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## A Low Bar for Death: 2020's Historic String of Federal Executions

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# A LOW BAR FOR DEATH: 2020'S HISTORIC STRING OF FEDERAL EXECUTIONS<sup>1</sup>

## I. INTRODUCTION

Capital punishment is among the most controversial elements of the United States' criminal justice system. As of 2021, capital punishment is authorized by twenty-seven states and the federal government, and prohibited by twenty-three states and the District of Columbia.<sup>2</sup> The public is similarly divided.<sup>3</sup> In 2021, 60% of Americans favored the death penalty for persons convicted of murder.<sup>4</sup> Yet, at the same time, a majority of Americans shared various concerns regarding the death penalty's racial equity, deterrence effect, and risk of killing innocents.<sup>5</sup> Perhaps reflecting the public's uncertainty, annual executions decreased by 83% between 1999 and 2020.<sup>6</sup>

Against this backdrop, it would seem imperative for courts to carefully consider appeals that challenge the legality of an execution. However, the Supreme Court's decisions in 2020 suggest it disagrees. Chief among these is *Barr v. Lee*,<sup>7</sup> a case the Supreme Court decided in the early morning hours of July 14, 2020. There, the Supreme Court vacated a district court's preliminary injunction, which prevented the federal government from executing four inmates with a novel single-drug procedure while the inmates challenged the legality of their executions in an appellate court.<sup>8</sup> Six hours later, Daniel Lewis Lee be-

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1. I am grateful for the insights and direction provided by Susan A. Bandes, Emeritus Centennial Distinguished Professor of Law, DePaul University College of Law; Garrett A. Towler, PharmD, University of Missouri-Kansas City School of Pharmacy; Sara Riddick, J.D., DePaul University College of Law; and Maria Dodona, J.D., DePaul University College of Law.

2. John Gramlich, *10 Facts About the Death Penalty in the U.S.*, PEW RSCH. CTR. (July 19, 2021), <https://www.pewresearch.org/fact-tank/2021/07/19/10-facts-about-the-death-penalty-in-the-u-s/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020).

8. Amy Howe, *In Overnight Orders, Justices Allow Federal Execution to Proceed*, SCOTUS BLOG (July 14, 2020), <https://www.scotusblog.com/2020/07/in-overnight-orders-justices-allow-federal-execution-to-proceed/>.

came the first person executed by the federal government since 2003,<sup>9</sup> putting an end to a seventeen-year moratorium on federal executions.<sup>10</sup> Over the next six months, the federal government executed twelve additional inmates, for a total of thirteen executions.<sup>11</sup> For comparison, the federal government executed a total of three inmates between 1964 and 2019.<sup>12</sup>

The preliminary injunction standard of review is likelihood of success on the merits.<sup>13</sup> Therefore, these executions were carried out while it was only deemed “likely” by the Supreme Court that the federal government’s new single-drug execution protocol was not cruel and unusual under the Eighth Amendment. This was despite the fact that an appellate court believed the inmates’ claims presented “novel and difficult constitutional questions” that require “further factual and legal development”<sup>14</sup> and scientific evidence indicated that the new protocol is likely to cause extreme pain and needless suffering.<sup>15</sup>

This Note reviews the majority opinion in *Barr v. Lee* and argues that the decision to vacate the preliminary injunction was improper. The public interest would have been better served by fully litigating the constitutional issues raised by the inmates instead of circumventing the appellate process. Section II of this Note provides a background of federal case law concerning the death penalty, the development of modern lethal injection, and the events preceding *Barr v. Lee*. Section III analyzes whether the Supreme Court improperly vacated the lower court’s preliminary injunction, arguing that the public interest favored injunctive relief. Section IV discusses the impact of *Barr v. Lee* and considers the future implications of a Supreme Court which acquiesces to the Department of Justice’s death penalty policy decisions. Finally, Section V concludes this Note.

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9. Mark Berman, *Trump Administration Carries out First Federal Execution Since 2003 After Late-Night Supreme Court Intervention*, WASH. POST (July 14, 2020), [https://www.washingtonpost.com/national/daniel-lewis-lee-execution-terre-haute-supreme-court/2020/07/14/18e3bf20-c5c7-11ea-b037-f9711f89ee46\\_story.html](https://www.washingtonpost.com/national/daniel-lewis-lee-execution-terre-haute-supreme-court/2020/07/14/18e3bf20-c5c7-11ea-b037-f9711f89ee46_story.html).

10. Lisa N. Sacco, *The Federal Death Penalty*, CONG. RSCH. SERV. (Dec. 1, 2020), <https://crsreports.congress.gov/product/pdf/in/in11474>.

11. *Capital Punishment*, FED. BUREAU OF PRISONS (2022), [https://www.bop.gov/about/history/federal\\_executions.jsp](https://www.bop.gov/about/history/federal_executions.jsp).

12. *Id.*

13. *Amoco Prod. Co. v. Vill. of Gambell*, Alaska, 480 U.S. 531 n.12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”).

14. *Barr*, 140 S. Ct. at 2593 (Sotomayor, J., dissenting).

15. *In re Fed. Bureau of Prisons’ Execution Protocol Cases*, Doc. 135, pp. 9, 11, 471 F.Supp.3d 209, 2020 WL 3960928 (July 13, 2020).

## II. BACKGROUND

This Section provides a background of federal law concerning the death penalty. First, Subsection A introduces the Eighth Amendment, which is often at the center of death penalty litigation, and discusses early challenges brought by death row inmates under the Eighth Amendment. Subsection B reviews the modern use of lethal injection, from 1977 through the present day, and the moratorium on federal executions, from 2003 through 2020. Finally, Subsection C discusses the events surrounding the Supreme Court's decision in *Barr v. Lee*.

### A. *The Eighth Amendment and Early Challenges*

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>16</sup> As part of the Bill of Rights, ratified in 1791, the Eighth Amendment has been an integral piece of the United States from its inception.<sup>17</sup> However, the Eighth Amendment's roots run even deeper in history, as it comes almost verbatim from the English Bill of Rights of 1689.<sup>18</sup>

Despite this long history, determining the Eighth Amendment's meaning is a difficult task. Reasonable minds often disagree over whether a punishment is cruel and unusual. However, in *Furman v. Georgia*, Justice William Brennan wrote in concurrence that there are four principles for determining whether a punishment is cruel and unusual,<sup>19</sup> which can help ground these discussions. The first principle is that “a punishment must not by its severity be degrading to human dignity.”<sup>20</sup> The second principle prohibits “a severe punishment that is obviously inflicted in wholly arbitrary fashion.”<sup>21</sup> The third principle prohibits “a severe punishment that is clearly and totally rejected throughout society.”<sup>22</sup> Finally, the fourth principle prohibits “a severe punishment that is patently unnecessary.”<sup>23</sup>

Federal inmates who challenge the legality of an execution method frequently rely upon the Eighth Amendment's prohibition on “cruel and unusual punishment”<sup>24</sup> to make their case. However, these in-

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16. U.S. Const. amend. VIII.

17. Michael Levy, *Eighth Amendment*, ENCYCLOPEDIA BRITANNICA (July 12, 2018), <https://www.britannica.com/topic/Eighth-Amendment>.

