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Comment: Death Watch: Why America Was Not Allowed To Watch Timothy McVeigh Die

*Robert Perry Barnidge, Jr.*¹

I. Introduction

Timothy J. McVeigh was sentenced to death on August 14, 1997, for the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, which left 168 people dead.² Although United States Attorney General John Ashcroft explained that “all the citizens of the United States were victims of the crimes perpetrated by Mr. McVeigh,”³ all such victims were not allowed to watch McVeigh’s execution by lethal injection at the United States Penitentiary at Terre Haute (USPTH) on June 11, 2001.⁴

Partly because of the logistical difficulties in accommodating the wishes of the survivors and the victims’ families in personally viewing McVeigh’s execution, Ashcroft approved of a setup whereby a closed circuit transmission of McVeigh’s execution would be available exclusively to “authorized survivors and family members of victims, and designated counselors and government representatives.”⁵ Among the stipulations were that the broadcast would be

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² See *United States v. McVeigh*, 153 F.3d 1166, 1176-1179 (10th Cir. 1998).

³ *Entm’t Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1008 (S.D. Ind. 2001).

⁴ CNN, *The Execution of Timothy McVeigh*, at <http://www.cnn.com/SPECIALS/2001/okc/> (last visited November 14, 2001) (on file with the North Carolina Journal of Law & Technology).

⁵ *Id.*

contemporaneous, instantaneous, and without recording of any kind and that it would utilize encryption technology with state-of-the-art videoconferencing over high-speed digital telephone lines.⁶

In *Entertainment Network, Inc. v. Lappin*,⁷ Internet content provider Entertainment Network, Inc. (ENI) requested permission to record and simultaneously broadcast McVeigh's execution via the Internet or, alternatively, to gain access to the live audiovisual transmission of the execution for the purpose of broadcasting that material.⁸ The Bureau of Prisons (BOP) declined ENI's request on the grounds that 28 C.F.R. § 26.4(f)⁹ prohibited such recording.¹⁰ Section 26.4(f) states that, except as otherwise ordered by a court, "[n]o photographic or other visual or audio recording of . . . [an] execution shall be permitted."¹¹ ENI's challenge was "to its face," meaning that, if successful, the section 26.4(f) ban could no longer be enforced against any member of the press.¹²

In upholding the constitutionality of the regulation, the court found that it was content neutral and gave the media sufficient alternative means of informing the public about executions. Even were this not the case, overriding penological concerns and a general deference to the prison system still required that the ban be enforced.¹³

⁶ *Id.*

⁷ *Id.* at 1002.

⁸ *Id.* at 1007-1008.

⁹ 28 C.F.R. § 26.4(f) (2001).

¹⁰ See *Entm't Network, Inc.*, 134 F. Supp. 2d at 1007-1008.

¹¹ 28 C.F.R. § 26.4(f).

¹² *Entm't Network, Inc.*, 134 F. Supp. 2d at 1009 (citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 483 (1989); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998)).

¹³ See *id.* at 1018-19.

This note examines the reasons why the *ENI* court upheld the ban on the press's ability to record executions. After explaining the court's reasoning, it will discuss how, although the ruling was not surprising, the court erred in finding section 26.4(f) to be content neutral and gave unwarranted, uncritical weight to the government interest in upholding the ban. Given the terrorist events in New York City and Washington, D.C., on September 11, 2001, this note also examines the press's rights of access in the event that suspected terrorist Osama bin Laden should be somehow captured, tried in an American court, and executed. It will finally present a number of compromises that would have been more appropriate on the facts of *ENI*.

II. Press Not Guaranteed First Amendment Rights of Access Greater than Public

The *ENI* court stated that the First Amendment rights of the press to information must be analyzed in relation to information available to the general public.¹⁴ The court relied on *Garrett v. Estelle*¹⁵ in this part of its analysis.¹⁶ In *Garrett*, a news reporter, Garrett, sought permission from the Texas Department of Corrections to film interviews with inmates on death row and to film a prisoner's execution, the first execution under Texas' new capital punishment statute.¹⁷ Garrett sought an injunction to compel Texas not to curtail his interviewing of inmates on death

¹⁴ See *Entm't Network, Inc.*, 134 F. Supp. 2d at 1010 (referencing *Estes v. Texas*, 381 U.S. 532, 584 (1965)).

