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## A Modest Proposal: The Federal Government Should Use Firing Squads to Execute Federal Death Row Inmates

Stephanie Moran

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# NOTES

## A Modest Proposal: The Federal Government Should Use Firing Squads to Execute Federal Death Row Inmates

STEPHANIE MORAN\*

*The Eighth Amendment prohibits cruel and unusual punishment in the criminal justice system. As the federal government looks to reinstate the death penalty, this Note argues that it should include firing squad as an option for carrying out executions. While firing squads may shock the senses, this Note argues that they are in fact the only way to comport with the requirements of the Eighth Amendment.*

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#### INTRODUCTION

*Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn’t be carrying out executions at all.*<sup>1</sup>

“I feel my whole body burning.”<sup>2</sup> Those were Michael Lee Wilson’s last words after being injected with lethal injection drugs.<sup>3</sup> Wilson was executed on January 9, 2014,<sup>4</sup> for the 1995 murder of a

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<sup>1</sup> *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting), *vacated by* *Ryan v. Wood*, 573 U.S. 976 (2014).

<sup>2</sup> Charlotte Alter, *Oklahoma Convict Who Felt “Body Burning” Executed with Controversial Drug*, TIME (Jan. 10, 2014), <http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/> (quoting Michael Lee Wilson).

<sup>3</sup> *Condemned Man’s Last Words: “I Feel My Whole Body Burning,”* CBS NEWS (Jan. 10, 2014, 12:20 PM), <https://www.cbsnews.com/news/okla-man-says-he-can-feel-body-burning-during-execution/>.

<sup>4</sup> *Execution Database*, DEATH PENALTY INFO CTR., <https://deathpenaltyinfo.org/executions/execution-database?q=Michael%20wilson> (last visited Oct. 20, 2019) (search “Michael Wilson”).

co-worker<sup>5</sup> using a combination of drugs, including pentobarbital<sup>6</sup>—the same drug the federal government plans to use when it resumes executions in December 2019.<sup>7</sup>

On July 25, 2019, Attorney General William Barr scheduled the executions of five federal death row inmates.<sup>8</sup> These executions will be the first use of the federal death penalty since 2003.<sup>9</sup> However, pentobarbital—Attorney General Barr’s drug of choice<sup>10</sup>—has been rendered near impossible to obtain<sup>11</sup> and has resulted in executions by lethal injection going awry.<sup>12</sup> Given the difficulty in obtaining the drug,<sup>13</sup> coupled with the rise in botched executions generally at the state level,<sup>14</sup> the federal government should consider an alternative method of execution.

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<sup>5</sup> Alter, *supra* note 2.

<sup>6</sup> *Id.*

<sup>7</sup> Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [hereinafter Federal Government to Resume Capital Punishment].

<sup>8</sup> *Id.*

<sup>9</sup> Tessa Stuart, *William Barr Orders Executions for 5 Prisoners, First Use of Federal Death Penalty in 16 Years*, ROLLING STONE (July 25, 2019, 1:00 PM), <https://www.rollingstone.com/politics/politics-news/william-barr-orders-executions-first-use-of-federal-death-penalty-in-16-years-862464/>.

<sup>10</sup> Federal Government to Resume Capital Punishment, *supra* note 7.

<sup>11</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015). In 2011, due to drug manufacturers opposing the use of their drugs in executions, pentobarbital became difficult to obtain. *Id.* The few states that have used pentobarbital since 2011, have either paid cash for the drug as to leave no paper trail, or had the drug compounded. See Susie Neilson, *Lethal Injection Drugs’ Efficacy and Availability for Federal Executions*, NPR (July 26, 2019, 7:11 PM), <https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions>; see also Josiah Bates, *Why the Justice Department’s Plan to Use a Single Drug for Lethal Injections Is Controversial*, TIME (July 29, 2019), <https://time.com/5636513/pentobarbital-executions-justice-department/>.

<sup>12</sup> See, e.g., Alter, *supra* note 2.

<sup>13</sup> See *supra* note 11 and accompanying text.

<sup>14</sup> See, e.g., David Waisel, Opinion, *The Drugs We Use for Executions Can Cause Immense Pain and Suffering*, WASH. POST (May 11, 2017), [https://www.washingtonpost.com/opinions/the-drugs-we-use-for-executions-can-cause-inhumane-pain-and-suffering/2017/05/11/267478d0-359e-11e7-b412-62beef8121f7\\_story.html?utm\\_term=.1417860e73b6](https://www.washingtonpost.com/opinions/the-drugs-we-use-for-executions-can-cause-inhumane-pain-and-suffering/2017/05/11/267478d0-359e-11e7-b412-62beef8121f7_story.html?utm_term=.1417860e73b6) (describing the execution

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment.<sup>15</sup> The purpose of this Amendment is to protect criminal defendants and inmates.<sup>16</sup> In the context of the death penalty, it appears as though lawmakers and society forget the purpose of the Eighth Amendment. Execution methods at both the state and federal level have evolved over time in an attempt to improve the humaneness of the process and comport with the Eighth Amendment;<sup>17</sup> but is there really such a thing as a humane execution?

Because lawmakers have deemed the death penalty a necessary evil of the criminal justice system, they have set standards for implementing it.<sup>18</sup> In recent years, the number of botched executions has continued to grow.<sup>19</sup> As a result, with the restoration of federal executions,<sup>20</sup> it might be time for lawmakers to consider who is being protected—the death row inmate or the execution witnesses—when considering how and if we will continue to execute people.

If the federal government wishes to go through with its scheduled executions, the firing squad should be the method used. Al-

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of Kenneth Williams, where witnesses stated that Williams groaned, convulsed, and gasped for air after the lethal injection drugs were administered).

<sup>15</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

<sup>16</sup> *Ingraham v. Write*, 430 U.S. 641, 664 (1977) (“An examination of the history of the [Eighth] Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.”); *see also* Bryan A. Stevenson & John F. Stinneford, *Common Interpretation: The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> (last visited Oct. 20, 2019).

<sup>17</sup> *See infra* Part I.A.

<sup>18</sup> *See infra* Part I.A.

<sup>19</sup> *See, e.g.*, Waisel, *supra* note 14 (discussing the botched execution of Kenneth Williams); Alter, *supra* note 2; Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was ‘A Bloody Mess,’* GUARDIAN (Dec. 13, 2014, 11:04 AM), <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess>; AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 123 (2014) (“Indeed the rate of botched executions where lethal injection is the method used is considerably higher than it has been when other, supposedly less humane, methods have been employed. This is in part a function of the elaboration of more precise and detailed execution protocols.”).

<sup>20</sup> Federal Government to Resume Capital Punishment, *supra* note 7.

though at first glance it might appear barbaric, the use of firing squads to execute inmates is far less barbaric than the use of lethal injection—especially when drugs like pentobarbital or midazolam are being used. However, this Note argues that firing squads are not cruel and unusual punishment. Between the battle to obtain the drugs necessary for executions<sup>21</sup> and the struggle of having non-professionally trained staff attempting to insert intravenous drugs into inmates,<sup>22</sup> litigation concerning lethal injection is on the rise at the state level<sup>23</sup> and will be no different at the federal level. As a result of the frequency of botched executions,<sup>24</sup> inmates on death row are filing lawsuits asking to be executed by alternative means, namely by firing squad.<sup>25</sup> If sentences of death are going to be handed out and enforced by the federal government, the execution should be by firing squads. Firing squads pose a substantially lower risk of pain and require materials the government already has in abundance.<sup>26</sup> Further, the use of firing squads is more feasible than lethal injection and results in a quicker death, with less risk of cruelty.<sup>27</sup>

In building off legal scholarship in this context,<sup>28</sup> this Note will argue for the use of firing squads by the federal government. It will do so by analyzing the constitutionality of firing squads as opposed to lethal injection by pentobarbital, Attorney General Barr's drug of

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<sup>21</sup> See, e.g., Radley Balko, *In Praise of the Firing Squad*, WASH. POST (Feb. 6, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/02/06/in-praise-of-the-firing-squad/?utm\\_term=.fd900faa0021](https://www.washingtonpost.com/news/the-watch/wp/2015/02/06/in-praise-of-the-firing-squad/?utm_term=.fd900faa0021) (“European pharmaceutical companies [refused] to export lethal injection drugs to death penalty states, some corrections departments brought the drugs off the black market (triggering surreal Drug Enforcement Agency raids on prison facilities) . . .”).

<sup>22</sup> See *infra* Part II.A.

<sup>23</sup> See, e.g., *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119 (2019) (“As it turned out, though, Mr. Bucklew’s case soon became caught up in a wave of litigation over lethal injection procedures.”).

<sup>24</sup> “Botched executions occur when there is a breakdown in, or departure from, the protocol for a particular method of execution. . . . Botched executions are those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.” SARAT, *supra* note 19, at 5–6 (internal quotation marks omitted).

<sup>25</sup> See *infra* Part II.C.

<sup>26</sup> See *infra* Part II.A.

<sup>27</sup> See *infra* Part II.B.

