



10-1973

Pell v. Procnier

Lewis F. Powell Jr.

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Note &
set

A companion case to 73-754
which we have noted
involves asserted right
of newsmen to interview
prisoner

DISCUSS

Note and consolidate
the two appeals
8/9/74

PRELIMINARY MEMO

JAN 18, 1974 Conf
List 3, Sheet 1
No. 73-918 - ATX
PELL (newsmen)
v.
PROCUNIER (Cal.)

Appeal from N.D. Cal (East, Williams;
Hamlin, C.J. concur)
Federal/civil Timely

1. This is a cross-appeal from the same judgment appealed from
in Procunier v. Hillery, No. 73-754, Prob Juris noted, 1/7/74.
The N.D. Cal invalidated a Calif Dept of Corrections regulation
prohibiting press interviews with specific inmates on the ground
that it violated the First Amendment rights of the inmates. The
D.Ct also held that the reg did not interfere with the rights of
newsmen seeking the interviews because under Branzburg v. Hayes,
408 U.S. 653 (1972) a newsmen had no right to gather news above that
of the general public. In No. 73-754 the state appealed from
that part of the judgment invalidating the regulation and finding
the First Amendment rights of the inmates infringed. In this cross-

appeal the newsmen appeal from that part of the D.Ct's judgment finding no abridgement of their rights.

2. Facts: The facts are identical to those stated in the memo for 73-754 and will not be repeated here except to note that the three appellants are each journalists (author, reporter and T.V. reporter) who had requested and been denied interviews with specified inmates. Appellants will still be injured if the D.Ct decision is affirmed since that decision only provided for interviews where demanded by the inmate and does not recognize any right in the newsman to request an interview with a specific inmate, who consents to an interview but will not demand it.

3. Contentions: a. Appellant asserts that numerous courts have decided this issue contrary to the ruling of the Ct below and that the substantial conflict that exists on the question of whether a reporter has a right to gather news from inmates should be resolved by this Ct. The state replies that in all the cases relied on by appellant there was an absolute prohibition on interviews whereas here, the newsman is permitted to interview a randomly selected inmate or one selected by the warden.

b. Appellant argues that the D.Ct misconstrued Branzburg in holding that there was no right to gather news. "Branzburg did not justify a complete bar to access--it merely allowed an 'uncertain burden' i.e., the fear of ultimate disclosure." Here, where there is a clear infringement on appellant's ability to gather news and the public's right to know, the state should at least have the burden of preserving their interest by a less drastic means than a blanket ban on interviews with specific inmates. Here the D.Ct itself, in treating the question of the

Inmate's right, found that the state had asserted no interest requiring such a broad ban. Appellant's are only seeking the same rights that are available to the general public, the right to speak with a specified inmate. The state responds that there is no right to gather news "not available to the public generally." Branzburg. The general public does not have an absolute right to visit a specifically designated inmate and the state argues that the regulation does not therefore deprive the press of anything that the general public can do. "The First Amendment does not protect the press in their mercenary activities and a notion that the press has some higher First Amendment right than has the public generally has been repeatedly denied." citing Red Lion.

c. Appellant includes copies of a recent D.Mass. decision (Murray) holding that an author could not be denied the opportunity to interview the brother of James Earl Ray (M.L.King's assassin) for a book he was writing on the assassination where the brother, who was a federal inmate, had consented to the interview.

4. Discussion: The issue of the limits of a reporter's right to gather news has never been fully explored by the Ct although it has been involved in a few cases. E.g. Branzburg, and the same can be said for the issue of the "public's right to know," E.g. Kleindianst v. Mandel, 408 U.S. 753 (1972); Red Lion. The issue presented by this cross-appeal presents a substantial issue that would appear to be unresolved as far as this Court's prior decisions go. Disposition of the issue raised in No. 73-754 does not resolve nor dispose of this issue. Finally, there is a conflict in the lower cts as to the existence and scope of the right to gather news in this context. Particularly since the

Ct has noted probable jurisdiction in 73-754, it would seem appropriate to note this one and to consolidate the two appeals.

There is a motion to dismiss or affirm

1/15/74

Richter

D.Ct op in app to juris st.

Court USDC, N.D. Calif. Voted on....., 19...
 Argued 19... Assigned 19... No. 73-918
 Submitted 19... Announced 19...

EVE PELL, BETTY SEGAL AND PAUL JACOBS, Appellants

vs.

RAYMOND K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF
CORRECTIONS, ET AL.

12/12/73 Appeal filed.

*Noted
 & consolidated
 with
 companion case
 - Procunier v Hillary*

	HOLD FOR		CERT.				JURISDICTIONAL STATEMENT			MERITS		MOTION		AB-SENT	NOT VOT-ING
	S	D	N	POST	DIS	AFF	REV	AFF	G	D					
Rehnquist, J.....			✓												
Powell, J.....			✓												
Blackmun, J.....			✓												
Marshall, J.....			✓												
White, J.....			✓												
Stewart, J.....			✓												
Brennan, J.....			✓												
Douglas, J.....			✓												
Burger, Ch. J.....								✓							

The Chief Justice

Douglas, J. Affirm on 754
& Reverse on 754 - per se

Brennan, J. Affirm
all that is before us in this case
is absolute prohibition.
See notes on Soyda

Stewart, J. Reverse - 754 & affirm on per se
Chief req. is OK.
As I understand the facts
interviews are not barred,
there is no absolute bar.

White, J.

Agree with Pollock

Marshall, J.

Agree in 754
Reverse ~~decision~~ object 1978

Only thing before us
is the one sentence
law in Calif. There
are no exceptions.

Blackmun, J.

See notes on Soxbe

Powell, J.

See my notes on
Soxbe

Rehnquist, J.

See notes on Soxbe

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,

