

ORIGINAL
OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RICHARD A. THORNBURGH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL., Petitioners V.
JACK ABBOTT, ET AL.

CASE NO: 87-1344

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD L. THORNBURGH, ATTORNEY ;
GENERAL OF THE UNITED STATES, ;
ET AL., ;
Petitioners ;
v. ; No. 87-1344
JACK ABBOTT, ET AL. ;
-----x

Washington, D.C.
Tuesday, November 8, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:02 o'clock a.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on
behalf of the Petitioners.
STEVEN NEY, ESQ., Silver Spring, Maryland; on
behalf of the Respondents.

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P_R_O_C_E_E_D_I_N_G_S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1344, Richard A. Thornburgh v. Jack Abbott.

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

ORAL ARGUMENT OF WILLIAM C. BRYSON

ON BEHALF OF THE PETITIONERS

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

The issue in this case is what standard should be applied by courts in confronting the censorship of publications sent into federal prisons for inmates. The question is whether the reasonableness standard should be used, which is the standard that this Court has articulated on a number of occasions with respect to prisoners' rights in cases during the last 15 years, or the heightened scrutiny standard of the decision in Procunier against Martinez.

The reasonableness standard is perhaps best articulated as a standard in which the action of the prison officials is to be upheld if it is reasonably related to a valid penological concern, as long as there is not substantial evidence that the reaction, the action, the regulation or whatnot, is an exaggerated

1 response by the prison officials.

2 The heightened scrutiny standard from
3 Procunier is that the regulation must actually further
4 an important governmental interest and go no farther
5 than is necessary or essential to do that.

6 Now, the regulations in this case that are at
7 issue are regulations which were first promulgated in
8 1979. They have precursors that go back many years, but
9 the particular regulations that are at issue are the
10 1979 regulations as modified by 1980 and 1985 policy
11 statements of the Bureau of Prisons. This adds some
12 complication to the case because most of the
13 publications that are at issue in the case that the
14 Plaintiffs protest their exclusion were excluded in 1977
15 and 1978, before the actual promulgation of the new
16 policy and before the promulgation of the policy
17 statement that deals with sexually oriented publications.

18 But the basic gist of the regulation is pretty
19 much the same. It has been changed in some
20 particulars. It has been made tighter as far as
21 procedural protections go. But the basic components of
22 the policy are still the same as they were in 1977 and,
23 indeed, back in 1973 when this case was first filed.

24 And the --

25 QUESTION: Is there any doubt about this being

1 still a live controversy?

2 MR. BRYSON: Well, Your Honor, it's not a --
3 there's no doubt about its being a live controversy.
4 What may not be live in this regard are -- and the Court
5 of Appeals acknowledged this -- are the challenges to
6 the rejection of these 46 publications that are at issue
7 in the case. These 46 publications all are publications
8 that were rejected in 1977 and 1978. These
9 publications, there was testimony at trial to show,
10 might very well have been admitted under the new policy,
11 but in any event, the Court of Appeals sent this case
12 back to the district court for an assessment, among
13 other things, of whether there's any further controversy
14 with respect to those publications.

15 What isn't in doubt is that there's a
16 continuing dispute about the validity of the standard
17 that should be applied in this case; that is to say,
18 whether Proconler, the standard or the reasonableness
19 standard should apply.

20 QUESTION: A dispute between people who are
21 still incarcerated --

22 MR. BRYSON: Some of whom are still
23 incarcerated, yes.

24 Now, the point of the original plaintiffs go
25 back to 1973. Some of these people are still

1 incarcerated, and in any event, it's a class action and
2 was certified at such at some point.

3 Now, the regulation that's at issue in this
4 case -- and I'd like to spend a little more time on the
5 facts perhaps than I normally would because they are
6 somewhat intricate -- but the regulation that's at issue
7 says that a warden may reject a publication only if it
8 is determined detrimental to the security, good order or
9 discipline of the institution, or if it might facilitate
10 criminal activity. The regulation then goes on to say
11 that the warden may not reject a publication solely
12 because its content is religious, philosophical,
13 political, social or sexual.

14 The regulation then contains a series of
15 examples of specific, dealing with specific areas,
16 directing when the warden can exclude particular types
17 of materials such as materials that are in code,
18 materials that depict escape plans, materials that
19 depict, encourage or describe methods of escape and may
20 lead to the use of physical violence or group disruption.

21 QUESTION: Mr. Bryson, what does the word
22 "sexual" in the regulation really mean? How far does it
23 carry us, because some of those that were rejected are
24 certainly sexually explicit magazines, are they not?

25 MR. BRYSON: Some of them certainly are

1 sexually explicit magazines, and here, Your Honor, is a
2 perfect example of why I think the materials that are,
3 the specific materials that are in dispute in this case
4 would probably be handled quite differently from the way
5 they were back in 1977 and 1978 when they were rejected.

6 The materials that are dealt with under the
7 sexual -- sexual materials provision of the regulation
8 are sexually explicit materials, but the wardens are
9 advised by the policy statement of 1980 that
10 heterosexual materials normally will not be excluded,
11 even if they are sexually explicit materials.

12 Now, there are exceptions to this which
13 include sadomasochistic materials, bestiality and child
14 pornography, but by and large, heterosexual materials,
15 even if sexually explicit, will be admitted. And this
16 is the program statement that is found in the appendix
17 to the Court of Appeals' opinion.

18 Again, there were materials that were kept out
19 in 1977 and '78 which the Plaintiffs protested, but
20 those materials, at least with respect to sexually
21 explicit heterosexual materials, probably would now come
22 in.

