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Supreme Court Allows Lethal Injection for Execution

By [LINDA GREENHOUSE](#)

WASHINGTON — The Supreme Court on Wednesday upheld Kentucky’s method of execution by lethal injection, rejecting the claim that officials there administered a common sequence of three drugs in a manner that posed an unconstitutional risk that a condemned inmate would suffer acute yet undetectable pain.

While the 7-to-2 ruling did not shut the door on challenges to the lethal injection protocols in other states, it set a standard that will not be easy to meet. Chief Justice [John G. Roberts Jr.](#) said in the court’s controlling opinion that challengers must show not only that a state’s method “creates a demonstrated risk of severe pain,” but also that there were alternatives that were “feasible” and “readily implemented” that would “significantly” reduce that risk.

“A slightly or marginally safer alternative” would not suffice, the chief justice said. He added: “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” under the Eighth Amendment.

At issue in the case was not the constitutionality of lethal injection itself, the method specified by 35 of the 36 states that have the death penalty. (Nebraska is the exception.) Rather, the challenge was to the details of the injection’s administration: the chemicals used, the training of the personnel, the adequacy of medical supervision, and the consequences and risk of error.

The legal question was what standard to apply in evaluating the risk. The appeal, brought by two men on Kentucky’s death row, Ralph Baze and Thomas C. Bowling, each convicted of double murders, asked the court to find the Kentucky protocol unconstitutional if it imposed an “unnecessary risk” of error in light of potential alternatives. Chief Justice Roberts, applying the more rigorous standard he outlined, said the risks identified by the inmates were not “so substantial or imminent as to amount to an Eighth Amendment violation.”

While most states use a method similar to Kentucky’s, a number of them have adopted additional safeguards to ensure that an inmate is properly anesthetized by the initial drug in the sequence, a barbiturate, before administration of the second two, which paralyze the muscles and stop the heart.

In fact, Justice [Ruth Bader Ginsburg](#), in a dissenting opinion, listed several of these states and described the extra steps they have taken, to show that Kentucky could and should be required to do a better job. The states she named were Alabama, California, Florida, Indiana and Missouri. The other dissenter, Justice [David H. Souter](#), signed her opinion.

Dozens of executions have been delayed around the country in recent months. Gov. Tim Kaine of Virginia, a Democrat, announced within hours of the ruling that he was lifting a moratorium on executions he had imposed, and other states were expected to follow. The Supreme Court itself had not imposed a general moratorium, instead granting individual stays of execution in cases that reached the court. Those stays will dissolve automatically when the justices deny the underlying appeals, as they are expected to do in the next week or two.

The court issued its decision on the same morning that it heard arguments in another closely watched death penalty case, a challenge to Louisiana's application of capital punishment for the crime of child rape. The two men on Louisiana's death row for raping young girls are the only two people in the country who have been sentenced to death for a crime in which death did not result.

In the Kentucky case, there was considerably less agreement among the justices than the vote of 7 to 2 might indicate. Six of the seven justices in the majority wrote separate opinions. The chief justice's opinion was signed by only two others, Justices [Anthony M. Kennedy](#) and [Samuel A. Alito Jr.](#) Justice Kennedy was the only member of the majority who did not write separately.

Justice Alito wrote a separate opinion suggesting that he regarded the chief justice's opinion as insufficiently conclusive and therefore open to "misinterpretation" by those who might see it as an invitation to "litigation gridlock." Justice Alito said that because ethics rules bar most medical professionals from taking part in executions, challenges based on the absence of doctors and nurses from the execution chamber must fail because an alternative protocol that would require their participation "cannot be regarded as 'feasible' or readily available."

Another member of the majority, Justice [John Paul Stevens](#), said in his separate opinion that he felt bound by the court's precedents to uphold the constitutionality of the Kentucky protocol. But he went on to call for abolishing the death penalty, both as a matter of policy and of Eighth Amendment jurisprudence. "State-sanctioned killing," Justice Stevens said, was "becoming more and more anachronistic."