¹⁵ *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977).

¹⁶ See *Entm't Network, Inc.*, 134 F. Supp. 2d at 1011-13.

¹⁷ *Garrett*, 556 F.2d at 1276.

row or his filming of executions.¹⁸ The district court, in a preliminary injunction, held that article 43.17 of the Texas Code of Criminal Procedure¹⁹ violated the First and Fourteenth Amendments, that the press should be allowed to visit death row, that the provisions allowing for a press pool at executions should be reinstated, and that Garrett, as a member of the press, should be allowed to film executions.²⁰

Texas appealed the district court's order that required it to allow Garrett to film executions.²¹ It relied on recent Supreme Court decisions which held that the press's right of access to prisons or prisoners does not exceed the general public's right and contended that "since the public has no right under the first [sic] amendment [sic] to film executions, a member of the press has no such right."²²

In particular, the *Garrett* court relied on *Saxbe v. Washington Post Co.*²³ and *Pell v. Procunier*²⁴ for the general principle that the press's right of access to information is not

¹⁸ *Id.* at 1276-77.

¹⁹ TEX. CODE CRIM. PROC. ANN. art. 43.17 (2001) (stating that "Upon receipt of such condemned person by the Director of the Department of Corrections, the condemned person shall be confined therein until the time for his or her execution arrives, and while so confined, all persons outside of said prison shall be denied access to him or her, except his or her physician, lawyer, and clergyperson, who shall be admitted to see him or her when necessary for his or her health or for the transaction of business, and the relatives and friends of the condemned person, who shall be admitted to see and converse with him or her at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections").

²⁰ *Garrett*, 556 F.2d at 1277.

²¹ *Id.*

²² *Id.*

²³ *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

²⁴ *Pell v. Procunier*, 417 U.S. 817 (1974).

greater than the general public's right and that the government is not obligated to give the press access to information not available to the general public.²⁵ Put differently, the First Amendment rights of the press do not "accompany the press where the public may not go."²⁶

Pell also supports the proposition that a state is not required to give the press rights of access to information greater than those given to members of the public.²⁷ In *Pell*, members of the press argued that section 415.071 of the California Department of Corrections Manual²⁸ was unconstitutional because it prevented them from conducting in-person interviews with specific prison inmates and amounted to state interference with the press.²⁹ However, the Court reasoned that because section 415.071 prohibited both the press and the public from conducting such interviews, it was consistent in its prohibition, did not discriminate against the press, and did not violate the First and Fourteenth Amendments.³⁰

*United States v. McDougal*³¹ also supports the proposition that the First Amendment does not grant the press rights of access

²⁵ See *Garrett*, 556 F.2d at 1277 (citing *Pell*, 417 U.S. 817, 834; *Saxbe*, 417 U.S. 843, 850).

²⁶ *Id.* at 1279.

²⁷ *Pell*, 417 U.S. at 833-34.

²⁸ See *id.* at 819 (quoting section 415.071 of the California Department of Corrections Manual as stating that "[p]ress and other media interviews with specific individuals will not be permitted").

²⁹ See *id.* at 833.

³⁰ See *id.* at 835 (stating "since § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee").

³¹ *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996).

greater than those of the general public.³² In *McDougal*, press organizations and a non-profit citizens' group sought physical access to the videotaped recording of President Bill Clinton's deposition in an underlying criminal case.³³ The district court denied the plaintiffs' request for the videotapes,³⁴ and its ruling to withhold rights of access to the videotapes for the press was affirmed by the Eighth Circuit.³⁵ The *McDougal* court, like the *ENI* court, stated that the First Amendment does not guarantee the press greater rights than those afforded the general public.³⁶ According to the *McDougal* court, "members of the public, including the press, were given access to the information contained in the videotape. Therefore, appellants received all the information to which they were entitled under the First Amendment."³⁷

In summary, the *ENI* court cited two cases involving press rights of access to prisons, *Garrett* and *Pell*, and one case dealing with press rights to material not available to the general public in a non-prison context, *McDougal*, for the proposition that the First Amendment does not guarantee the press rights of access that exceed the rights of access afforded the general public.³⁸ Since members of the general public were prohibited from recording McVeigh's execution, the court reasoned that the state was not required to give a member of the press, *ENI*, this right of access. The First Amendment did not require it; *ENI* was not guaranteed it.