23 The district court upheld the regulations
24 facially and as applied. The court found after a
25 ten-day trial in which evidence was taken from both the

1 Plaintiffs' experts and from the defense experts,
2 including a number of wardens and regional directors and
3 the Director of the Bureau of Prisons -- the district
4 court found that violence in federal prisons is a major
5 problem and that it is caused in major part by ethnic
6 gangs and homosexual activities. Many assaults, the
7 district court found -- and there are a lot of assaults
8 in federal prison, both on other inmates and on prison
9 guards -- many of the assault -- assaults are
10 precipitated, the district court found, or manifested by
11 homosexual activity.

12 These publications --

13 QUESTION: Mr. Bryson, when you say the
14 district court upheld the regulations, it upheld the
15 prior regulations or the current regulations?

16 MR. BRYSON: It upheld the current
17 regulations, Your Honor, the 1979 regulations.

18 QUESTION: They were already in effect by the
19 time the district court --

20 MR. BRYSON: That's right. The trial was in
21 1981 --

22 QUESTION: Okay.

23 MR. BRYSON: -- and the district court's
24 decision was 1984. So the '79 regulations were in
25 effect at that time. They are the regulations which the

1 facial challenge to which is at issue in this case.

2 QUESTION: Mr. Bryson, were the changes in the
3 current regulations major changes from the precursors?

4 MR. BRYSON: Well, Your Honor, the basic
5 principle, the principle that matters that are
6 detrimental to the good order, security and discipline
7 of the, of the prison, that was not changed. So the
8 core idea of the whole regulations was the same as it
9 has been since 1975. But what was changed was these
10 particular applications, these directions to the wardens
11 was -- Those were added in 1979.

12 In addition, the more liberal policy with
13 respect to sexually explicit materials was instituted in
14 1980, and perhaps particularly important for the purpose
15 of procedural objections that are raised here, a number
16 of changes were made in the regulations to provide, for
17 example, a more extensive review process for the
18 inmates. The inmates, under new regulations, can see
19 the materials prior to taking an appeal from the, from
20 the rejection by the warden in most cases, and the --
21 there is an effort made to attain more uniformity in the
22 prison system by virtue of an appeal system which was
23 much more rudimentary back in the '70s.

24 So there were procedural changes. But the
25 basic core provision is essentially the same.

1 QUESTION: May I ask you, are the materials
2 that are excluded primarily pictorial or written
3 materials?

4 MR. BRYSON: They're -- they fall into both
5 categories, Your Honor. The pictorial --

6 QUESTION: Because if, if you are trying to
7 prevent somebody, prevent somebody from reading the
8 material, he could read it to prepare his appeal from
9 not being able to read it?

10 MR. BRYSON: Well, there is a provision that
11 says he can, he can read it in cases where there is not
12 deemed to be some great harm from his reading it.

13 The problem is not, Your Honor, in the
14 individual reading the materials in most cases. The
15 problem is in the material getting into the prison.
16 That is, in most instances the warden doesn't worry
17 about individual No. 1 reading particular, particular
18 materials. The danger is in their becoming passed
19 around within the prison.

20 So there are, there is a class of cases, it's
21 not all the cases, but some cases in which there is
22 deemed to be no great harm to having the individual read
23 the materials in preparing his appeal but in which we
24 want to take the position that the material should not
25 come in for free distribution in the prison.

1 QUESTION: Are there, are there some examples
2 you could mention of materials which have been banned
3 and the government says that justifiably banned under
4 these regulations?

5 MR. BRYSON: Oh, certainly. For example, to
6 take perhaps the best example, publications advocating
7 prison unions. Prison unions are, are, frankly,
8 anathema to the prison system. It's completely contrary
9 to the efforts of the prison system to obtain discipline
10 and good order within the prison system, and we keep out
11 publications that advocate unionism among the, among the
12 prisoners.

13 We also keep out some homosexually explicit
14 materials because of the concern, and it's a two-fold
15 concern, that there will be targeting of particular
16 individuals as being homosexuals who would then be
17 subjects of assault, and also because, frankly, it tends
18 to, as several of the witnesses stated at trial, it
19 tends to suggest that the institution condones this form
20 of behavior and therefore results in more of that form
21 of behavior which is inimical to the operation of the
22 prison in an orderly way.

23 So those two classes, for example --

24 QUESTION: You're not keeping out Penthouse,
25 then, or things like that.

1 MR. BRYSON: No. Sexually, sexually explicit
2 heterosexual materials are, the provision states,
3 normally admitted. Now, there may be exceptions if, for
4 example, some sexually explicit heterosexual material
5 wanders over into the area of child pornography,
6 bestiality or sadomasochistic materials. But generally
7 speaking, that's true, you don't -- we don't keep out
8 heterosexual materials.

9 Now, the district court found that
10 publications can present a security threat, and
11 particular publications of the sort that were at issue
12 in this case can present a security threat. There's a
13 suggestion in the Respondents' brief, and it has been
14 their position all along, that this is not a realistic
15 concern, that there's no indication that any assaults
16 have occurred as a direct result of the admission of
17 publications, and therefore, any reaction on the part of
18 the prison officials to the admission of publications is
19 an exaggerated response, it is not tailored.

20 QUESTION: Well, Mr. Bryson, I suppose
21 personal correspondence can also pose security threats
22 sometimes.

23 MR. BRYSON: It can, and we do regulate
24 personal correspondence. Certain types of items,
25 obviously, escape plans, to take the most conspicuous

1 example, would be excluded.

2 QUESTION: In fact, that might be more of a
3 risk than this type of publication.

4 MR. BRYSON: It would depend on what it was.
5 Certainly, if it was an escape plan, you bet, we would
6 keep it out, just as we would a publication that
7 published, for example, the, the plans to Marion
8 Penitentiary. We would keep that out, I'm confident.

