THE SUPREME COURT AND PRIOR RESTRAINT DOCTRINE: AN OMINOUS SHIFT?

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"Free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

I. Introduction:

The Supreme Court has said prior restraints on the news media are antithetical to the First Amendment and must be presumed to be unconstitutional. In Near v. Minnesota, the 1931 case that has served as a beacon for modern prior restraint doctrine, Chief Justice Charles Evans Hughes reasoned that in determining constitutional protection afforded the press "it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraint upon publications." The forceful prohibition against prior restraints on the news media that has evolved from Near and its progeny is not absolute. At times, media rights must be balanced against other basic rights, such as a criminal defendant's right to a fair trial. In Nebraska Press Ass'n v. Stuart, the Supreme Court established a test for balancing the strong presumption against prior restraints with fair-trial consideration. Publicity must be intense and pervasive and its damaging effect on a trial more than speculative. A court imposing a prior restraint must make a finding supported by a record showing that measures short of a prior restraint on the media would not effectively protect the right in question, and that the court must establish that a prior restraint would, in fact, be effective.

A recent opinion by the Court of Appeals for the Eleventh Circuit, however, suggests that informed jurists and scholars still can reach opposite conclusions when attempting to balance competing interests in a particular prior restraint case. The Eleventh Circuit upheld a federal district court's temporary restraining order that the Cable News Network could not broadcast audio tapes it had obtained of conversations between deposed Panamanian leader Manuel Noriega and his lawyers. Noriega was in custody on drug-related charges after surrendering to United States authorities during the highly publicized and controversial military invasion of Panama. The Supreme Court refused to review the case.

II. CNN and the Noriega Tapes:

On November 6, 1990, representatives of Cable News Network (CNN) played an audio tape for Frank Rubino, the Miami-based attorney for Manuel Noriega. The tape, which Rubino identified as an audio recording of telephone conversations between Noriega and staff members at Rubino's office, was one of a number of such tapes CNN had acquired from an unidentified source. The network contended that the tapes suggested the federal government had unlawfully intercepted the telephone conversations. Officials at the prison where Noriega was held frequently monitored and recorded inmate telephone conversations, unless the inmate requested that conversations with attorneys be private.

On November 7, Noriega's lawyers filed a motion in the United States District Court for the Southern District of Florida seeking to enjoin CNN from broadcasting contents of the tapes. They argued that dissemination of the tapes' contents was a violation of attorney-client privilege and would hamper Noriega's Sixth Amendment right to a fair trial by disclosing to the prosecution elements of Noriega's trial strategy, as well as other confidences.

District Judge William Hoeveler granted an injunction against broadcast of the tapes in an order dated November 8. Hoeveler noted that the attorney-client privilege does not typically rise to constitutional dimensions. In this case, however, the judge concluded that the privilege took on a constitutional aspect because "it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeached communication and disclosure by the defendant to his attorney." Because Noriega's communication with his attorneys was already impeded by his knowledge of the existence of the tapes, however, any restraint based on this aspect of the privilege would be merely "symbolic and prophylactic," Hoeveler wrote.

The attorney-client privilege also implicated Noriega's Sixth Amendment right to a fair trial, according to Hoeveler. Because one purpose of the privilege is to prevent disclosure of information that might damage a criminal defendant's case, the judge said the real issue before the court was not the privilege per se, but the right to a fair trial. As a result, Hoeveler viewed the case as a direct confrontation between the First Amendment protection against prior restraint and Noriega's right to a fair trial under the Sixth Amendment. Hoeveler concluded that despite the "heavy burden" required to justify a prior restraint, cases involving a criminal defendant's fair-trial right were "[a]mong the very narrow range of cases which may justify a restraint." The judge cited the three-prong test used by the Supreme Court in the Nebraska Press case.

Although the Nebraska Press test was fashioned to guide courts in cases involving prejudicial pretrial publicity, Hoeveler concluded that the standard also applied to Noriega's attempt to keep his trial strategy private. The real danger posed by the tapes was that the tactics of Noriega's defense team would be known to the prosecution. The problem, the judge wrote, was that before he could apply the...
Nebraska Press test, he would have to review the tapes. Because CNN had resisted turning the tapes over to the court for review by a magistrate, Hoeveler concluded that a temporary injunction against airing the tapes would remain in effect until CNN made the tapes available.

