In the

Supreme Court of the United States

WILLIAM B. SAXBE, Attorney General of the United States, et al.,

Petitioners,

v.

THE WASHINGTON POST CO., et al.,

Respondents.

No. 73-1265

Washington, D. C.
April 17, 1974

Pages 1 thru 31

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM B. SAXBE, Attorney General of the United States, et al., Petitioners,	:	
v.	:	No. 73-1265
THE WASHINGTON POST CO., et al., Respondents.	:	

Washington, D. C.,

Wednesday, April 17, 1974.

The above-entitled matter came on for argument at 10:59 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; for the Petitioners.

JOSEPH A. CALIFANO, JR., ESQ., Williams, Connolly & Califano, 1000 Hill Building, Washington, D. C. 20006; for the Respondents.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Robert H. Bork, Esq., for the Petitioners.	3
In rebuttal	30
Joseph A. Califano, Jr., Esq., for the Respondents.	16

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1265, Saxbe against the Washington Post.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BORK: Mr. Chief Justice, may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the District of Columbia.

The respondents, the Washington Post Company and reporter Ben Bagdikian, brought this action in the District Court for the District of Columbia challenging, as a violation of the First Amendment, the Federal Bureau of Prisons policy prohibiting members of the press from obtaining personal interviews with preselected inmates.

Petitioners here, the Attorney General and Mr. Carlson, the Director of the United States Bureau of Prisons, were defendants below.

In the court below the plaintiff-respondents' complaint sought, by way of declaratory judgment, an injunctive relief to gain access to any and all inmates in the Federal Prison System.

Both the District Court and the Court of Appeals, however, gave more limited relief in which the presumption

appears to be, according to the relief granted, that press interviews will be allowed unless there are serious administrative or disciplinary problems likely to result.

That order of the District Court was, as I say, affirmed with slight modification by the Court of Appeals.

The positions of the parties, I think, have shifted slightly in this Court. Respondents now adopt and defend the decision of the Court of Appeals, and I have informed this Court and will mention again that the Bureau of Prisons will soon promulgate a new policy which prohibits interviews of preselected inmates only in those institutions where the Bureau deems it essential, that is, maximum and medium-security institutions.

All other institutions, prison farms, halfway houses, youth and juvenile institutions, for example, will permit press interviews under reasonable regulations as to time and place.

This policy now correlates the rule about interviews with the Director's judgment about which institutions are tension filled, in which institutions that policy is necessary.

QUESTION: With which institutions are "tension filled"?

MR. BORK: Yes, Mr. Justice Stewart.

QUESTION: I just wanted to be sure I understood you.

MR. BORK: This case comes down now, therefore, I think, simply to the question of the Bureau's power to maintain a no-interview rule in maximum-security and medium-security facilities. Those are facilities with strong perimeter guards, walls, double fences, and so forth.

Now, I think it's important to be quite clear about what this case involves and what this case does not involve. And I think I ought to say that I believe that the First Amendment claim here is not at the core of the First Amendment and is, I think, a relatively attenuated First Amendment claim; and I say that for two reasons.

One is that it does not involve any inhibition on a right to publish. This is a claim of a right of access to newsworthy information, which I think is not at the core of the First Amendment.

And secondly, we have the claim made in a prison context, which is a regulated context, in which many constitutional rights vary because of the nature of the context, and in which primary discretion is entrusted to the Director of the Bureau of Prisons.

What this case does involve is a restriction on one of many modes of access to news. It is not enough to argue, I think, as respondents do, that they could do a more effective job of reporting if this mode of access were also available to them.

As I've said, the core of the First Amendment's guarantee is the freedom to publish. The Amendment's application to rights of access is ancillary to the freedom to publish, and, as the Branzburg opinion reminds us, rights of access may be limited by government for reasons which would not give government the power or the right to limit publication.

The Branzburg opinion gives examples of that. I think Zemel v. Rusk and Kleindienst v. Mandel are other instances, where access may be denied lawfully, although publication could not lawfully be prevented.