9 QUESTION: What standard do you think applies
10 to review of personal correspondence?

11 MR. BRYSON: I think as a general matter the
12 Martinez standard applies, the Proconier against
13 Martinez standard applies.

14 Our position in this case is that, as a class,
15 the, the cases involving personal correspondence have a
16 more compelling argument to be made for them that they
17 should be admitted into the prisons than publication
18 because --

19 QUESTION: Isn't it difficult to break this,
20 the standard down according to the type of
21 correspondence, and you, you run into some real problems?

22 What about letters from the VA or the IRS or

23 --

24 MR. BRYSON: There's no, there's no doubt that

25 --

1 QUESTION: -- book clubs? I mean, I think, I
2 think you're asking the Court to apply a rather
3 confusing breakdown of standard.

4 MR. BRYSON: Well, it certainly is -- the
5 proliferation of standards is a real problem, and I
6 don't, I don't underestimate the difficulties that that
7 presents, both for the courts and also for the
8 administrators.

9 We have the Proconler decision, and that
10 decision sets forth a standard that is applicable to
11 direct personal correspondence between individuals on
12 the outside and individuals on the inside. Our, our
13 point in this --

14 QUESTION: Well, what's the real difficulty of
15 applying that standard to these publications as a
16 practical matter?

17 MR. BRYSON: I guess the biggest difficulty,
18 Your Honor, is more in the misapplication, I think, of
19 that standard than in its application, and this case is
20 a perfect example of its misapplication. The mischief
21 is in the requirement that the regulation go "no farther
22 than necessary," and that has been interpreted, and
23 indeed, I think it's fair to say that it was initially
24 intended, in all likelihood, as a least restrictive
25 alternative type rule; that is to say, if there's some

1 way that this particular regulation could be narrowed,
2 then it constitutionally must be so narrowed.

3 That least restrictive alternative, as the
4 Court noted in the Turner case, that approach to prison
5 -- the regulation of activities within a prison, tends
6 to put the wardens in a position that they can be
7 second-guessed by the court at every turn. That's the
8 mischief, I think.

9 It the, the standard in Procunier is not a,
10 it's a somewhat amorphous standard, frankly. It is a
11 standard which is subject, I think, to interpretation as
12 a kind of enhanced reasonableness test. The mischief,
13 as I say, is in this least restrictive alternative
14 aspect of the test. If you were to say that is not the
15 way Procunier should be read, to have a least
16 restrictive alternative requirement -- and that is
17 decidedly not the way the Court of Appeals read it in
18 this case -- but if this Court were to say that is not
19 the way Procunier was -- is to be read, then I think the
20 standard of that case could be squared with the standard
21 that this Court adopted in Turner for reasonableness.

22 We would advocate a reasonableness test across
23 the board. We have Procunier on the, on the books with
24 respect to direct, personal correspondence?

25 QUESTION: Even for personal correspondence?

1 MR. BRYSON: I think that reasonableness,
2 particularly the kind of reasonableness and analysis
3 that this Court spelled out in Turner, makes great sense
4 for any form of publication. In Turner this Court made
5 quite clear that reasonableness does not mean complete,
6 abject deference to the warden no matter what. It means
7 that you have to show some valid connection with a
8 legitimate penological interest and that there are not
9 easy alternatives which could solve the same problem.

10 There are a number of, of features to the
11 reasonableness test that this type of case the Court
12 laid out in Turner which we would believe should be
13 applied across the board.

14 But, as I say, to the extent that Proconier is
15 read as being inconsistent with Turner and it is
16 certainly possible to read it that way, and indeed,
17 that's the way the Court of Appeals read it, we submit
18 that Proconier should not be extended to this class of
19 cases, which is not as compelling a class of cases as
20 the direct personal correspondence.

21 And the reason --

22 QUESTION: And you might add that that was the
23 way it was written, too; I mean, in addition to saying
24 that it's possible to read it that way.

25 MR. BRYSON: Oh, yes, no question. They

1 expressly did not -- the Court expressly did not reach
2 the class of cases such as this one. The Court was
3 dealing and expressly with the limited class of cases
4 involving direct personal correspondence.

5 Now, the Court of Appeals, as I say, struck
6 down this, these regulations on their face and, in the
7 course of doing so, imposed an extraordinarily exacting
8 standard on the prison officials. For example, the
9 Court said with respect to the provision that states
10 that materials that instruct in criminal activity will
11 be excluded, the Court said that that wasn't
12 sufficient. The Court explained that there was no
13 requirement, no requirement in the regulations that the
14 warden find a probability that the publication will
15 result in a breach of security.

16 Now, that's asking an awful lot, to say that
17 instruct -- materials that instruct in criminal activity
18 cannot be excluded from a prison because there is no
19 likelihood, no probability that the publication will
20 result in a breach of security or order.

21 Now, there are various other provisions in the
22 -- various other statements in the Court of Appeals'
23 opinion in which essentially the same approach is taken,
24 which is to say you have to establish a likelihood that
25 something will actually happen as a result of the

1 admission of these materials.

2 We think the district court got it right when
3 the district court said at page 32A of the petition
4 appendix, that wardens should not be required to show a
5 likely, immediate or substantial threat of a breach of
6 security or order. That, as the district court
7 explained, would require the admission of publications
8 that could exacerbate tensions and lead indirectly to
9 disorder.

10 Now --

11 QUESTION: Mr. Bryson, of all the things you
12 mention, the one that troubles me most is your statement
13 that you keep out publications that advocate unionism.
14 Do you keep out publications that advocate better food --

15 MR. BRYSON: No.

16 QUESTION: -- in prisons?

17 MR. BRYSON: No, no. It depends on, it would
18 depend on the -- it would depend, of course, on, on, on
19 what -- how that was put. I mean, if the advocacy for
20 better food was to say go on a food strike until we get
21 better food, yes, we would probably keep it out.