"It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should be issued... because CNN has so far prevented this court from reviewing the contents of the tapes in its possession." 17

Hoeveler rejected CNN's argument that if the court wanted the tapes, it should obtain them from the government. First, the judge wrote, shifting through "potentially hundreds" of calls between the general and his attorneys for privileged communications would be an inefficient use of the magistrate's time. Second, CNN's tapes might not have been made by the government at all. The tapes might have been recorded from a location outside of the prison where the government incarcerated Noriega. 18

Hoeveler's Supplemental Order took on an almost apologetic tone as the judge emphasized that the restraint did not constitute a decision on the merits of Noriega's claim. Noting the Nebraska Press holding that even a temporary restraint required a showing of immediate harm, Hoeveler nonetheless concluded that "the unique nature of the problem" required that broadcast of the tapes be halted until the court could review the tapes and decide whether a permanent injunction should be issued.

On November 10, the United States Court of Appeals for the Eleventh Circuit denied CNN's request that it overturn Hoeveler's temporary restraining order. 19 Partially because temporary restraining orders are normally not appealable, the three-judge panel decided it would view CNN's "emergency appeal" not as a direct appeal of the district court's decision, but as "a petition for writ of mandamus against the district court to correct an abuse of discretion." 20 In other words, the Eleventh Circuit would examine the record to determine whether Hoeveler abused his judicial power by entering the restraining order.

The Eleventh Circuit began its discussion by noting that trial judges have broad discretion to take steps to ensure that Sixth Amendment rights of criminal defendants are protected. That discretion, the court of appeals wrote, includes steps that might negatively affect First Amendment interests. The court left little doubt that First Amendment rights could be trumped by fair trial rights if the two directly conflicted. The court wrote: "When the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter." 21

Nevertheless, the court said, some showing of immediate danger to a defendant's fair trial rights is necessary before First Amendment protections can be overcome. With only one indirect reference to Nebraska Press, the Eleventh Circuit opinion embarked on a divergent discussion of cases involving access to court proceedings and prejudicial pretrial publicity. The Eleventh Circuit did not cite the three-prong test from Nebraska Press, but apparently erroneously quoted the three-prong test from Press-Enterprises Co. v. Superior Court. This test, less rigorous than the test used in Nebraska Press, was designed for use in cases involving access to court proceedings, not restraint of material already possessed by the media. Nowhere in the opinion did the court seem to acknowledge the gravity of the historical presumption against prior restraint. Ignoring the district court's emphasis on the danger of disclosing trial strategy to the prosecution, the court of appeals seemed to regard the tapes as perilous primarily because their broadcast might make it difficult to seat an unbiased jury.

In another section of the opinion, the Eleventh Circuit outlined the steps the district court should follow, assuming it obtained the tapes, to determine whether the attorney-client communications were privileged. The court of appeals suggested Noriega may have waived the privilege by signing a release allowing prison authorities to record his telephone conversations. If so, the court wrote, the district court would have to examine the reasonableness of any expectation of privacy Noriega might assert. The Eleventh Circuit did not clearly state how these considerations affected the validity of a prior restraint against broadcast of the tapes. The court did say, however, that the existence of the privilege, "while not necessarily dispositive of whether such communications should be publicly broadcast, would be relevant to the district court's assessment of potential harm to Noriega's right to a fair trial." 22

Finally, the Eleventh Circuit expressed no small degree of indigination that CNN came before the court asking it to lift the restraining order while still refusing to turn over the tapes for review. "While appealing to our nation's judicial system for relief, CNN is at the same time defiant of that system's reasonable directions." 23 At the conclusion of its written opinion, the court of appeals asserted that no litigant could simultaneously violate a court order and seek review of that order. The latter statement seemed to cast doubt on whether the extensive discussion up to that point in the opinion was aimed at the issue ostensibly before the appellate court, the validity of the restraining order or whether it constituted mere dicta.

After its loss before the Eleventh Circuit, CNN filed an application to stay the restraining orders and a petition for writ of certiorari with the United States Supreme Court. The Court, without opinion, denied both the application and the petition on November 18, 1990. 24 Two justices dissented from the denial.