18. *Id.*

19. *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J., concurring).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. U.S. Const. amend. VIII.

mates rarely find success with their Eighth Amendment arguments. Notably, “the Supreme Court has never found a method of execution to be unconstitutional.”<sup>25</sup> Despite this poor track record, inmates continue to challenge their executions under the Eighth Amendment.<sup>26</sup>

In 1879, Wallace Wilkerson made history as the first condemned inmate to challenge an execution protocol before the Supreme Court in *Wilkerson v. Utah*.<sup>27</sup> After a court convicted Wilkerson of murder in what was then the Territory of Utah, the trial judge sentenced him to be publicly shot until dead.<sup>28</sup> On appeal, the Supreme Court considered whether executions by firing squad violate the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>29</sup> Relying upon the historical role of the firing squad in the military, the Court concluded that firing squads are not unusual.<sup>30</sup> Additionally, the Court distinguished the firing squad from “punishments of torture”—such as disembowelment, drawing and quartering, public dissection, and burning alive—to conclude that firing squads do not rise to an unacceptable level of cruelty.<sup>31</sup> As a result, the Supreme Court held that executions by firing squad are constitutional.<sup>32</sup>

A decade later, technological advances and social pressure for more humane executions led the State of New York to adopt death by electrocution.<sup>33</sup> This move quickly led to litigation, culminating with the 1890 case *In re Kemmler*.<sup>34</sup> There, the Supreme Court heard challenges brought by William Kemmler, a condemned inmate that New York planned to execute by electrocution.<sup>35</sup>

Kemmler claimed that execution by electrocution is a cruel and unusual form of punishment. In response, the Court stated, “[p]unishments are cruel when they involve torture or a lingering

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25. *Methods of Execution*, DEATH PENALTY INFO. CTR. (2022), <https://deathpenaltyinfo.org/executions/methods-of-execution>.

26. *Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022).

27. *Wilkerson v. Utah*, 99 U.S. 130 (1878).

28. *Id.* at 130–31.

29. *Id.* at 134–35.

30. *Id.*

31. *Id.* at 135–36.

32. *Id.* at 137.

33. *In re Kemmler*, 136 U.S. 436, 444 (1890).

34. *Id.*

35. *Id.* at 441. The Supreme Court declined to review electrocution for violations of the United States Constitution because Kemmler was sentenced under the laws of New York and the Eighth Amendment had not yet been incorporated against the states. Instead, the Court considered whether electrocution violated the New York State Constitution. But, since the New York State Constitution prohibited “cruel and unusual punishment” in language mirroring the Eighth Amendment, contemporary jurists consult the opinion’s dicta for further clarification of the Eighth Amendment’s meaning. *Id.* at 445–47.

death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life.”<sup>36</sup> Ultimately, the Court did not find electrocution to involve torture or lingering death and held it to be a constitutional form of punishment. Later that year, Kemmler became the first person ever executed by electrocution.<sup>37</sup> After *Kemmler*, the Supreme Court took an extended break from cases challenging execution protocols.

### B. Lethal Injection

Nearly a century after *Kemmler*, in 1977, Oklahoma became the first state to propose lethal injection for executing condemned prisoners.<sup>38</sup> By 2006, thirty-six states and the federal government adopted this method.<sup>39</sup> This first form of lethal injection used a three-drug procedure to execute condemned inmates.<sup>40</sup> First, sodium thiopental, a fast-acting barbiturate sedative, was administered to induce a deep, comalike unconsciousness.<sup>41</sup> Second, pancuronium bromide, a paralytic agent, was administered to paralyze the diaphragm and stop respiration.<sup>42</sup> Third, potassium chloride, an electrolyte replenisher used to treat hypokalemia,<sup>43</sup> was administered to induce cardiac arrest.<sup>44</sup> Both the second and third drugs, pancuronium bromide and potassium chloride, produced excruciating pain at the doses called for by the protocol.<sup>45</sup> Proper administration of the first drug, sodium thiopental, was vital to ensure that the prisoner was sufficiently anesthetized to not suffer from administration of the pancuronium bromide and potassium chloride.<sup>46</sup> Despite the risk that improper administration of sodium thiopental could lead to an agonizing death, the Supreme Court upheld the three-drug procedure in *Baze v. Rees*.<sup>47</sup>

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36. *Id.* at 447.

37. *Far Worse Than Hanging*, N.Y. TIMES (Aug. 7, 1890), <https://www.nytimes.com/1890/08/07/archives/far-worse-than-hanging-kemmlers-death-proves-an-awful-spectacle-the.html>.

38. *Baze v. Rees*, 553 U.S. 35, 42 (2008).

39. *Id.* at 42–43.

40. *Id.* at 44.

41. *Id.*

42. *Id.*

43. *Potassium Chloride*, DRUGBANK (last visited Nov. 19, 2022), <https://go.drugbank.com/drugs/DB00761>.

44. *Baze*, 553 U.S. at 44.

45. Brief for Petitioners in *Baze v. Rees*, 2007 WL 3307732 (U.S.), 43–44 (U.S. 2007).

46. *Baze*, 553 U.S. at 44.

47. *Id.* at 53–54.

### 1. *Baze v. Rees*

In *Baze v. Rees*, two inmates on Kentucky's death row challenged the state's execution protocol under the Eighth Amendment.<sup>48</sup> The inmates argued that Kentucky's execution protocol carried an inherent "risk that the protocol's terms might not be properly followed, resulting in significant pain."<sup>49</sup> This risk stemmed from concerns that sodium thiopental would not be properly administered during executions.<sup>50</sup> Specifically, the inmates were concerned with improper administration of sodium thiopental:

because the doses are difficult to mix into solution form and load into syringes; because the protocol fails to establish a rate of injection, which could lead to a failure of the IV; because it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein; because of inadequate facilities and training; and because Kentucky has no reliable means of monitoring the anesthetic depth of the prisoner after the sodium thiopental has been administered.<sup>51</sup>

However, the Supreme Court held that Kentucky's execution protocol contained safeguards that kept the risk of improper sodium thiopental administration from reaching a substantial level that would violate the Eighth Amendment.<sup>52</sup> Some of the safeguards that the Court found persuasive were the protocol's clear instructions for reconstituting sodium thiopental; the protocol's requirement that members of the IV team have "at least one year of professional experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman" and complete ten practice sessions per year; the protocol's allocation of an hour for the IV team to establish primary and backup IVs; and the presence of the warden and deputy warden in the execution chamber "to watch for signs of IV problems, including infiltration."<sup>53</sup>

### 2. *Post-Baze Challenges*

While the Supreme Court's holding in *Baze v. Rees* allowed for continued executions at the state level, condemned inmates continued to challenge the federal death penalty protocol.<sup>54</sup> These challenges

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48. *Id.* at 41.

49. *Id.*

50. *Id.* at 49.

51. *Id.* at 54.

52. *Baze*, 553 U.S. at 56.

53. *Id.* at 54–56.

54. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (TSC), 2020 WL 5604298, at \*1 (D.D.C. Sep. 20, 2020).

found some success, leading to stayed executions<sup>55</sup> and public concerns over the humaneness of lethal injection. In 2005, three federal inmates challenged the Bureau of Prisons' death penalty protocol to the Supreme Court and won a stay on their executions.<sup>56</sup> While this stay was supposed to be short-lived, litigation over the scope of discovery and other procedural hang-ups extended the stay through 2011.<sup>57</sup> By that point, the Bureau of Prisons ran into supply chain issues and were unable to procure one of the three necessary drugs for lethal injection.<sup>58</sup>

Thus, the Bureau of Prisons was forced to reevaluate its execution protocol and search for alternative drugs.<sup>59</sup> At the same time, individual states continued to use the three-drug procedure, often with variations in the specific drugs and dosages used while retaining the general process.<sup>60</sup> Variations on the three-drug method increased as many drug manufacturers boycotted sales to governments for use in executions throughout the 2010s.<sup>61</sup>

State efforts to compensate for supply chain issues would lead to one of the most notorious executions in United States history.<sup>62</sup> In 2014, the State of Oklahoma executed inmate Clayton Lockett with a relatively novel combination of drugs.<sup>63</sup> Instead of sodium thiopental, midazolam was selected as a sedative, and pancuronium bromide was replaced with vecuronium bromide as a paralytic agent.<sup>64</sup> Lockett's execution was marred with difficulties from the beginning. After attempting suicide and enduring a taser shock earlier in the day, Lockett was escorted to the execution chamber.<sup>65</sup> There, the paramedic and doctor in attendance struggled to establish an IV. After nine failed attempts to establish an IV in six different veins, the tenth attempt successfully established an IV in the femoral artery in Lockett's groin.<sup>66</sup> The execution then proceeded as planned.

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55. *Id.*

56. *Id.*

57. *Id.* at \*2.

58. *Id.*

59. *Id.*

60. See, e.g., Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>.

61. Maria Burke, *US drug giant will no longer supply lethal injection drugs*, CHEMISTRY WORLD (July 2016), <https://www.chemistryworld.com/news/us-drug-giant-will-no-longer-supply-lethal-injection-drugs/1010203.article>.

62. Stern, *supra* note 60.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*



Ten minutes after the administration of midazolam, Lockett was declared unconscious.<sup>67</sup> Injections of vecuronium bromide and potassium chloride followed.<sup>68</sup> Three minutes later, Lockett began struggling violently and attempted to rise from the table.<sup>69</sup> He loudly exhaled and spoke, saying, “Oh, man,” “I’m not . . .” and, possibly, “something’s wrong.”<sup>70</sup> Twenty minutes later, the execution was halted when it became clear that vein failure had disrupted the intended protocol.<sup>71</sup> Despite attempts to abort the procedure, Lockett passed away ten minutes later from cardiac arrest.<sup>72</sup>

While all three drugs were administered properly, the collapsed vein prevented Lockett from receiving the necessary doses.<sup>73</sup> Those present at the execution failed to notice the early signs of the collapsed vein due to a cloth that covered Lockett’s groin to preserve the privacy of the injection site.<sup>74</sup> Due to the collapsed vein, the drugs seeped into Lockett’s tissue, leading to a slow and agonizing death.<sup>75</sup> Whereas the previous nineteen inmates executed under this protocol were declared dead in six to twelve minutes, Lockett’s execution lasted forty-three minutes.<sup>76</sup>

### 3. *Single-Drug Procedure*

In 2019, Attorney General William Barr announced a new death penalty protocol for federal executions.<sup>77</sup> Following the lead of several states that adopted a single-drug procedure as early as 2014, the federal government moved to replace the three-drug procedure.<sup>78</sup> This new single-drug procedure would make use of pentobarbital, a barbiturate sedative very similar to the sodium thiopental used to induce unconsciousness in the three-drug procedure.<sup>79</sup> However, the dosage

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67. *Id.*

68. Stern, *supra* note 60.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Stern, *supra* note 60.

75. *Id.*

76. *Id.* See also *Execution of Clayton Lockett fails, dies of heart attack; Charles Warner execution stayed 14 days* (April 2014) KJRH-TV, <https://web.archive.org/web/20140502032829/http://www.kjrh.com/news/local-news/double-execution-planned-tuesday-night-for-2-oklahoma-inmates-clayton-lockett-and-charles-warner>.

77. Josiah Bates, *Why the Justice Department’s Plan to Use a Single Drug for Lethal Injections Is Controversial*, TIME (July 29, 2019), <https://time.com/5636513/pentobarbital-executions-justice-department/>.

78. *Id.*

79. Barr, 140 S. Ct. at 2591.

of pentobarbital was increased substantially to not only induce a coma-like state, but also to induce respiratory failure.<sup>80</sup> In theory, the single-drug procedure eliminates the potential for excruciating pain and terrifying convulsions—both possible effects of pancuronium bromide and potassium chloride.<sup>81</sup> However, the new single-drug procedure would create several controversies of its own.<sup>82</sup>

With a new procedure in place, the Bureau of Prisons was ready to resume executions. In 2020, with less than a year remaining in his tenure as Attorney General, Barr initially instructed the Department of Justice to expeditiously pursue the executions of five inmates.<sup>83</sup> By the end of the Trump Administration, thirteen inmates had been executed in a single calendar year,<sup>84</sup> an unprecedented number for the federal government which matched the average number of executions per year by Texas, the State with the most executions since 1976.<sup>85</sup>

### C. *Barr v. Lee*

Having decided on a new execution protocol, the Department of Justice announced an initial plan to execute five inmates on July 25, 2019.<sup>86</sup> Daniel Lewis Lee, Lezmond Mitchell, Wesley Ira Purkey, Alfred Bourgeois, and Dustin Lee Honken were each assigned an execution date between December 9, 2019, and January 15, 2020.<sup>87</sup> All five had been convicted of murdering either children or seniors in brutally violent, and in some cases sexual, fashion.<sup>88</sup> Attorney General Barr directed the Bureau of Prisons to carry out these executions by lethal injection of pentobarbital at the United States Penitentiary in Terre

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80. *Id.* at 2593 (Sotomayor, J., dissenting). A regular adult dose of pentobarbital in a clinical context calls for an initial dose of 1.4 mg/kg, which adds up to approximately 113 mg for the average North American adult, who weighs 80.7 kg. Sarah C. Walpole et al., *The Weight of Nations: An Estimation of Adult Human Biomass*, 12 BMC PUB. HEALTH 439 (2012). In comparison, a lethal dose of pentobarbital is 5 g, over 44 times the initial dose for an average North American adult in a clinical context. Kristen Kas et al., *Lethal Drugs in Capital Punishment in USA: History, Present, and Future Perspectives*, 12 RSCH. SOC. ADMIN. PHARM. 1026 (2016).

81. Bates, *supra* note 77.

82. See *infra* Section II.C.

83. Bates, *supra* note 77.

84. Jonathan Allen & Bhargav Acharya, *U.S. Carries out 13th and Final Execution under Trump Administration*, REUTERS (Jan. 16, 2021), <https://www.reuters.com/article/us-usa-executions/u-s-carries-out-13th-and-final-execution-under-trump-administration-idUSKBN29L06J>.

