

# A pivotal review for death penalty

## HIGH COURT TO CONSIDER FATE OF LETHAL INJECTION

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Firing squads. Hanging. The electric chair. The gas chamber.

None of these methods of execution tossed the nation's capital-punishment system into as much disarray as lethal injection, the supposedly antiseptic solution to concerns about how best to put condemned killers to death.

A metastasizing legal furor over lethal injection has forced the U.S. Supreme Court to examine a method of execution for the first time since 1878, effectively halting capital punishment around the country. One legal expert has dubbed it a "molasses moment" in death-penalty history.

A confluence of historical, legal and social factors have pushed the showdown over lethal injection onto the high court's docket - a paradox for an institution that never considered whether the hangman's noose or "Old Sparky" were constitutional ways to put someone to death.

With society's view of cruel and unusual punishment shifting dramatically in recent decades, legal experts say the almost universal embrace of one form of execution - a lethal dose of drugs - has made the time right for an unprecedented review of how states end the lives of condemned killers.

Most of the 38 states with the death penalty rely on the same three-drug combination to execute inmates, including California, where a challenge to lethal injection has put executions on hold for nearly two years. The U.S. Supreme Court's recent decision to review Kentucky's lethal injection method has ensured a near-moratorium on executing the more than 3,300 condemned prisoners in the United States will last until the justices rule next year.

In recent years, the conservative, closely divided Supreme Court has scaled back the death penalty somewhat - barring the execution of juveniles and the mentally retarded. At the same time, the court made sure most death sentences were preserved.

### Legal challenges

Legal experts say the justices could not wait any longer to weigh in on lethal injection. Lawyers for death-row inmates, armed with evidence of botched executions in states such as Ohio and Florida, have flooded courts around the country with legal challenges in the past few years.

"I think the court felt absolutely compelled to step in and make some sense of this," said Michael Laurence, director of California's Habeas Corpus Resource Center, which represents death-row inmates. "There is also the idea that the states need to get it right."

For all practical purposes, the Supreme Court has never addressed what it takes for states to "get it right" when it comes to executions. There is surprisingly sparse precedent on the subject, and the justices have never outlawed a form of execution.

Most legal experts do not expect the Supreme Court's ultimate ruling in the Kentucky case to end the death penalty. Instead, the consensus is the court will provide guidelines for what states must do to ensure that executions are carried out humanely, whether in the types of drugs they use or in the safeguards put in place during executions.

A number of judges around the country have found serious flaws in state lethal injection methods. Last year, U.S. District Judge Jeremy Fogel in San Jose declared California's process "broken." Fogel is considering whether to put that legal challenge on hold while the Supreme Court reviews the Kentucky case.

Legal experts predict the Supreme Court will follow the approach used several years ago when ruling that it is unconstitutional to execute mentally retarded inmates - rather than lay out a rigid protocol, the justices left it to the states and lower courts to set the standards for mental retardation in capital cases.

"They are going to want to make sure executions continue," said Deborah Denno, a Fordham University law professor and lethal injection expert. "But at the same time, there is going to be some sort of compromise."

The challenges to lethal injection center on the argument that the combination of drugs, coupled with sloppy procedures and inadequate medical training, create an unnecessary risk that death-row inmates will suffer painful executions. That, lawyers argue, violates the Eighth Amendment ban on cruel and unusual punishment.

### **No precedent to follow**

But even the handful of Supreme Court decisions touching on execution methods have not dealt with whether the mechanics of any particular method amounted to cruel and unusual punishment. Legal experts say the lethal-injection issue will put the Supreme Court in uncharted territory.

"There is certainly no case on point," said Ellen Kreitzberg, a Santa Clara University law professor and death penalty expert. "There is no case where there is precedent they need to follow."

Cases tucked in old law books aren't expected to provide much guidance. In 1878, the Supreme Court refused to block the firing-squad execution of a condemned murderer in Utah, but the ruling dealt primarily with whether the states could choose their execution method as long as it wasn't cruel and unusual. Rather than address the pain and suffering that might result from death by gunshot, the justices simply asserted: "The punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category."

The Supreme Court later took the same approach in two cases involving the electric chair, including a 1947 ruling that repeated malfunctions of Louisiana's electric chair did not subject condemned killer Willie Francis to cruel punishment. Five aborted attempts to execute Francis, the court said, were nothing that "amounts to cruel and unusual punishment in the constitutional sense."

The Supreme Court has not addressed an execution method in the past six decades, as states continued to hang, shoot, electrocute and use lethal gas to carry out death sentences until the 1990s. At that point, ironically, the threat of court fights prompted most states to shift to lethal injection. Two key legal battles in the mid-1990s are likely to be examined as the Supreme Court weighs lethal injection.

In 1994, the San Francisco-based 9th U.S. Circuit Court of Appeals, in a bitterly divided 6-5 ruling, found that Washington's hanging method was constitutional because the state took precautions to ensure a swift and painless death. But two years later, the 9th Circuit concluded that California's gas chamber was unconstitutional because of evidence that inmates had suffered during executions. That ruling spurred the state to switch to lethal injection.

But over the past five years, as virtually all states migrated to lethal injection, court battles heated up, producing conflicting rulings in different courts - and a scattershot approach to executing inmates from state to state.

Last month, the Supreme Court decided not to wait any longer to settle the confusion, agreeing to review the appeal of two death row inmates from Kentucky, where the state Supreme Court rejected a lethal injection challenge last year.

"The Supreme Court realizes it is writing the map," said Douglas Berman, an Ohio State University law professor whose criminal justice blog is widely read on subjects such as lethal injection. "No matter what they do, they can't make it worse."

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