22 The point of union publications --

23 QUESTION: Well, you didn't say that about the
24 unionism exclusion. Is it -- is it only the manner in
25 which it's proposed that, that induces you to keep it

1 out?

2 What if you just say, you know, you should try
3 to persuade prison authorities to allow unions? Would
4 you keep that out?

5 MR. BRYSON: Well, I, I don't know, frankly,
6 whether something that was put in that, in that way
7 would be excluded because it would be so much, so much,
8 so much closer to simply informational material rather
9 than advocacy, but in cases in which what is being urged
10 -- and this is uniformly the case with these materials
11 -- what is being urged is actual unionization itself;
12 that is to say, unionize, engage in collective action
13 against the prison officials, those materials we keep
14 out. And that's what we're dealing with when we deal
15 with prison union materials.

16 It is, I think, even if Martinez is good law
17 with respect to correspondence itself, when it's applied
18 outside that setting, outside the setting that it
19 defined itself as, as the appropriate setting, then you
20 run into, in addition to the problems that I've
21 discussed, you run into the line of cases from this
22 Court dealing with non-public forums. And those cases
23 make quite clear that a prison is the ultimate
24 non-public forum. and the rule that applies in
25 non-public forum cases is, again, the reasonableness

1 test, essentially, exactly the test that the Court has
2 adopted for the rights of prisoners themselves. And we
3 are urging that that rule be applied to the rights of
4 those who are seeking to send materials into the prison,
5 a non-public forum.

6 And that test is perhaps best put in the Perry
7 Education Association case when the Court said that
8 regulation must be reasonable and not an effort to
9 suppress expression merely because public officials
10 oppose the speaker's view.

11 Now, this is a case in which the regulations
12 in and of themselves made quite clear that suppression
13 is not done simply because of disagreement with the
14 speaker's views. Suppression is, is tied to the
15 effects.

16 QUESTION: Well, I'm not sure that's right.
17 In the prison union context you simply disagree with the
18 views of those advocating prisoners' unions. Maybe it's
19 a reasonable disagreement, but it's surely a
20 viewpoint-based exclusion.

21 MR. BRYSON: Your Honor, the reason we exclude
22 in that class of cases, as in every other class of
23 cases, is not because we disagree with the views but
24 because we are concerned about the effects, and the
25 effects of publications that say unionize are that,

1 typically, they will produce or can be expected to
2 produce, intransigence and resistance on the part of
3 prisoners. That is bad news for the prison when prison
4 officials try to run an orderly shop and the prisoners
5 are being urged to and in fact engage in collective
6 action.

7 QUESTION: Yes, but I think if you would -- in
8 answer to Justice Scalia's question, you would exclude a
9 publication -- I understand most of them are not this
10 kind, but which merely contained an article saying we
11 think in the long run prisons would be run better if
12 wardens would understand that unions could form a
13 useful, perform a useful function or something like that.

14 MR. BRYSON: I have never seen an article come
15 through that was of that nature, and I'm not sure that
16 it would be excluded. The warden would have to make a
17 decision as to whether that would be likely to result in
18 the collective action that is the real concern --

19 QUESTION: I see.

20 MR. BRYSON: -- the disruptive, group
21 disruption. If the warden did not rationally, could not
22 rationally draw that conclusion, then the material would
23 come in.

24 But again, it's -- the focus is on the
25 likelihood of group disruption, not on disagreement with

1 the views. It may be that the warden would disagree
2 with the views, but that is not the purpose of the
3 regulation. That's not the justification for the
4 regulation.

5 Again, on the non-public forum issue, the
6 Respondents argue that this, the Court's cases on
7 non-public forum don't apply because, for several
8 reasons: first, they say, because the mails are at
9 issue here, not the prisons, the mails are the forum.
10 Well, that really don't do as an answer because the
11 place where the materials are circulated, the place
12 where the materials are sent, is the prison.

13 In Jones against North Carolina Prisoners'
14 Union, the Court clearly said that the prisons were a
15 non-public forum in response to an argument that the
16 mails were being used to send in bulk materials. So the
17 mails as a forum is just another way of trying to say
18 that the prison is in part a public forum, which it is
19 decidedly not.

20 Second, they argue that these materials --
21 these, these regulations are not content-neutral. Well,
22 they are neutral with respect to the question of the
23 opposition or -- opposition to the speaker's viewpoint.
24 Now, that is the way in which neutrality is central in
25 the, in the non-public forum cases such as Perry.

1 QUESTION: May I ask one other question? I'm
2 just a little confused about the difference between
3 Procunier and this case. The fact that the prison is
4 obviously a non-public forum, what -- what did that have
5 to do with the analysis in the Procunier case?

6 MR. BRYSON: It wasn't raised in the
7 Procunier --

8 QUESTION: But it was just as non-public for
9 people who are writing letters, or people who are
10 writing letters enclosing magazines.

11 MR. BRYSON: That's true. The non-public
12 forum argument was not made in Procunier. The argument
13 that was made in Procunier by the state --

14 QUESTION: I don't know how it advances the
15 problem. That's really what I'm saying.

16 MR. BRYSON: Well, I don't -- it's, it's, it's
17 hard to say. I mean, the, the, the non-public forum
18 cases really developed after Procunier, and I think that
19 the Court might view Procunier, or counsel arguing that
20 case might view it quite differently now than they did
21 at the time when they did not really have that line of
22 cases other than Adderley against Florida, which was
23 really a very early case along that line.

