In the

Supreme Court of the United States

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,

Petitioner,

vs

KQED, INC., et al.,

Respondents.

No. 76-1310

Washington, D. C.
November 29, 1977

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Hoover Reporting Co., Inc.

Official Reporters
Washington, D. C.
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v.	:	No. 76-1310
KQED, INC., et al., Respondents.	:	

Washington, D.C.
Tuesday, November 29, 1977

The above-entitled matter came on for argument at 10:34 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KELVIN H. BOOTY, JR., Senior Deputy Counsel, Administration Building, 1221 Oak Street, Oakland, California 94012; for the Petitioner.

WILLIAM BENNETT TURNER, Esq., Pound 502, Cambridge, Massachusetts 02138; for the Respondents.

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 Houchins against KQED, No. 76-1310.

Mr. Booty, you may proceed whenever you are ready.

ORAL ARGUMENT OF KELVIN H. BOOTY, JR.

ON BEHALF OF THE PETITIONER

MR. BOOTY: Thank you, Your Honor. Mr. Chief Justice, may it please the Court:

The question presented in this case is, Must the sheriff give greater access to his county jail facility to the media than he gives to the public? The purpose of the access in this case is to gather information.

The District Court in this case required that certain access be given to the media. There was no requirement that similar access be given to the public, and there was no determination by the District Court that the public access was inadequate in any way.

The required media access is, as I say, greater than the sheriff gives to the public. I would like to discuss briefly with the Court what that public access is. First of all, it is mail, access by mail. There is no censorship; letters are not read. They are subject to inspection only.

Q Mr. Booty, could I interrupt with one question?

MR. BOOTY: Yes, sir.

Q Is not the first question whether there was a

violation of law entitled to any remedy which requires an examination of the situation at the time the lawsuit was brought? Should you not tell us what kind of access there was when the proceeding started?

MR. BOOTY: Yes, Your Honor. All of the accesses that I am discussing, except for the public tours, had in fact started when the proceedings started. So, I will answer Your Honor's question in that way. The mail was there at the time the proceeding started. As I say, if the inmate lacked cash to pay for stamps or postage or anyting like that, that was provided.

Secondly, at the time the proceeding started and after, there was visiting, ample visiting. It is unquestioned that it is ample. There is no category of persons who may visit. They need not be members of the family or anything else. Anyone, including a reporter, could visit. There are some restrictions on those who have been in prison or those who are under 18. The prison restriction stems from provisions in the California Penal Code.

Again, at the time the proceeding started there was access by telephones. For those who were in the maximum security facility there was telephone access on a collect basis to anyone. The phone lines did not go through the sheriff's department in any way. They went right to the telephone company. So, there was no monitoring, no capacity

for us to find out who was calling, what was said, nothing; totally open telephones. Other than in the maximum security facility, telephone access was through the correctional services officers.

Again, Mr. Justice Stevens, at the time the proceeding started there were interviews with pretrial detainees available. Those could be done--in fact, they would have been done--typically off the premises. Those could have been photographed, tape recorded. They would be private. No one from the sheriff's department would be there. The requirement is that consent previously be obtained from the inmate himself, from his counsel, from the District Attorney, and from the court having jurisdiction over the trial.

What was not present at the time the proceedings commenced were the tours. However, as--I believe it is at Appendix, page 10. I beg your pardon, page 19 of the Appendix. I am reading from the affidavit of Mr. Turner, who was counsel for the plaintiffs then and now, is on June 10, a week before the proceedings were filed, he spoke again with me, and I told him about the tours. So, for the situation at the time the proceedings commenced was that the tours were planned and scheduled, and it was well known to everyone, including these plaintiffs, they in fact would begin.

It is true that they have not begun. It was necessary for the sheriff to secure funding from the board of

supervisors. He had to go--in a bureaucracy those things take time, unfortunately. We cannot just spring to action.

The tours cover, as the record shows, virtually the entire facility. There is no screening of any visitors. The record indicates that many of the places are just taken by ordinary citizens, people who out of curiosity want to know what is going on in the jail. The tour does not see any inmates. No inmates are--I have got to be specific on that. You certainly might see them. You do not talk to them. There is no communication between inmates and the members of the tour. The tour is--at that time were 25 persons. There are now approximately 30, and there is only four guards. So, plainly conversation between inmates and visitors is impossible.

No cameras are permitted on the tours, and no tape recorders are permitted on the tours.

Q What opportunity do members of the media have to become one of the 25 admitted on these tours?

MR. BOOTY: They had at the commencement of the tours, Your Honor, better access than anyone else because the announcement of the tours was made through the media. There was in fact a suggestion by some of the members of the board of supervisors that the first tours should be set aside entirely for the media. And that suggestion was rejected on the grounds that if they wanted to go, they knew about it before

anyone else. So, all they had to do was file.

Q Basically the tours were organized on a first come, first served basis?

MR. BOOTY: Exactly. They were and are.

Q And did one of the briefs or the records state the opinion that they were overbooked some weeks in advance?

MR. BOOTY: The first six months of the tours became booked very quickly, quite possibly before the end of July. The first tour was on July 14, 1975. And probably before the--I do not remember. My recollection, Your Honor, is that before the end of July the tours had been booked.

