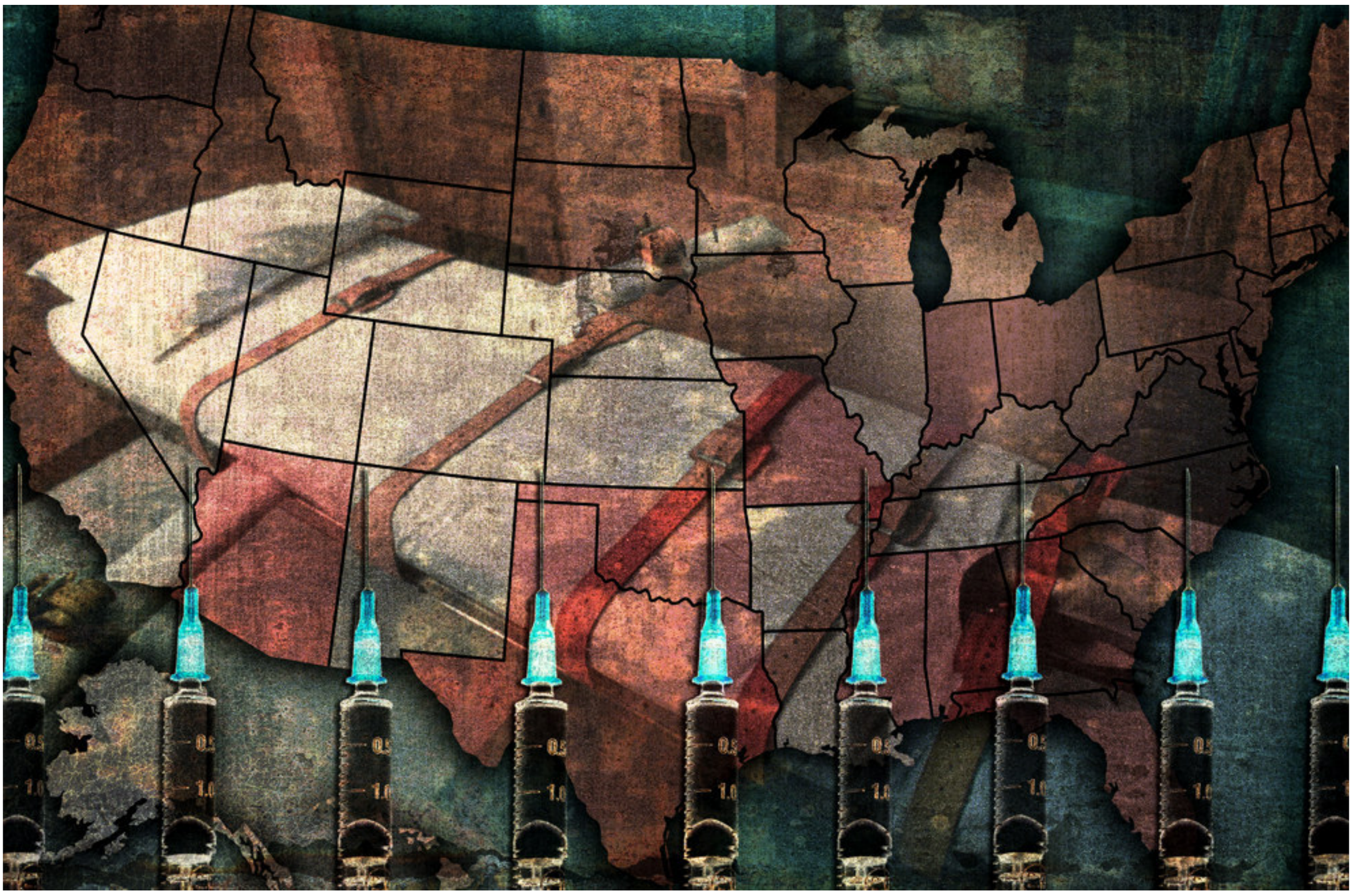
What 13 States Aren't Telling You About How They Execute Prisoners

Protected by secrecy laws, some states with the most active death chambers are refusing to disclose important elements of how inmates are killed by lethal injection.

posted on Jun. 16, 2014, at 11:36 p.m.

Tasneem Nashrulla
BuzzFeed News Reporter



Justine Zwiebel/BuzzFeed

Ever since Oklahoma botched the execution of an inmate, states' execution protocols and the secrecy surrounding lethal injection drugs have been front and center, with lawyers and advocates raising questions about the way states are killing convicts.

