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By

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ABSTRACT

THE PRECARIOUS RULE AGAINST
PRIOR RESTRAINT OF THE MEDIA:
THE PENTAGON PAPERS MEET THE REHNQUIST COURT

By

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The problem examined in this paper is whether the United States Supreme Court would decide New York Times v. United States, the landmark Pentagon Papers case that invoked the rule against prior restraint of the media, the same way in the 1997-1998 term as it did in 1971.

Each justice's position on the issue is drawn from an evaluation of her or his decisions in cases involving national security and prior restraint of speech. Expert opinions, analyses from research articles and data from statistical studies are incorporated in the discussion of the problem.

The paper concludes that the Supreme Court would favor the government in a 5-4 decision, the opposite result of the 1971 decision, which favored the press 6-3. Such a decision would severely damage, if not eviscerate, the rule against prior restraint of the media.

Without censorship, things can get terribly confused in the public mind.
- General William Westmoreland

For Mickey and Alex

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INTRODUCTION

> In psychological warfare ... the intelligence agencies of the democratic countries suffer from the grave disadvantage that in attempting to damage the adversary they must also deceive their own public.
>
> - Victor Zorza
> The Washington Post
> November 15, 1965

New York Times v. United States[1] is the landmark case that protects the media against prior restraint by the government.[2] Prior restraint occurs when an official prohibition is imposed upon speech or other forms of expression in advance of publication or dissemination. If the government had an across-the-board right to prevent the press from printing information, the heart of the First Amendment would dissolve. While no media organization has claimed in court that the government has attempted to restrain the information it disseminates to the same degree that it did with the Pentagon Papers, New York Times v. United States does not completely protect the media against such an attempt. Shortly after the decision was rendered, many criticized it for failing to establish just

[1] 403 U.S. 713 (1971)

[2] The government's effort to obtain a prior restraint to prevent The New York Times and The Washington Post from publishing the Pentagon Papers placed "freedom as we know it in the balance," said William Glendon, who represented The Washington Post before the Supreme Court in New York Times v. United States. David Rudenstine, The Day the Presses Stopped: A History of the Pentagon Papers Case, (Univ. of Calif. Press, Berekley, 1996), 350.

when and under what circumstances the government could restrain the press.[3] Clearly, the precedent established in Near v. Minnesota, 283 U.S. 697, 716 (1931) -- that the government may restrain the press for the good of the nation such as in time of war -- survived New York Times v. United States. But does the government's right go further? And how far? In 1971, when the Supreme Court consisted of different justices who were considered more liberal as a whole than the justices sitting today,[4] the decision was a 6-3 vote. In 1997, the Supreme Court is considered more conservative and is led by a chief justice, William H. Rehnquist, who often has not favored free speech advocates in expression cases. How would this Court decide New York Times v. United States if it arose today?

This thesis predicts the outcome of New York Times v. United States if it were argued in 1997 before the United States Supreme Court, and examines how the likely decision of the current Supreme Court would affect the press. The 1997-1998 Supreme Court term is an ideal time to consider such a hypothetical because, 26 years after the decision, the composition of the Court has completely changed and the current justices, with the most recent addition appointed in 1994, have each been sitting long enough to make a reasonable prediction as to how

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[3] See Don R. Pember, "The 'Pentagon Papers' Decision: More Questions Than Answers," Journalism Quarterly (Autumn 1971), 403; Louis Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," Univ. Penn. L. Rev., Vol. 120:179, 1971, 271 (New York Times v. United States is "some accident of immediate overwhelming interest which appeals to the feelings and" - some will add - "distorts the judgment.")

[4] The justices who decided the case were Chief Justice Warren E. Burger and Associate Justices John H. Harlan, Thurgood Marshall, Hugo L. Black, Potter Stewart, Byron R. White, William O.

each would decide the case.[5] The Supreme Court is completely new, with new perspective. In most instances, justices are of different generations than those on the Court during the Pentagon Papers case and have risen in their judicial careers under different social, cultural and economic environments. The national and international circumstances surrounding the Court are much different today than in 1971. Now is the time to look at the Pentagon Papers from the perspective of a different court in different times.

The History of Prior Restraint

Before discussing in more detail New York Times v. United States, it is necessary to understand where the aversion to governmental prior restraint in this country came from. The importance of the doctrine against prior restraint in American media would be difficult to ascertain without looking at its roots. Journalism in this country, and its aggressiveness, was born of oppression. The first printers and journalists were from England, where press licensing and government censorship prevented printed circulation of criticism or ideas contrary to the government opinion. In 1501, shortly after the invention of the printing press, Pope Alexander VI banned unlicensed printing. The Licensing Act of 1622 increased controls. But when that law expired and was not renewed, the right to publish free of government licensing controls became a common law right in

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Douglas, Harry A. Blackmun and William J. Brennan.

[5]Harry Blackmun, the last remaining justice who sat on the Pentagon Papers case, retired in April

England. Colonial printer Peter Zenger won a freedom of the press case in 1735. When the First Amendment was adopted in 1791, the framers of the Constitution intended to codify the English common law as taught by Sir William Blackstone, which banned all prior restraints such as licensing or censorship.

The executive quickly began making exceptions on the basis of national security, starting with President George Washington's complaints in 1797 of press leaks. Then came the Sedition Act of 1798. Thomas Jefferson, in a June 17, 1807, letter to U.S. Attorney George W. Hay of the District of Virginia during the trial of Aaron Burr for treason, presided over by Chief Justice John Marshall, wrote that "[a]ll nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their Executive functionary only. He of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication." Jefferson's letter followed a motion by Burr's counsel for issuance of a subpoena to compel Jefferson to turn over a letter that the President had written to an Army general.[6]

During the Civil War, the press in the North agreed to not print material sensitive to national security. However, the voluntary agreement was violated so often that President Abraham Lincoln issued an order providing for the court-

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1994. Stephen G. Breyer took Blackmun's seat in the fall of 1994, completing the turnover.

[6] Whitney North Seymour, Jr., "Press Paranoia – Delusions of Persecution in the Pentagon Papers

martial of correspondents whose reports were found to be of aid to the enemy.[7] William Cullen Bryant in an editorial in the Evening Post during the Civil War, espouses the importance of editorial restraint during times of war: "The Evening Post ... has been the consistent advocate of an unlimited freedom of discussion; it will still continue to point out notorious instances of inefficiency; and to urge the government to its duties, whenever it is lethargic or lax. But it will remember that secrecy in war is often vital to success; that great measures cannot be carried out in a day; that it is no less important to inculcate upon a naturally inpatient people patience and confidence in those who have the control of affairs, than to watch the conduct of the authorities, and lay open all instances of incompetency."[8]

The government relied on voluntary censorship during World War I, although it could fall back on the Espionage Act recently passed in 1917. Following the attack on Pearl Harbor in World War II, the government established the Office of Censorship, which issued a Code of Wartime Practices to press organizations. Under Office of Censorship rules, a correspondent was not allowed in the theaters of war until he or she signed an agreement to submit all his or her copy to military of navel censorship.[9]

Case," New York State Bar Journal, February 1994, 10, 11.

[7] Lincoln was, however, sparing in how often he applied this order, sometimes overturning his own generals' orders to court-martial correspondents.

[8] Seymour, Jr., supra note 6, citing Charles H. Brown, William Cullen Bryant, (Scribners, New York, 1971), 436.

[9] Brian William DelVecchio, "Press Access to American Military Operations and the First Amendment: The Constitutionality of Imposing Restrictions," 31 Tulsa L.J. 227, 228 (1995).

The judicial branch, too, wrestled with the conflicting issues of a free press and national security before the Pentagon Papers case. The clear and present danger test was established in a dissent to Schenck v. United States in 1919. Near v. Minnesota in 1931 was the most important free press/security case prior to the Pentagon Papers.

Two other notable pre-Pentagon Papers cases established standards for prior restraint cases. In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Supreme Court held that any system of prior restraint of expression comes to the court bearing "a heavy presumption against its constitutional validity." In 1971, just one month before it decided the Pentagon Papers case, the Court said in Organization for a Better Austin v. Keefe that the government carries a heavy burden of showing justification for the imposition of such a restraint.

In the country's most recent major military action, the Persian Gulf War, journalists were allowed access to the front through pools. However, a CNN pool reporter inadvertently revealed, on live television, the identity of American forces involved in an artillery duel with Iraqi forces. General H. Norman Schwarzkopf later commented that "any halfway competent Iraqi intelligence officer watching CNN ... would then discover that the 82nd [Airborne] was positioned for a flanking attack, a fact ...[that the military] had taken great pains to conceal," and

which may have endangered future press access to military operations.[10]

The Pentagon Papers

And that brings us to the Pentagon Papers. On June 15, 1971, the U.S. Attorney General, on behalf of the United States government, brought legal action against The New York Times, demanding it cease publication of stories about and containing classified Pentagon reports on U.S. military involvement in Vietnam. The government claimed the reports would threaten the nation's security. The Pentagon's report had been leaked to the newspaper by Daniel Ellsberg, one of 36 authors of the study.[11]

At the request of the government, the Federal District Court for the Southern District of New York issued a temporary restraining order against the Times. However, Judge Murray Gurgein refused to grant the United States a permanent injunction.

The U.S. Court of Appeals for the Second Circuit reversed Gurfein's decision.

The Washington Post, meanwhile, began publishing the Pentagon Papers, but the U.S. District Court for the District of Columbia denied the government's

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[10] General H. Norman Schwarzkopf, Ret., It Doesn't Take A Hero, 440-459 (1992).

[11] During a question-and-answer period following a speech in a Smithsonian Institute speakers series in Washington, D.C., in December 1996, Daniel Ellsberg said that "After 20 years, 25 years now, of mainly Republicans putting people on the bench, both the District Court and the federal court, the Supreme Court particularly, the core of the Supreme Court has changed and the Supreme Court's approach to the Constitution is likely to change. Certainly my odds (of getting the Pentagon Papers published in newspapers) would not be as good as they were then (1971)."

request to restrain publication there. The U.S. Court of Appeals for the District of Columbia also sided with the Post.

Following is the text of the short per curiam decision released by the U.S. Supreme Court on June 30, 1971, less than three weeks after the Times published its first article based on the Pentagon Papers. The decision favors the Times and the Post. Each of the nine justices also wrote a separate opinion.

The complete per curiam opinion:

> We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." - U.S. -- (1971). "Any system of prior restraint of expression comes to this court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also Near v. Minnesota, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the enforcement of such a restraint." Organization for a Better Austin v. Keefe - U.S. - (1971). The District Court for the Southern District of New York in The New York Times cases and the District Court for the District of Columbia Circuit in The Washington Post case held that the Government had not met that burden.
>
> We agree.
>
> The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25,

> 1971, by the court are vacated. The mandates shall issue forthwith.
>
> So ordered.

The constitutional issues were at odds in this case: the right of the press to be free of prior restraint by the government, as mandated by the First Amendment, and the asserted right of the President, as Commander in Chief, to preside over national security and to conduct foreign affairs in the best interest of the country, as outlined in Article II, section 2.

At issue addressed in four majority opinions is whether the Court had a right, in light of the separation of powers doctrine, to abridge the freedom of the press in the name of national security when Congress had specifically declined to do so. Justice White notes in his concurring opinion that Congress had authorized subsequent punishment for publishing information the executive rightly classified as confidential, but had not authorized prior restraint. Therefore the Court could not restrain publication, even if it believed the government's argument that publication would threaten national security and foreign relations, Justice Stewart states.

The three dissenting justices each state the speed with which the case was decided -- "unseemly haste," Chief Justice Burger says -- was inappropriate, and that haste was a significant issue in their deciding against joining the majority.

Justice Harlan in particular felt strongly that a number of questions should

have been answered before the Court decided the case, including a procedural point right from the beginning: Does the Attorney General have the right to bring suit in the name of the United States? Harlan calls the pace of the trial "almost irresponsibly feverish" and states that the Court should not decide a case of such magnitude while leaving some questions unanswered. Speed is imperative in a case involving the right to publish, Justice Blackmun states in his dissent, but only as long as speed does not result in carelessness and an unsound decision.

How, in America, could the government go from such aversion to government control of the press to legal action approving it? The 1971 U.S. Supreme Court justices asked themselves that, and came to varied opinions, as shown in the decisions written by each in the case.

Two of the main arguments:

- Government restraint of the press violated the First Amendment, plain and simple, and could not be tolerated.
- The government's demands were reasonable under Article II section 2 of the Constitution, which makes the president commander in chief and responsible for national security and the welfare of his nation and its people. The First Amendment is not absolute, as in cases in which national security presents a greater harm than suppressed speech.

Two strong and valid points. How could they be reconciled? New York Times v. United States did not completely answer that question, which has since

arisen in courtrooms and scholarly media. What can be shown through this study will not answer the question, either. But it can show how precarious the media's privileges are, and how a case decided in its favor 26 years ago may not have the same outcome under a different Court.

This analysis looks at how the current justices, with their varied experiences and backgrounds, would decide the Pentagon Papers case if it were presented to them. Some assumptions had to be made to put the 1997 case in reasonably the same context as the 1971 case. The documents would be the same age as they were when originally published in the newspapers, and the nation would be at war.

For all its significance, the Pentagon Papers case left vital questions unanswered. Why were the public interests asserted by the government insufficient, and what rules could be followed to prove sufficient public interest? The challenge to the reasonableness of the government's classification system was not resolved. Also, some critics have noted that while the newspapers won the case, the Pentagon Papers decision left the doctrine against prior restraint open to revision by saying that the government could restrain a publication if it met the burden of proof in a future national security case.

Since the Pentagon Papers case, the courts have denied that government speech restrictions are prior restraints in several cases, and have ruled that prior restraints are justified in other cases where a balancing test or theory such as

breach of trust was used instead of the standard used by the majority of justices in the Pentagon Papers case. The clear-and-present-danger formula was apparently used by the majority of justices then, but was not part of the per curiam opinion, so the Pentagon Papers case left the balancing test open for later cases.

The CIA cases that came after the Pentagon Papers case show the Court may be more likely now to allow prior restraint when the government claims national security is at stake. Two examples are U.S. v. Marchetti, 446 F.2d 1309 (1972), and Snepp v. U.S., 444 U.S. 507 (1980). In both cases, the Court upheld the government's right to prepublication review of writings by former CIA agents who had signed secrecy agreements while employed by the government.[12] It was assumed in both cases that the classification system used by the government was constitutional -- again, an issue left unresolved in the Pentagon Papers case. Since this paper examines the impact of the judicial branch's personality on a case, it is important to take a glance at the changed personalities of the other two branches and the Fourth Estate as well. Several researchers have pointed out that no administration had ever taken such action as in the Pentagon Papers case before 1971 and none has since, and that President Nixon had political and personal reasons that influenced the decision to sue. Would the President take

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[12] See also Weaver v. United States Information Agency, 87 F.3d 1429 (1996) (regulation requiring employees of federal agencies to submit for prepublication review materials regarding matters of official concern did not violate the First Amendment; citing Snepp v. U.S., 444 U.S. 507 (1980)); Judge Wald, dissenting, at 1444, ("regulation significantly chills free speech").

such an action today?