<sup>28</sup> See, e.g., Alexander Vey, Note, *No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of “Evolving Standards of Decency,”* 69 VAND. L. REV. 545 (2016).

choice.<sup>29</sup> It argues that executions by firing squads adhere to Supreme Court precedent and are far more humane when considering the perspective of the person to be executed, rather than the witnesses of the execution.<sup>30</sup> Part I will discuss the history of the federal death penalty and the evolution of methods of execution. This Part will also discuss the use of firing squads in the United States and the major Supreme Court cases that focus on the current standard for a constitutionally viable method of execution. Part II examines why the federal government should consider the use of firing squads, focusing on the standards laid out in *Baze v. Rees*,<sup>31</sup> and reaffirmed in *Glossip v. Gross*<sup>32</sup> and *Bucklew v. Precythe*.<sup>33</sup> Part II further argues that death row inmates should be able to choose the method by which they are executed.<sup>34</sup> Part III discusses *Arthur v. Dunn*, a recent Eleventh Circuit decision in which the court denied Arthur the opportunity to propose the firing squad as the method by which he would be executed.<sup>35</sup> While society has historically attempted to shy away from the gruesome reality of executions, if the federal government is going to begin executing inmates again, it must abide by the Constitution—something the system as it stands fails to do.

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<sup>29</sup> Federal Government to Resume Capital Punishment, *supra* note 7.

<sup>30</sup> For the purposes of this Note, the death penalty is presumed to be constitutional.

<sup>31</sup> 553 U.S. 35 (2008) (plurality opinion).

<sup>32</sup> 135 S. Ct. 2726 (2015).

<sup>33</sup> 139 S. Ct. 1112 (2019).

<sup>34</sup> While there are fifty-four women on death row as of April 1, 2019, accounting for approximately two percent of the death row population, this Note will use the pronoun “he” because there is a substantially higher male death row population and because men are executed far more often than women. See DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. SPRING 2019, at 1 (2019), [https://www.naacpldf.org/wp-content/uploads/DRUSA\\_Spring2019.pdf?\\_ga=2.222519515.1745995685.1571002927-624960552.1571002927](https://www.naacpldf.org/wp-content/uploads/DRUSA_Spring2019.pdf?_ga=2.222519515.1745995685.1571002927-624960552.1571002927).

<sup>35</sup> *Arthur v. Dunn*, 840 F.3d 1268, 1314–15 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017), *abrogated by* *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

## I. THE EVOLUTION OF THE DEATH PENALTY

The first death penalty laws can be traced back to Eighteenth Century B.C. in Hammurabi's Code.<sup>36</sup> Early death sentences were carried out by barbaric means, like drowning, crucifixion, and impalement.<sup>37</sup> By the Tenth Century A.D., hanging had become the most common method in Britain.<sup>38</sup> As society progressed, death penalty statutes reformed.<sup>39</sup> Reforms to death penalty statutes in places like Britain<sup>40</sup> later came to influence those of the United States.<sup>41</sup>

Over time, methods of execution in the United States have changed dramatically. This change is driven by the desire to execute in a more "humane" manner.<sup>42</sup> The search for a more humane and efficient method of execution began in the late 1880s, starting with the shift from hanging to electrocution in 1890, then moving to lethal gas in 1921, and to lethal injection in 1977.<sup>43</sup> "Over time, the choice of execution methods has generally been concerned as much, if not more, with how observers perceive the execution, as opposed to what it actually does to the condemned."<sup>44</sup> Some have noted that "the public is more concerned with whether an execution *seems* humane—say, through appearing like a medical procedure, as lethal

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<sup>36</sup> *Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> (last visited Oct. 20, 2019). Hammurabi's Code codified the death penalty for twenty-five crimes. *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Before the start of the Nineteenth Century, Britain reformed its death penalty statutes, eliminating over 100 of the 222 crimes that were punishable by death. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See SARAT, *supra* note 19, at 7 ("With the invention of new technologies for killing or, more precisely, with each new application of technology to killing, the law has proclaimed its own previous methods barbaric, or simply archaic, and has tried to put an end to the spectacle of botched executions."); see also *Baze v. Rees*, 553 U.S. 35, 40–41 (2008) (plurality opinion) ("As is true with respect to each of these States and the Federal Government, Kentucky has altered its method of execution over time to more humane means of carrying out the sentence.").

<sup>43</sup> Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1339 (2014) [hereinafter Denno, *Lethal Injection Chaos Post-Baze*].

<sup>44</sup> Vey, *supra* note 28, at 562.



injection does—than with whether it actually *is* humane.”<sup>45</sup> With each new method of execution, the rate of botched executions has only increased.<sup>46</sup> The botched execution rate for all methods of executions from 1900 to 2010 averages 3.15%.<sup>47</sup> Lethal injection has a botch rate of 7.12%, with lethal gas at 5.4%, hanging at 3.12%, electrocution with 1.92%, and firing squad at 0%.<sup>48</sup> As states have continued to seek out more humane methods of execution, the federal government has been slow in adopting them—however, now is the time for the federal government to make the change first.

#### A. *The History of the Federal Death Penalty*

On April 30, 1790, the first federal criminal statute—An Act for the Punishment of Certain Crimes, also known as the Crimes Act of 1790—was signed into law.<sup>49</sup> The Act set forth a mandatory sentence of death for convictions of murder, treason, forgery, and piracy.<sup>50</sup> The task of carrying out the sentence was assigned to the U.S. Marshals Service<sup>51</sup> and the method to be used was hanging.<sup>52</sup>

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<sup>45</sup> *Id.* at 548 (emphasis in original) (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 66 (2002)).

<sup>46</sup> See SARAT, *supra* note 19, at 177–78.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* While relatively low over the longer time frame, the botched execution rate for electrocution between 1980 and 2010 went as high as 17.33%. *Id.*

<sup>49</sup> Crimes Act of 1790, ch. 9, §§ 1, 3, 8–10, 14, 23 (1790).

<sup>50</sup> *Id.*

<sup>51</sup> *History—Historical Federal Executions*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/history/executions.htm> (last visited Oct. 20, 2019).

<sup>52</sup> Crimes Act of 1790, ch. 9, § 33 (“And be it further enacted, that the manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until dead.”). Hanging was also the primary method of execution for the states until about 1890. *Methods of Execution: Description of Each Execution Method*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method> (last visited Oct. 20, 2019) [hereinafter *Methods of Execution*]; see also *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015). Hanging was the predominant method used because it was believed that death would be instantaneous, but that rarely occurred. *Id.* As a result, public opinion turned against hanging as a method of execution. SARAT, *supra* note 19, at 60, 63.

Thomas Bird, convicted of murder on the high seas, was the first person executed by hanging by the Federal Government in 1790.<sup>53</sup>

Executions by hanging continued by the federal government<sup>54</sup> despite the search by the states for a more humane method of execution.<sup>55</sup> New York built the first electric chair in 1888.<sup>56</sup> William Kemmler was the first person to be executed by electrocution in 1890.<sup>57</sup> Despite New York's creation of this "more humane" method,<sup>58</sup> the federal government did not use electrocution as a method of execution until 1928.<sup>59</sup> Because so much preparation goes into an execution by electrocution,<sup>60</sup> it is unsurprising that issues began to arise in the carrying out of the punishment.<sup>61</sup>

Not long after the creation of the electric chair, the idea of using lethal gas for executions arose under the presumption that it would be a more humane alternative to hanging.<sup>62</sup> While not adopted in any state until 1921<sup>63</sup> or used by the federal government until 1945,<sup>64</sup> in the late 1890s,<sup>65</sup> doctors in Pennsylvania recommended

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<sup>53</sup> Garrett Quinn, *The Complicated History of the Death Penalty in Massachusetts, from the Salem Witch Trials to Dzhokhar Tsarnaev*, MASS LIVE, [https://www.masslive.com/news/boston/2014/02/history\\_of\\_the\\_death\\_penalty\\_i.html](https://www.masslive.com/news/boston/2014/02/history_of_the_death_penalty_i.html) (last updated Jan. 7, 2019).

<sup>54</sup> See, e.g., Mara Bovsun, *Doctor Killer Victor Harry Feguer Is Hanged Under Federal Death Penalty in 1963—After Eating His Tiny Last Meal, an Olive*, DAILY NEWS (Oct. 17, 2015), <https://www.nydailynews.com/news/crime/justice-hed-article-1.2401307>.

<sup>55</sup> *Methods of Execution*, *supra* note 52.

<sup>56</sup> *Id.*

<sup>57</sup> *In re Kemmler*, 136 U.S. 436, 441 (1890); see also Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 461 (1997); Vey, *supra* note 28, at 566.

<sup>58</sup> *Kemmler*, 136 U.S. at 443.

<sup>59</sup> See *Three Electrocuted in Washington Jail*, ST. LOUIS POST-DISPATCH, June 22, 1928, at 14.

<sup>60</sup> See *Methods of Execution*, *supra* note 52.

<sup>61</sup> See *id.*; see also Beard, *supra* note 57, at 461.

<sup>62</sup> Vey, *supra* note 28, at 567.

<sup>63</sup> SARAT, *supra* note 19, at 90–91. Nevada became the first state to adopt lethal gas as a method of execution in 1921. *Id.*

<sup>64</sup> SCOTT CHRISTIANSON, *THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER* 252 (2010).

<sup>65</sup> SARAT, *supra* note 19, at 91 n.8.

the use of carbon dioxide for executions.<sup>66</sup> Over twenty years after the first state execution by lethal gas, the federal government executed its first death row inmate with lethal gas in 1945 when Henry Ruhl was executed for murder.<sup>67</sup> The gruesome fact of inmates attempting to hold their breath and fight the gas for as long as possible,<sup>68</sup> the effect of burning sensations and convulsions,<sup>69</sup> and the negative associations with Nazi Germany<sup>70</sup> all indicated that a new method was needed.