85. *Total Number of Executions in the United States from 1976 to 2021, by State*, STATISTA (Dec. 2021), <https://www.statista.com/statistics/199090/total-number-of-executions-in-the-us-by-state/>. In 45 years, Texas executed 573 inmates for an average of 12.73 executions per year. *Id.*

86. See Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

87. *Id.*

88. *Id.*

Haute, Indiana, under the 2019 Federal Execution Protocol Addendum (hereinafter 2019 Protocol).<sup>89</sup>

Four of the five inmates—Lee, Purkey, Bourgeois, and Honken—filed complaints against the Department of Justice and the Bureau of Prisons, alleging that the 2019 Protocol violated the Federal Death Penalty Act; the Administrative Procedure Act; the Federal Food, Drug, and Cosmetic Act; the Controlled Substances Act; and the First, Fifth, Sixth, and Eighth Amendments to the Constitution.<sup>90</sup> These cases were consolidated into the *Matter of Federal Bureau of Prisons' Execution Protocol Cases* before the United States District Court for the District of Columbia.<sup>91</sup> However, the inmates' claims could not be fully litigated before the scheduled execution dates, so the inmates moved for a preliminary injunction halting their executions while the courts considered their case.<sup>92</sup>

### 1. District Court's First Injunction

The district court ultimately granted the inmates' preliminary injunction on November 20, 2019.<sup>93</sup> Most importantly, the district court found that the plaintiffs had demonstrated a likelihood of success on the merits due to a conflict between the 2019 Protocol and the Federal Death Penalty Act.<sup>94</sup>

The Federal Death Penalty Act was passed in 1994 and requires the federal government to carry out executions “in the manner prescribed by the law of the State in which the sentence is imposed.”<sup>95</sup> The district court observed that no statute gives the Bureau of Prisons or Department of Justice the authority to establish a uniform procedure, such as the 2019 Protocol, for all federal executions.<sup>96</sup> To the contrary, Congress expressly reserved those decisions for the states of conviction with the Federal Death Penalty Act.<sup>97</sup>

Additionally, the district court found a threat of irreparable harm to the inmates because without a preliminary injunction, the inmates

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89. *Id.*

90. In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 111 (D.C. Cir. 2020), *cert. denied sub nom.* Bourgeois v. Barr, 141 S. Ct. 180 (2020).

91. In re Fed. Bureau of Prisons' Execution Protocol Cases, No. 12-CV-0782, 2019 WL 6691814, at \*1 (D.D.C. Nov. 20, 2019), *vacated and remanded sub nom.* In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106 (D.C. Cir. 2020).

92. *Id.*

93. *Id.*

94. *Id.*

95. 18 U.S.C. § 3596(a).

96. *Execution Protocol Cases*, 2019 WL 6691814, at \*3.

97. *Id.* at \*7.

would “be executed under a procedure that may well be unlawful.”<sup>98</sup> The district court also found that the balance of equities favored the inmates because “the potential harm to the government cause by a delayed execution is not substantial.”<sup>99</sup> Finally, the district court found the public interest best served by “preliminarily enjoining the execution of the four Plaintiffs because it will allow them to determine whether administrative agencies acted within their delegated authority, and to ensure that they do so in the future.”<sup>100</sup>

With the preliminary injunction in place, the inmates enjoyed a brief respite from the threat of execution while the government filed interlocutory appeals with the court of appeals.<sup>101</sup> Seeking to make the respite as brief as possible, the government also filed an emergency application for stay or vacatur of the preliminary injunction with the Supreme Court.<sup>102</sup>

## 2. *Emergency Application to the Supreme Court*

The application for stay or vacatur essentially circumvented the court of appeals, granting the Supreme Court an opportunity to remove the preliminary injunction and allow the scheduled executions to proceed. However, on December 6, 2019, three days before Lee’s scheduled execution, the Supreme Court denied the government’s application for stay or vacatur.<sup>103</sup>

Despite opining that “[t]he Government has shown that it is very likely to prevail when this question is ultimately decided,” the Supreme Court allowed the preliminary injunction to remain in place while the court of appeals decided the interlocutory appeals with “appropriate dispatch.”<sup>104</sup> The scheduled execution dates would pass without their promised events.<sup>105</sup> However, the government would be allowed to refile a renewed emergency application for stay or vacatur if the preliminary injunction remained for an additional sixty days.<sup>106</sup>

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Barr*, 140 S. Ct. at 2591.

102. *Barr v. Roane*, 140 S. Ct. 353 (2019).

103. *Id.*

104. *Id.*

105. *Id.* at 353–54.

106. *Id.*

### 3. *Court of Appeals Vacates the First Injunction*

On January 15, 2020, the court of appeals heard arguments on the case.<sup>107</sup> The three-judge panel did not reach a decision until April 7, 2020—123 days after the Supreme Court denied the government's emergency application.<sup>108</sup> Each of the three judges came up with a different interpretation of the Federal Death Penalty Act.<sup>109</sup> However, two of the three judges agreed that the district court misconstrued the Act.<sup>110</sup> As a result, the court of appeals vacated the preliminary injunction and remanded the case to the district court for further proceedings.<sup>111</sup>

The district court and court of appeals ultimately disagreed over the meaning of the Federal Death Penalty Act's requirement that federal executions be implemented in the "manner provided by state law."<sup>112</sup> The district court found it likely that this language "requires the federal government to follow all the subsidiary details set forth in state execution protocols," such as the method of inserting an intravenous catheter.<sup>113</sup> The court of appeals disagreed. In its view, the "manner provided by state law" means, at most, the federal government must follow the execution procedures established by "state statutes and regulations, but not execution procedures set forth in less formal state execution protocols."<sup>114</sup> One judge even went as far to state that the Federal Death Penalty Act merely regulates "the top-line choice among execution methods, such as the choice to use lethal injection instead of hanging or electrocution."<sup>115</sup> In either case, two of the three appellate judges agreed that the inmates' claims under the Federal Death Penalty Act were without merit.<sup>116</sup> As a result, the preliminary injunction was vacated and the case remanded to the district court.<sup>117</sup>

Having cleared this legal obstacle, the Department of Justice and Bureau of Prisons could renew their plans to execute the inmates. On June 15, 2020, the federal government announced new execution dates

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107. *Execution Protocol Cases*, 955 F.3d at 106.

108. *Id.* at 108.

109. *Id.*

110. *Id.*

111. *Id.* at 113.

112. *Id.* at 112.

113. *Execution Protocol Cases*, 955 F.3d at 108.

114. *Id.* at 112.

115. *Id.*

116. *Id.* at 112.

117. *Id.* at 113.

for Lee, Purkey, and Honken.<sup>118</sup> Lee was scheduled for July 13, 2020, Purkey on July 15, 2020, and Honken on July 17, 2020.<sup>119</sup>

#### 4. District Court's Second Injunction

Fortunately for the inmates, they retained their claims in the district court under the Federal Food, Drug, and Cosmetic Act; the Controlled Substances Act; and the First, Fifth, Sixth, and Eighth Amendments to the Constitution.<sup>120</sup> Once again scheduled for execution before their claims could be fully litigated, the inmates asked the district court to enjoin the federal government from executing them.<sup>121</sup>

On July 13, 2020—the same day Lee was scheduled for execution—the district court announced its ruling.<sup>122</sup> In the district court's view, the inmates were likely to succeed on their claim that the 2019 Protocol is unconstitutional under the Eighth Amendment.<sup>123</sup> Furthermore, the analysis for the other three factors—irreparable harm, the balance of equities, and the public interest—remained the same as the last time the district court heard this case.<sup>124</sup> As a result, the district court granted another preliminary injunction preventing the scheduled executions so that litigation could continue.<sup>125</sup>

While the first injunction was based on the strength of the inmates' Federal Death Penalty Act claim, this injunction was based on their Eighth Amendment claim.<sup>126</sup> To show that the 2019 Protocol is incompatible with the Eighth Amendment, the inmates first needed to demonstrate that lethal injection of pentobarbital presents a "substantial risk of serious harm."<sup>127</sup> They then needed to identify a feasible and readily available alternative method of execution that would significantly reduce the risk of serious pain.<sup>128</sup> The district court ultimately found it likely that the inmates could satisfy both these requirements.<sup>129</sup>

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118. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 214 (D.D.C. 2020), *vacated sub nom. Barr v. Lee*, 140 S. Ct. 2590 (2020).