AP Photo/Ted S. Warren

On Tuesday, June 17, Marcus Wellons, a Georgia inmate, could become the first person to be executed since the botched Oklahoma execution in April. Wellons, who raped and murdered a 15-year-old girl, was denied clemency on Monday, as his lawyers continued to fight the method of his execution in court.

Over the past few years, states with the death penalty have faced shortages of the drugs used in lethal injections after several drugmakers, including those in Europe, have refused to sell their drugs for the purpose of executions.

States have resorted to using drugs manufactured by compounding pharmacies, which are not heavily regulated by the Food and Drug Administration, raising concerns about the safety and efficacy of the drugs. To cope with the shortage, some states have also changed their execution protocols, trying new drugs or untested combinations of lethal injection drugs.

Prison officials is many states have refused to disclose information regarding the sources, purity and in some cases, contents of the execution drugs. Some states with the most active death chambers — including Florida, Georgia, and Missouri — have adopted secrecy laws to protect the identities of the compounding pharmacies, citing concerns of threats and intimidation by anti-death penalty advocates.

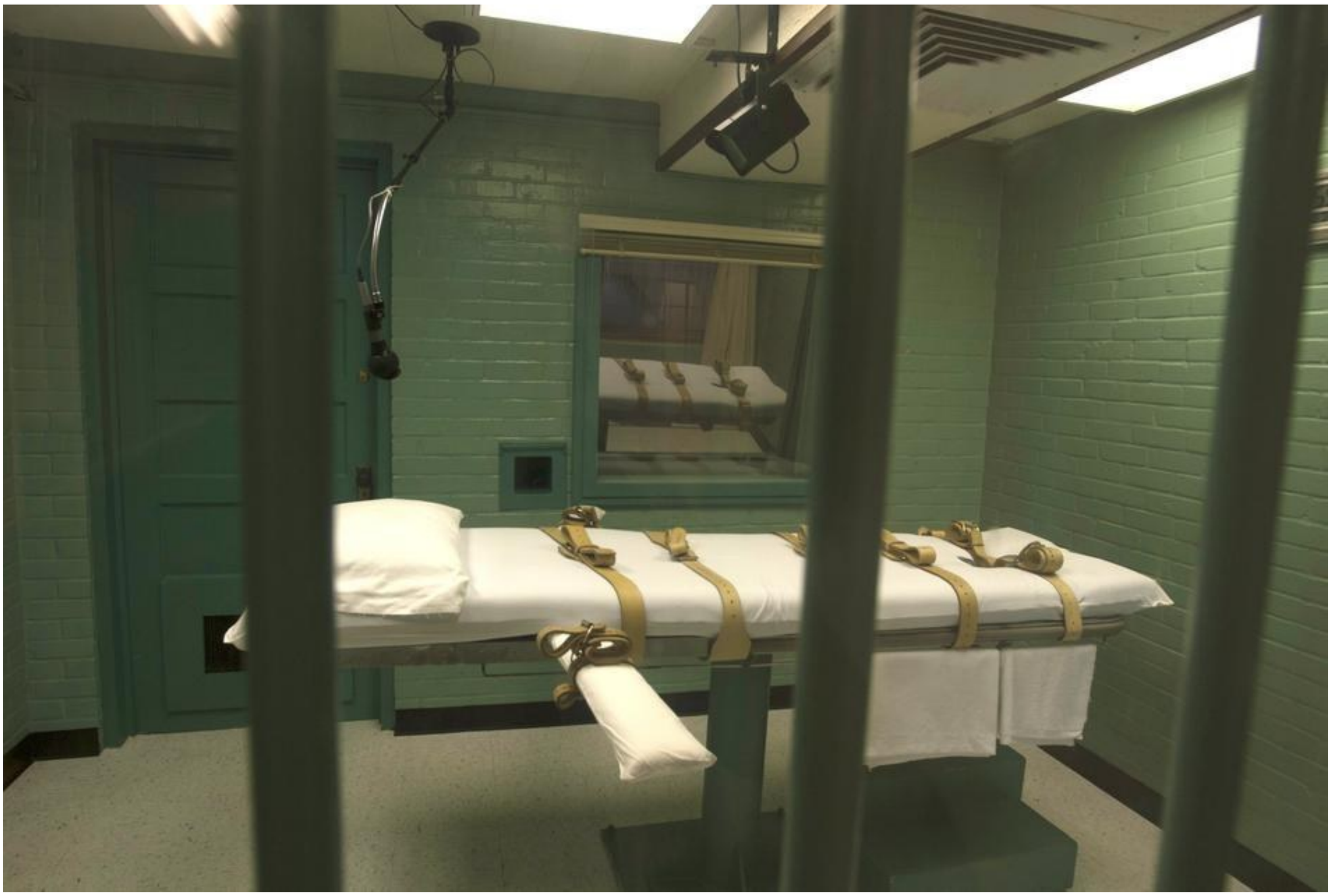
Changes to execution protocols, coupled with confidentiality laws, have spurred many lawsuits by death row inmates who argue that the new methods do not ensure a humane death and are therefore unconstitutional.

