



Federal Capital Punishment: Recent Developments

Updated November 22, 2019

Update: After this Sidebar was published, two more of the federal inmates scheduled for execution joined the litigation challenging the 2019 execution protocol and filed motions seeking preliminary orders barring their executions from going forward. On November 20, 2019, the district court granted the motions, concluding that the 2019 execution protocol’s “uniform procedure approach very likely exceeds the authority provided by” Congress because the Federal Death Penalty Act specifies that federal executions must be implemented in the manner prescribed by the state of conviction. As a result of the court’s order, it appears that the executions of the four inmates who filed motions will not take place as scheduled, though the order only relates to requests for preliminary relief and the Department of Justice has filed a notice of appeal. The fifth inmate’s execution has also been stayed by a federal appellate court so that an unrelated issue in his case can be reviewed.

The original post from October 23, 2019, is below.

In July 2019, Attorney General William Barr [instructed](#) the Federal Bureau of Prisons (BOP) to take action to resume executions of inmates sentenced to death for violating federal law, ending an effective years-long [moratorium](#). At the Attorney General’s direction, BOP’s then-Acting Director [scheduled](#) five federal inmates for execution in December 2019 and January 2020. A new [addendum](#) to BOP’s execution protocol will govern the executions. That addendum provides for injection of a single drug, pentobarbital sodium, as the lethal agent. The BOP protocol previously [called for](#) application of a three-drug sequence, but the [scarcity](#) of the drugs involved and a review initiated by the previous Administration (as well as ongoing legal challenges) forestalled federal executions under the three-drug protocol after 2003.

The resumption of federal executions could affect extant litigation challenging BOP’s execution protocol. In particular, at least one of the inmates scheduled to be executed previously sued the federal government, alleging that the execution protocol calling for three-drug lethal injection violated the Constitution and statutory requirements for agency action under the Administrative Procedure Act (APA). That lawsuit has been on hold since 2013, but BOP’s recent actions have prompted a flurry of activity in the suit and related challenges to the federal execution protocol. Congress has also responded: in August, a Subcommittee of the House Oversight Committee sent a [letter](#) to the Acting Director of BOP and the Attorney General seeking documents and information regarding the decision to resume executions, and bills have been introduced in both the [House](#) and [Senate](#) that would prohibit imposition of the death

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penalty for any violation of federal law. In light of these developments, this Sidebar provides a brief overview of the federal death penalty and some of the legal issues arising from BOP's recent actions as they relate to Congress.

Overview of Federal Capital Punishment

The death penalty is contemplated in the [text](#) of the Constitution and has been available as a punishment for certain violations of federal law for most of the nation's history. However, several Supreme Court decisions from the 1970s recognized that the Eighth Amendment's [prohibition](#) on cruel and unusual punishment places important limitations on imposition of the death penalty, and aspects of those cases are now reflected in federal law. First, in a splintered decision in *Furman v. Georgia*, a plurality of the Court [concluded](#) that the death penalty was being administered in an arbitrary manner. *Furman* resulted in a moratorium on the death penalty for several years, until a series of cases—headlined by *Gregg v. Georgia*—allowed the death penalty to be imposed under limited circumstances. In *Gregg*, the Court [clarified](#) that the death penalty is not unconstitutional in all of its applications, but a plurality of the Court concluded that any punishment cannot “involve the unnecessary and wanton infliction of pain” or “be grossly out of proportion to the severity of the crime.” The *Gregg* plurality also [recognized](#) that the death penalty cannot “be imposed under sentencing procedures that create[] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner,” [meaning](#) that “where discretion is afforded a sentencing body” to impose the death penalty, “that discretion must be suitably directed and limited so as to minimize [said] risk” Applying these principles, the Court in *Gregg* ultimately [upheld](#) imposition of the death penalty for murder under state [procedures](#) that bifurcated the guilt/innocence and sentencing phases of trials and guided discretion at sentencing by requiring consideration of aggravating and mitigating circumstances particular to each capital defendant. In a companion case decided the same day, *Woodson v. North Carolina*, the same plurality of the Court from *Gregg* [emphasized](#) that *mandatory* imposition of the death penalty is unconstitutional, as a capital punishment scheme must “allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition upon him of a sentence of death.” Following *Gregg* and *Woodson*, states began enacting death penalty laws employing the “guided discretion” procedures approved of in *Gregg*, and 29 states currently [authorize](#) the imposition of the death penalty.

