

AMERICAN BAR ASSOCIATION
DEATH PENALTY DUE PROCESS REVIEW PROJECT
DEATH PENALTY REPRESENTATION PROJECT
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges federal, state, and territorial legislative
2 bodies and governmental agencies, including departments of corrections, and the military that
3 impose or implement capital punishment, to:

- 4
- 5 (1) promulgate execution protocols in an open and transparent manner and allow public
6 comment prior to final adoption; and,
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- 8 (2) require disclosure to the public, to condemned prisoners facing execution, and to courts
9 all relevant information regarding execution procedures, including but not limited to:
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- 11 a. the steps to be followed in preparation for, during, and after an execution,
12 b. the qualifications and background of execution team members, and
13 c. details about any drugs to be used, including the names, manufacturers or
14 suppliers, doses, expiration date(s), and testing results concerning use of the
15 drugs.
16
- 17 (3) require that an execution process, including the process of setting IVs, be viewable by
18 media and other witnesses from the moment the condemned prisoner enters the execution
19 chamber until the prisoner is declared dead or the execution is called off;
20
- 21 (4) create and maintain contemporaneous records of what transpires during the execution,
22 including but not limited to the drugs administered, the timing of administration, and any
23 complications, errors or unanticipated events;
24
- 25 (5) disclose the entirety of records and logs on the execution process upon order of the court
26 or as otherwise required in discovery or by law upon request of a death-sentenced
27 prisoner, the prisoner's counsel, or successors; and,
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- 29 (6) provide an immediate, thorough, and independent review of any execution where the
30 condemned prisoner struggles or appears to suffer, where the execution is otherwise
31 prolonged, or where the execution deviates from the adopted protocols and regulations
32 concerning the execution process.

REPORT

In the modern era of capital punishment, secrecy has surrounded many aspects of the imposition of a death sentence in the United States. States have sought to shield not just the identities of executioners and other members of the execution team, but the details of those individuals' basic qualifications, pertinent information about the drug formulas used in lethal injections, and the protocols that instruct how the execution is to be carried out. They have long used blinds and curtains to control which aspects of executions the witnesses can view. Even certain lethal injection drug combinations sometimes contribute to hiding what is happening by paralyzing the condemned prisoners, thereby preventing witnesses from knowing what the prisoners are actually experiencing.¹

However, the past few years have been particularly noteworthy, as many states have increased efforts to cloak their execution procedures in secrecy. Many states have passed statutes that broaden the categories of information that will be kept confidential, exempting information about execution practices and procedures from public disclosure requirements and exempting departments of corrections from the public rulemaking requirements of administrative procedures act laws. The result of this troubling trend is that many jurisdictions have made secret information that may have once been readily available concerning their execution procedures, and other states are trying to do so.

The American Bar Association is concerned about this movement toward increased secrecy and regressive policies surrounding the processes by which prisoners are executed by lethal injection, particularly given the gravity of the authority exercised by state and federal governments in the execution of prisoners. This resolution reflects and complements the ABA's longstanding policy that "death penalty cases [should be] administered fairly and impartially, in accordance with due process."²

I. Background

A. Declining Drug Availability

The vast majority of U.S. executions since 1976 have been carried out by lethal injection using a three-drug formula, where the first drug is supposed to anesthetize the prisoner; the second drug causes paralysis of all voluntary muscles; and the third drug stops the heart, causing death.³ In 2008, the Supreme Court decided *Baze v. Rees*, upholding Kentucky's three-drug execution formula as constitutional.⁴ Nevertheless, challenges to lethal injection have continued over the

¹ Of the 1,215 executions imposed using lethal injection since 1976, 1,135 included administration of a paralyzing agent. Once the paralytic is administered, the condemned prisoner is unable to move, speak or otherwise communicate any distress s/he may experience. *See generally, Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision?did=1686&scid=64> (last visited Nov. 18, 2014).

² ABA House of Delegates Resolution 107 (Feb. 1997).

³ Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817 (2008).

⁴ 553 U.S. 35 (2008).

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six years since the *Baze* decision, in part due to substantial changes in execution protocols and states' increasing difficulties securing reliable sources for and obtaining execution drugs.⁵

Sodium pentothal (thiopental) was used as the first drug in the three-drug formula and also as a stand-alone agent in one-drug procedures.⁶ When the sole U.S. manufacturer of thiopental, Hospira, temporarily ceased manufacture of the drug in 2010, thiopental became scarce—not only for corrections departments looking for execution drugs, but also for hospitals and other health care providers.⁷ In response to the limited availability of thiopental, some corrections departments began to import unregulated thiopental from overseas sources.⁸ Hospira permanently ceased manufacture of thiopental for sale in the United States in January 2011, and since then there have been no Food and Drug Administration (FDA) -approved forms of the drug available in this country.

The unavailability of thiopental set off a chain reaction, as states scrambled to identify and stockpile other execution drugs.⁹ Many states turned to pentobarbital to replace thiopental in both three-drug and one-drug formulas. However, in July 2011, the Danish manufacturer of pentobarbital instituted distribution controls designed to prevent the sale of its drugs for use in executions.¹⁰ Since then, additional pharmaceutical companies have taken similar steps to prevent departments of corrections from obtaining their drugs for use in executions. As a result, states continue to struggle to identify and obtain drugs for use in executions and have turned to purchasing pentobarbital produced in compounding pharmacies that mix small batches of drugs “made-to-order” from the raw ingredients (called active pharmaceutical ingredients). Other states have developed protocols that use the benzodiazepine drug Midazolam in two-drug and three-drug formulas. The use of compounded drugs and the reliance on novel drug combinations mark a new era of experimentation in execution procedures. When corrections departments turned to these new drugs and new drug formulas, they simultaneously and dramatically increased the secrecy surrounding their execution procedures.