Justice Stevens voted with the majority that restored capital punishment in 1976, his first year on the court. But he said he had changed his mind, based on "my own experience" in seeing how the death penalty is actually carried out in a changing climate. Among the factors he singled out was a series of decisions that he said had "endorsed procedures that provide less protections to capital defendants than to ordinary offenders."

The set of opinions in this case, *Baze v. Rees*, No. 07-5439, put the personalities and priorities of the individual justices on display as much as any case in recent years.

There was Chief Justice Roberts, including in his opinion a discourse on the need for courts to step aside. The Kentucky inmates' proposed approach, he said, "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."

There was Justice Stevens, the court's senior member, who turns 88 on Sunday, taking a singular path as he has so often during his long career.

There was Justice [Antonin Scalia](#), pugnacious as ever, sufficiently provoked by Justice Stevens's position as to demand, in a separate opinion, "What prompts Justice Stevens to repudiate his prior view and to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution?" He added, "Purer expression cannot be found of the principle of rule by judicial fiat."

There was Justice [Clarence Thomas](#), joining the majority judgment while expressing the view that "this is an easy case" because "a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain," which Kentucky's protocol obviously was not.

There was another member of the majority, Justice [Stephen G. Breyer](#), digging deeply into the scientific evidence and concluding that, while there were grounds for "legitimate concern," he could not find "either in the record or in the readily available literature that I have seen, sufficient grounds to believe that Kentucky's method of lethal injection creates a significant risk of unnecessary suffering."

And there was Justice Ginsburg, writing a carefully modulated, almost minimalist dissenting opinion in which she did not go so far as to declare Kentucky's protocol unconstitutional. Rather, she said, the court should "vacate and remand" the Kentucky Supreme Court's decision that upheld the protocol, instructing it to consider whether the state's omission of safeguards used by other states "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

The argument about pain is based on the sequence of drugs used by Kentucky and other states. Pancuronium bromide, which is a paralyzing agent, and potassium chloride, which stops the heart, would both cause excruciating pain if a person was not first placed under deep anesthesia. If the anesthesia is insufficient, the paralyzed inmate would not be able to move or cry out.

There have been various problems with lethal injection executions, including evidence of insufficient anesthesia in some cases. One hurdle for the Kentucky challengers was that the state has carried out only one execution, which proceeded without apparent problems, since adopting the method in 1998.

Donald B. Verrilli Jr., who argued the case for the two inmates, said in an interview that it still remained open to challengers to argue that even in a state with a protocol that looked acceptable on paper, officials were not carrying it out with sufficient care.

Immediately after announcing the lethal injection decision on Wednesday, the court turned to the argument in the Louisiana case on the constitutionality of the death penalty for raping a child.

It has been 43 years since anyone has been executed in the United States for rape. In 1977, with 30 men on death row for rape, the court ruled in a Georgia case that the Eighth Amendment prohibited the death penalty for that crime. The victim in that case, *Coker v. Georgia*, was a 16-year-old married woman who was referred to as an adult throughout the opinion.

While the question presented to the court in the *Coker* case did not differentiate between adults and children, the decision for years was widely interpreted as barring capital punishment for any rape. Nonetheless, Louisiana enacted its law in 1995, and several other states followed suit, for a current total of five that permit the death penalty for the rape of a child.

The justices' questions from the bench indicated that most saw the Coker decision as limited to adult victims, with the issue of whether death could be imposed for raping a child still an open one, not governed by precedent. Patrick Kennedy, the defendant in this case, *Kennedy v. Louisiana*, No. 07-343, was convicted of raping his 8-year-old stepdaughter.

Only in Louisiana could he have received the death penalty, because the other states — Montana, Oklahoma, South Carolina and Texas — apply their laws only to those with prior convictions. Mr. Kennedy's lawyer, Jeffrey L. Fisher, argued that this demonstrated a "national consensus" against the penalty, at least for a first-time offender.

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