119. *Id.*

120. "[The court of appeals] based its ruling solely on the Plaintiffs' claims under the FDPA and the APA, and noted that 'regardless of our disposition, several claims would remain open on remand.'" *Id.* at 213–14 (citing *Execution Protocol Cases*, 955 F.3d at 113 (per curiam)).

121. *Id.* at 214.

122. *Id.* at 209.

123. *Id.* at 222–23.

124. *Execution Protocol Cases*, 471 F. Supp. 3d at 223–24.

125. *Id.* at 225.

126. *Id.* at 213, 217.

127. *Id.* at 217 (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)).

128. *Id.* at 217.

129. *Id.* at 222–23.

First, the inmates used expert testimony to demonstrate a substantial risk that pentobarbital executions cause severe pain.<sup>130</sup> The inmates' experts testified that, "the majority of inmates executed via pentobarbital injection suffered flash pulmonary edema" before their deaths.<sup>131</sup> In high enough doses, barbiturates like pentobarbital depress a person's central nervous system.<sup>132</sup> This in turn causes sedation and depression of the respiratory system.<sup>133</sup> Eventually, the inability to breathe will result in death.<sup>134</sup> During this process, pentobarbital can also cause a buildup of fluid in the lungs, known as pulmonary edema.<sup>135</sup> Flash pulmonary edema develops "almost instantaneously" following injection, producing "sensations of drowning and asphyxiation resulting in extreme pain, terror and panic" while the patient is "still conscious and capable of experiencing the severe pain associated with flash pulmonary edema."<sup>136</sup> In the district court's view, the likelihood of flash pulmonary edema developing during pentobarbital lethal injections "pose[d] a substantial risk of serious pain" that satisfied the first prong of this Eighth Amendment analysis.<sup>137</sup>

For the second prong, the inmates were required to "identify an alternative method of execution that [would] significantly reduce the risk of serious pain and that [was] feasible and readily implemented."<sup>138</sup> The district court accepted two of the alternatives proposed by the inmates. The first proposal was for a pre-dose of opioid pain medication, such as morphine or fentanyl, during the executions.<sup>139</sup> The district court found that this proposal addressed the risk of pain posed by pulmonary edema and "that the State could carry it out relatively easily and reasonably quickly."<sup>140</sup>

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130. *Execution Protocol Cases*, 471 F. Supp. 3d at 218.

131. *Id.*

132. "Barbiturates act on GABA-A receptors by increasing the amount of time the chloride ion channel is opened, which increases the affinity of the receptor for GABA. GABA is the primary inhibitory neurotransmitter of the central nervous system, which acts to reduce neuronal activity. In contrast to benzodiazepines, they also act to increase chloride influx in the absence of GABA, which accounts for their ability to significantly depress the central nervous system and contribute to their toxicity." Jolee T. Suddock & Matthew D. Cain, *Barbiturate Toxicity*, STATPEARLS (July 4, 2021), <https://www.ncbi.nlm.nih.gov/books/NBK499875/>.

133. Barbiturate toxicity results in "significant sedation and respiratory depression." *Id.*

134. *Id.*

135. *Pulmonary Edema*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/000140.htm> (last visited Oct. 13, 2022).

136. *Execution Protocol Cases*, 471 F. Supp. 3d at 218–19.

137. *Id.* at 219.

138. *Id.* at 217.

139. *Id.* at 220.

140. *Id.*

The second proposal was for execution by firing squad. While somewhat rare today, execution by firing squad is a “traditionally accepted method[ ] of execution”<sup>141</sup> that is currently legal in three states.<sup>142</sup> This proposal was supported by the fact that, “of all executions conducted since 1900, executions by firing squad had the lowest rate of ‘botched’ executions—zero out of thirty-four—of any method.”<sup>143</sup> When competently performed, execution by firing squad will cause a nearly instant death,<sup>144</sup> free from the risk of flash pulmonary edema. Therefore, the district court accepted execution by firing squad as an acceptable alternative.<sup>145</sup> Having demonstrated that the 2019 Protocol would cause a substantial risk of severe pain and that available alternatives can alleviate that risk, the district court once again preliminarily enjoined the federal government from carrying out its planned executions.<sup>146</sup>

### 5. *Supreme Court Vacates the Second Injunction*

Immediately after the district court granted its second preliminary injunction, the federal government once again petitioned the Supreme Court to stay or vacate the preliminary injunction.<sup>147</sup> The next day, July 14, 2020, the Supreme Court returned with a decision.<sup>148</sup> Unlike the last time they were asked to weigh in on this case, the Supreme Court vacated the district court’s preliminary injunction.<sup>149</sup> As a result, the executions proceeded as planned.<sup>150</sup>

Later that same day, the federal government executed Lee by lethal injection of pentobarbital, leading to his death at 8:07 a.m. and making him the first inmate executed by the federal government since 2003.<sup>151</sup> Purkey followed on July 16, 2020; Honken on July 17, 2020; Mitchell

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141. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

142. Execution by firing squad is legal in Utah, Oklahoma, and Mississippi. *Execution Protocol Cases*, 471 F. Supp. 3d at 221.

143. *Id.* (citing AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 117, App. A. (2014)).

144. *Id.* (quoting Deborah W. Denno, *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 688 (1994)).

145. *Id.* at 222.

146. *Id.* at 225.

147. *Barr*, 140 S. Ct. at 2590.

148. *Id.*

149. *Id.*

150. *Id.* at 2591–92; Press Release, Dep’t of Justice, Statement by Attorney General William P. Barr on the Execution of Daniel Lewis Lee (July 14, 2020). <https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-execution-daniel-lewis-lee>.

151. Berman, *supra* note 9.



on August 26, 2020; and Bourgeois on December 11, 2020.<sup>152</sup> In total, thirteen inmates were executed between July 14, 2020 and January 16, 2021.<sup>153</sup> Due to the Supreme Court's decision to lift the district court's preliminary injunction, all thirteen inmates were executed under an execution protocol with unresolved constitutional questions. The remainder of this Note argues that the Supreme Court reached the wrong decision in *Barr v. Lee*.

### III. ANALYSIS

This Section argues that the Supreme Court reached the wrong conclusion when it vacated the preliminary injunction and allowed these executions to go forward. Subsection A criticizes the reasoning that the Court expressed in the majority opinion of *Barr v. Lee*. Subsection B argues that the public interest in executions is weak, especially when compared with the value of fully litigating the inmates' claims, which is discussed in Subsection C.