Q So, if there were some occurrence in the jail that might have been of public interest, there would be no way for a representative of the media to get into the jail unless he had been signed up several weeks in advance?

MR. BOOTY: That is correct. He could not have gone on one of the tours. That of course is not the only means of access, Your Honor. Had there been an occurrence in the jail, indeed before the tours ever started, the media can and does have alternate means of finding out what is going on, by means of interviews. I have not completed that is now and was then available to the media.

Q You are still outlining access that was available?

MR. BOOTY: To the public. This is what became

available to the public. The media has then and now greater access than the public.

Q It has in addition to these rights of the public additional rights?

MR. BOOTY: Yes, Your Honor, that is what I am saying.

Q Additional rights may be the wrong word. In any event, under the existing regime the media has all the same rights that the public has of access.

MR. BOOTY: Yes, exactly.

Q Plus some additional ones that have been granted to it by the sheriff's office.

MR. BOOTY: That is right, Your Honor.

Q Mr. Booty, you have been outlining what I gather are general policies of the sheriff's office. Are these designed to cover the situation. Supposing a riot had broken out in the jail or some event of particular newsworthiness, would these regulations have necessarily governed press or public access under those circumstances?

MR. BOOTY: Yes, it would. There is nothing in the record in the case, Your Honor, to indicate any alternative means--as I say I am not finished. But this access package, taken as a whole, is the entire package. So, if there had been a riot or a fire or something like that, then the means of access for the media are through alternative means such as

interviews or something of that nature, not the capacity to go in with their cameras, at least on demand.

I do want to get into one specific media access that the media alone has, and that is special tours with the cameras and with tapes on a scheduled basis. That is critical, not on demand but on a scheduled basis. There is no fixed schedule the District Court had in mind, and as it turned out there was no schedule promulgated. But the sheriff was still willing to do that. That is part of it. And of course finally the release bus to contact inmates.

All right, that completes, Your Honors, the access that exists. The complaint of KQED with respect to this is that there is no random interviews on the tours, no inmates are on view for their cameras in cells or barracks or eating for televising, and that there is no access on demand for their equipment. As I have just indicated, there is access with their equipment on a scheduled basis but not on demand.

The District Court did not make any finding of any intention to conceal conditions in the jail. But nevertheless the District Court made its injunction, which requires the sheriff to allow what it called full and accurate news coverage and specifically required the sheriff to permit random interviews on the tours and to permit the use of cameras and tapes and plainly not on a scheduled tour but on a demand tour.

The only exception stated in the District Court's memorandum and injunction was that when tensions in fact existed, the sheriff would put a stop to it, a stop to the access. In fact, the District Court virtually invited litigation on the point because it says if anybody thinks there really is not tension, they can come in and we will have a hearing on that.

So, what the District Court did then is it balanced the asserted media needs against the sheriff's public access program. There was no balancing by the District Court of the public's rights in any way. The District Court did not address the public rights in any way.

Q When you say the public right, are you talking about some term that has meaning in constitutional law?

MR. BOOTY: Yes, I think I am. I think the public does have some rights of access.

Q Is the sheriff of Alameda County an elected official?

MR. BOOTY: Yes, Your Honor, he is.

Q And I presume if the public in Alameda County thought that they were not getting enough access, they could vote against him in the next election.

MR. BOOTY: No question about it.

Q And what other right of access does the public have?

MR. BOOTY: How does one--

Q I mean, say under the decided cases of this Court.

MR. BOOTY: That is--

Q Under the Constitution of the United States.

Q As interpreted by this Court, which may be a different thing.

MR. BOOTY: Well, it is not entirely clear. In the Pell case what the Court did, as I read it in any case, is the Court found that there was no intention to conceal any condition. The Court found that there was public access. And that was enough, those two factors. There was plainly nothing be swept under the rug, nothing being hidden. The Court determined that the public access was there adequate. That was the statement of the Court.

Now, I appreciate--and the reason I hesitate, Mr. Justice Rehnquist--I appreciate that the public access in that case was not, strictly speaking, an issue, just as it was not placed in issue here.

Q Was not Pell really a decision that said whatever the public access is, the media access need be no greater?

MR. BOOTY: Indeed, that is exactly what the Court said. But I do not read the decision as saying that that means necessarily that the public access is zero. That is not

resolved in any decision of this Court that I am aware of. It was not placed in issue in that case. That is my point.

Q More specifically, Mr. Booty, you do not seriously contend that the whole problem could be solved by having zero access to public and press both.

MR. BOOTY: Certainly not.

Q Why do you not? That is a perfectly logical position to take.

Q This is whether it is a correct position. It is logical, all right.

MR. BOOTY: It is a logical position, Your Honors, but it is not our position. I am not convinced, considering the body that I am speaking to, I am not convinced that that is what the Court held in Pell.

Q What the Court held in Pell was, as I understood it in writing it, was that the press had no right of access superior to that of the general public.

MR. BOOTY: Absolutely. No question about it.

Q It did not deal with whether the general public had any right whatsoever.

Q That is under the Constitution, the First and Fourteenth Amendments or any other provision of that document.

MR. BOOTY: That is exactly my position too, Your Honor, it was not dealt with. The Court did not have to deal

with it, and I have been asked did it, and I do not think that it did.