In 1986, Central Intelligence Agency Director William J. Casey announced that six news organizations that had published information that he asserted threatened the nation's security would be charged with espionage if they continued to publish information about United States communications intelligence activities. Casey's actions convinced the media to voluntarily censor itself.[13] During the Reagan years, the press did not appear to pursue stories as aggressively as it did during the Nixon years. Would the press be likely to even fight for the right to publish the Pentagon Papers today? Former Washington Post court reporter Sanford J. Ungar questioned whether it would. In a 1988 preface added to his 1972 book The Papers & the Papers: An Account of the Legal and Political Battle After the Pentagon Papers, Ungar wrote that "it is not at all clear that the media would have the stamina for a battle so bitter and on so many fronts, were it to occur today."[14]

Methodology

In order to predict the outcome of a 1997 Pentagon Papers case, the analysis looks at how the current justices have ruled in First Amendment, prior restraint and national security cases. Some justices have a long record of decisions in these areas, but a few have hardly any record at all. There is no

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13 See Reporters Committee for Freedom of the Press, The First Amendment Handbook, (3rd Ed.), pp. 57-59, for discussion of Casey, prior restraint of the media, and national security.

question that the Constitution speaks specifically to the issue of prior restraint of the media, and the Supreme Court would likely unanimously agree on that point. New York Times v. United States is unique, however, because it would bring into conflict many of the justices' views on prior restraint and on government rights when the national security is an issue. The Court in 1971 declined to establish a general rule that could be called upon to resolve prior restraints cases in general. The hypothetical here, then, asks the Court of 1997 to decide if the rule against prior restraint is absolute and, if not, what burden the government must meet before it can permissibly restrain the press from publishing information. There has not been a case like the Pentagon Papers since 1971. There have been cases on prior restraint of the press and there have been cases on national security, but there have not been cases on prior restraint of the media in the name of national security that have gone up to the Supreme Court.[15] This

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[14] Sanford J. Ungar, The Papers & the Papers: An Account of the Legal and Political Battle After the Pentagon Papers, (Columbia University Press, New York, 1972), viii (preface, 1988).

[15] Restraining orders have, however, been rejected in a few prior restraint cases involving the national security at the federal court level (446 PLI/Pat 517, 527):

Pfeiffer v. CIA, 60 F.3d 861 (D.C. Cir. 1995). A CIA agent wrote a report about the Bay of Pigs operation while employed with the CIA, and after he left wished to have it published. The CIA refused to review and release the report, and the agent filed suit, claiming the government's action was a prior restraint on his free speech. The circuit court held that the report was owned by the government and ordered it returned, but that the agent could recreate it from memory and publish any unclassified information.

Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991). The media challenged Department of Defense regulations governing coverage of the Persian Gulf conflict. The district court framed the complaint not as a prior restraint, but as a press access to military operations. The issue was mooted upon the end of the conflict.

State of Israel v. St. Martin's Press, Inc., 165 A.D.2d 712 (1st Dep't 1990), vacated, 166 A.D.2d 25 (1st Dep't 1990). After the Israeli government obtained an order barring publication of

study attempts to reconcile the justices' opinions in both areas and predict how they each would rule if the Pentagon Papers case were before him or her today.

The study is significant as a demonstration that a different ruling in a landmark case such as the Pentagon Papers could have had a tremendous chilling effect on the media and freedom of the press as we have known it since 1971. In this analysis, each justice is important because the analysis concludes that the vote would likely be 5-4 in favor of the government in a modern-day New York Times v. United States. While every justice has the power in this case to swing the vote, some are more likely to do so than others. Chief Justice Rehnquist is the most likely justice to favor the government. Justices Breyer, Thomas, and Ginsburg are also likely to favor the government. Justice Stevens is the most likely justice to favor the press. Justices Souter and Scalia are the most likely to also favor the press. Justice Kennedy stands in the middle, but would lean more toward the press, Justice O'Connor would be the swing vote. This analysis predicts she would ultimately favor the government.

Following are individual evaluations of each of the current justices. Only cases in which a justice wrote the majority opinion or a dissenting or concurring opinion in a prior restraint case are included in the overview and case history. The overview also encompasses prior restraint cases decided since New York

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a book by a former Mossad agent, the court of appeals vacated the order. The court held that Israel had not supported its claim that the safety of its agents was jeopardized by further publication of the book.

Times v. United States, in some cases including state and federal court decisions written before a justice was named to the Supreme Court. Case histories include only opinions written by a justice since he or she has been on the Supreme Court. Cases in which a justice joined an opinion written by another may be included for informational purposes in the overview preceding an individual justice's case history. Justices are reviewed in order from the justice least likely to favor the press, who is Chief Justice Rehnquist, to the justice most likely to favor the press, who is Justice Stevens, with the exception of Justices Kennedy and O'Connor, who are discussed last because either may be a swing vote in this case. Each case history is followed by a conclusion stating the likely decision of each justice if he or she were to hear New York Times v. United States.

Even if the Pentagon Papers case were to survive a round against today's court, it is significant that the vote would likely be close. Awaiting the decision under today's Court would be an on-the-edge-of-your-seat, suspense-filled waiting game and, as in New York Times v. United States, the rule against prior restraint of the media could be affirmed or reversed in a mere 18 days.

THE JUSTICES

William H. Rehnquist

Overview

> The First Amendment really protects a minority right ... For the average person, the right to go down to the pub in the evening was a great deal more important than the right to express oneself.
>
> - Chief Justice Rehnquist, 1990, quoting British philosopher Michael Oakeshott.[16]

Two justices have given exceptionally clear indications of which party each would favor if the Pentagon Papers case were before them, primarily because they are the two longest-sitting justices and each has sat on several significant free press cases. Each also sits at opposite ends of the spectrum on the issue of prior restraint. John Paul Stevens would almost certainly favor the press. William H. Rehnquist, whose record this paper now examines, would almost certainly favor the government.[17] The remainder of the Court falls philosophically at varying points between these two men.

Rehnquist is the only member of the Court who actually was involved in the Pentagon Papers case. He helped prepare the case against The New York

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[16]Tony Mauro, "A new outlook for the First: Recent Supreme Court appointees may turn the tide against press freedoms," The Quill, Oct. 1991, p. 5.
17 Marc Rohr, Freedom of Speech After Justice Brennan, 23 Golden Gate U.L.

Times and The Washington Post as assistant attorney general in charge of the Justice Department's Office of Legal Counsel in 1971.[18] In his book The Papers & the Papers, former Washington Post court reporter Sanford J. Ungar describes the call to Post Executive Editor Benjamin Bradlee from Assistant Attorney General Rehnquist on June 18, 1971, less than two weeks before the Court's decision in New York Times v. United States.[19] Rehnquist read Bradlee the following message from the Attorney General:

> I have been advised by the Secretary of Defense that the material published in The Washington Post on June 18, 1971, captioned "Documents Reveal U.S. Effort in '54 to Delay Viet[sic] Election" contains information relating to the national defense of the United States and bears a top-secret classification. As such, publication of this information is directly prohibited by the provisions of the Espionage Law, title 18, United States Code, Section 793. Moreover, further publication of information of this character will cause irreparable injury to the defense interests of the United States. Accordingly, I respectfully request that you publish no further information of this character and advise me that you have made arrangements for the return of these documents to the Department of Defense.

The message Assistant Attorney General Rehnquist read to Bradlee could

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Rev. 413 (1993).

[18] Shortly after the Pentagon Papers case was decided, President Richard M. Nixon named William H. Rehnquist an Associate Justice of the Supreme Court. President Ronald Reagan elevated Justice Rehnquist to Chief Justice in 1986.

[19] Sanford J. Ungar, The Papers & the Papers: An Account of the Legal and Political Battle after the Pentagon Papers, (Columbia University Press, New York, 1972) 152-53 ("The Papers & the Papers"). Ungar also states that Rehnquist is "the intellectually conservative 'President's lawyer's

just as well be the text of Chief Justice Rehnquist's opinion if the Pentagon Papers case were before him today. Significantly, Rehnquist, frequently in the minority during his years as an associate justice,[20] now finds himself more often in the majority as chief justice.[21] Rehnquist's role as chief justice would also be especially important if the Pentagon Papers case were to come before the Court today. In 1971, the Court heard the case on an expedited schedule. As chief justice, Rehnquist presides over case selection. He opens discussion of cases, frames the issues and presents the facts and the law. He also may assign authorship, sometimes based on strategic or political reasons.

Rehnquist has been on the Court 26 years, longer than any other current justice. He has been involved in numerous significant free expression cases. An overview of his stance on national security and prior restraint issues reveals that Rehnquist consistently decides such cases against the press.[22] A review of the

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lawyer,'" Ibid.

[20] As assistant attorney general, Rehnquist supported executive authority to order wiretapping and surveillance without a court order, no-knock entry by the police, preventive detention and abolishing of the exclusionary rule. The Oxford Companion to the Supreme Court of the United States, Kermit L. Hall, ed., Oxford University Press, New York, 1992, 715. "Rehnquist was considered politically loyal within the Nixon administration, having vigorously defended the invasion of Cambodia and supported Nixon's law-and-order measures, including the right to wiretap citizens when national security was involved." David Rudenstine, The Day the Presses Stopped: A History of the Pentagon Papers Case (University of California Press, Berkeley, 1996), 80.

[21] Ungar, The Papers & the Papers. After the Pentagon Papers, Nixon's replacements for Justices Black and Harlan, Justices Powell and Rehnquist, forebode a "prognosis (that) seemed considerably worse for the press, with the conservative wing of the Supreme Court substantially strengthened." p. 304.

[22] In Padgett's analysis of free expression cases between 1931-1979, Rehnquist supported free expression in 21 percent of the cases on which he sat -- the lowest of any justice in the study.

holding in each of these cases and the rationale for each will show strong support for the conclusion that Rehnquist would vote in favor of the government if the Pentagon Papers case were before him.

Case History

Rehnquist has written one majority opinion in a prior restraint case that also involved national security issues. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), examined whether records and notes of Henry A. Kissinger's official telephone conversations during his service as assistant to the president for national security affairs and as Secretary of State were exempt under the Freedom of Information Act (FOIA).

The Court found that the State Department did not improperly withhold documents where, at the time of the request, the documents had been removed to the Library of Congress. The documents were not "agency records" under FOIA because they consisted of information that threatened the internal secrecy of White House policymaking and were compiled by the Secretary of State acting in his capacity as presidential advisor, making them exempt under FOIA provisions.

Therefore, their disclosure was not mandated under FOIA. The

Another study shows Rehnquist supported speech and press cases not involving libel 29 percent of the time and never supported the press in libel cases. F. Dennis Hale, "Free Expression: The First Five Years of the Rehnquist Court," Journalism Quarterly, Vol. 69, No. 1 (Spring 1992), p. 89.

Rehnquist favored speech in 29 percent of the cases he sat on from the 1986 term through the 1990 term (the first five years of his tenure as chief justice), which was less often than any other justice in the study. He wrote opinions in 23 percent of those cases, was the majority author in 13 percent, dissented in 27 percent and heard 62 of the 64 free expression cases before the court

Conference Report for the 1974 FOIA Amendments indicates that the President's personal staff "whose sole function is to advise and assist the President" are not included within the term "agency." To the extent a newspaper columnist sought discussions concerning information leaks that threatened the internal secrecy of White House policymaking, he sought conversations in which Kissinger had acted in his capacity as a presidential adviser, only.

Rehnquist wrote six other majority opinions in prior restraint cases:

- Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

Although the majority opinion was written in part by Kennedy, Rehnquist's portion addressed the First Amendment and prior restraint issues that may be of use in this analysis. The case is therefore listed only under Rehnquist in this paper. Kennedy's opinion addressed the vagueness issue, which is not pertinent to the Pentagon Papers case.

A lawyer challenged the Nevada Supreme Court rule that prohibits a lawyer from making extrajudicial statements to the press that he or she knows or reasonably should know have a "substantial likelihood of materially prejudicing" the adjudicative proceeding. The issue was whether the rule violates a lawyer's First Amendment right to free speech. The Court found that it did not. The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" of actual prejudice or

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during those terms.

the imminent threat standard established for regulation of the press during pending proceedings. The less demanding standard is designed to protect the integrity and fairness of a state's judicial system and imposes only narrow and necessary limitations on a lawyer's speech. The standard is neutral as to points of view, applies equally to all the attorneys in a pending case and merely postpones an attorney's comments until after the trial.

- International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992). ("ISKCON")

The Port Authority's restrictions on the distribution of literature and solicitation of contributions in an airport terminal do not deprive people of their First Amendment free speech rights. An airport terminal is a nonpublic forum for First Amendment purposes, and a prohibition on solicitation of contributions is reasonable because it is a nonpublic forum and people have no right to speak free of restrictions there. The restrictions are reasonable because solicitation may have a disruptive effect on business by slowing the path of both those who must decide whether to contribute and those who must alter their paths to avoid the solicitation. Solicitation under such circumstances invites fraud and targets people on tight schedules who are unlikely to stop and complain to airport authorities. Additionally, the Port Authority provides access for speakers to the sidewalk outside of the terminals, which is a reasonable alternative channel of communication.

- Alexander v. United States, 509 U.S. 544 (1993)

A forfeiture of assets, including books and films used in an adult entertainment business, complies with the First Amendment when it is incidental to a conviction for participation in racketeering activities. Under those circumstances, a forfeiture is a permissible criminal punishment, not a prior restraint on speech. The term "prior restraint" describes orders forbidding certain communications that are issued before the communications occur. The order here poses no legal impediment to engaging in expressive activity. Instead, the order prevents a person from financing expressive activities with assets derived from prior racketeering offenses. The Racketeer Influenced and Corrupt Organizations Act provisions applied here are oblivious to the expressive or nonexpressive nature of the assets forfeited.

In Alexander, Rehnquist wrote that the threat of forfeiture has no more of a "chilling" effect on free expression than threats of a prison term or large fine, which are constitutional under Fort Wayne Books.[23] He also wrote that criminal sanctions with some incidental effect on First Amendment activities are subject to First Amendment scrutiny only when it was the expressive conduct that drew the legal remedy, citing Arcara v. Cloud Books, Inc., 478 U.S.697, 706-707 (1986) (a claim that the closure of an adult bookstore under a general nuisance statute

[23]Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 66 (1989) ("[M]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation.")

was an improper prior restraint).

Three of Rehnquist's majority opinions, half of the six he has written in prior restraint cases, deal with restrictions on abortion-related speech. Although these are primarily time, place and manner cases, they offer some insight into Rehnquist's position on government regulation of speech.

- Schenk v. Pro-Choice Network of Western New York, 117 S.Ct. 855 (1997).

