The Burger Court Opinion Writing Database

Houchins v. KQED, Inc.

438 U.S. 1 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 28, 1978

Dear John:

Re: 76-1310 Houchins v. KQED, Inc.

I will be writing in this case. If my position does not cover the views of Byron and Bill Rehnquist, they,too,may have something to say.

Regards,

WEB

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 25, 1978

Re: 76-1310 Houchins v. KQED, Inc.

MEMORANDUM TO THE CONFERENCE:

I have devoted a substantial amount of time on a dissent in this case with some emphasis on systems of citizen oversight procedures which exist in many states. Some have fallen into disuse, but these can be traced back to colonial days when all public institutions were subject to citizen surveillance.

This approach, rather than pushy TV people interested directly in the sensational, is the way to a solution. I will be circulating my views in due course. I agree with Potter's view that media have a right of access but not beyond that of the public generally.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 19, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-1310 Houchins v. KQED

Since John's opinion has been "in limbo" for some time, I have put my hand to an alternative, proposing reversal.

I send it in "Wang draft" and in less than the final form I would circulate normally. If there is enough support for this result, I am willing to put in more time on refinements.

Regards,

WEB

Draft - 5/19/78

76-1310 - Houchins v. KQED

The question presented is whether the First Amendment gives the news media the right of access to a county jail to interview inmates and make sound recordings, films, and photographs.

1.

Petitioner Houchins, as Sheriff of Alameda County, controlls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates a licensed television and radio broadcasting station which has frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The account reported a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there. The report also included a quotation from the Sheriff denying that prison conditions were responsible for the prisoners' illnesses.

KQED requested permission from Sheriff Houchins to inspect and take pictures within the Greystone facility. He refused. In response, KQED and the Alameda and Oakland Branches of the National Association for the Advancement of Colored People (NAACP) filed suit under 42 U.S. § 1983. They alleged that the Sheriff had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 23, 1978

Dear Potter:

Re: 76-1310 Houchins v. KQED

In light of your concurring opinion I will add some thoughts along the following lines: there are literally dozens of people -- law teachers, judges, penologists, writers, lawyers -- who tour prisons (as I did for 25 years in Europe and U.S.A.). Many of them write books, articles, or give lectures or a combination. I'm sure you will agree they have the same rights as a TV reporter doing a "documentary." Can they have greater First Amendment rights than these others whose form and certainty of communications is not so fixed?

This, of course, goes to the "debate" on the "special" status of those who regularly or semi-regularly use newspapers or broadcast facilities and reach a larger audience than a Law School, a Judicial Conference, or a Conference on Corrections. I do not believe First Amendment rights can be circumscribed by the scope of the audience. If so, the early pamphleteers who could afford only 100 sheets were "suspect."

I will try to be along soon with this enlargement with some emphasis on the fact that a team of TV cameramen (camera-persons!) will tend to produce far more disruption than the serious student or judge, lawyer, or penologist who wants to exercise First Amendment rights with a somewhat different objective.

Regards,

WEB

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-1310 Houchins v. KQED

In our common effort to "clear the docket" I have made another effort to dispose of this case. I believe it wholly consistent with Pell and Saxbe, et al, if not indeed compelled by those holdings.

As a legislator I would vote for a reasonably orderly access to prisons, etc., by media, because it would be useful. But that is not the issue. The question is whether special access rights are constitutionally compelled.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 9 1978

Second Draft

Re: 76-1310 - Houchins v. KQED

The question presented is whether the news media have a Constitutional right of access to a county jail over and above that of other persons to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

1.

Petitioner Houchins, as Sheriff of Alameda County, California controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The report included a statement by a psychiatrist

Wm Brewer Oct 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

16

June 14, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-1310 Houchins v. KQED

Here, with a few modifications, is my final effort to dispose of this case.

Regards,

WEB

DRAFT III - 6/14/78

SEE PAGES: 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

Re: 76-1310 - Houchins v. KQED

The question presented is whether the news media have a Constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

1.

Petitioner Houchins, as Sheriff of Alameda County, California, controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita jail. The report included a statement by a psychiatrist

STYLISTIC CHANGES

pp 2, 3, 4, 6, 7, 8, 9, 11, 10, 12

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: JUN 2 0 1978

(Printed)
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

I

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita Jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a quotation from the Sheriff denying that prison conditions were responsible for the prisoners' illnesses.

pp 3, 4, 6, 9, 10

STYLISTIC CHANGES

To: Mr. J...
Mr. ...
Mr. ...
Mr. ...
Mr. ...

