United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5361 **September Term, 2020**

1:19-mc-00145-TSC

Filed On: December 10, 2020

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

Alfred Bourgeois and Brandon Bernard,

Appellants

Bruce Webster, et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellees

BEFORE: Srinivasan*, Chief Judge, and Henderson***, Rogers, Tatel**, Garland*, Millett**, Pillard**, Wilkins**, Katsas***, Rao, and Walker***, Circuit Judges

O R D E R

Upon consideration of the emergency motion for reconsideration en banc and, if necessary, an administrative stay, the opposition thereto, and the reply, it is

ORDERED that the motion for en banc reconsideration be denied. It is

FURTHER ORDERED that the request for an administrative stay be dismissed as moot.

* Chief Judge Srinivasan and Circuit Judge Garland did not participate in this matter.

** A statement by Circuit Judge Wilkins, joined by Circuit Judges Tatel, Millett, and Pillard, dissenting from this order is attached.

*** A statement by Circuit Judge Katsas, joined by Circuit Judges Henderson and Walker, concurring in this order is attached.

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Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

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Wilkins, *Circuit Judge*, joined by Tatel, Millett, and Pillard, *Circuit Judges*, *dissenting*:

I would grant the stay because I believe that the movants have made the requisite showing under *Nken v. Holder*, 556 U.S. 418, 435 (2009).

First, the movants have shown a likelihood of success on the merits. As relevant here, the Federal Death Penalty Act provides: "When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States [M]arshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the [s]tate in which the sentence [was] imposed." 18 U.S.C. § 3596(a). The question here is whether prescribing the date that the sentence will be carried out is something that falls within the "manner" of "implementation" of the death sentence. I believe that the answer to that question is likely yes.

The plain meaning of "implementation" is "the process of making something active or effective." *Implementation*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/implementation (last visited Dec. 10, 2020). It is also defined as "the act of putting a plan into action or of starting to use something," DICTIONARY.CAMBRIDGE.ORG, https://dictionary.cambridge.org/us/dictionary/english/implementation (last visited Dec. 10, 2020), or "[t]he process of putting a decision or plan into effect," LEXICO.COM, https://www.lexico.com/en/definition/implementation (last visited Dec. 10, 2020). Here, a critical part of the process of carrying out the death sentence is notifying everyone involved when the execution is going to take place. This notification initiates the process, and it is crucial because it informs the condemned prisoner, his counsel, the warden, the victims, the public, as well as the President who has pardon and clemency power, and the courts which have power to enjoin, when the execution is actually going to occur.

Further, even if considering the more narrow definition that "implementation" means only those measures that "effectuate the death," *United States v. Mitchell*, 971 F.3d 993, 996–97 (9th Cir. 2020), it seems clear that prescribing the date and time for the execution to occur is a necessary element of effectuating the death sentence. Thus, I believe that the plain meaning of the term, as well as the construction of § 3596(a) from Judge Rao's controlling opinion in *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), supports the conclusion that movants are likely to succeed on the merits. *See id*. at 129 ("[T]he FDPA requires the federal government to apply state law—that is, statutes and formal regulations—at whatever level of generality state law might be framed.") (Rao, J. concurring). I disagree with the Government that anything stated in Judge Tatel's dissenting opinion is to the contrary. I remain convinced of this view after having reviewed the other decisions of the courts of appeal construing § 3596(a), though I note that only *United States v. Vialva*, 976 F.3d 458 (5th Cir. 2020), squarely addresses the issue we face today. I agree that "Section 3596(a) cannot be reasonably read to incorporate every aspect of the forum state's law regarding execution procedure," *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020), but setting the date for the execution to take place is such a fundamental part of its implementation that it is reasonable to hold that it must be incorporated here.

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I also find that movants have shown irreparable harm. Both have filed clemency petitions that are pending before the President. So long as those clemency petitions have not been acted upon, there is a chance that they could be granted after further consideration. The denial of time for that further consideration to occur is itself irreparable harm. The President is not required to act upon a clemency petition by any date certain, and if the execution proceeds before he acts, those clemency petitions become moot. Under these circumstances, denial of the full 90 days of consideration that would attain if Texas state law were followed denies these inmates further consideration of petitions that could save their lives.

Finally, the balance of equities and public interest weigh in favor of granting the stay because, even though the Government is harmed by a delay of the execution, the harm to movants is irreparable and the public interest is served when the Government abides by the law. *See League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016).

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Katsas, *Circuit Judge*, with whom Henderson and Walker, *Circuit Judges*, joins, concurring: I vote to deny a stay because the plaintiffs here are unlikely to succeed on the merits, for the Texas notice statute that they invoke does not concern "implementation" of their death sentences under the Federal Death Penalty Act. That statute requires a United States marshal to "supervise *implementation* of the [death] sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a) (emphasis added). Implementing a sentence means carrying it out. *See Implement*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1134 (3d ed. 1993) ("to carry out: accomplish, fulfill"); *Implementation Plan*, BLACK'S LAW DICTIONARY 872 (10th ed. 2014) ("An outline of steps needed to accomplish a particular goal."). The FDPA thus requires the marshal to follow only those state laws that concern *how* a state conducts an execution, not *when* it does so.

Moreover, under the FDPA, "implementation" of a death sentence involves only conduct that immediately precedes the execution. Section 3596(a) states that a person sentenced to death must be "committed to the custody of the Attorney General" while any appeal is pending. After that, "[w]hen the sentence is to be implemented," the Attorney General must "release" the prisoner to a United States marshal, "who shall supervise implementation of the sentence." This language makes clear that the prisoner is transferred to the marshal only "[w]hen the sentence is to be implemented," and that the "implementation of the sentence" covers only conduct that follows the transfer. In short, "implementation" does not include scheduling the execution, but instead presupposes a set time and date.

Our decision in the *Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), does not undercut this analysis. It addressed what constitutes a "manner" of execution under the FDPA, not what constitutes its "implementation." To be sure, Judge Rao argued that "implementation" could be read broadly, so as to cut against my construction of "manner" to include only the top-line choice among execution methods. *Id.* at 133–34 (Rao, J., concurring). But the case did not present, and we had no occasion to decide, whether the FDPA extends even to events that precede the release of the prisoner to the marshal. Indeed, as Judge Tatel noted in dissent, the plaintiffs themselves, to avoid an implausibly broad construction of the FDPA, argued that "implementation" covers only procedures that "effectuate the death." *See id.* at 151 (Tatel, J., dissenting). Any broader reading of "implementation," combined with the broad reading of "manner" that my colleagues adopted in the *Execution Protocol Cases*, would construe the FDPA—which was designed to expand availability of the federal death penalty—to create significant practical problems in carrying it out. *See id.* at 119–20 (Katsas, J., concurring); *see also Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (statement of Alito, J.).

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Four other courts of appeals have read our opinions in the *Execution Protocol Cases*, and have themselves construed the FDPA, not to encompass procedures (such as notice requirements) that do not effectuate the death. *See United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020); *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020); *United States v. Mitchell*, 971 F.3d 993, 996–997 (9th Cir. 2020); *LeCroy v. United States*, 975 F.3d 1192, 1198 (11th Cir. 2020). Indeed, the Fifth Circuit's decision in *Vialva* squarely held that the FDPA does not encompass the very Texas notice statute invoked by the plaintiffs here. *See* 976 F.3d at 462.