That's frequent in governmental life, and I think it's properly so. Surely a judge could tell his law clerks that they may not give interviews to the press about pending cases, and I assume he could discharge a clerk who did, even though he might not be able to enjoin the publication of the information, once given.

Now, in this case, the press has so many sources of information, and the minor restrictions placed on this one journalistic technique is so vital to prison administration that I find it difficult to think there is a valid First Amendment claim.

I would think, and I would urge, that the proper method of review is to ask whether the Director of the Bureau of Prisons has adopted a regulation which lies within a zone

of reasonableness, which accommodates the competing policies in a manner than can be said to be rational and to be reasonable; because any other mode of review will involve courts, in effect, in second-guessing the administrative decisions of the Director of the Bureau of Prisons in detail, in the guise of constitutional adjudication.

It would also prevent the evolution of prison policy, and policy in these matters and other matters does evolve in the Federal Prison System --

QUESTION: Has the Congress ever entered this area?

MR. BORK: About the communications with the press, Mr. Justice Douglas?

QUESTION: No, I mean generally, or with prison regulations generally.

MR. BORK: I think Congress has legislated as to certain matters dealing with the prison, but in the -- but much of the control is delegated to the Director of the Bureau of Prisons.

QUESTION: I've often wondered, but I've never thought through the question as to whether or not Congress, under the First Amendment, would have the power to take affirmative action, to make sure that the freedom of speech and of the press, which may not be abridged, is not abridged.

MR. BORK: Well, Mr. Justice --

QUESTION: That may be far afield here, but I just --.

MR. BORK: No, I think --

QUESTION: We're getting close to a federal regulation.

MR. BORK: We are in the field of federal regulation, Mr. Justice Douglas, and I think Congress would not need to legislate under the First Amendment. It could just regulate the prisons as it sees fit, and,if it wishes to do so, of course, may implement First Amendment values. Although it need not use the First Amendment as a source of legislative power. These are federal institutions.

But recalling that this is a regulated context, where regulation of constitutional rights is permissible, and I think that the zone of reasonableness is the proper standard to judge the Director of the Bureau of Prisons standards.

I think we might examine the actual claim in this case.

Respondents and various amici pitch this case on the press's need to learn about prison conditions, and the allegation is that prison conditions require reform, and if the press can't tell us about them, we won't know about them, and won't reform them.

I would suggest that there is almost nothing about prison conditions, certainly nothing about general conditions, that the press cannot now learn with ease.

I would like just to run through the sources of

information available to the press now about prison conditions, even, for example, in a maximum-security prison like Leavenworth.

It's been pointed out that the press are completely free to correspond at any length, as many times as desired, with any or all inmates, and to do so confidentially. And that is a new policy. That was a policy adopted by the Director recently, it was not in existence before, and is his attempt to experiment, to find out means of getting information out without causing serious problems to discipline and rehabilitation.

QUESTION: Is this because of the pressure of this litigation?

MR. BORK: No, no, this -- I don't believe so, Mr. Justice Blackmun. If I'm wrong, I'll correct myself later. I believe that policy was promulgated as part of a general review of the problem.

QUESTION: Aren't the prison bureaus, in the Federal System in any event, aren't these regulations being altered from time to time, with some changes almost every year in terms of administration?

MR. BORK: That is entirely correct, Mr. Chief Justice.

QUESTION: Their recent establishment of grievance procedures is something that's been evolving for quite a long

time, has it not?

MR. BORK: It has been. And these policies are under constant review and discussion with the wardens and with other persons within the central office who have specialized knowledge, sociologists, psychologists, and so forth. And experience causes modification of these policies.

And the tendency now is towards more openness in so far as that can be done, and that's a process that's going forward. I would hate to see it set in concrete all of a sudden by constitutional rulings.

A concept of a zone of reasonableness gives the system a little elbow room, a little play in the joints.

There is the correspondence.