Prior to the moratorium on the death penalty where the Supreme Court found the death penalty statutes of many states unconstitutional as written,<sup>71</sup> the last execution by the federal government was a hanging in 1963.<sup>72</sup> As a result, states sought out new, more humane methods of executions.<sup>73</sup> In 1977, Oklahoma state legislator Bill Wiseman asked Dr. Jay Chapman, Oklahoma's chief medical examiner, to create a more humane method of execution.<sup>74</sup> Dr. Chapman—a coroner and not a doctor—“initially felt he wasn't qualified,” and “[his] first response was that [he] was an expert in dead bodies but not an expert in getting them that way.”<sup>75</sup> Nevertheless, Dr. Chapman recommended the use of three drugs to perform executions—“the sedative sodium thiopental, pancuronium bromide as a paralytic agent, and potassium chloride to stop the heart.”<sup>76</sup> This protocol was intended to execute the inmate in three steps. Under Dr. Chapman's protocol, sodium thiopental is the first to be administered, rendering the inmate unconscious.<sup>77</sup> Pancuronium bromide,

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<sup>66</sup> *Id.* at 91–92.

<sup>67</sup> CHRISTIANSON, *supra* note 64, at 237–52 (listing inmates executed by lethal gas).

<sup>68</sup> *Methods of Execution*, *supra* note 52.

<sup>69</sup> *See Vey*, *supra* note 28, at 568.

<sup>70</sup> SARAT, *supra* note 19, at 115.

<sup>71</sup> *See Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

<sup>72</sup> *Federal Executions 1927–1928*, *supra* note 67.

<sup>73</sup> *See, e.g.*, Josh Sanburn, *Creator of Lethal Injection Method: 'I Don't See Anything That Is More Humane'*, TIME (May 15, 2014), <http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/>.

<sup>74</sup> *Id.*

<sup>75</sup> Max Kutner, *Meet A. Jay Chapman, "Father of the Lethal Injection,"* NEWSWEEK (May 1, 2017, 2:09 P.M.), <https://www.newsweek.com/jay-chapman-inventor-lethal-injection-arkansas-592506>.

<sup>76</sup> Sanburn, *supra* note 73.

<sup>77</sup> *See SARAT*, *supra* note 19, at 120.

the second drug, renders the inmate unable to show any signs of pain.<sup>78</sup> The third and final drug, potassium chloride, is administered to cause cardiac arrest, resulting in the death of the inmate.<sup>79</sup> If the execution goes as intended, it should take about ten minutes from the administration of the first drug for the inmate to die.<sup>80</sup>

Although the death penalty was reinstated for many states with the Supreme Court's decision in *Gregg v. Georgia*,<sup>81</sup> it was not reinstated for the federal government until 1988.<sup>82</sup> Like the majority of states with the death penalty, the federal government adopted Dr. Chapman's three-drug protocol.<sup>83</sup> Since 1988, the federal government has only executed three people.<sup>84</sup> Despite this low number, from 1988 to 2011, federal prosecutors have sought the death penalty in 435 cases,<sup>85</sup> with only sixty-nine cases resulting in a conviction.<sup>86</sup> Currently, there remain sixty-three federal death row inmates.<sup>87</sup>

Of the sixty-three inmates on federal death row, five are scheduled to be executed—three in December 2019 and two in January

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Gregg v. Georgia*, 428 U.S. 153, 189, 195 (1976).

<sup>82</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. PL 100-690, Title VII (codified at 18 U.S.C. § 924); see also U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1 (2000), [https://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/\\_dp\\_survey\\_final.pdf](https://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/_dp_survey_final.pdf) [hereinafter THE FEDERAL DEATH PENALTY SYSTEM]; AMNESTY INT'L, DEATH PENALTY FACTS 14, <https://www.amnestyusa.org/files/pdfs/deathpenaltyfacts.pdf> (last updated July 2011).

<sup>83</sup> *Baze v. Rees*, 553 U.S. 35, 42-43 (2008); see also Liam J. Montgomery, Note, *The Unrealized Promise of Section 1983 Method-of-Execution Challenges*, 94 VA. L. REV. 1987, 2000 n.61 (2008).

<sup>84</sup> Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html>.

<sup>85</sup> AMNESTY INT'L, DEATH PENALTY FACTS, *supra* note 82, at 14.

<sup>86</sup> See *Federal Death Sentences by Year Since 1988*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/federal-death-sentences-by-year-since-1988> (last visited Oct. 20, 2019).

<sup>87</sup> *List of Federal Death-Row Prisoners*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> (last visited Oct. 20, 2019).

2020.<sup>88</sup> These inmates are set to be executed by lethal injection using pentobarbital,<sup>89</sup> the same drug that caused Michael Lee Wilson to say “I feel my whole body burning.”<sup>90</sup> Like sodium thiopental<sup>91</sup>—the drug initially recommended by Dr. Chapman<sup>92</sup>—pentobarbital has become difficult to obtain because drug manufacturers do not want to be associated with the death penalty.<sup>93</sup> As a result, the federal government will either need to consider using midazolam, a drug that has led to many botched executions in state executions,<sup>94</sup> or an entirely different method of execution—the firing squad.

B. *The History and Use of Firing Squads in the United States*

While the firing squad has never been a primary method of execution, it has been used as an alternative method.<sup>95</sup> Since 1890, thirty-four people have been executed by firing squad<sup>96</sup>—with the

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<sup>88</sup> *Upcoming Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/upcoming-executions#year2020> (last updated Oct. 9, 2019).

<sup>89</sup> Federal Government to Resume Capital Punishment, *supra* note 7.

<sup>90</sup> Alter, *supra* note 2.

<sup>91</sup> In 2009, the only U.S. manufacturer of sodium thiopental, Hospira, Inc., ceased production of the drug due to difficulties in obtaining the active ingredient necessary for production. Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 43, at 1360.

<sup>92</sup> Sanburn, *supra* note 73.

<sup>93</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015).

<sup>94</sup> See, e.g., Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (last updated Mar. 1, 2018). Clayton Lockett was executed using midazolam in 2014. *Id.* After searching for a useable vein for an hour, midazolam was finally administered. *Id.* A few minutes after the final drug administration, Lockett began writhing on the gurney, breathing heavily, and straining to lift his head up. *Id.* Witnesses to the execution were ordered to leave. *Id.* It took forty-three minutes for Lockett to die. Fretland, *supra* note 19. Following the execution of Lockett, President Obama ordered a review of the death penalty. Merrit Kennedy, *Federal Government to Resume Capital Punishment After Nearly 20-Year Hiatus*, NPR (July 25, 2019, 11:05 AM), <https://www.npr.org/2019/07/25/745223284/federal-government-to-resume-capital-punishment-after-nearly-20-year-hiatus>.

<sup>95</sup> See *Glossip*, 135 S. Ct. at 2732.

<sup>96</sup> SARAT, *supra* note 19, at 177.

majority occurring in Utah.<sup>97</sup> The only other state that has used a firing squad to execute a person is Nevada.<sup>98</sup>

Between 1896 and 1972, thirty men were executed by firing squad in Utah.<sup>99</sup> After the moratorium on the death penalty was lifted in 1976,<sup>100</sup> the first execution to take place in the United States was by firing squad.<sup>101</sup> Gary Gilmore was executed in 1977 for murdering a gas station attendant and a motel clerk.<sup>102</sup> Gilmore chose to be executed by firing squad.<sup>103</sup> Prior to Gilmore's execution, it was reported that seventy-one percent of Americans favored his execution by firing squad.<sup>104</sup>

The most recent execution by firing squad was of Ronnie Lee Gardner in 2010.<sup>105</sup> Because Gardner was sentenced to death before 2004, the year Utah removed firing squads as an alternative method of execution,<sup>106</sup> Gardner had the choice of being executed by firing squad or lethal injection and chose the firing squad.<sup>107</sup> Gardner was

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<sup>97</sup> See Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 348 (2002).

<sup>98</sup> See *id.* at 400; see also Ben Margiott, *Death Penalty History: Nevada Once Used an Automatic Shooting Machine to Kill a Prisoner*, CBS6 (Nov. 9, 2017), <https://cbs6albany.com/news/nation-world/death-penalty-history-nevada-once-used-an-automatic-shooting-machine-to-kill-a-prisoner>; see also Nevada, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/nevada-1> (last visited Oct. 20, 2019).

<sup>99</sup> See Cutler, *supra* note 97, at 348.

<sup>100</sup> See *Gregg v. Georgia*, 428 U.S. 153, 189, 195 (1976).

<sup>101</sup> See Cutler, *supra* note 97, at 357.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 358; see also Lily Rothman, *The Strange Story of the Man Who Chose Execution by Firing Squad*, TIME (Mar. 12, 2015), <http://time.com/3742999/gary-gilmore-history/>.

<sup>104</sup> Cutler, *supra* note 97, at 359.

<sup>105</sup> See Ray Sanchez, *Ronnie Lee Gardner Executed by Firing Squad in Utah*, ABC (June 18, 2010), <https://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786>; Dustin Barnes, *What Methods of Execution are Still in Practiced in the United States?*, <https://www.tennessean.com/story/news/crime/2018/10/09/methods-execution-state-electric-chair-firing-squad-hanging-gas-chamber/1576763002/> (last updated Aug. 15, 2019, 4:37 PM).

<sup>106</sup> Jennifer Dobner, *Plan to Abolish Firing Squad Advances*, DESERET NEWS (Jan. 22, 2004, 9:22 AM), <https://www.deseretnews.com/article/590037757/Plan-to-abolish-firing-squad-advances.html>.