⁵ Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, B.U. L. REV. (2011); Elisabeth A. Semel, Op-Ed., *End Secrecy in Lethal Injections*, CNN (Jan. 16, 2014, 11:31 AM), <http://www.cnn.com/2014/01/15/opinion/semel-lethal-injection/>.

⁶ Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J., Jan. 22, 2011, <http://online.wsj.com/articles/SB10001424052748704754304576095980790129692>.

⁷ Tracy Staton, *Troubled Hospira Plant Puts Production, Sales in Jeopardy*, FIERCEPHARMA (Oct. 19, 2011), <http://www.fiercepharma.com/story/troubled-hospira-plant-puts-production-sales-jeopardy/2011-10-19>; Alan M. Wolf, *Hospira Halts Rocky Mount Production of Death Penalty Drug*, THE NEWS & OBSERVER, Jan. 21, 2011, <http://www.newsobserver.com/2011/01/21/935712/hospira-halts-rocky-mount-production.html>.

⁸ States include: Arkansas, Arizona, California, Georgia, Nebraska and Tennessee. See Greg Bluestein, *States Look Overseas for Scarce Execution Drug*, ASSOCIATED PRESS, Mar. 25, 2011, available at http://www.boston.com/news/nation/articles/2011/03/25/states_look_overseas_for_scarce_execution_drug.

⁹ Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?* 60 DUKE L.J. 865, 876 (2011); *States Moving Quickly to Switch Execution Drug*, USA TODAY, Apr. 21, 2011, <http://usatoday30.usatoday.com/news/nation/2011-04-21-execution-drug-pentobarbital.htm>; Owen Bowcott, *London Firm Supplied Drugs for US Executions*, THE GUARDIAN, Jan. 1, 2011, <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>.

¹⁰ Press Release, Lundbeck, Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (Jan. 1, 2011), available at <http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775>.

B. Expanding Secrecy Policies

In response to changes in drug availability, states have taken measures to decrease access to information about their lethal injection practices. Some states have heightened secrecy about lethal injection by passing confidentiality statutes that broaden the scope of information that is deemed secret, while others have simply begun to refuse to disclose information about lethal injection practices without passing statutes to authorize confidentiality.

1. Secrecy Statutes

In order to safeguard their access to execution drugs, some states have added—or are currently seeking to add—categories of confidential information to their previously existing frameworks, which had previously been focused only on protecting the identities of execution team members. These new statutes make confidential the identities of pharmacies, pharmacists, and pharmaceutical distributors who make and/or supply the drugs and other materials intended for use in executions. Some states, like Missouri, have actually defined the drug suppliers as confidential and privileged members of the execution team;¹¹ others simply state that drug manufacturers and suppliers' identities shall be confidential.¹²

Georgia's secrecy statute, for example, defines pertinent information about the drugs and equipment used in an execution as a "confidential state secret," subject to the highest level of secrecy, such that the public, condemned prisoners, and even the courts are prevented from viewing the information.¹³ Other statutes do not apply the designation of state secret, but nonetheless make the pertinent information unavailable through discovery in the course of litigation and unavailable even for *in camera* review by the courts.¹⁴ This type of secrecy surrounding the sources and production of drugs used in executions causes opacity regarding the quality and effectiveness of the drugs to be used.

¹¹ MO. ANN. STAT. § 546.720(2-3) (2007) ("The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential. Notwithstanding any provision of law to the contrary, any portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law.").

¹² *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-757(c) (2011) ("The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 3–9, chapter 1, article 2."); FLA. STAT. § 945.10(1)(g) (2014) ("Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection" is confidential.).

¹³ GA. CODE ANN. § 42-5-36(d)(2) (2013) ("The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.").

¹⁴ *See, e.g.*, 22 OKLA. STAT. ANN. tit. 22 § 1015(B) (2011) ("The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.").

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2. Non-Disclosure Statutes

Other states have passed somewhat narrower statutes that exempt information about execution drugs from disclosure under state public records laws. Under these statutory schemes, the information may still be subject to disclosure through discovery in litigation—perhaps subject to a protective order—but the state is not required to make the information publicly available. For example, the Tennessee execution protocol calls for administration of a compounded drug in a one-drug formula; and under Tennessee law, information “identifying an individual or entity” involved in executions “shall be treated as confidential and shall not be open to public inspection.”¹⁵ This information includes prison employees and private contractors who are part of the execution team and individuals or entities that procure or supply drugs and other materials for use in executions.¹⁶ Arizona has a similar statute that exempts from disclosure confidential, identifying information about persons and entities who participate directly or in ancillary ways.¹⁷ In Colorado, it is not statutory but case law that dictates that information about drug inventory in the possession of the Department of Corrections and the source of any drugs is not subject to public disclosure.¹⁸