24 And finally, the, the Respondents say that
25 well, this case is not really a closed, non-public forum

1 case because reading is not harmful. Well, that begs
2 the question. Reading may not be harmful, but what
3 we're concerned with are the consequences of the
4 reading, which can be very harmful indeed.

5 Thank you.

6 QUESTION: Thank you, Mr. Bryson.

7 Mr. Ney, we'll hear now from you.

8 ORAL ARGUMENT OF STEVEN NEY
9 ON BEHALF OF THE RESPONDENTS

10 MR. NEY: Mr. Chief Justice, and may it please
11 the Court:

12 I'm here today representing the press. This
13 is a case involving the free speech rights of outsiders,
14 and only incidentally a prisoner case. I represent
15 publishers whose publications and books were excluded
16 from federal prisons.

17 I'm going to make three basic points. First
18 point is that using a reasonableness type test, the, the
19 Bureau of Prisons has engaged in unjustified censorship
20 of otherwise protected material. In other words, the
21 standard that they are defending in this Court is
22 essentially one of reasonableness compared to their
23 correspondence policy, and it -- it is the
24 implementation of that policy that has led to
25 unjustified censorship.

1 My second point is that Martinez must control
2 the decision in this case. Both of those cases involved
3 the content-based censorship of individually mailed
4 written materials from outsiders, and to that extent,
5 those two cases are synonymous.

6 QUESTION: But from a particular group of
7 outsiders.

8 MR. NEY: Yes, you're right, and what --

9 QUESTION: What was the group?

10 MR. NEY: In Martinez?

11 QUESTION: Yes.

12 MR. NEY: Yes, those were correspondents, and
13 this Court in that case discussed --

14 QUESTION: Particular kinds of correspondents,
15 or what?

16 MR. NEY: The -- as I understand the rule that
17 the Court adopted in Martinez, it applies to the general
18 public as this Court described it in Turner, the general
19 public writing to prisoners. The Court certainly
20 discussed the importance of a familial relationship, but
21 the rule established in that case applied to all
22 correspondence sent to prisoners.

23 QUESTION: Is, isn't it fair to say, though,
24 that in Martinez we were dealing with correspondence
25 that was intended for and sent to individual prisoners,

1 but the material here is designed to appeal to prisoners
2 as a group, and that therefore there is a much greater
3 danger that there would be group disruptive conduct?

4 MR. NEY: Well, the materials that are sent
5 here are sent, in some cases, by publishers who are
6 focusing on a prison-oriented audience. In other cases
7 they are publications of general circulation.

8 QUESTION: But in both cases that you put, the
9 publication is intended for an audience of more than
10 one, and that was not true in Martinez.

11 MR. NEY: The -- as I understand the rule --

12 QUESTION: And the government is concerned
13 here with group disruption.

14 MR. NEY: In each instance here we have a
15 subscription, a request from the inmate to the publisher
16 seeking a nexus, seeking an act of communication,
17 seeking to establish a link, and the publisher is
18 responding in an individualized way saying yes, I accept
19 your request, I'm sending the publication.

20 QUESTION: But it's -- the material is
21 designed to appeal to a group.

22 MR. NEY: I think it depends on the type of
23 material that we're talking about. It covers a
24 variety. Some of the material that has been censored in
25 this case, for example, the WIN Magazine, was an article

1 that criticized prison industries, and it was censored
2 from Leavenworth Prison.

3 QUESTION: Well, Mr. Ney, do, do any of the
4 people you represent write individual messages to
5 prisoners as opposed to send them something that they
6 all -- so that they send the same thing to other
7 prisoners?

8 MR. NEY: I'm not sure I follow the question.

9 QUESTION: Well, I, I thought it was the same
10 question Justice Kennedy asked you.

11 When a, a subscription comes in to one of your
12 clients, a publisher --

13 MR. NEY: Yes.

14 QUESTION: -- does he send an individualized
15 publication for that person only, or does he send a
16 magazine or publication that is designed to be sent not
17 just to that person but to others?

18 MR. NEY: Yes, certainly it's the latter.

19 QUESTION: Oh.

20 MR. NEY: The result of the Bureau's policy is
21 that a magazine like The Labyrinth, which criticized
22 medical care at Leavenworth and in other federal
23 prisons, was rejected. They stated that it could cause
24 problems with -- the philosophy might guide inmates into
25 situations that would cause them problems with the

1 medical staff, that the article was slanted. The
2 article said that prisoners had been murdered by neglect.

3 The -- later on in depositions in this case,
4 the officials acknowledged that this publication was not
5 a threat to security and that they would let it in,
6 although the government never took the legal position in
7 this case, as they seem to be saying today, that those
8 publications could come in.

9 It was only as a result of the, the, the
10 bringing of this lawsuit that that unjustified
11 censorship came to light.

12 The, the -- another magazine that was kept out
13 was The Call magazine, criticized the control unit at
14 the Marlon prison.

15 QUESTION: Well, well, is the government going
16 to tell us in closing, if it has time, that that's just
17 an instance where the policy was misapplied and it
18 concedes error, and that's the end of the case?

19 MR. NEY: I don't know what they'll say.

20 QUESTION: Well, but I mean, if it does --

21 MR. NEY: Yes.

22 QUESTION: -- we still have the question of
23 what the standard ought to be.

24 MR. NEY: I think you're right, and --

25 QUESTION: Mere, mere, merely because a

1 standard is misapplied, it doesn't mean the standard is
2 invalid, does it?

