

## *Cover v. Idaho Board of Correction*

Practitioner Comment

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Government transparency is a democratic necessity. Idaho’s public records act recognizes this; it is designed to give ordinary citizens access to information to hold their government accountable. Transparency and accountability are all the more important in the context of the death penalty, where the state punishes with lethal force in the name of the people. Without knowing how the state is carrying out the death penalty, the public lacks crucial information about whether the capital punishment system is consistent with their values. In the unique area of the death penalty, such communal value judgments have constitutional significance: in evaluating capital punishment’s constitutionality, the Supreme Court looks to the “evolving standards of decency” reflected in the judgment of legislatures and the public.<sup>1</sup> Public access to information is therefore key to a robust public discourse that informs capital punishment policy as well as its constitutionality.

Historically, capital punishment was a public affair,<sup>2</sup> a brutal display that warned the populace about the consequences of criminal behavior. As capital punishment retreated away from the public square and into execution chambers, it became increasingly hidden from view, but it retained certain assurances of public access.<sup>3</sup> The past decade has ushered in a new era of execution secrecy, as lethal injection chemicals have become scarce and states have scrambled to obtain these chemicals—sometimes through illegal, unethical, or unsafe means<sup>4</sup>—while passing new laws shielding execution practices from public oversight.<sup>5</sup> Secret acquisition of drugs from unregulated and unreliable sources, as well as rapidly changing execution protocols sanctioning use of experimental drug cocktails, have increased risks of botched executions—what Justice Sotomayor has called the “chemical equivalent of being burned at the stake.”<sup>6</sup>

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<sup>1</sup> *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

<sup>2</sup> *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 875 (9th Cir. 2002).

<sup>3</sup> *Id.*

<sup>4</sup> *See, e.g.*, ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 24–45 (2018), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/behind-the-curtain-secrecy-and-the-death-penalty-in-the-united-states>.

<sup>5</sup> *See, e.g.*, William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 423 (2017).

<sup>6</sup> *Glossip v. Gross*, 576 U.S. 863, 949 (2015) (Sotomayor, J., dissenting); *see also id.* at 951 (describing botched execution of Clayton Lockett in Oklahoma).

Idaho, too, has moved toward execution secrecy, and the three years of public records act litigation in *Cover v. IBOC* shows the extent of the state's attempts to shield information about Idaho executions from public scrutiny. The court in *Cover* found that the Idaho Department of Correction's own public information officer acted in bad faith in refusing to provide responsive documents. And there is cause for concern about what these records reveal. One 2011 email shows that IDOC officials were in communication with a drug distributor in India who sold large quantities of lethal injection chemicals to other state correctional departments that were later seized at the border by the FDA because they were illegally imported.<sup>7</sup> Although we still don't have the whole story about how Idaho obtained all the chemicals used to execute Paul Ezra Rhoades in 2011 and Richard Leavitt in 2012, we now know that Idaho corrections officials paid more than \$10,000—in cash—to out-of-state compounding pharmacies in order to obtain at least some of these drugs.

The public needs access to information about whether the government is ethically and legally obtaining execution chemicals, and whether the nature and source of those chemicals is likely to cause torturous death. The Idaho Supreme Court's unanimous opinion in this case is an important affirmation of the public interest in transparency when the government's coercive power is at its peak.

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<sup>7</sup> Chris McDaniel & Tasneem Nashrulla, "This Is the Man in India Who Is Selling States Illegally Imported Execution Drugs," BUZZFEED NEWS (Oct. 20, 2015), <https://www.buzzfeednews.com/article/chrismdaniel/this-is-the-man-in-india-who-is-selling-states-illegally-imp>.