

No. 06-1750

In the
United States Court of Appeals
for the Seventh Circuit

David Paul Hammer,
Plaintiff-Appellant,

v.

John D. Ashcroft, Attorney General of the United States;
Harley G. Lappin, Warden; Kathleen Hawk-Sawyer, Director - Federal Bureau of
Prisons; and Keith Olson, Warden,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
No. IP 01-558-C-T/G,
The Honorable John Daniel Tinder, Judge Presiding.

BRIEF OF AMICI CURIAE
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET. AL.,
IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

LUCY A. DALGLISH
Counsel of Record
GREGG P. LESLIE
NATHAN WINEGAR
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100
Attorneys for The Reporters
Committee for Freedom of the Press

Additional counsel for *amici* listed
on inside cover.

Additional Counsel for *Amici*:

Steve Key

Hoosier State Press Association

41 E. Washington St., Suite 301

Indianapolis, IN 46204

Counsel for the Hoosier State Press Association and the Hoosier State Press Association Foundation

Kevin M. Goldberg

Fletcher, Heald & Hildreth, PLC

1300 North 17th St., 11th Floor

Arlington, VA 22209

Counsel for American Society of Newspaper Editors

Bruce W. Sanford

Bruce D. Brown

Laurie A. Babinski

Baker & Hostetler, LLP

1050 Connecticut Ave., NW, Ste. 1100

Washington, DC 20036

Counsel for Society of Professional Journalists

Kathleen A. Kirby

Wiley Rein LLP

1776 K Street NW

Washington, DC 20006

Counsel for Radio-Television News Directors Association

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: _____

Short Caption: _____

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: _____ Date: _____

Attorney's Printed Name: _____

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** _____

Address: _____

Phone Number: _____ Fax Number: _____

E-Mail Address: _____

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIESiii

STATEMENT OF INTEREST..... v

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

I. THE PURPORTED JUSTIFICATIONS FOR THE TOTAL BAN ON IN-PERSON INTERVIEWS FOR SCU INMATES ARE ILLEGITIMATE, NON-NEUTRAL AND RATIONALLY RELATED TO POLITICAL, NOT PENOLOGICAL, INTERESTS. 3

A. The SCU media policy is applied in a non-neutral fashion that thwarts press access to some of the most important sources of information in the federal prison system.4

B. The highly regimented routine of death row inmates decreases the likelihood of jailhouse celebrities being created by face-to-face press interviews.8

C. The SCU media policy is rationally related to political, not penological, interests.....10

II. THE INTERVIEW BAN AND ACROSS-THE-BOARD CONTENT RESTRICTIONS ON CERTAIN INFORMATION LEAVE THE MEDIA NO ALTERNATIVE TO ACQUIRE VAST AMOUNTS OF INFORMATION ABOUT THE FEDERAL DEATH PENALTY 16

A. The content restrictions on SCU inmates apply to all methods of communicating with reporters, leaving the press no alternative to acquire certain inmate information.16

B. There can be no wholly adequate substitute for a
journalist conducting a face-to-face interview.....18

CONCLUSION 24

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-
STYLE REQUIREMENTS 25**

**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE
31(E) 26**

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Cases

<i>Beard v. Banks</i> , 126 S.Ct. 2572 (2006)	5, 6
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	2, 5
<i>Fraise v. Terhune</i> , 283 F.3d 506 (3rd Cir. 2002)	5
<i>Houchins v KQED</i> , 438 U.S. 1 (1978)	18
<i>Jones v. North Carolina Prisoners' Labor Union, Inc.</i> , 433 U.S. 119 (1977)	2
<i>King v. Frank</i> , 371 F.Supp.2d 977 (W.D. Wis. 2005)	5
<i>Miami Herald Publ'g Co. v. Tornillo</i> , 418 U.S. 241 (1974)	17, 18
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	18
<i>Overton v. Bazzetta</i> , 539 U.S. 126 (2003)	5, 6
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974)	8, 9, 14
<i>Price v. Johnston</i> , 334 U.S. 266 (1948)	5
<i>Reed v. Faulkner</i> , 842 F.2d 960 (7th Cir. 1988)	4
<i>Rowold v. McBride</i> , 973 F.Supp. 829 (N.D. Ind. 1997)	6
<i>Saxbe v. Washington Post Co.</i> , 417 U.S. 843 (1974)	8, 9, 14, 20

