In the

Supreme Court of the United States

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,

Appellants,

v.

No. 73-754

BOOKER T. HILLERY, JR., et al.,

Appellees.

------ and ----------

EVE PELL, BETTY SEGAL, and PAUL JACOBS,

Appellants,

v.

No. 73-918

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al.,

Appellees.

Washington, D. C.
April 16, 1974

Pages 1 thru 82

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and	
EVE PELL, BETTY SEGAL, and PAUL JACOBS, Appellants, v. RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., Appellees.	No. 73-918

Washington, D. C.,

Tuesday, April 16, 1974.

The above-entitled matters came on for argument at 2:04 o'clock, p.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:

JOHN T. MURPHY, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; for Procunier, et al.

STANLEY A. BASS, ESQ., 10 Columbus Circle, Room 2030, New York, New York 10019; for Hillery, et al.

HERMAN SCHWARTZ, ESQ., National Prison Project of the American Civil Liberties Foundation, 525 O'Brian Hall, North Campus, Buffalo, New York 14260; for Pell, et al.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-754 and 73-918, Procunier against Hillery and Pell against Procunier; consolidated cases.

Mr. Murphy, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN T. MURPHY, ESQ.,

ON BEHALF OF PROCUNIER, ET AL.

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

This case is here on cross-appeals from a decision of a three-judge district court for the Northern District of California.

I am representing Raymond Procunier, who is the Director of the California Department of Corrections, and several of his subordinate officials who have been sued in this particular action.

Now, the facts are essentially these:

On August 21st of 1971, Mr. Procunier, based upon his knowledge of the California prison system and based on the sad experience of events, concluded that he could no longer permit press and other media interviews with specific individual inmates, and he issued a regulation to this effect.

Now, a civil rights suit was brought, and the plaintiffs in the civil rights suit were news media representatives and were also prisoners.

On November 1st, 1972, the District Court, single judge acting, issued a temporary restraining order which enjoined the operation of Mr. Procunier's regulation.

As a result of this injunction, interim procedures were adopted by the Department of Corrections, and those interim procedures remain in effect at this time.

On August 16th of 1973, the three-judge District Court issued its order in this particular case, the order which is before the Court.

The District Court found that the regulation unnecessarily restricted the First Amendment rights of the inmate plaintiffs in the action. However, the District Court also concluded that the complaint brought by the media plaintiffs was properly dismissed on the grounds set forth in the motion of the defendants to dismiss the complaint.

Now, the point of Mr. Procunier's appeal is this:

The California Department of Corrections has a real and demonstrated need for the regulation which has now been struck. The absence of this particular regulation then and now is causing a hazard, as far as the care and custody of inamtes and the prison situation generally in California.

And, furthermore, the decision of the court as a precedent tends to undercut the ability of Mr. Procunier to operate his prison system as he thinks it should be operated most effectively.

QUESTION: Is that the regulation on page 2 of your brief, that one sentence --

MR. MURPHY: Yes, Your Honor. That is California Department of Corrections Administrative Manual Section 415.071.

QUESTION: And just that one sentence is involved, nothing else?

MR. MURPHY: Yes, Your Honor.

Now, this regulation was generated by an emergency situation, namely the killing of three guards and the killing of three inmates and the wounding of others on August 21st of 1971.

But aside from having been generated by this particular incident, it involved something more -- more deep. It involves an underlying and persistent problem, recognized earlier and still recognized today, in the operation of the penal system.

So we are not necessarily treating this as being an emergency regulation, but an important regulation which the Department of Corrections is urging that it could institute or reinstitute today.

QUESTION: Mr. Murphy, how long has this been suspended?

MR. MURPHY: Since November 1st of 1972, Your Honor, by reason of the temporary restraining order.

QUESTION: And there have been interviews over that period -- since that time?

MR. MURPHY: Yes, Your Honor, pursuant to interim procedures.

QUESTION: And have there been any difficulties within the prisons?

MR. MURPHY: This record would not indicate any specific situations since that period of time, since November 1st of --

QUESTION: Does the record tell us what -- is there anything in the record about the experience since that time?

MR. MURPHY: Yes, I could go outside the record --

QUESTION: No. There's nothing in the record?

MR. MURPHY: No, there's nothing in the record which would indicate what the experience has been of the Department since November 1st of 1972.

QUESTION: What was the date of the three-judge court --

MR. MURPHY: August 21st -- oh, excuse me; August 16th of 1973.

QUESTION: Unh-hunh.

MR. MURPHY: The case had been submitted in February of 1973, and was not decided until August of '73.

Now, the problem, as seen by Mr. Procunier and the

other defendants in this particular action, is what to do about the inmate who has, in the past, or the inmate who will in the future use the press as a vehicle for promoting his own personal ambitions or leadership in disruptive forces within the prison.

This is what has been characterized in various cases -- not just this case, but in other cases -- as the Big Wheel syndrome or the Celebrity syndrome.

Now, courts that have looked at this judgment, this administrative judgment, this administrative consideration, have recognized it as a good-faith advancement made by prison officials. Yet there has been a tendency to put this aside, cast it aside, very lightly. However, it's a very important consideration and it's a very real consideration; it's a very troublesome consideration. And that's why I think this case is here and why Mr. Procunier has brought this particular case.

Now, the impact of the press on individuals has not gone unnoted by this Court before.

In Estes vs. Texas, this Court had the occasion to consider in depth what the impact of one form of the media would be on witnesses, on jurors, on judges and attorneys. Not just in the courtroom setting, but also in their behavior patterns. And if you could take that analysis from the Estes case and apply it to a prisoner setting, you'd come

up with this result.

When the press attention focuses on an individual inmate, this attracts interest in the prison community from staff and from inmate alike. As the publicity increases, the status of the inmate within the prison increases accordingly, becomes more important.

With the increase in publicity comes increases in tensions.

Now, if the views, if what the inmate is trying to communicate, arouses the hostility of others within the prison setting, you have considerable problems.

If that particular inmate is preaching a doctrine of non-cooperation, a doctrine of disruption, then those consequences are going to become even more serious.

QUESTION: Well, does this regulation also apply to an inmate who wants to preach Jesus Christ Superstar?

MR. MURPHY: I think it would be clear, Your Honor, that if an inmate were to preach within a prison, and he were to preach --

QUESTION: No, he's preaching to the press.

MR. MURPHY: Oh, preaching to the press.

QUESTION: Well, suppose he wants to preach that the warden is a wonderful man; would that be all right?

But he'd be barred from doing it, wouldn't he?

MR. MURPHY: He certainly would, Your Honor.

QUESTION: And isn't that the harm in the whole thing, that everything is barred?

MR. MURPHY: Your Honor, we would not advocate a one-sided regulation which would allow those inmates who have something favorable to say to the press about the institution to speak to the press, and yet, at the same time, --

QUESTION: So you just stop it all.

MR. MURPHY: -- bar other inmates who --

QUESTION: So you just stop it all.

MR. MURPHY: -- may have something unfavorable.

QUESTION: So you just stop it all. You just stop it all.

MR. MURPHY: That's right, Your Honor.

With alternatives. In other words, the inmate isn't denied access to the press as a general proposition. What is the concern here is the press interview, the face-to-face interview.

There's other avenues available and are used and have been used in the past and are being used now, for the inmate to communicate to the press. He can communicate through the mail, he can communicate through third persons.

Now, the record here is very clear, and is very substantial --

QUESTION: What third persons? What third persons does he communicate with the press?

MR. MURPHY: What type of --?

QUESTION: Third persons.

MR. MURPHY: What third persons. Your Honor, he would have the opportunity to talk to members of his family, or other people who would be on his visitor's list.

QUESTION: Or his minister.

MR. MURPHY: Yes, Your Honor, if they are on his visitor's list.

QUESTION: Or any good people; but not the press?

MR. MURPHY: No, he has no right to demand --

QUESTION: What makes the press bad people?

MR. MURPHY: The press are not bad people, Your Honor. The record --

QUESTION: Well, what makes the interviewing press bad people?

MR. MURPHY: Because, Your Honor, the problem that it has caused on the inmate himself. This is the situation where the inmate becomes a focus of attention within the prison setting.

QUESTION: Well, aren't you trying to rehabilitate him?

MR. MURPHY: Yes, Your Honor.

QUESTION: Can you rehabilitate a person without paying attention to him?

MR. MURPHY: No, Your Honor.

QUESTION: And the more attention you pay, doesn't that help his rehabilitation?

MR. MURPHY: Not necessarily, Your Honor. It would depend upon the type of attention that was --

QUESTION: Well, it depends upon the "you" in the more attention "you" pay.

QUESTION: Right.

QUESTION: Whether it's the press paying attention to him, or whether it's the prison authorities, or whether it's his minister or his doctor, or whether it's some very bad influences.

MR. MURPHY: Yes, Your Honor.

QUESTION: But the only bad influence is the press.

MR. MURPHY: No, Your Honor, that's --

QUESTION: Oh, yeah, other criminals. Other criminals are bad influence.

MR. MURPHY: Well, the record here is very clear, very clear, that an affirmative and aggressive effort is made by the California Department of Corrections to provide the press with access to the prisons.

In their access to the prisons, they have the opportunity to confront and to meet with inmates, this is the random process, which many, many excellent press stories have been developed this way. Both from the point of view of the administration of the prisons, and also from the point

of view of the prisoners themselves.

It's not an attempt to cut off all access of the inmate to the outside world through the press.