<sup>107</sup> Sanchez, *supra* note 105.

strapped to a chair, and twenty-five feet away, “behind a brick wall cut with a gun port,” stood five anonymous law enforcement officers who fired the deadly shots.<sup>108</sup>

In 2004, lawmakers in Utah removed firing squads as a method of execution because of the attention the execution brought to the inmate, which “overshadow[ed] the victim and the crime itself.”<sup>109</sup> However, in 2015, in part due to the shortage of lethal injection drugs, Governor Gary Herbert of Utah signed a bill<sup>110</sup> bringing back the firing squad in the event lethal injection drugs cannot be obtained thirty days before a scheduled execution.<sup>111</sup> Around the same time Utah announced this plan, a bill was introduced in the Wyoming state legislature proposing the use of firing squads with the option of sedation before execution.<sup>112</sup> Although Wyoming’s bill ultimately failed,<sup>113</sup> other states continued to be influenced by Utah. For example, in 2018, the South Carolina legislature proposed the use of firing squads as an alternative when lethal injection drugs are unavailable, but this bill also failed.<sup>114</sup> Currently, aside from Utah, both Mississippi and Oklahoma allow for the use of firing squad in the

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<sup>108</sup> *Id.*

<sup>109</sup> Dobner, *supra* note 106.

<sup>110</sup> *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (Apr. 5, 2015, 7:15 PM), <https://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one>; UTAH CODE ANN. § 77-18-5.5 (2019).

<sup>111</sup> UTAH CODE ANN. § 77-18-5.5(4).

<sup>112</sup> S.F. 13, 63d Leg., Reg. Sess. (Wyo. 2015); Laura Hancock, *Wyoming House Passes Firing Squads Execution Bill*, CASPER STAR TRIB. (Feb. 13, 2015), [https://trib.com/news/state-and-regional/govt-and-politics/wyoming-house-passes-firing-squads-execution-bill/article\\_1c77faca-32f5-5f00-8369-34ba66b0572d.html](https://trib.com/news/state-and-regional/govt-and-politics/wyoming-house-passes-firing-squads-execution-bill/article_1c77faca-32f5-5f00-8369-34ba66b0572d.html).

<sup>113</sup> Erin Jones, *Firing Squad Bill Fails*, WY. PUB. MEDIA (Mar. 12, 2015), <https://www.wyomingpublicmedia.org/post/firing-squad-bill-fails#stream/0>.

<sup>114</sup> S.B. 872, 122d Gen. Assemb. Reg. Sess. (S.C. 2018); *see also* Tim Smith, *SC Senate Rejects Firing Squads but Approves Requiring Electric Chair as Backup*, WLTX (Mar. 7, 2018, 7:08 AM), <https://www.wltx.com/article/news/politics/sc-senate-rejects-firing-squads-but-approves-requiring-electric-chair-as-backup/275-526514902>. However, a bill proposing the firing squad was reintroduced and is currently in committee. H.B. 4417, 123d Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed).

event lethal injection, lethal gas, and electrocution are not available as execution methods or have been deemed unconstitutional.<sup>115</sup>

After the firing squad was reinstated in Utah, the state released a technical manual for how it will conduct future executions by firing squad.<sup>116</sup> The “execution team” consists of five people, with one team leader and one alternate.<sup>117</sup> All five people must be certified officers who have passed marksmanship tests under similar conditions to that of an execution.<sup>118</sup> The team leader is in charge of supplying the .30 caliber rifles that will be used, as well as the live and blank rounds.<sup>119</sup> In order to be on the firing squad, each officer must pass the accuracy test, wherein the officer is required to hit each specified target with one round or be disqualified.<sup>120</sup> On the day of the execution, the team leader, not in the presence of the other members, loads each gun with two rounds, putting blanks in one gun.<sup>121</sup> A target is placed over the inmate’s heart followed by a hood over

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<sup>115</sup> MISS. CODE ANN. § 99-19-51(4) (2019); OKLA. STAT. tit. 22, § 1014(D) (2019).

<sup>116</sup> Letter from Misty Barry, Policy Coordinator, Utah Department of Corrections to MUCKROCK (March 9, 2017), <https://www.muckrock.com/foi/utah-234/death-penalty-procedures-utah-department-of-corrections-34278/#file-126014> (releasing redacted protocol to news outlet MuckRock); see also Nadia Pflaum, *Utah Corrections Department Releases Protocol for Executions by Firing Squad*, STANDARD-EXAMINER (Apr. 10, 2017), [https://www.standard.net/police-fire/courts/utah-corrections-department-releases-protocol-for-executions-by-firing-squad/article\\_b2aa0dfb-f33f-5cce-bd77-cae44d451591.html](https://www.standard.net/police-fire/courts/utah-corrections-department-releases-protocol-for-executions-by-firing-squad/article_b2aa0dfb-f33f-5cce-bd77-cae44d451591.html) [hereinafter Pflaum, *Utah Corrections Department Releases Protocol for Executions by Firing Squad*].

<sup>117</sup> Letter from Misty Barry, *supra* note 116, at 56; see also Nadia Pflaum, *How Utah’s Execution by Firing Squad Works*, STANDARD-EXAMINER (Apr. 10, 2017), [https://www.standard.net/police-fire/courts/how-utah-s-execution-by-firing-squad-works/article\\_1eefdaf-a792-5f1e-9de3-552ea665e989.html](https://www.standard.net/police-fire/courts/how-utah-s-execution-by-firing-squad-works/article_1eefdaf-a792-5f1e-9de3-552ea665e989.html) [hereinafter Pflaum, *How Utah’s Execution by Firing Squad Works*].

<sup>118</sup> Letter from Misty Barry, *supra* note 116, at 56–57.

<sup>119</sup> *Id.* at 63.

<sup>120</sup> *Id.* at 56. For the practice rounds, “a target is placed at a minimum of 21 feet and must be the same dimensions as the target that will be placed over the condemned’s heart on the day of the execution.” Pflaum, *How Utah’s Execution by Firing Squad Works*, *supra* note 117.

<sup>121</sup> Letter from Misty Barry, *supra* note 116, at 63. “One rifle [is] loaded with a blank so no one kn[ows] who fired the fatal shot.” Sanchez, *supra* note 105.



his head, and then the countdown begins.<sup>122</sup> Death typically occurs within a minute from the time the shots are fired.<sup>123</sup>

### C. *United States Death Penalty Jurisprudence*

#### 1. 1787 TO 1972

The first capital punishment case to reach the Supreme Court was *Wilkerson v. Utah* in 1879.<sup>124</sup> *Wilkerson* considered the constitutionality of firing squads.<sup>125</sup> Justice Clifford wrote for a unanimous Court, holding that executing a murderer by firing squad does not violate the Eighth Amendment.<sup>126</sup> Justice Clifford stated that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . are forbidden by that amendment to the Constitution.”<sup>127</sup>

Eleven years after *Wilkerson*, William Kemmler<sup>128</sup> sought a writ of habeas corpus, seeking to prevent New York’s use of the electric chair on him.<sup>129</sup> The Court held that execution by electric chair was not cruel and unusual and stated, “[p]unishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word used in the Constitu-

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<sup>122</sup> Letter from Misty Barry, *supra* note 116, at 91–92; *see also* Pflaum, *How Utah’s Execution by Firing Squad Works*, *supra* note 117.

<sup>123</sup> Kari Hong, Opinion, *Bring Back the Firing Squad: The Needle Spares the Witnesses, Not the Condemned*, BOS. GLOBE (May 13, 2015, 1:28 PM), <https://www.bostonglobe.com/opinion/2015/05/13/bring-back-firing-squad/4ETT0ZTQu0SMDwVBW3nKfL/story.html>; Balko, *supra* note 21.

<sup>124</sup> 99 U.S. 130 (1879).

<sup>125</sup> *Id.* at 134–35.

<sup>126</sup> *Id.* (“Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.”).

<sup>127</sup> *Id.* at 135–36.

<sup>128</sup> William Kemmler was the first person to be executed by electrocution in the United States, his execution did not go as intended. *See supra* Part I.A.

<sup>129</sup> *In re Kemmler*, 136 U.S. 436, 439 (1890).

tion. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>130</sup> The Court in *Kemmler* further expounded upon the *Wilkerson* Court’s definition of punishment that violates the Eighth Amendment by adding that “lingering death” is cruel and unusual.<sup>131</sup>

In the years following *Wilkerson* and *Kemmler*, cases challenging the death penalty remained few and far between with only two notable decisions by the Supreme Court until 1972.<sup>132</sup> In 1972, the Supreme Court decided *Furman v. Georgia*.<sup>133</sup> Prior to *Furman*, the last execution to take place occurred in Colorado in 1967.<sup>134</sup> In *Furman*, the Court held that the death penalty, as applied, violated the Eighth Amendment.<sup>135</sup> In further elaborating on when punishments are cruel and unusual, Justice Douglas said that

it is “cruel and unusual” to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.<sup>136</sup>

In a separate concurrence, Justice Brennan stated that in order to determine what the ban on cruel and unusual punishment means, we must look to “evolving standards of decency that mark the progress of a maturing society.”<sup>137</sup> Justice Brennan further suggested that a punishment is cruel and unusual when “it does not comport with

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<sup>130</sup> *Id.* at 447.

<sup>131</sup> *Id.*

<sup>132</sup> See *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915) (finding that retroactively changing the method of execution does not violate the ex post facto clause); *Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that a second attempt at execution following a failed execution is not cruel and unusual and does not violate double jeopardy).

<sup>133</sup> 408 U.S. 238 (1972) (per curiam).