#### A. Critique of *Barr v. Lee*

The Supreme Court asserted that last-minute stays, like the one granted by the district court, "should be the extreme exception, not the norm."<sup>154</sup> However, as the district court observed, "[t]he succession of last-minute rulings is the result of the Government's decision to set short execution dates even as many claims . . . were pending."<sup>155</sup> Putting oneself in the inmates' shoes, it is difficult to imagine a more extreme circumstance than when a government seeks to execute its citizens with a novel form of execution that poses a risk of severe pain. Even worse, that government is actively circumventing any attempts to litigate the legality of these executions. And to top things off, all this is occurring four months before an election that threatens to oust the administration presiding over the executions. It is in this exact moment, when a core constitutional question is raised and political motives threaten to usurp the government's commitment to due process, that last-minute intervention by a federal court is justly required. Litigation is slow for a reason. As the Seventh Circuit wrote, "just be-

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152. *Executions Under the Federal Death Penalty*, DEATH PENALTY INFO. CTR. (2022), <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty>.

153. *Id.*

154. *Barr*, 140 S. Ct. at 2591.

155. *Execution Protocol Cases*, 471 F. Supp. 3d at 214.

cause the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.”<sup>156</sup>

The Supreme Court ended its decision by remarking that, “the question of capital punishment” should remain with “the people and their representatives, not the courts, to resolve.”<sup>157</sup> This is a reasonable aspiration in a liberal democratic society. However, the Supreme Court’s actions fail to meet the ideal promised by its words. Neither the people, nor their representatives, ended up having a say in how these men would die. In Lee’s case, the people’s role was carried out in 1999, when he was sentenced to death. In 1999, pentobarbital had never been used to execute someone. It would take eleven years for an execution in Oklahoma to change that.<sup>158</sup> No one on the jury that sentenced Lee was ever aware of pentobarbital, flash pulmonary edema, Clayton Lockett, or any other information that society has gleaned over the past two decades.

As for the representatives, their main input was the Federal Death Penalty Act’s requirement that federal executions be implemented in the “manner provided by state law.” However, the court of appeals made it clear that this requirement is likely permissive and has no sway over the choice of drug used in a lethal injection.<sup>159</sup> While it is true that Congress could invalidate the court of appeals’ interpretation by amending the Act, this sort of “checks and balances” gamesmanship is inherently reactive and will never undue the deaths of these inmates. The Supreme Court ultimately left the decision in the hands of the Department of Justice and the Bureau of Prisons.

The decision to end the moratorium of federal executions by carrying out these pentobarbital injections was not made by elected officials. The Attorney General is appointed by the president and the law enforcement agencies at his disposal cannot be held accountable by the public in the same way that an elected official can. Thus, the Supreme Court’s depiction of the 2019 Protocol as an expression of the people’s will is fundamentally flawed. In truth, the 2019 Protocol is the will of a small group of government bureaucrats, attorneys, and law enforcement officials.

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156. *Purkey v. United States*, 964 F.3d 603, 618 (7th Cir. 2020).

157. *Barr*, 140 S. Ct. at 2591.

158. Divina Mims, *Death Row Inmate Executed Using Pentobarbital in Lethal Injection*, CNN (Dec. 16, 2010), <http://www.cnn.com/2010/CRIME/12/16/oklahoma.execution/>.

159. *Execution Protocol Cases*, 955 F.3d at 112.

Lee, Purkey, Bourgeois, and Honken committed horrible crimes and their guilt was practically certain.<sup>160</sup> However, it is worth questioning whether these executions were worth the circumvention of necessary litigation concerning the constitutionality of pentobarbital lethal injections. Both the value of carrying out death sentences and the value of fully litigating novel constitutional questions should be balanced.

### B. Societal Value of Executions

The value of a death sentence is best understood in relation to its nearest substitute, a life sentence. There are five recognized purposes for societies to punish criminals: (1) deterrence, (2) incapacitation, (3) rehabilitation, (4) retribution, and (5) restitution.<sup>161</sup> A death sentence is not significantly more effective than a life sentence at serving any of these five purposes.

Deterrence “prevents future crime by frightening the defendant or the public.”<sup>162</sup> For the individual defendant, a life and death sentence are equally effective deterrents because neither allow the defendant to rejoin society and commit future crimes. As for deterring the general public from committing crimes, the fact that the “murder rate in non-death penalty states has remained consistently lower than the rate in states with the death penalty,” with a 22% difference between the two groups in 2019,<sup>163</sup> suggests that a death sentence does not produce a greater deterrence effect than a life sentence.<sup>164</sup>

Incapacitation prevents future crime by removing the defendant from society.<sup>165</sup> This interest is equally served by life and death sentences, since neither punishment allows the defendant to return to society. While it is true that a defendant sentenced to life could possibly escape, and an executed defendant cannot, dramatic decreases in

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160. “[N]one of the four is contesting his guilt or his sentence.” *Barr v. Roane*, 140 S. Ct. 353, 353 (2019).

161. *The Purposes of Punishment*, UNIV. OF MINN. LIBRS. PUBL'G (2012), <https://open.lib.umn.edu/criminallaw/chapter/1-5-the-purposes-of-punishment/>.

162. *Id.*

163. *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR. (2022), <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states>. 22% calculated by taking  $1 - ((4.2 \text{ non-death penalty rate}) / (5.4 \text{ death penalty rate})) = 0.22$ ; see also *The Death Penalty: Questions and Answers*, ACLU, <https://www.aclu.org/other/death-penalty-questions-and-answers> (last visited Oct. 14, 2022).

164. *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., 3 (Oct. 6, 2022), <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>.

165. *The Purposes of Punishment*, *supra* note 161.

the number of escapees from United States prisons over the past two decades<sup>166</sup> suggest that the risk is minimal.

Rehabilitation prevents future crime by altering a defendant's behavior.<sup>167</sup> With both life and death sentences, this purpose is somewhat moot because the defendant is not permitted to rejoin society. However, a life sentence at least allows the defendant an opportunity to alter his behavior and find the error of his ways. In contrast, a death sentence takes away any opportunity for the defendant to reform.

Retribution prevents future crime by removing the desire for revenge against the defendant.<sup>168</sup> It cannot be denied that many of the families of the victims were likely satisfied to hear of these executions. However, there is reason to believe that the retributive effect of a death sentence is insubstantial. After all, public support for the death penalty is currently at its lowest point in a half-century.<sup>169</sup> Furthermore, as the district court observed in the *Execution Protocol Cases*, delayed executions do not cause substantial harm to the government.<sup>170</sup>

Finally, restitution prevents future crime by punishing the defendant financially. This purpose is usually not an issue with these types of crimes, given the general low-income of death penalty inmates.<sup>171</sup> In fact, enforcing the death penalty imposes severe financial burdens on state governments which end up punishing taxpayers financially.<sup>172</sup>

In sum, the societal benefits of executing these inmates are rather low. None of the five purposes of punishment, except arguably retribution, are served by these executions. Therefore, there is no readily

166. *Number of Escapees from State and Federal Prisons in the United States from 2000 to 2019*, STATISTA (Oct. 27, 2021), <https://www.statista.com/statistics/624069/number-of-escapees-from-prisons-in-the-us/>.

167. *The Purposes of Punishment*, *supra* note 161.

168. *Id.*

169. *2021 Gallup Poll: Public Support for Capital Punishment Remains at Half-Century Low*, DEATH PENALTY INFO. CTR. (Nov. 19, 2021), <https://deathpenaltyinfo.org/news/2021-gallup-poll-public-support-for-capital-punishment-remains-at-half-century-low>; *see also Facts about the Death Penalty*, *supra* note 164, at 4.