Secondly, the press is given liberty freely by the wardens and the other personnel of the Bureau of Prisons.

Third, the press is free, and is encouraged, to tour the prisons and to inspect any and all facilities and equipment, programs; and on such a tour there is no part of the prison that is closed to the press. They may go into the segregated facilities, and they may converse with prisoners in segregation as well as with any other inmates they drop into. In fact, Mr. Bagdikian was offered an opportunity to do precisely that. The inmates at a prison, who had led a strike, were in segregation; he was offered the chance

to tour the segregated facilities and converse with them, not at length, in-depth interviews, but to converse with them. He chose not to.

Fourth, members of the press may obtain interviews with groups of prisoners where randomly selected. Mr. Bagdikian was given such an interview, with no prison officials present.

Now, members of the press, of course, may also interview any visitors who have been to see an inmate, his lawyer, his family, his attorney; all of these persons may talk to the inmate in complete confidence and may then talk to the reporter.

And sixth, I think if we're talking about general prison conditions, it ought to be noted that members of the press may of course freely interview all of the inmates who are being released from prison. And that's a constant flow of men at any one time. I think it's approximately half of the entire Federal Prison population will be out within one year.

At Leavenworth, for example, during first 1973, 415 men were released, which is an average of 34 or 35 men a month.

Now, most of those men are processed out through prison farms or halfway houses, but they, under this new policy, can be reached as soon as they leave Leavenworth and get into the halfway house or the prison farm.

So we have a constant flow of inmates who can tell you immediately about the conditions they just left behind, aside from the correspondence, the tours, and everything else that's provided.

Now, those are six channels of information that give the press, I think, complete ability to learn what they want to know about prison conditions accurately and promptly. Respondents' brief refers to these rules as a dam against information. I think these general rules, view in context, act more like a sieve. Information comes out freely and easily, and the only kind of journalistic technique which is forbidden is the one that raises severe problems for discipline and for rehabilitation.

Well, what's left? Respondents concede they may be properly denied interviews during times of riot or heightened tension in the prison. So all that's really left of the First Amendment claim is the right to preselect an inmate for a confidential interview when there isn't riot or tension in the prison. And in practice that usually means the right to interview a celebrity, interview a Jimmy Hoffa, Philip Berrigan, or to interview a disruptive inmate who has just made the news because he's led a work stoppage or a riot.

And it is the latter, of course, that's particularly troublesome, because that man becomes a leader by leading the

trouble and then by broadcasting his inflammatory charges in rhetoric through the press.

And oddly enough, the very rule that respondents are arguing for would cut off access to that man as soon as he did it. Because he would become the disruptive figure.

So I think the rule they're asking for is really not a rule that makes a great deal of sense from anybody's point of view.

It ought to be said that it's very odd to claim this kind of right of access in the prison context. The maximum and medium-security prisons constitute the most tense, volatile, violence-prone societies, I suppose, on the face of the earth.

The Bureau of Prisons simply cannot maintain discipline and effect rehabilitation, which they have done with increasing effectiveness, if press interviews are permitted to create or maintain disruptive inmate leaders.

That much is conceded by the courts below and apparently by the respondents. But they think a case-by-case approach will cure it.

I don't think so. I think it would damage rehabilitation and harm discipline.

In the first place, there is inherent disagreement -- discrimination between inmates. The man who is disruptive, who is alienated, who is hostile, will not be allowed to have interviews, while a man who says more pleasant things will be.

Not because the warden is trying to control content, but you do get a control of content when you say the disruptive, hostile, alienated man cannot speak. It's inevitable.

And you also get tension and unhappiness as between prisoners.

Furthermore, wardens are going to be required to guess under this new policy about who is likely to be dangerous, and there is some --

QUESTION: Whose policy now?

MR. BORK: Oh, the Court of Appeals policy, Mr. Chief Justice. It suggest they have to have some past experience with this man to believe that he's disruptive. Well, they may have a subjective feeling that he's disruptive, and they may be quite right, but they are going to be required to guess, and sometimes they're going to guess wrong, and you may have seriously harmful, even tragic, results.