The rulings in such cases have been inconsistent. Some judges have delayed executions, calling for closer scrutiny of drug secrecy policies. Others have brushed aside such concerns, citing them as “speculation” or stating that secrecy is vital to safeguard the business interests of pharmacies and to ensure supply of the drugs.

Attorneys for death row inmates and critics of the death penalty say it is impossible for the courts to determine whether executions are humane and constitutional if the states keep information about the source and purity of the drugs secret from lawyers, judges, and the public.

The U.S. Supreme Court has yet to halt an execution based on a state’s refusal to reveal its drug supplier.

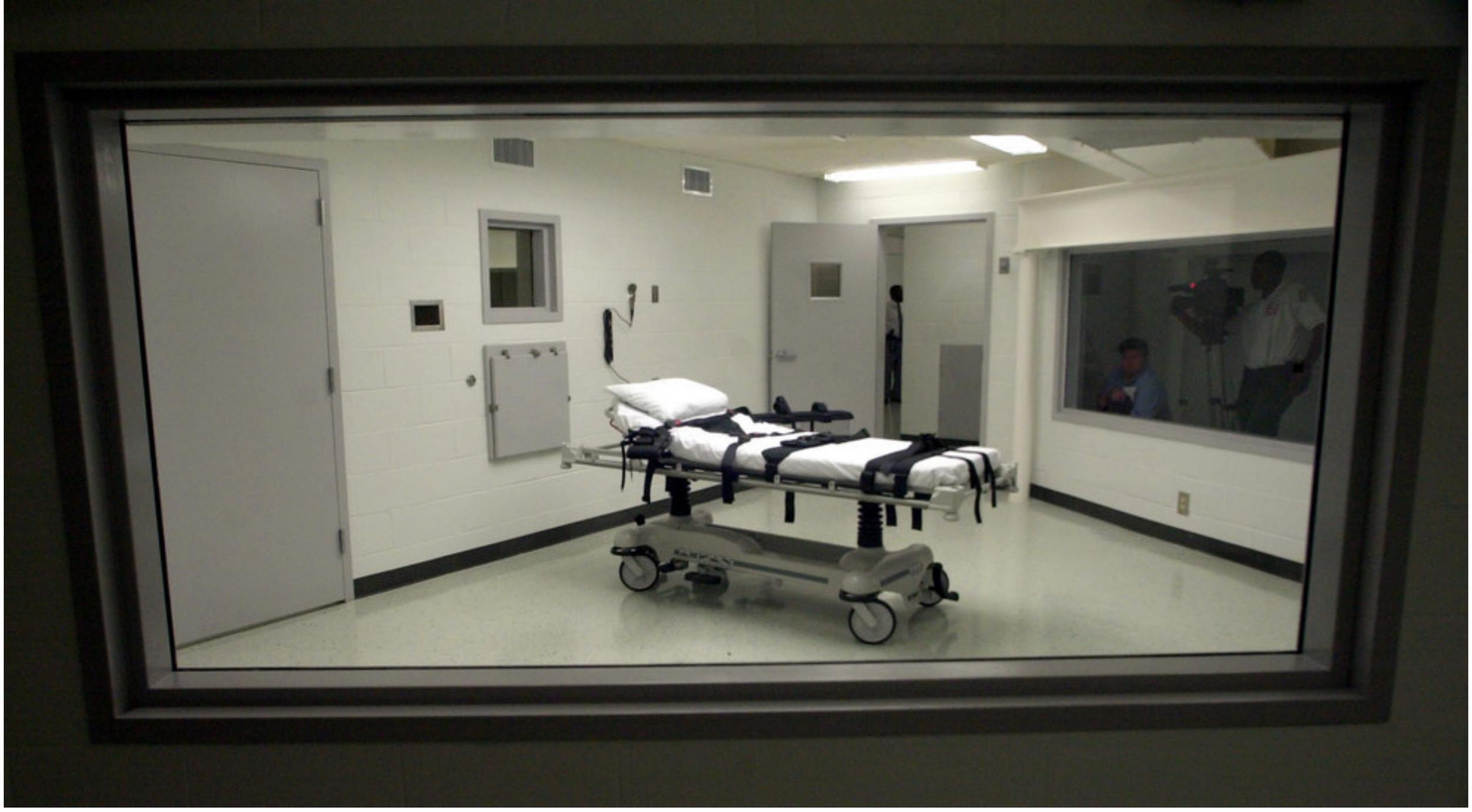
These 13 states have carried out the most executions since 2005. This is how secretive they are.