<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966)	23
<i>The Chicago Reader v. Sheahan</i> , 141 F.Supp.2d 1142 (N.D. Ill. 2001).....	19
<i>Thornburgh v. Abbott</i> , 490 U.S. 401 (1989)	2, 3, 16
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	1, 2, 3, 4, 7, 16, 19
<i>United States v. Associated Press</i> , 52 F. Supp. 362 (S.D. N. Y. 1943).....	13

Other Authorities

<i>Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act</i> , Erwin Chemerinsky, 35 Santa Clara L. Rev. 519 (1995)	15
<i>The Execution of the Innocent</i> , Michael L. Radelet and Hugo Adam Bedau, 61 Law & Contemp. Probs. 105 (1998)	15
<i>The Future of the Federal Death Penalty</i> , Rory K. Little, 26 Ohio N.U. L. Rev. 529 (2000)	15
“Killer Counts Down Days to the Death He Welcomes,” <i>Los Angeles Times</i> , August 6, 1998.	20
“N.D. senator threatens legislation to change policy,” <i>Associated Press</i> , March 15, 2000.....	11
“Senator appalled by McVeigh interview,” <i>The Tribune-Star (Terre Haute, Ind.)</i> , December 15, 2000	11
“Three students track down killers,” <i>The Baltimore Sun</i> , June 27, 1999	22
<i>When the Federal Death Penalty is ‘Cruel and Unusual,’</i> Michael J. Zydney Mannheimer, 74 U. Cin. L. Rev. 819 (2006)	14

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Hoosier State Press Association (“HSPA”) is a corporate association whose members include 176 Indiana newspapers. The primary focus of the HSPA is to safeguard and advance the newspaper industry in the State of Indiana. The corporation is nonpolitical and nonsectarian.

The Hoosier State Press Association Foundation is a non-profit entity whose members include 176 Indiana newspapers and other parties interested in the Foundation’s mission. The purpose of the Foundation is to enhance the ability of Indiana newspapers to fully educate and inform the public, and to defend the principles of the First Amendment to the United States Constitution.

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Amici's interest in this case is seeing that representatives of the press may exercise their First Amendment rights to communicate with inmates incarcerated in the Special Confinement Unit of the federal penitentiary in Terre Haute, Ind. The face-to-face interview ban imposed on the media and death row inmates inappropriately restricts

the news media's access to information about the federal death penalty because the reasons for the policy are rooted in political, not penological, interests. Because the in-person interview is an indispensable tool for reporters, *amici* write to demonstrate why it should not be curtailed in this case.

Pursuant to Fed. R. App. P. 29(b), both parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

In April 2004, the Bureau of Prisons (“BOP”) promulgated a media policy that prevented members of the news media from visiting inmates who are awaiting their death sentences in the Special Confinement Unit (“SCU”) of the federal prison in Terre Haute, Ind. This constraint on communication between prisoners and the press was enacted ostensibly due to security concerns unique to death row inmates, but these purported reasons are not sufficient even under the deferential scrutiny articulated in *Turner v. Safley*. See 482 U.S. 78 (1987). In reality, the risk of creating “jail celebrities” is mitigated, not heightened, by the targeted inmates’ presence on death row. Further, by singling out condemned prisoners, the regulation has been applied in a non-neutral fashion and acts simply to cut off the press from valuable sources of information about the federal death penalty.

The public comments of top-ranking government officials around the time of the enactment demonstrate that the interview ban is an attempt not to preserve order in one portion of a federal prison but to preserve the purity of American culture by depriving convicted criminals of a “platform” for expressing controversial opinions.

Also, the regulation is fatally flawed under the second prong of *Turner* to the extent its content restrictions apply across all platforms of communication, leaving inmates and journalists no alternative

mechanism for conveying or acquiring certain information about the conditions of life on death row.

The in-person interview is the lifeblood of American journalism and indispensable to members of the press as they exercise their constitutional functions. There is no wholly adequate alternative to the first-hand acquisition of verbal and non-verbal information, and to deprive the press of this vital tool should not be permitted unless the government can adequately articulate actual concerns.

ARGUMENT

The district court's *Turner* analysis of the propriety of the SCU media policy has conspicuously failed to take into consideration the rights of the press. *See Turner*, 482 U.S. at 78. It is well-settled that restrictions on the ability of a prisoner to speak to those on the outside implicate not only the inmate's rights but those with whom he would speak.

