

Mr. Brown represented the plaintiffs (The Associated Press; Idaho Statesman Publishing, LLC d/b/a *The Idaho Statesman*; Lee Enterprises, Incorporated d/b/a *The Times-News*; The Idaho Press Club, Inc.; Pioneer Newspapers, Inc. d/b/a *Idaho Press-Tribune*, *Idaho State Journal*, *Standard Journal*, *Teton Valley News*, *The News-Examiner*, *The Preston Citizen*, and *Messenger Index*; TPC Holdings, Inc. d/b/a *Lewiston Tribune* and *Moscow-Pullman Daily News*; Bar Bar Inc. d/b/a *Boise Weekly*; Cowles Publishing Company d/b/a *The Spokesman Review*; and Idahoans for Openness in Government, Inc.) against the state of Idaho in the matter of *The Associated Press et al. v. Otter, et al.*, Case No. 1:12-cv-00255-EJL, United States District Court for the District of Idaho.

Idaho U.S. District Court had denied the media coalition's request for a preliminary injunction in regard to an execution which was scheduled for June 12, 2012. The news organizations sought a preliminary injunction requiring ". . . all phases of the execution process, beginning with the condemned inmate's procession into the execution chamber, the restraining of the condemned inmate on the execution table, the connection of medical monitoring devices, the insertion of catheters, and the attachment of IV lines, and all incidental treatment of the condemned inmate be conducted in full and open view of the assembled witnesses to that execution."

The initial twenty minutes of an execution, as described above, occurs behind a pulled curtain preventing all gathered witnesses from viewing the execution process from the beginning to the end. The news organizations relied upon *California First Amendment Coalition v. Woodford*, 299 F.3d (9th Cir. 2002), hereinafter referred to as CFAC (IV), which ruled that the witnesses had the First Amendment right to view the entire execution process. The plaintiffs appealed the matter to the Ninth Circuit whereupon the Court reversed and remanded the matter.

The Ninth Circuit ruled that if there is going to be capital punishment then the execution process is an aspect of capital punishment and, thus, must be viewed in its entirety in order to allow for open debate and discussion. Further, First Amendment rights attached to the rights to view the process in its entirety.

In order to have a robust debate it is necessary to have an informed debate.

The State of Idaho argued that the facts of the CFAC (IV) case were distinguishable from the facts in the state of Idaho. They argued that the news organizations' Complaint was not timely filed in that it should have been filed prior to the scheduling of the execution so that a change in the State's protocol could have been made in a timely manner. They also argued that the statutory history in Idaho prevented the public from viewing executions and that their penological concerns legitimized a closing of a portion of the execution process.

Prior to Mr. Leavitt's execution, the previous execution in Idaho was in November of 2011 of a Mr. Rhoades. Prior to Mr. Rhoades, the previous execution was 15 years earlier.

In response to the State's allegation of historical closure, the news organizations produced references to books and newspaper articles showing that from 1899 forward, executions did take place within the confines of the state penitentiary but were consistently attended by witnesses and representatives of the media and others. (Prior to 1899, executions took place on the county level and, generally, in the town square, which is what the statutory provisions were seeking to avoid.)

Concurrent with the filing of the Complaint, the U.S. Court of Appeals for the Ninth Circuit contacted the attorneys involved indicating they were following the case. Judge Lodge entered an order on June 5, 2012, denying the news organizations' request for a preliminary injunction. On June 5, 2012, the news organizations filed a notice of appeal, and the Ninth Circuit immediately entered an order setting forth a briefing schedule within 24 hours and oral argument on June 7, 2012, all of which took place less than two days after the entry of Judge Lodge's order.

Oral argument was held on June 7, 2012, in Pasadena, California. The Ninth Circuit Court of Appeals entered its opinion on June 8, 2012, reversing the lower court and granting the news organizations' motion for preliminary injunction and issuing a writ of mandate to that effect.

On June 11, 2012, Judge Lodge entered a court order honoring the opinion and ordering that the Leavitt execution go forward without the curtain being drawn. Mr. Leavitt was executed on June 12, 2012.

The opinion issued by the Ninth Circuit Court of Appeals is very forceful and declarative; *Associated Press v. Otter*, 682 F.3d 821, 40 Media L. Rep. 1974 (9th Cir. 2012)

In regard to the timeliness of the news organizations' Complaint, the Ninth Circuit stated:

The State of Idaho has had ample opportunity for the past decade to adopt an execution procedure that reflects this settled law. It can hardly complain that it has been unaware of the binding precedent, since the media coalition specifically cited *California First Amendment Coalition* in asking the State to alter its execution procedure prior to the November 2011 execution of Paul Rhoades.

*Id.*, at 823-24.

The penological concerns expressed by the state of Idaho were to (1) preserve the prisoner's privacy and dignity, (2) respect sensitivities of the condemned prisoner's family, (3) respect sensitivities for his fellow death-row inmates, and (4) protect the anonymity of the members of the medical team who participate in the execution. The Ninth Circuit citing its own opinion from CFAC (IV), again reasserted that the relevant inquiry is "whether a prison regulation that burdens fundamental rights is reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to those concerns (internal quotation marks omitted)". *Id.*, at 825 citing *California First Amendment Coalition*, 299 F.3d at 879.

In regard to the feelings of the condemned, the condemned's family, and others on death row, the Ninth Circuit stated:

The State of Idaho already offends the dignity of condemned inmates and the sensibilities of their families and fellow inmates by allowing strangers to watch as they are put to death. It strains credulity for the State to assert that these interests will be offended to a meaningfully greater degree when witnesses are permitted to watch the insertion of intravenous lines than when they are simply allowed to watch the inmates die.

*Id.*, at 824-825.

In regard to the anonymity of the medical team, the Ninth Circuit simply found:

We considered this interest at length in *California First Amendment Coalition*, however, characterizing California's "fear that execution team members [would] be publicly identified and retaliated against" as "an overreaction, supported only by questionable speculation," 299 F.3d at 880 . . . .

*Id.*, at 825.

The Ninth Circuit found that the use of surgical medical garb is a practical alternative as opposed to restricting access to the witnesses of lethal injections.

The June 12, 2012, Leavitt execution went forward as scheduled. No change was made to the written protocol, and the medical team simply wore surgical garb to hide their identity.

Thus, the Ninth Circuit ruled that the lower court abused its discretion by not granting the preliminary hearing, that the news organizations were assuredly going to win on the merits and that the news organizations showed that they would suffer irreparable harm because the holding in CFAC (IV) was that the First Amendment protects the right to witness executions in their entirety.

To say that the plaintiffs will not suffer harm because they will be able to witness part of Leavitt's execution is like saying that the public would not suffer harm were it allowed to read only a portion of the *New York Times*.

*Id.* at 825-826.

The court then also stated that the denial of First Amendment rights for even minimal periods of time questionably constitutes irreparable injury. The Ninth Circuit then ruled that the State was to allow witnesses to observe:

. . . Leavitt's entire execution, "from the moment [he] enters the execution chamber through, to and including, the time [he] is declared dead." *California First Amendment Coalition*, 299 F.3d at 886 (internal quotation marks omitted).

*Id.* at 826.