3 MR. NEY: No, I think what our point is, is
4 that the -- this general framework established by the
5 Bureau of Prisons is virtually identical to the one that
6 this Court condemned in the Martinez case. It allowed
7 the warden virtually untrammelled discretion to keep out
8 whatever he felt was inflammatory material. And this
9 Court said that notwithstanding that belief, that
10 narrowly drawn guidelines were necessary, and that's the
11 same position that we would take in this case.

12 QUESTION: Mr. Ney, is it -- is it an
13 essential part of your position that a person in prison
14 retains not only the right to receive letters from
15 individuals who are writing him, but also the right of
16 access to the mass media? Isn't that essentially what
17 you're arguing?

18 MR. NEY: No, this is -- we are arguing this
19 case principally as a First Amendment case of the
20 outsiders, the freedom of the press, the press' right to
21 have at least the equal access to a willing listener
22 that a member of the general public would have.

23 QUESTION: What about, what about the
24 electronic media? Suppose you, you have a prisoner who
25 has enough money to buy a television set; he's willing

1 to invest his own money for a television set. There are
2 no prison problems with the set; it doesn't disrupt the
3 activities in the prison. Does he have a right to have
4 television in prison?

5 MR. NEY: As I understand the Bureau of
6 Prisons' policies is that they do allow prisons and they
7 do not regulate the media. I don't -- I'm --

8 QUESTION: Let me ask --

9 MR. NEY: I don't think the Court has to
10 answer that or reach that question today.

11 QUESTION: No, but you do.

12 (Laughter)

13 MR. NEY: Well, I think it's a difficult
14 question, and I think this Court has recognized that the
15 different forms of media are governed by different
16 principles.

17 QUESTION: Well, when, when they are more
18 disruptive but I'm positing that you can prove that a
19 television set is not -- in other words, it seems to me
20 that part of -- there's a lot of inconvenience in being
21 on prison, and the inconvenience does not consist
22 exclusively of having your, your mobility restrained.
23 There, there are just some things that that
24 traditionally you don't have in prison, and one of them,
25 it seems to me, is a television set. I'm not sure that

1 one of them Isn't Time magazine or general, general
2 access to whatever publications you want to subscribe to.

3 Can, can you distinguish the, the, the print
4 and the electronic media that way?

5 MR. NEY: Well, I think this Court's decisions
6 indicate that the -- that from the outsider's
7 perspective, that a -- that a publisher has a right to
8 reach an audience, to engage in that kind of act of
9 communication.

10 QUESTION: I'm sure an individual writer
11 does. We've, we've said that in Procunier.

12 MR. NEY: Yes. And what is the distinction,
13 from our perspective, between the -- a member of the
14 general public, anyone can write, anyone in this Court
15 could write to any prisoner in the United States, and
16 we're saying that same right should exist for a
17 publisher.

18 QUESTION: I think the distinction is what
19 have the traditions of our society been as to the
20 inconveniences that prison entails. One of them has not
21 been that your family, friends, people who want to write
22 to you individually, can't do so, but one of them may be
23 that you can't have television sets and you can't
24 necessarily subscribe to Time magazine.

25 MR. NEY: Well, I think one of the things to

1 look at is how has the Martinez rule worked in the past
2 14 years, and it's our position that it has worked well
3 in the correspondence area. There have been no great
4 outcries that it has led to the introduction of
5 inflammatory material.

6 QUESTION: What publications do you suppose
7 could be prohibited under the Martinez standard?

8 MR. NEY: We would, as we said in our brief,
9 we could -- certainly publications that would instruct
10 in how to escape from prison or how to pick a lock, how
11 to make bombs or weapons. We have no objection to
12 censorship of those kinds of materials, and the Martinez
13 standard would certainly allow that exclusion.

14 I think it's ironic that the -- and it shows
15 up the lack of an appropriate distinction, an unworkable
16 distinction between publications and correspondence, the
17 fact that you could send in, a lot of the materials that
18 were censored in this case could be transmitted by
19 letter under the Bureau of Prisons' own policies that,
20 and the -- if we adopt the Solicitor's suggestion that
21 there be a different standard, then if I summarize an
22 article in a letter, I could get it into the prison, or
23 if I even copy an editorial, or if I enclose a news
24 clipping, then my letter could get in but the news
25 clipping would be kept out.

1 I think it's an unworkable distinction and one
2 that this Court should not adopt.

3 QUESTION: In your view, could a magazine
4 advocating the organization of a prisoners' union be
5 distributed under the Procunier standard?

6 MR. NEY: Well, I think that's what this Court
7 said in the Jones case, that the bulk mailings could be
8 kept out but that individual mailings --

9 QUESTION: No, no, say a -- I'm talking about
10 bulk mailings now.

11 MR. NEY: Yes, okay.

12 QUESTION: I'm not talking about the problem
13 of a friend sending a copy of an article or a copy of a
14 magazine.

15 Would the publisher of a magazine advocating
16 the formation of a prisoners' union have a right under
17 the Procunier standard to have that publication
18 distributed within the prison, in your view?

19 MR. NEY: Well, this case does not involve
20 distribution. We see that as a separate question.

21 QUESTION: Well, do, do you have a right to
22 make a bulk mailing to the prison of that magazine?

23 MR. NEY: No, I -- but that's not this case.
24 This is a case involving individual subscriptions, as I
25 see it, individual acts of communication.

1 QUESTION: But you said when you started that
2 you represented publishers. You weren't representing
3 the inmates. You were talking about the point of view
4 of the publishers, and I'm asking you if you represent a
5 magazine that advocates the formation of a prisoners'
6 union and you contend that the Proconier standard
7 applies, would you have a constitutional right to have,
8 to send that magazine to inmates?

9 MR. NEY: Not on a bulk basis, no. I think
10 the Jones case would dispose of that.

11 QUESTION: So are there -- can you give me an
12 example of a magazine in which a different standard
13 would produce a different result?

