Cover v. Idaho Board of Correction

Practitioner Comment
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Justice Harry Blackmun famously wrote in a 1994 dissent that "from this day forward, I shall tinker no longer with the machinery of death."[1] Fed up with struggling to develop rules that might give the death penalty a patina of constitutional fairness—loosening a bolt here, tightening another one there—he abandoned the endeavor altogether.[2] Even though Justice Blackmun never again joined a majority opinion upholding a death sentence, the machinery trundles on, now in its fifth decade since reinstatement.

On its surface, *Cover v. Idaho Board of Correction*[3] is a public records act case. It is about the extent to which Professor Aliza Cover was entitled to certain records from the Idaho Department of Correction ("Department") regarding the lethal injection executions of Paul Rhoades and Richard Leavitt. The Idaho Supreme Court held that Cover should have received all that she had requested under Idaho's Public Records Act.

But *Cover* also illustrates the wider fight over the public's right to inspect the continued workability of the process that produces death sentences in its name. Idaho and other capital punishment states want to withhold much of that information. They profess concern that revealing the sources of their lethal drugs could chill those sources and jeopardize their ability to carry out death sentences. Indeed, while *Cover* was pending, the Department changed its policy to exempt specifically from disclosure all sources of chemicals, supplies, or services in an execution.

But the argument for concealment reveals its own flaw. The death penalty continues to be the subject of an ongoing and vigorous debate. A healthy democracy requires transparency so that its citizenry can make informed decisions.

The public may see capital punishment as Justice Blackmun eventually did: a Rube Goldberg contraption that is held together by duct tape and bailing wire. It is precisely *because* an informed citizenry might question the Department's practice of keeping a "Confidential Cash Log" that recorded execution-related cash expenditures, as in *Cover*, that such information should be disclosed. The public may also disapprove of purchasing unregulated drugs of an unknown efficacy from a compounding pharmacy in a parking lot with a suitcase of cash, as alleged in *Cover*. Or it may decide that these things are worth whatever value that the death penalty brings.

[1] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting)
[2] *Id.* at 1160.
[3] 167 Idaho 721, 476 P.3d 388 (2020)

In *Glossip v. Gross*,[4] the Supreme Court turned away an Eighth Amendment claim that a drug used in Oklahoma's lethal injection protocol might fail to render the inmate unconscious, subjecting him to excruciating pain. Writing for the majority, Justice Alito noted that the responsibility to resolve thorny moral and philosophical questions surrounding capital punishment rests primarily with the people. If he's right, then the people must have all of the facts. They must be able to see inside of Justice Blackmun's machine.

[4] 576 U.S. 863 (2015).