The problem is with the press interview. Now, if there were a problem with a family interview, or if there was a problem with a clergyman interview, then remedial action would have to be taken.

Now, inmates are allowed to see members of their family, because it has been determined that this has a remedial effect in the rehabilitation of the inmate.

However, the same individuals who have made this decision, that the family has access to the inmate, do not find the same rehabilitative effects to the inmate by the face-to-face press interview.

QUESTION: And that person is who? Who makes that decision? That one is rehabilitative and the other is not.

MR. MURPHY: Decisions are --

QUESTION: And when you do, will you also give me his qualifications as a psychiatrist, as a psychologist, or what are his qualifications to make such a determination?

MR. MURPHY: The law of California vests the control and the management and the care of prisoners in the hands of my client, Mr. Procunier. And he is the one that is ultimately responsible for making the decisions.

QUESTION: What are his qualifications in rehabilita-

tion?

MR. MURPHY: His qualifications have been set out in the record, in the testimony which he gave here in Washington, D. C., in the Washington Post case which is going to follow this case, where he was a witness.

QUESTION: Okay, I'll go read it, you don't have to tell me; I'll read it.

MR. MURPHY: And he set forth there what his qualifications were. Almost thirty years of experience in the correctional field, beginning with a custodial officer, he also at one time had been Administrator of the State of Utah in the correctional system in the State of Utah.

QUESTION: And his experience in rehabilitation is what?

MR. MURPHY: His experience in rehabilitation is through a very qualified staff, technical staff, which includes psychiatrists, psychologists, and correctional experts, which he relies upon in making his decisions.

He makes his decisions in three steps, in effect. You have the correctional problem, which is concerned with security and rehabilitation; you have the administrative problem, in which he has to think ahead, he must anticipate what the future is going to be as far as his institutions go; and he has to take into consideration the legal problems as well. Because in making his decisions without some information

as to what the legal ramifications of those decisions are, he would not be able to make the right decision.

Now, his testimony in the Washington Post case I think is very illustrative of what the situation was. As he indicates, and this testimony was made a part of the record here, as he indicates in his testimony that this decision was made with great reluctance, considerable amount of reluctance, after much agonizing, but he was confronted with a problem, a problem that he, under the law of California, had to make a decision on, and that problem was the effect that these interviews were having on inmates within the institutions.

All right. But that's a correctional part of it. He may have his views on correctional problems, but he also has a problem of running and administering a prison system of over 20,000 inmates; and he has to consider legal problems as well, because he cannot and he will not attempt to be selective in deciding who is going to get an interview or who isn't going to get an interview, what institutions are going to get interviews and what institutions are not going to get interviews.

We could just imagine, just speculate without any great difficulty, what would happen in the event that a procedure has been proposed by the plaintiffs in this case were to be adopted, and the unfettered discretion was left with the Superintendents and the Wardens, and one inmate gets

an interview and another inmate doesn't get an interview, an inmate is transferred from a minimum-security institution into a maximum-security institution, and he doesn't get his interview, there would be all kinds of litigation. And litigation, from the correctional point of view, presents its own problems in administrative problems, because litigation, whether it's of merit or doesn't have merit, involves time and effort and energy on the part of the correctional people. And this is something that he has to plan ahead on.

Now, the concept --

QUESTION: Mr. Murphy, these are -- I don't want to shorten your submission to us on these practical and sociological problems, some of which we've encouraged you to talk about with our questions, but we have here a constitutional case involving the First Amendment of the United States Constitution, made applicable to the State of California through the Fourteenth Amendment of the Constitution.

I'm interested in the very first point in your brief, that is, what right under the First and Fourteenth Amendments, if any, do prisoners in a State prison institution have to demand a personal interview with some reporter for some paper? Is this -- it certainly isn't the right of a free press, the prisoners aren't running a newspaper; and free speech, as such, I didn't know gave anybody an unconditional right to a personal interview with a reporter for a paper. I hope you'll get to

those constitutional questions.

MR. MURPHY: Yes, Your Honor, I'll get to that point right now.

Specifically, to answer your question, the inmate has no First Amendment right to demand that a press interview be set up with a consenting newsman as a First Amendment right.

Now, the First Amendment, or freedom of expression, if you want to put it that way, does to some extent permeate the walls of the prison. I think it's clear that the inmate has access to the courts. And the -- but this access to the courts does not give him a right to come here and argue his case in the court as a matter of constitutional right.

He has, in conjunction with his access to the courts, he has the right to receive a visit from a member of his family -- excuse me -- to receive a visit from his attorney, to see that his rights are taken care of, but he --

QUESTION: Right on that point, to pursue what Mr. Justice Stewart put to you, I think it's important to all of us; his right to an attorney, do you categorize that as a constitutional right?

MR. MURPHY: In so far as the attorney is necessary in order to vindicate his rights in the court of law.

QUESTION: Now, then, the right to visit with his

family and his friends under regulated hours and that sort of thing, you treat that as a constitutional right or is that a policy problem by the administrator as part of his treatment, rehabilitation, whatever you want to call it?

MR. MURPHY: No, we would not treat it as -- our position is that it is not a constitutional right. I could imagine a set of circumstances, however, if you were to lock an inmate away and deprive him for an extended period of time, of any visits from somebody from the outside, that that may rise to a constitutional right on a cruel and unusual punishment.

I could also see that if you took an individual inmate and denied him access to his family, but you let all other inmates visit with their family, that under those circumstances that there may be an equal protection argument that could be urged.

But to say that as a matter of United States constitutional law a man has a right to visit with a member of his family, I think is incorrect.

QUESTION: How about a visit with his attorney?

MR. MURPHY: I think he has a right to visit with his attorney --

QUESTION: Is this a constitutional right?

MR. MURPHY: Well, in conjunction with his access to the courts.

QUESTION: Constitutional, then.

QUESTION: Well, that would be his Sixth and Fourteenth Amendment rights.

MR. MURPHY: It could be. It could be.

QUESTION: You don't concede this?

MR. MURPHY: I'm not -- I don't think it's part of this particular case, but I could see a set of circumstances --

QUESTION: No. There's no Sixth Amendment claim made in this case at all.

MR. MURPHY: Right.

But let me continue on this, too, that on this First Amendment freedom of expression question, Your Honor; that he has a right to petition the government for redress, as part of the First Amendment. We don't argue with that. But, again, it's limited, it's curtailed, it's circumscribed, he can't go to the Legislature and lobby for his own bill.

All right. Now, other rights that may be considered as part of the freedom of expression are seriously curtailed by the fact of the incarceration, his right to assembly, if it exists at all, is seriously curtailed by the fact of his incarceration.

Also his right to practice his religion the way he wants to practice his religion. He may have freedom of thought, but he may not be able to -- well, that famous

California case, he may not be able to smoke peyote as part of the exercise of his religion, restrictions could be placed on him there.

And I think he has also curtailed right to engage in speech, as Justice Marshall indicated about preaching Jesus Christ Superstar to the press. He certainly could not preach his religion in one of our major cell blocks with 250 inmates, nor could he preach his religion in the middle of the big yard at San Quentin prison.

In other words, there are seriously circumscribed rights, because of the delicate situation.

Now, the relationship between the State of California and its inmates is a particularly intimate relationship. This was pointed out by this Court in the Preiser case, an intimate type of relationship; it's not the same relationship as between the State and the citizen in free society.

In the management and care of prisons and inmates is an area in which the State has a particularly strong interest. And there has also been a traditional judicial reluctance, which I certainly urge here, to decide matters which have been determined based on the firsthand information that's available to the State authorities, where the State authorities are exercising their expertise in a special field, and they have reached a decision and have settled upon a choice, after a considerable amount of deliberation on the subject.

QUESTION: Mr. Murphy, you're arguing this case both on the petition and the cross-petition --

MR. MURPHY: Yes, Your Honor.

QUESTION: -- so both as petitioner and respondent. So I expect you must also deal with the asserted right of the petitioning newspaper people in this case, won't you?

MR. MURPHY: Yes, Your Honor.

If I may get back to some of the questions that were asked earlier, and I think I can respond to those questions again in terms of the interests of the media.

Now, this case was tried and argued, as a matter of fact the complaint alleged and asserted in the arguments of counsel, that the press did have a special access to the sources of information, namely, the inmates. And one of the arguments that's been advanced, which deserves somewhat more discussion, we have talked about it in our brief, but it's been advanced at length, is that when family members are allowed in, when clergymen are allowed in to talk to individual inmates, why is not the press aloowed in?

When a family member comes in, it's to talk to a family member; a father comes in to talk to a son, he doesn't come in to talk to all the prisoners in the institution. When a lawyer comes in, he comes in to talk to his client, he doesn't come in to talk to everybody that happens to be in the institution.

The same would be for a clergyman. It's a very limited right of access, not to the general public but to certain segments of the general public.

What's being demanded here by the media is special access. Now, they argue in their briefs that they want no more than what is afforded the general public. They get what is afforded the general public.

California has maintained a progressive approach of an open prison institution in which thousands of people are allowed to tour the facilities, to engage in various programs with inmates.

QUESTION: Aren't members of the general public in fact -- if John Smith showed up and said, "I just want to conduct a tour through the prison", would they let him do it?

MR. MURPHY: If he does not have prior criminal --

QUESTION: They say, "Who are you?" and he just says, "I'm John Smith; I'm interested in a guided tour through the prison."

MR. MURPHY: Right. If he does not have a criminal record, the chances are -- are very good.