Justice Marshall, in a dissenting opinion joined by Justice O'Connor, said: "In my view, this case is of extraordinary consequence for freedom of the press." He expressed concern that the Court had left intact lower court decisions that allowed a prior restraint with no showing that the restrained material would harm Noriega's right to a fair trial or that no less restrictive means were available to prevent such harm. Citing Nebraska Press, Marshall reminded the majority of the strong presumption against prior restraints and the significant burden on a party seeking to justify such restraints.

III. Analysis:

The Noriega case, as Justice Marshall warned, represents a disturbing precedent in First Amendment jurisprudence. Armed only with highly speculative justifications, a federal court has restrained broadcast of information already in the hands of a news organization, all the while downplaying its actions as "only temporary." This restraint was approved explicitly by the Eleventh Circuit and implicitly by the Supreme Court. Although CNN was ultimately allowed to broadcast the tapes, the temporary restraining order, with its intervening freeze on speech, is difficult to reconcile with past judicial opinions on prior restraint.
As Judge Hoeveler pointed out, Noriega appears to be a case of first impression. That novelty may account for some of the apparent difficulty both the district court and the court of appeals encountered in applying the proper legal test to these circumstances. The district court acknowledged that Nebraska Press provided the basis for deciding the propriety of an injunction against broadcast of the tapes. Nebraska Press required that the publication clearly impair the right to a fair trial, that no less restrictive alternatives could function to make the prior restraint unnecessary, and that a prior restraint would effectively prevent the asserted harm. Despite the heavy burden imposed by the Nebraska Press test, the district court chose to regard the test as applicable not to determine the legitimacy of the temporary restraining order, but only to future consideration of lasting injunctive relief. Yet language from Nebraska Press suggests that any prior restraint, regardless of duration, must be weighed under the three-prong test. Citing New York Times v. United States, the case in which the federal government sought to restrain publication of the Pentagon Papers, the Nebraska Press Court stated:

"The Court's conclusion in New York Times suggests that the burden on the Government is not reduced by the temporary nature of restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue."

Thus, under existing Supreme Court precedent, the heavy burden applied to those seeking to restrain publication is not lessened when the restraint sought is only temporary. Indeed, the fallacy underlying the decision in Noriega is that short-term injunctive relief can operate to maintain the status quo while a court assesses the impact of a more lasting restraint.

Had the district court applied the Nebraska Press test to the facts in Noriega, it seems almost inescapable that Noriega's lawyers would not have made a sufficient showing to justify the restraint. Under the first prong of Nebraska Press, the restrained publication must cause some concrete harm to the criminal defendant's fair trial rights. The district court emphasized that the harm flowing from broadcast of the tapes might be the prosecution's knowledge of Noriega's defense strategy. The Eleventh Circuit, on the other hand, focused on the more remote prospect that broadcast of the tapes would make it difficult to seat an impartial jury for Noriega.

Looking first at the district court's concern about the existence of the tapes strongly suggests they were created by the government and that their contents were already available to the prosecution. Assuming this, no prior restraint on CNN could prevent the prosecution from learning the information on the tapes. Thus, if the prosecution knew what the tapes contained through the government's copies, the requested restraint fails to satisfy both the first and third prongs of Nebraska Press. The first prong requires that the published material would impair the right to a fair trial. If the fair trial right being protected was Noriega's right to keep his attorney-client conversations from prosecutors, and the prosecutors already had access to those conversations, CNN broadcast of the tapes posed no additional harm. The third prong requires that the restraint be effective. If prosecutors knew the contents of the tapes, no action by the court could remedy this.

If, on the other hand, the prosecutors were unaware of the contents of the tapes, the court could have effectively prevented the harm by ordering the prosecution not to listen to news accounts of the contents of the tapes and by ordering the government to turn the tapes over to the court for review. Under these facts, the requested restraint fails the second prong of the test because a means less restrictive to the media was available to prevent the harm. Thus, regardless of the prosecution's knowledge of the tapes, a prior restraint on CNN was not the appropriate vehicle to protect Noriega's confidences.