A preliminary injunction that prohibits abortion protestors from engaging in efforts to prevent women from obtaining abortions was not an unlawful prior restraint on free speech in light of alternative channels of communication left open to protestors. The injunction provisions that impose "fixed buffer zone" limitations are constitutional, but the provisions that impose "floating buffer zone" limitations violate the First Amendment because they burden more speech than is necessary to serve the relevant governmental interests. The injunction was not issued because of the content of the protestor's expression, but rather because of the protestor's prior unlawful conduct. Government interests in ensuring public safety and order and promoting the free flow of traffic, protecting property rights and protecting a woman's freedom to seek pregnancy-related services, are all significant enough to justify an appropriately tailored preliminary injunction to secure unimpeded access to clinics.

- Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994)

The issue in this case is whether an injunction entered by a Florida state court that prohibits antiabortion protestors from demonstrating in certain places and in various ways outside a health clinic that performs abortions violates protestors' First Amendment right to free speech. The fact that the injunction only restricts the speech of antiabortion protestors does not make it content-based. A content-neutral injunction is upheld if its challenged provisions burden no more speech than is necessary to serve a significant governmental interest. Therefore, the provision of the injunction that establishes a 36-foot buffer zone around the clinic entrances and driveway and imposes limited noise restrictions does not violate the First Amendment. Provisions of the injunction that establish a 36-foot buffer zone out onto private property and that ban observable images, establish a 300-foot no-approach zone around the clinic and establish a 300-foot buffer zone around staff residences, burdens more speech than is necessary to serve government interests and are therefore invalid under the First Amendment.

- Rust v. Sullivan, 111 S.Ct. 1759 (1991)

Regulations prohibiting recipients of specific federal subsidies from espousing particular views on abortion are permissible under the First Amendment. By forbidding counseling, referral and the provision of information regarding abortion as a method of family planning, the regulations ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope. The regulations do not unconstitutionally condition

receipt of a benefit on the relinquishment of a constitutional right because grantees do not have to give up abortion-related speech. Instead, the regulations require that such activities are kept separate and distinct from the activities supported by the federal funds. The Court found that the First Amendment protection of the doctor-patient relationship is not significantly impinged. A doctor's ability to provide, and a woman's right to receive, abortion-related information remains unfettered outside the context of the specific federal subsidies at issue here. The fact that most clients may be effectively precluded by indigency from seeing a health-care provider for abortion related services does not affect the outcome here, according to the Court, since the financial constraints on such a woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions, but of her indigency.

Rehnquist wrote four dissenting opinions in prior restraint cases. One of the cases, Boos, infra page 90, also involved national security. Rehnquist wrote that the portion of a code that prohibits signs within 500 feet of any embassy "if that sign tends to bring that foreign government into "public odium" or "public disrepute"" should be upheld.

Rehnquist came at Minneapolis Star, infra page 92, from a very different direction than the majority. He proffers a supposedly pro-press resolution of the case that in fact rules against the press, in which he wrote "[t]oday we learn from

the Court that a state runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered." Rehnquist explained that the tax on newspapers does not "prohibit activities which in no way diminish or curtail the freedoms [that the First Amendment] protects," as the majority contends. Instead, newspapers would pay less under a use tax than if they were taxed under the regular sales tax.

> Thus, the Minnesota taxing scheme which singles out newspapers for "differential treatment" has benefited, not burdened, the "freedom of speech, [and] of the press....
>
> To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers, and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

While the majority had found an unconstitutional restraint on press freedom, Rehnquist found no abridgement of First Amendment guarantees whatsoever, let alone a significant burden on First Amendment rights.

Rehnquist dissented in FCC v. League of Women Voters, 468 U.S. 364 (1984) (majority opinion per J. Brennan). At issue was a statute that prohibited

the use of federal funds to subsidize noncommercial, educational broadcasting stations which engage in editorializing or which support or oppose any political candidate. Rehnquist, in his dissent, wrote, "I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public monies in that manner." He analogized the statute to Faust and Mephistopheles: A broadcaster, well aware of the conditions attached to accepting public funding, cannot later "seek to avoid the conditions which Congress legitimately has attached to the receipt of that funding."

In Forsyth County, Georgia v. Nationalist Movement, 112 S. Ct. 2395 (1992), an organization challenged the constitutionality of a county assembly and parade ordinance. The Court, per Justice Blackmun, held that the county ordinance was unconstitutional because it permitted the government administrator to vary the fee for an assembly or parade to reflect the estimated cost of maintaining public order during the event. The court also found the ordinance unconstitutional because it required the administrator to examine the content of the message conveyed and estimate public response to that content in order to estimate the cost of police services. Rehnquist dissented, writing that a parade ordinance fee is not a prior restraint because it is not a revenue tax, but one to meet the expense incident to administration of the ordinance and maintenance of public order.

Conclusion

Rehnquist would favor the government if he were to hear the Pentagon Papers case today. Rehnquist's position as part of the prosecution team during the actual Pentagon Papers case and his consistently pro-government opinions in numerous prior restraint cases, including those involving abortion clinic protests, non-public forum solicitation, asset forfeiture and taxation, strongly indicate that he would favor the government in this case. Rehnquist favored the government in each of the 10 prior restraint cases for which he wrote an opinion. He has never favored the press in a prior restraint case for which he wrote an opinion.

Stephen G. Breyer

Overview

Breyer, who was nominated to the Supreme Court by President Clinton and took his seat on the Court in the fall of 1994,[24] making him the newest member of the Court, would likely view the Pentagon Papers case much as Chief Justice Burger did in his dissent in the case: as one "conducted in unseemly haste." Burger in his dissent stated (403 U.S. 713, 750):

> It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know", has held up publication for purposes it considered proper and thus public knowledge was delayed. ... But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

Like Burger, Breyer might agree generally with his fellow justices that prior restraint has no place under the First Amendment, but he also might well not be prepared to reach that conclusion on the merits of the case before him.

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[24]Breyer was a judge, U.S. Court of Appeals for the 1st Circuit, from 1981-1994. He became chief judge in 1990.

Breyer, a centrist on many legal issues, is known for his conservative views on economic regulation and has a reputation as an antitrust and administrative law expert[25] who is leery of government interference in private enterprise.[26] Associates say his policy background will lead him to side more often with individual rights than government interests.[27] However, "it is in economic regulation, not individual rights and liberties, that Breyer has a concrete record."[28] He has scant background in prior restraint of the press or national security cases.[29] An analysis of his stance on related issues in cases involving disputes over access to government information and records shows that he has favored the government in part because he disfavors haste in constitutional decisions.[30]

While on the federal bench, Breyer wrote the majority opinion for the en banc hearing in Irons v. Federal Bureau of Investigation, 880 F.2d 1446 (1st Cir.1989), ruling that historians were not entitled to FBI documents that contained more information from sources than the sources had revealed at a public trial.

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[25]Breyer is best known for drafting legislation to deregulate airlines and for creating the federal prison sentencing guidelines, both far cries from prior restraint issues.

[26]Ann Devroy, "Boston Judge Breyer Nominated to High Court: After Long Process, Clinton's Choice of Centrist Likely to Avoid Confirmation Controversy on Hill," The Washington Post, May 14, 1994, A1 (at A4).

[27]Joan Biskupic, "Boston Judge Breyer Nominated to High Court: A Moderate Pragmatist, Nominee Widely Admired in Legal Circles," The Washington Post, May 14, 1994, A1 (at A4).

[28]Devroy, supra note 26.

[29]For an overview of Judge Breyer's record on media issues, see Reporters Committee for Freedom of the Press, Summary of Judge Stephen Breyer's Decisions on Media Issues, 1994.

The dissent argued that informants who testified waived the right to have any information related to their testimonies remain confidential. Other judges also criticized Breyer's opinion. Judge Bownes, who joined in the dissent, wrote a particularly scathing retort: "Under the rubric of 'security' and 'protecting government sources,'" the Freedom of Information Act "is slowly being strangled to death. The majority decision tightens the garrotte one more notch."

In another case, El Dia Inc. v. Hernandez Colon, 963 F.2d 488 (1st Cir. 1992), a panel including Breyer reversed a lower court order that struck down the governor of Puerto Rico's executive order restricting public access to government documents. A daily newspaper had challenged the executive order in federal court. The panel favored the government and found that the constitutional questions that led the lower court to overturn the executive order should be decided as a last resort, and that the district court acted too hastily in striking down the order.

Breyer also joined in the en banc review of In Re Providence Journal, 820 F.2d 1354 (1st Cir. 1987), in which a newspaper had defied a gag order. A panel opinion (reported at 809 F.2d 63 (1st Cir. 1986)) had reversed the trial court's criminal contempt citation against the newspaper. The en banc per curiam opinion modified the panel opinion, saying a publisher, even when it thinks it is

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[30] See generally Marcia Coyle, "Breyer Charts Moderate Course to High Court," The Nat'l Law Jrn., July 25, 1994, A11.

the subject of a transparently unconstitutional order of prior restraint, had to "make a good faith effort to seek emergency relief from the appellate court." The panel opinion stated:

> We realize that our ruling means that a publisher seeking to challenge an order it deems transparently unconstitutional must concern itself with establishing a record of its good faith effort. But that is the price we should pay for the preference of court over party determination of invalidity.

Breyer would likely find that The New York Times had not made a good faith effort to ascertain the propriety of publishing information rooted in classified documents, and continued to publish even after ordered by the government to stop instead of prudently withholding publication and seeking emergency court relief.

Breyer voted in 1990 to strike down President Bush's gag orders on abortion counseling at federally funded health clinics, an order the Supreme Court later upheld in Rust v. Sullivan. Breyer's decision in Rust was based on whether the court should defer to an agency decision when Congress has been silent on the issue. His decision was not based on the free speech rights of doctors.[31] He agreed that "the decisive question was whether the court should defer to a reasonable agency interpretation in which Congress has not decided the issues in question" rather than the First Amendment issues.

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[31] See also Ernest Gellhorn, "A Justice Breyer May Tip the Court's Balance," The Nat'l Law Jrn, July 4, 1994, A19.

Breyer also participated in three cases in which the court upheld lower court decisions denying access to CIA files, and in one case in which FBI files remained closed after the FBI sufficiently explained the harm that would result from the release of the documents.

The age of some of the information in the Pentagon Papers would likely not convince Breyer that it no longer posed a risk to national security. Breyer sat on a three-judge panel on Maynard v. Central Intelligence Agency, 986 F. 2d 547 (1st Cir. 1993), amended, slip op. (1st Cir., Feb. 11, 1993), that ruled that a court should defer to the CIA's "arguable" determination that 30-year-old information is rightly exempted under the FOIA in the interest of national defense or foreign policy.[32]

Case History

Breyer has not written any majority opinions in prior restraint cases since he's been on the Supreme Court. He wrote an opinion concurring with Stevens' majority opinion in Morse, infra page 54, a prior restraint case that did not involve any national security issue, in which he showed his dissatisfaction with hasty decisions:

> While these limitations exclude much party activity -- including much that takes place at an assembly of its members -- I recognize that some of

[32]Breyer also participated, but did not write an opinion, in a case in which the court found no right of access to CIA operational files by next-of-kin. Sullivan v. Central Intelligence Agency, 992 F.2d 1249 (1st cir. 1993).

> the First Amendment concerns raised by the dissents may render these limits yet more restrictive in the case of party conventions. ... Like the more obviously evasive "all-white" devices, it is of a kind that is the subject of a specific constitutional Amendment. U.S. Const., Amdt. 24, s 1 (banning poll tax). We go no further in this case because, as the dissents indicate, First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones. (citations omitted) ... Those questions, however, are properly left for a case that squarely presents them.

Conclusion

Breyer would favor the government because he disfavors haste. In the one prior restraint Supreme Court case in which he has written an opinion, Breyer stated that although First Amendment concerns were raised, resolutions of those concerns were better left for another case that would squarely address them. In New York Times v. United States, Breyer would likely favor waiting to decide such significant First Amendment issues in a case in which the Court had all the facts in front of it and time to weigh those facts carefully and thoroughly without the pressure of an expedited argument.

If Breyer applied a cost-benefit analysis to the Pentagon Papers case, as he so often does in regulation and antitrust law cases, he likely would deduce that the benefits of slow, deliberate consideration outweigh the costs of a hasty, and

thus potentially catastrophic, decision that would favor the press but possibly endanger national security.

Clarence Thomas

Overview

Justice Thomas does not provide much information useful for drawing a conclusion in this study. Thomas served on the U.S. Court of Appeals for the District of Columbia Circuit from March 1990 until his nomination to the Supreme Court by President Bush in July 1991. At the time of his nomination, he had written only 20 judicial opinions, all in routine cases. During his time on the federal bench and on the Supreme Court, he has written only one relevant opinion, a dissent in Morse. The dissent dealt primarily with a question of statutory interpretation, but a small portion dealt directly with the First Amendment right to free expression.

Thomas joined in a few relevant cases while on the federal bench. As a member of a unanimous three-judge panel, he found a Justice Department memo that discussed proposed amendments to the FOIA to be a predecisional inter-agency document properly withheld from the editors of a newsletter who had requested it under the FOIA.[33] Specifically, the memo analyzed the amendments, which had recently been introduced in the Senate, and that listed specific news stories that could not have been written if the new amendments had been in place.

Thomas was also on the panel that found that scholars and journalists under deadline have no special right to be placed at the top of the FOIA

processing list and that "publishing deadlines do not necessitate expedited treatment." The case involved an author under contract to write a book about J. Edgar Hoover who had sued the FBI to expeditiously release Hoover's appointment calendars, telephone logs and message slips. The district court denied the author's request for expedited proceedings but did order the FBI to submit progress reports on its processing of the request every 60 days.[34]

In a rehearing en banc of New York Times Co. v. NASA, 820 F.2d 1002 (D.C. Cir. 1990), Thomas joined the majority opinion that NASA could withhold the audio tape recording of voice communications aboard the space shuttle Challenger just before it exploded. The majority said that voice inflections on the tape might contain "non-lexical" information, distinct from the words themselves already released in written documents, which if disclosed might constitute an invasion of privacy.

In another case, a panel including Thomas said a businessman could not travel to Cuba when the Trading with the Enemy Act is imposed, but a journalist could because otherwise "news from Cuba could be 'packaged' for transmission only by non-citizens, in whom American audiences might have less trust." That was one of the few cases where Thomas supported the press.

During his first terms on the Court, Thomas joined Chief Justice

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[33] Access Reports v. Department of Justice, 926 F.2d 1192 (D.C. Cir. 1991).

[34] Summers v. Department of Justice, 925 F.2d 450 (D.C. Cir. 1991).

Rehnquist's dissent in City of Cincinnati v. Discovery Network, 113 S.Ct. 1505 (1993), in which the majority had said that a ban on newsracks containing commercial handbills was unconstitutional. Thomas also dissented in ISKCON when the majority ruled that a ban on distribution of literature in airports was invalid under the First Amendment. Thomas also joined the dissent when the majority had invalidated a parade permit ordinance because it was not content-neutral.