3. Refusal to Disclose Pertinent Information

Some states have refused to disclose information about execution procedures, despite having little or no legal support for the refusal. For example, Texas has neither a secrecy statute that prevents the disclosure of execution information, nor a non-disclosure statute that specifically exempts execution information from disclosure under the state’s Public Information Act. In fact, historically, the Texas Department of Criminal Justice (TDCJ) had consistently disclosed information about its execution procedures and drug suppliers in response to Public Information Act requests. However, in April 2014, despite previously providing this information, TDCJ sought an opinion from the Texas Attorney General on whether it could withhold identifying information pursuant to a common-law physical safety exception to the disclosures required under the Public Information Act. The Attorney General agreed that publicly disclosing identifying information would subject the execution drug-supplying pharmacy and pharmacist to a “substantial threat of physical harm” and ordered that the information be withheld.¹⁹ In a subsequent opinion, the Attorney General further opined that releasing the name of a laboratory that conducts testing of execution drugs would similarly put it at risk and ordered that TDCJ not release identifying information regarding laboratories that conduct execution drug testing.²⁰ Mississippi has recently taken a similar position, and has withheld information about execution

¹⁵ TENN. CODE ANN. § 10-7-504(16)(h)(1) (2014).

¹⁶ *Id.*

¹⁷ ARIZ. REV. STAT. § 13-757(C) (2009) (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.”).

¹⁸ *ACLU of Colo. v. Colo. Dep’t of Corr.*, No. 13-CV-32325 (Dist. Ct. Denver, Colo. Aug. 1, 2013) (order making findings of fact and conclusions of law).

¹⁹ Op. Tex. Att’y Gen. OR2014-09184, May 29, 2014 at 3.

²⁰ Op. Tex. Att’y Gen. OR2014-17389, Sept. 30, 2014.

procedures and drug sources without citing any statutory authority for non-disclosure. The State has simply opined that “[f]or security purposes, MDOC cannot release the name of the entity.”²¹

C. Decreasing Transparency During and After Executions

In a majority of states carrying out executions, witnesses are also denied access to significant parts of the lethal injection process. In these states, witnesses are only permitted to see the condemned prisoner after the execution team members have set the IV lines and left the chamber.²² This means that steps crucial to ensuring that an execution is carried out in a humane manner are hidden from public view, and no independent scrutiny of that part of the process is possible. Witnesses and the public must then rely on departments of corrections to provide information about whether, and to what extent, there were problems during executions.

The April 2014 botched execution of Clayton Lockett in Oklahoma underscores the importance of independent witnesses’ access to the entire execution process.²³ During the execution, witnesses had no idea that Mr. Lockett was punctured at least fifteen times in his arms, legs, feet, and neck before the execution team purportedly set an IV in the femoral vein in his groin.²⁴ By the time the Oklahoma Department of Corrections (ODOC) opened the curtains to witnesses, Mr. Lockett was already laying on the gurney and his body was covered with a sheet. When the IV line failed and drugs were administered into Mr. Lockett’s surrounding tissue, instead of into his vein, resulting in his prolonged death, witnesses did not know where the IV had been set or that there was visible evidence of its improper placement.²⁵ This was not revealed until three days later when the ODOC released piecemeal and conflicting information about the execution.²⁶ Additionally, when Mr. Lockett was observed writhing and groaning, the ODOC once again closed the curtain to prevent witnesses from observing the actions of the execution team.²⁷ As a result, there was a significant gap in the public’s knowledge about what happened to Mr. Lockett during the subsequent twenty-four minutes until he was pronounced dead. Because witnesses were prevented from observing the setting of the IV as well as the actions of the execution team after Mr. Lockett regained consciousness, the public only has the information provided by

²¹ Memorandum from Tara Booth, Office of Communications, Miss. Dep’t of Corr. to Vanessa Carroll, MacArthur Justice Ctr. (Feb. 18, 2014) (on file with the Berkeley Law Death Penalty Clinic).

²² See, e.g., Florida Department of Corrections, *Execution by Lethal Injection Procedures* (Sept. 9, 2013), http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_9-9-2013.pdf; State of Ohio Department of Rehabilitation and Correction Execution Policy, 01-COM-11 (Oct. 10, 2013), http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf; Montana State Prison Execution Technical Manual (Jan. 16, 2013), <http://www.deathpenaltyinfo.org/documents/MontanaExecutionProtocol.pdf>.

²³ Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies After Execution is Botched*, ASSOCIATED PRESS, Apr. 29, 2014, available at <http://bigstory.ap.org/article/oklahoma-prepares-execution-2-inmates>.

²⁴ Oklahoma Department of Public Safety, *The Execution of Clayton Lockett: Case Number 14-0189SI Executive Summary*, available at <http://www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf>.

²⁵ Cf. *Baze*, 553 U.S. at 56 (“Three of the Commonwealth’s medical experts testified that identifying signs of infiltration would be ‘very obvious,’ even to the average person, because of the swelling that would result.”).

²⁶ *Oklahoma Execution of Clayton Lockett – Timeline of the Botched Procedure*, THE GUARDIAN, May 2, 2014, <http://www.theguardian.com/world/interactive/2014/may/01/oklahoma-execution-clayton-lockett-timeline-document>.