And I would add this. Even if a notorious inmate proves not disruptive within the prison,it seems to me that constant press attention, which could not be denied him if he was not disruptive, is totally inconsistent with the idea of an opportunity for penitence and for rehabilitation. A man who has become the object of the press and whose opinions are cited everywhere is not likely to repent; he will maintain his status and come out of the prison, I would think, in much

the same condition -- at least that's what the Director of Prisons thinks.

Finally, I would suggest that there will be increased litigation. The Court of Appeals opinion suggests we have to have certain kinds of experience in order to deny him an interview. I think we're going to have a case made, a record made, and we're going to be in the courts all of the time; and that's a heavy administrative burden.

I would say one last word. I think the First Amendment itself cuts against this case-by-case policy. If the press has to have full access to the prisons, we are going to have to decide who is the press.

Now, respondents say you've already done that, you have a definition of the press. That was a definition adopted as a matter of administrative discretion without constitutional pressure. Once it is stated that the definition is controlled by the Constitution, then we have a government official, in the first instance a warden of a penitentiary, deciding who qualifies as the press and who does not.

That becomes something like an official licensing policy, if made under the First Amendment, and I think that's a concept that's anathema to the First Amendment.

We submit, in short, that considerations of the First Amendment, considerations of the prison context, considerations of the deference due to the Director of the

Bureau of Prisons suggests that the case be reversed, and that the Director be allowed to go forward under the policy statement he has promulgated.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

Mr. Califano.

ORAL ARGUMENT OF JOSEPH A. CALIFANO, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CALIFANO: Mr. Chief Justice, and may it please the Court:

The issue in this case is clear. The question is: does a reporter for a newspaper, the Washington Post, have a First Amendment right to interview a prison inmate when that inmate is willing to be interviewed and the interview presents no serious risk of administrative or disciplinary problems to the prison.

And secondly, there is no need to speculate, as I believe the Solicitor General has done in many of his remarks this morning, as to correctional problems, as to the importance --

QUESTION: Well, haven't you denifed now -- haven't you just defined away the reason for the rule? You said, "and no serious administrative or correctional problems." I thought the basis for the rule was that it would lead to serious problems.

MR. CALIFANO: That the particular interview presents no serious risks.

QUESTION: Well, that one would contribute to the -- the assertion is that that face-to-face interview would raise serious problems, along with others.

MR. CALIFANO: Mr. Justice, we have in the record the testimony from several wardens, including federal prison wardens, including State prison wardens. Nineteen States, whose prison population, as the record indicates in this case, are --

QUESTION: Well now, you're -- all right, you're just taking the -- you're addressing yourself to the merits of the risk problem.

MR. CALIFANO: The reason --

QUESTION: Okay.

MR. CALIFANO: -- for the risk problem.

With respect to that problem, while we're on it, I would note that we do have in this record testimony from those wardens; we do have in this record the fact that 19 of the 24 American jurisdictions, whose regulations -- who have regulations that are introduced in the record -- permit either press interviews on a virtually without exception or on a discretionary basis; and we now have a situation in which the warden, at least at the lesser secure prisons of the federal government, will have to make discretionary judgments,

because, presumably in times of emergency or in times of particular individual disciplinary problems, they will not permit a particular interview.

That change in policy, I believe, makes relevant the Bureau of Prisons policy with respect to the way men are assigned to the various prisons of the Bureau of Prisons, and that is their policy statement 7300.13C.

I would simply note for this Court that of the many, many reasons listed as to why individuals are assigned, only one or two of them deal with security problems; they deal with hospital care, the availability of training programs, whether prisons are overcrowded, whether they are close to the home of the particular inmate involved.

So I would hardly consider it a rational distinction in the context of a First Amendment right.

And lastly I would note that the record contains the fact that the federal prison population is not a highly volatile, tense prison population, as the Solicitor General has speculated, but that the bulk of the individuals in federal prisons are there for white-collar crimes.

