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CONSTITUTIONAL LAW

FIRST AMENDMENT — FREEDOM OF SPEECH AND PRESS

Pentagon Papers. As one of three per curiam decisions¹ rendered this term, *United States v. New York Times Co.*² especially reflects the character of the judges of the Second Circuit.³ The court rejected the argument that prior restraint of publication is unconstitutional per se⁴ and remanded for a determination of whether publication of the "Pentagon Papers" posed such a serious threat to national security as to warrant its continued enjoinder.⁵

Prior Restraints. In the years since *Schenck v. United States*,⁶ the first amendment right of freedom of speech has undergone detailed analysis by the Supreme Court. In *Eisner v. Stamford Board of Education*,⁷ the court examined this analysis and attempted to "advance formulations sufficient to bridge past decisions with new facts."⁸ The court was concerned with the following regulation:

The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations:

¹ *United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971); *Sostre v. McGinnis*, 422 F.2d 178 (2d Cir. 1971); *Scanapico v. Richmond, F. & P. R.R.*, 439 F.2d 71 (2d Cir. 1971).

² 444 F.2d 544 (2d Cir. 1971) (per curiam).

³ The case was considered by the court en banc before Friendly, C. J., and Lumbard, Smith, Kaufman, Hays, Feinberg, Mansfield, and Oakes, circuit judges. Three of the judges, Kaufman, Feinberg, and Oakes, dissented. Judge Lumbard, who was among the majority, has since retired and been replaced by Judge William H. Mulligan. (July 20, 1971).

⁴ In view of the "heavy presumption against" prior restraint, the basis upon which the Supreme Court subsequently resolved the issue, *sub nom.* *United States v. Washington Post Co.*, 401 U.S. 3018 (1971), the fact that a per curiam decision was rendered might be quite significant. The question necessarily arises whether the circuit court used a per curiam, 5-3, decision as a means of expressing consensus or as a means of avoiding meaningful study. The Supreme Court also rendered a per curiam decision; however, there were simultaneously nine separate opinions.

⁵ The *New York Times* applied for a writ of certiorari which was granted. See 403 U.S. 713 (1971). For an in depth study of the case and its surrounding events, see Note, *The Purloined Pentagon Papers and Prior Restraint: The Press Prevailed!*, 46 ST. JOHN'S LAW REVIEW 81 (1971).

⁶ 349 U.S. 47 (1919). The Court here, in an opinion by Mr. Justice Holmes, established the famous "clear and present danger" standard. However, in the years immediately following this decision, the Court applied the standard less strictly than was contemplated by Holmes. See *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919). The Court, in later decisions, reversed that trend. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951).

⁷ 440 F.2d 803 (2d Cir. 1971).

⁸ *Id.* at 804 n.1.

No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.

In granting or denying approval, the following guidelines shall apply.

No material shall be distributed which, either by its content or the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.⁹

The district court struck down the regulation as a prior restraint on freedom of expression, and alternatively, as lacking "procedural safeguards designed to obviate the dangers of a censorship system."¹⁰ The court of appeals affirmed, holding that the provision was unconstitutional because it lacked a definite procedure for prior submission of materials for approval and that the prohibition of "distribution" was unconstitutionally vague. Contrary to the district court, it did not consider the measure an unconstitutional prior restraint.¹¹

The Supreme Court in *Near v. Minnesota*¹² was primarily concerned with the censorship effect of prior restraints in the political marketplace of ideas.¹³ It did not therefore declare all prior restraints invalid per se.¹⁴ On the contrary, it specifically noted certain "exceptional" areas in which government may prohibit speech on the basis of its content.¹⁵

⁹ *Id.* at 805.

¹⁰ 314 F. Supp. 832, 835-36 (D. Conn. 1970).

¹¹ 440 F.2d at 805.

¹² 283 U.S. 697 (1931).

