10-1973

Saxbe v. Washington Post

Lewis F. Powell Jr.

Grant & Consolidate

DISCUSS

PRELIMINARY MEMO

March 1, 1974 Conf.
List 3, Sheet 1

No. 73-1265-CFX

Cert to CADC
(McGowan, Leventhal, Robinson)

SAXBE, Attorney General

Federal/civil

v.

WASHINGTON POST CO.

Timely

Grant & consolidate with 2 → Owens

1. This case presents the identical issue raised in No. 73-754, Procunier v. Hillary, and 73-918, Pell v. Procunier, prob juris noted. The DDC (Gessell) invalidated a federal prison rule forbidding interviews between the press and individual inmates. CADC affirmed. The SG is seeking cert.

2. FACTS: The Brueau of Prisons' regulations at issue here provides:

"Press representatives will not be permitted to interview

individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, it is limited to the discussion of institutional facilities, programs and activities." Policy Statement No. 1220.1A (2/11/72)

Respondents are a newspaper and one of its reporters, and they filed this suit seeking to obtain interviews with individual inmates at various federal prisons and a declaration of the regulation's invalidity.

Judge Gessell ruled that Branzburg was inapplicable and invalidated the regulations holding that the regulations infringed on the constitutional right of the respondents to gather news. In its opinion affirming the D. Ct., the CA acknowledged that its decision conflicted with the 3-judge Ct. decision in Procunier.

CONTENTIONS: The SG properly argues that this case presents the identical issue as Procunier and the lower courts are in conflict. It argues that this case should be heard along with Procunier since the issues will be further illuminated and since that case involved a state system, whereas this involves a federal system. It asserts that it will have its briefs filed in time for argument. (Procunier is tentatively set for April.)

Respondents do not oppose the granting of certiorari. They argue with the SG that it would be helpful to have this case considered alongside the California case, and, like the SG, they promise to have their brief filed in time to consolidate with Procunier.

DISCUSSION: This should be granted and consolidated with Procunier. There is a response.

2/25/74 Richter CA OP in supplemental petition

Conference 3-1-74

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 73-1265

Submitted ....., 19... *Announced* ....., 19...

SAXBE

vs.

WASHINGTON POST

Grant +
set with
Procunier v Hillard
73-754, and
Pell v Procunier

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
.....		✓												
Rehnquist, J.		✓												
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.		✓												
White, J.		✓												
Stewart, J.		✓												
Brennan, J.		✓												
Douglas, J.		✓												
Burger, Ch. J.		✓												

MEMORANDUM

TO: Mr. John Jeffries DATE: April 11, 1974

FROM: Lewis F. Powell, Jr.

No. 73-1265 Saxbe v. Washington Post

The three cases involving the alleged right of the media to interview prison inmates "face to face" present close and difficult questions for me.

I have taken a preliminary look at the opinions and briefs in all three cases, and am left with a feeling of dissatisfaction as well as doubt as to a rational solution of the problem common to all of them. But let me focus, for the purpose of this memo, on the Saxbe case - in which Judge McGowan wrote the opinion with which you are quite familiar. I start with the order of the District Court (supplemental petition, p. 5, note 2), which requires (i) a general policy allowing "confidential and uncensored press interviews with any consenting inmates"; and (ii) allows exceptions only "where it can be established as a matter of probability on the basis of actual experience that serious administrative or disciplinary problems are, in the judgment of the prison administrators directly concerned, likely to be created by the interview because of either the demonstrated behavior of the inmate concerned or special conditions existing," in the particular prison at that time.

Perhaps the government's principal objection to the order is that it requires an individualized judgment in each particular case on the basis of objective evidence before any exception to the general policy may be allowed. This would mean, in a state like California, that each of the 20,000 inmates would be entitled - absent such an individualized judgment - to be interviewed as frequently as he desired. And if, in the exercise of individualized judgments, some are allowed the privilege and others denied it, the government argues that serious disciplinary and morale problems will result - an argument which is certainly persuasive with me.