²⁷ Ziva Brainstetter, *Eyewitness Account: A Minute-By-Minute Look at What Happened During Clayton Lockett’s Execution*, TULSA WORLD, May 2, 2014, http://www.tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article_f7764efc-d036-11e3-af7e-0017a43b2370.html.

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ODOC and subsequent results from an internal investigation into what happened during the execution by the Department of Public Safety, issued four months later.

In a handful of states witnesses are permitted to view the entire execution process. California was the first state required to provide full access after the Ninth Circuit ruled that “the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process of putting the condemned inmate to death.”²⁸ In 2013, the Ninth Circuit’s ruling was extended to Idaho and Arizona, and witnesses in those states now have access to the entire execution procedure.²⁹ Similarly, in 2012, a federal district court judge in Pennsylvania granted an injunction against the Pennsylvania Department of Corrections barring them from preventing witnesses, including members of the press, from observing the full execution process. The judge held that reporters must be allowed to observe the entire execution because it contributes to the “wide freedom in matters of adult public discourse” guaranteed by the First Amendment.³⁰ Witnesses in Ohio have been permitted to watch the setting of IVs on a closed-circuit television screen before the execution chamber curtain is opened to witnesses.³¹

The shift in some states to require full witness access is a significant step toward ensuring a level of independent public scrutiny of the actual execution process in those states. However, a majority of executions are still carried out without this independent oversight. In those states, just as during the Lockett execution, department of corrections officials can limit witness access to the aspects of the execution that appear in compliance with standard protocol and have complete control over the information that is ultimately released about whether an execution was carried out in a humane manner, absent a court or executive order for a more independent review of the facts. Media plaintiffs have petitioned the courts in Missouri and Oklahoma to grant witness access to the entire execution procedure.³²

II. Botched Executions and Internal Investigations

While it is impossible to know how many recent executions were problematic, there were four plainly botched executions in the United States in 2014. The botched executions in Arizona, Ohio, and Oklahoma are stark illustrations of the risks involved in the execution procedures shrouded in secrecy and using novel and experimental drug formulas. When jurisdictions are permitted to operate in secrecy, the courts, legislatures, and the public cannot provide critical oversight to guard against the use of risky and experimental drug protocols and untrained and unqualified execution team members. Botched executions are the predictable result of such practices.

²⁸ *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002).

²⁹ *The Associated Press v. Otter*, 682 F.3d 821 (9th Cir. 2012).

³⁰ *The Phila. Inquirer, et. al. v. Wetzel*, No. 12-cv-01917, 10 (M.D. Pa. Nov. 6, 2012) (order granting preliminary injunction) (quoting *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010) (citation and quotation marks omitted)).

³¹ State of Ohio Department of Rehabilitation and Correction Execution Policy, *supra* note 22, at 14.

³² Mark Berman, *The Guardian, ACLU Sue for Greater Media Access to Executions*, WASH. POST, Aug. 25, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/08/25/the-guardian-aclu-sue-for-greater-media-access-to-executions>.

For example, in January 2014, on the eve of Dennis McGuire's execution in Ohio, the U.S. District Court considered whether Mr. McGuire could show a reasonable likelihood of success on the merits of his claim that the new drug combination to be used in his execution posed a substantial risk of serious harm.³³ The court denied Mr. McGuire's request for a temporary injunction but acknowledged that the case presented the unknowable:

There is absolutely no question that Ohio's current protocol presents an experiment in lethal injection processes. The science involved, the new mix of drugs employed at doses based on theory but understandably lacking actual application in studies, and the unpredictable nature of human response make today's inquiry at best a contest of probabilities.³⁴

The court was prescient in describing Ohio's new protocol as an experiment³⁵—one that led to Mr. McGuire's prolonged execution, as there was widely-reported evidence that he “gasp[ed], chok[ed], clenched his fists and appear[ed] to struggle against his restraints for about 10 minutes after the administration of . . . midazolam and hydromorphone.”³⁶ Since then, that same drug combination was also used in July 2014, when Joseph Wood was given fifteen times the fifty milligram doses of midazolam and hydromorphone provided for in Arizona's two-drug execution protocol. Witnesses reported that he gasped for breath for more than an hour and forty minutes before he was pronounced dead.³⁷

Additionally, witnesses who observed the April 2014 execution of Clayton Lockett, discussed above, also stated that Mr. Lockett grimaced, writhed, and clenched his jaw well after the sedative should have rendered him unconscious. Mr. Lockett was not declared dead until more than forty minutes after the execution started.³⁸ These gruesome and prolonged executions have led many to find that these new protocols, which are sometimes developed without expert consultation and using drugs that do not carry the assurances associated with FDA approval, constitute dangerous and failed experiments on human subjects.³⁹

³³ *In re Ohio Execution Protocol Litig.*, 994 F.Supp.2d 906 (S.D. Ohio 2014).

³⁴ *Id.* at 913.

³⁵ See Max Ehrenfreund, *Dennis McGuire Executed in Ohio With New Combination of Lethal Drugs*, WASH. POST, Jan. 16, 2014, http://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html.

³⁶ Alan Johnson, *Dennis McGuire's Execution was Not 'Humane,' Doctor Says*, COLUMBUS DISPATCH, Aug. 13, 2014, <http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html>.

³⁷ Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES, Jul. 23, 2014, <http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html>; Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was 'Gasping and Struggling to Breathe'*, WASH. POST, Jul. 23, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/>.

