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## SUBMISSION TO THE 3<sup>RD</sup> UNITED STATES UNIVERSAL PERIODIC REVIEW THE DUI HUA FOUNDATION

Dui Hua (对话, meaning “dialogue” in Chinese) is a nonprofit humanitarian organization that seeks clemency and better treatment for at-risk detainees through the promotion of universally recognized human rights in a well-informed, mutually respectful dialogue with China. Focusing on political and religious prisoners, juvenile justice, women in prison, and issues in criminal justice, our work rests on the premise that positive change is realized through constructive relationships and exchange. The Dui Hua Foundation’s activities include advocacy, expert exchanges, research, publications, and community engagement. The Dui Hua Foundation is a 501-C3 organization registered in the United States, with offices in San Francisco and Hong Kong. It was founded in 1999. It has been in Special Consultative Status with the Economic and Social Council [ECOSOC] of the United Nations since 2005.

1. The Dui Hua Foundation provides this submission for the 3<sup>rd</sup> Universal Periodic Review of the human rights record of the United States. The submission focuses on the U.S. Attorney General's announced intention to proceed with the first federal executions in more than 16 years.

## Achievements

2. The death penalty in the United States received significant attention during the 1<sup>st</sup> and 2<sup>nd</sup> Universal Periodic Reviews of the United States that took place in 2010 and 2015, respectively. In its National Report in advance of the 2<sup>nd</sup> UPR, the United States noted that "the number of states that have the death penalty, the number of persons executed each year, and the size of the population on death row have continued to decline since our last report."<sup>i</sup> The Working Group Report from the 2<sup>nd</sup> UPR indicates that more than three dozen member states formally encouraged the continuation of these trends and recommended that the United States take steps to further reduce its use of capital punishment.
3. In the period since the 2<sup>nd</sup> UPR these trends have continued. Despite a slight year-on-year increase in annual executions from 2016 to 2018 (20, 23 and 25 respectively), the number of executions in every year of the present UPR cycle remains below that of every year in the previous cycle, continuing the broad decline in executions nationwide. Since the last UPR cycle capital punishment has been struck down by courts in two states (Delaware, 2016; Washington State, 2018), repealed by the legislature in one state (New Hampshire, 2019) and subjected to moratoria in two states (Pennsylvania, 2015; California, 2019). The death penalty is now abolished or under moratorium in exactly half of all states.<sup>ii</sup>
4. In its 2015 National Report the United States noted that "[t]he federal government has carried out no executions since our last UPR; in fact, it has not executed an inmate since 2003 and only three since 1963."<sup>iii</sup> Member states also praised the U.S. federal government's "ad hoc" moratorium<sup>iv</sup> and called for the institution of a formal federal moratorium.<sup>v</sup> The federal government has not performed any executions during the current review period. However, recent statements by the President and the Attorney General raise concerns that federal executions will soon resume.

## Areas of Concern

5. On July 25, 2019 Attorney General William Barr announced that the Department of Justice plans to resume federal executions. At Barr's direction the Bureau of Prisons scheduled execution dates in December 2019 and January 2020 for five of the roughly sixty condemned individuals currently held in federal prison. Barr also directed the Bureau of Prisons to adopt a proposed Addendum to the Federal Execution Protocol. The Addendum abandons the three-drug mixture previously used in federal executions in favor of a single sedative: pentobarbital.<sup>vi</sup>
6. The decision to move forward with federal executions is flawed both in principle and implementation. In principle, the decision runs contrary to both the global and the national trends away from the use of the death penalty. Support for the death penalty continues to decline in the United States, and after nearly two decades since the last

federal execution, a recent Gallup poll indicates that a majority of citizens now think that the death penalty is already imposed at “about the right amount” or “too often.”<sup>vii</sup>