³² *Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1013 (S.D. Ind. 2001).

³³ *McDougal*, 103 F.3d at 652.

³⁴ *Id.* at 654.

³⁵ *Id.* at 659.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *See Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1010-13 (S.D. Ind. 2001).

III. Government Regulation Must Be Content Neutral

ENI also argued that by preventing the press from making photographic, audio, and visual recordings of executions, section 26.4(f) was not content neutral and, thus, was subject to a strict scrutiny analysis.³⁹ Essentially, ENI stated that the regulation was an attempt by the government to censor content in violation of the First Amendment. ENI argued that the content of written and verbal accounts of an execution differs in a substantive way from the photographic, audio, and visual recordings prohibited by section 26.4(f),⁴⁰ in that “human accounts are subject to ‘spin’ and perspective, whereas the broadcast is not. ENI argues, therefore, that the BOP is denying the public information based on its content.”⁴¹ However, the court disagreed with ENI’s understanding of the word “content” and found no First Amendment violation on such grounds.⁴²

The *ENI* court adopted the test set forth in *Ward v. Rock Against Racism*⁴³ to determine whether a government regulation is content neutral.⁴⁴ According to the test, the “principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys [t]he government’s purpose is the controlling consideration.”⁴⁵

³⁹ *Id.* at 1014.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁴⁴ *See Entm’t Network, Inc.*, 134 F. Supp. 2d at 1014.

⁴⁵ *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

Essentially, to qualify as content neutral, a government regulation must be "justified without reference to the content of the speech [and must serve] . . . purposes unrelated to the content, . . . even if it has an incidental effect on some speakers or messages but not others."⁴⁶

According to the court, section 26.4(f) did not discriminate based on content in its ban on photographic, audio, and visual recordings of executions because, in this case, "the medium is not the message."⁴⁷ The court held that, despite the ban, "the public can be fully informed; the free flow of ideas and information need not be inhibited."⁴⁸

JB Pictures, Inc. v. Department of Defense,⁴⁹ cited by the *ENI* court,⁵⁰ explores the content neutrality principle. *JB Pictures, Inc.* centered around a military policy that, in the context of Operation Desert Storm, prevented press access to the arrival of the remains of fallen soldiers at interim stops or ports of entry.⁵¹ The plaintiffs argued that this ban amounted to "impermissible 'viewpoint discrimination.'"⁵² The prohibition on their presence at the unloading of the caskets, the plaintiffs asserted, was unconstitutional content-based discrimination.⁵³ They argued that such coverage conveys a certain content, apparently a content "necessarily laden with anti-war implications,"⁵⁴ and because of

⁴⁶ *Entm't Network, Inc.*, 134 F. Supp. 2d at 1014 (referencing *Ward*, 491 U.S. at 791; *Boos v. Barry*, 485 U.S. 312, 320 (1988)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1015 (citing *Garrett v. Estelle*, 556 F.2d 1274, 1278 (5th Cir. 1977)).

⁴⁹ *J.B. Pictures, Inc. v. Dep't of Defense*, 86 F.3d 236 (D.C. Cir. 1996).

⁵⁰ *Entm't Network, Inc.*, 134 F. Supp. 2d at 1012.

⁵¹ See *JB Pictures, Inc.*, 86 F.3d at 238.

⁵² *Id.* at 238.

⁵³ *Id.* at 239.

⁵⁴ *Id.*

this, prohibiting such press coverage was the equivalent of shielding anti-war content from the public.