That's the record in this case.

QUESTION: Well, are they the people who are in the maximum-security institutions, Mr. Califano?

MR. CALIFANO: I think some of them are. We were just informed of this policy on Friday, when we were informed

they would cover thirteen institutions, and then we were given a list of these --

QUESTION: Well, long before that --

MR. CALIFANO: -- just yesterday, when the list was increased to twenty.

QUESTION: -- long before that policy, wasn't it -- isn't it a matter of public knowledge that the assignment is made of the people thought to be more dangerous on certain established criteria, and assigning them to the maximum-security institutions?

MR. CALIFANO: There is -- there is testimony in our record as to how individuals are assigned. Surely, the more dangerous people are assigned to the maximum-security institutions.

QUESTION: Just by definition, isn't that the --

MR. CALIFANO: But the --

QUESTION: They may be wrong, they may make mistakes in judgment. I think that the Solicitor General conceded that. But that's at least the objective of the assignment policy, the classification, when they come into an institution they spend a period of six or eight weeks studying the prisoner, to try to determine where he should go and where he can best be rehabilitated, if he can be at all.

MR. CALIFANO: That's correct, Mr. Chief Justice.

QUESTION: Now, assuming, for the purposes of your

case for the moment, that the decision is a correct decision, to send a man to a maximum-security prison, then do you say that there are no potential problems?

MR. CALIFANO: I say there are no problems when we're talking about 75 percent of the federal prison population, which will still be subject to this total ban. I say that there is no -- that there are no problems serious enough to justify a total ban.

If there are problems at a particular institution, at a particular time, because it is in a high state of tension or because there is disruption there, we recognize that there is -- that the First Amendment values have to be weighed at those times, and that the warden can make a judgment as the courts, as both courts below did; that they would not be appropriate for an interview.

If there's a problem with a particular inmate, we recognize that it would not be appropriate to have an interview under circumstances in which he's a disciplinary problem. But --

QUESTION: But I suppose you --

MR. CALIFANO: But we have testimony in the record, I would note, at Terre Haute, which is a maximum-security prison, Warden Alldredge testified that only at the top ten percent of the prisoners at Terre Haute, at a maximum-security prison, could be regarded as troublemakers; and of

that -- and then at most five percent would be entitled to this sort of nebulous pejorative of Big Wheel. So it's eighty percent of those prisoners that are not a problem.

QUESTION: If you concede that in a time of emergency you wouldn't be entitled to go ahead with the proposed rule, and yet even that would be litigable, I suppose, in the District Court if the warden says, "We have an emergency here"; the people that want the interview said, "No, it's not that kind of an emergency." The District Court then decides?

MR. CALIFANO: The District Court would then decide.

I would simply note that in all the cases cited by the Solicitor General, by us in our case and the other case that this Court heard prior to ours, that all the litigation deals with the total ban. But that with one exception there is not a single case that I'm aware of that deals with any of the nineteen jurisdictions that were introduced in the record, or the twenty-nine jurisdictions in fact that have discretionary policies or generally permit interviews.

So that I think that the litigation point is not a point of serious concern.

I would note that in the context of our record and the evidence that was submitted in the findings of the court below, all, virtually all of the evidence deals with maximum and minimum-security prisons. Those are the wardens

who testified, those are the wardens who testified on our behalf.

We submit, and it is our point, that under Branzburg v. Hayes, newsgathering was firmly hitched to the First Amendment by all nine Justices, and by all opinions in that case. And that in that case the Court applied to newsgathering the same kinds of tests that it has applied to the right to publish and other protections guaranteed by the First Amendment; namely, that the infringement of the protected First Amendment rights must be no broader than necessary to perceive -- to achieve a permissible government purpose; and, secondly, that a State's interest must be compelling or paramount to justify even an indirect burden on First Amendment rights.

We think that the -- that in this case in which the government had two hearings, two opportunities to present evidence, that they clearly did not establish that kind of a governmental interest.