From: ...

Circulated: ...

Recirculated: JUN 2 0 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 22, 1978]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

I

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita Jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a quotation from the Sheriff denying that prison conditions were responsible for the prisoners' illnesses.

STYLISTIC CHANGES

See pgs. 4,5,6,7,9,11,12,13

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 1 1978

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST joined.

The question presented is whether the news media have a constitutional right of access to a county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio and television.

I

Petitioner Houchins, as Sheriff of Alameda County, Cal., controls all access to the Alameda County Jail at Santa Rita. Respondent KQED operates licensed television and radio broadcasting stations which have frequently reported newsworthy events relating to penal institutions in the San Francisco Bay Area. On March 31, 1975, KQED reported the suicide of a prisoner in the Greystone portion of the Santa Rita Jail. The report included a statement by a psychiatrist that the conditions at the Greystone facility were responsible for the illnesses of his patient-prisoners there, and a statement from petitioner denying that prison conditions were responsible for the prisoners' illnesses.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1978

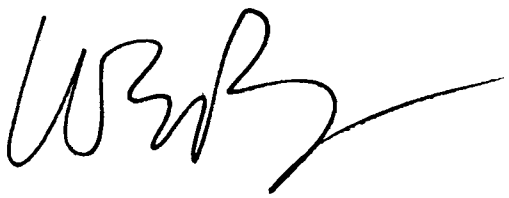
Re: 76-1310 - Houchins v. KQED, Inc.

MEMORANDUM TO THE CONFERENCE:

I intend to make a slight enlargement of the quote from Potter's Hastings Law Review article, cited at pages 12-13 of my opinion, so it will read as follows:

> "There is no constitutional right to have access to particular government information, or to require openess from the bureaucracy. [Citing Pell v. Procunier, supra.] The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society." Stewart, Or of the Press, 26 Hast. L. J. 631, 636 (1975).

Regards,



HA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1978

Re: Case Held for No. 76-1310 - Houchins v. KQED, Inc

MEMORANDUM TO THE CONFERENCE:

No. 77-884 Garrett v. Estelle I WILL VOTE TO DENY CERT

Petitioner, a reporter for a Texas television station, requested permission from the Texas Dept. of Corrections to film the first execution to take place under Texas' new death penalty statute.1/ Permission was denied because Art. 43.20 of the Texas Code of Criminal Procedure permitted only certain officials and not more than five friends or relatives of the condemned person to be present at executions. Petitioner then filed this suit asserting, among other rights, a First Amendment Right to film executions for broadcast purposes and seeking a judgment declaring Art. 43.20 unconstitutional.

The District Court (Taylor) preliminarily ordered reinstitution of a prior Department of Corrections policy of permitting two media pool representatives to be present at executions. The Court also ordered that petitioner be permitted to film executions as "pool representatives for the electronic media."

Subsequently, respondent moved that the District Court modify its order by deleting the portion ordering that petitioner be allowed to witness and film executions. In support of the motion, respondent stated its intent to comply with the other portions of the order and also to reinstitute its policy of permitting any media representative to witness, but not to photograph or record, executions via closed circuit television monitors. The District Court denied the motion.

1/ When petitioner filed this suit on Dec. 13, 1976, an execution was scheduled for Dec. 27, 1976 and other executions were scheduled for Jan. 14, 1977. Those executions, however, were stayed prior to the completion of the proceedings in the District Court in this case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1978

RE: No. 76-1310 Houchins v. KQED, Inc.

Dear John:

I agree.

Sincerely,

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1978

RE: No. 76-1310 Houchins v. KQED, Inc., et al.

Dear John:

Please join me.

Sincerely,

Bill

Mr. Justice Stevens

cc: The conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 24, 1978

Re: No. 76-1310, Houchins v. KQED, Inc.

Dear John,

Try as I may, I cannot bring myself to agree that a county sheriff is constitutionally required to open up a jail that he runs to the press and the public. Accordingly, I shall not be able to subscribe to the opinion you have circulated, affirming the judgment of the Court of Appeals.

My tentative view, which may not stand up, is that it would be permissible in this case to issue an injunction assuring press access equivalent to existing public access, but not the much broader injunction actually issued by the District Court. I shall in due course circulate an expression of these views.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

22 MAY 1978

Circulated:

Recirculated:

No. 76-1310, HOUCHINS v. KQED

MR. JUSTICE STEWART, concurring in the judgment.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.*/ Accordingly, I agree substantially with what the opinion of the Chief Justice has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

---

*/ Forces and factors other than the Constitution must determine what government-held data are to be made available to the public. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 728-730 (concurring opinion).

p. 1

Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

No. 76-1310, HOUCHINS v. KQED

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 12 JUN 1978

MR. JUSTICE STEWART, concurring in the judgment.