QUESTION: Would he be allowed to say, "I'd like to speak to inmate X, and talk to him for a while"?

MR. MURPHY: No. No, he would not.

If he were to participate in an Alcoholics Anonymous program, he could go in. If he were to participate in a Black

Cultural Studies program, he could go in.

Any other programs, the record shows here --

QUESTION: Well, in my hypothetical, the gentleman, John Smith, wasn't there to participate in anything; he was just a citizen and he was interested in going through the prison. Could he do it in California?

MR. MURPHY: Yes, Your Honor. I think the record shows here, as far as San Quentin prison is concerned, anyway, within a certain period of time during the year they have regularly conducted tours, as you would have tours of the White House or you would have tours of this particular building.

And the general public gets in on those.

QUESTION: Do I understand your answer to my Brother Stewart's question that if Joe Doakes walks out to San Quentin, out of nowhere, this afternoon and says, "I want a tour", he won't get any tour?

MR. MURPHY: He would not be able to get a private, personally conducted, guided tour.

QUESTION: Well, would he get any kind of a tour?

The answer is no, you know it's no. You don't -- nobody walks in off the street into a penitentiary and everybody stops and takes him around.

MR. MURPHY: He would have to, Your Honor, maybe I didn't make the point clear, he would have to qualify for

one of the public tours,regularly scheduled tours of the institution. But I thought I had made it clear that the prisons are closed off to the public, they're not open to the public to the extent -- except to the extent that the administrators allow them to be open. And it is part of the program of rehabilitation to let -- to let members of the general public to come into the institution.

It's also part of the program of the prisons to allow newsmen to come in on special assignments to check out matters. Now, the record here shows some examples, but there's other, many other examples that could be suggested; and are in fact -- could be shown.

That a newsman involved with a special topic, for example he is concerned about the topic of rape, he will make a request, the institution will make convicted rapists available to him, he will interview them, get their background, and, in fact, there was a television show to this effect.

A newsman will go in -- a newsman will go in, he's interested in the senior citizens at the prison, to make a study as to how the senior citizens, the older inmates are taking to the new breed of inmate that's arriving; and he will --

QUESTION: Is the issue here whether press interviews may be forbidden entirely; is that it?

MR. MURPHY: The issue --

QUESTION: Your regulation does forbid them entirely, doesn't it? And that's what you're defending.

MR. MURPHY: The -- they're not forbidden entirely, Your Honor.

QUESTION: Well, that's what it says on the face of the regulation.

MR. MURPHY: The regulation says: Press and media interviews with specific individual inmates are barred.

QUESTION: All right. They are entirely forbidden with specific inmates.

MR. MURPHY: Individual inmates. That's right.

QUESTION: And that's what you're defending?

MR. MURPHY: Yes, Your Honor.

QUESTION: And that's what the District Court held unconstitutional?

MR. MURPHY: As being unnecessarily restrictive of the First Amendment rights of the prisoners.

QUESTION: Now, it didn't hold -- the District Court didn't hold that you could not regulate.

MR. MURPHY: That's right, Your Honor. The District Court said that --

QUESTION: And you're here saying that you have the right to forbid them entirely.

MR. MURPHY: Individual face-to-face interviews, with -- in the actual practice under the procedure, individual

interviews could occur, but only on a random basis. If there --

QUESTION: Well, when you say "specific", you mean under this regulation -- this regulation forbids having the news media say, "I want to talk, I want an interview for next Wednesday, or some time, with Sirhan Sirhan" or some other specific prisoner; but are you saying that under this regulation they can see prisoners at random, not selecting them on their own part?

MR. MURPHY: Yes, Your Honor.

Yes, Your Honor. And that is the way it has been operating --

QUESTION: Is there any -- I see nothing in the regulation, but in practice is there any limitation placed that they may interview the prisoner but they may not identify him and quote him by name?

MR. MURPHY: No, Your Honor. Nor is there any restriction on the topic, that they can talk to the prisoner about.

QUESTION: And when you say that they are permitted to do it at random, who does the random picking?

MR. MURPHY: It would depend upon the circumstances, Your Honor. The record shows here that there was some press interest in those that had been released from Death Row. And, consequently, some of those inmates that fit into that category, with their consent, were made available to the

press, so that the press could engage them in in-depth type of interviews on that particular subject.

The difficulty is this, and this is getting back to this Big Wheel syndrome, and it is also getting back to the case of Estes vs. Texas, because the tendency of the press is to focus in on the notorious trial. The same situation develops as far as an institution, the tendency will be to focus in on the notorious inmate. And it raises all kinds of practical problems, as to what is going to be the role of that inmate with relation to members of the staff, with other inmates, and his own rehabilitative program.

Okay, that's one thing.

We have the problem that if we allow specific individual inmates to interview members of the press of their choice, with the consent of the press, the only way that the inmate is going to attract the attention of the press is to stage some kind of incident to make him newsworthy, to get himself involved in some kind of newsworthy event.

You also have the situation that incidents could be staged at the time that the press is on the scene. We've all experienced this situation. The mere appearance of the press can have a disruptive effect.

We have even had situations where demands are made for national TV in the form of extortion to get to accomplish an end for the -- that the inmate is attempting to reach.

It's looked on as an administrative problem.

Now, California --

QUESTION: The administrative problem could be regulated, couldn't it?

MR. MURPHY: Certainly, Your Honor, and this is a regulation.

QUESTION: But regulations -- I don't know regulations that say no; that's not the kind of regulation I'm talking about.

MR. MURPHY: Well, it depends on where you start, Your Honor.

QUESTION: I mean, one of the ways, if you have trouble with the family visiting, one of the way is just to keep all the families out. But instead of that you regulate it, they come at a certain time. Why can't you say the press can come at a time that we decide is not disruptive?

MR. MURPHY: Well, --

QUESTION: And that you shall hold your thing some place where there's no other prisoner within a block.

MR. MURPHY: This was considered, Your Honor.

QUESTION: And you mean it's impossible to do it?

MR. MURPHY: It was considered, and it was done in California from 1957 until 1961, there were no serious regulations on the press during that period of time. We had a discretionary procedure up until August of 1961 -- excuse

me, 1971.

QUESTION: And you can't go back to that?

MR. MURPHY: The procedure in California was to leave it up to the discretion of the warden or the superintendent, he would make the arrangements for the interview and the interview was carried out.

It was abandoned, and --

QUESTION: But you say there is no way that you can set up regulations that will grant what this Court here, from the United States District Court, to allow that order to stand with the regulations which that order invited; and you -- rather than to try to work it out, you want us to knock it out; is that right?

Is that not it?

MR. MURPHY: This -- I see where my time is up, Your Honor, but I'll answer the question as briefly as I can.

This is not a total ban on interviews, it is an attempt to come up with a regulation to meet a problem. And in California the problem is particularly serious, the inmates are engaged in gang warfare, there are alliances of groups within the prison, they are seeking notoriety through rhetoric and other means. It has been decided by the prison administrators that it is in the best interest, not only of the institution but of the inmate himself, that there not be this particular type of interview.

QUESTION: And you cannot live with this order?

MR. MURPHY: That is correct, Your Honor.

QUESTION: One more question. Is there any restriction here, except that the media cannot select their own persons to be interviewed, under this regulation? Is that or is that not the only restriction?

MR. MURPHY: That is the extent of the restriction.

QUESTION: They can come in, they can interview, they can take their notes, they can write their articles, and they can identify the person interviewed; but they are not permitted to pick out the particular prisoner that they want to interview. Is that it?

MR. MURPHY: That's right, Your Honor. They're in institutions and of course there are some local rules, as far as using TV cameras and such; in other words, you can't photograph an inmate unless you have his consent to it. And there's mechanical problems which I really don't think are worth even getting into a discussion on, because they're so -- so practical, as far as the institutions go.

MR. CHIEF JUSTICE BURGER: Now, we've used up a great deal of your time, necessarily, we'll extend your time five minutes, and we'll enlarge yours five minutes, so that you will have the same amount of time.

MR. MURPHY: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Bass.

ORAL ARGUMENT OF STANLEY A. BASS, ESQ.,

ON BEHALF OF HILLERY, ET AL.

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

At the outset I would like to point out two factors that makes this case very different from what might be termed a run-of-the-mill prison case.

In the first place, this does not involve just prisoner's rights, but it involves an amalgam of the prisoners' rights, the right of the press, and the public's right to know.

We're talking about a subject of paramount public concern, the question of what goes on in the nation's prisons, and therefore the questions, general questions as to what First Amendment rights prisoners may have to talk about the arts, to discuss matters of social concern, or things that do not have to do with the grievances pertaining to prison conditions, are not involved here.

The second feature which is a rather extraordinary development is the fact that we do not seek to override administrative discretion in this case. The Director of the Department of Corrections, Mr. Procunier, has candidly admitted that he would prefer more flexible regulation, and that the only reason that he has this regulation is not based upon penological considerations but legal advice.

And the courts are clearly qualified and are not bound by any rule of deference to administer discretion, to defer to the opinions of counsel.

As a matter of fact, decisions such as Price vs. Johnston, which involved the power of a District Court to order a prisoner brought before it to argue a case is discretionary, and the simile --

QUESTION: Excuse me, Mr. Bass, I gather that certainly we can't intervene unless some constitutional right has been abridged, can we?

MR. BASS: That's correct. Well, --

QUESTION: So no matter whom you're speaking for, that's really got to be the thrust of your argument.