³⁸ Mark Berman, *Oklahoma Investigation Into Botched Execution Finds Problems With IV Insertion, Training of Execution Team*, WASH. POST, Sept. 4, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/09/04/oklahoma-investigation-into-botched-execution-finds-problems-with-iv-insertion-training-of-execution-team/>.

³⁹ Johns Hopkins Bloomberg School of Public Health, *State Departments of Corrections Are Violating FDA's Investigational New Drug Regulations By Experimenting With Lethal Injection Drugs* (2014), <http://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publics-health/Lethal%20Injection%20Policy%20Paper%20Final.pdf>.

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Finally, in furtherance of these secrecy laws and policies, several states have sought to have the same departments of corrections who were involved in administering the executions also conduct the sole investigative review following a botched execution. After the January botched execution of Dennis McGuire in Ohio, the Department of Rehabilitation and Corrections conducted an internal review and released an Executive Summary on April 28, 2014.⁴⁰ The summary explains that the department interviewed nearly twenty witnesses and consulted with the same medical expert who had testified for the state prior to the botched execution. The summary ultimately concluded that “[t]here is no evidence that McGuire experienced any pain, distress or anxiety” during the execution.⁴¹ The Ohio Department of Corrections and Rehabilitation did not release any transcripts from the interviews that were conducted, did not provide any primary documents, and no autopsy was performed after the execution. In Oklahoma, following the Lockett execution, the Governor ordered the state’s Department of Public Safety to conduct an “independent review” of the state’s execution procedures.⁴² While the report that was released by Oklahoma was much more extensive than what was released by Ohio after the McGuire execution, including the results from an autopsy and toxicology tests, the review was led by the commissioner of the state agency that oversees the department of corrections instead of an independent party.⁴³

III. The Importance of Transparent Execution Laws and Protocols

The ABA has long been a champion of due process and a leader in the call for fair administration of the death penalty in accordance with the Constitution. The trend of decreasing transparency in execution processes implicates numerous constitutional and public policy issues that should be of great concern to members of the ABA. Such concerns are the subject of active litigation in the courts and make a strong case in favor of transparency.⁴⁴ Included among these constitutional issues are lack of due process and violations of the First, Eighth, and Fourteenth Amendments.

A. Constitutional Concerns

1. Due Process

When condemned prisoners, their lawyers, the public, and even the courts are prevented from knowing about the protocols, drugs, and personnel involved the execution, any meaningful exploration of these issues in civil discourse, the media, or in the courts is completely foreclosed. State secrecy laws greatly impede the ability of prisoners to access the courts in order to raise

⁴⁰ Ohio Department of Rehabilitation and Correction, *Executive Summary* (Apr. 28, 2014), <http://www.documentcloud.org/documents/1149721-ohio-review-of-dennis-mcguire-execution.html>.

⁴¹ *Id.* at 1.

⁴² Eyder Peralta, *Oklahoma Governor Calls For Review of Botched Execution*, NPR (Apr. 30, 2014 3:06 PM), <http://www.npr.org/blogs/thetwo-way/2014/04/30/308372080/oklahoma-governor-calls-for-independent-review-of-botched-execution>.

⁴³ Erik Eckholm, *IV Misplaced in Oklahoma Execution, Report Says*, N.Y. TIMES, Sept. 4, 2014, <http://www.nytimes.com/2014/09/05/us/oklahoma-report-on-clayton-lockett-execution.html>.

⁴⁴ Although the U.S. Supreme Court has not yet considered a case regarding the new and increasing secrecy policies surrounding lethal injection drugs and other execution protocols, these issues are likely ripe for further judicial review.

meritorious challenges to the protocols, drugs, and qualifications and training of personnel involved the execution. The promise of due process and access to the courts is hollow if the evidence required to raise such claims may be withheld by the state.

These secrecy laws and policies also fundamentally deny condemned prisoners real and true notice of how they will be put to death. Although they may be provided with general information about the names of the drugs to be used, they often do not know the type of IV that will be set in their body or the provenance of the drugs and, therefore, whether they will be effective generally (or in their bodies specifically), or the competence of the execution personnel to establish IV access and administer the drugs. When condemned prisoners are denied access to this critical information about the drugs and the execution team members' qualifications, they are denied due process and are prevented from presenting legal claims to the courts that are charged with determining whether execution procedures are constitutional under the Eighth Amendment.

2. The Eighth Amendment

The Eighth Amendment's prohibition on cruel and unusual punishment is the traditional vehicle by which prisoners have challenged the constitutionality of methods of execution.⁴⁵ The U.S. Supreme Court has recognized that this prohibition extends to "subjecting individuals to a risk of future harm—not simply actually inflicting pain"⁴⁶ As discussed above, this risk of harm is not merely theoretical; several prisoners have suffered actual physical harm as the result of ineffective and experimental combinations and untrained corrections staff. Proving such harm prospectively, however, requires access to the very information that states seek to hide behind their secrecy laws.

In order to prevail on an Eighth Amendment challenge to an execution method, the prisoner must show that there is a "substantial risk of serious harm" that is "objectively intolerable."⁴⁷ To conduct this analysis, courts look to the details of the execution protocol and drugs being used—precisely the information that many states seek to withhold. For example, in *Baze v. Rees*, the U.S. Supreme Court analyzed the Eighth Amendment challenge to an execution method by considering evidence about the training of corrections officers who administer the lethal drugs, evaluating how many other states use the exact same drugs, and reviewing expert testimony about the efficacy of the specific drug combination. Under many of today's active and proposed secrecy laws, such an analysis would not be possible.