It is equally certain that prison walls do not form a barrier separating prison inmates from the protections of the Constitution, nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the "inside."

Thornburgh v. Abbott, 490 U.S. 401, 407 (1989), *citing Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (internal citations and quotation marks omitted.)

Though the *Turner* inquiry integrates all of these relevant considerations, the district court failed to recognize that the rights of journalists were intertwined with those of Hammer. *See Thornburgh*, 490 U.S. at 410 n.9. Proper application of the *Turner* analysis enables courts to give outsiders' interests their due weight while maintaining appropriate judicial deference. *See* 482 U.S. at 89. Remaining faithful to *Turner's* guiding principles requires considered examination of all concerns captured by the four factors.¹

The lopsided formulation urged by the government and adopted by the district court has upset this thoughtful balance. Consequently, the First Amendment right of the press to access information about the federal death penalty has been inappropriately curtailed.

I. THE PURPORTED JUSTIFICATIONS FOR THE TOTAL BAN ON IN-PERSON INTERVIEWS FOR SCU INMATES ARE ILLEGITIMATE, NON-NEUTRAL AND RATIONALLY RELATED TO POLITICAL, NOT PENOLOGICAL, INTERESTS.

Turner first requires a court to “determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective.” *Thornburgh*, 490 U.S. at 414. BOP alleges that the unique nature of the federal death row justifies singling out inmates

¹ Below, in order to avoid duplicating any arguments before the court, *amici* address only the first two *Turner* factors as they are the ones that most directly implicate the interests of the press in this case. *Amici* fully endorse Hammer's arguments as to the third and fourth *Turner* factors.

sentenced to death for extra deprivations of constitutional rights. These assertions amount to little more than “the piling of conjecture upon conjecture.” *See Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988). In reality, it is precisely the inmates’ death row status that undermines the legitimacy and neutrality of the alleged governmental objectives and heightens the media’s right to obtain information by directly interacting with them.

- A. The SCU media policy is applied in a non-neutral fashion that thwarts press access to some of the most important sources of information in the federal prison system.

The restrictions on face-to-face interviews are not applied in a neutral manner, as other, non-death row inmates are permitted to participate in similar interviews.² *See* Conditions for Media Telephone Contact with Inmates in The Special Confinement Unit, USP Terre Haute (“SCU Media Policy”), Appendix of Plaintiff-Appellant (“Appendix”) at 198. Of the nearly 200,000 inmates currently serving time in federal prison, the BOP has singled out for interview bans 48 of the most newsworthy, cutting off the ability of the media to gather first-hand information from those serving on the federal death row. *See* Federal Bureau of Prisons, Quick Facts, (available at <http://www.bop.gov/news/quick.jsp>). By utilizing non-neutral

² *Amici* fully support Hammer’s argument that application of the SCU media policy only to death row inmates violates the Equal Protection Clause of the Constitution. For the foregoing reasons, *amici* contend that the policy also violates the lower standard of *Turner* rationality.

regulations prohibiting face-to-face interviews of condemned prisoners, the BOP is preventing the media from reporting on specific content: namely, first-hand perspectives of those serving time on federal death row.

“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Price v. Johnston*, 334 U.S. 266, 285 (1948). However, inmates “do not forfeit all constitutional protections by reason of their conviction and confinement in prison.” *See Bell*, 441 U.S. at 545. In other cases where inmates are subjected to more restrictive constraints on their constitutional rights, it has been the result of further behavioral problems after incarceration, and not a product of the prisoners’ original crimes that landed them in prison. *See Beard v. Banks*, 126 S.Ct. 2572 (2006); *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Fraise v. Terhune*, 283 F.3d 506 (3rd Cir. 2002) (not a First Amendment violation to transfer core members of “security threat groups” who have taken part in incidents endangering inmates, staff or safe operation of the facility to a special unit); *King v. Frank*, 371 F.Supp.2d 977, 984 (W.D. Wis. 2005) (prison officials describe limited visitations, access to publications and telephone privileges for those in the “health and segregation complex” as “designed to promote the institution’s

interests in maintaining security and rehabilitating inmates by awarding increasing levels of privileges for good behavior.”); *Rowold v. McBride*, 973 F.Supp. 829 (N.D. Ind. 1997) (reasonable to require inmate assigned to extra duty by prison Conduct Adjustment Board to perform that work on the Sabbath).

