

# Justice Department standards on federal death penalty called confusing



By [David Nakamura](#)

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The Justice Department's disparate approaches in a pair of mass-killing cases is generating accusations that the Biden administration has failed to press for the elimination of capital punishment and is not applying clear standards in judging who, if anyone, should face the death penalty.

On Monday, federal prosecutors will begin the death penalty phase in the trial of Sayfullo Saipov, who was convicted last month on murder and terrorism charges for fatally hitting eight pedestrians with a truck on a New York City bike path in 2017.

That comes days after the Justice Department announced an agreement allowing Patrick Crusius, who pleaded guilty to killing 23 people and injuring 22 while targeting Mexicans during a mass shooting rampage at a Walmart in El Paso in 2019, to avoid the death penalty. He faces life in prison.

Saipov's lawyers had sought a [similar plea agreement](#) in 2018 to spare his life.

Analysts said the Justice Department's decisions in those cases and several others make it difficult to detect a consistent policy more than two years into the Biden presidency. As a candidate, Biden made promises to push for legislation banning capital punishment over concerns about how federal executions are carried out and how prosecutors have disproportionately targeted racial minorities and the poor.

Biden has said little about the issue since taking office. Attorney General Merrick Garland has deauthorized 25 death penalty cases that were started under previous administrations, and the Justice Department has not authorized any new capital cases since he took over in 2021.

The Justice Department in 2021 and 2022 continued to back capital convictions in the face of appeals from Dylann Roof, a White man who fatally shot nine Black parishioners in Charleston, S.C., in 2015, and Dzhokhar Tsarnaev, who orchestrated, along with his older brother, a bombing that killed three at the Boston Marathon in 2013. Federal courts upheld both of their death penalty sentences.

Meantime, seven federal capital cases, including Saipov's, remain active, Justice officials said. Among them is the government's prosecution of Robert Bowers, who is set to stand trial in April on charges related to the mass shooting that slaughtered 11 people at the Tree of Life synagogue in Pittsburgh in 2018.

"It's really hard to say what's going on," said Monica Foster, a federal public defender representing Jairo Saenz, an MS-13 gang member who, along with his brother Alexi, are facing capital charges in connection with seven killings in Long Island in 2016.

Federal prosecutors announced in 2020 that they would seek the death penalty for both men; Foster, who recently took over Jairo Saenz's defense, said she intends in March to ask Garland to withdraw the death penalty — a formal Justice Department process known as a deauthorization request. Lawyers for Alexi Saenz said they, too, will seek deauthorization.

"They have deauthorized a lot, but letting Saipov go to [capital] trial, we're left trying to read the tea leaves," Foster said. "When the Supreme Court set the death penalty aside in the '70s, they said it was arbitrary because we couldn't tell who would get it or not. Nothing has changed on that. We're all sitting here asking, 'What's different about this handful of cases and the other ones they've deauthorized?'"

Lawmakers also expressed frustration. Rep. Adriano Espaillat (D-N.Y.) — who plans to reintroduce a 2021 bill that would ban capital punishment on the federal level — said the Justice Department's decisions in the Saipov and Crusius cases are "plainly contradictory."

"The death penalty should not be sought in either of the cases," Espaillat said in an interview. "The president, when he was running, pledged to work to pass legislation and end the death penalty on the federal level. So far, President Biden and the DOJ have failed to meet that promise."

The federal death penalty was held unconstitutional in 1972 but was reinstated in 1988.

Garland issued a moratorium on federal executions, pending a review of changes to the process made during the Trump administration.

Federal authorities carried out 13 executions in the final six months of Donald Trump's presidency. Before that, three people had been executed for federal crimes between 1988 and 2020, the most recent in 2003.

By the end of 2020, there were 2,469 people on death row in the United States, including 51 federal inmates, according to the Bureau of Justice Statistics. The overall figure has steadily declined, down about 30 percent from two decades earlier.

In the Bowers case, some of the Pittsburgh synagogue's members have asked Garland to deauthorize the death penalty, and Bowers's defense attorneys have said he would accept a plea agreement for a life prison sentence. Nevertheless, the Justice Department has continued to support the capital case decision made during the Trump administration.

Bowers's attorneys did not respond to a request for comment.

"They clearly are willing to walk back prior authorizations, so then it's just a question of when?" said Nathan Williams, a former federal prosecutor who helped oversee Roof's conviction in 2015. "What's distinguishing those cases, the ones they dismissed the notice on, from the cases of Bowers or Roof or Tsarnaev? My guess is that they are less egregious cases. But then on the more egregious ones, are we seeing a general policy or a reflection of individual decisions on cases?"

The answer could have a direct bearing on another high-profile case, as the Justice Department is still deliberating over whether to pursue a capital case against Payton Gendron, a White man who faces 27 hate-crime and gun-related offenses in the fatal shooting of 10 Black people in a Buffalo grocery store last year.

Gendron live-streamed his attack and is alleged to have written a 180-page manifesto spouting white supremacist conspiracy theories and anti-Black and anti-Jewish rhetoric, while laying out plans for the assault.

“I was more than a little surprised when I saw what happened” in the Saipov bike path case, said Terrence Connors, a lawyer who represents victims’ families in the Gendron case. The families have expressed split opinions over whether Gendron should face capital punishment.

