Supreme Court Allows Lethal Injection for Execution

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WASHINGTON — The Supreme Court on Wednesday upheld Kentucky's method of putting criminals to death by lethal injection, not only clearing the way for Kentucky to resume executions but ending an unofficial moratorium in the 35 other states that have the death penalty.

However, Justice John Paul Stevens, while concurring reluctantly with the judgment of the court, wrote that he now believed capital punishment itself is unconstitutional, and that Wednesday's ruling might serve to reignite the debate over whether it should exist in the United States.

By 7 to 2, the court rejected challenges to the Kentucky execution procedure brought by two death-row inmates, holding that they had failed to show that the risks of pain from mistakes in an otherwise "humane lethal execution protocol" amounted to cruel and unusual punishment, which is banned by the Constitution.

The prisoners had contended that the three-drug procedure used on death row — one drug each to sedate, paralyze and end life — was unconstitutional, and that in any event there were strong indications that Kentucky had bungled some executions, creating unnecessary pain for the condemned. Through their lawyers, they maintained that problems could be largely solved by administering a single overwhelming dose of a barbiturate, as opposed to the three-drug procedure.

The prisoners' challenge had implications far beyond Kentucky. Of the 36 states with the death penalty, all but Nebraska, which uses the electric chair, rely on the same three-drug procedure that Kentucky uses. So does the federal government. Now, with the Kentucky challenge disposed of, other states that had set aside executions seem poised to begin them again.

Gov. Tim Kaine of Virginia quickly announced that his state would lift its moratorium on executions, and the Rev. Pat Delahanty, head of the Kentucky Coalition to Abolish the Death Penalty, said, "We're going to be facing some executions soon," The Associated Press reported.

Executions across the country have been on hold since last September, when the Supreme Court decided to take the Kentucky case. About two dozen executions did not go forward as scheduled while the case was pending, death penalty opponents told the A.P. Because pre-execution procedures can be time-consuming, there was no immediate way to gauge how quickly they might resume. One prisoner who could be facing death soon, in view of

the Governor Kaine's remarks, is Edward Bell, who is on Virginia's death row for killing a Winchester police officer. Mr. Bell's execution had been set for April 8.

In a decision written by Chief Justice John G. Roberts Jr., which weighed the Kentucky prisoners' claims that they faced an unacceptably high risk of suffering at the hands of their executioners, the court concluded that "Kentucky's continued use of the three-drug protocol cannot be viewed as posing an 'objectively intolerable risk' when no other state has adopted the one-drug method and petitioners have proffered no study showing that it is an equally effective manner of imposing a death sentence."

The prisoners who brought the challenge were Ralph Baze, who killed a sheriff and a deputy who were trying to serve him with a warrant, and Thomas C. Bowling, who killed a couple whose car he had damaged in a parking lot.

The procedure that they challenged uses a barbiturate, then pancuronium bromide, a paralyzing agent, followed by potassium chloride, which stops the heart and brings about death — but with terrible pain if the barbiturate does not work as intended, the condemned men's lawyers maintained. And because of the paralyzing agent, a prisoner could appear peaceful and relaxed even while suffering, they argued.

Lawyers for the prisoners contended that the barbiturate-only method is widely used by veterinarians, who are barred in many states from using the same paralyzing agent employed in executing people. But the court rejected that argument, stating that "veterinary practice for animals is not an appropriate guide for humane practices for humans." The justices who concurred in the judgment — with varying degrees of agreement — were Anthony M. Kennedy, Samuel A. Alito Jr., Antonin Scalia, Clarence Thomas and Stephen G. Breyer, as well as Justice Stevens.

Alluding to the Eighth Amendment's prohibition of cruel and unusual punishment, the court said history leads to the conclusion that "an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain," a standard that bars disemboweling, burning alive and other excruciating ways of bringing about death. "Judged under that standard, this is an easy case," the court held.

But the deliberations were not easy, if the number of opinions is any indicator. Although seven members concurred in the judgment of the court, only Justices Kennedy and Alito (who filed a concurring opinion of his own) joined Chief Justice Roberts's opinion. Justices Scalia and Thomas joined each other's concurring opinions.

Justices Ruth Bader Ginsburg and David H. Souter dissented from the court's judgment. "I would not dispose of the case so swiftly given the character of the risk at stake," Justice Ginsburg wrote, declaring that she would have sent the case back to the Kentucky courts for further scrutiny of the condemned men's claims.

Perhaps most interestingly, Justice Stevens filed an opinion concurring in the judgment of the court, but turning against capital punishment itself. Indeed, he asserted that recent

decisions by state legislatures, Congress and the Supreme Court itself to preserve the death penalty “are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks” of the ultimate punishment.

Justice Stevens noted that in the 1976 decision in which the Supreme Court upheld the constitutionality of capital punishment, Gregg v. Georgia, the court declared that “three societal purposes” justified the death penalty: “incapacitation, deterrence and retribution.”

“In the past three decades, however, each of these rationales has been called into question,” Justice Stevens said. The possibility of a life sentence without parole, he said, has often caused people to soften their positions in favor of inflicting death.

“Full recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this court and legislatures to re-examine” the ultimate question, Justice Stevens wrote, using a phrase used by a former Texas prosecutor and judge: “Is it time to kill the death penalty?”

Coming from Justice Stevens, those words were especially significant. The justice (who will turn 88 on Sunday) was one of the seven justices who voted in 1976 to uphold capital punishment. Since then, he has heard many challenges to various aspects of the death penalty and the “evolving standards of decency” often invoked by its opponents. In 2002, Justice Stevens was in the majority as the court ruled that mentally retarded killers could not be executed, and in 2005 he was in the majority as the court banned the death penalty against juvenile offenders.

Deborah Denno, a Fordham University law professor, said further death-penalty litigation is all but certain in light of the court’s “heavily splintered” opinions on Wednesday, in part because the court recognized that “a risk of harm can qualify as an Eighth Amendment violation.”

On Wednesday, after handing down their opinions in the Kentucky case, the justices heard arguments in a death penalty case from Louisiana. The question was whether the Constitution allows capital punishment for the rape of a child who is not killed.