Judge McGowan, apparently recognizing merit in the government's position, construed - in the third from final paragraph of his opinion - the District Court's order as follows:

> "Properly interpreted and followed, (it) simply requires that administrators of the federal correctional institutions make individualized judgments based on their perceptions of the correct requirements of their institutions, and the likely effect of a particular interview on the proper functioning of the institution."

It requires no great perception (speaking of one's perceptions), to observe that Judge McGowan's reading - in this paragraph of his opinion - rather drastically changes the meaning of the DC's order. The McGowan reading of the order allows, as indeed his opinion states on the preceding page, the "exercise of discretion" by the prison administrator without any requirement that such discretion be based on "objective

evidence". As reasonable as this sounds, I do not believe that this is the way the McGowan opinion was intended or indeed would be interpreted. If an administrator's absolute discretion were allowed, this would be unreviewable by the courts and all of the disadvantages cited by the government with respect to the opportunity for discrimination and discontent would probably arise.

But Judge McGowan did not stop with his third from the last paragraph. In the very next paragraph he undertook to "recast" the District Court's order:

> ". . . To require that interviews be denied only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." (Supp. Pet. p. 26)

It seems to me that Judge McGowan reversed his field as quickly as Larry Brown did prior to last season. In the recast order, and this is all that counts, the administrator's discretion is narrowed to situations where either the demonstrated behavior of the inmate or special conditions existing in the prison at the time "present a serious risk of administrative or disciplinary problems". We are back, for all practical purposes, to the DC's formulation of a general rule, plus exceptions supported by objective or demonstrable evidence.

I will have a hard time going along with this. First, I doubt that the First Amendment was ever intended to be read as according any such rights with respect to prison inmates and those who wish to interview them. If so, and accepting the basic rationale of the McGowan and other like opinions that some relaxation of the present absolute ban on face-to-face interviews is required by a contemporary reading of the First Amendment, I am not persuaded - at least as of this time - that the McGowan formula is reasonable or would not result in serious problems. I view the interests urged by the federal government and the states as real and legitimate, and not illusory. As one of the briefs indicated (I think in Procunier), the effect on the state interest of rehabilitation could be significant. An inmate's attitude is fundamental to any program of rehabilitation. If he is encouraged to seek the publicity which most human beings so desire, or to air his grievances, or to ferment unrest within the prison or public clamor from without, or to make himself a "big wheel", or - by virtue of individualized judgments - he is denied the right to interview the press, the inmate's attitude toward rehabilitation is [redacted] easy to imagine. It would be quite negative.

I mention the rehabilitation interest, primarily because the courts and the briefs in these cases have rather subordinated this interest. It is related, of course, to the necessity of

maintaining discipline, a modicum of morale, and a forestalling (or minimizing) of the violence which is so characteristic of prison life.

And when one thinks of the problems of administering a prison (whether it be maximum or minimum security) under the Gessell or McGowan formula, there will be few candidates for the position of prison administrator. Apart from having to make countless individualized judgments, worrying in each case as to whether he can document his reasons sufficiently to prevail when the disappointed prisoner brings a 1983 case against him, there is the problem not addressed by any of the courts as to who constitutes the "media" or the "press"? In our discussion of this issue under the law of libel, your view was that the monthly mineographed bulletin of a page or two circulated at Harbour Square is for the purpose of the First Amendment a part of the press. We must, presumarly, add to this all who wish to write books, magazines articles, television and movie scripts and, of course, the reporters of every college and high school newspaper or underground publication in the 50 states. And what of television and radio representatives - who can hardly be classified as not constituting a part of the media?

The answer which will undoubtedly be given is that, of course, reasonable rules and regulations with respect to time, place and frequency will be appropriate. But if one reflects

on these, in view of the literally thousands of demands that are likely to flood in, the mechanics and manageability of conducting such a program - and especially in a way to minimize a flood of new litigation - should not be minimized. The resulting litigation will derive not merely from prison inmates but, as illustrated by these cases, from disappointed members of the "media" who feel they are being discriminated against, denied the opportunity to win Pulitzer prizes or even modest raises from their publications, etc.