In *Beard*, the plaintiff-inmate who sued for access to outside publications was housed in Pennsylvania’s most restrictive unit for disruptive inmates. *See* 126 S.Ct. at 2576. The Pennsylvania prison system had three progressively more restrictive units for unruly inmates, the most restrictive, to which the prisoner belonged, “is reserved for the Commonwealth’s ‘most incorrigible, recalcitrant inmates.’” *Id.* There were two levels within this last stop, with level two the most restrictive and the level the inmate in question belonged. *Id.* At this level, inmates’ rights were most restricted, including being limited to one visitor per month, no phone calls except in an emergency, and no access to newspapers, magazines, or personal photographs. *Id.* At level one, inmates could receive one newspaper and five magazines. *Id.*

In *Overton*, inmates with two substance abuse violations faced a two-year visitation ban. *See* 539 U.S. at 134. The Court said: “Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate

behavior, especially for high-security prisoners who have few other privileges to lose.” *Id.*

In the current case, however, the heightened First Amendment restrictions were not implemented in response to inmate violence or repeated violations of substance-abuse regulations. Rather, the restrictions here are applied only to death row inmates in a way that adds post-sentence punishment without further misbehavior on the inmates’ part. There is no indication that Hammer or other SCU inmates have earned these additional restrictions through misbehavior within the unit. In fact, all of the evidence demonstrates that Hammer and others have been the subjects of in-person interviews with the media while incarcerated on death row without any security breaches or concerns being raised.

Targeting a select group of inmates because of their previous crimes gives government officials far too much power to control the flow of information to the public. *See Turner*, 482 U.S. at 90 (“We have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression.”) The sentence an inmate receives cannot alone be what makes him or her a security threat, given that many inmates in the federal prison population are guilty of equally (or more) heinous crimes but are not sentenced to

death. On the other hand, the punishment imposed on convicted criminals like Hammer and his fellow SCU inmates, irrespective of any other single thing about them, is precisely what makes them of great concern to the public. The BOP's censorship of specific viewpoints does not comport with the appropriate scope of potential restrictions on inmate communication with the press.

- B. The highly regimented routine of death row inmates decreases the likelihood of jailhouse celebrities being created by face-to-face press interviews.

Prison officials defend the singling out of this class of prisoners based on a concern they will become "jail celebrities" if they are allowed face-to-face interviews with the press, even though the highly regimented routine triggered by their sentences undermines this concern. The day-to-day conditions of life on death row make it far less likely that an inmate could wreak havoc with his or her perceived status as a celebrity.

It is not uncommon for prison officials to cite the so-called phenomenon of jailhouse celebrities, also known as the big-wheel theory, in support of restrictions upon media access to inmates. *See Pell v. Procunier*, 417 U.S. 817, 831-832 (1974) (inmates receiving press attention becoming "virtual 'public figures' within the prison society" and creating disciplinary problems); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 866 (1974) (Powell, J., dissenting). The added

attention of media interviews is seen as giving this type of prisoner “notoriety and influence” and allowing them to become “the source of severe disciplinary problems.” *Pell*, 417 U.S. at 832. The majority in *Saxbe* said that “inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison.” *Saxbe*, 417 U.S. at 848-849. The *Saxbe* dissent describes the phrase “big wheels” as “inmate leaders.” *Id.* at 866 (Powell, J., dissenting). The concern under this theory is that media interviews with this type of inmate “increase their status and influence and thus enhance their ability to persuade other prisoners to engage in disruptive behavior.” *Id.*

The concerns presented in *Pell* and *Saxbe* may be reasonable in their specific factual settings, but they are not present in this case. Here, the lack of interaction between Hammer and his fellow SCU inmates hardly presents an opportunity for Hammer to use any prestige or notoriety he may receive from an in-person media interview to elicit disruptive behavior from others. Life in the SCU is tightly regulated. There are three classifications for inmates, only one of which allows any contact between inmates. See “Operation & Security of the Special Confinement Unit,” THA-5566.05D (7), March 12, 2002, Appendix at 200. Even that allowed contact is highly regulated as only

four inmates may be outside their cells at any time. *Id.* If a prisoner needs to leave the SCU for any reason, he must be “restrained in front with full restraints, handcuffs, black box, martin chain and leg irons.” *Id.* at (4)(B). During such an outing, the prisoner must be escorted by no fewer than three guards. *Id.* And, regardless of their classification, SCU inmates are only allowed non-contact visits. THA-5566.05D (7), March 12, 2002, Appendix at 200.