REUTERS/Jenevieve Robbins/Texas Dept of Criminal Justice/Handout

The death chamber at the federal penitentiary in Huntsville, Texas, in this Sept. 29, 2010, handout.

1. Alabama



Dave Martin / AP

No. of executions since 2005: 26

Execution procedure: Lethal injection using a three-drug protocol with pentobarbital as the first drug, followed by pancuronium bromide and potassium chloride.

Secrecy law: In April, the state legislature did not approve a bill that would have kept the identities of persons or entities that manufacture, compound, prescribe, dispense, supply, or administer death penalty drugs confidential except if a judge ordered a release. It would have also shielded the identities of people who participated in the execution.

Challenges to secrecy: A month before the secrecy bill was killed, the Associated Press along with two local newspapers filed public record requests regarding execution drug purchases in Alabama over the past five years. However, the state's prison commissioner refused to disclose the suppliers of the execution drugs, citing a confidentiality order from a 2011 lawsuit filed by a death row inmate who challenged the state's lethal injection procedure as potentially cruel and unusual punishment. The confidentiality order, signed by a federal judge, included an agreement by both parties of the lawsuit not to disclose the identities of people or entities involved in current or past executions of any Alabama death row inmates.

What now: Alabama has put its executions on hold, as it has run out of pentobarbital, the first drug in the three-drug protocol used to render the inmate unconscious. Without the drug secrecy bill, state representatives argued that it would be impossible for the state to buy drugs from suppliers like compounding pharmacies, who they say fear harassment and lawsuits by death penalty opponents. This is the major stated reason most death penalty states facing drug shortages are enforcing or pushing for drug secrecy laws.

2. Arizona

Mike Fiala/AFP/File

No. of executions since 2005: 14

Execution procedure: In March, the Arizona Department of Corrections announced that it will use a new two-drug cocktail of a Valium-like drug, midazolam, with a morphine derivative, hydromorphone, in coming executions.

Secrecy Law: The state's execution procedure manual clearly states that according to Arizona's confidentiality law, the anonymity of any person who participates in or performs any ancillary function(s) in the execution, **including the source of the execution chemicals**, and any information contained in records that would identify those persons are to remain confidential and are not subject to disclosure.

Challenges to secrecy: The Federal Defender's Office in Phoenix representing two death row inmates asked the DOC to reveal the sources of both drugs to be used in upcoming executions. The concern they state is that midazolam was used in the botched April execution in Oklahoma where the inmate died of a heart attack, and the two-drug cocktail was used in a problematic Ohio execution in January where the inmate gasped, convulsed, and took more than 20 minutes to die.

An assistant attorney general told the *Arizona Republic* that the state will not disclose the information based on the secrecy law. Further, Arizona argued that the Oklahoma debacle was not due to the drug but due to a ruptured vein. The state's attorney general said that if they face a similar problem with the inmates' veins, they use the femoral vein in the thigh. While Arizona has frequently opted for this procedure, it is said to be painful and dangerous if done by an unskilled physician.

What now: Despite the controversy surrounding the two-drug cocktail, the Arizona Supreme Court set a July 23 execution date for death row inmate Joseph Wood, who murdered his girlfriend and her father in 1989.

3. Florida

Chris Livingston / Getty Images

No. of executions since 2005: 27

Execution procedure: Florida became the first state to use the sedative midazolam in a three-drug protocol, after the state's supply of pentobarbital was exhausted due to boycotts of the barbiturate by foreign drug manufactures.

Secrecy Law: Florida's statute deems confidential any information that identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

Challenges to secrecy: Despite assurances by Florida's Department of Corrections that its new lethal injection protocol would ensure a "humane and dignified death," the department faced scrutiny about vetting the new protocol after William Happ, the first death row prisoner to be executed with midazolam last year, reportedly remained conscious longer and made more body movements than others executed by the old formula. A department spokeswomen declined to give specifics about how the protocol was designed saying, "Those decisions are exempt from public record because they could impact the safety and security of inmates and officers who are involved in that process." In February, Paul Howell was the fifth person in Florida to be executed by the new procedure after he unsuccessfully challenged the state's use of midazolam, saying the drug would not work properly because of his medical conditions.

