatives have been put on hold due to safety concerns surrounding the coronavirus pandemic.

That pursuit persists in the wake of members of the execution team testing positive for the virus, and prisoners at the U.S. penitentiary in Terre Haute suing the federal government to halt executions because that the number of people entering and leaving the facility during executions endanger the lives of prisoners.

"I always want to emphasize that this is not a partisan issue, but it is very much that Attorney General Barr has said if you have death sentences, you're going to have executions. But really, you make discretionary choices about when those happen and if they happen," Ndulue said.

When it was initially announced last year that federal executions would resume after a 17-year hiatus, Barr said the DOJ has a responsibility to follow the laws adopted by Congress and signed by the president.

"The Justice Department upholds the rule of law — and we owe it to the victims and their families to carry forward the sentence imposed by our justice system," he said in a statement.

The leading theory, Ndulue said, is that President-elect Joe Biden will seek to end the death penalty after taking office on Jan. 20, and that the double-digit executions racked up in 2020 were the result of trying to complete them while a supportive president remained in office.

A spokesperson for Biden told the AP this month that the president-elect "opposes the death penalty now and in the future" and would work to end its use. He did not say whether executions would be paused immediately once Biden takes office.

In a recent interview with The Associated Press, Barr defended executions in the post-election period. He said he will likely schedule more before he leaves office, and encouraged the Biden administration to keep it up.

"I think the way to stop the death penalty is to repeal the death penalty," Barr said. "But if you ask juries to impose and juries impose it, then it should be carried out."

On Monday, Trump announced via Twitter that Barr will resign next week. Barr is set to leave Dec. 23. Deputy Attorney General Jeffrey Rosen will be acting attorney general, Trump said.

Ndulue told IndyStar that the death penalty ending when the Biden presidency begins is a safe assumption to make -- not only because Biden has repeatedly opposed capital punishment, but because history indicates that the past year has been a significant break from the norm.

"For 17 years there has not been a single execution. Republican administration, Democratic administration, no executions. It's only been since earlier this year that federal executions have resumed, and since then we've had more than we've had in the entire modern era of the federal death penalty," she said.

She said that this is the first year since 1896 in which federal executions have reached double digits.

With his execution Friday, Alfred Bourgeois became the 10th person put to death by the government in 2020. Before the Trump administration resumed executions this year, the federal government had put only three inmates to death since 1988.

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