170. *Execution Protocol Cases*, 2019 WL 6691814 at \*7.

171. "According to the Equal Justice Initiative, 95% of convicts languishing on death row in the United States come from underprivileged backgrounds." Florence Bellivier & Dimitris Christopoulos, *The Death Penalty: A Punishment for the Poor?*, INT'L FED'N FOR HUM. RTS. (Oct. 10, 2017), <https://www.fidh.org/en/issues/death-penalty/the-death-penalty-a-punishment-for-the-poor>; *see also* Press Release, Off. of the United Nations High Comm'r for Hum. Rts., Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn (Oct. 6, 2017), <https://www.ohchr.org/en/press-releases/2017/10/death-penalty-disproportionately-affects-poor-un-rights-experts-warn>.

172. *Facts about the Death Penalty*, *supra* note 164, at 4.

apparent advantage to circumventing the judicial process to expedite these executions.

### C. *Societal Value of Litigation*

Next, the value of fully litigating the claims raised by the inmates should be assessed. The inmates challenged the constitutionality of pentobarbital lethal injections as a method of execution. Ultimately, the Supreme Court disagreed with the district court's determination that flash pulmonary edema poses a substantial risk of serious pain to inmates executed by injection of pentobarbital.<sup>173</sup> As a result, the Court declined to hear full arguments on the effects of this drug.

The Supreme Court, unlike the district court, placed greater weight on the government's expert testimony than the expert testimony offered by the inmates. The government's experts indicated that pulmonary edema only occurs "[a]fter the prisoner has died or been rendered fully insensate."<sup>174</sup> However, the Supreme Court offered no reasoning for its decision to accept the opinion of one camp of experts over another. This omission is even more glaring when considering Purkey's autopsy, which showed that he suffered "severe bilateral acute pulmonary edema" and had "frothy pulmonary edema in [his] trachea and mainstem bronchi."<sup>175</sup> According to a medical expert, these symptoms indicate that "Purkey's lungs filled with fluid and that he suffered excruciating air hunger while still alive."<sup>176</sup> In short, the inmates' concerns about flash pulmonary edema were confirmed.

It is naive to assume that all forms of lethal injection are similarly free of cruelty. Clayton Lockett's botched execution, discussed in Section I.A.3, is an unsettling reminder of how vicious these drugs can be. However, courts generally fail to consider the medical realities at play in lethal injection cases. Importantly, drugs do not always affect everyone in the same way. Even when dealing with a single drug administered to a single patient, the drug's pharmacokinetic and pharmacodynamic profiles can vary drastically, depending "on [its] concentrations, aqueous solubility, and [its] route of administration."<sup>177</sup> Further complicating matters is the fact that a "sizeable per-

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173. *Barr*, 140 S. Ct. at 2591.

174. *Id.*

175. In re Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-MC-145 (TSC), 2020 WL 4915563, at \*1 (D.D.C. Aug. 15, 2020), *appeal dismissed sub nom.* In re Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5252, 2020 WL 6038916 (D.C. Cir. Sept. 16, 2020), *rev'd and remanded sub nom.* In re Fed. Bureau of Prisons' Execution Protocol Cases, 980 F.3d 123 (D.C. Cir. 2020).

176. *Id.*

177. Kas et al., *supra* note 80, at 1030.

centage of death row inmates” have a history of substance abuse.<sup>178</sup> Due to this history of substance abuse, specific inmates may exhibit “unusual drug resistance and accelerate[d] metabolism of a drug.”<sup>179</sup> These complicating factors make the efficacy of certain drugs, including barbiturates like pentobarbital, unknown.<sup>180</sup> In such a case, where medical complications can lead to unpredictable results, courts must rely on experts to better understand the complex interactions at play.

While both the inmates and the government offered expert opinions on the effects of pentobarbital during lethal injection, neither party was able to further develop these expert opinions at trial. A trial would have allowed the parties to cross-examine witnesses and present evidence directly to a factfinder. These processes help a trial court ascertain the truth of a matter. However, the inmates in this case were never given that opportunity.

Unfortunately, by declining to hear full litigation on the legality of pentobarbital injections, the Supreme Court created a self-fulfilling prophecy for premature dismissal of the inmates’ claims. By vacating the preliminary injunction, the Supreme Court prevented full litigation concerning pentobarbital’s risk of causing flash pulmonary edema. Without litigation, the amount of information and precedent cases available to the inmates is limited,<sup>181</sup> allowing the Supreme Court to deny any challenges to the 2019 Protocol because the “claim faces an exceedingly high bar.”<sup>182</sup> Without a full trial, concerns about how pentobarbital affects certain inmates remain unresolved. This uncertainty will only lead to more unusual execution results and will handicap the ability of inmates to challenge execution protocols in the future.

#### IV. IMPACT

This Section focuses on the potential impact that *Barr v. Lee* will have on the federal death penalty. Going forward, the Supreme Court’s decision in *Barr v. Lee* will contribute to increasing politicization of the death penalty and further reliance on local compounding pharmacies for pentobarbital supply. Subsection A discusses how greater executive authority over death penalty protocols will increase

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178. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCIS. LAW 191, 206 (2002), <https://files.deathpenaltyinfo.org/legacy/documents/CunninghamDeathRowReview.pdf>.

179. Kas et al., *supra* note 80, at 1031.

180. *Id.*

181. See *Whitaker v. Collier*, 862 F.3d 490, 502 (5th Cir. 2017); *Zink v. Lombardi*, 783 F.3d 1089, 1106–07 (8th Cir. 2015); *Gissendaner v. Comm’r*, 779 F.3d 1275, 1284 (11th Cir. 2015).

182. *Barr*, 140 S. Ct. at 2591.

the role that political interests play in death penalty decision making. As a result, death penalty protocols will shift dramatically from one presidential administration to the next, and the ideal of an impartial criminal justice system may become unattainable. Subsection B discusses how future reliance on pentobarbital for lethal injections will require local compounding pharmacies, rather than big pharmaceutical manufacturers, to supply the federal government with pentobarbital. This trend may worsen the supply chain issues that originally led to pentobarbital's adoption in death penalty protocols and raise ethical issues for health care professionals involved in the compounding process.

### A. *Politicization of the Death Penalty*

As discussed in Section III of this Note, the Supreme Court's decision in *Barr v. Lee* grants the Department of Justice enormous discretion over the manner and means of federal executions. Under the direction of Attorney General Barr, the Department of Justice and Bureau of Prisons were able to unilaterally implement a new death penalty protocol and resume executions after a seventeen-year pause. By failing to intervene in *Barr v. Lee*, the Supreme Court effectively approved of this unilateral change in policy. As a result, with each new presidential election, and each new attorney general appointment, there is a potential for immediate substantial changes in federal death penalty policy.

In fact, this process played out clearly during the transition from the Trump Administration to the Biden Administration. Unlike President Trump, President Biden is a vocal critic of the death penalty who ran on eliminating the death penalty from the federal criminal justice system.<sup>183</sup> The contrast between these two presidential administrations was clear to see in the week preceding President Biden's inauguration, when the federal government executed three inmates.<sup>184</sup> The last of these inmates, Dustin Higgs, was executed on January 16, 2021, a mere four days before President Biden's inauguration on January 20.<sup>185</sup> Since January 16, 2021, there have been no further federal executions. The Biden Administration's departure from the Trump Ad-

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183. Annika Russell, *What the 2020 Elections Mean for the Future of the Death Penalty*, ABA (Nov. 22, 2020), [https://www.americanbar.org/groups/committees/death\\_penalty\\_representation/publications/project\\_blog/2020-election-results-on-death-penalty/](https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/2020-election-results-on-death-penalty/).