<sup>134</sup> See Olivia B. Waxman, *The Story of the Last U.S. Execution Before a Nationwide Moratorium Took Effect 50 Years Ago*, TIME (June 2, 2017), <http://time.com/4801230/last-execution-before-moratorium/>.

<sup>135</sup> *Furman*, 408 U.S. at 239–40.

<sup>136</sup> *Id.* at 245 (Douglas, J., concurring).

<sup>137</sup> *Id.* at 269–70 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

human dignity.”<sup>138</sup> *Furman* essentially established a nationwide moratorium on the death penalty by voiding the applicable death penalty statutes of the forty states with the death penalty at the time.<sup>139</sup>

## 2. 1972 TO PRESENT

Although *Furman* rendered a moratorium on the death penalty as a whole, the holding of the Court was not that the death penalty itself was unconstitutional, but that the death penalty statutes as they were written in many states were.<sup>140</sup> This gave states and the federal government the opportunity to revive the death penalty by allowing the rewriting of death penalty statutes to avoid the problems addressed in *Furman*.<sup>141</sup> In crafting these new statutes, lawmakers sought to limit the discretion of juries when deciding whether to impose the death penalty through the consideration of aggravating and mitigating factors during sentencing.<sup>142</sup> Bifurcated trials were also established in these new statutes, requiring separate deliberations for the guilt and penalty phases.<sup>143</sup> Automatic appellate review and proportionality review were also included.<sup>144</sup>

As a result of the crafting of new death penalty statutes, the Supreme Court considered the reforms in *Gregg v. Georgia*.<sup>145</sup> In *Gregg*, the Court found the reforms to be constitutional, thus reinstating the death penalty in all states that adopted similar statutes.<sup>146</sup>

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<sup>138</sup> *Id.* at 270.

<sup>139</sup> *Id.* at 437 (Powell, J., dissenting); see also *Constitutionality of the Death Penalty in America*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america> (last visited Oct. 20, 2019).

<sup>140</sup> *Furman*, 408 U.S. at 239–40.

<sup>141</sup> See *id.* For example, the Florida Supreme Court responded to *Furman* by resentencing all death row inmates to life imprisonment. *Donaldson v. Sack*, 265 So. 2d 499, 505 (Fla. 1972). The Florida Legislature, in turn, became the first state to enact a revised death penalty to fit the *Furman* standards. Fla. Laws 1973, ch. 72-724, § 9, amending FLA. STAT. § 921.141 (1972).

<sup>142</sup> See *Constitutionality of the Death Penalty in America*, *supra* note 139. The most current aggravating and mitigating factors for the Florida death penalty can be found in FLA. STAT. § 921.141(6)–(7) (2019).

<sup>143</sup> See, e.g., FLA. STAT. § 921.141(1).

<sup>144</sup> *Id.* at § 921.141(5).

<sup>145</sup> 428 U.S. 153 (1976).

<sup>146</sup> *Id.* at 189, 195.

The Court held that “the punishment must not involve the unnecessary and wanton infliction of pain . . . [and] the punishment must not be grossly out of proportion to the severity of the crime.”<sup>147</sup>

Not long after *Gregg*, the Court decided *Coker v. Georgia*, holding the death penalty to be an excessive and disproportionate punishment for the crime of rape.<sup>148</sup> Following in the path of *Coker*, in *Enmund v. Florida* the Court held that sentencing a person to death who was a participant in a murder, but did not kill, attempt to kill, or intend to kill, was unconstitutional.<sup>149</sup> In the early 2000s, the Court found it to be cruel and unusual to execute an intellectually disabled person,<sup>150</sup> as well as a person who was under the age of 18 when he committed the crime.<sup>151</sup>

In 2006, in a unanimous decision, the Supreme Court held in *Hill v. McDonough* that inmates could challenge methods of execution under 42 U.S.C. § 1983.<sup>152</sup> The Court reasoned that challenges under § 1983 were fundamentally different from seeking a writ of habeas corpus, because a challenge under § 1983 is a challenge to the method of execution rather than to the execution itself.<sup>153</sup> As a result, the door opened for death row inmates to challenge methods of execution, especially lethal injection.<sup>154</sup>

Shortly after *Hill*, the Supreme Court decided *Baze v. Rees*.<sup>155</sup> *Baze* concerned a challenge to Kentucky’s lethal injection protocol, where the petitioners contended that the protocol was “unconstitutional under the Eighth Amendment’s ban on ‘cruel and unusual punishments’ because of the risk that the protocol’s terms might not be properly followed, resulting in significant pain.”<sup>156</sup> The Court disagreed with petitioners, holding that the petitioners did not meet

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<sup>147</sup> *Id.* at 173 (internal citations omitted).

<sup>148</sup> 433 U.S. 584, 592 (1977) (“We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”).

<sup>149</sup> *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

<sup>150</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>151</sup> *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>152</sup> *See Hill v. McDonough*, 547 U.S. 573, 576 (2006).

<sup>153</sup> *Id.* at 576, 580.

<sup>154</sup> *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

<sup>155</sup> 553 U.S. 35 (2008) (plurality opinion).

<sup>156</sup> *Id.* at 41.

“their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.”<sup>157</sup> The Court stated that to successfully challenge a method of execution, inmates must prove that the method to be used presents a risk that is “*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers.”<sup>158</sup> Further, in order “to prevail on such a claim there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm,’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”<sup>159</sup> In order to qualify as an alternative, the method must be readily implemented, feasible, and actually reduce the risk of severe pain.<sup>160</sup>

Almost ten years later, the Court faced another challenge to lethal injection in *Glossip v. Gross*.<sup>161</sup> In *Glossip*, inmates sentenced to death in Oklahoma challenged the state’s three-drug protocol, arguing that the use of midazolam, as the first drug, creates a severe risk of pain because it “fails to render a person insensate to pain.”<sup>162</sup> The Court found that not only did “the prisoners fail[ ] to identify a known and available alternative method of execution that entails a lesser risk of pain,” but also that the prisoners failed to establish that the use of midazolam creates a substantial risk of pain.<sup>163</sup> In holding that the inmates failed to identify an alternative method, the Court reaffirmed the plurality opinion of *Baze*, finding that inmates sentenced to death will not succeed on a challenge to the constitutionality of their execution unless they suggest an acceptable alternative method.<sup>164</sup>

Recently, the Court again reaffirmed the *Baze* plurality in *Bucklew v. Precythe*.<sup>165</sup> The Court reiterated the burden an inmate faces

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 50 (emphasis in original) (quoting *Helling v. McKinney*, 509 U.S. 25, 33–35 (1993)) (internal quotation marks omitted).

<sup>159</sup> *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, 846 n.9 (1994)).

<sup>160</sup> *Id.* at 52.

<sup>161</sup> 135 S. Ct. 2726 (2015).

<sup>162</sup> *Id.* at 2731.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> 139 S. Ct. 1112 (2019).

when challenging a method of execution.<sup>166</sup> As stated in both *Baze* and *Glossip*, “a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.”<sup>167</sup> The Court did, however, go one step further than *Baze* and *Glossip* by stating that inmates presenting an alternative method are *not* limited to those authorized by the state and can look to protocols used in other states.<sup>168</sup> As a result of *Baze*, *Glossip*, and *Bucklew*, in order to successfully challenge a method of execution, an inmate must satisfy two prongs: first, he must demonstrate that the method of execution is very likely to cause substantial harm or suffering, and second, he must present a feasible, readily implemented, less painful alternative that is prescribed by at least one state.<sup>169</sup>

## II. WHY THE FEDERAL GOVERNMENT SHOULD USE FIRING SQUADS TO EXECUTE FEDERAL DEATH ROW INMATES

Notwithstanding the fact that an inmate who has not exhausted his appeals can propose an alternative method of execution if he proves that the current method of execution is likely to cause substantial harm or suffering, the federal government should get ahead of the litigation that will likely ensue for using lethal injection by amending the execution protocol to allow for federal death row inmates to be executed by firing squads, or to have a choice of method. Implementing firing squads at the federal level would satisfy the requirements set out in *Baze* because firing squads are not likely to cause substantial harm and suffering, are less painful than other methods, and are readily implemented. By adopting the firing squad, not only would the government save itself the headache of litigation, but it would be at the forefront of a change that states are pushing for.<sup>170</sup>

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<sup>166</sup> *Id.* at 1125.

<sup>167</sup> *Id.*; see also *Glossip*, 135 S. Ct. at 2732–38; *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion).

<sup>168</sup> *Bucklew*, 139 S. Ct. at 1128.

<sup>169</sup> *Id.* at 1125; *Glossip*, 135 S. Ct. at 2732–38; *Baze*, 553 U.S. at 52.

<sup>170</sup> See, e.g., H.B. 4417, 123d Gen. Assemb., Reg. Sess. (S.C. 2019) (proposed).

A. *Firing Squads Better Comply with Supreme Court Precedent*

Using the framework for what an inmate must prove to be successful in proposing an alternative method of execution, it would behoove the federal government to use firing squads for executions. Firing squads are easy to implement, practicable, and convenient, especially when compared to lethal injection. In order to implement firing squads, the federal government can look to Utah's technical manual,<sup>171</sup> as well as past executions by firing squads.<sup>172</sup> Because the firing squad is composed of law enforcement officers who volunteer to be on the execution team,<sup>173</sup> the training required to successfully perform the execution is minimal.<sup>174</sup> The supplies necessary for executions by firing squad—guns and ammunition—are at the government's immediate disposal<sup>175</sup> and are regulated by it.<sup>176</sup> No matter the political landscape surrounding guns, law enforcement will likely always have guns.<sup>177</sup> Most importantly, gun and ammunition suppliers are far less likely to be influenced by death penalty abolitionists who work to restrict the supply of materials needed for executions.<sup>178</sup> Unlike the pharmaceutical companies, which created many of the drugs used in executions for life-improving or even life-saving medical procedures and therefore face a con-

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<sup>171</sup> See Pflaum, *How Utah's Execution by Firing Squad Works*, *supra* note 117.