I agree that the preliminary injuction issued against the petitioner was unwarranted, and therefore concur in the judgment. In my view, however, KQED was entitled to injunctive relief of more limited scope.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.*/ Accordingly, I agree substantially with what the opinion of the Chief Justice has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

---

*/ Forces and factors other than the Constitution must determine what government-held data are to be made available to the public. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 728-730 (concurring opinion).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 15 JUN 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE STEWART, concurring in the judgment.

I agree that the preliminary injunction issued against the petitioner was unwarranted, and therefore concur in the judgment. In my view, however, KQED was entitled to injunctive relief of more limited scope.

The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.* Accordingly, I agree substantially with what the opinion of THE CHIEF JUSTICE has to say on that score.

We part company, however, in applying these abstractions to the facts of this case. Whereas he appears to view "equal access" as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public.

When on assignment, a journalist does not tour a jail simply

*Forces and factors other than the Constitution must determine what government-held data are to be made available to the public. See, *e. g.*, *New York Times Co.* v. *United States*, 403 U. S. 713, 728–730 (concurring opinion).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 22, 1978

Re: No. 76-1310 - Houchins v. KQED

Dear Chief,

As previously indicated to you, I plan to express my views orally in this case, in brief compass.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1978

Re: 76-1310 - Houchins v. KQED

Dear Chief,

If the First Amendment requires a government to turn over information about its prisons on the demand of the press or to open its files and properties not only to routine inspections but for filming and public display, it would be difficult to contain such an unprecedented principle. I would suppose there are many government operations that are as important for the public to know about as prisons, or more so; yet I cannot believe that the press has a constitutional right to be at every administrator's elbow and to read all of his mail. To start down this road would surely necessitate working out a series of constitutionally authorized exemptions from the duty of state governments to submit themselves to daily or periodic auditing by the press.

This is not to say that the availability of accurate information about government is not essential or to deny the important role of the press in this regard. But I resist taking over what is essentially a legislative task and by reinterpreting the First Amendment assigning to ourselves and other courts the duty of determining whether the state and Federal Governments are making adequate disclosures to the press.

I join your opinion and hope that it commands a majority.

Sincerely yours,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1978

Re: No. 76-1310 - Houchins v. KQED, Inc.

Dear Chief:

I should be marked out of this one.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1978

Re: No. 76-1310 - Houchins v. KQED, Inc.

Dear Chief:

I should be marked out of this one.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

March 20, 1978

No. 76-1310 Houchins v. KQED

Dear John:

Over the weekend, I read with special interest and admiration your opinion for the Court.

My interest derives, in major part, from the fact that I read your opinion as a substantial adoption of the views I expressed in my Saxbe dissent. I admire your opinion because, in addition to being extremely well written, you come out with sound doctrine and yet accomplish this consistently with Saxbe as well as Pell.

If your draft becomes the opinion of the Court, as I hope, it will be a landmark precent. It will be the first time that the Court has held that both the press and the public share a First Amendment right of access to information in the government's hands, subject to appropriate safeguards.

I do have a couple of suggestions that I think are quite important. We know that pressures from various sources, in addition to the press, have been building in recent years for total disclosure of all information in the hands of government, however confidential or secret it may be when judged in terms of enabling government to function. For example, there are law professors who join the media in saying that Conferences of our Court should be open to the public. The Freedom of Information Act also has caused serious problems. Ed Levi told me that it now requires the full time attention of over 100 people in the Justice Department simply to process demands. This sort of "openness" has the merit you identify. It also has negatives. It causes people in government to be ever fearful that their views and recommendations will end up in the public press or in some congressional expose. Thus, forthright candor - that often exists only if one is assured of confidentiality - is likely to become a

disappearing characteristic of government officials and employees.

In Nixon I (418 U.S.683, at 705), the Court declined to sustain an absolute privilege by the President, but recognized the need for a qualified privilege:

> "The first ground [of the privilege] is the valid need for protection of communications between high Govrernment officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."