It is important, also, that the problem be kept in perspective. The Federal Bureau of Prisons presently allows wide access by the media to inspect and visit prisons, to interview prison officials, former inmates, and to receive uncensored and unlimited correspondence, affidavits, charges, articles and even books from prison inmates. Prisons also regularly allow bar association, civic and legislative inspections and general oversight. It is quite fictional, in 1974, to suggest in view of all of this "openness" and of the ready accessibility of inmates to the courts under habeas corpus and 1983, that the "right of the public to know" (whatever that is) is not rather generously gratified.

But having said all of the foregoing, my instinct is to consider the possibility of some middle ground. From a doctrinal point of view, if middle ground were devised it may not be logical and would please neither the prison

administrators, or the media, or the ACLU. But where First Amendment rights lurk in the background, I do agree with Judge McGowan and others that everyrreasonable effort should be made to accommodate them as broadly as the particular circumstances permit.

One possible thought, which we might explore, would be to conclude that the limited First Amendment rights implicated with respect to prison inmates could be met not only by Judge McGowan's formula, but, in the discretion of the administrators, by a general regulation somewhat along the following lines: That a controlled and limited number of personal, head-to-head interviews would be allowed in a particular prison over a particular time span (e.g., one a week); that inmates desiring such interviews and representatives of the media desiring them should sign up some specified time in advance, and the inmate and reporter who are accorded the privilege would then be selected by lot - excluding inmates then being subject to disciplinary control or otherwise placed on an "out-of-bounds" status with respect to personal press interviews.

Such a plan would have its administrative problems, to be sure. But these would be far more manageable, in my view, than any proposal found in the record of these three cases. Moreover, it would add one additional cross-check - to the substantial ones presently existing - on the manner in which

prisons are operated and inmates treated.

In sum, I am reasonably familiar with the legal arguments on both sides and there are precedents to support both. Yet, as you know, I feel strongly that the courts should not be drawn further into overseeing the administration of penal institutions. Let us do some thinking together.

L.F.P., Jr.

ss

Jeffries

No. 73-1265 SAXBE v. WASHINGTON POST Argued 4/16/74

Bork (SG)

We are concerned only with maximum & maximum security prisons.

This ~~case~~ case involves only an alleged 1st A claim: One one of many modes of access is involved. Brought by soap right of access may be prevented.

NO ~~a~~ limitation on right to publish.

The press has many alternative means.

Core of 1st amend. not implicated.

Cts must not be put in position of overseeing admin. decision

Bork (cont.)

"Zone of reasonableness" is proper standard to apply. In a regulated context (prisons) limitations on rights and recovery.

Sources of inf. presently available:

1. Correspondence - no limitation
2. Interviews - just as public - randomly selected.
3. Tours of prisons - nothing off limits, including solitary confinement.
4. Lawyers & family may interview confidentially - & are then free to talk to press
5. Constant flow of inmates as they are discharged - almost 1/2 of Fed. prisoners are freed each year.

CADC formula:

Case by case approach will be disruptive & also inhibit rehabilitation. Impossible to administer. Litigation will result.

1st Amend itself cuts against this approach. The choices of who to allow to interview & to be interviewed would constitute censorship.

Califano (for Press)

Q - Does a reporter have a 1st amend right to interview

19 states allow such interviews — testimony of warden is in record.

Press has a const. 1st A right as surrogate of the public.

MEMORANDUM

TO: Mr. Justice Powell DATE: April 18, 1974

FROM: John C. Jeffries, Jr.

No. 73-1265 Saxbe v. Washington Post

This memorandum will record in general and conclusory terms the highlights of our conversation about the Washington Post case and its companions. We covered three principal topics: the nature and derivation of the First Amendment interest involved; the appropriate standard for reviewing a regulation or practice that touches that interest; and the application of that standard to specific situations.

First, I think we agreed that no individual reporter has a personal constitutional right to demand an interview with a consenting prisoner. He or his publisher may have a personal constitutional right to publish what he finds out but not to insist on a particular means of access to information. To this extent the SG's distinction between so-called rights of access and prior restraints of publication is well taken. This does not mean, however, that an absolute ban on interviews violates no constitutional guarantee. There is a constitutional interest involved here. It is the interest of the public or community at large in access to information relevant to self-government. It is one aspect of a constitutionally-created system of freedom of expression. In theory, the press generally represents the public's rights and discharges the communication function essential to

a democracy, but no particular individual who calls himself a reporter and who has some colorable claim to that status can insist that he ~~alone~~ personally has a constitutional right to represents the public. Thus, I believe that the First Amendment places some restraint on the ~~competence~~ authority of prison administrators to bar all inmate interviews with the press, but I do not believe that it requires an administrator to accede to every demand for an interview.