These are hardly conditions that would allow any one death row inmate to have enough influence and control over others as to be able to steer them toward disruptive behavior. The highly regimented routine and tight control of a death row inmate’s daily life totally undermine the BOP’s assertion that the ability to meet with members of the media would result in additional notoriety or influence. All the regulation does ensure is that the media are cut off from quality information about a small class of federal prisoners who are involved in a highly newsworthy subject: the federal death penalty.

C. The SCU media policy is rationally related to political, not penological, interests.

Rooted in illegitimate and non-neutral objectives, the death row interview ban is further compromised by its rational relationship to political, not penological, interests. The SCU media policy appeared after the BOP was publicly criticized by a United States senator for allowing convicted murderer Timothy McVeigh to be interviewed by

the television news program *60 Minutes*. See “N.D. senator threatens legislation to change policy,” *Associated Press*, March 15, 2000.

According to an excerpt published in *The Tribune-Star* of Terre Haute, Ind., the letter from North Dakota Senator Byron L. Dorgan blasted prison officials for allowing McVeigh to speak with a television news crew. See “Senator appalled by McVeigh interview,” *The Tribune-Star (Terre Haute, Ind.)*, December 15, 2000, Appendix at 175.

The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society, but will also prevent him from further intrusion in our lives through television interviews and from using those forums to advance his agenda of violence.

Id.

The letter went on to invite the BOP to revise its regulations and curtail prisoner access to the media so as not to further “dishonor” crime victims, otherwise, the senator said he might introduce legislation to do so.

The fact is, the Bureau of Prisons decision to allow this interview to take place goes well beyond what the Supreme court has ruled is required to comply with Mr. McVeigh’s first amendment rights as well as the free press rights of a news organization to cover those within the federal prison system.

Id.

Senator Dorgan’s letter reveals his personal distaste for what an inmate said, not a concern that the prisoners and employees of the SCU were being put at risk by McVeigh’s comments. But instead of registering his displeasure by changing the channel or writing a letter

of complaint to CBS, Senator Dorgan chose to pressure the BOP to keep death row inmates quiet.

This attitude was echoed by then-Attorney General John Ashcroft during a press conference announcing the new SCU media policy in April 2001. *See* Appendix at 151. Standing with BOP Director Kathleen Hawk Sawyer, Ashcroft invoked his distaste for McVeigh's appearance on *60 Minutes* to justify the new ban.

As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as attorney general of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates will be limited to each inmate's ordinary allotment of telephone time.

Appendix at 152.

Ashcroft's frank discussion of his personal preferences about the content of American culture belies any notion that security threats, either real or potential, were at the heart of this interview ban. An American who cared about the Constitution would recognize that the framers designed the First Amendment precisely so the predilections of high-ranking government officials could not dictate the terms of the national debate.

In a footnote, the government casually dismisses as mere coincidence the sudden need by the BOP, on the heels of this public criticism (but more than a decade after the federal death penalty was

reinstated), to implement a ban on face-to-face interviews to preserve the security of its institutions.

Moreover, even if the letter from Senator Dorgan somehow pressured BOP into establishing stricter limits on death-row inmates in the SCU, it is entirely within Congress's constitutional powers to enact legislation governing the administration of federal prisoners in the federal prison.

See Brief for the Appellees at 22.

The government's position glosses over the fact that Congress's ability to regulate federal prisons is not plenary and must conform to the higher authority of the Constitution. Congress has no more power than prison officials to infringe upon the First Amendment rights of prisoners and the press just because a government official's sensibilities are offended by what an inmate says on television. This debate on who should dictate the form and content of information available to the public, an editor or a high-placed government official, was played out more than 200 years ago when the Bill of Rights was drafted, and the government official lost. *See United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D. N. Y. 1943). (The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.")