Q You would not urge the Court to take that extreme position, would you?

MR. BOOTY: No, I am not urging that. That is not our position. In the first place, Your Honor, with respect, that is not before you. It was not tried in the District Court. We urged that that was the issue. Our position in the District Court was the extent of the public access should be measured, and that automatically, if you will, sets the media's access rights. But that is not what was tried, and that is not what the District Court did.

KQED's position in the District Court, which the District Court adopted, was that we have to have special things for the media. It was tried as a media access case, not as a public access case.

I want to emphasize one other thing. Access, if you read the District Court's opinion, is mainly something about tours, and access is more than tours. Access is visitation; access is mail. This Court has said some strong things about mail rights in prisons. For instance, in Procunier v. Martinez the Court said you cannot do censoring without a lot of due process protection. There may well be a right to have visits, particularly if in--as we are. We are a county jail. Half of our inmates are pretrial detainees. They have special

rights which might not appertain to an entirely convict population.

Q Mr. Moody, can I ask one other question about the access at the time the lawsuit started. One of the points was visiting. People could visit prisoners or inmates that they requested.

MR. BOOTY: Yes, Your Honor.

Q Does the record tell us the scope of the visit they had. In other words, could the visitor--what could the visitor see? Does the record tell?

MR. BOOTY: No, the record does not tell you. As I recall it, the visiting is in--well, I do not want to go outside the record. It does not tell you. It is not the same thing as a tour.

Q Does the record--of course, I do not question your statement, but does the record tell us that there was visiting before the--

MR. BOOTY: Oh, yes, it does.

Q It does tell us that?

MR. BOOTY: Yes, it does tell you that, Your Honor.

For instance, in Appendix page 41--and I believe this is dealing with the minimum security inmates who had visiting only on Sundays, there is greater visiting for the pretrial detainees. We were under some orders from the District Court--a different judge, Judge Zirpoli--on visiting,

and so we have greater visiting for pretrial detainees.

Q That page does tell us something about the nature of the visiting rights. It tells us they will be in the barracks--in the auditorium rather, and they wait in the barracks. It implies that they will not have unrestricted access to the entire facility.

MR. BOOTY: Yes, that is correct.

I perhaps misunderstood the Court's question. It is not expanded on any more than this.

Q It does indicate there is no physical contact between the visitor and the inmate. Does that mean they talk through a glass window?

MR. BOOTY: In the maximum security facility that is the case at present. It is not indicated here; it is my understanding there is not glass and telephones. This is across the table.

Q I see.

MR. BOOTY: So, it seems to me we come now to what I consider to be the legal issue, which is in a situation where the adequacy of the public rights to access are unchallenged, and there is no determination of any intention to conceal once the sheriff gave access rights greater to the media than he gives to the public. And we have, in our briefs, cited the cases back approximately 20 years, all to the same effect, which is that the press has no greater rights than does

the public to gather information. We are talking about access rights. The two latest cases from this Court which in our view are controlling are the Pell case and the Saxbe case, to which we have referred, and the issue in each case there was, Did interviews by the media with specifically named inmates have to be granted when it was not available to the general public? And the Court held in each case that they did not. The Court applied the general rule which we have stated, which is that the press has no greater rights. And since the public did not have the right to interview specifically named inmates, the press need not be given it either.

It is true that in both cases the media had greater access than did the public. They had the right to interview those encountered randomly on the course of the tours, for instance. And from this KQED argues that because this greater media access in fact existed in that case, the Court held that it was constitutionally compelled. But when that greater media access was not an issue--and it was not, it was merely an existing situation--there was not any controversy about it, it was not placed in issue by any litigant. There was nothing to decide, nothing to resolve, and hence in our view there is no such holding as contended by KQED.

Q Did you say earlier in your argument that the sheriff was now willing to or has been willing to give the press greater access than the public?

MR. BOOTY: He does and has in two respects, Your Honor. He gives the press tours with their cameras and with their tape recorders.

Q You say that is critical to your case? Is that the word you said?

MR. BOOTY: No, Your Honor. I might have.

Q You do not mean it?

MR. BOOTY: I do not mean that, if I said that. It is not critical.

Q It is wholly inconsistent with your present argument, if it were critical.

MR. BOOTY: It is not critical. It is a fact that just as in Pell and Saxbe--

Q But according to your present argument, you could eliminate that special privilege to the press.

MR. BOOTY: Yes, Your Honor, that is correct.

Q Could you tell me where in your brief you describe the special press privilege? Is it in your opening brief?

MR. BOOTY: I believe so.

Q My other question is, If some member of the public, non-press member, said, "We would like to go with the press tour," what would you say?

MR. BOOTY: That would have been denied.

Q Because the public does not have as much right

as the press?

MR. BOOTY: Yes, that is right. Well, I do not know whether that is right. That was the sheriff's policy. The sheriff's policy is that this is something especially for the media.

Q What if a private person wanted to go with the press tour with his cameras and he sued, what would you say? Would you say you are not required to give him equal access with the press--in short, that the press has a greater privilege; is that what you are saying?

Well, anyway, where do you describe that, or do you?

MR. BOOTY: I will find it.

Q All right.

MR. BOOTY: I will reserve the rest of my time for rebuttal.