Second, the appropriate standard is whether the regulation or practice involved is necessary or essential to the legitimate state interests of order, security, and rehabilitation. This is well settled as a general approach to time, place and manner restrictions. It is also emerging as a standard for determining the validity of an incidental restraint on First Amendment liberties imposed by government in the course of a legitimate organizational activity. E.g., secondary schools (Tinker), universities (Healy), draft program (O'Brien), prisoner mail (Procunier).

Third, this standard should be applied to the rule or regulation involved rather than to each particular case on an ad hoc basis. Once a valid rule is established, the application of that rule to a particular circumstance is an appropriate subject for deference to prison administrators. Thus I believe that the penal authorities are competent to make and enforce rules limiting press interviews. They can make rules limiting the number of interviews for each inmate and in general, setting

up qualifications to insure that the interviewers are bona fide press, prohibiting interviews with prisoners under temporary disciplinary sanction, etc. So long as the rule restricts the general public's constitutional interest in access to information no more than is necessary and so long as its application to a particular case is not arbitrary, the Constitution is not offended by the fact that one particular reporter does not get a particular interview when he wants it.

As a footnote I might add that there is no sense in making a distinction between press-requested interviews and inmate-requested interviews. Whoever is favored will make the formal request, often after prompting by the other party.

JCJ,jr

ss

LFP/gg 4-19-74

73-1265 SAXBE v. WASHINGTON POST CO.

The case of Kleindienst v. Mandel, 408 U.S. 753 is relevant.

Justice Blackmun quoted from Justice White's opinion in Red Line as follows:

> "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." At 763.

Responding to the Government's idea that professors who wanted to hear Mandel's ideas had access to books and speeches, Justice Blackmun said:

> "While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests. * * * We are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access."

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No. 73-1265, Saxbe v. Washington Post — Conf. 4/19/74

The Chief Justice — Reserved Vote

Prison conditions need ventilating - regardless of 1st Amend.

Convicted persons lose many rights - even those on parol!

Does not "buy" all of desc. predictions of person's dangerousness - but they do know more about this than any court.

See ABA reports (Commission on Corrections) - as to desirability of visitations.

But as to inmates, C/J finds no 1st amend. right. We have (in Saint Prunier) recognized no right to "communicate" - write letters, etc.

The two prisons systems before us (Fed & Calif) are best in country.

McGowan's op. impossible to administer - as the two op. makes late offense up to its conclusion.

After 2 spoke, CJ said he agreed with me as to broad public interest - but he knows of no Const. right of public to know.

Douglas, J. — Affirm

Agree with most of what Chief says - but also agree with most of what Gressell said as modified by McGowan. There are serious problems & press tends to aggravate them. Would not think of turning press loose, but CADC may have come up with a reasonable accommodation.

Brennan, J. — Affirm

Problems urged by Gov't are real & "administration must have wide latitude" - but Gov't has not met made case for absolute bans.

McGowan is approximately right.

The less we try to write guidelines better we will be.

Even the recent changes in Fed. Rules (to allow interviews with all except work & med. security prisons) do not meet 1st amend. requirements either of inmates or press.

Stewart, J. — Reverse

Not accurate to say there is an absolute ban. Random interviews are allowed & numerous other means are available both to inmates & press.

Not convinced the Fed. regs are not within zone of reasonable regulation - i.e. prison admin. must have very wide latitude.

If we affirm McGowan, impossible to apply uniform all sorts of problems - including potential for extensive litigation.

White, J. [redacted] Reverse

Agree with Potter

– but not entirely at rest.

Would not impose a Const. [redacted] rule on prison adm. in an area as sensitive as this where we are dealing with worst elements in society

Press can take care of itself. Inmates have a better case than media.