MR. BASS: Yes. Well, I was just going to get to that as soon as we get these two points out of the way. That is, the question of the amalgam theory, and the question of not overruling administrative discretion.

QUESTION: But each one of these rights, as Justice Stewart previously and Justice Brennan now points to, must be linked to some constitutional guarantee, must it not?

MR. BASS: That's correct.

QUESTION: That is, the right of the inmate to speak and to presumably associate, and the right of the news representative to come in. Each one of those must be linked to a specific constitutional guarantee, must it not?

MR. BASS: Yes, Mr. Chief Justice, the rights that we seek to enforce come from a number of decisions of this Court. The decisions of this Court protecting, for example, the right of access to the court, which is part of the umbrella right of petition for redress of grievances. Also the prisoner's right to communicate.

Surely, the prisoners do not lose their First Amendment rights when they are incarcerated. For example, just two years ago, in Cruz vs. Beto, the Court pointed out that persons in prison are not bereft of their First Amendment rights to practice religion, and, in a footnote, the Court indicated reasonable opportunities to practice religion should be made available.

QUESTION: Well, do you --

QUESTION: If I may, Mr. Bass, let's accept your hypothesis that prisoners don't lose -- let's go as far as you want to go -- any of their First Amendment rights, just by hypothesis. What right does a person outside a prison have to access to a newspaper?

MR. BASS: Well, presumably, a person on the outside would have a right to meet with a newsman at his office or perhaps the newsman would come to the person's --

QUESTION: Well, why? Why would he? If I went down to the Washington Post and I were John Smith, and I would say, "I want to come in here, I have something to tell

a reporter," and they'd say, "Well, we're awfully sorry -- even if we're not on strike, we're still sorry" --

[Laughter.]

QUESTION: -- "we're not interested in what you have to say. You've been here before, and we're not interested in you."

Now, what constitutional right does he have to go in there and talk to a reporter?

MR. BASS: We're not suggesting that, with the parties other than willing, there would be a right to coerce the press, for example.

QUESTION: Well, that's -- the press's willingness or unwillingness doesn't have to do with a citizen's right. Then you get over to the press's right; that's something quite different. But you're here representing Mr. Hillery, who's a prisoner.

MR. BASS: Right.

The inmate has a right of communication, and this right of communication and a right of association permit him to correspond or to communicate with the press in order to discuss matters that deal with grievances --

QUESTION: Well, other citizens don't have that right, do they? Constitutional right? They can write letters to the newspaper; the newspaper has an absolute right to throw them in the wastebasket.

MR. BASS: That's true. The press's right to gather the news is part of the amalgam theory that supports the inmate's right to communicate about subjects of grievances.

QUESTION: Well, it seems to me you're suggesting that an inmate has a right superior to an ordinary citizen.

MR. BASS: I was suggesting --

QUESTION: Not equivalent to one.

MR. BASS: -- that the inmate has the same right a citizen --

QUESTION: Well, I thought what was put in the regulation which -- which is a State interference with communication was at issue here.

MR. BASS: That's correct.

QUESTION: Isn't that -- isn't it the validity of the regulation?

MR. BASS: The regulation interferes with communication. It does so by absolutely precluding --

QUESTION: And I suppose a regulation like that, or a law, perhaps, that prevented ordinary citizens from going to the Washington Post might -- you might be up here on that, too.

MR. BASS: Well, we suggest that the underlying right is there, whether or not the State can show some justification to qualify that right would depend upon whatever is asserted, or the record that's developed.

But in this case, the showing that the State has made has been completely insufficient. The State refers to the Big Wheel syndrome, but it should be obvious to everyone that the problems mentioned by the State, that is extensive interviews of notorious inmates, can be dealt with with a much narrower regulation than we have here; and the point that establishes that is that Director Procunier himself recognizes that, and it was only because his lawyer told him he has to treat all inmates equally, at least as to this point, that he cannot have the regulation that decides on a case-by-case basis, or even within guidelines.

QUESTION: Well, this isn't communications. As I understand the STate, and I want to get this from you if it's agreeable, he can write to the newspaper?

MR. BASS: Yes, Mr. Justice Marshall.

QUESTION: He can send any material he wants to the newspaper. He can send anything he wants to the television studio. Is that right?

MR. BASS: Yes.

QUESTION: Can they write him, and ask him for it?

MR. BASS: Yes. Presumably they can.

QUESTION: So the only issue here is the television, face-to-face; isn't that it? Is there anything other than that?

MR. BASS: Face-to-face interview.

QUESTION: Is there anything other than that here?

MR. BASS: I wouldn't characterize the question as one of television, it would be of the right of the reporter, as well as the inmate, to have the face-to-face meeting.

QUESTION: Right. And other than face-to-face, there's nothing else here?

MR. BASS: No conduct involved --

QUESTION: In this case.

MR. BASS: -- other than the discussion.

QUESTION: In this case.

Now, where do you get that right to have the face-to-face interview to try to get what Brother Stewart was asking you about, where does the inmate get that right to have a face-to-face interview in prison?

MR. BASS: The -- well, if I understand Your Honor's question, it's first where does the inmate get the right, and then where does he get the right in prison?

QUESTION: No. He's in prison.

MR. BASS: He cannot go out. We start with the basic proposition that an inmate is not entitled to go out on visits. Of course if the State wants to give him a furlough, that's discretionary. So he's necessarily precluded by the State's action in keeping him in the prison, his forms of communication are limited. That is to say, the only way he can communicate with an outsider, meaningfully

speaking, is for the outsider to come in.

And so, in order for the press to have a meaningful discussion about grievances with the inmate, the representative of the press must come in and talk with the inmate.

Now, I take the State to argue that a face-to-face meeting is completely unnecessary because adequate alternative methods are available. But this ignores both the record in the other cases involving this issue and the record in this case.

Specifically on page 159 of the Appendix is the Affidavit of Bobby Bly, who is one of the inmates in this case, who specifically mentioned the need to, quote, "see and talk with representatives from the media and express my views on different topics freely, as well as fully describe the conditions I am being subjected to as a black prisoner."

Now, this --

QUESTION: Mr. Bass, this raises a question that may be more procedural than substantive, but did the District Court grant anybody's motion for summary judgment here?

MR. BASS: Apparently there was an oral motion for summary judgment. Originally, the plaintiffs had moved before the single judge for a preliminary injunction. That was granted. The State came in and said a three-judge court is required. It vacated it. But the motion for preliminary injunction was left hanging.

Then when the three-judge court convened, they heard the motion for preliminary injunction, and apparently, without any objection from the parties, consolidated the hearing on the merits with the motion for preliminary injunction, and called that a motion for summary judgment.

QUESTION: What's the posture of an affidavit like this? If you have a ruling in your favor, you can assume that the court chose to believe it; if the ruling is against you, you have to assume that the court chose not to believe it?

MR. BASS: Oh, the court does say that based upon the affidavits and exhibits and so forth in the file, it makes its ruling. So it did consider the affidavit of Bly, as well as the letters written by the journalist and the testimony of Mr. Guthrie, and the testimony of Mr. Procunier in the Washington Post case, also put in the record by the defendants.

So everything was considered by the District Court.

QUESTION: But can you tell from the findings of the District Court whether they chose to believe the particular affidavit you're relying on?

MR. BASS: Well, you cannot tell as to that specific point. On the other hand, since there was nothing in the record to rebut that, it really doesn't seem to be a consequential point. That is, that since it's in the record,

and the District Court ruled in favor of the inmate plaintiffs, and the State didn't rebut it, it's -- the judgment is supportable by what is in the record.

QUESTION: And you think there is a constitutional right when they have visitor's day for the general public, not for relatives, just visitors who are going through to see the prison, there's a constitutional right either on those visitors or in the prisoners to stop and talk to each one of them? Conduct visits?

MR. BASS: We need not reach that problem in this case because the individual just walking through, who's just a person, does not play the same role as the press does, in terms of reporting the grievances. And since the --

QUESTION: Well, he might. He might.

MR. BASS: Well, he does -- if he purported to play a role of informing the public, more weight would be given there to the need of communication. But in this case --

QUESTION: He might be a lawyer who is just generally interested in the subject of penology.

MR. BASS: Well, --

QUESTION: Do you think his right is any less than that of a newspaper or other media?

MR. BASS: Well, Mr. Schwartz, of course, will argue the freedom of the press.

QUESTION: Oh.

MR. BASS: I would simply point out that since the right of the press is part of this amalgam, that the press is recognized specifically in the First Amendment, and it would have a right of reporting on those conditions.

I would then get to the State's interests that are asserted in defense of the regulation, and would point out that in so far as security is advanced as a justification, the warden's answers to the interrogatories make rather plain that if the prisoner is dangerous, or if the visiting room is overcrowded, or if the media abused its access, then of course subsequent interviews could be denied.

Those are all parts of what might be called regulation of interviews.

Interestingly, Mr. Guthrie testified on page 260 of the record that the visit in the visiting room would not create greater security problems than a tour, where the newsmen would go at random on, let's say, the maximum-security facilities.

With respect to the Big Wheel theory which, I sense, is really the problem that the State --

MR. CHIEF JUSTICE BURGER: I think we'll take that theory up first thing in the morning.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, April 17, 1974.]

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., Appellants, v. BOOKER T. HILLERY, JR., et al., Appellees.	No. 73-754
- - - and - - - EVE PELL, BETTY SEGAL, and PAUL JACOBS, Appellants, v. RAYMOND K. PROCUNIER, Director, California Department of Corrections, et al., Appellees.	No. 73-918

Washington, D. C.,

Wednesday, April 17, 1974.

