

Is government transparency on Death Row?

Open records provide checks and balances

The continued execution of Death Row inmates in Missouri is a subject of significant controversy in this state, as it is nationwide. I know it's a subject with strong passions on both sides, and I am sure those of you who are readers of this column don't all hold the same opinion. However, I want to address an issue that arises out of it which does concern us and talk a little about why Missouri Press has chosen, and continues to choose, to be involved in that issue.

The issue concerns the execution protocol - how the drugs are administered in killing the prisoner. All of you are familiar with what recently happened in Oklahoma. Media coverage of the malfunction of that process was substantial.

Back in 2007, Missouri changed its execution statute (Section 546.720) to make secret the names of people who are members of the execution team. At the time that change was made in the law, and regulations were proposed to enact this secrecy, Missouri Press Association unsuccessfully took a stand before the Department of Corrections seeking to limit the secrecy that was being imposed by state statute.

Since that time, the secrecy protocol has become more and more complex. As you have read, pharmaceutical companies became concerned over their drugs being used for executions and some products were no longer available for that use. Then those pharmacies dispensing the drugs began to want confidentiality to avoid the publicity that came with serving this state purpose. Now, reporters have demonstrated that pharmacies not subject to Missouri's regulations are supplying the drugs being used. There continues to be a lack of transparency about the process, from start to finish. It is not the doing of the act that concerns Missouri Press Association, but it is how the acts of government are being done behind closed doors and with no checks and balances that come from public disclosure of the process that concerns us.

Several weeks ago, Missouri Press was approached by Public Citizen, Inc., a non-profit organization which advocates for consumer protections, health and safety regulations, access to the courts and open government. That organization decided to file an amicus before the 8th Circuit U.S. Court of Appeals in connection with a lawsuit which originally was filed by Larry C. Flynt against George A. Lombardi, director of the state Department of Corrections.

Flynt's original lawsuit was over the department's refusal to allow Flynt to see sealed documents that might identify an anesthesiologist on the state execution team. Flynt, who was a victim of one of the people about to be executed by the State of Missouri, believed he had an interest in the subject. However, the federal court judge hearing his case ruled that "A generalized interest in a subject of litigation does not justify intervention" in the case.

That holding is very troubling to us. If I must be, in essence, a possible party to a case to have an interest that allows me to intervene in litigation, then the point of amicus briefs falls by the wayside.

"Concerned citizens and the media are watchdogs of our government and often seek access to sealed court documents," said Tony Rothert, legal director of the ACLU in Missouri, in the *St. Louis*

Post-Dispatch back in April. He pointed out, as is obvious, that the media and the public, either of which clearly is a third-party with no direct interest in the underlying factual situation, needs the ability to challenge a holding that closes court records.

Therefore, Missouri Press chose to join with Public Citizen, Inc., in its amicus argument before the federal court of appeals *solely* in regard to this holding about who is an “interested party” in contesting closed records. It’s an important issue to our members. I would also note that a similar amicus brief was filed jointly by the Reporters Committee for Freedom of the Press and 13 other media organizations in that same case.

Then, a few days ago, a group of media entities including the *Post-Dispatch*, the *Springfield News-Leader*, *The Kansas City Star*, the AP, and Guardian News and Media, all joined to file their own lawsuit against the department in regard to the secrecy under which executions are being conducted in the state. This group had made a Sunshine Law request for a number of documents related to the drugs being used for lethal injection executions in the state.

I want to remind everyone the point here is NOT whether the media is for or against the death penalty. What is at issue in all of these cases is that government is undertaking governmental functions in secret. Government is basically telling citizens, to trust it to carry out one of its highest and most severe functions. None of us necessarily believes that government is acting wrongfully; but we do have concerns that if there is not a public watchdog on the process, that it is possible shortcuts will be taken that would not occur in full sunlight; that steps will be skipped; that favors might occur; that wrongful acts will be done.

“The people are the only censors of their governors,” Thomas Jefferson said in his famous quote, ending with his admonition it is better to have newspapers without government rather than government without newspapers. These briefs are not asking that executions end. Instead, they are asking there be full and complete disclosure of all facets of the process. There’s a significant difference in those positions.