Marshall, J. Affirm

Agree with Brennan

Blackmun, J. Agree with Potter

Mandel is distinguished.

A starting point in LFP's op. is Procunier.

He has visited many mental hospitals & [redacted] prisons. Problems are unimaginable.

No right to [redacted] to gather news anywhere & everywhere.

McGowan op. sounds good but [redacted] doesn't work – would create more problems than it solves.

Powell, J. Affirm with substantial modification.

The purpose of 1st Amend. is to safeguard the societal interest in information relevant to self-government. The way in which our penal system is adm. is of significant societal & public interest.

As SG argues, there are many ways (sources of inf.) in which public is now informed. I cannot say, however, that face to face interviews would not add an important dimension to the process of informing the public.

I conclude that an absolute ban on such interviews does infringe the societal interest which is the core of 1st Amend.

This is not to say – indeed I would not say – that reporters have a Const. right of access – or [redacted] even that public has any "right to know" as such. How does an inmate have any absolute right? The basis 1st Amend. interest is that of society.

*See Bynum's op. in Redlion

Rehnquist, J. Reverse

Agree with Potter, Burger & Harry.

Agree with LFP that there is no const. right of reporters A to or B to interview a particular inmate.

But he also thinks there is no const. right of [redacted] public to know.

Concurrence (L.F.P.):

But in the context of incarceration [redacted] the societal right is subject to necessary limitations. [redacted] Thus must be accomodated with the state's interest in prison order, security & rehabilitation.

General regs. are therefore appropriate. If they are framed in relation to these interests, the discretion of the person adm. as to "when & with whom" should not be second guessed by Courts – absent arbitary application.

Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1974

Re: No. 73-754 - Procunier v. Hillery
No. 73-918 - Pell v. Procunier
No. 73-1265 - Saxbe v. Washington Post Co.

MEMORANDUM TO THE CONFERENCE:

This difficult case had few very clear cut and fixed positions but my further study over the weekend leads me to see my position as closer for those who would sustain the authority of the corrections administrators than those who would not! I would therefore reverse in 73-754, affirm in 73-918 and reverse in 73-1265.

This is another one of those cases that will depend a good deal on "how it is written." The solution to the problem must be allowed time for experimentation and I fear an "absolute" constitutional holding adverse to administrators will tend to "freeze" progress.

Regards,

WEB

Sopkin v World Post
5/8/74

1. Introduction
(Q)

1. Short gov't restriction on news gathering
- govt restrictions on news gathering
raise const. issue

2. Facts of this case.
absolute prohibition cuts across
interest in news gathering (not a
case of time, place, etc

3. Derivation of standard

4. Apply standard to show
absolute prohibition is invalid

5. But prison admin's must operate
on a case by case basis (ad hoc basis)
— must accord broad discretion
within broad guidelines.

L.F.P.

To: The Chief Just
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAY 31 1974

No. 73-1265

Recirculated:

William B. Saxbe, Attorney General of the United States, et al., Petitioners, v. The Washington Post Co. et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Reviewed LFP 6/1

[June —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

Well written & persuasively. But I'd hold this probably moot.

The respondents, a major metropolitan newspaper and one of its reporters, initiated this litigation to challenge the constitutionality of paragraph 4 (b) (6) of Policy Statement 1220.1A of the Federal Bureau of Prisons.[1] At the time that the case was in the District Court and the Court of Appeals, this regulation prohibited any personal interviews between newsmen and individually designated federal prison inmates. The Solicitor General has informed the Court that the regulation was recently amended "to permit press interviews at federal prison institutions that can be characterized as minimum security."[2] The general prohibition of press interviews with

[1] "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

[2] Letter of April 16, 1974, to Clerk, Supreme Court of the United States, presently on file with the Clerk.

inmates remains in effect, however, in three-quarters of the federal prisons, *i. e.*, in all medium- and maximum-security institutions, including the two institutions involved in this case.