The above-entitled matters were resumed for argument at 10:08 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:

[Same as heretofore noted.]

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments now in No. 73-754.

Mr. Bass, you have about nine and a half minutes remaining.

ORAL ARGUMENT OF STANLEY A. BASS, ESQ.,

ON BEHALF OF HILLERY, ET AL. [Resumed]

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

QUESTION: Mr. Bass, before you get back into your argument, I would hope, as to some of the questions and answers I think more between Mr. Murphy and the Court yesterday, that perhaps you could straighten me out.

Is it your position that newsmen in the California penal system are denied access that would be afforded to an ordinary member of the public?

And, second, do you contend that a newsman is entitled to access of a type that would not be accorded to a member of the general public?

MR. BASS: Well, my argument, Mr. Justice Rehnquist, will focus on the inmate's right, and Mr. Schwartz, of course, who represents the media plaintiffs, will discuss the right of the newsmen.

QUESTION: So, I see, you're dealing just with the inmates.

MR. BASS: Yes. But I would like to get back to Mr. Justice Stewart's question of yesterday as to what the underlying right is.

The hypothetical situation was the citizen and the newsman.

I would say, first, if no law is involved and is merely a newsman who refuses to meet with a private citizen, then the absence of State action would not make that unconstitutional.

If there were a State law that prohibited a meeting between the consenting parties, between a newman and a citizen, that would violate what I think would be three rights: it would violate the right to communicate ideas, which is a basic right in our society; it would violate freedom of association to meet for a valid legal purpose, in this case it would be to petition for redress of grievances; and it would further violate the press's right to gather news.

Now, the right to communicate ideas, subject to limitations, is the basic right involved in this case. And we submit that it's freedom of speech essentially, that is involved where the inmate, as a citizen, seeks to meet with the newsman to discuss prison conditions.

This right, of course, is not forfeited by virtue of conviction. Cruz vs. Beto at least establishes the

proposition that there's no forfeiture, and I take it that California does not argue in this case, as it did in the Martinez case, that there is a forfeiture once the person is convicted.

So we then get to the question of what restrictions could be imposed once there is a basic right that's imposed. And the Healy vs. James case, in an opinion by Mr. Justice Powell, sets forth, we think, what is the applicable rule of law with respect to restrictions on First Amendment rights: that there must be a showing of evidence of a material and substantial interference with the operation -- in this case it's the prison. And, secondly, that there must be a showing that the restriction on First Amendment rights is not greater than is essential to further the State's legitimate interests.

Now, I mentioned yesterday that the alternatives provided by the State of California were inadequate. It should be pointed out that from the inmate's point of view, the random interviews do not help the inmate who's not lucky enough to be selected. He of course, perhaps the person with the most to say, may, by bad luck, simply not be selected; and so he has no right of face-to-face interview.

Mr. Schwartz will of course discuss it from the standpoint of the newsmen; but I assume that the press would take the position that inmates are not fungible, and that it is

the desire to see particular inmates rather than just to go in at large and confront anyone who happens to be there.

QUESTION: Mr. Bass, does the State of California prevent the newspaper from submitting interrogatories, and the man answering them? In writing.

MR. BASS: As I understand the record, communication by mail, written communication is permitted.

QUESTION: Well, couldn't the same point be accomplished that way?

MR. BASS: No, because the face-to-face communication, as this Court recognized in Kleindienst vs. Mandel, there are particular equalities involved in face-to-face discussion, and --

QUESTION: The prisoner might be illiterate.

MR. BASS: He might be illiterate, of course, but, I think, as the District of Columbia --

QUESTION: Well, is this one illiterate?

MR. BASS: Well, there is nothing in the record to show that --

QUESTION: Well, I'm not convinced that there's that much difference, because many a case is settled on written interrogatories.

MR. BASS: That's true, but I was going to suggest that the District of Columbia Circuit put it very well, where they said: the literacy problem aside, communication by mail

lacks the spontaneity and flexibility of a personal interview.

QUESTION: Were they talking about written interrogatories in that case? They were not.

MR. BASS: No, they were talking --

QUESTION: I'm limiting it. Now, do you have any case that passes on written interrogatories, and written answers?

MR. BASS: There is nothing in this record to show that written interrogatories, as called interrogatories, would be allowed. The only thing that the record speaks of is letters from newsmen to the inmates.

QUESTION: Well, would written interrogatories in the letter, saying: Dear Joe, I want to ask you the following questions -- would that be all right?

MR. BASS: Would that be satisfactory --

QUESTION: I understand you can write any letter you want to write.

MR. BASS: Presumably, you can, subject to censorship rules.

QUESTION: Well, the letter would say interrogatories, he would answer, and then he would have counter interrogatories, and he would answer.

MR. BASS: Well, the problem, of course, with the mail is the problem of censorship and delay. And in order to

be able to meet in sufficient time, in order to deal with a particular problem, like drug traffic or some danger, or some newsworthy event, the mailing of interrogatories would entail such delay that even if the person were articulate and could answer the interrogatories, the information would come back so late --

QUESTION: Well, he wouldn't be any more articulate in the question-and-answer, would he?

MR. BASS: Well, the problem is there's no give-and-take as there is in the face-to-face interview. There's no ability to follow through on a thought; there's no ability to size up the individual that's being interviewed. It's merely cold words on the paper, without the possibility of getting depth perspective.

And as I understand the decision in Kleindienst vs. Mandel, there's a recognition by this Court that there are peculiar qualities, particular qualities in the face-to-face meeting that make it much more important and part of communication to have the face-to-face meeting.

QUESTION: Under the constitutional right that you claim for the inmate, I take it, is the right to have his name identified with the statements.

MR. BASS: Not necessarily, Mr. Chief Justice.

QUESTION: Would you think it would satisfy constitutional requirements if he is interviewed but his name

is excluded from the reported interview?

MR. BASS: If -- if the State -- well, the State apparently is indifferent at this point. The State of California, unlike the federal bureau, allows presumably a person's name to be mentioned, so that that prohibition is not asserted in this case.

I would think it might be an impediment upon communication, but we need not reach that issue here, because that's not presented in this case.

The State's legitimate interest was the area that I was getting up to, and particularly the Big Wheel theory asserted by the defendants.

First of all, there's nothing in this record to show that these plaintiffs are Big Wheels. In fact, the court's order directing that the interviews of the named parties go ahead has not been stayed, no request for a stay has been made --

QUESTION: Was it not the State's point that if they are not, in quotation marks, "Big Wheels" now, that an interview or a series of interviews will establish some kind of a reputation that they don't have?

MR. BASS: That's what I understand the State's argument to be. However, Mr. Guthrie, one of the defendant's witnesses, testified at the hearing and he was specifically asked about the extent to which interviews would cause a person

to become a Big Wheel. He was asked, too, whether or not a random interview was less likely to make a person a Big Wheel than the designated interview; and he indicated that the problem was one of volume.

And then he was specifically asked, on page 254 of the record, whether one interview would be likely to turn an inmate into a celebrity; and he said no. And then he was asked, two interviews; and he said he can't give a number, but the problem was volume limitation. If there were volume limitations, he said, there would be a control over that problem.

And I take the argument of the defendants in this Court to be that they want to prevent the problem of extensive interviews of notorious inmates.

Well, this regulation is not reasonably related to that problem, this regulation prohibits all interviews of designated inmates. In other words, they agree that one interview will not do it, but they adopt the regulation that says no interviews at all. And our argument is that they have to have a narrower regulation, if the articulated interest of the State is to deal with extensive interviews of notorious inmates; then a regulation less broad can surely be adopted, and --

QUESTION: Well, don't you really realize that that would cause all sorts of even more difficult constitu-

tional questions, because that would be, if you had, if you began selecting, you'd begin -- the State would be accused of trying to control the content and of preventing an interview with this man because of what this man was going to say, and so on.

That, Mr. Procunier was, the record shows that he was advised that he couldn't do that. And wouldn't you agree that was probably pretty good advice?

MR. BASS: That wasn't good advice --

QUESTION: You couldn't begin picking and choosing among them.

MR. BASS: He could because -- well, it's in the essence of correctional administration to treat different people differently.

QUESTION: Well --.

MR. BASS: And we don't suggest that the Director is unable to utilize discretion. In fact, Mr. Procunier testified that he would prefer a more flexible regulation. And I think he had in mind the fact that the Big Wheel problem can be handled by selectivity.

QUESTION: Yes.

MR. BASS: But the equal protection clause does not require --

QUESTION: Selectivity would be exactly where he'd get into real trouble with the Constitution, both the First

and Fourteenth Amendments and the equal protection clause.

MR. BASS: Well, the interesting thing, Mr. Justice Stewart, is that the other States which have had flexible interview policies, which allow it to be in the discretion of the administrator, have not resulted in the spate of litigation that has been predicted.

QUESTION: Well, there's lots of things that haven't yet been litigated.

MR. BASS: But the point is that it seems to be workable, that discretion in the officials will allow personal interviews, and the showing has not been made that the State is required to make in a First Amendment case. The requisite showing of inability to run a correctional administration.

QUESTION: Would you be satisfied with a rule that said you may interview anyone you want to, but no more often than once a month?

MR. BASS: Well, we haven't of course gotten to the point yet of where the District Court has finally adopted rules, so that question is not yet before the Court.