<sup>172</sup> See *supra* Part I.B.

<sup>173</sup> See Curtis Waltman, *Utah Department of Corrections Releases Technical Manual for Their Execution Process*, MUCKROCK (Mar. 30, 2017), <https://www.muckrock.com/news/archives/2017/mar/30/utah-death-penalty-manual/>; see also Sanchez, *supra* note 105.

<sup>174</sup> *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting) *vacated by* *Ryan v. Wood*, 573 U.S. 976 (2014) (“There are plenty of people employed by the state who can pull the trigger and have the training to aim true”).

<sup>175</sup> Kent Faulk, *Death Row Attorney: Firing Squad is a ‘Feasible’ Option*, AL.COM (Oct. 12, 2015), [https://www.al.com/news/birmingham/index.ssf/2015/10/death\\_row\\_inmates\\_attorney\\_ala.html](https://www.al.com/news/birmingham/index.ssf/2015/10/death_row_inmates_attorney_ala.html).

<sup>176</sup> See, e.g., Gun Control Act, 18 U.S.C. § 921 (2012).

<sup>177</sup> *Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting) (“The weapons and ammunition are bought by the state in massive quantities for law enforcement purposes, so it would be impossible to interdict the supply.”).

<sup>178</sup> See Balko, *supra* note 21.

flict when their products are used in an execution, guns and ammunition suppliers count law enforcement needs as one of the top drivers of demand for their product.<sup>179</sup> Additionally, Utah's re-adoption of the firing squad, followed by the addition of firing squads to Oklahoma's and Mississippi's death penalty statutes, serves as an example of the feasibility of the method and suggests that public opinion on the method is shifting.<sup>180</sup>

The inmates on federal death row who are scheduled to be executed within the next year have been waiting over ten years for their executions,<sup>181</sup> with some inmates waiting over twenty-five years.<sup>182</sup> Although the federal government took an almost two-decade hiatus from executions,<sup>183</sup> delays from sentencing to execution can be attributed, at least at the state level, to the amount of time it takes to obtain lethal injection drugs.<sup>184</sup> Because manufacturers and other countries do not want to be associated with the death penalty, states have to jump through hoops to obtain the drugs necessary,<sup>185</sup> sometimes by using unethical means.<sup>186</sup> The difficulty states face in obtaining the necessary drugs has arguably rendered lethal injection impracticable, and it will be no different for the federal government.

If the death penalty is a punishment the government wishes to continue to pursue, it could reduce the time between sentencing and execution by eliminating the need to search for execution drugs. Further, the number of medical challenges to lethal injection would

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<sup>179</sup> See *Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting) (“And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose *other* than destroying their targets.”) (emphasis in original); see also Balko, *supra* note 21.

<sup>180</sup> See *supra* Part I.B.

<sup>181</sup> *A Look at the 5 Federal Death Row Inmates Facing Execution*, AP NEWS (July 25, 2019), <https://www.ap-news.com/5730e863beb5477c96a1b4f2bd6c5ab0>.

<sup>182</sup> See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> (last visited Oct. 20, 2019).

<sup>183</sup> *List of Federal Death-Row Prisoners*, *supra* note 87.

<sup>184</sup> See Denise Middleton, *Here's Why it Takes so Long to Execute a Death Row Inmate*, THV11 (Apr. 10, 2017, 6:21 PM), <https://www.thv11.com/article/news/local/heres-why-it-takes-so-long-to-execute-a-death-row-inmate/91-430235541>.

<sup>185</sup> See Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 43, at 1360–61.

<sup>186</sup> See Balko, *supra* note 21.



be reduced,<sup>187</sup> resulting in less litigation and reducing procedural inefficiencies in the criminal justice system, both in court rooms and prison facilities.

In addition to the efficiencies of using firing squads, the firing squad is also a less painful method of execution. A 1993 study attempted to measure the pain experienced during different types of executions by monitoring the heart activity of the inmates being executed and concluded that execution by firing squad was one of the least painful methods.<sup>188</sup> The risk of error in executions by firing squads (such as missing) are minimal because there should be at least four bullets coming for the inmate.<sup>189</sup> Although the scene of an execution by firing squad is quite bloody for onlookers, “scientific research indicates that the initial pain felt by the victim may be comparable to being punched in the chest. There is some indication that the pain may also be hampered by an ‘adrenaline surge.’”<sup>190</sup>

Comparing the firing squad with the federal government’s proposed method of execution, it is clear that the firing squad will result in less pain and therefore comply with a long history of Supreme Court precedent interpreting the Eighth Amendment. However, the proposed federal method of execution is a single drug execution

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<sup>187</sup> See, e.g., Amy Howe, *Argument Preview: Justices to Consider Another Lethal-Injection Challenge, this Time by Inmate with Complicated Medical History*, SCOTUSBLOG (Oct. 31, 2018, 10:04 AM), <http://www.scotusblog.com/2018/10/argument-preview-justices-to-consider-another-lethal-injection-challenge-this-time-by-inmate-with-complicated-medical-history/> (discussing a death row inmate’s argument that lethal injection will result in his gruesome death because of a rare medical condition).

<sup>188</sup> Amelia Thomson-DeVeaux, *Is the Firing Squad More Humane than Lethal Injection?*, FIVETHIRTYEIGHT (Mar. 2, 2017, 7:02 AM), <https://fivethirtyeight.com/features/is-the-firing-squad-more-humane-than-lethal-injection/> (citing Harold Hilman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745 (1993)). The study also said lethal injection was one of the least painful methods, this study was conducted prior to changes in the lethal injection protocol and assumed all things went as intended. *Id.*; see also Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 43, at 1360 (sodium thiopental left the drug market in 2009).

<sup>189</sup> See Pflaum, *How Utah’s Execution by Firing Squad Works*, *supra* note 117.

<sup>190</sup> Cutler, *supra* note 97, at 413 (citing L. KAY GILLESPE, *THE UNFORGIVEN: UTAH’S EXECUTED MEN* 166 (1997)).

with pentobarbital.<sup>191</sup> The use of a single drug is contrary to the original protocol adopted and used by the majority of states.<sup>192</sup> Pentobarbital is used to euthanize animals and treat brain swelling and uncontrolled seizures in intensive care units and operating rooms,<sup>193</sup> as well as for physician-assisted suicides.<sup>194</sup> The drug acts to slow brain activity and is *not* a drug that any doctor can prescribe.<sup>195</sup> Because of its potency, special training is required to administer the drug; as a result it is restricted in its use.<sup>196</sup>

While visual effects of the drug have not been witnessed often when compared to executions with sodium thiopental or midazolam,<sup>197</sup> inmates have reportedly stated during the execution that they feel as if they are burning from the use of the drug<sup>198</sup>—signaling an error in the method being used.<sup>199</sup> Moreover, “the FDA-approved manufacturer of the drug will not sell directly to any state for use in an execution and has made it clear it doesn’t want third-party distributors to do so.”<sup>200</sup> As a result, compounding pharmacies that do

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<sup>191</sup> Federal Government to Resume Capital Punishment, *supra* note 7.

<sup>192</sup> *Baze v. Rees*, 553 U.S. 35, 42–43 (2008); *see also* Montgomery, *supra* note 83, at 2000 n.61.

<sup>193</sup> Erica Hunzinger, *Secret Sedative: How Missouri Uses Pentobarbital in Executions*, ST. LOUIS PUBLIC RADIO (Aug. 18, 2017), <https://news.stlpublicradio.org/post/secret-sedative-how-missouri-uses-pentobarbital-executions#stream/0>.

<sup>194</sup> Chip Brownlee, *The Federal Government Plans to Revive the Death Penalty After 16 Years*, SLATE (July 25, 2019, 3:38 PM), <https://slate.com/news-and-politics/2019/07/justice-department-bill-barr-orders-revival-federal-executions-lethal-injection.html>.

<sup>195</sup> Hunzinger, *supra* note 193.

<sup>196</sup> *Id.*

<sup>197</sup> *See, e.g., supra* note 94 and accompanying text.

<sup>198</sup> *See, e.g.,* Chris Kitching et al., *Texas Execution: Christopher Young Groans “I Taste It In My Throat” as Lethal Injection Surges Through Veins*, MIRROR, <https://www.mirror.co.uk/news/us-news/texas-execution-christopher-young-groans-12940027> (last updated July 18, 2019, 3:19 PM); Alter, *supra* note 2; Keri Blakinger, *Lawyer Claim Last 2 Texas Executions Botched by Old Drugs - And Dallas Killer Should Get Stay*, CHRON <https://www.chron.com/news/houston-texas/article/Lawyers-claim-last-2-Texas-executions-botched-by-12543974.php> (last updated Feb. 1, 2018, 8:46 PM).

<sup>199</sup> Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 43, at 1334.