In his later order lifting the stay, Judge Hoeveler indicated that he had "instructed the prosecutors on November 16 to begin sequestration of the entire prosecution team," in addition to earlier orders that prosecutors avoid any CNN broadcasts of the tapes. The judge seemed to acknowledge that ordering prosecutors to avoid broadcasts would have been a less restrictive and equally effective means of preventing Noriega's confidences from reaching the prosecution team. Hoeveler argued that such sequestration could not have taken the place of the restraining order against CNN only because of the time needed to establish sequestration. This argument ignores the simple expedient of imposing immediate sequestration where possible and replacing members of the team tainted by exposure to the tapes. The judge's underlying assumption seems to be that the effect of a CNN broadcast would be both immediate and all-pervasive, a questionable assumption at best.

While the district court's concern about the secrecy of trial strategy appears reasonable at first glance, the Eleventh Circuit's focus on the difficulties the tapes might create in seating an impartial jury is altogether too speculative to pass muster under the Nebraska Press test. As Justice Brennan noted in his concurrence, information on potential jurors is based on supposition concerning the method of presentation, the scope of exposure, and the impact on potential jurors of the information sought to be restrained.

The rule that seems to emerge from the two lower courts' decisions in Noriega is that while lasting injunctive relief can be obtained only by the burdensome showing required by Nebraska Press, a temporary restraining order can be issued based on a high degree of speculation. Indeed, the district court seemed to resolve matters of disputed fact summarily against CNN in considering the merits of the restraining order. For example, the district court rejected CNN's argument that the court should obtain copies of the tapes from the government rather than CNN, partially on the highly improbable basis that someone other than the government may have recorded the tapes. Based on the strong presumption against prior restraints, it would seem that disputed factual questions should be viewed in a light favorable to the party against whom the restraint is sought.

Although there is danger in reading too much into the Supreme Court's denial of certiorari, the strength and tone of Marshall's dissent suggests that a majority of the Court found Hoeveler's decision consistent with settled First Amendment law. If so, there may be reason to think that the Nebraska Press standard is open to revision. The Court may be prepared to accept a distinction between temporary restraining orders and permanent injunctive relief in prior restraint cases. Such a rule could only be seen as a major setback for First Amendment freedoms of the news media, whose very existence depends on timely news reporting.
IV. Conclusion:

Prior restraint doctrine is one area of First Amendment jurisprudence in which the Supreme Court has seemed willing to approach absolutism. The Near v. Minnesota and Pentagon Papers cases made clear that the Supreme Court views prior restraints on the publication of news as impermissible in all but the most extreme of circumstances, such as imminent threats to national security in times of war. Yet the recent lower court decisions in Noriega, which the Supreme Court refused to review, cast doubt on this seemingly settled area of law.

Both the district court and the Eleventh Circuit expressed indignation that CNN sought to avoid a prior restraint while refusing to turn over the tapes. The crucial point is that the district court had the opportunity to obtain the tapes from the party to whom the Sixth Amendment duty applies, the government. Yet for reasons of administrative convenience, and on the unlikely chance that CNN's tapes were not recorded by the government, the district court chose not to seek the tapes from the government. Assuming that the burden of sorting through all of the Noriega tapes was beyond the ability of the court, the judge could have asked CNN for only the dates of the tapes in question, thus imposing a less restrictive First Amendment burden on the network.

Nebraska Press clearly seems to require findings that the material sought to be restrained meets the three-prong test. No such findings were made in this case, even though the temporary restraining order had an effect indistinguishable from any other prior restraint. The lower courts' focus on CNN's refusal to turn over the tapes seems to have obscured the courts' view of the burden of justifying a prior restraint, which lay with Noriega's lawyers and not with CNN. In fact, the district court's circular reasoning, that it must impose a prior restraint in order to determine whether a prior restraint is necessary, stops the inquiry at the point at which it should have begun under Nebraska Press. Even without physical possession of the tapes, the court had enough information to determine whether Noriega had begun to meet his burden in seeking a prior restraint.