However, to try to answer the question, I would say that the type of test that would seem to accommodate both the individual's interest, the press's interest, the public's right to know, and correctional administration would be something similar to the District of Columbia Circuit test:

that the interview should ordinarily be allowed, unless the administrator makes a determination that because of specific problems in the institution or based upon a particular inmate, that there's some serious danger of administrative discipline.

QUESTION: So your answer is that no, it wouldn't satisfy you?

MR. BASS: I would say a per se rule as to number would raise problems; on the other hand, there might be some reasonable limitation dependent upon how many people want to come to visit. But there's no showing yet in this record that the numbers are a problem. In fact, the administrative burden argument was completely unsupported as far as this record is concerned.

QUESTION: Do I understand, Mr. Bass, your position then to be you would be satisfied with what Judge McGowan worked out on the District of Columbia case?

MR. BASS: We believe that that appears to be a good accommodation of the competing interests.

QUESTION: Would this not be subject to manipulation and complaint on your part in the hands of a tough administrator?

MR. BASS: Well, we could --

QUESTION: Wouldn't you be up here with another case at that time?

MR. BASS: I think we would have to see how it's

being administered, if in fact the interviews are being denied wholesale, then we could make a record and show that; but it appears on face to be a valid test that would give proper weight to the competing interests involved.

QUESTION: You said, in answer to Justice White's question, that the District Court hasn't yet gotten to the stage of adopting rules.

MR. BASS: Yes.

QUESTION: Is that what's going to happen, the District Court devises a rule? I would have thought it was a question of whether the administrator's rule was constitutional or not.

MR. BASS: I should rephrase that, Mr. Justice Rehnquist. The order of the District Court directs the officials to come up with a rule and submit it to the District Court. The officials have submitted proposals, and the District Court is considering them now, and will hold a hearing in June, probably after this Court rules on the underlying question of the validity of the original regulation.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Schwartz.

ORAL ARGUMENT OF HERMAN SCHWARTZ, ESQ.,

ON BEHALF OF APPELLANTS PELL, ET AL.

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

I represent the press appellants in this case, in which the District Court split the case and held that, although there is a First Amendment right of expression, there is not a First Amendment right in the press, to obtain access to the court.

My argument will be essentially in two or three parts.

First, some general comments about the underlying right of what's involved here; secondly, the analysis of the District Court, which essentially is in two parts, the Branzburg discussion and the alternatives; and, thirdly, some remarks on some of the policy questions raised in terms of the justification by the State of California for this rule and some of these points made in the record.

And with respect to that very first issue, what is the underlying right, what we are dealing with here is one of the most important rights in the whole prison context; which is the right of the community to know what is going on in its prison system.

We start this case from the Chief Justice's speech before the Bar Association of the City of New York in 1970,

where he talked about the terrible importance, the vital importance to the community of getting all the facts. And he said in a line, that those interested in improving prisons have quoted over and over again"a visit to most prisons will make you a zealot for prison reform."

And that's what's involved in this case.

QUESTION: Well, if the community were vitally concerned about getting facts about the prisons, say the California community, couldn't they make their views known to the California Legislature, and the Legislature require the warden to let the press in?

MR. SCHWARTZ: Yes, they could, but the way the community becomes involved is if things are brought to its attention. The Attica uprising obviously produced attention, unhappily. That's the wrong way for it to happen.

But, by and large, the community, the purpose of the press is to alert the community to the problems that are going on, to tell them what it is that's going on, and then they can come in. The community, sadly enough, is often indifferent about these problems, and it isn't until the press turns to the community and says "Look what's happening" that one can expect any kinds of changes or any movement toward the Legislature.

Now, what we deal with, as I said, is the community's right to know and the press as the proxy, the surrogate for

the community. Because, as the Solicitor General said in his brief in the Washington Post case, the community has neither the time -- the general public, the average citizen has neither the time nor the resources; it is the press that has the skill, the time, the incentive to try to obtain and to communicate and to put together the story of what is going on.

QUESTION: Mr. Schwartz, --

MR. SCHWARTZ: Yes, Mr. Justice Powell.

QUESTION: -- it would help me at the outset if you would define your conception of the press. What does it embrace?

MR. SCHWARTZ: Well, Your Honor, we think that it embraces for these purposes anybody who tries to communicate information to the community. Generally, for purposes of this case, in terms of the press regulations that have been adopted so far, it refers to pretty much recognized representatives, people who can show that they represent media of one kind or another. It can include free-lance people, it can include those who work for small newspapers, weekly newspapers, college newspapers; but those who do in fact represent the press.

And the experience so far has been, in California and elsewhere, that it is not a difficult problem to administer. Press passes are issued, the interim regulations that were

proposed in this case have a definition, and after some discussion and debate that is what is being operated.

To my knowledge, and I must -- I don't want to interject a personal element, but I have followed this area closely; of the many States which allow press access, the Reporters Committee concluded it was something like 27 out of 36 who responded, we have not heard of any serious problems of any kind respecting that problem of defining the press for these purposes.

QUESTION: What do these States do about radio and television?

MR. SCHWARTZ: The experience I know in New York is that radio and television are included; that we would think that normally they should be included. However, just as in Estes and in other contexts, where it appears that a good-faith case can be made by the administrator, that that would be too dangerous and too troublesome, then we think that they could be excluded in the right kind of setting, certainly.

QUESTION: Would it be your thought that the administrator would allow interviews on a first-come-first-served basis, or would he have to make a choice between A and B or the representative of a large daily on the one hand, or a high school weekly on the other?

MR. SCHWARTZ: Well, what has been done, and this

I know from personal experience in the post-Attica situation where I was involved, is it was initially done on a first-come-first-served basis, and then, when it looked as if it was a great deal, a pool arrangement was made, in which the press among themselves agreed who would go in and represent others. And that seems to have worked fairly well. To my knowledge, I know of no difficulty.

QUESTION: Does your conception, Mr. Schwartz, embrace the idea that if some unusual situation or a situation thought by the media to be unusual, involving one particular prisoner, one particular inmate arose, that the matter of -- the right of the media would be such that fifty of them could go in at one time --

MR. SCHWARTZ: Oh, no. No.

QUESTION: -- and have --

MR. SCHWARTZ: No. No.

QUESTION: Well, let me finish out.

MR. SCHWARTZ: Sorry.

QUESTION: Fifty of them could go in at one time, of all the branches of the media, and in effect have a press conference.

MR. SCHWARTZ: Well, I must confess, Mr. Chief Justice, that I think that's the business of the administrator to determine space and, you know, the noise of press coming in. Burnham v. Oswald is a case which raises that precise

problem.

If the Court will recall, originally Judge Curtin in the Western District of New York said that the press could not go in the aftermath of the Attica uprising. A week before the case was going to be argued in the Second Circuit on an expedited appeal, the State administrator said, Let them go in. And this was the first press going in.

There was an enormous desire to go in. The superintendent of the institution and the State said, We cannot have press trooping in in large numbers, we just don't have the manpower. So they worked out a pool arrangement. They worked out some kind of priority, and it started out with a press conference.

Now, it didn't have to be that way, but it started out that way, with television and the New York Times and others there.

QUESTION: But if it is a constitutional right, Mr. Schwartz, a constitutional right, and fifty members of the media said that they wanted to get in and interview this one man on this one episode, how do you dilute the constitutional right that you claim by saying only a pool goes in?

MR. SCHWARTZ: Well, the constitutional right is the right of the community, it's not the right of the individual, as I see it, the right of the individual reporter. He is really a proxy for the community. And if arrangements

are made for the community to get an adequate knowledge of what's going on, then I don't think any individual member of the press has any standing. Because then he's simply talking about his economic interest.

QUESTION: It strikes me that you're moving from an absolute constitutional claim to a policy question, that you can satisfy the constitutional claim by this very reasonable policy that you suggest. But waht if fifteen or twenty or twenty-five of the newsmen, news media people said,"No, we're not satisfied, we want to be there."

MR. SCHWARTZ: Well, I think it's --

QUESTION: "Each one of us wants to be there."

MR. SCHWARTZ: I think it's the same kind of situation. I don't think -- first of all, we're talking about an absolute constitutional right which is absolute only in the sense of this regulation. It is subject to control, to restriction. We accept the provision that Judge Gesell in the D. C. Circuit adopted, which involves reasonable regulation. We are not asking for an unrestrained right.

And what happens in notorious trials, for example in the first days of the Mitchell-Stans trial, the community were excluded, and ten newspapermen were allowed in to represent the press-at-large as a pool.

It seems to me that's all we have a right to ask, that we, standing for the community, give the community some

access, not that every individual newspaperman or whatever he is has the right to be there. It's not a personal right, he has, in effect, a derivative right of the community. And if --

QUESTION: But the First Amendment doesn't say anything about the community's rights, it says: Congress shall make no law abridging the freedom of the press.

How do you get from there to the community's right?

MR. SCHWARTZ: Well, the freedom of the press is designed to enhance the community's right to know. It is not, as we see it, it is not for the press to make money or anything like that, it is to maintain the flow of ideas so that a democratic community can know what's going on; particularly in its public institutions.

It is always subject to control when there is some kind of clear and present danger of some evil that shouldn't be permitted. And that could happen in a prison if you had fifty or seventy-five. Because it takes guards to supervise, and it takes staff. So that the freedom of the press that's involved in the First Amendment is subject to reasonable regulations, so long as it does not interfere with the flow of information to the community.