Q Thank you.

MR. BOOTY: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Turner.

ORAL ARGUMENT OF WILLIAM BENNETT TURNER, ESQ.

ON BEHALF OF THE RESPONDENTS

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

Q What would you have to say about the right of an individual who walks in on the day when the press has a scheduled tour and says, "I have a camera and I am an amateur

photographer, and I want to go along"; do you think the sheriff can exclude that private citizen?

MR. TURNER: First off, I would like to correct the state of the evidence. The sheriff has never, since he has been in office, held a special tour for the press. There is nothing in the record to support it. All he said when it became clear at the evidentiary hearing in this case is that he would be willing if the Court was going to grant preliminary injunctive relief to live with a special tour for the press in which they could bring their cameras and do their business in that way. He has never implemented that offer. And in context that offer was only to be carried out if the Court was going to order him to do anything more than he was otherwise willing to do.

Q Do you think as a matter of prison or jail administration the director or sheriff could say it is more convenient to keep these two categories separate--that is, we will have general public visitation on the first Monday in every month and we will have media representatives on the second Monday of every month?

MR. TURNER: I think it is permissible--

Q As an administrative matter.

MR. TURNER: --for an administrator of a jail or a prison to--

Q Any constitutional question involved in that

kind of decision? Or is that just routine administration of the institution?

MR. TURNER: A constitutional question arises when, as in this case, the sheriff limits access by reporters either to zero, as before this case was filed, or to these antiseptic guided tours that he initiated right after we filed suit. There is a constitutional issue.

Q If he gives the media precisely and exactly the same access as the public, do you think there is any constitutional problem involved?

MR. TURNER: I do if that access is zero or if the access is not reasonably sufficient to prevent concealment of conditions in the jail. Then we would have situation, as they have in South Africa, where the press is effectively precluded from reporting on jail and prison conditions.

Q What part of the Constitution do you draw on to say that there is a right of access to take pictures and do these things?

MR. TURNER: This is a First Amendment case. I think it would trivialize the First Amendment to say that it requires specific things like a particular number of days a week or photographs or random interviews as opposed to full interviews with individuals and so on. I do not think that is what the First Amendment does. What the First Amendment does is prohibit a government official from unjustifiably

interfering with the acquisition of information for publication, and that is what this case is about.

Q When you say unjustifiably interfering with acquisition of information for publication, then it is a justiciable question in every case whether, for instance, the Supreme Court of the United States excludes the press from its conferences or whether the Federal Aviation Administration excludes the press from its executive sessions?

MR. TURNER: I do not know about justiciable.

Q Under your test, at any rate, it is something that is subject to constitutional inquiry by a court that can decide constitutional questions whether the decision of any governmental official to exclude the press from any part of the public domain under his control is, quote, "justifiable"?

MR. TURNER: Yes, that is our position. Our position of course is not that the press is entitled to sit in on conferences of this Court, any court, any administrative agency and so on.

Q But only because that is a justifiable decision on the part--

MR. TURNER: Yes, and the information has some claim to confidentiality.

Q But in each case you could go into the United States District Court of whatever district you want to and under 1331 argue a constitutional question as to whether or not

the decision of the particular agency was justifiable.

MR. TURNER: Theoretically, yes. But in fact there are not any other agencies that we are aware of that treat information the way this sheriff does. The evidence in this case shows that the jails and prisons in the area are completely open to the press, and they may enter and go into the maximum security sections, talk with prisoners, interview prisoners, take pictures, whatever they want to do. Those are the institutions where, one would assume,public access is rather limited and justifiably so.

Q Let us suppose the President decides to have cabinet meetings open to the media with television and all the other instance, does that mean the courts have to open their conferences because someone else does it?

MR. TURNER: No, of course not.

Q Then what significance is it that some other prisons in this area have a different practice?

MR. TURNER: Because it shows how unjustifiable this sheriff's practice is, that there is no valid interest--

Q If the President opens the cabinet meetings to TV, then how could the United States Court of Appeals or the Court of Claims have a justifiable reason for excluding TV?

MR. TURNER: I do not know what the President's reasons might be for opening cabinet meetings, but surely in the context of a court, where there is deliberation going on,

where there has to be a freedom to take opposite points of view than will ultimately be handed down in decision, that kind of discussion just has to, by its very nature, be confidential.

Q Then suppose the United States Courts of Appeals all decide to open their conferences to television. Does that mean all other courts have got to do it? They are engaged in the same kind of decisional function.

MR. TURNER: I do not think that they would have to, no.

Q Then what someone else does is really not very relevant, is it?

MR. TURNER: It is only relevant to show how unjustifiable this sheriff's practice is. It is not dispositive in the case of this Court or any other court where there might be radically different considerations.

I would like to answer Mr. Justice Stevens' opening question about the state of access when this suit was filed. There was none. Until the suit was filed, conditions in this jail were concealed from the public because the sheriff completely excluded both press and public from the facility.

Q There was, I presume, access under the Sixth and Fourteenth Amendments.

MR. TURNER: An attorney could go and interview his client in a visiting room.

Q At any reasonable time.