In March of 1972, the respondents requested permission from the petitioners, the officials responsible for administering federal prisons, to conduct several interviews with specific inmates in the prisons at Lewisburg, Pennsylvania, and Danbury, Connecticut. The petitioners denied permission for such interviews on the authority of Policy Statement 1220.1A. The respondents thereupon commenced this suit to challenge these denials and the regulation on which they were predicated. Their essential contention was that the prohibition of all press interviews with prison inmates abridges the protection that the First Amendment accords the newsgathering activity of a free press. The District Court agreed with this contention and held that the Policy Statement, insofar as it totally prohibited all press interviews at the institutions involved, violated the First Amendment. Although the court acknowledged that institutional considerations could justify the prohibition of some press-inmate interviews, the District Court ordered the petitioners to cease enforcing the blanket prohibition of all such interviews and, pending modification of the Policy Statement, to consider interview requests on an individual basis and "to withhold permission to interview . . . only where demonstrable administrative or disciplinary considerations predominate." 357 F. Supp. 770, 775.

Position of Press

I agree this was error!

The petitioners appealed the District Court's judgment to the Court of Appeals for the District of Columbia Circuit. We stayed the District Court's order pending the completion of that appeal. 406 U. S. 912 (1972). The first time this case was before it, the Court of Appeals remanded it to the District Court for additional findings

of fact and particularly for reconsideration in light of this Court's intervening decision in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), 477 F. 2d 1168 (1972). On remand, the District Court conducted further evidentiary hearings, supplemented its findings of fact, and reconsidered its conclusions of law in light of *Branzburg* and other recent decisions that were urged upon it. In due course, the court reaffirmed its original decision, 357 F. Supp. 779, and the petitioners again appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Court. It held that press interviews with prison inmates could not be totally prohibited as the Policy Statement purported to do, but may "be denied only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." — F. 2d —, — (1974). Any blanket prohibition of such face-to-face interviews was held to abridge the First Amendment's protection of press freedom. Because of the important constitutional question involved, and because of an apparent conflict in approach to the question between the District of Columbia Circuit and the Ninth Circuit,[3] we granted certiorari, — U. S. —.

The policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies considered in *Pell* v. *Procunier*, *ante*, at —. As the Court of Appeals noted,

[3] See *Seattle-Tacoma Newspaper Guild* v. *Parker*, 480 F. 2d 1062, 1066–1067 (1973), and *Hillery* v. *Procunier*, 364 F. Supp. 196, 199–200 (ND Cal. 1973).

"inmates' families, their attorneys, and religious counsel are accorded liberal visitation privileges. Even friends of inmates are allowed to visit, although their privileges appear to be somewhat more limited." —— F. 2d, at ——. Other than members of these limited groups with personal and professional ties to the inmates, members of the general public are not permitted under the Bureau's policy to enter the prisons and interview consenting inmates. This policy is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons to visit friends or family members. But, again like members of the general public, they may not enter the prison and insist on visiting an inmate with whom they have no such relationship. There is no indication on this record that Policy Statement 1220.1A has been interpreted or applied to prohibit a person, who is otherwise eligible to visit and interview an inmate, from doing so merely because he is a member of the press.[4]

Except for the limitation in Policy Statement 1220.1A on face-to-face press-inmate interviews, members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there. Indeed, journalists are given access to the prisons and to prison inmates that in significant respects exceeds that afforded to members of the general public. For example, Policy Statement 1220.1A permits press representatives to tour the prisons and to photograph any prison facilities.[5] During such tours a newsman is permitted to conduct brief interviews with any inmates he might en-

Press does have access

[4] The Solicitor General's brief represents that "[m]embers of the press, like the public generally, may visit the prison to see friends there." Presumably, the same is true with respect to family members. The respondents have not disputed this representation.

[5] See Paragraphs 4 (b)(5) and (7) of Policy Statement 1220.1A.

counter.[6] In addition, newsmen and inmates are permitted virtually unlimited written correspondence with each other.[7] Outgoing correspondence from inmates to press representatives is neither censored nor inspected. Incoming mail from press representatives is inspected only for contraband or statements inciting illegal action. Moreover, prison officials are available to the press and are required by Policy Statement 1220.1A to "give all possible assistance" to press representatives "in providing background and a specific report" concerning any inmate complaints.[8]

The respondents have also conceded in their brief that Policy Statement 1220.1A "has been interpreted by the Bureau to permit a newsman to interview a randomly selected group of inmates." As a result, the reporter-respondent in this case was permitted to interview a randomly selected group of inmates at the Lewisburg prison. Finally, in light of the constant turnover in the prison population, it is clear that there is always a large group of recently released prisoners who are available to both the press and the general public as a source of information about conditions in the federal prisons.[9]

Thus, it is clear that Policy Statement 1220.1A is not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons. This limitation on prearranged press inter-

[6] See paragraph 4 (b) (6) set out in n. 1, *supra*. The newsman is requested not to reveal the identity of the inmate, and the conversation is to be limited to institutional facilities, programs, and activities.