Thomas did cast a positive vote for free expression when he joined the majority opinion in R.A.V. v. St. Paul, in which the majority said an ordinance could not discriminate based on content in bias-motivated hate speech.

Case History

Like Breyer, Thomas has not written any directly relevant opinions while on the Supreme Court except in Morse, infra page 54, [35] Thomas' dissent primarily dealt with statutory interpretation, but a small segment of it spoke directly to the issue of prior restraint:

> [T]he Court creates a classic prior restraint on political expression.... Legislative burdens on associational rights are subject to scrutiny under the First Amendment. [citations omitted]... Though Justice Stevens and Justice Breyer glibly dismiss this constitutional inquiry, [citations omitted] it is not equally obvious to me that §5 [of the Freedom of Information Act], as interpreted today, would survive a First Amendment challenge....

[35] Breyer concurred with Stevens' majority opinion in Morse. See discussion, supra ___.

> If there were no state involvement, the rule would be permissible. Exclusion of political parties from the coverage of §5 obviates the foregoing First Amendment problems. [citations omitted] By letting stand a construction of §5 that encompasses political parties, however, the Court begets these weighty First Amendment issues. Ironically, the Court generates these difficulties by contorting, rather than giving the most natural meaning to, the text of §5.

Conclusion

Thomas would most likely favor the government in this case. Although he has only written one opinion in a prior restraint case, and he favored free expression in that opinion, he did not strongly advocate freedom of expression (he merely wrote that whether or not a part of the Freedom of Information Act would survive a First Amendment challenge was not as "equally obvious" to him as it was to the majority, which felt that the FOIA section would pass constitutional muster). Thomas also joined in three decisions favoring the government while on the federal bench and three while on the Supreme Court, and only one favoring the press while on the Supreme Court. Even though Thomas usually joins Scalia on decisions and Scalia has indicated he would likely favor the press in a case similar to New York Times v. United States, Thomas' record does not otherwise indicate that he would vote alongside Scalia in this hypothetical case. This analysis predicts Thomas would side with the government if New York Times v. United States were before him.

Ruth Bader Ginsburg

Overview

Ginsburg was appointed to the Supreme Court by President Clinton in 1993. Although she has only been on the Court a relatively short time, Ginsburg has a significant trail of media-related decisions on the U.S. Court of Appeals for the District of Columbia Circuit, where she sat from 1980 until her appointment to the High Court.

In In Re Application of National Broadcasting Co., Inc., American Broadcasting Companies, Inc., and CBS, Inc., 653 F.2d 609 (D.C. Cir. 1981), three broadcasting companies asked for permission to copy FBI audio and video tapes introduced as evidence in the "Abscam" trial of former Congressman John Jenrette. A three-judge panel, including Judge Ginsburg, reversed the district court's decision to deny the broadcaster's access to the tapes. Following an expedited appeal, the panel said the strong public interest in the information on the tapes outweighed the government's interest in withholding them.

Ginsburg sat on a three-judge panel in 1991 that struck down a magistrate's decision to seal a plea agreement because the government had failed to provide a compelling reason to justify the seal.[36] The Washington Post was the plaintiff. Ginsburg also participated on but did not write an opinion in a case that required the government to release information on whether two individuals

residing in Iran are U.S. citizens or hold U.S. passports,[37] another in which the court ruled that an agency may withhold the preliminary draft of an historical work concerning the Air Force's role in Vietnam because it would reveal the agency's deliberative process,[38] and yet another that upheld broad exemptions for the release of CIA files.[39] She joined Judge Harry T. Edwards' dissenting opinion in the en banc rehearing of New York Times v. NASA, supra page 38, which said that the majority ruling had created a general exemption for any information with a privacy value greater than its public value. Finally, Ginsburg dissented from a ruling in 1989 that allowed the Bush administration to deny funds to clinics where doctors discussed abortion as a family planning option.

It is difficult to draw a conclusion from such a mixed bag of decisions. Ginsburg is a moderate and, because she is close to the center politically, it is hard to predict which way she will lean on a specific case. One case in which she joined the Court's opinion has facts similar enough to New York Times v. United States that it warrants discussion, albeit outside of the case history, since it was not a Supreme Court case and Ginsburg did not write it. The case is Dudman Communications Corporation v. Department of the Air Force, 815 F.2d 1565 (1987), and the issue is whether a draft manuscript concerning the history of the

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[36]Washington Post Co. v. Robinson, 935 F.2d 282 (D.C. Cir. 1991).
[37]Washington Post v. State Department, (D.C. Cir. 1981), rev'd, 456 U.S. 595 (1982).
[38]Dudman Communications Corporation v. Department of the Air Force, 815 F.2d 1565 (1987).

Air Force in South Vietnam between 1961 and 1964, requested by a radio broadcaster, was exempt from FOIA's general disclosure requirements. The court held that the manuscript was exempt from FOIA general disclosure because it would reveal the Air Force's deliberative process and disclose alterations that the Air Force made during the process of compiling the official history, possibly stifling the creative thinking and candid exchange of ideas necessary to produce good historical work.

The difference between "factual" material and "deliberative" material is key to this decision. The latter consists primarily of governmental officials' opinions and recommendations on matters of executive policy, and should be withheld under the appropriate FOIA exemption. The Court, per Judge Abner Mikva, relied on Russell v. Dep't of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982) (panel held a similar draft document exempt from FOIA's general disclosure requirements), when rendering its decision:

> Russell stated that an author [of such a government manuscript] "would hesitate to advance unorthodox approaches if he knew that the Department's rejection of an approach could become public knowledge. We think equally likely that in these circumstances, editors would place pressure on authors to write drafts that carefully toe the party line."...
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> Dudman argues that this holding will allow agencies to hide all manner of factual information

[39]Fitzgibbon v. Central Intelligence Agency, 911 F.2d 755 (D.C. Cir. 1990).

> from public view. An agency, Dudman claims, will need only to place factual information within draft documents in order to ensure that no member of the public can gain access to it. Thus, Dudman claims, our holding will give agencies full control over what information will be made publicly available.
>
> Our holding, however, can have no such effect. If a person requests particular factual material -- e.g., material relating to an investigation of a war crime -- an agency cannot withhold the material merely by stating that it is in a draft document. In such a case, the agency will usually be able to excise the material from the draft document and disguise the material's source, and thus the agency will usually be able to release the material without disclosing the deliberative process.

Dudman is an interesting case because in both Dudman and New York Times v. United States, the media wanted to reveal the deliberative process, which in the Pentagon Papers case was contrary to what the government had told the public was happening in Vietnam. The deliberative process showed that the government was lying and hiding information, and that is what the press wanted to reveal and what the press should reveal in its function as the Fourth Estate.

Ginsburg has been labeled a "judicial-restraint liberal." During confirmation hearings, she stressed the importance of other branches taking their constitutional responsibilities seriously.[40] The New York Times reported during

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[40]Judges "play an interdependent part in our democracy. They do not alone shape legal doctrine ... [T]hey participate in a dialogue with other organs of government, and with the people as well." Neal Devins, "The Last Word Debate: How social and political forces shape constitutional values," ABA Journal, Ocotber 1997, 46, 47.

Ginsburg's confirmation hearing that, "In her view, equality – or any other goal – is best achieved if all branches of government have a stake in achieving it. If courts move too fast, a legal victory may be fleeting and the political support necessary to sustain it may not develop."[41] Ginsburg would favor the government because she is strongly opposed to hasty decisions on important issues that may have lasting societal impact. During her 13 years on the federal bench, Ginsburg often found her niche mid-way between warring factions. For instance, during her first term on the Court, 1993-1994, Ginsburg voted almost as often with the conservative Chief Justice Rehnquist as she did with liberal Justice Blackmun in cases in which those justices were on opposite sides. She remains somewhat unpredictable but, based upon her stance in cases involving both national security and prior restraint, which she has had more occasion to consider than any other justice, it is reasonable to conclude that she would ultimately side with the government in New York Times v. United States.

Ginsburg has not written any relevant opinions, majority or otherwise, since she became a justice in 1993. She did, however, write four relevant majority opinions while on the federal bench. Because only Supreme Court cases are considered in the case history, Ginsburg's federal court opinions will be discussed briefly here:

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[41]Neil A. Lewis, "Ginsburg Embraces Right of a Woman to Have Abortion," The New York Times, July 22, 1993, A1, A11.

American Library Association v. Odom, 818 F.2d 81 (1987): The issue in this case was whether the National Security Agency, in contravention of the First Amendment, interfered with researchers' access to documents collected by a cryptologist and kept in the private collection of a library by wrongly classifying the documents. The court held that the researchers had no standing where the library had not indicated a willingness to make the material available if it had been legally free to do so. There is no right to hear what a speaker does not choose to say. Ginsburg found that the First Amendment did not block classification of documents previously available to the public "where their disclosure might endanger the national security." After reviewing in camera a classified affidavit of NSA's deputy director, the district court concluded that the agency had properly classified the 30-odd documents at issue because their "[d]isclosure ... could be reasonably expected to cause serious damage to the national security."

Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574 (1987), looks at whether the Department of Justice unconstitutionally denied the Puerto Rican Senate access to records in the department's possession regarding the 1978 killings of two Puerto Rican political activists. The court found that the record did not bear out the DOJ's exemption claims. The department failed to carry its burden of establishing exemption from disclosure although it claimed deliberative process privilege and work-product

shield. The names and other identifying information pertaining to individuals who were subject to the Civil Rights Division investigation, potential defendants, witnesses and the translator at the grand jury proceedings and several FBI agents, were exempt from disclosure under FOIA exemption for investigatory records compiled for law enforcement purposes to the extent that disclosure would constitute unwarranted invasion of personal privacy. Further, the district court's declaration, without explanation, that exemption from disclosure of documents under FOIA on the ground that disclosure would interfere with an ongoing investigation, had been properly invoked and required remand for a more complete accounting of ruling. The court stated in its opinion that it had never embraced a reading of the rules so literal as to draw "a veil of secrecy ... over all matters occurring in the world that happens to be investigated by a grand jury." The majority opinion, written by Ginsburg, found that "[a]utomatically sealing all that a grand jury sees or hears would enable the government to shield any information from public view indefinitely by the simple expedient of presenting it to the grand jury."

In Strang v. United States Arms Control and Disarmament Agency, 864 F.2d 859 (D.C. Cir.1989), the court had to decide whether the government had to disclose a memoranda regarding a federal employee's alleged transmission (without proper clearance) of classified information to Japanese officials. The employee who had allegedly transmitted the information requested a copy of the

memoranda under the Privacy Act so that she could examine it and request amendment if the documents were inaccurate. The part of the holding relevant to a hypothetical Pentagon Papers case stated that "law enforcement" within FOIA and Privacy Act exemptions encompasses enforcement of national security laws as well as criminal laws. The court based its decision on Section (k)(2) of the Privacy Act, which provides that an agency may promulgate rules exempting from the disclosure requirements investigatory materials compiled for law enforcement purposes. Ginsburg wrote, "We do not interpret "law enforcement" as limited to criminal law enforcement, as Strang would have us do, rather, we read the term as encompassing the enforcement of national security laws as well."

In the last of Ginsburg's federal court national security and prior restraint cases, Bonner v. United States Department of State, 928 F.2d 1148 (1991), the court examined the State Department's refusal to release to a writer documents relating to United States foreign policy in the Philippines. The court held that to maintain the representativeness of a sample of the numerous materials requested, a district court must determine whether the released material was properly withheld when initially reviewed by the agency. The State Department at first said that some of the information requested could not be released because it posed a threat to national security, but two years later changed its position, leading the court to doubt the accuracy of the State Department's classification system. The district court decided to examine the documents closely to see "how disclosure of

the material ... would cause the requisite degree of harm to the national security." If significant portions of the sample documents do not survive inspection upon remand, the propriety of withholding other non-sample documents may be unacceptable and the court will require that the State Department reprocess all documents.

Case History

Ginsburg has not written any opinions in prior restraint cases since taking her seat on the Supreme Court.

Conclusion

Ginsburg would favor the government. Of all the justices, she has sat on a case with facts most similar to New York Times v. United States and agreed with the court when it favored the government in that case. Ginsburg sided with the government in three of the five cases she heard while on the federal bench that involved both national security and prior restraint of the press, and remanded the other two cases. Additionally, Ginsburg's record of remanding cases indicates that she, like Breyer and O'Connor, would not decide a case hurriedly and without all facts available for thorough consideration.

Antonin Scalia

Overview

Justice Scalia[42] is widely regarded as a conservative,[43] and conservatives are widely regarded as anti-press.[44] A review of opinions Scalia has written in prior restraint cases, however, indicates he would likely favor the press if New York Times v. United States were before him.

Scalia takes plain language at face value. Although that means he may deny access to government documents under FOIA, it also means that if the First Amendment says no prior restraint, then there shall be no prior restraint. If Near v. Minnesota says that prior restraint it permissible only when it involves the imminent publication of "the sailing dates of transports or the number and location of troops," then Scalia requires the imminent publication of sailing dates of transports and the number and location of troops, and his reasoning in the hypothetical Pentagon Papers case may well be that documents about old battle plans do not pose such a danger, regardless of what the Executive Branch says

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[42]Scalia was on the Circuit Court of Appeals for the District of Columbia for four years before he was appointed to the Supreme Court by Republican President Ronald Reagan in 1986.

[43]"[T]o the liberals, (Scalia) is the Prince of Darkness; to conservatives, he's the deity." "Good for the Left, Now Good for the Right: The Rehnquist court plays the same judicial politics that once drove conservatives crazy," David A. Kaplan and Bob Cohn, Newsweek, July 8, 1991, 20, 22.