7. The proposed implementation of federal executions raises human rights concerns as well. The most recent method of federal execution—lethal injection with a three-drug formula—received constitutional challenges in federal court as a violation of the Eighth Amendment prohibition on cruel and unusual punishment. While a single-drug formula has been upheld as constitutional in some states, reports of executions using the single-drug pentobarbital indicate that in some cases it has produced an excruciating burning sensation when administered. This issue appears to be linked to the provenance of the drug, which remains in question.<sup>viii</sup>
8. The selection of individuals scheduled for execution also raises troubling procedural questions about the entire process. The five people who have been given dates for execution are not the individuals who have been on federal death row the longest, although they are among the 23 prisoners with exhausted appeals. The Bureau of Prisons has not explained why these five individuals were selected for execution. A common thread in all five cases is that the victims are children, which could suggest case selection calculated to receive a high level of public support for the decision. It is also noteworthy that all these crimes could also have been prosecuted under state law. The decision to pursue federal capital convictions against these defendants represents a discretionary policy choice on the part of federal prosecutors under the Department of Justice, but there is no transparency about the decision.
9. In addition to the Department of Justice’s announcement of plans to resume executions, the current administration has also made numerous public statements advocating the expansion of the use of capital punishment. For example, President Donald Trump has repeatedly called for the death penalty for drug dealers,<sup>ix</sup> a policy he has said was inspired by China.<sup>x</sup> The decision as to whether to pursue capital punishment ultimately resides with the Attorney General. Following Trump’s statement, former Attorney General Jeff Sessions released a memo encouraging federal prosecutors to pursue capital punishment in drug cases where permitted by federal law, including non-homicide “drug kingpin” cases.<sup>xi</sup> While capital punishment for non-homicide drug kingpin crime is allowed under federal statute, no defendant has ever been sentenced to death under the statute, so its legality is untested.<sup>xii</sup> Existing caselaw suggests that capital punishment for a non-homicide drug crime is unconstitutional under the Eighth Amendment.<sup>xiii</sup>

## Recommendations

10. a) The Department of Justice should rescind its order to resume executions and cancel the five currently scheduled executions;
- b) The Bureau of Prisons should halt efforts to implement the Addendum to the Federal Execution Protocol *and* respond to all requests for information about the sourcing and supply of any lethal injection compounds obtained to date;
- c) The Office of the President should cease calls for executions in non-homicide drug cases and the Attorney General should retract the March 21, 2018 Department of Justice memo encouraging capital prosecution in federal drug cases.

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<sup>i</sup> Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, United States of America, A/HRC/WG.6/22/USA/1, para 51.

<sup>ii</sup> See Death Penalty Information Center state by state data, available at <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

<sup>iii</sup> A/HRC/WG.6/22/USA/1, para 51.

<sup>iv</sup> Human Rights Council, Report of the Working Group on the Universal Periodic Review,\* United States of America, A/HRC/30/12, see e.g. Slovakia at para 55.

<sup>v</sup> A/HRC/30/12, see e.g. Lithuania at para 176.170, Luxemburg at para 176.171; Nepal at para 176.72; France at para 176.175; Germany at 176.183; New Zealand at para 176.186; Italy at para 176.189; Holy See at para 176.191, Uzbekistan at para 176.192; Norway at para 176.193.

<sup>vi</sup> Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse, Department of Justice Office of Public Affairs, July 25, 2019, available at <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

<sup>vii</sup> See “New Low of 49% in U.S. Say Death Penalty Applied Fairly,” Gallup, October 22, 2018, available at <https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx>.

<sup>viii</sup> See The U.S. House of Representatives Committee on Oversight and Reform press release, August 14, 2019, available at <https://oversight.house.gov/news/press-releases/oversight-subcommittee-investigates-trump-administration-s-decision-to-resume>.

<sup>ix</sup> See Trump pushes death penalty for some drug dealers, CNN, March 19, 2018, available at <https://www.cnn.com/2018/03/19/politics/opioid-policy-trump-new-hampshire/index.html>.

<sup>x</sup> See “Donald Trump again calls for drug dealers to be executed . . . and says he got idea from China’s President Xi Jinping,” *The South China Morning Post*, March 11, 2018, available at <https://www.scmp.com/news/world/united-states-canada/article/2136694/donald-trump-again-calls-drug-dealers-be-executed>.

<sup>xi</sup> Attorney General Sessions Issues Memo to U.S. Attorneys on the Use of Capital Punishment in Drug-Related Prosecutions, Department of Justice Office of Public Affairs, March 21, 2018, available at <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-memo-us-attorneys-use-capital-punishment-drug-related>.

<sup>xii</sup> Federal Capital Offenses: An Overview of Substantive and Procedural Law, Congressional Research Service, February 25, 2016, available at [https://www.everycrsreport.com/files/20160225\\_R42095\\_d57af985c9c0afb049d66787fc2ae22c5912f591.pdf](https://www.everycrsreport.com/files/20160225_R42095_d57af985c9c0afb049d66787fc2ae22c5912f591.pdf) at 32.

<sup>xiii</sup> See *Kennedy v. Louisiana*, 554 U.S. 407 (2008); U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (1993) at (I)(3).