In the wake of *Gregg* and the end of the moratorium on the death penalty, the Court has addressed several subsidiary questions, including when death is “grossly out of proportion to the severity of the crime” (i.e., what kinds of *crimes and offenders* may constitutionally be punished by death) and when the carrying out of the death penalty would “involve the unnecessary and wanton infliction of pain” (i.e., what *methods* of execution are constitutionally permissible). With respect to the former question, whether imposition of the death penalty for a particular crime is cruel and unusual is [measured](#) against “the evolving standards of decency that mark the progress of a maturing society.” The Court has [said](#) that death is reserved for “offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” As a result, juvenile offenders and the intellectually disabled may not constitutionally be sentenced to death because of their “lesser culpability.” Additionally, at [least](#) as it relates to “crimes against individuals,” the Court has said that “the death penalty should not be expanded to instances where the victim’s life was not taken.”

As to what methods of execution are constitutionally [permissible](#), “the Eighth Amendment does not guarantee a prisoner a painless death.” Rather, the Constitution [prohibits](#) only those “long disused (unusual) forms of punishment that intensif[y] the sentence of death with a (cruel) superaddition of terror, pain, or disgrace.” As such, torturous methods of execution such as disembowelment, public dissection, and burning alive are [forbidden](#), but the Supreme Court has [upheld](#) sentences of death by firing squad and the electric chair, among other methods. In recent years, the Court has considered, and rejected, challenges to particular procedures for administration of lethal injection, the most common [method](#) of

execution in the United States. [According](#) to the Court’s most recent pronouncement on the issue, a prisoner challenging a chosen method of execution “must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain” and that the governmental authority “has refused to adopt without a legitimate penological reason.” In [other words](#), the Eighth Amendment “does not come into play unless the risk of pain associated with the [challenged] method is ‘substantial when compared to a known and available alternative.’” Based on these standards, which appear quite difficult to meet, the Court has [upheld](#) the use of three-drug protocols and the [use](#) of a single-drug administration of pentobarbital to execute a man who claimed that his unique medical condition would render that method of execution extremely painful.

Congress has established detailed [procedures](#) for federal death-penalty cases in the Federal Death Penalty Act (FDPA). Among other things, and in line with *Gregg*, the statute [provides](#) for bifurcated consideration, where the sentencing body first determines a defendant’s guilt or innocence and then, if the defendant is convicted of a death-eligible federal offense and the government has provided [notice](#) of its intent to seek the death penalty, considers whether the death penalty should be imposed based on the sentencing body’s assessment of aggravating and mitigating factors specific to the defendant and his or her crime. In line with *Woodson*, imposition of a sentence of death is [never](#) mandatory. A jury verdict imposing the death penalty must also be [unanimous](#). Federal crimes for which the death penalty is authorized are limited to espionage, treason, exceptionally large-scale drug kingpin offenses, and homicides in particular jurisdictional contexts. Given the Supreme Court’s indication that the death penalty is suspect in cases where the victim’s life has not been taken, the extent to which the few death-eligible federal offenses that do not involve homicide comport with the Court’s interpretation of the Eighth Amendment is uncertain. Since 1976, [3](#) federal inmates have been executed, and [61](#) federal prisoners remain on death row as of April 1, 2019. For more information on federal capital punishment, see [this CRS report](#).