What now: On May 5, three days after Oklahoma's botched execution, Gov. Rick Scott signed a death warrant for inmate John Henry, who is scheduled to be executed on June 18. Despite a bipartisan death penalty committee's recommendation to adopt a one-drug protocol, Scott is not reconsidering Florida's three-drug procedure.

4. Georgia

Georgia Department of Corrections / Getty Images

No. of executions since 2005: 17

Execution procedure: In 2013, Georgia was forced to switch from its three-drug protocol to a single drug, pentobarbital, after the U.S. manufacturer Hospira stopped making the requisite anesthetic. However, the supply of pentobarbital was also hit by boycotts and Georgia turned to compounding pharmacies to produce the drug.

Secrecy Law: In 2013, Gov. Nathan Deal signed into law a bill that classified all information identifying people or entities who participate in executions — and who manufacture, supply, compound, and prescribe drugs used in executions — as a "confidential state secret" that cannot be disclosed even under judicial process.

Challenges to secrecy: In May, the Georgia Supreme Court upheld the secrecy law, saying it made the execution process "more timely and orderly." The court also voided a stay of execution for Warren Hill, a death row inmate who argued that he had a constitutional right to know which compounding pharmacy was making the pentobarbital that will be used to kill him. He also expressed concerns that, if tainted, the drugs could cause severe medical side effects. However, in the opinion, the justices wrote: "Such a side effect obviously would be shockingly undesirable in the practice of medicine, but it is certainly not a worry in an execution." The dissenting justice warned that the court's decision could lead to the "macabre results" of Oklahoma's botched execution.

What now: Hill's lawyers said they would appeal the decision to the U.S. Supreme Court if the Georgia court refused to reconsider. On June 17 at 7 p.m., the state is set to execute Marcus Wellons, who raped and murdered a 15-year-old girl in 1989. The State Board of Pardons and Paroles on Monday denied clemency to Wellons. His lawyers have filed a lawsuit in Atlanta's federal court

saying that the state is violating Wellons' civil rights by not disclosing the supplier and nature of the drugs to be used in his execution.

5. Indiana

youtube.com

No. of executions since 2005: 9

Execution procedure: Lethal injection using a three-drug protocol with Brevital as the first drug, followed by pancuronium bromide and potassium chloride.

Secrecy Law: There are no laws protecting the identities of drug suppliers in Indiana.

Challenges to secrecy: The state has not executed an inmate since December 2009 due to lawsuits working their way through the courts. Death row inmates have challenged the state on various grounds, including claims that the three-drug cocktail and the execution protocol itself are unconstitutional, as well as on grounds of an inmate's intellectual disability. Now, the state is facing opposition for turning to Brevital — a potent anesthetic — as the first drug to compensate for the shortage of sodium thiopental. Brevital has never been used in an execution by any state and its use was successfully challenged in Oklahoma due to the contention that it might lead to a "torturous" death.

The maker of Brevital, Par Pharmaceutical, denounced Indiana's intention to use a drug "intended to be used as an anesthetic in life-sustaining procedures" for executions. The company said using Brevital for executing people was "inconsistent with its medical indications" as outlined by the FDA. Par said it would amend its distribution agreements to prevent the drug from being sold to the state's Department of Corrections, which reportedly has enough to carry out an execution.

What now: The DOC, however, is confident that the powerful anesthetic will work well in an execution. A DOC spokesman told the Associated Press, "Brevital, the way we intend to use it, will do exactly what its intended purpose is, which is to induce a deep, painless, unconsciousness." Attorneys for death row inmates will likely challenge the use of Brevital in executions. As of now, there is

one execution scheduled for 2014, which is likely to be stayed.

6. Mississippi

mdoc.state.ms.us

No. of executions since 2005: 15

Execution procedure: Lethal injection using a three-drug protocol with pentobarbital as the first drug.

Secrecy Law: Mississippi statutes are silent on confidentiality regarding executions. However, in response to a March lawsuit filed by a death row inmate who said the state was providing no information on its execution drugs, the Department of Corrections asked a state judge to rule that information on the drugs and suppliers is confidential and exempt from the state's Public Records Act. The lawsuit was soon dropped after the department released all the information except the drug maker's identity. The department denied that withholding the identity violated the Public Records Act. However, an attorney from the MacArthur Justice Center, a public interest law firm representing two death row inmates, said that they had determined the identity of the compounding pharmacy and added that "[w]e have no assurance that this compounded pentobarbital is sufficiently potent and effective."

What now: Mississippi has not conducted an execution since 2012. As of now, there are no executions scheduled for 2014 and 2015.