14 MR. NEY: The -- I think part of the
15 importance of the standard chosen by the Court is the
16 signal that it will send to prison officials, that it --
17 this is a standard that ten Circuit Courts of Appeals
18 have used.

19 QUESTION: Well, I understand that two
20 standards will send different signals.

21 Can you give me an example of a magazine that
22 would succeed under one standard and fail under the
23 other?

24 MR. NEY: Well, I think that the question
25 perhaps should be put to the Solicitor. We have been

1 trying to get a, a statement from them as to what of the
2 46 publications they would allow in, and we have never
3 been able to get it. So I don't know what the
4 difference would be.

5 We think if --

6 QUESTION: You think all these publications
7 should come in even under the reasonableness standard.

8 MR. NEY: That's right. We think that if
9 that's the standard the Court adopts and it's remanded
10 for fact findings, as the Solicitor has agreed should be
11 done, that we would prevail under -- under either
12 standard.

13 QUESTION: So this is kind of a symbolic case
14 is what it is.

15 MR. NEY: Well, I think symbols -- I don't
16 think it is totally symbolic, but I think symbols are
17 very significant because I think it would be an
18 invitation to prison administrators to engage in much
19 more censorship than they are presently doing, and I
20 think that will lead to -- let's, let -- right now they
21 censor, according to their brief, 1700 publications in
22 the past year. That may lead to thousands of more being
23 kept out under this vague standard, and will lead to
24 more litigation in this, in lower courts and in this
25 Court.

1 The Sclicitor has made the point that the
2 interest of the correspondent is less than the interest
3 of the publisher, and what we think the First Amendment
4 protects is the act of communication. As this Court
5 said in the Martinez case, it takes a listener and a
6 speaker in order to have an act of communication, and
7 this Court acknowledged that in the Virginia Board of
8 Pharmacy case. It's a constitutionally protected
9 relationship that the First Amendment protects.

10 We are not seeking any special access as this
11 Court denied in the Pell case or in the KQED case. We
12 are seeking equal access for the press to the prisons,
13 just as this Court acknowledged in the Richmond
14 Newspapers case, that the press would have equal access.

15 We would also indicate that the -- believe
16 that the test set up in Martinez is not an
17 insurmountable one. Several Circuit Courts of Appeals
18 have upheld prison regulations when they have been
19 challenged. It does not require the compilation of a
20 dossier on the eve of a riot or predicting with
21 certainty. It allows a degree of latitude for a prison
22 official. And of course, it does allow a prior
23 restraint, which is exceptional but recognizes the
24 uniqueness of that forum.

25 I think it's also important to point out that

1 there really is no danger in this case that's any
2 greater than the dangers that were posed in the Martinez
3 case. The government has talked about prison violence.
4 There certainly is prison violence but they have never
5 linked any particular publication to any particular act
6 of violence. The -- publication after publication that
7 was rejected, we showed them to prison officials in
8 depositions and at trial, and they acknowledged that
9 they were not dangerous to security.

10 How can these publications that they kept out
11 be considered dangerous when they now say that they can
12 let them in?

13 I would also take issue with the Solicitor
14 General's statement that the policies -- that the reason
15 these admissions have been made resulted because of the
16 change in policy. In fact, the general policy which
17 allowed -- allows a warden wide discretion, and his
18 staff, is the same as it was in 1979.

19 QUESTION: May I ask you another question just
20 about the general framework of the case that I just
21 don't quite understand?

22 You're -- I can understand the interest of the
23 prisoners in getting access to as much different kinds
24 of material as they can, but you made the particular
25 point that you're representing publishers, and I just

1 wonder what kind of a market do the publishers have in
2 the prisons? Most of these people can't afford to
3 subscribe to publications, can they?

4 Are these publishers that are distributed for,
5 you know, for -- like the Washington Post or something
6 like that, you've got to pay a substantial amount of
7 money for?

8 MR. NEY: It varies --

9 QUESTION: What kind of publications are we
10 really talking about?

11 MR. NEY: It varies widely. Some of them are
12 prison --

13 QUESTION: It's certainly not a very big
14 market, is it? Financially?

15 MR. NEY: It's not a big market, and some of
16 the publishers do distribute their publications for
17 free, although on a subscription basis, to prisoners.
18 There also are the -- there are different categories of
19 publications. Some are political, some are of a hetero-
20 or homosexual nature, and it depends. Many publishers
21 do request subscriptions and do request payment. Some
22 offer discounts. It varies.

23 QUESTION: But these heterosexual
24 publications, those are things, I suppose, the prisoners
25 subscribe for, aren't they?

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MR. NEY: Yes.

QUESTION: But these other publications are, are -- well, I just -- I just don't quite know what they are, I guess.

MR. NEY: We've given excerpts of some of them in the joint lodging which is available to the Court. Many of them -- the ones that seem to have stimulated most of the censorship are the ones that are geared towards prison conditions and that are critical of the prison, critical of the prison administrators.

As one warden explained in his deposition, he said, well, the people in the mailroom have to read something, so it seems they either look at the political magazines or they look at the sexual magazines, and I think it really depends on the whims of the particular institution and the persons there.

We've also challenged the all-or-nothing rule in this case which allows the prison official to exclude the entire magazine, even if only a single paragraph or single page is objectionable and we believe that that would fall afoul either of the reasonableness test or the Martinez test.

The prison officials acknowledged that they had no security basis for throwing out the entire magazine and that there would not be a -- any security

1 risk posed by deleting the offending portion of the
2 publication and allowing the rest to be given to the
3 prisoner.