In the Noriega case, Judge Hoeveler's actions once CNN turned over the tapes underscores the damage done to a news organization even when the prior restraint is only temporary. After receiving the tapes, the judge took ten days to determine there was nothing in the tapes to support the request for the restraint. This reflects the various Noriega courts' lack of understanding, or disregard for, the lessons of Nebraska Press about the exigencies of news gathering. The courts' notion that a temporary restraining order merely maintains the status quo when dealing with the reporting of news also reflects little on understanding the role of the news media in modern society. News is a perishable commodity and any restraint, even of the shortest duration, can render news useless in the discourse about current events. As Judge John Minor Wisdom noted in the Providence Journal, "Today's news will often be tomorrow's history." Noriega also illustrates how the rule adopted by the Eleventh Circuit, that a news medium subjected to a request for a temporary restraining order must relinquish information in its possession so a court can determine whether the news medium should use the information, in itself deprives the news medium of its exclusive use of newsworthy information. After the Eleventh Circuit upheld the lower court's action and the Supreme Court had refused to intervene, several competing news organizations took legal action to obtain the contents of the tapes CNN gave to the court. Because the contents of the tapes had become court records upon review by the court, they were effectively out of CNN's control and fair game to competitors.

The Noriega courts' actions also effectively shift the burden, established in Nebraska Press, away from the party seeking the prior restraint to the news medium fighting it. In this case, the courts commanded CNN to forgo the First Amendment right to publish timely news about potential government misconduct based solely on speculation that publication might interfere with a future trial. Under this rule, a party to a trial arguably could seek a prior restraint on any colorable basis and demand that the news medium show its hand in order to prove why it should not be subject to prior restraint. This is exactly the problem envisioned in Nebraska Press. Once a medium is commanded not to publish and then ordered into court to prove why it should not be restrained, the First Amendment is defeated. News media should be brought before a court for a prior restraint hearing only after the party seeking the restraint has met its substantial burden, at which time the media could argue against the evidence. Only after such a hearing should a restraint even be entertained.

Never has the Supreme Court upheld a lasting prior restraint on the publication of news. The Court's leading cases emphasize the rare instances in which interference in the editorial discretion of news media might be upheld. Even though Chief Justice Burger cracked the door to fair-trial considerations, a prior restraint on news already in possession of the news media has never survived a constitutional challenge. Courts have responded to fair-trial concerns by other means.

Justice Marshall's strong dissent to the Supreme Court's denial of certiorari also is a reason for concern about the future of prior restraint doctrine in the free press/fair trial context. While denial of certiorari also is considered a neutral response with respect to the case on appeal, the alarm expressed in the dissenting opinion, by parties privy to the debate surrounding that denial, suggests a majority of the court might be willing to give judges a freer reign in balancing First Amendment principles with fair trial concerns.

1 Assistant Professor, University of Miami School of Communication.
2 Assistant Professor, University of Alabama School of Journalism.
3 Bridges v. California, 314 U.S. 252, 260 (1941).
United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990).


id. at 1053.

id.

id. at 1054.

Nebraska Press Ass’n v. Stuart, 427 U.S. at 592. Nebraska Press involved a conflict between the media’s right to publish information about an ongoing sensational murder case including the defendant’s confession, and the defendant’s Sixth Amendment right to a fair trial.


id. at n. 3.

United States v. Noriega, 917 F.2d at 1552.

id. at 1546.


id. at 1551.

Id.


Nebraska Press Ass’n, 427 U.S. at 562-68.


Nebraska Press Ass’n, 427 U.S. at 559.

A restraint on CNN without an injunction directed against the prosecution would seem to merely encourage prosecutors to seek out the confidential conversations by other means, such as reviewing the government tapes. On the other hand, preventing everyone from hearing the tapes in order to ensure that prosecution or defense potential jurors are not exposed to prejudicial information runs contrary to First Amendment principles. See, Linde, Courts and Censorship, 66 Minn. L. Rev. 171, 189 (1981).


In other situations in which facts are disputed, courts frequently view disputed facts in the light most favorable to the party against whom the motion is directed. See, e.g., F.R.C.P. 56.


See, L. Tribe, American Constitutional Law 622-31 (1978) ("If our system of justice is functioning properly, government is prohibited from trying an accused in a prejudicial atmosphere; if pre-trial publicity prevents the impaneling of an impartial jury, the defendant is entitled by the Sixth Amendment to a dismissal of the charges against him. The key conflict is therefore not between a defendant’s Sixth Amendment rights and a publisher’s First Amendment rights: the interests advanced to justify suppression are largely the state’s interests — in putting guilty criminals in jail and in maintaining fairness of the judicial system." Id. at 625-26 n. 15) (citations omitted).