

I want to thank the Bar Association of Metropolitan St. Louis for the invitation to speak today.

No exercise of state power is more daunting or irrevocable than the carrying out of a duly imposed death sentence. Simply put, the Missouri Department of Corrections is empowered to kill. It does so as an extension of our collective will. The method and transparency by which it conducts that act should, therefore, concern all of us deeply.

Since I took office in 2009, I've served as legal officer in 8 executions. Today, I would like to talk about the long history of the death penalty in our state, and about the concern I have regarding the expanding secrecy that surrounds the current method for carrying out the death penalty: lethal injection.

Introduction of the Problem

Lethal injection relies upon an uneasy cooperation between medical professionals who assist in the executions, pharmaceutical companies that provide the chemicals, and the State that is ultimately responsible for coordination of executions and on whose legal authority the process is carried out.

In recent years, this cooperative arrangement has become so strained that continued use of lethal injection as the preferred execution method is currently being reconsidered in several states.

One challenge to the lethal injection process has been known for many years; that is, the vast majority of medical professionals refuse to participate in any aspect of the procedure, believing it conflicts with their Hippocratic Oath. For the very few medical professionals willing to participate, the state has long strived to keep secret their identities to protect them from reprisal, both personal and professional. Anonymity of the executioner has been an accepted element of this process since the days of the hooded hangman.

A second challenge to the lethal injection process is new. Pharmaceutical companies, averse to public controversy, are increasingly unwilling to allow their products to be used in the procedure. The resulting difficulty in obtaining lethal drugs has caused states to change the chemicals used in executions, to seek out new sources to obtain these chemicals, and to enlarge the boundaries of state secrecy to protect merchants in the chemical supply chain.

Despite these strains, capital punishment remains the law of Missouri. While the method of execution has changed over time in our state, capital punishment itself has been an element of Missouri's criminal justice system throughout our history.

History - Hanging

From 1821 to 1937, our first 116 years, Missouri had no centralized system for conducting executions, and condemned offenders were hanged by local sheriffs in the counties where their crimes occurred. Records from this period are incomplete, but at least 245 criminals faced local gallows, many hanged in their courthouse squares.

The last of these hangings occurred in Galena, Missouri, near Branson, on May 21, 1937, a day recent enough in our state's history that older Missourians can still recall it. Stone County Sheriff Isaiah Coin sent out 400 handwritten invitations to the execution, and more than 1,200 spectators showed up that day, including many young children.

Disgusted by what he described as a "Roman holiday for the morbid and curious," State Senator Paul Jones of Kennett called for an end to local executions in Missouri.

History – Gas Chamber

In September 1937, Governor Lloyd Stark signed legislation mandating that state authorities, not local sheriffs, carry out future executions in a newly constructed, two-seated gas chamber located inside the Missouri State Penitentiary, known as “The Walls,” in Jefferson City. Between 1938 and 1965, corrections officials administered hydrogen cyanide gas to 38 men and one woman.

The United States Supreme Court halted executions nationwide in 1972 in *Furman v. Georgia*, citing a lack of uniform standards for imposing the death penalty and noting the disparity between white and black offenders sentenced to death for similar crimes. In response, Missouri enacted new requirements intended to reduce the risk of arbitrariness in the imposition of capital punishment.

Satisfied with these changes in Missouri and across the country, the U.S. Supreme Court reinstated the death penalty in 1976 in *Gregg v. Georgia*.

History – Lethal Injection

As Missouri prepared to move forward with the death penalty in the wake of *Gregg*, some policymakers raised concerns about the safety and humanity of death by lethal gas. Witnesses to such executions described prolonged vomiting, gasping, and choking by the condemned, whose body—saturated with hydrogen cyanide gas—posed a danger to corrections workers and undertakers even after the offender’s death.

In response, the General Assembly amended Missouri's capital murder law in 1988 to permit execution by either lethal gas or lethal injection, the latter of which was then gaining acceptance throughout the United States.

In 1989, Tiny Mercer became the first Missouri inmate executed by lethal injection.

The three drug protocol used to kill Mr. Mercer was the same procedure used in the succeeding 67 executions carried out in Missouri between 1989 and 2011: sodium thiopental is first injected to render a defendant unconscious; pancromium bromide is then administered to stop a defendant's respiratory system; and finally potassium chloride is used to arrest a defendant's heart.