MR. TURNER: Yes, of course. And of course there was mail by prisoners to people on the outside. At the time we filed suit, the sheriff's rule forbade prisoners from mentioning the name or action of any officer. That was changed immediately after we filed suit. But of course there was social mail and so on. There was visiting with family and friends. That serves the purpose of not cutting prisoners off from the outside world. They can maintain some contact. But it does not serve the purpose of informing the public what is going on in this jail and of the conduct of an elected sheriff's office.

Q At the time the suit was started, could a member of the press interview a prisoner during visiting hours if the prisoner was willing to be interviewed?

MR. TURNER: The practice, as I understand it, was that anybody could visit any prisoner.

Q Including the press, the answer is yes?

MR. TURNER: If you happen to know of somebody, you could go out and ask for them; and if they were willing to talk with you, you could talk with them in the visiting area.

Q How about recording an interview with a willing prisoner?

MR. TURNER: No, that would not have been permitted.

Q Or a photograph, a willing photograph.

MR. TURNER: That would not have been permitted unless reporters obtained the four consents mentioned by counsel. The prisoner himself--that is certainly reasonable. His lawyer--that is certainly reasonable. And the sheriff required the consent of the District Attorney, for reasons unknown to us and unexplained, and the court having jurisdiction of the case. This is not a gag rule problem. This was standard procedure. That made it exceedingly difficult to have any interviews.

Q What is the rule now?

MR. TURNER: Same rule.

Q On visitors, on visiting.

MR. TURNER: Same rule. That has not changed.

Q And the Court did not order it changed?

MR. TURNER: No.

The only feasible way that the public at large will know what is going on in this jail is if reporters are allowed in. A handful of people can go on the tours. But reporters acting as agents for the public at large--the eyes and ears of the public at large--can go in and without any disruption to jail routine, because it is done routinely in all of the other jails and prisons in the area, can meet this public need without interfering with any valid purpose of the sheriff.

Q Would you say if the old-fashioned system that existed at least a century ago of having boards of

visitation who reported semiannually or quarterly to the local governing body created and you had six citizens designated by the mayor or by the court or by someone, who made these visits regularly and reported publicly, would you say that would satisfy the public's right to--

MR. TURNER: No, it would not, Mr. Chief Justice. It would be helpful, but such a visiting board could only--and where they do exist, do only--go on a very occasional basis to the facility and do an inspection.

Q I did not put any limit on it. And, indeed, at times, the beginning of the Colonial days, these boards of visitors visited such institutions just the way bank examiners do today, unannounced.

MR. TURNER: If they were charged with gathering information about an event of public concern and were in a position to go out to the jail and investigate, find out what happened, report it to the public promptly, that would serve the same purpose.

Now, the sheriff in answering why should not the court be allowed to do the job, the same job done in other jails and prisons in the area, points to the Court's decisions in Pell and Saxbe. And his core position is that all he needs to do is provide equality of access--not access but equality is the way he reads those decisions.

Q How do you read them?

MR. TURNER: We think that the whole assumption of the Pell and Saxbe decisions is that there be reasonably sufficient access to prevent concealment of conditions. If there is that, then equality is fine. We do not claim any superior rights for the press.

Q You do claim, I suppose--you certainly coule reasonably claim--that even though the right of access of the communications media is no greater than that of the general public, that perhaps because of the technical needs of the communications media the equality needs to be provided in a different kind of way. In other words, let us say there is a right under existing rules and regulations the public can go through certain rooms of the White House within certain hours every day. The press could not set up its television cameras then and there and interfere. Then they each would be interfering with each other. But certainly there is an equivalent availability to the communications media of the same sort of guest access to those rooms in the White House that are open to the public. But that might require special arrangements for you to make to set up your television cameras or something else at an hour when the public in fact is not there just in order to preserve and provide the very equality to which the media is entitled.

MR. TURNER: Exactly.

We have no quarrel with the Court's holdings in Pell

and Saxbe. There was rather full access there. Reporters could enter the institutions, go to the maximum security sections, talk with prisoners they randomly encountered, take photographs. The only thing they could not do, the only purpose for which access was denied, was to single out individual prisoners and make media heroes out of them, have them interviewed, have them come to public attention. The evidence in that case was that that indeed created security problems, and the Court upheld that narrow restriction on access. But there was certainly sufficient access to prevent concealment of conditions in that prison.

And we do not have any quarrel either with the broad, no-greater access statement of the Court in those cases, provided that it is understood that there is sufficient access to prevent concealment.

Q How far does your argument go? There are many areas, would you not agree, to which the public does not in fact have access--let us say to the Oval Office in the White House, no general right of access by the general public at any time during the 24 hours of each day of the seven day week. And to that extent, there is no access, period. And to that extent, the public does not know what goes on there.

MR. TURNER: That is right.

Q It knows only through press officers at the White House. And yet does that mean for some reason or another

the fact that the public is not admitted at all, that the press then must be?

MR. TURNER: No.

Q Then what is your argument?

MR. TURNER: Well--

Q Let us assume in this particular county jail the public was not admitted at all except in terms of--that is, the general public. Members of the families were and lawyers were and doctors were. But the general public, no. By that very fact, does the press then gain access? That seems to be your argument.

MR. TURNER: Yes, it is.

Q I do not understand that.

MR. TURNER: That was the situation before this case was filed.