7. Missouri

AP Photo/James A. Finley, File

No. of executions since 2005: 13

Execution procedure: In 2013, Missouri's Department of Corrections adopted a new one-drug protocol using pentobarbital because of concerns about the use of propofol.

Secrecy Law: Last year the DOC expanded its definition of "execution team" to include individuals or entities who prepare, prescribe, compound and supply lethal drugs, specifically the compounding pharmacy that would provide the pentobarbital under the new protocol. Under Missouri's revised statute, the identities of all members of the execution team, as defined by the DOC, are to be kept confidential.

Challenges to secrecy: On May 15, the Associated Press, *The Guardian*, and the state's three largest local papers filed a lawsuit in Missouri's Cole County circuit court asking the state's DOC to disclose where it purchases its execution drugs along with details about the composition and quality of those drugs. The lawsuit argues that, under the First Amendment, the public has a right of access to know the "type, quality and source of drugs" used by the state to execute a person.

In another lawsuit filed by St. Louis Public Radio, the Reporters Committee for Freedom of the Press, and the ACLU of Missouri, Missouri's practices are challenged on the grounds that corrections officials are violating the state's Sunshine Law, which states that meetings, records, votes, actions, and deliberations of public governmental bodies are to be open to the public.

On May 21, the U.S. Supreme Court stopped the execution of inmate Russell Bucklew after his lawyers argued that he could

potentially suffer an excruciating execution under the current protocol due to his medical condition.

What now: Missouri's attorney general, Chris Koster, recently expressed his concerns about the "creeping secrecy" surrounding executions. In a speech on May 29, he suggested that the state should make its own lethal drugs to deal with both the drug shortage and the secrecy-ridden protocol. He said Missouri should "not be reliant on merchants whose identities must be shielded from public view."

A day after Koster's remarks, the state Supreme Court set the execution date for inmate John Middleton, who is scheduled to die on July 16.

8. North Carolina

AP Photo / Gerry Broome

No. of executions since 2005: 9

Execution procedure: In October 2013, the state switched from a lawsuit-ridden three-drug protocol to a one-drug protocol using pentobarbital.

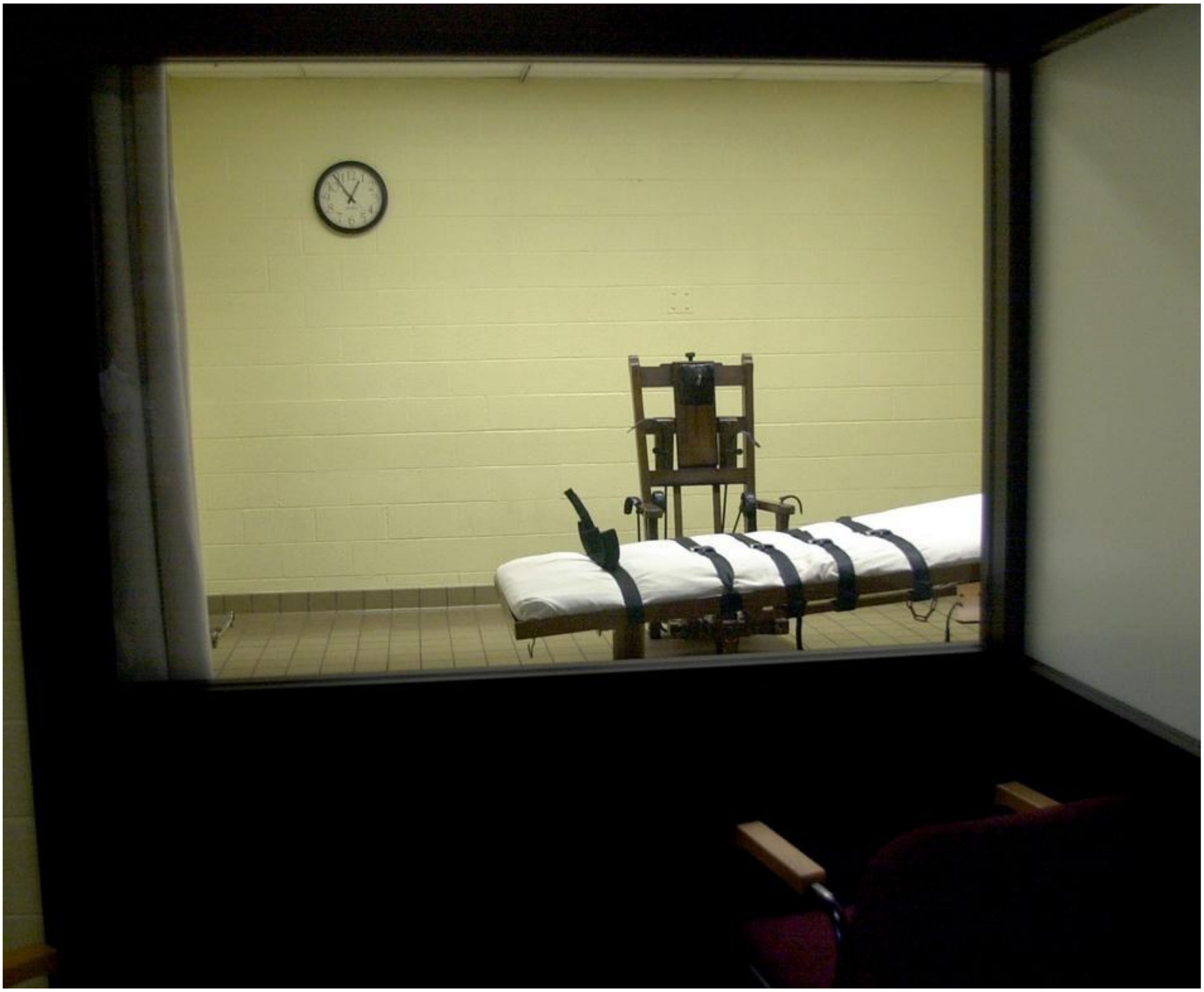
Secrecy Law: The execution protocol calls for confidentiality of execution members, according to a state statute. However, there are no laws governing the sources of lethal injection drugs used in executions.