[44]"Scalia will probably continue to protect the government from expressive activity that might make the work of the government more difficult." He will, for example, maintain his hard line against access to government records." At the same time, "Scalia will continue to be opposed to attempts at restricting the expression of either individuals or organizations, although he will allow narrowly drawn restrictions." W. Wat Hopkins and Timothy L. Yarbrough, "Antonin Scalia: Judge & Justice," Newspaper Research Journal, Spring 1989, p. 61, 69-70. Again, the two predictions

about such publication jeopardizing future negotiations with foreign governments or anything else that does not pose immediate danger to life or limb. A review of Scalia's prior restraint and national security cases shows that he strictly adheres to the language of the Constitution in every case.[45]

His opinion concurring in part and dissenting in part in Madsen, a case involving the speech rights of abortion protestors, may be telling on Scalia's likely position in the Pentagon Papers case. Note especially his cite to New York Times v. United States and his references to speech restrictions during time of war:

> [A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint. .... We have said that a "prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) [additional citations omitted], and have repeatedly struck down speech-restricting injunctions. New York Times v. United States, 403 U.S. 713 (1971) [additional citations omitted]....
>
> In his dissent in Korematsu v. United States, 323 U.S. 214 (1944), the case in which this Court permitted the wartime military internment of Japanese-Americans, Justice Jackson wrote the following:
>
> > "A military order, however unconstitutional, is not apt to last longer than the military emergency

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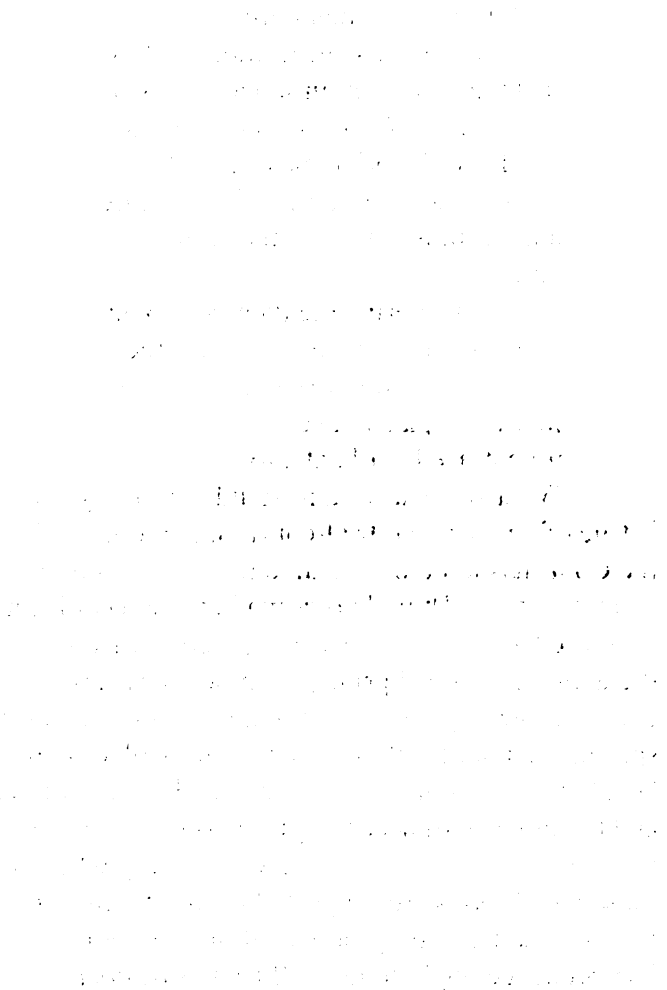
come into conflict when confronted with the Pentagon Papers.

[45] See discussion of "textualist" movement, led by Scalia and Kennedy in Gellhorn, supra page 33, at A19 ("[T]he text of the statute is the language Congress voted on and the president approved; any less rigorous approach would violate the basic constitutional scheme."). As a sidenote, "textualist movement" is a term that, based upon Scalia's literal approach to language, would make him cringe.

> ... But once a judicial opinion ... rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.
>
> The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." Id., at 246.
>
> What was true of a misguided military order is true of a misguided trial-court injunction. And the Court has left a powerful loaded weapon lying about today. ... [I]t will go down in the lawbooks, it will be cited, as a free-speech injunction case -- and the damage its novel principles produce will be considerable.... [T]he notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial-court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact -- these latest by-products of our abortion jurisprudence ought to give all friends of liberty great concern.

Case History

Scalia has not written any opinions in prior restraint cases involving national security since he began his tenure on the Supreme Court. He has written one majority opinion, one opinion in which he concurred in part and dissented in part, and two in which he dissented in prior restraint cases not involving national security.



His majority opinion was in R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992). The issue there was whether a city ordinance prohibiting bias-motivated disorderly conduct (in this specific incidence, the burning of a cross on a Black family's lawn) censored expressive conduct in violation of the First Amendment. The majority found the ordinance facially invalid under the First Amendment because it imposed special prohibitions on those speakers who express views on the disfavored subjects of race, color, creed, religion or gender. In its practical operation, the ordinance went beyond mere content, to actual viewpoint, discrimination. "Displays containing 'fighting words' that do not invoke the disfavored subjects would seemingly be useable by those arguing in favor of tolerance and equality, but not by their opponents," Scalia wrote. "(The city of) St. Paul's desire to communicate to minority groups that it does not condone the 'group hatred' of bias-motivated speech does not justify selectively silencing speech on the basis of its content."

Scalia concurred in part and dissented in part in Madsen, supra page 24, a case in which regulation of abortion protestors speech was at issue:

> Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.
>
> Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at

> odds with our First Amendment precedents and traditions, I dissent.
>
> The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim.... The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view.
>
> [P]ersons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: they must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings. This is good reason to require the strictest standard for issuance of such orders

Scalia's dissent in Morse, supra page 54, is worthy of a substantial excerpt here because it provides a good glimpse into Scalia's prior restraint philosophy. Scalia's dissent in Morse, together with his powerful words in Madsen, give a view of a position solidly in favor of the press in prior restraint cases. Scalia's dissent in Morse v. Republican Party of Virginia, 116 S.Ct. 1186 (1996) is below:

> Before today, this Court has not tolerated such uncertainty in rules bearing upon First Amendment activities, because it causes persons to refrain from engaging in constitutionally protected conduct for fear of violation. (citations omitted) Surely such an effect can be expected here. Political party officials will at least abstain from proceeding with certain convention activities without notification; and in light of the high degree of uncertainty they may well decide to hold no conventions at all.

> I find curious the proposition that certain subsidiary determinations of the convention, such as " 'adoption of resolutions or platforms outlining the philosophy [of the party],'" are not subject to Government oversight, whereas the determination of who may attend the convention -- upon which all else depends -- is subject to Government oversight. This is a good bargain for the tyrant.
>
> [T]his case involves a classic prior restraint. Our cases have heavily disfavored all manner of prior restraint upon the exercise of freedoms guaranteed by the First Amendment. Although most often imposed upon speech, prior restraints are no less noxious, and have been no less condemned, when directed against associational liberty (with which, we have said, freedom of speech "overlap[s] and blend[s]," Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981) (additional citations omitted). Today, however, a majority of the Court readily accepts the proposition that §5 can subject this First Amendment freedom to a permit system, requiring its exercise to be "precleared" with the government even when it is not being used unlawfully. The Court thus makes citizens supplicants in the exercise of their First Amendment rights.
>
> There would be reason enough for astonishment and regret if today's judgment upheld a statute clearly imposing a prior restraint upon private, First Amendment conduct. But what makes today's action astonishing and regrettable beyond belief is that this Court itself is the architect of a prior restraint that the law does not clearly express.

Finally, Scalia has some additional strong words against government attempts to quell speech in his dissenting opinion in Schenk, supra page 24. The Court held that an injunction on speech may be upheld even if not justified on the

basis of the interests asserted by the plaintiff, as long as it served "public safety." A threat to public safety was never raised in the complaint. For the court to use "public safety" as a basis for restricting speech is "a novel and dangerous proposition," according to Scalia, who concurred in part and dissented in part in Schenk:

> The Court's effort to recharacterize this responsibility of special care imposed by the First Amendment as some sort of judicial gratuity is perhaps the most alarming concept in an opinion that contains much to be alarmed about....
>
> Today's opinion makes a destructive inroad upon First Amendment law in holding that the validity of an injunction against speech is to be determined by an appellate court on the basis of what the issuing court might reasonably have found as to necessity, rather than on the basis of what it in fact found.

Conclusion

Scalia would likely favor the press in New York Times v. United States. Scalia would favor the press because he interprets the Constitution and its prohibition of government restrictions on speech strictly, and he would view the government's actions in New York Times v. United States as contrary to constitutional mandate. Scalia's concurring opinion in Madsen, in which he cites New York Times v. United States to support his opinion that speech-restricting injunctions imposed upon abortion clinics receiving federal funds are impermissible prior restraints, indicates that he would find the government's

imposition of a prior restraint in the Pentagon Papers case the equivalent of a "misguided trial-court injunction, ... a powerful loaded weapon lying about" whose damage would be "considerable." In fact, Scalia's opinion in Madsen specifically underscores Scalia's suspicion of prior restraints imposed in the name of national security during time of war.

Scalia favored the press in each of the four opinions he's written in prior restraint cases while on the Supreme Court. In each case, he had strong words for government entities that attempted to restrain speech. Scalia's record clearly indicates that he would favor the press in New York Times v. United States.

David H. Souter

Overview

Souter took his seat on the Supreme Court on October 9, 1990. He was appointed by President Bush.

Judge Souter had been appointed to the United States Court of Appeals for the 1st Circuit in April 1990, less than six months before his debut on the Supreme Court. Souter served as an associate justice of the New Hampshire Supreme Court from 1983 to 1990, and as a trial judge for the Strafford County (New Hampshire) Superior Court from 1978-1983. He was attorney general of New Hampshire from 1976-1978.[46]

Souter did not write any opinions during his brief tenure on the 1st Circuit. As a state judge, he wrote a lot, but little of significance to the issues in New York Times v. United States. One case that offered some insight to his position on prior restraint was New Hampshire v. Hodgkiss, 565 A.2d 1059 (N.H. 1989), in which he wrote the majority opinion. He wrote that neither a city ordinance prohibiting encumbrance of sidewalks nor an ordinance prohibiting posting of signs on city property violated the First Amendment. Free speech advocates, without much information to go on, took Hodgkiss as a sign that Justice Souter would favor government interests in expression cases. However, Souter has since

[46]For an estimation of Souter's position on issues concerning the news media that was made prior to his confirmation as a Supreme Court justice, see The Reporters Committee for Freedom of the

been compared to retired Justice Blackmun, who made the transition from pro-government justice to pro-press justice in the course of his tenure on the bench.[47] The Pentagon Papers was one of Blackmun's first cases, and he ruled against the press. By the time he retired, he was the greatest supporter of press freedoms on the High Court. Souter may be making a similar transition, only more quickly.[48] But for all the statistics and his decisions in expression cases during his first year, Souter has now shifted to the left side of the Court and takes a pro-press stance. One Supreme Court authority has said Souter may eventually prove to be as friendly to the press as was Justice Brennan.[49]

Souter's changed perspective is reflected in his decisions since 1991. In Forsyth County, Georgia v. Nationalist Movement, supra page 28, Souter joined the majority in striking down a parade permit ordinance that the Court said unconstitutionally "conferred unbridled discretion upon administrative officials." He joined the majority in R.A.V. v. St. Paul, which held that an ordinance

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Press, Summary of Judge Souter's Decisions on Media Issues, (July 26, 1990).

[47]Souter agreed with Blackmun more than twice as often as he agreed with Rehnquist when all three were sitting on the Court.

[48]Souter was considered conservative his first year on the Court. Souter agreed with Rehnquist, generally a press foe, in 82 percent of free expression cases. Souter voted with Rehnquist in 86 percent of expression cases his first year on the court. In 1989, Brennan, a friend to the press and the justice whom Souter replaced, had voted with Rehnquist in only 38 percent of expression cases. And in a number of 5-4 decisions during his first term, Souter joined the conservative majority.

[49]One of Souter's key traits is his respect for precedent, an aspect of his judicial personality that some court experts have said has "helped to slow what some once predicted would be a conservative tidal wave in key areas of the law." Marcia Coyle, "In Search of an Identity: For now, a moderate-to-conservative core defines a less-ideological Supreme Court," The National Law Jrn, C1, Aug. 15, 1994.

prohibiting bias-motivated disorderly conduct was facially invalid under the First Amendment. Souter joined the dissent when the majority in Burson v. Freeman, 504 U.S. 191 (1992), said a statute prohibiting display or distribution of campaign materials within 100 feet of an entrance to a polling place was permissible under the First Amendment. Souter also joined the dissent in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), in which the court found a state rule that prohibited attorneys from talking to the press acceptable because the "substantial likelihood of material prejudice" test applied by the state passed First Amendment scrutiny. In Cohen v. Cowles Media, Inc., 111 S.Ct. 2513 (1991), where the majority had said a newspaper impermissibly breached a promise when it printed the name of a person who had given information in confidence, Souter joined the dissent, which said that "[f]reedom of the press is ultimately founded on the value of enhancing (public) discourse for the sake of a citizenry better informed and thus more prudently governed." Souter found that enlarging public discourse outweighs a state interest in enforcing promises on the press.

If the Pentagon Papers case were before the Court in 1991, Justice Souter may have sided with the government. In 1997, he would likely favor the press.

Case History

Souter has written two opinions relevant to this study while on the Supreme Court: a dissent and an opinion in which he concurred in part and dissented in part. Both cases involved prior restraint; neither involved national security.

1.) ISKCON, supra page 22, dissent: A total ban on solicitation of money for immediate payment is wrong. Solicitation of money by charities is fully protected speech and is considered dissemination of ideas.

2.) Alexander, supra page 23, concur/dissent: The petitioner has not demonstrated that the forfeiture of books and films purchased with proceeds from criminal activity qualifies as a prior restraint. However, the First Amendment forbids the forfeiture of petitioner's expressive material in the absence of an adjudication that it is obscene or otherwise of unprotected character. No such adjudication was held in this case.

Conclusion

Souter would favor the press. Souter favored a free press or free speech in all four prior restraint cases in which he joined in an opinion while on the federal bench and in the one additional free press case that did not involve prior restraint but nonetheless provided Souter with a platform for his view emphasizing the

importance of a free press to the democratic process. He also favored the press in the two Supreme Court cases in which he wrote an opinion.

John Paul Stevens

Overview

Stevens was appointed to the Supreme Court by President Ford in 1975, five years after President Nixon had appointed Stevens to the U.S. Court of Appeals for the 7th Circuit.

Stevens, although appointed by Republicans and considered a moderate most of his career, is the closest thing the Rehnquist Court has to a liberal. However, he tends to distinguish between issues within issues, often rendering what at first glance appear to be conflicting opinions in similar cases until further examination shows smaller issues that led him to different conclusions. This tendency has earned him a reputation as independent and unpredictable. However, in free speech cases, regardless of how he structures the analysis, Stevens' outcome almost always favors a press free of government restriction. In fact, Stevens provides a big hint on where he would stand and why on a hypothetical Pentagon Papers case in his 1980 dissent in Snepp v. U.S.. In Snepp, Stevens dissented to the Court's decision that a former CIA employee who failed to submit his book manuscript to the CIA for prepublication review, as he had agreed to do in an employment contract, had to give all book profits to the CIA. Snepp is discussed in depth in the following case history section.

In a 1987 case, Stevens held that a federal act requiring registration, reporting and disclosure by people engaging in propaganda on behalf of foreign powers was constitutional because there was no evidence that the law had interfered with the exhibition of a significant number of foreign-made films (the plaintiff had been restricted from showing a Canadian film). The flip side of the same rationale would apply in the Pentagon Papers case: Publishing the Pentagon Papers is permissible under the Constitution, and a prior restraint therefore is impermissible because there is no evidence that publication would interfere with any immediate national security interest.

Additionally, it is notable that the only prior restraint cases in which Stevens votes opposite the proponents of First Amendment rights are Meese v. Keene, 481 U.S. 465 (1987), and Morse v. Republican Party of Virginia, 116 S.Ct. 1186 (1996), two of the three cases in which he wrote a majority opinion. It seems a majority of justices has agreed with Stevens on press issues only in the rare cases when he rules contrary to the press interest at issue, as he did in these two cases.

Case History

In Meese v. Keene, the Court considered whether the Foreign Agents Registration Act, which required a citizen who wanted to exhibit a Canadian film to label it "political propaganda," was unconstitutional. Stevens wrote in his majority opinion that the act is constitutional in that its use of the term "political

propaganda" is neutral and there is no evidence that public misunderstanding of the term, or fear thereof, actually interfered with exhibition of a significant number of foreign-made films. The act poses no obstacle to a citizen's access to materials he wishes to exhibit.

In another case in which Stevens wrote the majority opinion, Morse v. Republican Party of Virginia, the court found a political party's requirement that a person pay a registration fee to be a delegate to the state convention at which the party nominates its candidate for United States Senate is constitutional.

Specifically, Stevens wrote that the requirement that the party preclear a change in practices that imposes a registration fee on voters seeking to participate in the nomination process is not a "classic prior restraint." In fact, the requirement imposes no restraint at all on speech. Because past discrimination gave rise to the preclearance remedy, the minimal burden on the right of association was justified.

In the most recent Stevens majority opinion, City of Ladue v. Gilleo, 512 U.S. 43 (1994), the Court found that a city ordinance that banned all residential signs except for those falling within one of 10 exemptions violated a city resident's free speech rights. The ordinance had been cited as grounds to prohibit a resident from displaying a sign reading "For Peace in the Gulf" at her home. The city's attempt to justify the ordinance as a time, place and manner restriction failed because alternatives such as handbills and newspaper advertisements are

inadequate substitutes for the important medium that the city closed off. The ordinance had "almost completely foreclosed a venerable means of communication that is both unique and important." Displaying a sign at home sends an important message that is intended for a specific audience, and which is cheap and convenient.

Stevens condemned prior restraints in this context. He wrote that a special respect for individual liberty in the home has long been part of this nation's culture and law and has a special resonance when the government seeks to constrain a person's ability to speak there. The decision did not leave the city of Ladue powerless to address the ills that may be associated with residential signs. In addition, residents' self-interest in maintaining property values and preventing "visual clutter" in their yards and neighborhoods diminishes the danger of an "unlimited" proliferation of signs.

Stevens could pull his dissenting opinion in Snepp v. United States[50] out of the closet, dust if off, change a fact or figure here and there, and submit it as his opinion in the Pentagon Papers case. The issue in Snepp was whether the CIA's employment contract agreement with a former agent constituted an impermissible prior restraint. The contract required that the agent submit all future writings for prepublication review. The agent published a book about his work with the CIA despite the agreement. The agreement also called for imposition of a constructive

trust in the event of breach. Because the former agent had violated his fiduciary obligations to the CIA, he would have to deposit all profits from his book into a constructive trust for the government's benefit. A second issue before the Supreme Court was whether this constructive trust also constituted an impermissible prior restraint. The Court found that agreement, although a prior restraint, was not impermissible. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA -- with its broader understanding of what may expose classified information and confidential sources -- could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents. The majority found that prior restraint of speech under these circumstances, in the interest of national security, is permissible.

In his dissent, Stevens pointed out that the government conceded that the book contained no classified, nonpublic material. Thus, by definition, Stevens reasoned, the interest in confidentiality that Snepp's contract was designed to protect was not compromised.

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[50]444 U.S. 507 (1980).

Congress, he wrote, has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information. For instance, 18 USC §794 makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government. Thus, even in the absence of a constructive trust remedy, an agent like Snepp would hardly be free, as the majority suggested, "to publish whatever he pleases."

The public interest lies in a proper accommodation that will preserve the intelligence mission of the agency while not abridging the free flow of unclassified information. When the government seeks to enforce a harsh restriction on the employee's freedom, despite its admission that the interest the agreement was designed to protect -- the confidentiality of classified information -- has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.

Stevens agreed with the majority that the government may regulate certain activities of its employees that would be protected by the First Amendment in other contexts. However, the Court had not previously considered the enforceability of an employment contract that requires an employee to submit all proposed public statements for prerelease censorship or approval, or the remedy that would be imposed in the event of a breach. If Snepp had submitted the book to the agency for prepublication review, the government's censorship authority would surely have been limited to the excision of classified material. In this case,

then, it would have been obliged to clear the book for publication in precisely the same form as it now stands.

Stevens also found it noteworthy that the Court does not disagree with the 4th Circuit's view in Marchetti, 446 F.2d 1309 (1972), reiterated in Snepp, that a CIA employee has a First Amendment right to publish unclassified information. Thus, despite the reference in the majority's opinion to the government's so-called compelling interest in protecting "the appearance of confidentiality," and despite some ambiguity in the Court's reference to "detrimental" and "harmful" as opposed to "classified" information, the Court does not imply that the government could obtain an injunction against the publication of unclassified information.

"[E]ven if such a wide-ranging prior restraint would be good national security policy, I would have real difficulty reconciling it with the demands of the First Amendment," Stevens wrote. Stevens said that the majority opinion was a "drastic new remedy [that] has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government" and that:

> Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met.

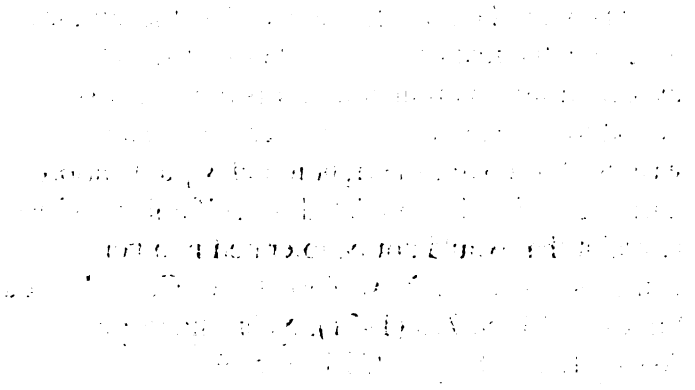
In a footnote, Stevens continues:

> The mere fact that the agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971); Nebraska Press Association v. Stuart, 427 U.S. 539.

It is important to note that although Stevens favored the press in Snepp, he concluded his dissent stating a narrow exception to the rule against prior restraint:

> In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.

Although Stevens concludes Snepp with a caveat, it is unlikely that New York Times v. United States would fall under such an exception. Stevens has written numerous opinions in expression cases and his strong record against prior restraint in other press cases indicates that prior restraint against a story based on documents that do not pose immediate danger to troops would not satisfy the Snepp exception. And while Stevens would prefer to resolve the issues in Snepp only after a "full briefing and argument," he cites the Pentagon Papers decision to



support his argument that delayed publication is itself a prior restraint. Stevens would almost certainly favor the press in the Pentagon Papers case if it were before him today.

Stevens also dissented in Kissinger, supra page 20. He wrote that the majority decision exempts documents that have been wrongfully removed from agency files from any scrutiny whatsoever under FOIA, and thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests.

The answer to whether the State Department's withholding of documents is improper depends on the agency's explanation for its failure to attempt to regain the documents. If the agency is unable to advance a reasonable explanation, such as no knowledge of where the documents are, for its failure to act, a presumption arises that the agency is motivated by a desire to shield the documents from FOIA scrutiny.

In Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), Chief Justice Burger wrote in the majority opinion that a prior restraint is permissible only if it meets a heavy burden of proof that it is necessary to protect another vital right. An order restraining the news media from publishing or broadcasting accounts of confessions by an accused criminal to law enforcement officers or third parties (except to members of the press) and other facts "strongly implicative" of the guilt of the accused violates the constitutional guarantee of

freedom of the press. The heavy burden of proof that such a prior restraint was necessary to protect the right of the accused to a fair trial was not met.

Stevens concurred in the unanimous to lift the court-imposed gag order on the press during a criminal trial:

> I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See Ashwander v. TVA, 297 U.S. 288, 346-347 (Brandeis, J., concurring). I do, however, subscribe to most of what Mr. Justice Brennan says [in his concurring opinion] and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

Stevens is sometimes poetic in his condemnation of prior restraint, so impassioned is his abhorrence of government-imposed speech restrictions. His dissent in FCC v. League of Women Voters , 468 U.S. 364 (1984), (per J. Brennan) was perhaps his most eloquent lambasting:

> The Court jester who mocks the King must choose his words with great care. An artist is likely to paint a flattering portrait of his patron. The child who wants a new toy does not preface his request

> with a comment on how fat his mother is. Newspaper publishers have been known to listen to their advertising managers. Elected officials may remember how their elections were financed. By enacting the statutory provision that the Court invalidates today, a sophisticated group of legislators expressed a concern about the potential impact of government funds on pervasive and powerful organs of mass communication. One need not have heard the raucous voice of Adolf Hitler over Radio Berlin to appreciate the importance of that concern.

Stevens even more clearly outlined his view on prior restraint in his opinions in two abortion clinic speech cases. In Rust v. Sullivan, supra page 25, he dissented, stating that, "In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech." Stevens wrote that the act that authorized funding for abortion clinics did not concurrently authorize the government to censor the speech of grant recipients or their employees. In Madsen, Stevens concurred in part and dissented in part with Rehnquist's majority opinion. There, he stated that the injunction at issue prohibits conduct ("physically approaching patients"), not speech, and therefore passes muster under the First Amendment.

In the last case in Stevens' long line of free speech cases, R.A.V., he concurred with Scalia's opinion, supra page 53, and found it significant that the

St. Paul ordinance at issue regulated speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm the speech caused. Stevens noted that the St. Paul ordinance is narrow, and leaves open and protected a vast range of expression.

> [The ordinance does not] raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace, as the majority fears. The petitioner is free to burn a cross to announce a rally or to express his view about racial supremacy, and he may do so on private property or public land, at day or at night, so long as the burning is not so threatening and so directed at an individual as to by its very [execution] inflict injury.

A limited proscription such as that provided by the ordinance "scarcely offends the First Amendment," Stevens wrote.

Conclusion

Stevens would vote in favor of the press. Stevens has been on the Court for 22 years, and has consistently favored the press in many cases during that time. While he wrote two majority opinions that favored the government in free speech cases, his third majority opinion as well as all eight of his concurring and dissenting opinions in prior restraint cases favored the press. In his opinion in Snepp, Stevens writes that an "issue surely should not be resolved in the absence of full briefing and argument," an indication that he might favor the government over the press in the Pentagon Papers case because of the speed with which a

decision would have to be made. However, the likelihood of Stevens not favoring the press in New York Times v. United States on the grounds that the case was being decided with "unseemly haste" is slim because Stevens only referred to speed of decision-making in that one case, and even then it was not the sole basis of his dissent, which strongly favored the press and condemned prior restraint.

Anthony M. Kennedy

Overview

Kennedy is a potential swing vote, although he is likely to ultimately side with the press. Kennedy often reaches the same conclusion as the bloc of justices often considered the conservative majority on the Rehnquist Court,[51] but he does so for different reasons than other members of that bloc,[52] indicating that he could go either way in his analysis of the Pentagon Papers case. Furthermore, analysis of the conservative voting bloc's position on prior restraint and national security cases indicates that its members may split the vote in the hypothetical Pentagon Papers case. An analysis of Kennedy's position on prior restraint and national security issues indicates that he could comfortably fall on either side of that divide.

Kennedy was appointed to the Supreme Court by President Reagan and took his seat on the bench on February 18, 1988. He served on the U.S. Court of Appeals for the 9th Circuit from 1975 until 1988. He was appointed to that post by President Gerald Ford at the recommendation of then-Gov. Ronald Reagan.

While on the Court of Appeals, Kennedy wrote two majority opinions that dealt with broadcast news. In a 1978 case, Goldblum v. National Broadcasting

[51]Rehnquist, Scalia, O'Connor and Thomas, along with Kennedy, are the conservative majority voting bloc on the current Court.

[52]Kennedy's concurring opinion in ISKCON, below, is a good example.

Corporation,[53] a lawyer for NBC was jailed for refusing to submit for the court's review a copy of a newscast his client planned to air later that day. A prison inmate had filed suit seeking to enjoin NBC from airing the film, claiming that the film would jeopardize his release on parole and his right to a fair trial in any future proceedings against him. NBC filed an emergency petition with the Court of Appeals. Kennedy wrote the opinion for a three-judge panel vacating the orders to produce the film:

> The express and sole purpose of the district court's order to submit the film for viewing by the court was to determine whether or not to issue an injunction suspending its broadcast. Necessarily, any such injunction would be a sweeping prior restraint of speech and, therefore, presumptively unconstitutional. E.g., Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L.Ed. 2d 683 (1976).... Petitioner has not established that relief in the form of a prior restraint on publication would, on any assumption of fact or law, be appropriate with respect to the film in question. The order to produce the film in aid of a frivolous application for a prior restraint suffers the constitutional deficiencies of the application for an injunction. The order not only created a reasonable apprehension of an impending prior restraint, it was also a threatened interference with the editorial process. The district court's order was therefore void.
>
> It is a fundamental principle of the First Amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. [citations omitted] ... The district court proceedings here intervened in the

[53] 584 F.2d 904 (9th Cir. 1978).

> editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech
>
> A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt. (citations omitted) We have heretofore vacated forthwith the orders to produce the film and all orders issued in aid of the orders to produce the film.

In a unanimous decision by Kennedy in a 1985 case, he ordered a trial court to unseal documents sought by CBS news in the post-conviction criminal proceeding of John DeLorean. Kennedy wrote that most of the information could "easily be surmised from what is already in the public record," and that the trial court had alternatives to sealing, such as blacking out names on documents. CBS, Inc. v. United States District Court for the Central District of California, 765 F.2d 823 (9th Cir. 1985). The oral argument and opinion in this case were expedited in response to the network's emergency motion, similar to the emergency motion under which the Supreme Court agreed to expedite the Pentagon Papers case. Kennedy's opinion:

> We begin with the presumption that the public and the press have a right of access to criminal proceedings and documents filed therein. [citations

> omitted] ...
>
> We must make initial inquiry into what interests or rights will overcome the right of access....
>
> The interest which overrides the presumption of open procedures must be specified with particularity, and there must be findings that the closure remedy is narrowly confined to protect that interest. The rule stated in Press-Enterprise is controlling here:
>
> > The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Kennedy next chastised the government for having "compromised its own position by trying to manufacture a secret document, reciting confidential material." The assistant U.S. attorney had submitted an affidavit to the court that contained details of an ongoing criminal investigation in an attempt to render all of the documents at issue classified. The court, per Kennedy, found that the affidavit was unnecessary to consideration of the motion on its merits, and was improvidently filed. The court ordered the document removed from the record and returned to the government:

> We recognize that information relating to cooperating witnesses and criminal investigations should be kept confidential in

> some cases, but it does not follow that the government is free to reduce such matters to writing and then insist on filing the document as a court record under seal. ...
>
> The government and the trial court here went so far as to assert that the government's interests would be threatened if even its position of support or opposition to the motion were made known. That idea is as remarkable as it is meritless.

Kennedy's decision in CBS indicates that he not be persuaded by the government's argument in New York Times v. United States that all the Pentagon Papers should be withheld from public view because portions may contain classified material. Kennedy is even less likely to be persuaded by the government's argument that the documents should be withheld because, even if they reveal no specific classified information, they could maybe reveal the deliberative process underlying U.S. government involvement in Vietnam.

Despite Kennedy's opinions against prior restraint in the 9th Circuit, he would be a potential swing vote in New York Times v. United States because his record as a justice supports the government on most issues before the Supreme Court and is at least as strong as his federal court record against prior restraint.

Case History

Kennedy wrote a majority opinion in one case involving prior restraint, Ward v. Rock Against Racism, 491 U.S. 781 (1989). He wrote no opinions in cases involving both prior restraint and national security issues. Ward v. Rock Against Racism said that a New York City regulation that required a city sound technician be present at certain Central Park concerts "grants no authority to forbid speech, but merely permits the city to regulate volume," and is therefore constitutional as a reasonable regulation of the time, place and manner of protected speech. The guidelines are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. The three dissenters viewed government "distortion" of a performer's music as censorship.

The only other case in which Kennedy wrote the Court's decision was Cable News Network, Inc. v. Noreiga, 498 U.S. 976 (1990), in which Kennedy referred an application to stay a restraining order to the Court, and cert was denied.

Kennedy has also written three dissenting opinions and one concurring opinion. The most recent, his concurrence in ISKCON, 505 U.S. 672 (1992), supra page 22, he said that airport corridors and shopping areas outside of passenger security zones are public forums, and speech in those places is entitled to protection against all government regulation inconsistent with public forum

principles. However, Kennedy wrote that a ban on distribution or sale of literature is unconstitutional and a prohibition on solicitation and immediate receipt of funds is consistent with these principles, and therefore constitutional. Kennedy concurred, but at the same time found the majority's opinion flawed:

> This analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.
>
> The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there. The Court acknowledges as much, by introducing today into our First Amendment law a strict doctrinal line between the proprietary and regulatory functions of government which I thought has been abandoned long ago. [citations omitted]...
>
> Because the Port Authority's solicitation ban is directed at abusive practices and not at any particular message, idea, or form of speech, the

> regulation is a content-neutral rule serving a significant government interest.

Kennedy wrote at some length about prior restraint in his dissent in Alexander, supra page 23:

> The Court today embraces a rule that would find no affront to the First Amendment in the Government's destruction of a book and film business and its entire inventory of legitimate expression as punishment for a single past speech offense. Until now I had thought one could browse through any book or film store in the United States without fear that the proprietor had chosen each item to avoid risk to the whole inventory and indeed to the business itself. This ominous, onerous threat undermines free speech and press principles essential to our personal freedom....
>
> In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents. [citations omitted]...
>
> [P]rior censorship, including licensing, was the means by which the Crown and the Parliament controlled speech and press [citation omitted]. As those methods were the principal means used by government to control speech and press, it follows that an unyielding populace would devote its first efforts to avoiding or repealing restrictions in that form. ...
>
> The enactment of the alien and sedition laws early in our own history is an unhappy testament to the allure that restrictive measures have for governments tempted to control the speech and publications of their people....
>
> One wonders what today's majority would have done if faced in Near [v. Minnesota] with a novel argument to extend the traditional conception of the

prior restraint doctrine. In view of the formalistic approach the Court advances today, the Court likely would have rejected Near's pleas on the theory that to accept his argument would be to "blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not." [citation omitted] In so holding the Court would have ignored, as the Court does today, that the applicability of First Amendment analysis to a governmental action depends not alone upon the name by which the action is called, but upon its operation and effect on the suppression of speech [citing Near v. Minnesota] [additional citations omitted].

What is happening here is simple: Books and films are condemned and destroyed not for their own content but for the content of their owner's prior speech. Our law does not permit the government to burden future speech for this sort of taint.

What is at work in this case is not the power to punish an individual for his past transgressions but the authority to suppress a particular class of disfavored speech ... Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973).

In a society committed to freedom of thought, inquiry, and discussion without interference or guidance from the state, public confidence in the institutions devoted to the dissemination of written matter and films is essential.... Independence of speech and press can be just as compromised by the threat of official intervention as by the fact of it. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

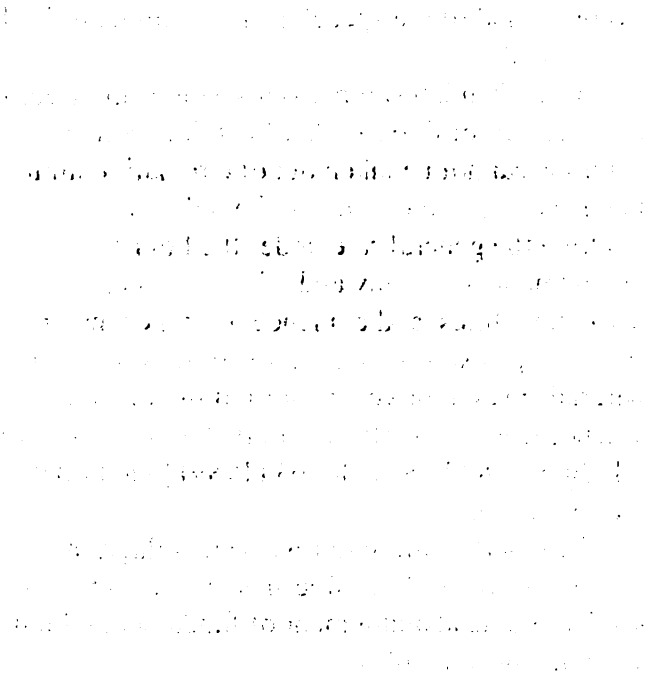
The threat of censorial motive and of ongoing speech supervision by the state justifies the imposition of First Amendment protection. Free speech principles, well established by our cases, require in this case that the forfeiture of the

> inventory and of the speech distribution facilities be held invalid.
>
> Even when interim pretrial seizures are used, we have been careful to say that First Amendment materials cannot be taken out of circulation until they have been determined to be unlawful. "[W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause ..., it is otherwise when materials presumptively protected by the First Amendment are involved." Fort Wayne Books, Inc. v. Indiana, 489 U.S. at 46, 63 (1989) [additional cites omitted].
>
> The Court's failure to reverse this flagrant violation of the right of free speech and expression is a deplorable abandonment of fundamental First Amendment principles.

Finally, Kennedy found no constitutional question in his dissent in Morse, supra page 54. The text of the law at issue in Morse reflects Congress' intent to reach governmental, not private entities. Therefore, Kennedy reasoned, there is no state action. Without state action, there can be no constitutional violation and therefore no free speech issue. "Given the absence of any ambiguity in the statutory text before us, there is no basis for a grasping and implausible construction of the Act that brings constitutional problems to the fore."

Conclusion

Kennedy is close to the center on the issue important to this analysis, although he may be more likely to favor the press than the government. Kennedy wrote two majority opinions favoring the press in prior restraint cases while a



federal judge. Kennedy also has written three opinions in prior restraint cases since he's been on the Supreme Court: one favoring the government, one favoring the press, and a third favoring the press on one issue and the government on a second issue. Such a split makes him unpredictable in an analysis of his stance on the important issue of prior restraint and national security. A look at Kennedy's federal and Supreme Court opinions places Kennedy with the pro-press contingency on the Court because he has, in total, written more opinions favoring the press than opinions favoring the government.

Sandra Day O'Connor

Overview

O'Connor would be the swing vote in this case. O'Connor has supported both government interests and press interests in her opinions. A review of her cases indicates, however, that her decision in a Pentagon Papers case might lean more in favor of the government than the press.

O'Connor was appointed to the Supreme Court by President Reagan and has primarily joined the conservative wing of the Court since taking her seat in 1981. Before she was a state assistant attorney general, served in the Arizona Senate, and was a judge in Arizona trial and appellate courts.

An important aspect of O'Connor's philosophy is that the Court should limit its interference into the functioning of other government branches. She frequently argues for limited constitutional protection for individuals.[54] Her approach to cases emphasizes procedure, suggesting the Court should resolve constitutional questions only when absolutely necessary.[55] O'Connor's philosophy could reasonably lead her to rule that the Legislature, not the Court, should make a rule regarding what information the Executive may withhold, in his capacity as Commander in Chief, for national security reasons. O'Connor's opinions are

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[54]See Robyn S. Goodman, "Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: A Decade in Review," (August 1992) (School of Journalism, Michigan State University, paper presented to the Law Division of the Association for Education in Journalism and Mass Communication, Montreal, Quebec, Canada), p. 3.

fact-specific and lead to narrow, limited holdings. She often writes concurring opinions to suggest alternate narrower grounds.[56] "When balancing the collective interest in strong government against the legitimate fear of the potential abuse of government power, she often tips the scale in support of government power."[57] That philosophy shines through in her dissenting opinion in Rust v. Sullivan, in which the Court upheld the government's right to prohibit abortion counseling in federally funded health clinics. O'Connor argued that the department had overstepped its authority:

> This court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with 'great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.[58]

With O'Connor, it is important to look at why she favors or disfavors the media in a decision because her opinions in expression cases are not always content-based. Instead, procedure is often the basis of her decisions. For

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[55]Goodman, at 12, 21.

[56]Oxford Companion to the Supreme Court of the United States, at 604.

[57]Goodman, at 11, citing R. Cordray and J. Vradelis, "The Emerging Jurisprudence of Justice O'Connor," Univ. Chicago L. Rev. 52 (1985), 391, 437.

O'Connor illustrates this approach in one of her early cases on the Court, Board of Education v. Pico, 457 U.S. 853 (1982) (plurality opinion), when in her opinion she rejected a First Amendment challenge to a school board's decision to remove certain books from it curriculum library. She based her argument on "the broad scope of the board's responsibilities." She wrote, "it is not the function of the courts to make the decisions that have been properly relegated to the elected members of the school boards. It is the school board that must determine educational suitability, and it has done so in this case."

instance, a decision favoring the rule against prior restraint in one case may not necessarily indicate that O'Connor would rule against prior restraint in another case because the decision may have been based on procedure rather than content.

She joined in a dissent, written by Justice Thurgood Marshall, in Cable News Network, Inc. v. Noriega, supra page 81, that indicates she may favor the press in some circumstances. The dissent calls for re-examination of the Nebraska Press rule in light of the court's refusal to hear a case in which the government wanted to enjoin publication of information alleged to threaten a criminal defendant's right to a fair trial. The government did not make the threshold showing that the information would cause harm and that suppression is the only means of averting it. "This case is of extraordinary consequence for freedom of the press" because it brought into question the heavy burden required for imposition of a prior restraint under Nebraska Press; Organization for a Better Austin v. Keefe, and New York Times v. United States.

O'Connor agreed with Marshall's dissent in Noreiga:

> I do not see how the prior restraint imposed in this case can be reconciled with these teachings. Even more fundamentally, if the lower courts in this case are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by Nebraska Press, then I think it is imperative that we reexamine the premises and operation of Nebraska Press itself.

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[58]Rust v. Sullivan, 111 S.Ct. 1759 (1991).

O'Connor's dissenting opinion in Rust v. Sullivan cited the Court's failure to act accordingly in deciding the case. Such a decision indicates she might vote against the press in New York Times v. United States simply because she would oppose a hasty decision on a constitutional issue. Although O'Connor would come closer to the center than the most conservative members of the Court,[59] her overall record indicates she would not likely cross it in favor of the press.[60]

Case History

O'Connor wrote the majority opinion in two prior restraint cases, the most recent of which involved national security issues. In Boos v. Barry, 485 U.S. 312 (1988), the issue was whether an ordinance prohibiting display of signs critical of foreign governments within 500 feet of the embassies of those governments is constitutional. The Court found the statute's display clause violated the First Amendment because it was a content-based restriction on political speech in a public forum that was not narrowly tailored to serve a compelling government interest. O'Connor explained that he display clause is content-based because

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[59]"Justice O'Connor would tend to decide expression cases by accepting the competing interests between government and individual rights presented by various Justices and then would argue that the Court's majority
opinion had struck a balance too protective of individual rights." R. Cordray and J. Vradelis, "The Emerging Jurisprudence of Justice O'Connor," Unv. of Chicago L. Rev. 52, 391, 437 (1985).

[60]Goodman's study showed O'Connor voted against individual rights in 14 of the 21 First Amendment opinions she wrote during her first 10 years on the Court, 1981-1991. Goodman's study found O'Connor ruled in favor of individual and press rights rather than government rights in three out of four political press cases, suggesting that O'Connor is more likely to support

"[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not," rendering the ordinance content-based and therefore unconstitutional, despite national security interests:

> The need to protect diplomats is grounded in our Nation's important interest in international relations. As a leading commentator observed in 1758, "[i]t is necessary that nations should treat and hold intercourse together, in order to promote their interests, -- to avoid injuring each other, -- and to adjust and terminate their disputes." E. Vattel, The Law of Nations, 452 (J. Chitty ed. 1844) (translation). This observation is even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security. Diplomatic personnel are essential to conduct the international affairs so crucial to the well-being of this Nation. ... At the same time, it is well established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. [citations omitted]. Thus, the fact that an interest is recognized in international law does not automatically render that interest "compelling" for purposes of First Amendment analysis. Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently "compelling" to support a content-based restriction on speech, we conclude [that the display clause] is not narrowly tailored to serve that interest. [citations omitted]

The second case for which O'Connor wrote the majority opinion was

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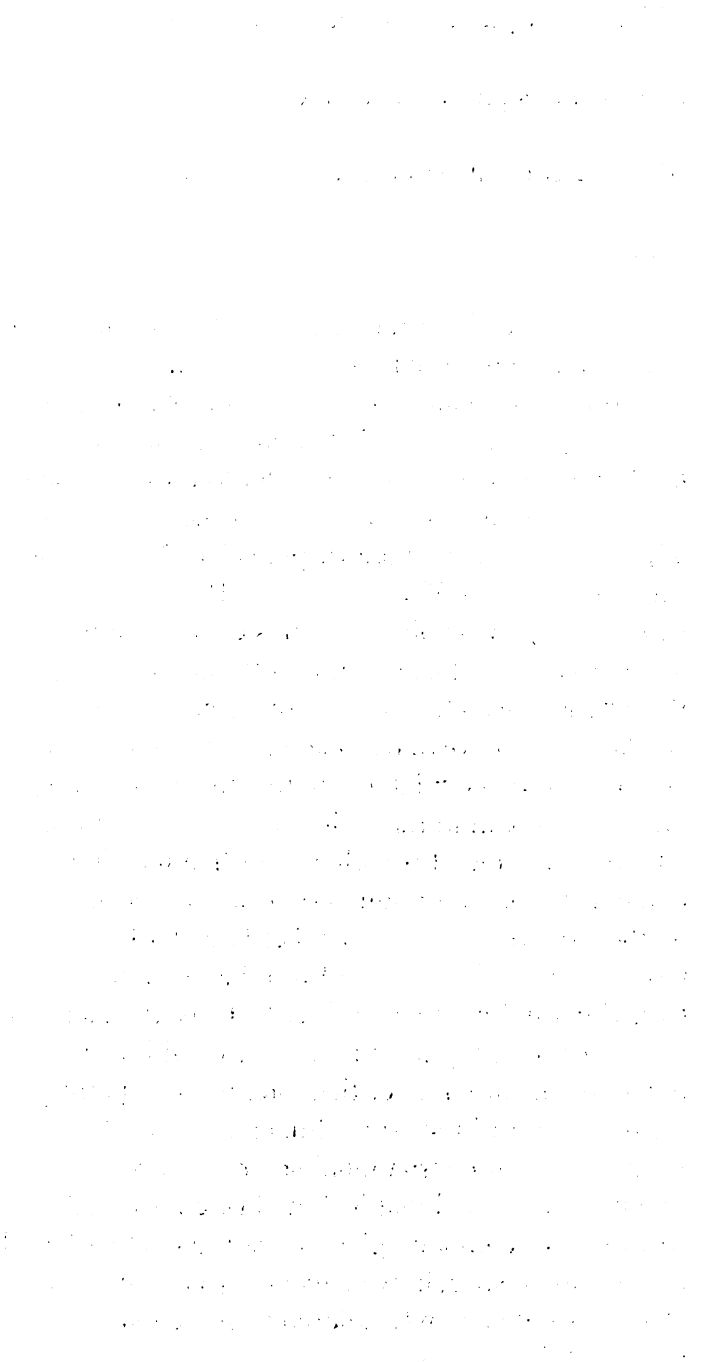
individual rights in press cases than in other First Amendment cases.



Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). The Court found that a "use tax" on the cost of paper and ink products consumed in the production of publications violated the guarantee of the freedom of the press in the First Amendment. Because the tax exempted the first $10,000 worth of paper and ink consumed in a year, the Court found that Minnesota had singled out the press for special treatment and that the tax specifically presented potential for government abuse of larger publications:

> When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. [citations omitted] Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. [citations omitted] Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.
>
> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.... Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few

> members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

O'Connor dissented in Rust v. Sullivan, supra page 25, saying that regulations that place content-based restrictions on the speech of federal fund recipients directed precisely at speech concerning one of "the most divisive and contentious issues that out Nation has faced in recent years" raises serious constitutional problems.

She concurred with the majority opinion in three cases. In Gentile, supra page 21, she agreed that a state may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press. She clarified her position by adding that lawyers do not therefore forfeit their First Amendment rights in such cases, but that a less demanding standard applies. In ISKCON, supra page 22, she reiterates the majority opinion in her concurring opinion but not add much other than her support. In City of Ladue, supra page 65, O'Connor wrote that she would have preferred to use the examination of the content-based city ordinance as an opportunity to modify the existing doctrine to take into account special factors such as this case presents.

Conclusion

O'Connor would be the swing vote in this case. She more likely would favor the government than the press in New York Times v. United States. Her

opinions reflect a philosophy that the Court should not in most cases interfere with decisions of other government branches. O'Connor has voted in favor of free speech in three prior restraint cases, in favor of the government once, and split her opinions to favor some government arguments and some press arguments in two other cases. Although her record does not clearly indicate a preference for any particular type of party that would be involved in the Pentagon Papers case, her adherence to procedure indicates that even if she were inclined to favor the press in New York Times v. United States on the merits of the case, she would not because she would disagree with the speed with which the decision would be rendered.

CONCLUSION

Let the people know the facts, and the country will be safe.
- Abraham Lincoln

Vincent Marchetti, the former CIA agent who lost his case[61] against government prepublication review of his 1974 book The CIA and the Cult of Intelligence, and then published the book with notations indicating government-imposed edits and deletions, wrote about the impact of the Pentagon Papers on the press:

> [M]ost of the American press has at least tacitly gone along, until the last few years, with the agency view that covert operations are not a proper subject for journalistic scrutiny. The credibility gap arising out of the Vietnam war, however, may well have changed the attitude of many reporters. The New York Times' Tom Wicker credits the Vietnam experience with making the press "more concerned with its fundamental duty." Now that most reporters have seen repeated examples government lying, he believes, they are much less likely to accept CIA denials of involvement in covert operations at home and abroad. As Wicker points out, "Lots of people today would believe that the CIA overthrows government," and most journalists no longer believe in the sanctity of classified material." In the case of his own paper, the New York Times, Wicker feels that "the Pentagon Papers made the big difference...."

[61] U.S. v. Marchetti, 446 F.2d 1309 (1972).

> Perhaps most important, the press has largely rejected the "national security" defense used by the White House to justify its actions. With any luck at all, the American people can look forward to learning from the news media what their government – even its secret part—is doing. As Congress abdicates its responsibility, and as the President abuses his responsibility, we have nowhere else to turn.[62]

However, if the Pentagon Papers case came before the Court today, the result would likely favor the government, not the press. If New York Times v. United States came before the United States Supreme Court in the 1997-1998 term, the likely outcome would be a 5-4 vote in favor of the government. Chief Justice Rehnquist and Justices Breyer, Thomas and Ginsburg would likely rule in favor of the government. Justices Scalia, Souter and Stevens would likely favor the press. Justices Kennedy and O'Connor would both sit near the middle, with Justice Kennedy ultimately siding with the press and Justice O'Connor providing the swing vote in favor of the government.

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[62] Vincent Marchetti and John D. Marks, The CIA and the Cult of Intelligence, (Dell Publishing

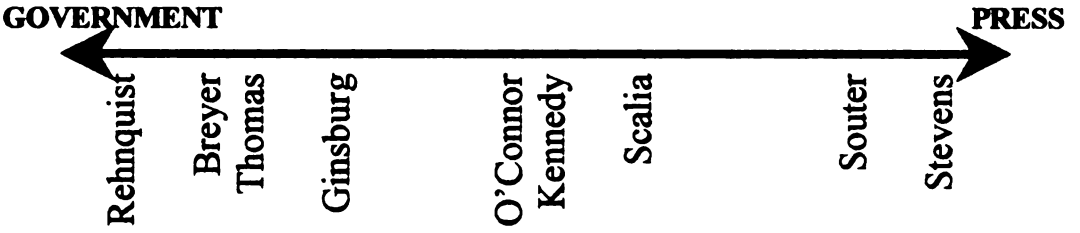

Figure 1

The chances that the Pentagon Papers case would have had a different result during the last several sessions are unlikely, despite the changing make-up of the court and the change from a Republican administration to a Democratic administration. If this hypothetical were set in the 1992-93 term, the vote would likely have again been 5-4. Justice White would likely have voted for the press, as he did in the actual Pentagon Papers case. His replacement, Justice Ginsburg, would probably vote the opposite way, reducing the Court from the 6-3 vote of 1971 to the hypothetical 5-4 vote of 1997. If this thesis looked at the 1993-94 term, the result still would have likely been a 5-4 decision, with Blackmun replacing Thomas's vote.

If the case had arisen in 1968 rather than 1971, the result likely would have been a stronger decision in favor of the press. Don R. Pember briefly analyzed the decision shortly after it came out in his article, "The 'Pentagon

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Co., New York, 1974), 345-46.

Papers' Decision: More Questions Than Answers," Journalism Quarterly, (Autumn 1971), 403. He speculated that the rule against prior restraint was precarious even as the Pentagon Papers decision came off the presses:

> Subtract, for a moment, the court's two elder statesmen – Black and Douglas – and add two new appointees. The result clearly could have been five-to-four against the newspapers. This case reveals that this is a far different court than the Warren Court of just three years ago.

Pember found the case to be more of a wake-up call to the American public than an important legal decision:

> The great importance in this case, then, might be an old lesson – one which each generation must learn anew. It is simply that freedom of the press is never secure, never certain, even in a constitutional democracy such as ours. The guarantees of the past can become meaningless in an instant if the people drop their guard. For 15 days the government of the Untied States successfully stopped the presses of two of the nation's most influential newspapers. For 15 days the freedom of the press was held in abeyance. For 15 days the people were denied the right to read a report prepared by their government about a war in which they have fought and died. The rights of a citizen are only as strong as his will to defend them. This, perhaps, is the lesson of the case.

The hypothetical 1997 Pentagon Papers decision would probably be similar to the actual 1971 decision in that it would be limited to the specific case, and it would fail to establish a rule on when prior restraint falls within the bounds of the Constitution and when it does not. New York Times v. United States left

questions unanswered in 1971. Most notably, it failed to determine what burden the government must meet to restrict the press on national security grounds without trampling the First Amendment. If the case came before the Court in 1997, it would leave the same troubling question for a nation built on democratic principles: What burden must the press meet to earn the privilege to print news of its government? And how much longer before that precarious right falls to one more pro-government vote on our nation's highest court?

This study could have been done from numerous perspectives. For instance, what if the Pentagon Papers had not been papers at all? What if they were audio tapes, as in New York Times v. NASA, supra page 38, or e-mail or a video cassette? Some of the justices have held that electronic media are not entitled to the same protections under the First Amendment as are the print media. As a body, the Supreme Court has indicated that not all types of media are allotted the same protection. There are many issues that may threaten the rule against prior restraint in the near future.

It is an assumption that the Court would hear the Pentagon Papers case at all. The Court has been taking fewer and fewer cases in recent years.[63] There is a faction on the conservative court that would avoid the political hot potato presented by a Pentagon Papers case, and would not take it because it would feel

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[63]For a comprehensive list of prior restraint cases heard by lower courts in the 1990s, see Kellie L. Sager and Robert W. Lofton, "Prior Restraint in the '90s: Twenty-five Years After the Pentagon

the decision should be left to the Executive.

Another factor is the popularity of the press. The Supreme Court responds, at least in part, to the pulse of the people. The print media are not as popular today as in 1971. The press has less credibility with the public, and likely would not get the kind of support that it did in 1971. Journalists are no longer seen as soldiers protecting the rights of the population, but are regarded more often as pack wolves seeking readers or ratings. As Sanford Ungar says in his book The Papers & the Papers, "The pendulum swings quickly." In a survey conducted by the Gallup Organization for the Times Mirror Company in 1988, 48 percent of the respondents said they think that press reports are "often inaccurate" and 59 percent said that the press "tend(s) to favor one side" when reporting on political or social issues. Only 18 percent rated network television news "very favorably," and 21 percent gave that rating to their daily newspapers; 78 percent said they believe the press "often invades people's privacy." In every area, the media were rated less favorably than in a similar survey in 1985.[64]

Today's Americans largely supported the war in the Persian Gulf in 1991, even when political watchdogs were predicting it to be another Vietnam. Grenada also did not raise many eyebrows amongst the public, and press restrictions did not raise many questions among the press. Meanwhile, surveys show that people

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Papers", 446 PLI/Pat, 517 (1996).

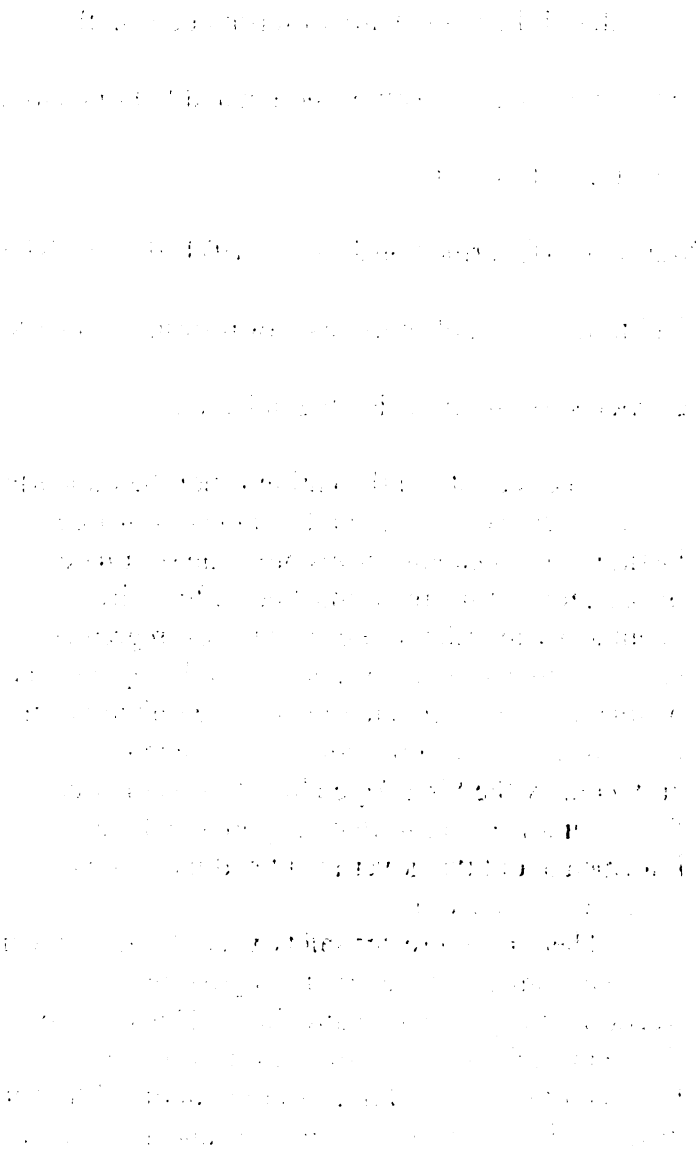
[64] Ungar, The Papers & the Papers at 310.

do not trust their media. Like many hard-won privileges in the United States, the rule against prior restraint seems easily forgotten and left open to the whittling away of government and the courts.

Judge Murray Gurfein ruled on June 19, 1971, that the Nixon administration had failed to establish its case for restraining The New York Times from publishing articles based on the Pentagon Papers:

> The security of the nation is not the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know ... It is not merely the opinion of the editorial writer or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the government and its actions. These are troubled times.
>
> There is no greater safety valve for discontent and cynicism about the affairs of government than freedom of expression in any form. This has been the genius of our institutions throughout our history. It is one of the marked traits of our national life that distinguishes us from other nations under different forms of government.

Certainly justices on the current Rehnquist Court could write with equal power and eloquence on the value of a free press to our nation. The question is whether those justices would constitute a majority. The likely answer is "no".



AND YE SHALL KNOW THE TRUTH

AND THE TRUTH SHALL MAKE YOU FREE

John, VIII:32

inscribed on the marble wall of the main lobby at CIA headquarters,

Langley, Virginia

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