The *JB Pictures, Inc.* court doubted that images of caskets being unloaded would necessarily have anti-war implications.⁵⁵ According to the court, “[o]ne has only to think of Pericles’s famous speech honoring the first Athenians killed in the Peloponnesian War, or the Gettysburg Address, to recognize that one cannot easily pigeonhole the meaning of a return of soldiers killed in battle.”⁵⁶ Because the *JB Pictures, Inc.* court did not believe that images of the unloading of caskets conveyed a content, i.e., an anti-war content, not otherwise accessible by the public, it held that a government policy prohibiting such press coverage could not, and did not, amount to content discrimination.⁵⁷

According to the *ENI* court, filming an execution, like filming the unloading of caskets, conveys nothing of substance that cannot be otherwise conveyed through written and verbal accounts to the public.⁵⁸ Section 26.4(f), therefore, was content neutral in its scope, reach, and application.⁵⁹

⁵⁵ *Id.*

⁵⁶ *Id.* Apparently, the court suggested that public perceptions of war and attitudes toward American casualties have not changed since the Peloponnesian War or the Gettysburg Address. The court perhaps overlooked the impact of public support for the war effort during the Vietnam War when images of American body bags were broadcast into American homes. Such images conveyed an unmistakable, tangible, anti-war content to viewers that traditional newspaper accounts simply could not.

⁵⁷ See *JB Pictures, Inc.*, 86 F.3d 236.

⁵⁸ See *Entm’t Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1014-1015 (S.D. Ind. 2001).

⁵⁹ See *id.*

IV. "Time, Place, and Manner" Restrictions Must Allow for Other Means of Communication and Involve a Substantial Government Interest

Having determined that the regulation was content neutral in its application, the court considered that it might be a "time, place, and manner" restriction.⁶⁰ Referencing *United States v. Kerley*,⁶¹ the court stated that section 26.4(f) was a manner restriction on news coverage.⁶² A content neutral regulation of time, place, and manner, such as section 26.4(f), is permissible "only if it is supported by a substantial government interest and does not unreasonably limit alternative avenues of communication."⁶³

In considering the possibility of a substantial government interest, the court stated that questions of press rights of access must never be "unmoored from the particular settings in which the claims have been considered."⁶⁴ The particular setting in *ENI* required a consideration of the legitimate goals and policies of the prison system.⁶⁵ Put simply, the main concerns of the court were prison safety and stability,⁶⁶ and prison policies were to be afforded "wide-ranging deference."⁶⁷

⁶⁰ *Id.* at 1015 (citing *United States v. Yonkers Board of Education*, 747 F.2d 111, 114 (2d Cir. 1984)).

⁶¹ *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985).

⁶² *Entm't Network, Inc.*, 134 F.Supp.2d at 1015 (referencing *Kerley*, 753 F.2d 617).

⁶³ *Id.* (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)).

⁶⁴ *Id.* at 1016.

⁶⁵ *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

⁶⁶ *See id.* at 1017-18.

⁶⁷ *Id.* at 1017 (quoting *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991)).

The court applied the reasonableness standard of *Turner v. Safley*⁶⁸ in assessing whether a substantial government interest existed.⁶⁹ The *Turner* considerations are:

1) Whether there is a valid, rational connection between the prison regulation and the legitimate, neutral governmental interest; 2) If alternative means of exercising the constitutional right remain open to prison inmates; 3) The impact an accommodation of the asserted right would have on the guards and other inmates, and on the allocation of prison resources; and 4) The absence of ready alternatives.⁷⁰

The BOP gave four justifications for the regulation.⁷¹ Warden Harley Lappin of the USPTH gave more specific reasons for the regulation.⁷² According to Lappin, there were five concrete reasons for the ban on the press's recording of executions:

[F]irst, that to maintain security and good order in a prison setting, it is important that inmates understand and believe that they will be treated like

⁶⁸ *Turner v. Safley*, 482 U.S. 78 (1987).

⁶⁹ *See Entm't Network, Inc.*, 134 F. Supp. 2d at 1017-18.

⁷⁰ *Id.* at 1017 (citing *Turner*, 482 U.S. at 89-91).