Q Yes, it was. I am talking not about policy or prudential considerations or wisdom or lack of it. We are talking about what is required by the First and Fourteenth Amendments.

MR. TURNER: Yes.

Q Or else this case should not be here. Why then does the mere fact that the public does not have access thereby confer a right upon the press to access? That is a brand new doctrine that I have never heard of.

MR. TURNER: If both the press and public were wholly

excluded, as they were before this case was filed--

Q And as they are from many areas of public life, of governmental life. They are excluded from the War Room over in the Penatagon, I assume.

MR. TURNER: Indeed, and should be.

Q Various parts of the CIA. As has been pointed out, various private meetings of all sorts of commissions and courts and everything else.

MR. TURNER: The difference between those kinds of closed institutions and this one are two. First, the information which is being discussed in the CIA, the various government agencies which you have mentioned, is information that properly should not be made public, while here what is going on in this jail is information that has no claim to confidentiality.

Q How do you know what should properly be made public and what has no claim to confidentiality under the First and Fourteenth Amendments?

MR. TURNER: There is no claim at all by the sheriff that anything that happens in this jail should be held secret from the public.

Q But you have to make our your claim under the First and Fourteenth Amendments to the Constitution. So, when you say that something has no claim to confidentiality, that must be a part of the First and Fourteenth Amendments.

Otherwise you cannot prevail.

MR. TURNER: What I am saying is that we do not seek access to information that has any claim to confidentiality.

Q There may be other reasons that the public is not given access aside from confidentiality, reasons of security, of discipline, of the very fact is a jail is a jail.

MR. TURNER: Indeed, to the extent that there is a governmental interest.

Q A commander of a military station could certainly keep members of the public out of observing certain troop activities, I assume.

MR. TURNER: Yes, of course. When there is a governmental interest--

Q Quite apart from confidentiality, just for discipline and training the troops.

MR. TURNER: Indeed, of course. We concede that. We believe that the proper test is the one that this Court used in Martinez, before that in O'Brien, where there is a governmental interest, whether the interest is confidentiality of information or security problems or some other important governmental interest, of course access can be denied

Q And maybe part of the punitive policy of a particular governmental agency might be that in this jail you are not going to have members of the general public around.

This is a maximum security institution, and one of the conditions in this jail is that you are not going to be able to associate, even peripherally, with members of the general public. Why would that not be a perfectly legitimate governmental interest?

MR. TURNER: It may be, but this sheriff has never advanced that consideration.

Q He does not have to. It is you who are attacking what he has done. You are saying that what he has done is unconstitutional, violative of the United States Constitution. He does not have to justify it. You have to invalidate it.

MR. TURNER: The District Court invalidated it because it found that the interests advanced by the sheriff were, though important--the means of exclusion that he used were not necessary to serve any of his interests. Of course, if access has to be denied during an emergency, no question about it. That is built into the District Court's order. All the District Court said is reasonable time. We see that as meaning on reasonable notice. And the sheriff may completely refuse access at any time when he thinks in his discretion, according to the District Court's order, tensions in the jail would authorize him to close it down.

Q Mr. Turner, in answer to Mr. Justice Stewart's question about the difference between what you claim your

rights are here and the interest in finding out what happens in governmental conferences where there is secrecy and the like, you said there are two differences. One is there is an absence of interest in confidentiality here, and there is an interest in confidentiality in these other cases. But you never got to your second point.

MR. TURNER: The second one is that this is an institution whose focus is the involuntary confinement of people, with an opportunity for overreaching of liberties of the people who are involuntarily confined, and very little opportunity for that to come to public knowledge unless reporters are permitted in.

Q Do not each of those people have a right of access to a lawyer?

MR. TURNER: Some would be represented by the public defender if they are pretrial detainees. The other half of the prisoners who are convicted and serving misdemeanor sentences or short felony terms do not, as I understand it, have the right to counsel.

Q But has not this Court held they have right of access to court at any rate?

MR. TURNER: Of course. And they could mail off to the court a writ of habeas corpus. But that is not a way of bringing to public attention the sheriff's stewardship of this facility.

Q Why is it not?

MR. TURNER: It might if the writ were heard--

Q Might it not be a very appropriate way of doing precisely that.

MR. TURNER: --on the evidence. But that is just not what happens when prisoners file these writs. They do not hold a plenary hearing and inquire into conditions. Probably 99 percent of the writs are denied summarily with no hearing at all.

Q And they are filed in the court and are matters of public record, available to the press, are they not?

MR. TURNER: Yes, they would be.

Q Is there anything to prevent every prisoner in the institution, whether pretrial detainee or under a conviction, from writing a long, long letter to his wife or his mother or his lawyer and having that published in the "Letters to the Editor"?

MR. TURNER: The sheriff does not prevent it. What prevents it is the responsibility of journalism. They are not going to print unsubstantiated information received from a prisoner whether by letter or otherwise without an opportunity to verify the allegations made by the prisoner. That is what is missing here. Cannot go in. The prisoner says there has been a terrible fire in the next cell and somebody has been badly injured; nobody can get in to find that out.

Q Can you not go in to interview him on a particular day?

MR. TURNER: You can visit a sentenced prisoner during the three-hour visiting period on Sundays.

Q Could you not verify or corroborate his story or further develop it in such in interview?