QUESTION: But the warden could select some newsmen and say they have this right of access; he can tell other newsmen, You don't have the right of access. And their

freedom is not being abridged under your theory?

MR. SCHWARTZ: I think that's right, so long as he selects on a basis which doesn't involve any attempt to control content or anything of the like. So long as he selects on the basis of some method which seems fair, fair in terms of assurance; because not everybody gets press passes to the White House or to be accredited to Congress.

QUESTION: Well, but none of them claim it on a constitutional basis, as I understand.

MR. SCHWARTZ: Well, I think there are decisions which say that there is no right of an individual -- I think there is a case, the citation to which escapes me at the moment, in which it was allowed to deny a press pass to a member of the press. And that was because the freedom of the press -- whether I agree with that decision or not -- but the rationale was because the freedom of the press is guaranteed, if the community is allowed an opportunity to know what's going on.

QUESTION: Of course I don't know, but isn't the White House press conference determined by the press men themselves?

MR. SCHWARTZ: I'm not sure, Your Honor, but that in itself --

QUESTION: Well, I think you ought to be sure before you start talking about it.

MR. SCHWARTZ: Well, but that in itself, if it was an unfair basis for exclusion, then it would seem -- then the --

QUESTION: It wouldn't be a constitutional matter, would it?

MR. SCHWARTZ: If it was unfairly excluded?

QUESTION: By the press itself?

MR. SCHWARTZ: Yes, but the -- --

QUESTION: It would be a constitutional question?

MR. SCHWARTZ: The Consumers Union case in the D. C. Circuit holds, I think, precisely that, where they excluded a member of the press.

QUESTION: And it violated what section of the Constitution?

MR. SCHWARTZ: It violated the equal protection clause and the First Amendment, according to --

QUESTION: First Amendment?

MR. SCHWARTZ: It may have been just the equal protection clause. I would have to check the case, Your Honor.

QUESTION: But do you think the press has a constitutional right, at least in the terms you've described it, to go into the White House?

MR. SCHWARTZ: No, they don't have a right to go into the White House, because that's secret to everybody.

Nobody has a right to go into the White House, because things go on there, as in a grand jury, as in the executive conferences of this Court, which have to remain private if the work is to be done.

But where something is open to the public generally, as it is here, where ten thousand people go into San Quentin every year, where families, friends, clergy, all kinds of special-purpose visits are allowed access to individual-named inmates, when that happens then we are saying the press has a right to go in.

Now, -- and that's the second point that I wanted to get to. We are not claiming the right to go where nobody else has the right to get any information; we're claiming the right to go in where other interests are permitted to go in, and we say that the press interest is at least as valid as these.

Now, the State of California claims that we have been given viable alternatives, the random access thing.

But just let's take this possible case. A newsman gets a tip that there's drug traffic in the prison, and that there are three or four inmates who can tell him about the drug traffic. If he's wandering through, or going to Alcoholics Anonymous, or to a meeting of this, there is no -- it is just the wildest of chances that he may run into these people.

Not only that, but there may be times when the information he has has come up in a case in the First Circuit, is something that only that person has and has nothing to do with prison grievances. And again he's got to find somebody, he's got to find this particular person, nobody else can help.

And under those circumstances, the random access, which is purely fortuitous, doesn't help at all. Not only that, but the notion of the warden selecting some people to talk to him doesn't help, either. Suppose he wants to talk to some people who have grievances, is he going to count on the warden to select a few people who have grievances? That just doesn't make any sense, and just wouldn't work.

They have to be able to talk to the people who have information, and if family, friends, clergy can, then nobody else -- then they should be at least included.

Now, --

QUESTION: Mr. Schwartz, would you carry this theory of yours also to the institutional mental hospital, St. Elizabeth's?

MR. SCHWARTZ: I'm sorry? To the institutional mental hospital?

QUESTION: Mental hospital. Like St. Elizabeth's or whatever you have in New York State.

MR. SCHWARTZ: Yes, I would, unless a very -- unless

a good case could be made, that in the specific case, and we are -- we think the discretion should be followed here; unless it can be shown that in the specific case it would do harm to either the security of the institution or to the safety of that patient, to his mental state, and to his hopes for recovery.

Now, if it can be shown, and if a good-faith State case can be made, then we quite agree. And we think --

QUESTION: How do you do that short of a litigation process?

MR. SCHWARTZ: Well, again, the record shows that the State of California managed to do that for many, many years, not just in mental institutions here; the litigation that has come out and that has cropped up has been almost exclusively with just rare exceptions, and one of those is Seale v. Manson, but with rare exceptions against absolute bans.

The experience in most institutions, in most penal systems, has been that those have been observed.

And Mr. Procunier said he could do it. In fact, on mail censorship, which is somewhat analogous, he says: We decide, my wardens decide on an individual inmate basis whose mail is going to be censored, and whose mail will not be censored.

Indeed, when the reporter is supposed to be taking

this random access walk through the yard, they will decide on an individual conversation basis when security justifies it, allows it to be confidential and when it is not to be confidential.

Now, several things were said about why this rule was adopted. Through an oversight we did not include several crucial pages of the original record below, pages 14 to 16, and it is very clear there, Mr. Nock, the Attorney General, said: The thing that bothers us is interviews, not a single interview, not even a couple of interviews, but interviews on a daily or weekly basis.

And then there's the equal protection problem, and that's what bothers us.

Now, we have gotten permission of the Clerk to reprint those pages of the Appendix. They are pages 14 through 16 of the original record, and we will submit them with our Reply Brief.

That's what this is all about, a lawyer's judgment. Mr. Procunier said over and over again, This is the only rule we have, the only rule, where we don't have things on an individual, one-by-one basis.

QUESTION: Well, when Mr. Procunier, or any other prison, institutional director is making these rules, he's doing it in terms of policy and administration and what he thinks is desirable. But does that have anything to do with

a constitutional requirement?

MR. SCHWARTZ: No, but he must make those decisions within constitutional requirements.

QUESTION: That's why he brought up the equal protection problem, wasn't it?

MR. SCHWARTZ: That's right, Your Honor, but it seems -- what we seem to have here, on the basis of his testimony in the Washington Post case, is that on penological, correctional, administrative grounds, he would have allowed interviews and prohibited them just on a case-by-case basis.

But he swung all the way over because of the legal matter, and that's exactly what Judge Gesell commented on in his opinion below.

And so that those things that Mr. Procunier would have done as a correctional matter, he had to change his mind because of this legal judgment.

Now, I've used up my time; I wonder if I might just take one minute because several comments were made yesterday about points in the record; if I may.

MR. CHIEF JUSTICE BURGER: Yes, we will give you another minute or so.

MR. SCHWARTZ: Thank you, Your Honor.

The comment was made yesterday about dangers from gang warfare, and murders and the like, that might arise. There is information in the record about murders and gang

warfare, and unless they took place all within the last six weeks of 1972, they took place while there was a flat and total ban on interviews during that period.

Secondly, there was talk about what happens if a man acts up just to get an interview, and I think the short answer to that is: If he acts up just to get an interview, that's precisely what will deny him the interview.

So I think, Your Honors, what we have here is a lawyer-made rule which has really no basis.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Schwartz.

Mr. Murphy, you have about seven minutes left.

REBUTTAL ARGUMENT OF JOHN T. MURPHY, ESQ.,

ON BEHALF OF PROCUNIER, ET AL.

MR. MURPHY: Thank you, Your Honor.

Mr. Chief Justice, may it please the Court:

A reference has been made to my client, Mr. Procunier's testimony in the Washington Post proceeding, which was made part of the record in this case, and I understand it's part of the record also in the case which is going to follow.

And it appears on page 302 of the record, and it's quite clear as to the analysis which Mr. Procunier was going through, if not the agony, because he uses the term "agony". And he says:

"However, in order to correct the situation that was getting out of hand, in my opinion, after consulting with the wardens and my staff, time after time, to avoid putting in the very policy we have, because this disturbs me greatly, we had to go to this. Our relationship with the press has always been fine. I would prefer not to have this rule."

And that represents what his view was from the period of 1957 up until 1971. In other words, California had the opportunity to test the very program that is being urged here and has been urged in the Washington Post case, and found that it did not work.

And if we look at the decision of the Court of Appeals, the Court of Appeals for the District of Columbia Circuit, and what their conclusion, of the Court, was; and you can highlight, you can actually see the problem that is presented. The Court there said, and I'm quoting from the opinion, at the very -- the second from the last paragraph of the opinion:

"Accordingly, we recast that portion of the District Court order to require that interviews be denied only where it is the judgment of the administrator directly concerned."

Okay, so it has to be the warden or the superintendent, the administrator directly concerned; not the Director of the Department of Corrections.

"Based on either a demonstrated behavior of the

inmate" -- not potential conduct of the inmate; 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 administration or disciplinary problem."

Now, how can you formulate a policy that's going to be able to meet that, when we have emphasized throughout this proceeding that the difficulty is with the potential impact, that the press can have on the environment, the volatile environment of California prisons?

Now, one of the Justices --

QUESTION: Mr. Murphy, I was not entirely unsure -- or entirely sure in connection with some of your response to colloquies from the Court yesterday; can a member of the general public in California come into a California prison and seek to interview an inmate with whom he is not previously acquainted?

MR. MURPHY: The answer is no. With exceptions. There is what is reserved as the special-purpose visit. Now, a special-purpose visit is within the discretion of the warden. This is available to a scholar, a medical man, anyone that -- a historian, anyone that has a special interest.