Jay Nixon

It is worth noting that in the 194 years since statehood, the burden of enforcing Missouri's death penalty has fallen on no man more singularly than Jay Nixon. For sixteen years as the state's legal officer and six more as its clemency officer, Governor Nixon has been directly involved in 65 executions. He has overseen more than half of all executions in Missouri since the state took responsibility for administering the death penalty from county sheriffs in 1937. Such a burden on a single individual is without precedent in Missouri's history, and is nearly unprecedented nationally.

Challenges to Lethal Injection Process

Across the country, lethal injection has become the dominant form of capital punishment. It is the only method sanctioned in 21 of the 35 states that permit capital punishment, and in the 14 states, including Missouri, where more than one method is authorized, lethal injection is used nearly exclusively.

Nonetheless, lethal injection now faces serious practical impediments, the result of market forces beyond the state's control. The Department of Corrections used the last of its supply of sodium thiopental in 2011 in the execution of Martin Link. Obtaining the lethal drug that was part of Missouri's three-drug protocol for 35 years has now become impossible, as the U.S. drug company, Hospira, has stopped production.

Unable to obtain sodium thiopental, Missouri looked for alternative drugs. First, Missouri switched to the common operating room anesthetic, Propofol. Within weeks, however, German drug manufacturer, Fresenius Kabi, maker of Propofol, threatened to stop selling the nation's leading anesthetic to anyone in the United States—including hospitals—if Missouri or any other state used Propofol for executions.

Next, Missouri turned to the barbiturate pentobarbital. But again, its manufacturer, the Danish company Lundbeck, refused to permit sale of its product to any department of corrections for use in executions.

Consequently, Missouri has been forced to obtain pentobarbital, or an identically compounded substitute, through sources that are currently concealed from the public and from defense counsel, as well. Missouri's sources have insisted, as a condition of sale, their identities be withheld for fear of litigation or reprisal.

Since last fall, when Missouri began conducting executions using pentobarbital or its equivalent, attorneys for the condemned and members of the press have worked relentlessly to discover the sources of the chemical. The inmates argue they have a constitutional right to know who is producing the lethal chemical and to evaluate the sources for themselves. Journalists, meanwhile, have argued that the public has a first amendment right to information regarding a matter of such importance as the death penalty. There is much on this topic yet to be litigated. Thus far, however, the courts have upheld Missouri's right to keep the identity of its chemical suppliers secret.

Bucklew and the State Secrets Doctrine

The State of Missouri has now carried out six executions since November of last year, and the Missouri Supreme Court is setting one execution per month. Today, there are 42 inmates on death row in Missouri, 14 of whom have exhausted their appeals.

Oklahoma's 40-minute execution of Clayton Lockett last month reignited the debate over lethal injection, nationally. Last week, the United States Supreme Court stayed the Missouri execution of Russell Bucklew so the 8th Circuit can consider Mr. Bucklew's argument that his own unique medical condition raises a likelihood that he will suffer extraordinary pain as a consequence of his lethal injection. In essence, Mr. Bucklew argues he is too sick to be executed.

Mr. Bucklew's case tests the contours of permissible secrecy around Missouri's execution process, and asks whether Mr. Bucklew, or any defendant, has a right to know who makes and delivers the chemicals used in his execution.

Conclusion

However the Bucklew case resolves, it is clear that the perimeter of secrecy around the lethal injection process in Missouri has expanded. Before, the hangman's hood covered only those present and participating in an execution. Now, it covers merchants who sell the state its lethal drugs, wherever and whenever those transactions may occur.

While this creeping secrecy is legal, it may not be prudent, and it merits the attention of state policymakers.

For Missouri to maintain lethal injection as its preferred method of execution, it is my belief the legislature should remove market-driven participants and pressures from the system at the earliest opportunity. The legislature should appropriate funds to establish a state-operated, DEA-licensed, laboratory to produce the execution chemicals in our state. As a matter of policy, Missouri should not be reliant on merchants whose identities must be shielded from public view or who can exercise unacceptable leverage over this profound state act.

I am a supporter of the death penalty, but I'm also charged with maintaining sensible and transparent government processes. Eliminating outside business interests from Missouri's execution protocol would improve the high level of public transparency that is demanded in the exercise of this extraordinary state power.

Thank you for the opportunity to speak to you today on this important topic.