Amici acknowledge the U.S. Supreme Court has recognized the discretion of prison administrators to curtail public access to prisons when legitimate interests are at stake and alternatives for communication are present. *See e.g., Pell*, 417 U.S. at 817; *Saxbe*, 417 U.S. at 843. Further, *amici* respect the fact that officials who run prisons have a difficult task in maintaining the safety of their charges and employees. But that said, the Constitution does not permit wardens to cloak political calculations with insincere invocations of security concerns in an attempt to cut off media access to inmate information. Here, in the name of institutional security where none has ever been threatened by media interviews, the BOP has prevented the press from obtaining quality information from sources at the heart of a wrenching national debate over the manner in which the federal death penalty is implemented in the United States.

There are many serious legal issues implicated by the existence of a federal death penalty that would benefit from robust public debate based in part on in-person interviews of inmates. *See* Michael J. Zydney Mannheimer, *When the Federal Death Penalty is 'Cruel and Unusual,'* 74 U. Cin. L. Rev. 819 (2006) (describing the recent shift in Department of Justice policy that has resulted in federal prosecutors seeking death sentences for defendants convicted of crimes in states that do not have the death penalty); and Rory K. Little, *The*

Future of the Federal Death Penalty, 26 Ohio N.U. L. Rev. 529 (2000) (describing the broad scope of crimes beyond murder that are eligible for punishment by death in the federal system).

And these legal considerations do not even touch on the serious moral concerns raised by the manner in which this country puts people to death. See Michael L. Radelet and Hugo Adam Bedau, *The Execution of the Innocent*, 61 Law & Contemp. Probs. 105 (1998) (“Between 1972 and the end of 1996, sixty-eight death row inmates in the nation were released because of doubts about their guilt.”); and Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 Santa Clara L. Rev. 519 (1995) (“[T]he most fundamental decisions that a society can make – who shall live and who shall die – are racially biased. Controlling for all other variables, the differences shown in the studies are explainable only by the race of the defendant and the race of the victim.”)

Amici take no position on these issues except to say that they should be the subject of robust political debate facilitated at least in part by journalists who are able to obtain first-hand information from inmates unimpeded by crass political calculations of prison officials more concerned with image than security.

II. THE INTERVIEW BAN AND ACROSS-THE-BOARD CONTENT RESTRICTIONS ON CERTAIN INFORMATION LEAVE THE MEDIA NO ALTERNATIVE TO ACQUIRE VAST AMOUNTS OF INFORMATION ABOUT THE FEDERAL DEATH PENALTY.

The second step in the *Turner* analysis is to determine “whether there are alternative means of exercising the right that remain open to prison inmates.” 482 U.S. at 90. Recognizing that in the First Amendment context, the interests of the prisoner and the journalist are intertwined, *Thornburgh*, 490 U.S. at 407, a corollary to this rule is that members of the media must have an alternative means of acquiring information about federal death row inmates. The content restrictions forbidding one inmate from discussing another inmate completely foreclose the media’s access to important sources of information. Similarly, there is no substitute for the in-person interview for a journalist seeking reliable information from a source.

- A. The content restrictions on SCU inmates apply to all methods of communicating with reporters, leaving the press no alternative to acquire certain inmate information.

Under the media policy, inmates of the SCU are not permitted to discuss anything about their fellow inmates, no matter what form of communication is used. *See* SCU Media Policy, Appendix at 198. These content restrictions leave journalists no alternative to acquire information about inmates except what one is willing to say about himself.

The regulation purports to require a journalist to strictly adhere to an inflexible method of acquiring information, and then forbids the journalist from verifying through certain sources that which she collected. For a profession with an unofficial slogan of “If your mother says she loves you, check it out,” this is a fundamentally inappropriate way to report stories. More importantly, it is an impermissible wielding of government power.

In *Miami Herald Publ'g Co. v. Tornillo*, the U.S. Supreme Court ruled that a Florida law that dictated what editorials a newspaper must run violated the First Amendment because it interfered with the right of editors to determine the content of a newspaper or television program. *See* 418 U.S. 241, 258 (1974) (“It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”) Similarly, the BOP’s attempt to dictate the content of journalists’ discussions with death row inmates curtails what information can be published, particularly in cases such as that of Hammer, who was convicted of killing another inmate based in part on the testimony of fellow inmates. It is difficult to see what portion of his own case Hammer could discuss with the news media given how intertwined his fellow inmates are to the story.