<sup>200</sup> Hunzinger, *supra* note 193.

make the drug do so in secret,<sup>201</sup> thereby hiding how the drug is being produced. The quality of a drug compounded varies greatly,<sup>202</sup> which leads to a high likelihood of its use going awry. In addition, compounded pentobarbital has a short shelf life, which reduces the potency of the drug, causing death to be more painful.<sup>203</sup> Because compounding pharmacies are not subject to accreditation or oversight, some of the pharmacies are using improper procedures in preparing the drugs.<sup>204</sup> States are secretive about where they are obtaining the drugs from in order to avoid challenges to the constitutionality of the method.<sup>205</sup>

No matter the drug used, executions by lethal injection require an intravenous catheter (“IV”) to be inserted into the inmate.<sup>206</sup> Many issues arise when inserting the IV, leading to unnecessary and unconstitutional pain felt by the inmate.<sup>207</sup> For example, inmates who are overweight or are former drug users often have veins that are difficult or nearly impossible to find, even for well-trained phlebotomists.<sup>208</sup> Due to the code of medical ethics, doctors are advised against participating in executions,<sup>209</sup> which results in non-medical professionals attempting to insert IVs.<sup>210</sup> As a result, inmates are

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Brownlee, *supra* note 194.

<sup>204</sup> *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFO. CTR. <https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies> (last visited Oct. 20, 2019).

<sup>205</sup> Hunzinger, *supra* note 193.

<sup>206</sup> See Ben Bryant, *Life and Death Row: How the Lethal Injection Kills*, BBC (Mar. 5, 2018), <https://www.bbc.co.uk/bbcthree/article/cd49a818-5645-4a94-832e-d22860804779>.

<sup>207</sup> See SARAT, *supra* note 19, at 123.

<sup>208</sup> *Id.*

<sup>209</sup> *Capital Punishment: Code of Medical Ethics Opinion 9.7.3*, AMA, <https://www.ama-assn.org/delivering-care/ethics/capital-punishment> (last visited Oct. 20, 2019) (“[A]s a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution.”). While doctors cannot participate in the execution, doctors are, however, allowed to certify death after the inmate has been declared dead by another person. *Id.*

<sup>210</sup> See Balko, *supra* note 21.

poked and prodded in an attempt to search for a useable vein, resulting in more pain and lengthy delays.<sup>211</sup>

The uncertainty surrounding where the drug is actually coming from and how potent it actually is—in conjunction with the fact that inmates have audibly stated they feel as though they are burning when the drug is administered by a non-medical professional—implies that the use of pentobarbital is likely to cause immense pain and suffering. By contrast, the level of pain of an execution by firing squad is a known constant. Because firing squads are likely to cause less harm, are more feasible, and are readily implemented, the federal government should consider the use of the method for future executions.

B. *The Firing Squad is the Most Humane Method of Execution Available*

“Traditional lethal injection *is* more humane if you consider the humanity of the procedure from the perspective of everyone *except* the person being executed.”<sup>212</sup> Death by firing squad, however, is more humane from the perspective of the inmate to be executed. Executions by firing squad take about a minute, if that, to kill the inmate, while death by lethal injection *without* any complications takes about nine minutes.<sup>213</sup> Because death by firing squad is relatively quick, it avoids any indicia of torture.<sup>214</sup>

Executioners for lethal injection are not medical professionals, and are thus not medically trained to administer an IV and the lethal

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<sup>211</sup> See, e.g., Tracy Connor, *Doyle Lee Hamm Wished for Death During Botched Execution, Report Says*, NBC (Mar. 5, 2018, 3:40 PM), <https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706>.

<sup>212</sup> Balko, *supra* note 21 (emphasis in original).

<sup>213</sup> *Id.*

<sup>214</sup> See *In re Kemmler*, 136 U.S. 436, 447 (1890) (stating that a method of execution is unconstitutional when it involves torture and lingering death).

injection drugs.<sup>215</sup> However, a person on a firing squad is professionally trained to carry out the method of execution,<sup>216</sup> without violating any ethical codes.<sup>217</sup> Errors in lethal injection can arise from failure to insert the IV properly or the drugs not working as intended.<sup>218</sup> An error resulting from the firing squad either comes from the inmate moving around or the executioners having poor aim. Unlike the errors in lethal injection, the errors that can occur in an execution by firing squad can be easily remedied by restraining the inmate and having more intense training for executioners. Cruelty in firing squad is more easily noticed and a purposeful miss would be an obvious infliction of suffering, whereas errors in other methods may be more easily covered up as accidents, such as by blaming the inmate's veins.<sup>219</sup> As a result, the firing squad is a more humane method because it provides a reliable, efficient, and simple method of execution.

### C. Choice

While there are some states that give inmates a choice of how they wish to be executed, none give the explicit option of the firing squad.<sup>220</sup> Of the federal government and the twenty nine states with the death penalty, six states give the inmate a choice of how he would like to die, though the choices are limited to what the statute authorizes.<sup>221</sup> Recently, inmates who do not have a choice have been

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<sup>215</sup> Balko, *supra* note 21.

<sup>216</sup> *See id.*

<sup>217</sup> Medical professionals are not allowed to take part in executions by lethal injection, with few extremely limited exceptions. *See Capital Punishment: Code of Medical Ethics Opinion 9.7.3, supra* note 209.

<sup>218</sup> *See supra* Part II.A.

<sup>219</sup> *See, e.g.,* Connor, *supra* note 211 (blaming the unsuccessful search for a useable vein in Doyle Lee Hamm's arms as having "been compromised by illness and years of drug use.").

<sup>220</sup> *See, e.g.,* MISS. CODE ANN. § 99-19-51(4) (2019); OKLA. STAT. tit. 22, § 1014(D) (2019); UTAH CODE ANN. § 77-18-5.5 (2019); *see also* Richard Gonzales, *Tennessee Death Row Inmates Request Death by Firing Squad*, NPR (Nov. 5, 2018, 8:15 PM), <https://www.npr.org/2018/11/05/664548834/tennessee-death-row-inmates-request-death-by-firing-squad>.

<sup>221</sup> ALA. CODE § 15-18-82.1 (2019); CAL. PENAL CODE § 3604 (West 2019); FLA. STAT. § 922.105 (2019); MO. REV. STAT. § 546.720 (2019); S.C. CODE ANN. § 24-3-530 (2019); VA. CODE ANN. § 53.1-234 (2019).

asking for one,<sup>222</sup> and those with a choice have been exercising their ability to choose alternative methods to lethal injection.<sup>223</sup> Inmates are making these requests because they believe other methods of executions are more humane and less painful than lethal injection.<sup>224</sup> Inmates in Alabama,<sup>225</sup> Ohio,<sup>226</sup> Tennessee,<sup>227</sup> and Texas<sup>228</sup> have asked to be executed by firing squad, arguing that lethal injection is very likely to have a risk of serious harm.<sup>229</sup> While these requests have been unsuccessful,<sup>230</sup> the fact that inmates are requesting to be executed by firing squads gives perspective to the humanity of lethal injection: inmates seem to believe that lethal injection is more painful and far less humane than death by firing squad.<sup>231</sup>

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<sup>222</sup> See, e.g., David K. Li, *Execution Stayed in Case of Tennessee Inmate Who Requested Electric Chair over Lethal Injection*, NBC NEWS (Oct. 10, 2018, 2:36 PM), <https://www.nbcnews.com/news/us-news/tennessee-denies-inmate-s-request-die-electric-chair-n918576>; *Condemned Inmates Request Execution by Firing Squad*, N.Y. POST (Nov. 6, 2018, 1:36 PM), <https://ny-post.com/2018/11/06/condemned-inmates-request-execution-by-firing-squad/>.

<sup>223</sup> See Matt Lakin et al., *Tennessee Executes Stephen Michael West by Electric Chair*, TENNESSEAN (Aug. 15, 2019, 7:30 PM), <https://www.tennessean.com/story/news/2019/08/15/tennessee-execution-stephen-michael-west-dies-electric-chair/2009390001/>.

<sup>224</sup> See Li, *supra* note 222.

<sup>225</sup> *Arthur v. Dunn*, 840 F.3d 1268, 1272 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017), *abrogated by* *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

<sup>226</sup> *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 5163553, at \*4 (S.D. Ohio Oct. 31, 2017); see also Andrew Welsh-Huggins, *Lawyers Argue for Firing Squad for Ohio Death Row Inmate After Unsuccessful Lethal Injection*, CHI. TRIB. (Jan. 21, 2018, 2:59 PM), <https://www.chicagotribune.com/news/nationworld/ct-ohio-firing-squad-death-row-20180121-story.html>.

<sup>227</sup> Complaint for Injunctive Relief at 62–67, *Miller v. Parker*, No. 3:18-cv-01234, 2018 WL 6003123 (M.D. Tenn. Nov. 15, 2018), *reconsideration denied*, No. 3:18-cv-01234, 2018 WL 6069181 (M.D. Tenn. Nov. 20, 2018), *aff'd*, 910 F.3d 259 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 399 (2018) (No. 3:18-cv-01234); see also *Condemned Inmates Request Execution by Firing Squad*, *supra* note 222.

<sup>228</sup> *Bible v. Davis*, 739 F. App'x 766, 769 (5th Cir. 2018); see also 'Ice Pick Killer' Executed Without His Request for Firing Squad or Gas, ST. LOUIS POST-DISPATCH (June 28, 2018), [https://www.stltoday.com/news/ice-pick-killer-executed-without-his-request-for-firing-squad/article\\_4188ae46-c86f-50a3-a54c-59754d9f5ff6.html](https://www.stltoday.com/news/ice-pick-killer-executed-without-his-request-for-firing-squad/article_4188ae46-c86f-50a3-a54c-59754d9f5ff6.html).