4 We think that's a clear example of an
5 overbroad policy that does not show sufficient respect
6 for the First Amendment rights of the outsiders.

7 QUESTION: Does that all-or-nothing rule work
8 on a, on a magazine by magazine base -- what I mean, is
9 it just a particular issue that will be excluded, or
10 once, once you get on the list, is the whole, is the
11 publication banned entirely?

12 MR. NEY: The Bureau of Prisons, when this
13 litigation began, had an excluded list.

14 QUESTION: I see.

15 MR. NEY: And they eliminated it partly as a
16 result of this litigation. The all-or-nothing rule
17 works --

18 QUESTION: So now it would be just one
19 particular issue of a magazine would be excluded.

20 MR. NEY: Right, or a book.

21 QUESTION: Yes.

22 MR. NEY: If there's one page objectionable,
23 the entire book is kept out. And other prison systems
24 around the country have used an item-by-item censorship
25 without any great problems.

1 I think it's, it's important to recognize that
2 the broad standard that the Bureau has adopted allowing
3 this wide discretion really allows for the exercise of
4 unprofessional judgments, personal judgments, personal
5 distaste by the prison officials, and that's what the
6 record in this case shows.

7 And we feel that's where the standard could
8 make a difference, Justice Stevens. I think it will
9 give a signal that the same protection that is given to
10 correspondence must be given to books and publications
11 coming into prisons.

12 We think that the standard adopted by the D.C.
13 Circuit is a -- is consistent with Martinez. The, the
14 Circuit Court said that the prison official would have
15 to make a reasoned determination that material
16 encourages conduct which would constitute or otherwise
17 was likely to produce a breach of security. That's not
18 much different than the standard even used in the Jones
19 case in this Court for non-prison related where the
20 question was did it possess a likelihood of disruption
21 to prison security, order or stability.

22 If there are no further questions, thank you.

23 QUESTION: Thank you, Mr. Ney.

24 Mr. Bryson, you have four minutes remaining.

25 REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

1 ON BEHALF OF PETITIONERS

2 MR. BRYSON: Thank you.

3 Very briefly, there are some publications that
4 we think would be disposed of differently under the two
5 standards, at least, again, the standard that the Court
6 of Appeals applied, purportedly applying the Proconier
7 standard. One of them the Court of Appeals made quite
8 clear it would keep out was the The Call magazine, which
9 the Plaintiffs have made a great deal of in their brief.

10 This was a magazine in which -- which was kept
11 out of Marlon Penitentiary because it was deemed to be
12 too inflammatory, basically, and to be a magazine which
13 would be likely to cause disruption within the
14 penitentiary. Marlon, as you may know is the maximum,
15 maximum security institution. The people who are
16 incarcerated in Marion are people who have failed to
17 adjust to other institutions. It is an extremely
18 dangerous place, and the prospects of difficulties in
19 Marlon [Inaudible].

20 QUESTION: Mr. Bryson, I suppose you would
21 contend that Call ought to be kept out under -- even
22 under the Proconier standard?

23 MR. BRYSON: Your Honor, we would say that, we
24 might well. But what, what we're looking at is the
25 standard the Court of Appeals applied, purporting to

1 apply Procurier, and the Court of Appeals said with
2 respect to Call that it was insufficient to keep that
3 magazine out simply because it was inflammatory in tone
4 because it contained no exhortation for group activity.

5 And let me read you a selection from the
6 article that was the result, that was the reason that
7 Call was kept out, and I think this makes the case very
8 well for why the exhortation only rule that the Court of
9 Appeals applied just won't work.

10 The magazine said beatings by racist guards
11 are a regular occurrence at Marion, but officials have
12 not been able to crush prisoner resistance or halt the
13 spread of revolutionary ideas. Besides the lawsuit,
14 Marion inmates have staged strikes and fasts and have
15 continued to struggle against their oppression.

16 Well, that doesn't contain exhortation,
17 technically, but any reader, particularly some of the
18 readers who are perhaps a little more excitable than
19 others and who are looking for opportunities to express
20 grievances towards the prison officials, will read that,
21 I submit, as a form of implicit exhortation, to continue
22 to do these very things that are described.

23 Similarly, the magazines such as homosexual
24 explicit materials which the Court of Appeals said we
25 could not keep out on the basis of the explanations that

1 we gave, would be materials that we would want to keep
2 out and would expect to keep out under a reasonableness
3 test.

4 With respect to The Labyrinth, which was the
5 publication that the Plaintiffs rely a lot on, that is,
6 the publication that had the article on medical murder
7 in the prison system, the rejection, the reason for the
8 rejection in that case explains a lot about the way the
9 BOP engages in this policy, which is the reason it was
10 kept out was because, as testimony at trial showed,
11 Leavenworth, which is the place from which it was kept
12 out, was very tense at the time. It would probably not
13 have been excluded under normal times, the testimony
14 was, but a number of prisoners at the time were upset
15 over the rumors of these so-called murders, and there
16 was, as the warden testified, some real tension among
17 the prisoners over the issue. It was a very sensitive
18 issue at the time, particularly because it involved an
19 inmate who had been there at Leavenworth.

20 This was a, if you will, a time, place and
21 manner exclusion. It was an exclusion by the warden
22 because in his discretion at that time that particular
23 article would have been potentially very disruptive.
24 That's the kind of discretion that the BOP attempts to
25 protect and the kind of discretion that we think would

1 be at risk if a standard like the Court of Appeals
2 standard were adopted.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Bryson.

6 The case is submitted.

7 (Whereupon, at 10:48 a.m. the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

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NO. 87-1344 - RICHARD A. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES
ET AL., Petitioners V. JACK ABBOTT, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY JUDY Freilicher
(REPORTER)

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