MR. TURNER: Yes, but you could not see the scene. You have no idea what the conditions look like. Should the press take the prisoner's word for what it looks like and what happened without checking it out? I think not. And certainly my client thinks not.

Q Should the press take the President's Press Secretary's word for what the President's views are without going into the Oval Office and checking him out?

MR. TURNER: That is the way they do business over there.

Q This is the way they do business in Alameda County.

Q We are dealing here with a constitutional issue.

MR. TURNER: The President of the United States cannot be required to meet the press by any constitutional provisions.

Q How about a United States senator? There are normally a hundred of them.

MR. TURNER: No, I do not think that any court could

order a senator to sit down and meet with the press.

Q Four hundred and thirty-five members of the House.

MR. TURNER: We are not trying to use the First Amendment as a Freedom of Information Act. We are not saying the sheriff has to come out and meet the press or open his files or tell us when anything happened. He just cannot shut the door to us on the ground that all that is required is equality, even if that equality is zero.

Q Mr. Turner, before you proceed, I am now confused as to the facts with respect to personal interviews by a representative of the media with a preselected inmate. I understood you to say earlier--perhaps I am in error--to say that there were four preconditions to such an interview, including court approval.

MR. TURNER: That is correct. It is a mysterious system, Mr. Justice Powell. The sheriff's position is that he will allow visiting by practically anyone. So, if a reporter happens to know of somebody at the jail--KQED reporters do not--could go out there and ask for that person during regular visiting hours and have a visit without any recording equipment or photographs, anything of that nature. In order to have what the sheriff calls an interview, then the four formal consents are required.

Q When you say interview, you mean the television

equipment and the tape recording?

MR. TURNER: Yes.

Q You can simply go and interview a prisoner during visiting hours without the four requirements?

MR. TURNER: If you know somebody to ask for and if that person is willing to talk.

Q And I suppose you would go with a notebook.

MR. TURNER: Yes.

Q Is not the only issue here the propriety of the injunction that was issued ordering the special tours for the press with cameras and recording equipment?

MR. TURNER: We do not want tours.

Q What do you think is the issue here? Just tell me.

MR. TURNER: The propriety of the District Court's preliminary injunction which grants during the pendancy of this litigation reasonable access--

Q And the issue in the Court of Appeals, as I understand it, according to the opinions, is whether or not granting the press access to the prison different from the public was proper or was necessary. And that is the question that was raised in the petition for certiorari.

MR. TURNER: That is the way the sheriff poses the issue.

Q Do you defend the opinion of the Court of

Appeals?

MR. TURNER: Yes, we do.

Q And that is the sole issue, is it not?

MR. TURNER: Yes, it is.

Q Not whether the sheriff has a satisfactory access program. The only issue is whether this injunction giving a special privilege to the press is constitutionally required.

MR. TURNER: We do not want a special privilege. What we want is access sufficient to prevent concealment of the conditions.

Q I know, but that is what you got. And if you say you are defending the Court of Appeals opinion, you must defend that proposition--

MR. TURNER: Yes.

Q --because they said they expressly held that a special privilege to the press was quite proper.

MR. TURNER: Yes. We are also defending the District Court's order which provides for reasonable access and authorizes the sheriff to figure out just how that access will be organized.

Q That may be so, but in this case the only issue is the special privilege to the press. That is the only question that was in the petition for certiorari.

MR. TURNER: That is the way the sheriff poses the

issue.

Q That is the one we granted.

MR. TURNER: Whether the Constitution--

Q Why should we listen to any other question?

MR. TURNER: Well--

Q Mr. Turner, is that a correct statement of the question? The question presented is whether the District Court erred in granting a preliminary injunction. The question does not ask about the form of the preliminary injunction, does it, but whether or not any injunction should have been granted?

MR. TURNER: Yes, but this injunction does speak in terms of access for reporters.

Q The relief requested by the other side is a vacation of the entire injunction, not a change in its terms.

MR. TURNER: Exactly. They want a reversal which will be a message to jailers throughout this land that access is never required by the Constitution. That is the position we oppose.

Q I still ask you what do you think the question presented by the petition for certiorari is that is before the Court? I would not doubt that the sheriff would like to get the press out of hair. But the issue here is--

MR. TURNER: Is whether he can do that.

Q Yes. And the Court of Appeals said the

remedy granted by the District Court giving special access to the press--

MR. TURNER: Was not an abuse of discretion.

Q He would say that it was quite proper and apparently thought it was constitutionally required. Otherwise, I do not know how the District Judge had any business ordering the shariff to issue special access to the press. He must have thought it was constitutionally required under the First Amendment.

MR. TURNER: What was constitutionally impermissible was the sheriff's exclusion of access.

Q You can put it any way you want. But I gather then that you think the Constitution required the injunction that was issued by the District Court.

MR. TURNER: It requires some access and the District Court--

Q Some access? Special access. That is what it did.

MR. TURNER: Different access for the press than for the public at large. No doubt about that.

Q That is the issue here, is it not?

MR. TURNER: But how that access is implemented was expressly left to the sheriff to determine in the first instance under the District Court's order. We hope that upon remand to the District Court to work out all the details so

that these conditions will never again escape public scrutiny.