We also believe, as the Court of Appeals and the District Court found, that the record provides substantial evidence and uncontroverted testimony that face-to-face personal interviews are not simply another technique, but that they are essential to effective newsgathering in this situation.

The Bureau of Prisons method of permitting an

exchange of letters with the prisoner's letter to the reporter not examined, but the reporter's letter to the prisoner examined for contraband and for content which would incite illegal conduct, is patently inadequate as far as the press is concerned, and we think as far as First Amendment values are concerned.

The reporter has no opportunity to test the credibility of the prisoner, or to follow up in his questioning; indeed, he does not even have the assurance that the prisoner who is signing the signature block of that letter is the prisoner who is answering the questions he's writing to him about.

We all know that in prison life one prisoner writes for another, one prisoner answers and helps other prisoners answer questions.

And I would note that such a policy makes an assumption that prisoners and inmates can read and write clearly; and, as the Chief Justice has noted, the percentage of inmates in all institutions who cannot read or write is staggering.

We think the public interest in learning about prisons weighs heavily on the First Amendment scales, and there I would simply note that there are more than 1.5 million Americans in prison in this nation, on any given day, --

QUESTION: In prison or --

QUESTION: Jails and prisons.

MR. CALIFANO: Incarceration. Incarceration or in jails on any given day. That the annual bill for American taxpayers, at the federal, State and local level, now exceeds $1 billion for prisons, and that the projected fiscal 1975 budget for the Federal Bureau of Prisons alone is more than one-quarter of a billion dollars.

QUESTION: How do you relate that to the First Amendment problem, Mr. Califano?

MR. CALIFANO: We think, Your Honor, that the public -- the fact that these are public institutions, that the taxpayers of this country are paying for them, that they are a significant part of our government, is a weight in the scale of the right of the public to know about what's going on in our prisons.

We think that the right of the press here is essentially their right as surrogates of the public, to inform the public. And that that should weigh in these scales.

We believe that the record in this case, which I said puts us in the position of not having to speculate, does not justify a government's sweeping ban, the kind that here exists.

I mentioned Warden Alldredge's comments about Terre Haute, I would mention that all warden directors who

testified on the issue of Big Wheels, Wardens Alldredge and Directors Wainwright and Bensinger in the court below all testified that Big Wheels come into prison Big Wheels or become Big Wheels in prison, whether or not they are interviewed. That what is involved here is a kind of negative leadership function.

They also noted that prison officials are easily able to identify the disruptive prisoner, particularly in the federal prison system, for the reasons mentioned by the Chief Justice in the context of the testing that now goes on, the more sophisticated psychological and aptitude testing that now goes on for prisoners.

We do not think that there is any significant evidence in this record which indicates that press interviews create disturbances at prisons. There were three items of testimony in this area, in this case, one related to the warden or the head of the State correctional system in Iowa, Mr. Brewer. He testified that during a period of tension he was overruled by the Governor, who ordered him to permit press interviews, and that this increased the tension in his institution.

There was still no violence at the institution, I might note. And, moreover, Iowa still has the discretionary interview policy.

In the other -- the other instance mentioned was in

the State of Florida, in which a warden from the State of Florida said that some articles that were written created tension in Florida four months later, where there was violence.

I think the causation -- when this Court looks at the record, the causation is highly tenuous, and the warden admitted that there were severe racial tension problems in his prison before any press interviews, or articles actually, were written.

In the context of the questions that have been raised by this Court, I think in the context of an attempt to define the press, I do not consider that a difficult problem. The press is defined in many, many ways, and if the Solicitor General is concerned about how the press is defined, he should be concerned about the fact that it's defined by every department of this government, every day. The Justice Department has regulations defining what the press is, who is entitled to use their press facilities, who is entitled to go in there.