“The expressed policy of the Biden administration and the policy of Merrick Garland has been anti-death penalty,” Connors said. “With the horrible events in Buffalo and the racial animus and the predetermination [from Gendron], it may be a case that changes their minds.”

The Justice Department has long-standing policies governing how decisions on capital cases are made. The process, which typically takes more than a year, includes recommendations from a capital case committee in Washington, U.S. attorneys and the department’s Civil Rights Division, along with input from victims’ families, defense attorneys and community leaders.

In the end, the attorney general must personally approve the final decision in writing. Biden administration officials said Garland does not have the power to set administration policy and that, while he maintains significant concerns over the fairness of the death penalty’s application, he continues to judge each case on the facts and legal precedents.

Administration officials cautioned that because Garland has not authorized any new death penalty cases, it does not mean he is firmly opposed to doing so. The officials spoke on the condition of anonymity, citing active legal cases.

During his Senate confirmation hearing in 2021, Garland told lawmakers he had concerns “about the increasing almost randomness or arbitrariness” of the death penalty and its disparate impact on racial minorities.

Black people have been overrepresented on death row in the modern era, and killers of White people are more likely to face a capital conviction than are the killers of Black people, according to [a 2020 report](#) from the Death Penalty Information Center. Thirty four of 57 federal inmates on death row at the time of the study were people of color, including 26 Black men.

Garland has maintained that he has no regrets about his role, while serving as a high-ranking Justice Department official, in [helping oversee](#) the federal prosecution and execution of Timothy McVeigh in the Oklahoma City bombing that killed 168 people — the deadliest domestic terrorist attack in U.S. history.

Cassie Stubbs, director of the ACLU’s Capital Punishment Project, suggested Garland might be distinguishing between honoring decisions in capital cases made by prior administrations, while staking out his own legacy in not approving any new cases under his watch.

She said such a policy is inherently paradoxical.

“It is just not possible to really reconcile saying the system is plagued by racial bias but still go for it with these decisions,” Stubbs said. “They have not said that is their policy, but if, in fact, that does become the dividing line, that’s just another layer of arbitrariness and unfairness. It should not be that whether you live or die depends on who is president when you are tried” in court.

In announcing Crusius's plea deal in El Paso, under which he faces 90 consecutive life sentences, assistant U.S. Attorney Ian Hanna acknowledged that the defendant has schizoaffective disorder, a signal that the government viewed the disability as a mitigating factor against capital punishment.

Crusius's legal team had hired an outside expert, who made the diagnosis, and the Justice Department agreed with the findings, in part because the expert was someone that federal authorities also have consulted on cases and trusted, according to a federal government official who spoke on the condition of anonymity to discuss private deliberations.

The Justice Department's position in the Crusius case stands in contrast to the decision made by El Paso's district attorney's office, which is seeking the death penalty in the state's murder case against Crusius, of Allen, Tex.

Twenty-three states have abolished the death penalty, while three — Oregon, Pennsylvania and California — have a moratorium against it. The number of state executions has fallen from 60 in 2005 to 18 in 2022, according to the Death Penalty Information Center.

Texas has executed 581 people since 1977, nearly five times more than Oklahoma, the state with the second-most executions.

Jaime Esparza, who as El Paso district attorney announced the state's capital prosecution, joined the Justice Department in December as the U.S. attorney for the Western District of Texas — the office that announced the federal death penalty was off the table.

"I'm sure he's disappointed" in Garland's decision, said a person who worked with Esparza on the state case. This person spoke on the condition of anonymity because a Texas judge put a gag order on attorneys from commenting publicly on Crusius's case. "If anybody deserves the death penalty, it's something like this. It's most analogous to the Dylann Roof shooting."

Experts said a major problem with capital punishment is that deciding which defendants should face death suggests to the public that there is a hierarchy on which crimes are the most costly to society.

In the New York bike path case, Saipov, a legal permanent U.S. resident from Uzbekistan, was described by prosecutors as an ISIS sympathizer who was radicalized online, although there is no known direct contact between him and the terrorist group.

Daniel Byman, a counterterrorism expert at the Brookings Institution, said the Justice Department's willingness to seek the death penalty against Saipov is more useful in signaling to the American public that the government is combating international terrorism than it is as a means of cowing ISIS leadership or even dissuading other followers in the United States.

"I see it largely in the realm of sending a message to the U.S. public," Byman said.

In a twist compared to the situation in El Paso, the Justice Department is seeking death for Saipov in New York, which has banned capital punishment in state cases.

Defense lawyers in the six other outstanding death penalty cases are watching the Saipov trial closely. Attorneys representing Alfonso Rodriguez Jr., convicted of killing a North Dakota student in 2003 and Efrain Rodriguez Mendoza, charged in a 2006 human smuggling case, said they are in the process of filing death penalty deauthorization requests with the Justice Department.

So is Richard B. Mazer, who represents Victor Skates, an alleged Norteño gang member in California who is facing charges in connection with racketeering and a dozen killings over a two-year period in the mid-2010s. Mazer said he asked the Justice Department to deauthorize the capital case against Skates in 2021 and sent a supplemental request in early 2022.

“We have a better shot, but there’s no guarantee,” Mazer said when asked about his client’s chances at avoiding the death penalty under the Biden administration compared with the Trump administration. “But people who are at least as bad as, and some worse than, Victor have been deauthorized.”