US Supreme Court ruling guts ban on “cruel and unusual punishment”

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In a decision that sets a new standard for legalistic sophistry in the service of barbarism, the US Supreme Court has approved the execution of a Missouri inmate using methods that are tantamount to torture.

Despite evidence that the death row prisoner, Russell Bucklew, has a rare medical condition involving the formation of tumors in his bloodstream, which renders execution by lethal injection excruciatingly painful, the court issued a 5–4 ruling Monday that the execution should proceed as planned.

The decision was the first in which the replacement of conservative Justice Anthony Kennedy by ultra-conservative Justice Brett Kavanaugh clearly paid dividends for the most right-wing factions in Washington. Kennedy was the fifth vote to approve a stay of execution for Bucklew last year in an earlier, unrelated appeal. Kavanaugh supplied the fifth vote to send Bucklew to the death chamber.

There are exceptional aspects to the issues in *Bucklew v. Precythe.* Only five cases of his rare medical condition are known to exist. As the dissent by Justice Stephen Breyer noted, Bucklew “ suffers from a congenital condition known as cavernous hemangioma that causes tumors filled with blood vessels to grow throughout his body, including in his head, face, neck, and oral cavity.”

As a result, Breyer explains, “executing him by lethal injection will cause the tumors that grow in his throat to rupture during his execution, causing him to sputter, choke, and suffocate on his own blood for up to several minutes before he dies.”

The majority opinion, authored by Justice Neil Gorsuch, President Trump’s first nominee to the Supreme Court, simply dismisses the unique character of Bucklew’s appeal and uses the case to set a precedent for near-universal dismissal of challenges to the death penalty under the Eighth Amendment to the US Constitution, which prohibits “cruel and unusual punishment.”

If death by lethal injection is not cruel to a prisoner with Bucklew’s particular cancer, and if a disease affecting only four other people is not unusual, it is hard to imagine what other circumstances would be sufficient to meet the test of the Eighth Amendment.

The Gorsuch opinion bristles with resentment over the legal campaign waged by Missouri death row inmates and opponents of the death penalty over many years, claiming they have challenged the methods employed by the state to carry out executions in an effort to block executions altogether.

The language of the opinion is revealing: “After a decade of litigation, Mr. Bucklew was seemingly out of legal options.” But “Bucklew’s case soon became caught up in a wave of litigation over lethal injection procedures,” which “severely constrained states’ ability to carry out executions.”

After losing one appeal, “that was still not the end of it,” Gorsuch writes, venting his impatience at the refusal of Bucklew and his attorneys to accept his fate. “Next, Mr. Bucklew and other inmates unsuccessfully challenged Missouri’s protocol in state court.” Then the prisoner “sought to intervene in yet another lawsuit…”

The corporation that manufactured sodium thiopental stopped supplying it for use in executions after a campaign by death penalty opponents, Gorsuch notes. “As a result, the State was unable to proceed with executions until it could change its lethal injection protocol again.”

The result is that Bucklew is still alive 22 years after he was convicted of killing his girlfriend’s new lover and kidnapping and raping her.

Gorsuch claimed that the surviving victim, as well as the state, have “an important interest in the timely enforcement of a sentence.” He then argued: “Those interests have been frustrated in this case. Mr. Bucklew committed his crimes more than two decades ago. He

exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit."

The vindictiveness is palpable, as is the determination to clear away all obstacles to the functioning of the American death machine. Gorsuch concludes: "Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm …"

In the context of recent Supreme Court decisions on the death penalty, there are only narrow grounds for legal challenges by inmates to the method of execution. Bucklew had to prove that the method of execution would be unconstitutionally painful, and he was required to propose an alternative method of execution that was constitutionally permissible.

The five-member majority essentially ignored the evidence of Bucklew's medical condition, while dismissing his suggestion of nitrogen gas—approved as a method of execution in three states—on particularly ludicrous grounds, namely, that he did not submit a full plan of operation for his own execution, including such details as what kind of protective gear his executioners should wear when they gassed him.

A noteworthy aspect of the Gorsuch opinion is his extensive and graphic discussion of the methods of execution that prevailed at the time of the adoption of the Eighth Amendment in 1791, when the ten amendments known collectively as the Bill of Rights were added to the Constitution.

He writes that the methods of execution deemed "cruel and unusual" by the Founding Fathers were such things as hanging, drawing and quartering, death by dragging through the streets, and burning at the stake. Hanging in and of itself was not considered cruel, he writes, because "The force of the drop could break the neck and sever the spinal cord, making death almost instantaneous." He continues: "But that was hardly assured given the techniques that prevailed at the time. More often it seems the prisoner would die from loss of blood flow to the brain, which could produce unconsciousness usually within seconds, or suffocation, which could take several minutes."

The legal significance of this discussion is that the Supreme Court has, for more than half a century, moved away from "originalism" in its Eighth Amendment jurisprudence. Chief Justice Earl Warren set the tone in a 1958 opinion holding that the Eighth Amendment prohibited not merely what was regarded as barbaric in the 18th century, but any punishment that defied "evolving standards of decency that mark the progress of a maturing society."

This is the basis for such relatively recent decisions as the finding that capital punishment is "cruel and unusual" as applied to any child or juvenile, or to the intellectually disabled, or to those suffering from mental illness such that they cannot comprehend either their crime or their punishment. Kennedy had adhered to the Warren view, but Kavanaugh evidently does not, suggesting that the recent decisions limiting capital punishment could be reversed.

The two most right-wing justices on the high court, the late Antonin Scalia and Clarence Thomas, bitterly opposed any meaningful limitations on executions. Gorsuch succeeded to Scalia's seat on the court, and his opinion in *Bucklew* takes a giant step toward Scalia and Thomas' position. As noted by several legal commentators, Gorsuch embraces Thomas's language in previous dissents on death penalty cases, finding that a method of execution is prohibited only when "the State is cruelly super-adding pain"—in other words, where the state intentionally chooses a method of execution calculated to cause more pain than "necessary" to end a human life.

The dissents by Justice Breyer and Justice Sonia Sotomayor make many valid criticisms of the majority opinion. Breyer notes the reversal of longstanding court precedent, given that the court has "repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual today."

As is invariably the case, Gorsuch applies originalism selectively: to oppose efforts to apply constitutional principles more democratically. As he explains in his *Bucklew* opinion, he has no objection to the choice of electrocution as a method of execution—clearly never envisioned by the Founding Fathers—or any other new method of state killing such as the gas chamber.