For example, many different types of professionals participate in executions across the country, from prison guards, to paramedics, nurses, doctors, and pharmacists. In a situation where corrections departments maintain secrecy beyond just the identities of execution team members who are performing crucial tasks and also shroud the qualifications and training required of those individuals, such secrecy has the ability to unjustifiably protect individuals who are unqualified to perform the required steps and/or who already have performed them incorrectly in the past. When a department knows that it will be required to disclose information about the members and

⁴⁵ See *Baze*, 553 U.S. at 48 (2008) (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879)).

⁴⁶ *Id.* at 49.

⁴⁷ *Id.* at 50.

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training of its execution team, it is also more motivated to set rigorous standards for and select qualified, competent personnel.

Likewise, in order for the court to assess whether a lethal injection is humane and constitutional, governments must provide advance information about the drugs they possess and plan to use both in preparation for the execution and in the execution itself,⁴⁸ including: the source of the drugs and whether they are manufactured or compounded; whether the drugs are FDA-approved; dealers and brokers involved in the purchase; the doses to be used; and any testing that was conducted on the drugs. All of this information should be known by the corrections department and is easy to disclose well in advance of a planned execution, even when the jurisdictions have found certain drugs newly unavailable and have had to identify and procure new drug sources and plan for new combinations and new doses. This transparency is particularly important when these new drug combinations and procedures have never been utilized for an execution before and/or have been developed without expert medical or pharmacological consultation.

As bedrock principles of civil litigation, there must be meaningful ability for parties to obtain information about their claims and present relevant information as evidence. So when lethal injection procedures are challenged, the court must have the relevant facts before it to determine whether the procedures present a substantial risk of harm, whether past executions have in fact risen to the level of an Eighth Amendment violation, and/or whether the corrections department has acted with deliberate indifference to the known risks of harm. Simply put: without the facts, a court is prevented from making these determinations. Consequently, secrecy laws and practice render it virtually impossible for prisoners to carry their burden, no matter how great a state's violation of constitutional principles may be, and the Eighth Amendment becomes effectively meaningless. If executions are to be conducted in accordance with the principles of the U.S. Constitution, rather than operating outside the rule of law, prisoners and courts must have access to the basic information required for the legal analysis of such claims.

3. The First and Fourteenth Amendments

Public right of access to executions and execution protocols is also safeguarded by the First Amendment and the Fourteenth Amendment.⁴⁹ State secrecy laws and limits on access to media and witness viewing of executions violate this public right. Traditionally, executions—and information about how executions are conducted—have been accessible to the public.⁵⁰ In fact, executions were popular public events well into the twentieth century, when technological changes in execution methods required that executions take place behind prison walls, rather

⁴⁸ There have been reports of inmates being given sedatives in advance of the actual execution. *See, e.g.*, Tracy Connor, *Missouri Fights Lethal Injection Suit on Eve of Earl Ringo Execution*, NBC NEWS (Sept. 9, 2014 4:49 AM), <http://www.nbcnews.com/storyline/lethal-injection/missouri-fights-lethal-injection-suit-eve-earl-ringo-execution-n198681>; Chris McDaniel, *Missouri Swore It Wouldn't Use A Controversial Execution Drug. It Did.*, ST. LOUIS PUBLIC RADIO (Sept. 2, 2014 10:53 PM), <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did>.

⁴⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *See also* *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court for Norfolk Cnty.*, 457 U.S. 596 (1982).

⁵⁰ *Cal. First Amendment Coal.*, 299 F.3d at 875.

than in public squares.⁵¹ Throughout U.S. history, the open availability of information about execution procedures has served to ensure the fair functioning of our criminal justice system and promote confidence in the integrity of our government. The free flow of information about executions has enabled the public to evaluate state actions to decide if they comport with our country's evolving values, and to check state powers by calling for reforms when appropriate. Though execution methods have changed over time, the importance of protecting the public's right to access information about the death penalty has not. By allowing states to shroud irreversible and momentous state actions, like executions, in secrecy, we violate core values found in the First Amendment and risk eroding the public's faith in the judicial system as a whole.

Society, the courts, and condemned prisoners should have assurances that execution procedures are humane and constitutional before the procedures are implemented. For this surety to happen, there must be transparency. Core constitutional values including due process, free speech and press, and freedom from cruel and unusual punishment require that states that wish to conduct executions do so in a transparent manner.

B. Public Policy Concerns

As a fundamental matter, the ABA has consistently and frequently taken the position that a good and democratic government requires transparency, and carrying out death sentences—which is one of the government's greatest and most extraordinary powers—is no exception.⁵² Governmental secrecy can undermine public confidence in the justice system, leaving citizens to view that these governmental acts are being done in violation of one of our system's principles that “access to information concerning the conduct of the people's business is a fundamental and necessary right of every person.”⁵³ Compliance with state administrative rulemaking requirements would allow for public knowledge of the proposed protocol, including the evidence and reasoning behind it. Exemption from the law prevents such fundamental public oversight.⁵⁴ Likewise, exemption from public records act requests (or refusal to comply with them) prevents the media from obtaining relevant information and presenting it to the public.