<sup>229</sup> See, e.g., Welsh-Huggins, *supra* note 226.

<sup>230</sup> See *supra* notes 225–28.

<sup>231</sup> See, e.g., Lakin et al., *supra* note 223.

The last person to be executed by firing squads exercised his ability to choose his method because he believed firing squads were the only dignified way to die.<sup>232</sup> Furthermore, in Tennessee, a state where inmates have the choice of electrocution or lethal injection, of the last five executions carried out, three were by electrocution.<sup>233</sup> Of the two that chose lethal injection, one reportedly coughed, gasped, and choked throughout his execution,<sup>234</sup> and the other sang for two minutes after being administered the first drug, fell silent, turned purple, and let out a gasp.<sup>235</sup>

By allowing inmates to choose how they wish to be executed, not only do we avoid post-execution claims of inhumanness, but we allow inmates to choose the method they deem most humane. The Eighth Amendment protects the inmate, not the lawmakers deciding what method of execution should be used.<sup>236</sup> As a result, the most humane option is to allow the inmate to choose the method he deems the least painful, most reliable, or most humane because he is the one protected by the Eighth Amendment. If we are going to continue to be concerned with executions appearing humane, allowing death row inmates to choose how they will be executed is the most humane option.

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<sup>232</sup> See Sanchez, *supra* note 105; Barnes, *supra* note 105.

<sup>233</sup> See *Execution Database*, *supra* note 4 (select “State”; click “Tennessee”; then “Apply”).

<sup>234</sup> See Dave Boucher et al., *Billy Ray Irick Execution Brings No Resolution to Lethal Injection Debate*, TENNESSEAN, <https://www.tennessean.com/story/news/crime/2018/08/10/billy-ray-irick-execution-lethal-injection-debate/954312002/> (last updated Aug. 10, 2018, 11:48 AM).

<sup>235</sup> See Adam Tamburin et al., *Tennessee Executes Donnie Edward Johnson by Lethal Injection*, TENNESSEAN, <https://www.tennessean.com/story/news/crime/2019/05/16/execution-donnie-johnson-tennessee-lethal-injection/3668943002/> (last updated May 16, 2019, 10:51 PM).

<sup>236</sup> See *Ingraham v. Write*, 430 U.S. 641, 664 (1977).

### III. *ARTHUR V. DUNN*: AN ATTEMPT FOR AN EXECUTION BY FIRING SQUAD

Thomas Arthur was sentenced to death in 1992 for the 1982 murder of Troy Wicker.<sup>237</sup> Since his sentencing, Arthur has challenged lethal injection as his method of execution numerous times.<sup>238</sup> Following the Supreme Court's decision in *Glossip*, Arthur was allowed to amend his complaint to challenge the lethal injection protocol to be used in his execution.<sup>239</sup> In his amended complaint, Arthur sought to assert the firing squad as an alternative method for his execution.<sup>240</sup> The district court did not allow Arthur to do so, concluding that execution by firing squad is not authorized in Alabama, and as a result it could not be considered readily implemented or feasible in the State.<sup>241</sup>

#### A. *The Eleventh Circuit's Decision*

##### 1. THE MAJORITY

The Eleventh Circuit affirmed the district court's denial of leave to amend to include the firing squad as an alternative method.<sup>242</sup> The court stated that Arthur did not meet his burden to both plead and prove that "(1) Alabama's current three-drug protocol is 'sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers'; and (2) there is an alternative method of execution that is feasible, readily implemented, and in fact significantly reduces the substantial risk of pain posed by the

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<sup>237</sup> Kelsey Davis & Brian Lyman, *Thomas Arthur Put to Death for 1982 Murder*, MONTGOMERY ADVERTISER (May 25, 2017, 11:48 AM), <https://www.montgomeryadvertiser.com/story/news/2017/05/25/thomas-arthur-executed-thursday-evening/345627001/>; *Arthur v. Thomas*, 674 F.3d 1257, 1264 (11th Cir. 2012) (Hull, J., dissenting).

<sup>238</sup> *Arthur*, 674 F.3d at 1264 (Hull, J., dissenting) ("This is Arthur's fifth § 1983 civil action since he was sentenced to death in 1992, and his third such § 1983 challenge to lethal injection as his method of execution.").

<sup>239</sup> *Arthur v. Dunn*, 840 F.3d 1268, 1277 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017), *abrogated by* *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1314–15.



state's planned method of execution."<sup>243</sup> The court reasoned that Arthur failed on the first prong as to his claim about midazolam because he did not present any evidence that the use of the drug will cause serious harm or pain.<sup>244</sup> As a result of failing to meet the first prong, the proposal of the firing squad failed because, according to the Eleventh Circuit, the first prong must be satisfied before the second prong can be considered.<sup>245</sup>

Despite finding that Arthur failed to meet the first prong, the court considered the firing squad as an alternative, finding that even if Arthur proved the first prong, his alternative failed because lethal injection "has been repeatedly approved by the courts and successfully carried out in the past."<sup>246</sup> The court further reasoned that the alternative method presented can only be one authorized by the state's death penalty statute.<sup>247</sup> As a result of such reasoning, the majority concluded that the availability of execution by firing squad in a handful of states does not convert execution by firing squad to be a readily implemented alternative in Alabama.<sup>248</sup>

## 2. THE DISSENT

Judge Wilson dissented from the majority, finding that the firing squad was a possible alternative and that Arthur may be entitled to some form of relief.<sup>249</sup> Judge Wilson began by stating that "[t]he firing squad is a well-known, straightforward procedure that is regarded as 'relatively quick and painless.'"<sup>250</sup> Judge Wilson vehemently opposed the majority's conclusion that a method can only be presented if it is prescribed by the state where the execution is to take place.<sup>251</sup> In effect, Judge Wilson believed that the majority's decision allowed for "a state [to] restrict a prisoner's access to

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<sup>243</sup> *Id.* at 1315 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1316. This proposition was recently overruled by the Supreme Court. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law.").

<sup>248</sup> *Arthur*, 840 F.3d at 1316.

<sup>249</sup> *Id.* at 1322 (Wilson, J., dissenting).

<sup>250</sup> *Id.* at 1321 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015)).

<sup>251</sup> *Id.* at 1322.

Eighth Amendment relief by legislatively rejecting a viable execution alternative.”<sup>252</sup>

B. *The Supreme Court’s Denial of Certiorari*

Following the Eleventh Circuit’s affirmance of the district court’s decision to deny leave to amend Arthur’s petition to include the firing squad, Arthur appealed to the Supreme Court.<sup>253</sup> In his petition, Arthur argued that the Eleventh Circuit erroneously applied *Glossip*, allowing “states to legislatively exempt themselves from Eighth Amendment scrutiny by limiting their prescribed methods [of execution].”<sup>254</sup>

The Supreme Court denied Arthur’s petition for certiorari.<sup>255</sup> While there is no majority opinion, Justice Sotomayor wrote a dissent to the denial, joined by Justice Breyer.<sup>256</sup> In her dissent, Justice Sotomayor argued that she would have granted certiorari because the Eleventh Circuit’s decision “permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review.”<sup>257</sup> Justice Sotomayor reasoned that Arthur should have been allowed to amend his complaint to include firing squads because “[c]ondemned prisoners . . . might find more dignity in an instantaneous death [resulting from the firing squad] than prolonged torture on a medical gurney.”<sup>258</sup>

Had the Supreme Court granted certiorari, not only would it have presented an opportunity to consider the constitutionality of lethal injection, but it would have allowed for the Court to weigh in on the use of firing squads. More importantly, if the Court granted certiorari, Thomas Arthur would not have died a lengthy, painful death.<sup>259</sup>

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<sup>252</sup> *Id.*

<sup>253</sup> Petition for Writ of Certiorari, *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (No. 16-602).

<sup>254</sup> *Id.* at 1.

<sup>255</sup> *Arthur v. Dunn*, 137 S. Ct. 725 (2017), *denying cert.*

<sup>256</sup> *Id.* at 725 (Sotomayor, J., dissenting).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 734.

<sup>259</sup> The execution of Thomas Arthur lasted about thirty minutes, a length in time substantially longer than normal. Jenny Jarvie, *Murderer Known as ‘Houdini of Death Row’ Executed in Alabama*, L.A. TIMES (May 25, 2017, 11:50 PM), <https://www.latimes.com/nation/la-na-alabama-houdini-execution-20170525->

## CONCLUSION

While it does not appear likely that the Supreme Court will find the death penalty unconstitutional any time soon, given the pushback against lethal injection and the federal government's recent decision to use it, the best alternative may be allowing the person being executed to choose his method. Choice preserves the dignity of the inmate and will not only reduce litigation, but will allow inmates to choose the method they believe to be the most humane and least painful.

Although firing squads have been used less than forty times to execute in the United States,<sup>260</sup> using firing squads is a feasible method of execution that the federal government should consider as a choice for condemned inmates. The use of firing squads is arguably the most humane and efficient method of execution. The firing squad results in a quicker, less painful death. Not only would the use of firing squads likely result in fewer botched executions, but it would also force society to accept what we are authorizing the state to do. While some may view the firing squad as a barbaric method of execution, the perspective of the witness to the execution is immaterial. The law must consider only the perspective of the man being executed. It is he who the Eighth Amendment protects.

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htmlstory.html; Balko, *supra* note 21 (stating that an execution by lethal injection should take approximately nine minutes).

<sup>260</sup> See *infra* Part I.B.