⁷¹ *Id.* (quoting the purposes given by the Bureau of Prisons for the regulation as: "(i) the prevention of the sensationalizing of executions, (ii) the preservation of the solemnity of executions, (iii) the maintenance of security and good order in the Federal Prison System, and (iv) protection of the privacy rights of a condemned individual, the victims, their families and those who participate in carrying out the execution").

⁷² *Id.* at 1017-18.

human beings and not dehumanized; *second*, that the government's interests in not sensationalizing and preserving the solemnity of executions is [sic] based upon the danger that if prison inmates were to see the execution on television or receive word of the televised event through other means, the inmates may well see the execution as 'sport' which dehumanizes them; *third*, that when inmates feel that they are dehumanized or devalued as persons, agitation amongst the inmates is frequently fomented, which in turn can lead to prison disturbances; *fourth*, that a broadcast would violate the privacy of condemned persons, and would also 'strip[] away' the privacy and dignity of victims and their families; and *fifth*, that 'a public broadcast of the execution would violate the privacy and seriously put at risk the safety of those charged with implementing the sentence of death.'⁷³

Lappin described a volatile prison atmosphere in which section 26.4(f) acted as a linchpin, perhaps among many regulations, that prevented the prison from becoming a place of anarchy and high disorder in which the safety of both prison officials and inmates would be jeopardized. The court stated that the government interest in maintaining this particular regulation was substantial and that the prison system should be given deference. According to the court, execution procedures are within the particular expertise of prison officials and, absent a showing of an

⁷³ *Id.* at 1018.

exaggerated response to such considerations, courts ordinarily should defer to their judgment.⁷⁴

The second requirement when a regulation is content neutral but constitutes a time, place, and manner restriction is, as stated above, that it “not unreasonably limit alternative avenues of communication.”⁷⁵ The court referenced *Kerley*.⁷⁶ In *Kerley*, the defendant unsuccessfully requested permission to videotape and broadcast his court proceedings.⁷⁷ The court considered whether “it is reasonable to conclude that the *marginal gains* from videotaping and broadcasting an already public trial, which members of the public and media will be free to attend and to report on, are outweighed by the risks and uncertainties the procedure, in the minds of some, entails.”⁷⁸ The *Kerley* court held that there were significant government interests in and justifications for the ban,⁷⁹ and indeed, the availability of other means of communication meant that the ban did not unreasonably abridge opportunities for thought communication.⁸⁰ Put differently, when both an alternative means of communication is available and a substantial government interest is present, the court may uphold a restriction on press rights of access to information.

On the facts of *ENI*, the court was able to show that section 26.4(f) was permissible despite being a time, place, and manner

⁷⁴ *Id.* (citing *Cal. First Amendment Coalition v. Calderon*, 150 F.3d 976, 982-83 (9th Cir. 1998) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974))).

⁷⁵ *Id.* at 1015 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986)).

⁷⁶ *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985).

⁷⁷ *Id.*

⁷⁸ *Id.* at 621.

⁷⁹ *Id.*

⁸⁰ *Id.* at 620 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n. 18 (1980) (quoting *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941))).

restriction. It found a strong government interest in promoting a safe prison environment, as well as acceptable alternative reporting methods. The court concluded that the press could still effectively cover McVeigh's execution.

V. What If Timothy McVeigh Were Osama Bin Laden?

Given the terrorist events in New York City and Washington, D.C., on September 11, 2001, it is interesting to speculate how the press's rights of access might unfold in the event that bin Laden should be somehow captured, tried in an American court, and executed.⁸¹

The actions of McVeigh and bin Laden were similar in a number of respects. Each masterminded acts of terrorism on American soil. A large loss of life resulted from each terrorist act: 168 deaths from McVeigh's act and at least 4,537 deaths from bin Laden's act.⁸²

Attorney General Ashcroft asserted that "all the citizens of the United States were victims of the crimes perpetrated by Mr. McVeigh."⁸³ It is difficult to imagine that Ashcroft would not be able to make the same statement about the tragedy on September 11, 2001. Indeed, while not in the least seeking to belittle the horrors of Oklahoma City, an even stronger case can be made that all Americans were victims of the attacks on September 11, 2001: the bin Laden-executed terrorism caused a much greater loss of American life, has caused a fundamental rethinking of both

⁸¹ See *supra* note 13.