For example, we've had examples of them on national TV. Truman Capote wants to make a national TV show on San Quentin prison. He gets permission from the warden, he goes

in, the whole thing is arranged. It's a special-purpose type of visit.

This has been done in many situations in the California correctional system, because it's in line with what the philosophy of the director is in the operation of the prison; but an individual cannot come off the street and say, "I want to see" another individual.

A newsman can't come off the street and say "I want to see a certain individual."

QUESTION: But Truman Capote can?

MR. MURPHY: He can as a special-purpose visit, or a scholar who is doing research on the penological system.

QUESTION: Well, why is he --

MR. MURPHY: Or a student.

QUESTION: Why is he different than an individual newsman, who may be seeking an interview?

MR. MURPHY: He's -- he's not different from an individual newsman. As I said yesterday, a newsman comes in and he wants -- and this is an actual situation -- he wants to do a television program on rape. The institution makes available to him, with the consent of the inmate, certain inmates who have been convicted of this crime.

So that the newsman can have his program, he can develop his program on that subject matter, which could be of interest to the public.

You develop it, the concentration there, the emphasis is on the subject matter. Our concern is where the emphasis is placed on the individual who is maybe notorious now, he may not be notorious now; he may be a troublemaker or he may not be a troublemaker, he may be a model prisoner, for all we know. But he is seeking a status role in --

QUESTION: But then no one where -- is this right, no one who is not previously acquainted, then, with a particular inmate can seek out a particular inmate and say, We want an interview with him?

MR. MURPHY: That is correct, Your Honor. Because the random -- I may have misled the Court to some extent, and I hope I did not; but the random interview, which is given to the newsman, is the same random association that a member of the public who signs up for the tour at an institution -- and not all the institutions have tours, but some of them do, like San Quentin. The public signs up, they get on the list, they pay a dollar seventy-five cents, they get a dinner and they get a show put on by the inmates.

And it's again an opportunity to acquaint the public with the situation.

But, as a principle of law, this is policy. We believe Mr. Procunier, in an emergency situation, certainly could suspend this; and as a policy matter he could suspend this.

This is his decision. This is what --

QUESTION: But what's behind the judgment that personal interviews would raise Big Wheel problems, but unlimited correspondence does not? Unlimited interrogatories, written interrogatories, to a particular named prisoner, does not raise any problems.

MR. MURPHY: Well, we're not worried about content, Your Honor.

In other words, if an inmate wants --

QUESTION: But what about -- why wouldn't unlimited written interrogatories to a prisoner, and publishing his answers, writing stories about his answers, why wouldn't that raise the same Big Wheel problem as the personal interview?

MR. MURPHY: It hasn't, Your Honor, in practice. Going back to the time of Carl Chessman, writing his books, and other inmates that have written books and literature in the prison, --

QUESTION: That isn't what I'm asking you about, I'm asking you about a specific newsman directing specific interrogatories, perhaps on a daily or weekly basis, to a particular inmate, getting his answers back, and publishing them. Now, that isn't Carl Chessman writing a book, that's a newspaperman developing a story and publishing it.

MR. MURPHY: Well, the difference is a difference of degree. When the press comes, the attention becomes focused

within the prison community on the individual, the television cameras, the newspapermen, and he -- there's a difference between the working press, those that have the beat, the day-in and day-out assignment, to come to the prisons to get the information in the prisons. If the attention is captured there by this direct face-to-face --

QUESTION: Well, suppose a press man comes to the prison and he says, I want to talk to so-and-so, and they say, You can't talk to him, but you can get written interrogatories. So he has interrogatories presented right there on the spot that day, they get answered, and he goes away and writes his story. And you say that doesn't raise a problem?

MR. MURPHY: Oh, it raises a problem, but it's not this degree of the problem. And again, in both situations it's a matter of policy. I don't see where it reaches a constitutional dimension. We can argue, I know, for minutes more if Your Honor will give me one minute -- I notice my time is up -- to conclude --

QUESTION: Well, you can answer my question, you must answer my question; I still am rather in the dark as to why you think there's such a difference between the face-to-face interview and the written interrogatories, in terms of the Big Wheel problem.

MR. MURPHY: It's a matter of the attention which

the personal contact tives to the inmate in the prison setting. In other words, he's there, they know the press is interested in him, this puts pressure on him, it puts pressure on others within the prison environment. This is a conclusion that's been reached by the administrators.

Now, we can --

QUESTION: Well, okay, that's enough.

MR. MURPHY: If I just can conclude in one minute, to show you what the problem is.

The parties that are suing Mr. Procunier in the court below and here have attempted to define what the press is, and they have put in some proposed procedures.

All right. They define the press as follows, and this at 151 of the Joint Appendix in this matter.

They define the media: "All newspapers, magazines and other regular publications having second-class mail privileges.

"All radio and television stations.

"All publishers of books.

"All news services.

"All film and videotape production companies.

"All persons who are employed by the media in reporting, writing, editing, and so on.

"All free lance writers who are affiliated with any media."

And then, "All free lance writers, reporters, editors, publishers, directors or photographers who earn a substantial portion" -- in other words, we'd have to find out how much money they're making -- "who earn a substantial portion of their income from free lance media activity."

And then they would include this:

"Interviews with representatives of the media shall be suspended only in the event of extreme emergency when officials no longer have sufficient control of the prison" -- in other words, that gunfire has to be going on -- "and a clear and present danger makes it impossible for the officials to safely transport prisoners to and from the interviewing facilities."

We can't accept that at all, Your Honor; we can't accept the decision of the Court of Appeals for the District of Columbia; and we ask that the decision of the District Court below be reversed.

QUESTION: I have another question, Mr. Murphy. You're on our time now.

I'm a little puzzled by the position of the State seeing an equal protection problem in selecting one reporter over another, or one inmate over another, perhaps, as well; and that you do not see any equal protection problem in letting someone of standing, particular standing, to come in and do the special-event show, I think you called it.

MR. MURPHY: Special purpose.

QUESTION: Special purpose. Well, now, what if -- one man who got that special purpose is a well-known author, but what if an unknown newspaperman, who is working for $185 a week, would like to become better known as an author and he wants to do a special-purpose show; does he get in, too?

MR. MURPHY: He could, Your Honor. That is an area that's left to the discretion of the warden, in the individual --

QUESTION: But then this is a selection process, isn't it? When you say "discretion" that means selection.

MR. MURPHY: Yes, Your Honor, it's a policy problem.

QUESTION: Well --.

MR. MURPHY: It's not a constitutional problem. In a particular institution a warden could say, "I'm not going to allow any special-purpose visits in my institution." It's an accommodation.

QUESTION: But once he allows one author to come in, you still don't see an equal protection problem that was seen in the other situation?

MR. MURPHY: Your Honor, I don't see any constitutional problem, when you let a member of the family in, or you let --

QUESTION: Well, I was just suggesting that I see a constitutional problem. I'm referring to the fact that

Mr. Procunier said the Attorney General's office told him there was an equal protection program in selecting one out of a group of comparable people.

MR. MURPHY: Well, the context of that statement that's made by Mr. Procunier is clear that, as a policy matter, he favors flexibility.

Now, it's interesting that the Martinez case, which is also before this Court and was argued in December, has been mentioned here. Because in the Martinez case, which involved correspondence, it was urged and successfully by the other side in the District Court that there was too much flexibility in letter writing and correspondence. In other words, that Mr. Procunier had delegated too much of this. And they asked for a rigid -- they asked for a rigid rule.

All right.

Now we have something that is close to a rigid rule, and they're saying, We want flexibility, we want to do it, you know. This is the -- the decision or the advice that was given to Mr. Procunier looked at the three elements of his process. He's got a correctional problem, that's one thing. He's got an administrative problem, if he wants to build a new prison he has to get $100 million from the Legislature; hire people, and all that. Okay, he's got administrative decisions which are independent of the correctional decisions.

Then he's got legal decisions that he has to make. And this would not be a good --

QUESTION: Hasn't he also got rehabilitation?

MR. MURPHY: Certainly. I take that as part of the correctional problem. The correctional problem is discipline, security, and rehabilitation.

All right. But he's got more things to consider about, and he's got to consider protecting the rights of the inmates at his institution, as well.

QUESTION: Well, getting back to the Chief Justice's point, what purpose encompassed Truman Capote? What special purpose?

MR. MURPHY: Well, Your Honor, I pulled that out of the air, --

QUESTION: Well, let's put it back in the air, and leave it.

MR. MURPHY: -- and I could have made a different choice. A scholar coming into this country, who may be totally unknown in the United States, but wants to make a study of the California prison system.

As a special-purpose visit, this could be allowed.

All right. If the --

QUESTION: But I thought you said this was allowed, they did let Truman Capote in.

MR. MURPHY: My understanding is that he had a show

approximately two, three years ago. And I didn't realize this would be any problem.

[Laughter.]

MR. MURPHY: As I indicated before -- I indicated before --

QUESTION: I've forgotten it, so you can.

MR. MURPHY: Well, as I indicated before, we do not follow the closed prison system, yet, as a matter of constitutional law, prisons are not open to the public. They are closed to the public. But there's an attempt to accommodate, and that's policy.

MR. CHIEF JUSTICE BURGER: I think you've answered my question now, Mr. Murphy; if there are no others, I think your time is consumed.

MR. MURPHY: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:59 o'clock, a.m., the case in the above-entitled matters was submitted.]