The BOP seems to recognize that one-source stories make for poor journalism. Ironically, after mandating one-source reporting in the context of individual inmates, it requires a journalist, when faced with an inmate allegation against an employee of the BOP, to “exercise your professional responsibility to make reasonable attempts to verify these allegations, and afford the institution the opportunity to comment.” See SCU Media Policy, Appendix at 198. While the BOP’s commitment to journalistic integrity (at least when its own reputation is at stake) is commendable, the constitutional course is to leave decisions about reporting directly to the journalists and editors.³

The clear implication has been that any such compulsion to publish that which reason tells them should not be published is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Miami Herald Publ’g Co, 418 U.S. at 256 (internal quotations omitted).

- B. There can be no wholly adequate substitute for a journalist conducting a face-to-face interview.

³ Though not directly under attack in this case, *amici* believe the additional portions of the SCU media policy that purport to restrain a journalist from reporting information that goes outside the content restraints are relevant as indications of the hostility with which the BOP regards the press.

The BOP instructs journalists that if the inmate they are interviewing (via phone or written correspondence, of course) “provides you with any information regarding other federal or state inmates, you are prohibited from publishing such information.” There is no indication in the record that the BOP could justify this prior restraint. See *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Any system of prior restraint bears a heavy presumption against its constitutional validity.); and *Houchins v. KQED*, 438 U.S. 1, 14 (1978) (“Editors and newsmen who inspect a jail may decide to publish or not to publish what information they acquire.”)

The in-person interview is the lifeblood of quality journalism, and there can be no wholly adequate substitute for a reporter. *Amici* believe that too often, as in the lower court decision here, the *Turner* analysis is colored by the opinion that from a journalist's perspective, an in-person interview is interchangeable with phone discussions or written correspondence. This discounts the value of sitting face to face with an interview subject, which allows the journalist to judge the source's nonverbal actions, which, in turn, enhances the reliability of the information and allows for more accurate and complete stories.

Many courts appreciate how indispensable this tool is for reporters. In 2001, the United States District Court for the Northern District of Illinois upheld a journalist's request to attend Cook County Jail programs for incarcerated women. *The Chicago Reader v. Sheahan*, 141 F.Supp.2d 1142 (N.D. Ill. 2001). The court found that alternatives offered to the reporter, which included telephone interviews with jail officials and inmates, as well as a videotape of the program, were "not adequate substitutes for first-hand observations." *The Chicago Reader*, 141 F.Supp.2d at 1146. This was in part, the court said, because inmates may feel more comfortable "talking to someone who was physically in class with them." *Id.*

The value of the face-to-face interview is analogous to the time-tested method of divining truth at a trial. As Justice Powell said in his

Saxbe dissent, a “newsman depends on interviews in much the same way that a trial attorney relies on cross-examination.” 417 U.S. at 853-854 (Powell, J., dissenting).

The need for in-person interviews is particularly crucial for journalists reporting on death row, as a sampling of that reporting demonstrates. For example, in 1998, a reporter for the *Los Angeles Times* spent four hours interviewing Bill Bradford, a man sentenced to death for killing two young women, resulting in a chilling and illuminating report.

In a rare and wide-ranging death row conversation, Bradford explained why he has abandoned his appeals

If he can't be free, Bradford says, he'd rather be dead.

....

With his hands cuffed behind his back, Bradford walked in shortly before 9 a.m. He backed into the cell door and placed his hands through a slot, where a guard unlocked the handcuffs. He wore no shackles during the visit, and his hands remained free. At one point, discussing a knife police found during a search of his car, he turned to his visitor, made a stabbing motion, and said, “I could do more damage to you right now with that pen.”

His manner was more joking than menacing, but the point was not lost.

See “Killer Counts Down Days to the Death He Welcomes,” *Los Angeles Times*, August 6, 1998.

Death row reporting like this can remind citizens why many states and Congress have elected to enact the ultimate penalty.

At the same time, it is no secret that problems infect the death penalty system, and journalists have a long history of utilizing

jailhouse interviews to investigate the issue of innocent people being sentenced to death for crimes they did not commit.

One particularly memorable example involves journalism students who, as part of a Northwestern University investigatory reporting class, were able to utilize an in-person inmate interview to obtain a confession to a murder that had resulted in the conviction of four innocent men, two of whom were sentenced to death row. Recounting her investigation in a 1999 *Baltimore Sun* article, Laura Sullivan captures the moment of the jailhouse exchange in gripping detail.