⁸² David Bamber, *Bin Laden: Yes, I Did It*, TELEGRAPH (London), Nov. 11, 2001, at 1.

⁸³ *Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002, 1008 (S.D. Ind. 2001).

American domestic and foreign policy, and has resulted in a significant economic downturn.

In the case of McVeigh's execution, Ashcroft made provisions for a closed circuit transmission to a select group of survivors and victims' families, among others. It seems that the victims' families of the September 11, 2001, attacks would have a consistent argument that they should be similarly entitled to view bin Laden's execution. Based on sheer numbers and space considerations, however, this could require the equivalent of filling New York City's Madison Square Garden for a closed circuit transmission of bin Laden's execution.

In an effort to record the execution, members of the press would probably make the same arguments to record the execution that were made by ENI. Similarly, the government would probably make the same arguments for the ban on the press's recording of executions as it did in *ENI*. The government would likely succeed in arguing that the ban was content neutral and that viable and sufficient alternative means of informing the public were otherwise available to the press. It would also likely argue for an overriding government interest in preventing a closed circuit transmission of bin Laden's execution to a select group of survivors, victims' families, and others. First, it could be argued that the sheer number of survivors, victims' families, and others who would, theoretically, be eligible to view bin Laden's execution would make such a live broadcast the equivalent of a public execution. On the international front, the idea of a large audience viewing bin Laden's execution would likely enrage many American allies, who might see it as a barbaric throwback to the days of the Roman gladiator. There would also be national security concerns.

It is unlikely that Ashcroft would make the exception for a closed circuit transmission to a select group of survivors, victims' families, and others in the case of bin Laden's execution, and it is almost certain that the press would not be allowed to record the execution.

VI. *ENI's* Better Wisdom: Analysis and Possible Compromise

While the decision in *ENI* was not surprising, the court improperly glossed over *ENI's* assertion that section 26.4(f) discriminated on the basis of content and gave unwarranted, uncritical acceptance to Lappin's justifications for the ban. Given the facts and case law surrounding the case, it seems that *ENI* had a stronger case than the court credited it with and that a compromise might have been more appropriate.

The court failed to fully appreciate *ENI's* argument that section 26.4(f) was not content neutral. A strong argument can be made that broadcasting McVeigh's execution would have conveyed a more tangible understanding of it to the public than newspaper accounts and after-the-fact verbal commentaries by witnesses and, thus, may have risen to the "conveyance of new information" standard. Furthermore, Ashcroft's bending of the traditional rules governing executions to allow a closed circuit transmission of McVeigh's execution to survivors and victims' families in Oklahoma City suggests that there was something significant that the chosen in Oklahoma City were able to receive in viewing the execution that they would not have been able to receive if their experience was limited to traditional written and verbal accounts. In a way, then, by allowing the exception, Ashcroft acknowledged that the closed circuit transmission

conveyed some important content that the survivors and the victims' families would otherwise have missed.

The court's deference to the prison system on the grounds of an overriding substantial government interest in affirming section 26.4(f) was misplaced.⁸⁴ The court assigned great importance to Lappin's affidavit and found it to be highly influential, though it is interesting that the court did not give further weight to the contrary opinion of another veteran of the corrections system, Raymond K. Procunier.⁸⁵ While it acknowledged the existence of Procunier's contrary opinion, the court single-handedly dismissed it by stating that his views did not "render Warden Lappin's explanation inadequate."⁸⁶ It is curious that Procunier's points are never mentioned while Lappin's are articulated point for point.

Lappin, for instance, emphasized the policy prerogative of not dehumanizing inmates. While no one responds well to dehumanizing treatment, it remains highly questionable how capital punishment does not dehumanize inmates, notwithstanding efforts to sanitize it.

He also expressed his concern about inmates seeing a televised execution or otherwise learning of a televised execution.⁸⁷ Inmates, particularly in a maximum-security prison, are well aware that capital punishment is carried out by the state; further, they usually also know when executions are in fact carried out. Since inmates would, in any event, hear about the execution

⁸⁴ The policy of a substantial government interest being able to override the press's First Amendment rights could close the door on information that the government does not want the press and, thereby, the public to know.