Ongoing Litigation and Implications

As noted above, one of the federal inmates scheduled for execution, Alfred Bourgeois, and several other federal offenders sentenced to death previously filed lawsuits challenging BOP’s three-drug execution protocol. At least one other inmate scheduled to be executed, Daniel Lewis Lee, has also sued following the announcement of BOP’s new protocol. The cases have been consolidated in the federal district court for the District of Columbia, and both Lee and Bourgeois have sought preliminary orders barring their executions from taking place in December and January. Bourgeois and Lee assert, among other things, that the new protocol and the previous three-drug protocol violate the Eighth Amendment and the inmates’ due process rights based on the lack of information and safeguards to ensure the provenance and effectiveness of the drugs that will be used in their executions.

The inmates also raise challenges to the protocols under the Administrative Procedure Act ([APA](#)). Among other things, the APA requires a court to set aside agency action that is “arbitrary and capricious” or in excess of statutory authority. Bourgeois and Lee argue that the protocols exceed statutory authority because Congress, in the FDPA, [specified](#) that a sentence of death must be implemented “in the manner prescribed by the law of the State in which the sentence is imposed” or, if there is no such law, the law of another state designated by the court. As such, the inmates claim, neither the FDPA nor any other statutory authority permits the Department of Justice (DOJ) to promulgate the [regulation](#) establishing lethal injection as the default method for federal executions, nor is BOP authorized to adopt a protocol that implements that regulation. Bourgeois and Lee additionally assert that the protocols violate the APA because DOJ and BOP failed to go through the ordinary public rulemaking process required by statute or to provide a reasoned explanation for their contents, rendering the actions of adopting the protocols “arbitrary and capricious” in violation of the APA.

DOJ has responded to the claims regarding the new protocol in part by arguing that (1) the Supreme Court and lower courts across the country have upheld the use of pentobarbital in executions under the Eighth Amendment, and any claim regarding drug quality or maladministration is speculative; (2) Congress has generally authorized the Attorney General to prescribe regulations that govern the carrying out of DOJ functions like executions; (3) Lee’s execution, at least, is being carried out “in the manner prescribed” by state law because Arkansas (the state where Lee was convicted) prescribes lethal injection as the sole method of execution; and (4) the execution protocol is a mere “procedural rule” or policy statement that is not required to go through the public rulemaking process prescribed by the APA.

As of this writing, the court in the ongoing litigation has not ruled on the merits of the inmates’ claims or their requests for orders barring their executions from taking place as scheduled. However, at least one commentator has [argued](#) that the APA claims are “hard to dismiss out of hand” and could forestall the executions as a result.

Considerations for Congress

The procedures for imposing and carrying out the death penalty for violating federal law are based in statute. Thus, Congress may amend those procedures (within the bounds established by the Supreme Court), including by requiring use of the three-drug protocol previously adopted by BOP. Given the [difficulty](#) states and the federal government have encountered in procuring at least one of those drugs—sodium thiopental—however, a statutory requirement that the three-drug combination should be used could affect DOJ’s ability to carry out federal executions going forward.

Alternatively, Congress could codify the one-drug application of pentobarbital that BOP has recently implemented, although that drug’s ready availability is also in [question](#) and the House Oversight Subcommittee’s recent [letter](#) to the Acting Director of BOP raised concerns about safety and sourcing. As another option, Congress might theoretically require that some other drug or method of execution be used, though any alternative method would almost certainly be challenged under the Eighth Amendment. Congress could also clarify DOJ’s and BOP’s regulatory authority to implement the FDPA through an execution protocol, which could obviate some of the APA issues raised in the ongoing litigation discussed above. In fact, Congress has considered such [legislation](#) in the past. Finally, Congress is free to eliminate the death penalty as a punishment for some or all federal crimes, as recent [proposals](#) would [do](#). Should Congress instead seek to expand the availability of the federal death penalty, it would need to ensure that such an expansion comports with the Eighth Amendment by [limiting](#) the punishment to “offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”

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