US Supreme Court hears challenge to lethal injection procedure

Kate Randall
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"This is an execution, not surgery ... Where does that come from, that you must find the method of execution that causes the least pain?"—Supreme Court Justice Antonin Scalia

The US Supreme Court on Monday heard a case challenging the constitutionality of lethal injection, the method of execution used by 36 of the 37 US states that still practice capital punishment. It was the first time in more than a century that the high court has examined a method of execution.

The case has been brought on behalf of two Kentucky death row inmates, who argue that the state's lethal injection process constitutes cruel and unusual punishment, which is banned by the Eighth Amendment to the US Constitution. At issue in the case is not the constitutionality of the barbaric practice of state killings, but what methods are considered acceptable in carrying them out.

The hour-long proceedings Monday morning took on an air of the macabre, as the justices heard legal arguments opposing and supporting the execution method, with detailed descriptions of lethal injection. Justices voiced their opinions on the pros and cons of the grisly procedure and alternatives to it.

From their comments on Monday, it was clear that most of the justices—including what is generally considered the liberal faction—indicated that their sympathies lay more with the state of Kentucky than the plaintiffs.

Several justices questioned whether the challenge brought on behalf of the plaintiffs presented enough evidence to decide whether lethal injection should be banned.

Executions have been effectively put on hold in the US since the Supreme Court decided last September to take the case, with more than 40 people receiving stays of execution due to lethal injection challenges. Forty-two people were executed in 2007, the lowest number since 1994. There are indications that some of the justices voting to take the Kentucky case did so hoping to dispose of the challenge as insubstantial in order to take the issue out of the courts and restart the state-sanctioned killing machine.

In his opening statement before the court, Donald B. Verrilli Jr., attorney representing the Kentucky inmates, argued, "Kentucky's lethal injection procedures pose a danger of cruelly inhumane executions." If the toxic chemicals are not administered properly, he argued, the condemned inmate can suffer a horrifically painful death.

In the procedure, the prisoner is strapped to a gurney and sedated with sodium thiopental, a barbiturate, which renders him or her unconscious. The person is then injected with pancuronium bromide, which stops the breathing muscles. Finally, the prisoner receives a dose of potassium chloride, which causes cardiac arrest.

Verrilli said that if the first drug in the sequence is not effectively administered, "then the second drug, pancuronium, will induce a terrifying conscious paralysis and suffocation and the third drug ... will inflict an excruciating burning pain as it courses through the veins." The attorney argued that there is no guarantee that the first drug would be administered properly.

The Death Penalty Information Center lists 28 known instances of botched executions involving lethal injection. Most involve difficulty in finding the vein to administer the drugs. In December 2006 in Florida, Angel Diaz squinted, grimaced and tried to mouth words after the first injection was administered. An autopsy revealed that the deadly chemicals had been injected into soft tissue, rather than the vein, rendering them ineffective.

Verrilli argued that the risk of pain could be avoided if medically trained personnel monitored the anesthesia procedure. Justice Antonin Scalia countered that the American Medical Association's code of ethics prohibiting doctors from supervising executions. Verrilli proposed another "practical alternative"—a single, lethal dose of barbiturate, "which does not require the participation of a medically trained professional."

Chief Justice John Roberts objected to this recommendation, indicating that it might open the way for further challenges to this revised method of execution. If the plaintiffs prevailed in this case, he said, the next case might be brought by someone subject to the single-drug protocol, who might object that the execution would take longer, and would appear less "dignified" because of muscle contractions suppressed by the pancuronium bromide. Roberts's overarching concern was avoiding future legal challenges that might slow executions.

Justice Stephen Breyer questioned whether there was any guarantee that the one-drug protocol would be less painful, saying he found the scientific articles supporting it cited in the plaintiffs' briefs confusing. "You claim that [lethal injection] is somehow more painful than some other method," he said, "But which? And what's the evidence for that?"

Scalia expressed his contempt for any discussion of whether individuals might experience torturous pain during the lethal injection procedure. "This is an execution, not surgery," he stated. Scalia is one of the court's most consistent and ruthless defenders of the interests of the ruling elite.

Scalia made clear that he did not want to see the case sent back

to the lower courts to reevaluate the quality of evidence: “I’m very reluctant to send it back to the trial court so we can have a nationwide cessation of all executions while the trial court finishes its work and then it goes to another appeal to the State supreme court and ultimately, well, it could take years.”