⁸⁵ See *Entm't Network, Inc.*, 134 F. Supp. 2d at 1018.

⁸⁶ *Id.*

⁸⁷ *Id.*

through other means, such as the print media or television news, an argument can be made that televised executions would not represent a “huge leap” from current media coverage, to which inmates are already exposed. Even if the press were allowed to broadcast executions, prisons could enforce a ban on television viewing by inmates during a televised execution. Finally, it could be argued that the broadcasting of executions might actually have a desirable deterrent effect, especially among inmates.

Lappin also expressed his concern that lifting the ban would undermine the safety and anonymity of those who administer or otherwise play key roles in executions.⁸⁸ Clearly, it would be wrong to endanger the lives of prison workers. While Lappin’s concern is valid and understandable, it is not totally convincing as a reason to ban televised executions. Some compromise agreement could have been reached with the media whereby prison workers’ anonymity would be maintained via blurred facial images that cloud executioners’ identities on camera. This is already a common and effective practice used in the television industry for interviews with people who wish to remain anonymous on camera.

In addition to blurred facial images to obscure executioners’ identities on camera, there are a number of other compromises that the court could have considered in sanitizing the process of recording executions. For instance, members of the press could record executions but would be required to submit recorded film to a censoring board, consisting of government officials or government officials and appropriate members of the press or public. The censoring board would then have some discretion to edit the material but would have to allow publication

⁸⁸ *Id.*

of the recording within a particular timeframe after the execution. Given the sensitive nature of the subject, there could be further restrictions as to the number of times that the execution could be aired or limitations on the hours of broadcast. The restrictions should not be so great, however, as to render useless and impractical the press's First Amendment right to inform the public without unreasonable government interference.

VII. Conclusion

The broadcast of executions would play an interesting role in the ongoing national debate on capital punishment. In recent years, the issue of DNA testing and fears that innocent people have been or are currently on death row throughout the country have made national headlines, as did Illinois Governor George Ryan's decision in 2000 to impose an indefinite moratorium on capital punishment in Illinois.⁸⁹ Indeed, McVeigh's execution came at a time of "deep and growing ambivalence about the death penalty, to the point that bare majorities of Americans favor[ed] a moratorium on executions – or even a law replacing them with mandatory life in prison."⁹⁰ Why, in this atmosphere, is the government unwilling to let the general public see what happens in the execution chamber? After all, it is the public, as taxpayers, who fund capital punishment.

⁸⁹ See CNN, *DNA Testing Frees Virginia Death Row Inmate* (Feb. 11, 2001), at <http://www.cnn.com/2001/LAW/02/11/virginia.death.penalty/index.html> (on file with the North Carolina Journal of Law & Technology).

⁹⁰ ABC News, *Death Penalty Ambivalence: Poll Points To Support For Execution Moratorium In U.S.* (May 2, 2001), at http://abcnews.go.com/sections/us/DailyNews/poll010504_deathpenalty.html (on file with the North Carolina Journal of Law & Technology).

Given that the current ban discriminates based on content and that the government interest in maintaining it is exaggerated, one must wonder why the press is not allowed to record executions as a way of informing the public. Is the government afraid that if Americans saw a recorded execution, support for capital punishment would decrease? If a public outcry were to occur, would it undermine the stability of the criminal justice system?

By permitting the press to record executions, the government, with the prison establishment as its surrogate, might undermine its position and the current legitimacy of capital punishment as a tool of deterrence, a way to eliminate society's most-hated individuals. Certainly, the government does not want to lose its grip on executions as an option.⁹¹ In this context, the broadcasting of executions could not only be an effective way for the press to hold the government accountable, but it could also shift the burden to the government to justify its use of capital punishment.

⁹¹ Practically speaking, courts may also fear that allowing filming of executions will open up a Pandora's box on similar issues where media recording rights are circumscribed or non-existent, such as at court proceedings.

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