We held that the qualified privilege has "constitutional underpinnings". (Id. 706). If the Court now holds, in accordance with your draft, that there is a constitutional right of access to information in the government's hands, I suppose courts will be called upon to "balance" the interests supporting the qualified right of governmental officials to confidentiality and the right of access. The difficulty is that normally a First Amendment right weighs more heavily in the scales of a balancing analysis than almost any other right. I therefore suggest the desirability of some broader caveat than the sentence on page 17 of your draft. There, you recognize the confidentiality of "proceedings, conferences and meetings of official bodies" (citing Branzburg), but this language can be read as not includingthe type of confidentiality recognized in Nixon.

In a different context, the effectiveness of our foreign intelligence (CIA) and the domestic intelligence (FBI) services has been seriously handicapped by the investigations and the "exposes" with which we are all familiar. An official of the Carter administration (indeed, a member of the Cabinet) has told me within the past three months that the broad ranging (and often publicity seeking) "investigations" of the CIA over the past couple of years have substantially impaired its capacity to serve our country effectively. My source is neither the Secretary of Defense nor of State. I would think it quite important to provide some specific recognition of the need for secrecy. Something along the following lines would do it:

> "In addition, some functions of government - essential to the protection of the public and indeed our country's vital interests - necessarily require a large measure of secrecy, subject to appropriate legislative oversight."

Even the recognition of the qualified privilege of confidentiality of government officials, and the inclusion of the foregoing sentence, will not prevent your opinion from encouraging numerous attempts to obtain arguably confidential and secret information. In short, we can expect a good deal of litigation testing the reach of the new principle that you articulate so well. But additions along the lines I have suggested should give courts a strong signal not to view the opinion as justifying intrusions on confidentiality and secrecy where these are necessary to the proper functioning of government.

In sum, I am enthusiastic about your opinion, but I do think it would be wise to make somewhat clearer that the right of access necessarily has limitations.

I am not circulating this letter to the Conference, as I am hopeful you can make changes that will enable me to join you promptly.

Sincerely,

Mr. Justice Stevens

lfp/ss

March 22, 1978

No. 76-1310 Houchins v. KQED

Dear John:

Your proposed changes are satisfactory to me, although I have taken the liberty of rearranging the footnotes - for reasons that I think will be apparent.

Sincerely,

Mr. Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 23, 1978

No. 76-1310 Houchins v. KQED

Dear John:

Please join me.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Confernce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1978

No. 76-1310 Houchins v. KQED

Dear John:

Please add my name to your dissent.

Sincerely,

Lewis

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1978

Re: No. 76-1310 - Houchins v. KQED

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1978

No. 76-1310 - Houchins v. KQED

Dear Chief:

Although I was a solid join with respect to your earlier draft, your circulation of June 9th (second draft) leaves me much less convinced. While I am perfectly willing to join in any accommodation as to language or minor points, the paragraph beginning at the bottom of page 14 and ending at the top of page 15, and the new material at the top of page 8, both seem to me to weaken the thrust of your opinion. I will certainly not jump ship on you at this point, and would be happy to offer any suggestions that might both satisfy me and accomplish your goal of getting a Court; but with the language which I have referred to in its present state, I think you will have to mark me as "dubitante", as FF would have said.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1978

Re: No. 76-1310 Houchins v. KQED

Dear Chief:

I am still with you.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

— ✓

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAR 15 '78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1978]

MR. JUSTICE STEVENS, delivered the opinion of the Court.

The question presented is whether a preliminary injunction requiring the Sheriff of Alameda County, Cal., to allow representatives of the news media access to the county jail is consistent with the holding in *Pell* v. *Procunier*, 417 U. S. 817, 834, that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."

Respondent KQED, Inc., operates a public service television station in Oakland, Cal. It has televised a number of programs about prison conditions and prison inmates. KQED reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 21, 1978

Re: 76-1310 - Houchins v. KQED

Dear Lewis:

Needless to say I am most gratified by your letter, and I think your concern is entirely justified. Do you think the suggested changes on the enclosure are adequate?

Yes. New n. 28 is good.
JPS

Respectfully,

JPS

Mr. Justice Powell

the press claim to a particular form of access, since the record demonstrated that the flow of information to the public, both directly and through the press, was adequate to survive constitutional challenge; institutional considerations justified denying the single, additional mode of access sought by the press in that case.

Here, in contrast, the restrictions on access to the inner portions of the Santa Rita jail that existed on the date this litigation commenced concealed from the general public the conditions of confinement within the facility. The question is whether petitioner's policies, which cut off the flow of information at its source, abridged the public's right to be informed about those conditions.