There are press definitions here, and this is not proposed in the Bureau of Prisons -- which are in existence in the Bureau of Prisons policy, this is not a situation like Branzburg, where we have an inherently unlimited number of people that might claim to be reporters. In the Branzburg case, any individual who, at any given point in time, might

claim to be a reporter, claim to be entitled to First Amendment rights, and therefore create a problem in terms of investigation by the grand jury, where he had witnessed a crime.

We don't have that situation in this case.

In this case we -- there's a recognition by the press that there has to be some -- has to be reasonable judgments made, as they are made every day by this Court, in who sits in its own press box.

QUESTION: Who would make those judgments?

MR. CALIFANO: I think in the -- those judgments would have to be made by the warden in the institution. That's what we would suggest, or the chief of the Bureau of Prisons.

QUESTION: Would they be reviewable by the courts?

MR. CALIFANO: I think in cases of severe abuse, they would be; but I think that -- I mean, the right, the First Amendment right is a personal right, but it is not an absolute right. It is subject to reasonable regulation. That's recognized in case after case by this Court.

One of the implications of Estes, for example, is that there will be a limited number of reporters in a courtroom during a trial.

And I do not think that that means that all reporters should -- that everyone who ever claims to be a

reporter, or every reporter for every established newspaper, or every one should be banned from having interviews, personal interviews with pre-identified inmates.

I would note that it is not simply a situation where we can speculate that the press will always want to interview the man creating the disturbance or always want to interview a Jimmy Hoffa.

Surely, they will want to interview people that are celebrities. For example, on television Saturday night, CBS had an interview with Bud Krough, who is out at Allenwood, at a time when the policy prohibited personal interviews, and he was photographed for ten minutes.

But Mr. Bagdikian, in the record of this case, was not after people who had created a disturbance, he was not after celebrities, he was after a group of people that had been selected to sit on a negotiating committee with the prison officials, after a non-violent demonstration at Lewisburg and at Danbury. And he wanted to find out, as the record shows, why the problems were resolved in those prisons non-violently; how that came about.

He was not after the Big Wheel, if you will, or the major celebrity.

My own closing with respect to this is that, as far as the Washington Post and Mr. Bagdikian are concerned, and as our brief reflects, it is our firm conviction that one

of the reasons why prisons are in the condition that they are in today, a condition that's been described by the Chief Justice many, many times, is because the First Amendment has not been permitted to operate the way it operates on government, the way it operates in schools, the way it operates in virtually every other facet of our society.

The First Amendment has not been permitted to let a little sunshine in to those prisons, and let the reporters, whose right becomes even more critical when the average American, when the citizen cannot walk through every prison and interview every prisoner he desires, and let them go into the prisons and get the story of the prisons out.

The First Amendment is part of that process.

I can understand, as anyone can, that this policy is very convenient and very helpful for the warden administrators, wardens and administrators in the Bureau of Prisons System. There isn't a single member running in a United States government department or bureau or court or university or anything in this country, or military base, that wouldn't be delighted to have a regulation that prohibited interviews in this context.

But that's not what our system is all about, and that's not what the First Amendment is all about.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Califano.

Do you have anything further, Mr. Solicitor General?

REBUTTAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. BORK: Mr. Chief Justice, may it please the Court:

I would just rise to note that the federal prisons -- we hear about the white-collar prisoners, and the federal prisons, in fact, are not staffed entirely by white-collar criminals who just violated the antitrust laws. Systemwide, fifty percent of the prisoners are convicted of crimes of serious violence against the person or are major narcotics traffickers, who are also regarded as a violence threat in the prison.

Those members are much higher in the maximum and medium-security prisoners. We are dealing with a dangerous and volatile population.

The testimony of the wardens below, the federal wardens said that they perceived, on the experience of the States -- and we have the experience of California which thinks it perceived it -- they perceive that this kind of interview was quite troublesome to their efforts to rehabilitate and to maintain order.

It is always difficult to link one event with a result in human activity. Their best judgment is that there is such a link. California's best judgment is that there is

such a link. I think that's a judgment that they are entitled to make.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:37 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -