



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bill 1060 (as enrolled)
 Sponsor: Senator Philip E. Hoffman
 Senate Committee: Judiciary
 House Committee: Judiciary and Civil Rights

PUBLIC ACT 549 of 1996

Date Completed: 1-23-97

RATIONALE

Although prisoners are allowed to receive publications while incarcerated, the Department of Corrections (DOC) restricts prisoners' receipt of certain publications. This ability to prohibit the introduction of certain printed materials stems from the Department's need to maintain security within prison facilities.

In the case of *Thornburgh v Abbott* (490 U.S. 401 (1989)), the United States Supreme Court determined that reasonable restrictions may be placed upon the types of publications and materials that Federal prisoners are allowed to receive. The Court relied upon a previous decision that held that it is acceptable for a prison to establish restrictions that are reasonably related to legitimate prison security interests. Specifically, the Court upheld Federal regulations that allow wardens to prohibit a particular publication "if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity". In addition, the regulations provide that a warden may not reject a publication "solely because its content is religious, philosophical, social or sexual, or because its content is unpopular or repugnant". Further, a warden must review each issue of a subscription publication separately, rather than establishing a list of excluded publications.

The DOC apparently has instituted a policy that complies with the *Thornburgh* decision to restrict publications that might pose a threat to the security, order, or discipline of a prison, or that might facilitate criminal activity or interfere with a prisoner's rehabilitation. Some people believe, however, that policies consistent with the Federal regulations upheld in *Thornburgh* should be codified to provide statutory, rather than administrative, grounds for the Department's decisions regarding banned material. (See

BACKGROUND for a discussion of *Thornburgh*.)**CONTENT**

The bill amended the prison code to allow the Department of Corrections to prohibit a prisoner from receiving or possessing any material that the DOC determines is detrimental to the security, good order, or discipline of the institution; that may facilitate or encourage criminal activity; or that may interfere with the rehabilitation of any prisoner. The DOC may not prohibit a prisoner from receiving or possessing any material solely because its content is religious, philosophical, political, social, or sexual, or because it is unpopular or repugnant.

Items that may be prohibited under the bill include, but are not limited to, material that:

- Depicts or describes procedures for constructing or using weapons, ammunition, bombs, or incendiary devices.
- Depicts, encourages, or describes methods of escaping from correctional facilities or contains blueprints, drawings, or similar descriptions of DOC institutions or facilities.
- Depicts or describes procedures for manufacturing alcoholic beverages or drugs.
- Is written in code.
- Depicts, describes, or encourages activities that may lead to the use of physical violence or group disruption.
- Encourages or provides instruction in criminal activity.
- Is sexually explicit and, by its nature or content, poses a threat to the security, good order, or discipline of the institution; facilitates criminal activity; or interferes with the rehabilitation of any prisoner.

The bill does not prohibit the DOC from setting limits on the amount of material an inmate may receive or retain in his or her quarters for fire, sanitation, or housekeeping reasons. The DOC may not establish a list of prohibited material before the material is reviewed, but may prohibit other prisoners from receiving or possessing identical copies of the material without review after the material's initial review.

If the DOC prohibits a publication, it must notify the prisoner promptly, in writing, that the material is prohibited and the reasons for the prohibition. The notice must state the specific content upon which the prohibition is based. The DOC also must allow the prisoner to review the material to determine whether he or she wishes to appeal the DOC's decision administratively, unless review would threaten the institution's security, good order, or discipline, encourage or provide instruction in criminal activity, or interfere with the rehabilitation of any prisoner.

MCL 800.43

BACKGROUND

Thornburgh v Abbott involved a class of inmates and publishers who challenged, on First Amendment grounds, the Federal Bureau of Prisons' regulations prohibiting prisoners from receiving material that prison officials determined to be detrimental to the security, good order, or discipline of the institution or that might facilitate criminal activity. The U.S. Supreme Court agreed with the Federal District Court "that the proper inquiry...is whether the regulations are 'reasonably related to legitimate penological interests'" as established in *Turner v Safley* (482 U.S. 78 (1987)). The *Thornburgh* court then applied the four-factor test established in *Turner* to assess the reasonableness of the Federal regulations.

The Court determined 1) that the regulations were "neutral" and "rationally related to security interests"; 2) that prisoners had alternative means of expressing their rights; 3) the right in question could be exercised only at a cost of less liberty and safety for others; and 4) that the regulations were not an "exaggerated response" to the problem and that "no obvious, easy alternative has been established". The Court held that the Federal Bureau of Prisons' regulations regarding prohibited material were "facially valid" under the *Turner* reasonableness standard.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Due to the nature of penal institutions, the DOC needs to have control over prisoners' access to certain types of documents and reading materials. Material that might provide prisoners with information that could create or increase the threat of disruption, violence, or escape within the prison should be kept out of prisoners' hands. In *Thornburgh*, the U.S. Supreme Court stated: "In the volatile prison environment, it is essential that prison officials be given broad discretion to prevent...disorder." The bill enacts a policy, like the one upheld for Federal penitentiaries in *Thornburgh*, limiting prisoners' access to materials that may pose a threat to prison security, result in disruption of order, violence, or escape, or interfere with rehabilitative efforts. The bill establishes reasonable statutory restrictions on the types of materials that prisoners may receive, requires that notification of prohibited materials be given to a prisoner, and allows for prisoner review of the material and administrative appeal of the decision to ban it. The bill is modeled on the Federal regulations, thereby providing a constitutionally tested statutory framework for making decisions about what materials pose a threat to the administration of the prison.

Response: The Federal rules upheld in *Thornburgh* require not only that the warden notify the prisoner of the material's rejection and the reasons for that decision, but also that the publisher or sender be provided with a copy of the rejection letter. The publisher or sender then may obtain an independent review of the warden's rejection decision by writing to the Regional Director of the Federal Bureau of Prisons. The bill has no similar provision.

Opposing Argument

The bill does not address the situation in which only a part of a particular publication is prohibited. It is unclear whether the entire publication may be banned or whether the objectionable contents should be removed and the remainder of the publication be made available to the prisoner.

Response: Although the Federal regulations reviewed in *Thornburgh* do not specifically address this situation, the Supreme Court upheld the Bureau of Prisons' "all-or-nothing" practice of

withholding any publication containing excludable material. The Federal District Court held that the Bureau's position that "tearing out the rejected portions and admitting the rest of the publication would create more discontent" than banning the entire publication was "reasonably founded". The Supreme Court agreed.

Opposing Argument

As introduced, the bill merely would have prohibited a prisoner in a correctional facility from receiving or having in his or her living area any sexually explicit matter. The enrolled bill's provision regarding sexually explicit material seems redundant because that material may be prohibited only if it poses a threat to the prison's security, good order, or discipline, facilitates criminal activity, or interferes with prisoner rehabilitation. Since that is the bill's standard for banning *any* material, perhaps all sexually explicit matter should be specifically prohibited, as the introduced version of the bill proposed.

Response: At one time, the DOC operated under a policy directive prohibiting prisoners from receiving material describing or depicting "unlawful sexual behavior" because those items were "considered to be a threat to the order and security of an institution or to the rehabilitation of prisoners" (PD-BCF-63.03). That policy was ruled unconstitutional in a case before the United States District Court for the Western District of Michigan, Northern Division (*Boyer, et al. v Brown, et al.* (1991)). The District Court ruled that the DOC's policy directive did not meet the four-factor test established in *Turner* and applied in *Thornburgh*. The District Court held, however, that if the DOC modified the regulation "to require...a specific determination as to whether or not the publication provides a threat to prison security, then the regulation would pass constitutional muster". The bill does just that.

Legislative Analyst: P. Affholter

FISCAL IMPACT

While the bill likely will have no fiscal impact on State or local government, there may be additional administrative duties required by the Department of Corrections in implementing the bill's provisions.

Fiscal Analyst: M. Hansen

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.