Ira Johnson was unlike anyone I had ever met. Something about him left you uneasy, as if he knew who you were without asking. He could look right through you, dismiss you, even as you sat in front of him. He was a strange mix of danger and aloofness, the way his legs twitched under the table, the way he leaned so far back in his chair. He would smile, then jingle the handcuffs hanging from his wrists. Something about him, about the way he stared at your back when you turned around, something about him was evil.

He had killed, and he watched while his friends killed. And yet months later this same man would lean across a table in an Illinois prison and confess to an unspeakable crime so that four men wrongfully convicted – two sent to death row – wouldn't die for what he had done.

Ira Johnson, 36, with dark eyes and calloused hands, was already serving time for murdering a woman in a drug deal gone bad. But this was different. He could get the death penalty for acknowledging what happened one night in early May 1978. And he knew it.

My partner and I, two students from Northwestern University, were there hoping to find information about a brutal

kidnapping, rape and double murder of a man and his fiancée. It was 1996, 18 years since they had been killed, and yet nothing about the case seemed settled. It lingered in the courts like a bad taste no one wanted to talk about and no one wanted to remember.

Ira Johnson was the only person alive who could put the pieces together. And as he sat at the table struggling between good and bad, between doing the right thing and telling us to go to hell, it struck me that he was the final paradox in a story that began in violence, corruption and racism on the South Side of Chicago, and ended in the hands of the unlikeliest heroes.

....

Sitting at the table, Ira was barely whispering. He was so quiet. After that night, he said, the four of them vowed never to speak of any of it again. Ira had kept that promise. Until now.

Ira told us he had been a good kid, that he had just wanted to be like his brother. But that night he crossed a line.

I wondered what he was thinking as he sat across the table.

Could he see that I was just like her, that 23-year old student he watched his brother kill? Could he see that she was all I had thought about for six months, running over in my head what her last few hours had been like? Did he understand that she had a life? I don't know if he did. He never even knew her name.

And yet why was he telling us this? Why was he crying?

See "Three students track down killers," *The Baltimore Sun*, June 27, 1999.

Amici submit that Johnson was telling Sullivan this because she was sitting across the table, asking him questions face to face. It seems unremarkable to conclude that this confession never would have taken place if Sullivan had been forced to conduct her interview on the telephone, or in handwritten correspondence.

Of course, not all media interviews of prisoners result in the dramatic exoneration of innocent men condemned to death. But the First Amendment does not contemplate such productiveness as a prerequisite for a journalist to be able to access information. Instead, the Constitution acts as a bulwark against inappropriate government interference in communications between inmates and the press, communication which in turn acts as a curb on the awesome power that the government sometimes wields to the detriment of innocent men.

The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Ultimately, there is no wholly adequate substitute for the in-person observations of a journalist, and the ability to gather information in this manner should not be taken away based on unsupported assertions or political preferences of those who operate prisons.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the entry of summary judgment and remand the case for further proceedings.

Respectfully Submitted,

LUCY A. DALGLISH

GREGG P. LESLIE
NATHAN WINEGAR
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100
*Attorneys for The Reporters
Committee for Freedom of the
Press*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE
REQUIREMENTS**

1. This brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,513 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)iii.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Century Schoolbook font.

LUCY A. DALGLISH

Dated: August 8, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

I HEREBY CERTIFY that, pursuant to Circuit Rule 31(e), I have filed electronic versions of the brief in non-scanned PDF format, and I hereby verify that the same is virus free.

LUCY A. DALGLISH

Dated: August 8, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served one original and fourteen copies of the foregoing *amicus* brief, and one CD containing the foregoing *amicus* brief in searchable PDF format upon:

Clerk's Office
U.S. Court of Appeals
219 South Dearborn Street
Room 2720
Chicago, Illinois 60604

I HEREBY Certify that I served two copies of the foregoing *amicus* brief, and one CD containing the foregoing *amicus* brief in searchable PDF format upon:

Jerold S. Solovy
Barry Sullivan
Chad E. Bell
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611
Attorneys for Plaintiff-Appellant David Paul Hammer

Edward Himmelfarb, Esq.
Attorney, Appellate Staff,
RFK Main Room 7646
3370 V Street, N.E.
Washington, D.C. 20018

by mailing them via Federal Express Overnight Service, on this 8th day of August 2007.

LUCY A. DALGLISH