

Supreme Court Upholds Use of Lethal Injection

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The Supreme Court today upheld the constitutionality of execution by lethal injection in Kentucky, rejecting claims that the procedure amounts to cruel and unusual punishment and clearing the way for a resumption of executions in states that were awaiting the court's decision.

By a 7-2 vote in the case, *Baze v. Rees*, the court ruled that the three-drug combination used by Kentucky and most other states to execute prisoners does not violate the Eighth Amendment. Chief Justice John G. Roberts Jr. announced the judgment and delivered one of several opinions. Justices Ruth Bader Ginsburg and David H. Souter dissented.

In an opinion joined by Justices Anthony M. Kennedy and Samuel A. Alito Jr., Roberts wrote that the petitioners, two convicted murderers sentenced to death in Kentucky state court, had not proved that "the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment."

In an opinion concurring in the judgment, Justice John Paul Stevens wrote for the first time that he considers the death penalty unconstitutional. But he said he continues to respect Supreme Court precedents that have upheld capital punishment and wrote that the Kentucky petitioners failed to prove their case.

Executions using the lethal injection method were put on hold in many states after the Supreme Court agreed to hear the case in September. The court previously ruled that the death penalty is constitutional. At issue in *Baze v. Rees* was the more specific question of whether the three-drug protocol passed constitutional muster.

Lethal injection is used by the federal government and 36 states to carry out capital punishment. At least 30 states, including Kentucky, use the same combination of three drugs to execute prisoners: sodium thiopental, which induces unconsciousness; pancuronium bromide, which paralyzes the muscles; and potassium chloride, which causes cardiac arrest.

An attorney for the petitioners, who were backed by other death row inmates around the country, argued that if the first drug does not work, the second induces a "terrifying, conscious paralysis" and the third causes an "excruciating burning pain as it courses through the veins."

The Kentucky inmates were not asking to be spared execution or injection. Rather, they wanted the court to order Kentucky to switch to injection of a single, massive dose of barbiturates -- the same method used to euthanize animals.

The use of Kentucky's three-drug protocol was upheld by a state trial court and Kentucky's Supreme Court, which ruled last year that the method did not violate the Eighth Amendment because it did not create a substantial risk of pain, torture or lingering death.

In his opinion, 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."

He noted that the Supreme Court "has never invalidated a state's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." In fact, it has upheld firing squads and the electric chair, he said.

Roberts also pointed out that the petitioners were not challenging lethal injection itself or the proper administration of Kentucky's three-drug cocktail, but were claiming existence of a "significant risk" that the proper procedures would not be followed, resulting in severe pain.

"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. He added that "a condemned prisoner cannot successfully challenge a state's method of execution merely by showing a slightly or marginally safer alternative."

Permitting such challenges "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology," the chief justice said. This approach "would embroil the courts in ongoing scientific controversies beyond their expertise" and would "substantially intrude on the role of state legislatures in implementing their execution procedures," he said.

In his concurring opinion, Stevens quoted the late Justice Byron R. White in saying he has concluded that imposing capital punishment represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." The death penalty thus is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment," he wrote, again quoting White.

But Stevens added: "The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my decision in this case particularly difficult. It does not, however, justify a refusal to respect precedents that remain a part of our law." He noted that the Supreme Court has upheld the constitutionality of the death

penalty and established a framework for evaluating particular execution methods. Under those precedents, he wrote, he found that the Kentucky petitioners failed to prove a violation of the Eighth Amendment.

Deborah Denno, a death penalty expert at Fordham University Law School, said Stevens's opinion helps make today's decision notable because he "says for the first time that he believes the death penalty is unconstitutional."

In her dissenting opinion, Ginsburg said she "would not dispose of the case so swiftly given the character of the risk at stake." She wrote that Kentucky's lethal injection protocol "lacks basic safeguards used by other states to confirm that an inmate is unconscious before injection of the second and third drugs." She said she favored sending the case back to Kentucky with instructions to consider whether the omission of those safeguards "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

Five other justices also filed opinions. Alito wrote an opinion concurring with Roberts, and Stevens and Justice Stephen G. Breyer each filed an opinion concurring in the judgment. Justices Antonin Scalia and Clarence Thomas also wrote opinions concurring in the judgment, and each joined the other in them.

The two Kentucky death row inmates were sentenced to death for murders committed in the 1990s. One of them, Ralph Baze, was convicted of shooting a sheriff and a deputy sheriff execution-style when they tried to serve felony warrants on him in 1992. The other, Thomas C. Bowling, fatally shot a couple and wounded their 2-year-old son as they sat inside their car in a parking lot after Bowling had run into them with his vehicle.

Virginia was one of the states that put lethal-injection executions on hold pending the Supreme Court decision. In an April 1 announcement, Gov. Timothy M. Kaine (D) said he was granting temporary stays "in order to provide guidance to courts, litigants and the public."

That order stayed the scheduled April 8 execution of Edward N. Bell, who killed a police officer in Winchester in 1999.

Kaine said today that Virginia can proceed with executions now that the Supreme Court has upheld the use of lethal injection in Kentucky. A spokesman said the governor would "continue to review any clemency requests on a case-by-case basis."