Challenges to secrecy: The state has temporarily suspended executions since 2006, after a group of death row inmates filed a lawsuit challenging the state's three-drug execution protocol on the grounds that it violated their Eighth Amendment rights by

inflicting cruel and unusual punishment. In 2013, days before a court of appeals was scheduled to hear the prisoners' arguments, the secretary for public safety adopted a new one-drug protocol amid growing national scrutiny of the three-drug cocktail. The General Assembly had rewritten the law so the public safety secretary could do so. In March this year, seven years after the lawsuit was filed, a three-judge state appeals court panel sent the case back to the the trial court in light of the new protocol and changes to the law.

What now: There are concerns about the state's use of pentobarbital, a drug in short supply across the country. Some states have turned to compounding pharmacies to procure the drug, but the secrecy surrounding this process has been legally challenged. The N.C. Department of Public Safety has declined to say whether it has already gotten the drug or from where it will get the drug. Attorneys for death row inmates are likely to challenge the new execution protocol. There are no executions scheduled in 2014 and 2015 as of now.

9. Ohio



Mike Simons / Getty Images

No. of executions since 2005: 38

Execution procedure: Ohio adopted a new two-drug protocol, midazolam and hyrdromorphone, on Jan. 16.

Secrecy Law: Ohio does not have a confidentiality statute with regard to executions. Compared to other active death penalty states, Ohio has been relatively open about the drugs used for executions. Through public record requests filed by the Associated Press early this year, it was revealed that the state was using drugs manufactured by a company that opposes the use of its drugs in capital punishment.

What now: On May 29, a federal judge suspended all lethal injection executions until Aug. 15 after considering the effects of the untested two-drug protocol on Dennis McGuire's prolonged execution in January. According to witnesses, McGuire gasped for breath, audibly choked, and said he could feel his whole body burning. He died after 25 minutes. His family sued the state saying his execution amounted to cruel and unusual punishment. The lawsuit also alleged that the drug maker should have been prohibited from making the drugs available for capital punishment.

Since McGuire's execution, the Department of Corrections said it would continue to use the same drug cocktail but in a larger dosage. This promoted U.S. District Court Judge Gregory L. Frost to temporarily halt two executions scheduled for July and early August to allow time for the state and attorneys of inmates to work out legal issues related to the new procedure.

Two other executions scheduled for later in the year are not impacted by the stay, but Frost left his order open-ended should questions not be resolved by then, the *Columbus Dispatch* reported.

10. Oklahoma

AP Photo, File

No. of executions since 2005: 36

Execution procedure: Due to various drug shortages, the Department of Corrections authorized the use of five different lethal injection protocols in March.

Secrecy Law: Oklahoma's confidentiality statute dictates that the identity of all people involved in the execution process and the people who supply the lethal injection drugs is confidential and not subject to discovery in civil or criminal proceedings.