The answer to that question does not depend upon the degree of public disclosure which should attend the operation of most governmental activity. Such matters involve questions of policy which generally must be resolved by the political branches of government.[28] Moreover, there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy. For example, the public and the press are commonly excluded from "grand jury proceedings, our own conferences, [and] the meetings of other official bodies gathering in executive session . . . ." *Branzburg* v. *Hayes*, 408 U. S., at 684; *Pell* v. *Procunier*, 417 U. S., at 834.[29] In such situations the reasons for withholding information from the public are both apparent and legitimate.

[29] In the case of grand jury proceedings, for example, the secrecy rule has been justified on several grounds:

"(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exoner-

See attached insert for n. 28.

In addition, some functions of government – essential to the protection of the public and indeed our country's vital interests – necessarily require a large measure of secrecy, subject to appropriate legislative oversight. [30]

76-1310 - Houchins v. KQED

Add following footnote on page 17 of printed draft:

28/ In United States v. Nixon, 418 U.S. 683, 705 n. 15, we pointed out:

> "There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. Warren, The Making of the Constitution 134-139 (1937)."

In ~~recognizing~~ the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties, we ~~explained~~ that "the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." Id., at 705.

30. We also recognized in U.S. v. Nixon, supra at 705.

pp. 17-18
footnotes remembered

The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 23 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1978]

MR. JUSTICE STEVENS, delivered the opinion of the Court.

The question presented is whether a preliminary injunction requiring the Sheriff of Alameda County, Cal., to allow representatives of the news media access to the county jail is consistent with the holding in *Pell* v. *Procunier,* 417 U. S. 817, 834, that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."

Respondent KQED, Inc., operates a public service television station in Oakland, Cal. It has televised a number of programs about prison conditions and prison inmates. KQED reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JUN 15 '78

Recirculated: _____

Please join me

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE STEVENS, dissenting.

The Court holds that the scope of press access to the Santa Rita jail required by the preliminary injunction issued against petitioner is inconsistent with the holding in *Pell* v. *Procunier,* 417 U. S. 817, 834, that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" and therefore the injunction was an abuse of the District Court's discretion. I disagree.

Respondent KQED, Inc., has televised a number of programs about prison conditions and prison inmates, and its reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding that the "shocking and debasing conditions which prevailed [at Santa Rita] constituted cruel and unusual punishment for

cc Mr. Brennan 6/15/78

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 16, 1978

Re: 76-1310 - Houchins v. KQED

Dear Lewis:

I have added the following at the end of n. 29 on p. 18 of the printed draft:

> "Nixon v. Warner Communications, Inc., ___ U.S. ___, decided this Term, does not suggest a contrary conclusion. The effect of the Court's decision in that case was to limit the access by the electronic media to the Nixon tapes to that enjoyed by the press and the public at the time of the trial. That case presented 'no question of a truncated flow of information to the public.'" Id., at ___.

OK

I hope this is acceptable.

Respectfully,

Mr. Justice Powell

pp. 1, 18, 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT Recirculated: 6/19/78

SUPREME COURT OF THE UNITED STATES

No. 76-1310

Thomas L. Houchins, Sheriff of the County of Alameda, California, Petitioner, *v.* KQED, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

The Court holds that the scope of press access to the Santa Rita jail required by the preliminary injunction issued against petitioner is inconsistent with the holding in *Pell* v. *Procunier*, 417 U. S. 817, 834, that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" and therefore the injunction was an abuse of the District Court's discretion. I respectfully disagree.

Respondent KQED, Inc., has televised a number of programs about prison conditions and prison inmates, and its reporters have been granted access to various correctional facilities in the San Francisco Bay area, including San Quentin State Prison, Soledad Prison and the San Francisco County Jails at San Bruno and San Francisco, to prepare program material. They have taken their cameras and recording equipment inside the walls of those institutions and interviewed inmates. No disturbances or other problems have occurred on those occasions.

KQED has also reported newsworthy events involving the Alameda County Jail in Santa Rita, including a 1972 newscast reporting a decision of the United States District Court finding that the "shocking and debasing conditions which prevailed [at Santa Rita] constituted cruel and unusual punishment for

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 22, 1978

Re: 76-1310 - Houchins v. KQED

Dear Chief:

Although I previously indicated that I would not say anything orally in this case, since both you and Potter are announcing your positions, I will take about a minute.

Respectfully,

The Chief Justice

Copies to the Conference

P.S. As I understand the "Glaxo" tradition, I have the inherent right to enlarge my time to 90 seconds if necessary.

Wm Brennan
07 77