Q Sheriff Houchins, we have been told, is an elected official. Do you know for how long a term?

MR. TURNER: I am not sure. I think it is a four-year term, but I do not know, Your Honor.

Q You do not know how many terms he has served, if more than one?

MR. TURNER: He came into office on January 1, 1975.

Q So, he is in his first term.

MR. TURNER: Yes.

Q Mr. Turner, before you sit down, the record includes the visiting rules which are in effect in June of '75, that show they are revised in June of '75. Does the record contain the rules that were in effect before the June '75 revision because I understand your controversy began in March and through May.

MR. TURNER: Yes. Attached to my affidavit, which is--my affidavit is in the Appendix--attached to that and in the record of the case but not in the Appendix are the rules that prevailed before the suit was brought.

Q I see, they are in the record but not the Appendix.

MR. TURNER: That is right.

MR. CHIEF JUSTICE BURGER: Mr. Booty, do you have anything further?

REBUTTAL ARGUMENT OF KELVIN H. BOOTY, JR.,

ON BEHALF OF THE PETITIONER

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

Just a couple of points only. The Court has asked some questions about visiting. It is true that if you happen to know any inmate, you may visit him. Any prisoner could write to any member of the press or could telephone him and ask him to come over on Sunday or, if he is a pretrial detainee, on Tuesday, Wednesday, or Thursday, for that matter.

We are talking about consents, the requirement of consents. Why does the sheriff require consents from all attorneys and the courts? It seems that the likelihood of harm from an interview with a pretrial detainee is to the detainee himself, and it is the sheriff's view that he would rather stay out of that and have the parties and the attorneys and the courts who are responsible decide whether an interview with filming and recorders is to be permitted or not.

I do want to point out to the Court that the access for the public in our case is greater than the public access was in Pell. For instance, in Pell the mail access was subject to censoring with appropriate due process protection. In our case the mail is totally uncensored. In Pell the visits were limited to certain groups of persons. In our case the visits are not limited. In Pell the public access tour

did not cover the entire facility; it did not cover the maximum security area, for instance. There was a one-year wait. You saw no inmates and took no cameras. In our case we do feel that the facility, except--

Q Except Greystone.

MR. BOOTY: No, except Little Greystone, Your Honor.

Q Do not say all the facility.

MR. BOOTY: Except for Little Greystone. Little Greystone, Your Honor, is a barracks facility. Other barracks facilities are seen. They are identical.

Q All right, so there is an exception.

MR. BOOTY: There is that exception. Incidentally, Mr. Justice White, you asked for the reference.

Q Yes.

MR. BOOTY: It is in our brief at page 11. This is the scheduled tours for the media, and in there is the reference to the record where that is described.

Q You and your opponent seem to differ substantially on the quality and the kind of access available when this suit began. Are there some findings as to what it actually was by the District Court?

MR. BOOTY: The District Court's memorandum has the only findings, and that is directed almost entirely to a critique of the public tours from the point of view of a reporter.

Q So that there are no findings.

MR. BOOTY: There are no findings.

Q So that you two are just fighting it out on the evidence in the record?

MR. BOOTY: That is correct in that respect. I am afraid that is true, Your Honor.

Q Now, where is that description of the special press tour that you say--

MR. BOOTY: In the record, Your Honor? It is page 11 of our opening brief.

Q Page 11. Thank you.

Q Does the District Court down in this area generally enter injunctions without very specific findings of fact?

MR. BOOTY: This District Court, Your Honor? I have had no previous experience with the late Chief Judge, and so I really cannot speak to that.

I think that substantially completes my presentation.

Q Mr. Booty, may I ask one other question--

MR. BOOTY: Certainly, Your Honor.

Q --on precisely what question we are being asked to decide?

MR. BOOTY: Yes, Your Honor.

Q Is it your view that there was no basis for any

injunctive relief at all? That is what you are asking, that the injunction be entirely set aside. Or is your claim one that excessive relief was granted?

MR. BOOTY: It is our claim that under the District Court's approach, no injunction was proper. If someone had tried to establish--and it should be noted that there were private persons as parties in this case who did not testify, the NAACP plaintiffs. If those, as representatives of the public, had challenged our public access program, then it is possible that the District Court could have determined--properly or improperly, I do not know--but could have determined that the public access program was adequate or not. That was never done. And so I--

Q If the Court had been persuaded that at the time the lawsuit was brought, there was insufficient access--not quite zero but close enough to zero so that there was a denial of First Amendment rights both to the public and to the press--and if arguing for a preliminary injunction the press had said, "At least give us this much" and he had only granted relief to the press, would that have been constitutional error?

MR. BOOTY: Yes, I guess it would, in my opinion. The error is--as I understand the holding of this Court in Pell and Saxbe, you cannot, you need not give the press greater access than the public.

Q Could he have cured that constitutional error by

saying that both the public and the press shall be entitled to the same relief and then had exactly the same relief--

MR. BOOTY: It would have cured our error. It would not have cured the other error of whether or not any access whatever is required. That is a different issue which of course was never reached, Your Honor.

Q But that is the first issue that has to be decided; you would agree with that?

MR. BOOTY: Yes, I do.

Thank you, Your Honor.

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

(The case was submitted at 11:35 o'clock a.m.)

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