⁵¹ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 154-55 (2002).

⁵² For example, in 1974, the ABA House of Delegates passed a Resolution supporting, in principle, the adoption of legislation designed to improve the Freedom of Information Act to “protect all interests yet place emphasis on the fullest responsible public disclosure and maximum public access.” 1974 REPS. OF THE A.B.A. 99, at 583. *See also*, ABA House of Delegates Resolution 107D (Feb. 2006) (calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient...”); ABA House of Delegates Resolution 304 (Aug. 1995) (encouraging the Food and Agriculture Organization of the United Nations to “restructure itself, streamline its operations, and strengthen its transparency and accountability”); and ABA House of Delegates Resolution 109B (Feb. 1993) (supporting the “governments of Canada, Mexico and the United States to establish, through the North American Free Trade Agreement (NAFTA) principles, rules, procedures, and institutions for the conduct of trade and other economic relations among the participating countries which are designed to provide transparency, predictability, fairness and due process.”).

⁵³ *See, e.g.*, CAL. GOV'T CODE § 6250 (West 2014).

⁵⁴ The Uniform Law Commission, which publishes the Revised Model State Administrative Procedure Act, notes that the purposes of the act include: “ensur[ing] fairness in administrative proceedings, increas[ing] public access to the law administered by agencies.” MODEL STATE ADMIN. PROCEDURE ACT, Revised Model Summary, <http://www.uniformlaws.org/ActSummary.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model>.

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Moreover, procedures that are created in secrecy and maintained without transparency are far more likely to be ill-conceived and poorly or inconsistently administered. When execution protocols are promulgated without public notice, opportunity for comment, or a public hearing, there is no mechanism for citizen and expert engagement in the creation the policies, foreclosing the possibility of valuable perspectives and information from external, non-governmental sources. Finally, without meaningful public process in formulating these execution protocols, no record is created that would allow a court to evaluate the diligence and deliberation that went into creation of the execution protocol.

C. Balancing States' Justifications for Secrecy

Some states have indicated that their increasing secrecy is necessary in order to prevent lethal injection drug suppliers from becoming the targets of public backlash. However, fear of criticism and outcry does not justify hiding critical information about executions from the public. The public's view of drugmakers' participation in executions—whether it be a detriment or even a boon to a business's reputation and bottom line—is part and parcel of the American economic system. It is difficult to imagine other scenarios in which a business's concerns about the public's response to their activities would lead U.S. elected officials to conceal that business's identity from the public.

Proponents of secrecy have also argued that manufacturers need to be protected from harassment and threats to their personal safety, presumably by opponents of the death penalty. However, such claims have not been verified in any state seeking to shield information concerning execution drug suppliers from the public, either through prosecution, litigation, or other publically available evidence.⁵⁵ If credible evidence of such threats does come to light, there are civil and criminal remedies available. Furthermore, courts are well-suited to craft narrowly-tailored remedies that protect names and identifying information from entering the public record while still allowing prisoners to bring meaningful challenges to execution protocols.

IV. Conclusion

For the reasons discussed in this Report and because of the ABA's commitment to meaningful due process and fair administration of the death penalty, this Recommendation calls upon each jurisdiction that imposes capital punishment to ensure that it has execution protocols that are subject to public review and commentary, and include all major details regarding the procedures to be followed, the qualifications of the execution team members, and the drugs to be used. Without this information, the analysis called for by the U.S. Supreme Court in *Baze* to determine whether an execution protocol poses a substantial risk that inmates will face severe and needless suffering, cannot be done.

Additionally, these principles require the ABA to support access by media representatives and other citizen witnesses to view the entirety of an execution process while it is in progress and

⁵⁵ See Nomaan Merchant & Bailey Elise McBride, *Scant Evidence of Threats to Execution Drugmakers*, ASSOCIATED PRESS, Apr. 3, 2014, available at <http://bigstory.ap.org/article/scant-evidence-threats-execution-drugmakers>.

have access to the contemporaneous records created to document an execution. Only when executions in every state provide witnesses full access to the entire procedure will the public have independent information about the manner in which states are actually carrying out executions. Finally, to ensure our ability to study and prevent other sentinel events, there should be an immediate, thorough, and independent review anytime there is prolonged, botched, or otherwise flawed execution.

These important indicia of transparency will bolster our collective confidence in our justice system's fairness, accuracy, and impartiality and will better ensure that there is meaningful due process available to individuals facing the death penalty in this country. Society's interest in the fair administration of the death penalty is significant—and far outweighs any jurisdiction's asserted governmental interest in secrecy regarding their execution drugs and procedures.

Respectfully submitted,
Virginia E. Sloan, Chair
Death Penalty Due Process Review Project
February 2015

Robert L. Rothman, Chair
Death Penalty Representation Project
February 2015

Mark I. Schickman, Chair
Section of Individual Rights and Responsibilities
February 2015

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GENERAL INFORMATION FORM

Submitting Entity: Death Penalty Due Process Review Project, with Co-sponsors: Death Penalty Representation Project, Section of Individual Rights and Responsibilities

Submitted By: Virginia Sloan, Chair, Steering Committee, Death Penalty Due Process Review Project; Robert L. Rothman, Chair, Steering Committee, Death Penalty Representation Project; Mark I. Schickman, Chair, Section of Individual Rights and Responsibilities

1. Summary of Resolution(s).

This resolution seeks to ensure that all death penalty jurisdictions' lethal injection procedures fully comport with the ABA's longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. Because proper evaluations of the death penalty can only occur when execution processes are transparent, this resolution calls on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. Approval by Submitting Entity.