[7] Paragraphs 4(h) (1) and (2) of Policy Statement 1220.1A.

[8] Paragraph 4 (b) (12) of Policy Statement 1220.1A.

[9] The Solicitor General's brief informs us that "approximately one-half of the prison population on any one day will be released with the following 12 months. The average population is 23,000, of whom approximately 12,000 are released each year."

views with individually designated inmates was motivated by the same disciplinary and administrative considerations that underlie § 115.071 of the California Department of Corrections Manual, which we considered in *Procunier* v. *Hillery* and *Pell* v. *Procunier*, *ante*. The experience of the Bureau accords with that of the California Department of Corrections and suggests that the interest of the press is often "concentrated on a relatively small number of inmates who, as a result, [become] virtual 'public figures' within the prison society and gai[n] a disproportionate degree of notoriety and influence among their fellow inmates." *Pell*, *ante*, at —. As a result those inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison.

The District Court and the Court of Appeals sought to meet this problem by decreeing a selective policy whereby prison officials could deny interviews likely to lead to disciplinary problems. In the expert judgment of the petitioners, however, such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows. The Director of the Bureau testified that "one of the very basic tenets of sound correctional administration" is "to treat all inmates incarcerated in [the] institutions, as far as possible, equally." This expert and professional judgment is, of course, entitled to great deference.

In this case, however, it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment. For it is apparent that the sole limitation imposed on newsgathering by Policy Statement 1220.1A is no more than a particularized application of the general rule that nobody

may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate. This limitation on visitations is justified by what the Court of Appeals acknowledged as "the truism that prisons are institutions where public access is generally limited." — F. 2d, at —. See *Adderley* v. *Florida*, 385 U. S. 39, 41 (1966). In this regard, the Bureau of Prisons visitation policy does not place the press in any less advantageous position than the public generally. Indeed, the total access to federal prisons and prison inmates that the Bureau of Prisons accords to the press far surpasses that available to other members of the public.

We find this case constitutionally indistinguishable from *Pell* v. *Procunier*, *ante*, and thus fully controlled by the holding in that case. "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell*, *ante*, at —. The proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court." *Id.*, at —. Thus, since Policy Statement 1220.1A "does not deny the press access to sources of information available to members of the general public," *ibid.*, we hold that it does not abridge the freedom that the First Amendment guarantees. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 31, 1974

Re: No. 73-1265 - Saxbe v. Washington Post

Dear Potter,

Please join me in your opinion for the Court in this case.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 3, 1974

Re: No. 73-1265 - Saxbe v. Washington Post Co.

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1974

Re: No. 73-1265 - William B. Saxbe, Attorney General of the U.S. v. Washington Post Co.

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1974

Dear Potter:

Re: No. 73-1265 - Saxbe v. Washington Post Company

Please join me.

Sincerely,

Harry

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1974

Re: No. 73-1265 -- Saxbe v. Washington Post

Dear Lewis:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18, 1974

RE: No. 73-1265 Saxbe v. Washington Post

Dear Lewis:

Please join me in your fine dissent in the above case.

Sincerely,

Bill

Mr. Justice POWELL

cc: The Conference

June 21, 1974

No. 73-1265 Saxbe v. Washington Post

Dear Potter:

I am circulating a final paragraph of my dissent which I would like to add.

I am aware of your planned departure for Monday. If the printer cannot add this at the end of my opinion in time for you to bring the case down on Monday, I'll forget this. It is merely a conclusion, and adds nothing new.

Sincerely,

Mr. Justice Stewart

lfp/ss