Verrilli went on to argue that under the one-drug protocol, even if there were a problem with its administration, “it will not be a problem that causes any pain, and that’s the critical difference, because if it doesn’t cause pain it can’t be cruel and unusual punishment.”

Scalia interjected at this point, “We have been discussing this as though that is a constitutional requirement. Where does that come from that you must find the method of execution that causes the least pain? We have approved electrocution, we have approved death by firing squad. I expect both of those have more possibilities of painful death than the protocol here.

“Where does this come from that in the execution of a person who has been convicted of killing people we must chose the least painful method possible? Is that somewhere in our Constitution?”

Verrilli went on to emphasize, “Justice Scalia, our position is that the pain that is inflicted here when this goes wrong is torturous, excruciating pain under any definition.”

Justice Samuel Alito, impatient with the discussion, asked, “Isn’t your position that every form of execution that has ever been used in the United States, if it were to be used today, would violate the Eighth Amendment?”

Attorney Roy T. Englert, representing the Kentucky Department of Corrections, argued that the state had safeguards in place to insure that lethal injections would be administered properly.

Kentucky has carried out two executions since the Supreme Court reinstated the death penalty. Only one was by lethal injection, but it has had 100 practice sessions of the procedure. “Kentucky requires monthly practice sessions every month by the execution team,” Englert stressed, “because it is very concerned to get it right.”

Justice John Paul Stevens said, “The record is very persuasive in your favor, I have to acknowledge.”

When Justice Ruth Bader Ginsburg pointed out that there had been a finding that the second, paralyzing drug used in lethal injection, pancuronium bromide, serves no therapeutic purpose, Englert said, “We don’t quarrel with that. The purpose it serves is the purpose of dignifying the process for the benefit of the inmate and for the benefit of the witnesses.”

Justice Department Deputy Solicitor General Gregory G. Garre, representing the Bush administration, spoke before the court in support of Kentucky. He argued that the plaintiffs’ claim would “lead to endless litigation and a regime in which there is not finality.”

Scalia agreed, “Those who oppose capital punishment entirely across the board are quite willing to take a careful look at everything... whenever there is a newly developed method of execution the problem will always be before us and executions will always be impermissible.”

The Supreme Court is not expected to rule on the case before June. If it rules in favor of Kentucky, a spike in the number of executions can be expected, as states would feel the legal ambiguity of the lethal-injection procedure had dissipated.

The last time the high court ruled on a method of execution was in 1878, when it upheld death by firing squad. By the twentieth century, states moved to utilize the electric chair, the gas chamber, and finally lethal injection, which was introduced 30 years ago. The lethal-injection protocol has remained virtually unchanged since then.

The lethal-injection procedure used for executions today was long ago given up by the American Veterinary Association for use in euthanizing animals because it was deemed unnecessarily cruel. The three-drug protocol is outlawed for animals in Kentucky.

The Supreme Court has historically interpreted the Eighth Amendment’s ban on cruel and unusual punishment on the basis of evolving standards of decency. The current Court’s reluctance to consider the merits of cases challenging lethal injection as it is currently practiced indicate the pendulum is swinging the other way.

In another death penalty case, last Friday the court heard the case of Patrick O. Kennedy, a convicted child rapist on Louisiana’s death row, described by his lawyers as “the only person in the United States who is on death row for a nonhomicide offense.” If the court rules against Kennedy and he is put to death, it would end a four-decade hiatus on executions for crimes other than murder. A ruling is expected by late June.

Since the Supreme Court reinstated the death penalty in 1976, 1099 condemned inmates have been sent to their deaths. These have included the mentally impaired, those convicted of crimes committed as juveniles, and foreign nationals not informed of their consular rights.

Much of the world looks on with revulsion at a society that condemns its own citizens to death, a practice outlawed by much of the industrialized world. While public support in the US for capital punishment is declining, the ruling establishment of both big business parties maintains overwhelming support for the brutal practice.

As Monday’s Supreme Court proceedings demonstrate, this ruling elite is determined to keep the death penalty intact. Its abolition—or any challenges to it—would set a dangerous precedent under conditions when the government’s domestic and foreign policies face growing popular opposition.