Lethal injections: cruel and unusual?

A majority decision by nine United States Supreme Court judges will decide the ultimate fate of murderers Ralph Baze and Thomas Bowling

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In his compelling new book on the United States Supreme Court, The Nine (Doubleday, $27.95), Jeffrey Toobin quotes the question Justice William Brennan used to ask his law clerks in the 1960s: “What is the most important law at the Supreme Court?” The clerks would puzzle over the answer. Was it freedom of speech or due process or equal protection? Justice Brennan would enlighten them: “The law of five. With five votes, you can do anything around here.” Opponents of the death penalty will be hoping that five votes out of nine justices can be found to establish that the death penalty implemented by lethal injection is a breach of the constitutional prohibition on cruel and unusual punishment.

Ralph Baze and Thomas Bowling were convicted of murder in Kentucky. Baze shot a sheriff and a deputy sheriff who were trying to serve him with a warrant. Bowling shot a husband and wife as they sat in their car. Like 37 of the 38 states that maintain capital punishment, Kentucky uses lethal injections. Only Nebraska still uses the electric chair.

Baze and Bowling contend, based on the evidence presented at a hearing before the Kentucky Circuit Court, that the use of sodium thiopental, pancuronium bromide and potassium chloride causes substantial pain and that there are other chemicals that would kill but cause less suffering. The Kentucky Supreme Court rejected the argument because the Constitution does “not provide protection against all pain, only cruel and unusual punishment”. Since there was nothing cruel and unusual about the Kentucky method, there was no legal obligation to use drugs that would cause less pain to the offender.

Last month the Supreme Court agreed to hear the case. That required the approval of only four judges. They were no doubt influenced not only by the strength of the arguments advanced on behalf of the applicants as to the pain and suffering that they would incur, but also that a variety of tests have been articulated by state and federal courts as to the principles to be applied.

The Supreme Court has only once before directly ruled on the constitutionality of a method of execution, in 1878, when it upheld the use of a firing squad. The court there accepted that some means of putting criminals to death would be legally objectionable. However heinous the crime, the criminal could not be “embowelled alive, beheaded and quartered” or subjected to “burning alive”. In 1890, the court added, “burning at the stake, crucifixion, breaking on the wheel, or the like”, would offend constitutional standards. So United States law does not adopt the approach of the Duchess of Malfi in John Webster’s play. When asked if the means by which she is to be executed (strangulation) terrifies her, she replies, “Not a whit: / What would it pleasure me, to have my throat cut / With diamonds? or to be smothered / With cassia? or to be shot to death, with pearls?”.

The applicants’ petition to the Supreme Court refers to a number of recent cases where lethal injections caused substantial pain to the death row prisoner, physical and mental. In 2006, in Ohio, the procedure took so long – about two hours – that the condemned inmate had to go to the lavatory while he was waiting to die. Also last year, in Florida, an execution took 34 minutes while the inmate grimaced in pain throughout.

The Supreme Court does not have a distinguished record in protecting death penalty prisoners from pain and suffering. In a notorious case in 1947, the electric chair failed to operate “presumably because of some mechanical difficulty”, and the intended victim was taken back to his cell. The court held that it was not cruel and unusual to return him to the execution chamber for a second attempt some months later.

As Toobin’s book suggests, the fundamental problem facing Baze and Bowling when their case is argued next year is that four of the justices are most unlikely to decide in their favour. Chief Justice Roberts, Justice Scalia, Justice Thomas and Justice Alito each adopts, to varying degrees, a narrow view of constitutional rights, a broad concept of state discretion and a hostility to death row offenders who bring repeated legal challenges to postpone their fate. The applicants will need to persuade all five of the remaining Justices: Stevens, Kennedy, Souter, Ginsburg and Breyer. Anthony Kennedy, the most conservative of that group, may well decide the case.

Of course, opponents of capital punishment are primarily concerned with ensuring its abolition, not its speedy and
painless implementation. But as Albert Camus observed in his Reflections on the Guillotine, if capital punishment is not
to be abolished, let us at least “begin by reforming the manner of administering it. The science that serves to kill so many
could at least serve to kill decently.” The author is a practising barrister at Blackstone Chambers in the Temple and a
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