US Supreme Court upholds lethal injection, opening way to resumed executions

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On Wednesday the US Supreme Court ruled 7-2 to reject a challenge to execution by lethal injection. The case was brought by two Kentucky death row prisoners, who argued that the method exposes those condemned to die to the risk of cruel and unusual punishment.

The reactionary ruling will lead to a resumption of executions, which were halted nationwide last September after the court agreed to hear the case. Moreover, while the decision is not a direct ruling on the constitutionality of the death penalty itself, it will thwart pending and future cases brought forward by prisoners on similar grounds and make challenging the death penalty more difficult.

The case, Baze v. Rees, concentrated on the constitutionally of the lethal injection procedure, the form of execution used in most states that practice capital punishment. Specifically, the two Kentucky prisoners claimed that the method of lethal injection posed a significant enough risk of misadministration and excruciating pain that its use, even when properly administered, constituted cruel and unusual punishment, which is banned by the Eighth Amendment to the US Constitution.

The court justices issued varying opinions. Chief Justice John Roberts wrote the majority opinion, which was joined by justices Anthony Kennedy, Samuel Alito, John Paul Stevens, Antonin Scalia, Clarence Thomas, and Steven Breyer. All but Kennedy filed separate concurring opinions in which they laid out differences on the ruling—most going even further to the right than the majority opinion.

The petitioners cited numerous instances in which the most common three-drug method of lethal injection left prisoners in agonizing pain for extended periods of time. In lethal injection, a prisoner is bound to a gurney and fitted with two needles connecting to intravenous drips. The first injection, consisting of the barbituate sodium thiopental, is intended to swiftly put the prisoner into a comatose state of unconsciousness.

However, if the injection is improperly placed, or the chemical does not pass evenly through the intravenous tube, there is a chance the prisoner will be cognizant and suffer severe pain when the other toxic chemicals are administered.

The second injection contains a paralyzing agent called pancuronium bromide, which renders the prisoner completely immobile and causes suffocation. If a prisoner is conscious at this point, all signs of suffering, seizures, and terror are undetectable. The third and fatal injection of potassium chloride, which induces a massive heart attack, also induces a severe burning sensation in the veins.

Wednesday's decision will be followed by a wide resumption of executions. Forty-two people were executed in 2007, through September when the moratorium was imposed, the lowest number of executions in the US in 13 years. Yet even considering this drop, the US was still ranked fifth in the world in terms of people executed. At the time of the moratorium, the executions of 40 prisoners were imminent.

Thousands of prisoners sit on death row throughout the country. Numerous states—including Texas, California, Ohio, Arizona, Alabama, and Florida—hold well over a hundred condemned prisoners; California's death row population is approaching 700. According to the Death Penalty Information Center, death row inmates typically spend more than a decade of their lives awaiting execution, in isolation, excluded from education and vocational programs, disallowed most forms of exercise and visitation.

Between 1977 and 2006, over 7,100 people have been sentenced to death in the US. Thirty-six of the 50 US states, in addition to the federal government, administer lethal injections to carry out death sentences, with most, including Kentucky, using the three-drug combination.

In the majority opinion Wednesday Chief Justice Roberts asserted that Kentucky's lethal injection procedure "complies with the constitutional requirements against cruel and unusual punishment." Making clear its support for the barbaric procedure, the high court ruling affirmed a lower court ruling and acknowledged that "there are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds."

Roberts wrote, “Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”

Roberts stated that the court had “never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” He cited an 1879 ruling upholding the use of firing squads, which found that the practice was not cruel and unusual, in contrast to English executions in which “terror, pain, or disgrace were sometimes superadded.” What punishments like being “emboweled alive, beheaded, and quartered” had that was absent in American executions, Roberts asserted, “was the deliberate infliction of pain for the sake of pain—‘superadding’ pain to the death sentence through torture and the like.”

Citing another 19th century ruling, Roberts noted that the US justice system recognized punishment as “cruel” when involving “something inhuman and barbarous, something more than the mere extinguishment of life.”

“Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual,” Roberts wrote.

Death penalty opponents have pointed out that the three-drug lethal injection method was long ago discontinued by the American Veterinary Association in the euthanizing of animals because it was determined to be unnecessarily cruel. The majority opinion rejected the extension of this logic to human beings. “If [the paralyzing agent] pancuronium is too cruel for animals, the argument goes, then it must be too cruel for the condemned inmate,” Roberts wrote. “Whatever rhetorical force the argument carries ... it overlooks the States’ legitimate interest in providing for a quick, certain death.”

By this reasoning, the “States’ interest” trumps human rights. Such logic flows from the same political origins as the Bush administration’s justifications for the use of “enhanced interrogation techniques” on prisoners held by the CIA and the military.

The opinion concluded, “The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.”

Justice Stevens, who nevertheless concurred with the majority in the ruling, wrote in a separate opinion: “The imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”

Justice Scalia, in a bristling counter-opinion, wrote of Stevens’s: “There is a risk that an innocent person might be convicted and sentenced to death—though not a risk that Justice Stevens can quantify, because he lacks a single example of a person executed for a crime he did not commit in the current American system.” In fact, Scalia wrote, the death penalty represented a cost to society only because those “opposed to the death penalty... have ‘encumbered it... with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it.”

In other words, the United States justice system would function more smoothly and in accordance with the Constitution if only the death penalty were relieved of the ethical, moral, legal, and social considerations that make executions such a long legal process.

Justices Ruth Bader Ginsburg and David Souter dissented, with Ginsburg writing for the minority. While citing a 2002 ruling that declared the Eighth Amendment “must draw its meaning from evolving standards of decency that mark the progress of a maturing society,” Ginsburg framed the dissent strictly in terms of whether the state of Kentucky’s lethal injection protocol was meticulous enough in its safeguards to flawlessly execute prisoners.

The dissenting opinion, like the case itself, did not call into question the death penalty. Instead, the nominally more liberal faction of the court proscribed itself to questioning minor details of the lethal injection process.

Kentucky, Ginsburg wrote, did not employ “essentially costless” measures such as “saying the condemned inmate’s name,” “gently strok[ing] the condemned inmate’s eyelashes,” or “pinch[ing] the condemned inmate’s arm” after administering the first injection.

Ginsburg wrote, “Lethal injection as a mode of execution can be expected, in most instances, to result in painless death. Rare though errors may be, the consequences of a mistake about the condemned inmate’s consciousness are horrendous and effectively undetectable after injection of the second drug. Given the opposing tugs of the degree of risk and magnitude of pain, the critical question here, as I see it, is whether a feasible alternative exists.”