Yes, the Steering Committee of the Death Penalty Due Process Review Project and the Steering Committee of the Death Penalty Representation Project have each approved the Recommendation, on November 18, 2014 and November 19, 2014, respectively. The Council of the Section of Individual Rights and Responsibilities approved the Recommendation on November 8, 2014 at the Section's Fall Meeting in Snowbird, Utah.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The American Bar Association has no existing policies that pertain to execution policies and procedures. However, this resolution complements current ABA policy that seeks to protect the constitutional rights of persons facing possible death sentences, including the 1997 ABA Policy Supporting a Temporary Halt on Executions in the United States and the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A. The report is not late filed, but the Recommendation should be considered at the 2015 Mid-Year meeting so that the ABA is able to engage in the ongoing policy discussions on these issues, respond to legislation to be introduced in 2015, and participate as *amicus curiae*, if a case reaches the U.S. Supreme Court this year with relevant claims.

6. Status of Legislation.

There is no relevant legislation pending in Congress. However, several states have passed laws limiting access to information about lethal injection protocols in the past few years, including Arizona, Georgia, Missouri, Oklahoma, South Dakota, and Tennessee. Additionally, legislatures in other death penalty states like Ohio and Alabama will likely be considering new lethal injection secrecy laws in their 2015 sessions.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, the sponsors will use that approval to provide information to policymakers and other stakeholders about the need for transparency in lethal injection protocols. The policy will support the filing of amicus briefs in cases that present issues of transparency in execution procedures. The sponsors will also use the policy to consult on issues related to lethal injection transparency when called upon to do so by judges, lawyers, government entities, and bar associations.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

By copy of this form, the Resolution will be referred to the following ABA entities that may have an interest in the subject matter:

Criminal Justice Section
 Government and Public Sector Lawyers Division
 Section of International Law
 Section of Litigation
 Section of State and Local Government Law
 Tort Trial and Insurance Practice Section

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Judicial Division
Law Student Division
Solo, Small Firm and General Practice Division
Senior Lawyers Division
Young Lawyers Division
Center for Racial & Ethnic Diversity
Standing Committee on Legal Aid and Indigent Defense
Committee on Bioethics and the Law

11. Contact Name and Address Information (prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution seeks to ensure that states' lethal injection procedures fully comport with the ABA's longstanding position that the death penalty be administered only when performed in accordance with constitutional principles. The resolution aims to accomplish this goal by calling on jurisdictions to make detailed information available to the public about lethal injection drug protocols and execution procedures, to protect media and witness rights to view the entirety of the execution process, to conduct and make publicly available contemporaneous records of the minute-to-minute events of executions, and to provide for independent investigations of all flawed or troubled executions.

2. Summary of the Issue that the Resolution Addresses

In 2011, the sole U.S.-based manufacturer of sodium thiopental, a key component in lethal injection protocols across the country, ceased producing the drug. Since that time, death penalty states have been experimenting with new and untested lethal injection drug combinations and dosages. The results of this experimentation have been troubling. In recent years there has been a marked increase in the number of botched executions, and states' lethal injection procedures have been questioned by death row prisoners, experts, advocates, and the public. Death penalty states responded to this scrutiny by implementing measures that undermine important constitutional protections. Many states have enacted secrecy laws that prohibit disclosure of information about the drugs used in lethal injection protocols, including the identity of the drug manufacturers, and the types, dosages, and expiration dates of the drugs. These secrecy laws prevent prisoners from obtaining the information necessary to determine if the drugs will cause death in a humane manner that comports with Eighth Amendment standards. Secrecy laws also violate prisoners' due process rights and First Amendment rights by withholding information essential to a constitutional claim. In addition to enacting secrecy laws, states are moving toward only allowing witnesses and the media to view certain parts of the execution process, rather than the whole procedure. Like the secrecy laws, these measures pose a significant threat to fundamental First Amendment freedoms.

3. Please Explain How the Proposed Policy Position Will Address the Issue

States' secrecy laws and limitations on information about execution protocols and access to viewing execution procedures create a grave risk that executions will be carried out in a manner that fails to comport with important U.S. constitutional and public policy principles. Condemned prisoners need access to the types of information detailed in the resolution in order to challenge the constitutionality of the procedures in state and federal court. The public needs this information so that it can properly evaluate death penalty procedures and decide whether or not they comport with current standards of decency. This resolution will encourage all death penalty jurisdictions to provide the type of information about execution protocols and drugs that is essential for our society and legal system to be able to evaluate death penalty cases and ensure that they are administered fairly and impartially, in accordance with due process, and not in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

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4. Summary of Minority Views

There has been no opposition raised or minority views expressed within the American Bar Association to this Recommendation. However, externally, proponents of lethal injection drug secrecy laws have asserted the contentions that state officials want to provide confidentiality for drug suppliers in order to protect those suppliers from purported threats or harassment and to prevent anti-death penalty advocates from pressuring them to stop selling the drugs.