184. Dennis Romero, *Dustin Higgs, Last Convict Scheduled to Die under Trump, is Executed*, NBC News (Jan. 16, 2021), <https://www.nbcnews.com/news/us-news/dustin-higgs-last-convict-scheduled-die-under-trump-executed-n1254503>.

185. *Id.*

ministration's death penalty policy reached its peak six-months later, when Attorney General Merrick Garland issued a directive formally pausing federal executions on June 30, 2021.<sup>186</sup> Presumably, this new moratorium will remain in effect so long as Democrats control the White House.

This presumption is justified by the vast disparity between Republican and Democratic attitudes towards the death penalty.<sup>187</sup> Republicans and Republican-leaning independents are 1.7 times more likely to favor the death penalty for convicted murderers than Democrats and Democratic-leaning independents.<sup>188</sup> The gap between these camps has steadily widened since the mid-1990s, with no signs of slowing as support falls among Democrats and rises among Republicans.<sup>189</sup>

Hyper-partisan views on the death penalty may incentivize political candidates to use the death penalty to gain political leverage.<sup>190</sup> In such a context, it becomes increasingly difficult to hold a rational debate on the value of capital punishment.<sup>191</sup> Candidates wishing to appear “tough on crime” may propose hyperbolic death penalty policies that discourage law makers from legislating in good faith. A prime example of this occurred in 1995, when then-Speaker of the House Newt Gingrich campaigned for the mandatory execution of drug smugglers and the elimination of most of the appeals available to defendants in such cases.<sup>192</sup> It's also impossible to ignore the political optics of the Trump Administration's executions, which began three months before a presidential election where 59% of registered voters cited “violent crime” as a very important factor in their decision about who to vote for.<sup>193</sup>

By attempting to one-up each other as the “toughest” on crime, politicians risk compromising the integrity of the criminal justice sys-

186. Katie Benner, *Merrick Garland pauses federal executions a year after his predecessor resumed them*, N. Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/us/politics/executions-pause-merrick-garland.html>.

187. Gramlich, *supra* note 2.

188. 77% of Republicans and Republican-leaning independents support the death penalty versus 46% of Democrats and Democratic-leaning independents. Gramlich, *supra* note 2.

189. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RSCH. CTR. (June 11, 2018), <https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/>.

190. See *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFO. CTR. (Oct. 18, 1996), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/killing-for-votes-the-dangers-of-politicizing-the-death-penalty-process>.

191. *Id.*

192. *Id.*

193. *Important Issues in the 2020 Election*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/>.



tem.<sup>194</sup> The politicization of the death penalty threatens to undermine the United States' commitment to due process, the Eighth Amendment, and an impartial criminal justice system. When *Barr v. Lee* offered the Supreme Court a chance to check this trend towards a more political death penalty, it declined. Rather, the Supreme Court ensured that federal death penalty policy will remain subject to the political pressures of presidential elections by granting discretion over death penalty protocols to the Department of Justice.

### B. *Pharmaceutical Supply Issues*

Another noteworthy impact of *Barr v. Lee* is the effect that pentobarbital lethal injections will have on the pharmaceutical supply chain. As alluded to in Section II, major pharmaceutical manufacturers are boycotting the use of their products in executions.<sup>195</sup> This boycott is what led states and the federal government to adopt pentobarbital for lethal injections in the first place. However, pentobarbital is among the list of drugs that major manufacturers refuse to allow in lethal injections.<sup>196</sup> As a result, governments have turned to local compounding pharmacies as an alternate source for the drug.<sup>197</sup> Unlike manufacturers, which synthesize drugs on an industrial scale, compounding pharmacies modify existing medications for specialized purposes.<sup>198</sup> However, the reliance on compounding pharmacies for pentobarbital raises regulatory and ethical concerns.

The main regulatory issue raised by relying on compounding pharmacies for pentobarbital is the fact that local compounding pharmacies are not subject to the same regulations as large-scale manufacturers. Large-scale manufacturers are regulated by the Food and Drug Administration, whereas compounding pharmacies are regulated by state boards of pharmacy.<sup>199</sup> Differences in the regulatory guidelines among these state boards of pharmacy can lead to inconsistent quality standards, safety measures, and drug efficacy.<sup>200</sup> These in-

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194. *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, *supra* note 190.

195. Kas et al., *supra* note 80.

196. Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs Used in US Executions*, *GUARDIAN* (Dec. 20, 2011), <https://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-commission>.

197. Kas et al., *supra* note 80.

198. *Drug Compounding vs. Manufacturing: What's the Difference?*, *HEALTHY CHOICE*, <https://www.thehealthychoice.net/drug-compounding-vs-manufacturing-whats-the-difference/> (last visited Mar. 12, 2022).

199. Kas et al., *supra* note 80.

200. *Id.*

consistencies may contribute to “unexpected events during executions.”<sup>201</sup>

The role these compounding pharmacists play in death penalty protocols may also raise ethical issues, since these pharmacists are compounding drugs for the specific purpose of executions. For instance, the American Medical Association, the American Pharmacists Association, the American Psychiatric Association, the American Nurses Association, the American Board of Anesthesiologists, the American Correctional Health Services, the National Association of Emergency Medical Technicians, the American Academy of Physician Assistants, and other medical associations and boards, both domestically and abroad, have all denounced physician participation in capital punishment.<sup>202</sup> The American Pharmacists Association, in particular, adopted a policy discouraging pharmacist participation in executions in 2015, “on the basis that such activities are fundamentally contrary to the role of pharmacists as providers of health care.”<sup>203</sup>

These ethical concerns may cause some pharmacies to reconsider supplying the federal government with pentobarbital in the future. As a result, the supply of pentobarbital for lethal injections will not only vary in quality due to inconsistent regulation of compounding pharmacies, but it will also be more expensive to purchase due to the low number of suppliers. These developments will increase the cost of pentobarbital lethal injections, while also limiting their effectiveness and possibly causing unforeseeable medical complications.

## V. CONCLUSION

In conclusion, it was wrong of the Supreme Court to lift the preliminary injunction that prevented the federal government from executing its death row inmates while litigation of their Eighth Amendment claims was pending. The public interest is best served by allowing full litigation of these constitutional claims so that any risks of medical complications from pentobarbital lethal injections—such as flash pulmonary edema—can be fully explored at trial. By revoking the preliminary injunction, the Supreme Court set the stage for a further politicized death penalty and for future supply chain issues when pro-

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201. *Id.*

202. David Landon Bowles, *Between Medicine and Punishment: Essays in Correctional Healthcare Ethics*, PROQUEST, n.1 (2020), <https://www.proquest.com/docview/2414048295>.

203. Press Release, Am. Pharmacists Ass’n, APhA House of Delegates Adopts Policy Discouraging Pharmacists Participation in Execution (Mar. 31, 2015), <https://www.pharmacytimes.com/view/apha-house-of-delegates-adopts-policy-discouraging-pharmacist-participation-in-execution>.

curing drugs for lethal injection protocols. As a result, federal death row inmates may face an increased risk of botched executions in the future.

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