Challenges to secrecy: In April, the Oklahoma Supreme Court overturned a district court ruling that would have required the state to reveal the source of its execution drugs. Death row inmate Clayton Lockett's botched execution using an untested three-drug protocol in April prompted Oklahoma Gov. Mary Fallin ordered a review of the state's execution process. It also led President Obama to call for a review of death penalty procedures at the federal level. Inmate Charles Warner's execution was granted a stay of execution until November.

What now: Both Lockett and Warner had unsuccessfully challenged the state's secrecy laws. While the state's review will evaluate the current execution protocols and give recommendations for future executions, it is unclear whether it will impact the state's drug secrecy laws. Attorney General E. Scott Pruitt has previously said that the reason for Oklahoma's confidentiality statute "is to protect those who provide lethal injection drugs to the state from threats, coercion and intimidation."

11. South Carolina

youtube.com

No of executions since 2005: 11

Execution procedure: Three-drug protocol using pentobarbital, pancuronium bromide, and potassium chloride.

Secrecy Law: South Carolina's statute (Title 24, Section 24-3-580) prohibits disclosing the identity of any current or former execution team member except in the case of a court order. It does not, however, have a law that protects the identities of pharmacies that provide the execution drugs.

What now: The state has not carried out an execution since 2011 and currently lacks the required lethal injection drugs. A

Department of Corrections spokeswoman told South Carolina Radio Network, “We don’t have any pancuronium bromide or potassium chloride … and we probably won’t be getting it.” The state Supreme Court has not scheduled any executions for 2014 and 2015.

12. Texas

AP Photo/Pat Sullivan, File

No. of executions since 2005: 178

Execution procedure: A single-drug protocol using pentobarbital.

Secrecy Law: There are no state laws protecting the suppliers of lethal injection drugs. Nonetheless, the Department of Corrections has refused to disclose the name of the compounding pharmacy that supplied its latest batch of pentobarbital, citing concerns of threats made against previous suppliers. However, an Associated Press investigation in April revealed there was little evidence to support this claim.

In a May 29 ruling, Texas Attorney General Greg Abbott said the Texas prison system can keep sources of the execution drugs secret, even though he had rejected three similar attempts by the Texas Department of Criminal Justice to protect the identities of suppliers. Abbott citied an assessment by the state's Department of Public Safety, which determined that pharmacies providing lethal drugs could face "a substantial threat of physical harm" if identified publicly.

Challenges to secrecy: Lawyers for Robert James Campbell, who was set to become the first person to be executed since the Oklahoma debacle, unsuccessfully challenged a stay on his execution on the grounds that Texas did not disclose enough information about the source if the drugs to ensure a humane, non-torturous execution. However, Campbell was eventually granted a stay of execution on grounds of his intellectual disability.

What now: Between the prison system's determination to protect its drug suppliers and Abbott's ruling, the state seems unlikely to change course on the issue outside of any change in federal court rulings on the issue. There are five executions scheduled for 2014 in the country's most active death chamber.

13. Virginia

Virginia Department of Corrections via Getty Images

No. of executions since 2005: 16

Execution procedure: Three-drug protocol using midazolam as an alternative first drug.

Secrecy Law: There are no state laws protecting the identities of drug suppliers for executions.

What now: There are concerns about Virginia using the controversial midazolam as an alternative first drug since it was used in the problematic and prolonged execution of an Ohio inmate whose family is suing the state for inflicting cruel and unusual punishment. State documents show that Virginia's Department of Corrections acquired midazolam and other execution drugs last fall. The state has said that it has an drug shortage problem, which prompted a failed attempt in Virginia's legislature to change the law to allow inmates to die in the electric chair if lethal injection is unavailable.

Virginia has the second highest number of executions, behind Texas, since capital punishment was reinstated in 1976. However, no executions have been scheduled so far in 2014 and 2015.

Other death penalty states:

Executions in the remaining states with the death penalty have been put on hold either by the courts or executive order. There is a temporary moratorium on executions in many of these states because of lethal injection challenges or reviews of new executions protocols. In some cases, governors have called for a debate or reconsideration of the death penalty.

While some of these states, such as Tennessee and South Dakota, have laws protecting the sources of lethal injection drugs, others like Louisiana have proposed legislation to keep such information confidential. Some of the remaining states don't have language pertaining to drug secrecy.

Tasneem Nashrulla is a reporter for BuzzFeed News and is based in New York.
Contact Tasneem Nashrulla at tasneem.nashrulla@buzzfeed.com.

Got a confidential tip? Submit it here.

More

Tagged:death penalty, executions, florida, lethal injection, ohio, prisoners, prisons, texas

© 2017 BuzzFeed, Inc