¹³ Professor Meiklejohn has proposed that the first amendment's purpose is political and therefore he distinguishes between public and private speech, only the former being protected. A. MEIKLEJOHN, *FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT* (1948), reviewed, Chafce, 62 HARV. L. REV. 891 (1949). The Supreme Court has indicated that the expression of political ideas is at the "very center" of the first amendment protections. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962); *Terminiello v. Chicago*, 337 U.S. 1 (1949). But it is clear that the Court has not adopted Meiklejohn's theory wholesale. For example, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that the first amendment protected a marginally newsworthy, and in no sense political, story at the expense of a serious invasion of privacy. See Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 958-67 (1968). *Contra*, Note, *Privacy, Defamation, and the First Amendment: The Implications of Time Inc. v. Hill*, 67 COLUM. L. REV. 926, 940 (1967).

¹⁴ 283 U.S. at 716.

¹⁵ See *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961). However, any restraint that is overbroad, in that it includes areas that would ordinarily be protected speech under the first amendment, would be declared unconstitutional and void on its

The court felt that a public school would fall into one of those "exceptional" areas on the strength of *Tinker v. Des Moines School District*.¹⁶ That case upheld the right of high school students to wear black armbands to protest the Vietnam War.¹⁷ The Supreme Court there stated that

conduct by the student . . . which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.¹⁸

Therefore, the regulation is neither invalid as overbroad and void on its face; nor is the language unconstitutionally vague.¹⁹

Yet, although the provision was not struck down as an unconstitutional prior restraint, it was defective in its lack of procedure for approval of material to be distributed. The leading case with respect to procedural safeguards designed to obviate the risks involved in any prior restraint on speech is *Freedman v. Maryland*.²⁰ There, the Court promulgated a threefold test. First, the state must bear the burden of proof to show that the speech is not constitutionally protected; second, a judicial determination is necessary before the speech can be censored; and third, the proceeding must be expeditious.

face. See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

¹⁶ 393 U.S. 503 (1969).

¹⁷ Although *Tinker* might be considered as a precedent for the broad application of the first amendment rights in the classroom, the better view is that the decision probably rests on the more narrow ground of evenhandedness. That is, since the regulation singled out the Vietnam protest to the exclusion of other political opinions, its fatal defect lay in its specificity.

Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.

Id. at 511. Cf. *United States v. Brown*, 381 U.S. 437 (1965).

¹⁸ 393 U.S. at 513. However, the power of school authorities in this area is far from absolute. That students do not surrender their first amendment rights upon entering school grounds is clear from the rule that the burden of establishing the reasonableness of a regulation rests upon the school authorities. See, e.g., *Dawson v. Hillsborough County Florida School Bd.*, 322 F. Supp. 286 (M.D. Fla. 1971); *Turley v. Adel Community School Dist.*, 322 F. Supp. 402 (S.D. Iowa 1971); *Axtell v. LaPenna*, 323 F. Supp. 1077 (W.D. Pa. 1971); *Karr v. Schmidt*, 320 F. Supp. 728 (W.D. Tex. 1971); *Qunham v. Pulsifier*, 312 F. Supp. 411 (D. Vt. 1971).

¹⁹ The doctrine of vagueness is similar to that of overbreadth; the reasonable man must guess at his peril what is or is not prohibited. Vagueness applies with special significance in the area of free speech. The theory is that the scrupulous avoidance of areas that might be prohibited has a notable "chilling effect" on the free expression of ideas. Thus, indirect prohibitions of constitutionally protected speech will not be allowed to stand. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961).

²⁰ 380 U.S. 51 (1965).

In *Eisner* the Second Circuit felt that it would be an unreasonable burden upon school officials to initiate court proceedings in order to curtail activities not consonant with the educational goal. In fact, the court felt that such a burden would, itself, be "highly disruptive to the educational process. . . ." ²¹ But if the student had sought a judicial determination, it has been held that the school authorities must establish a reasonable basis for its prohibition. ²²

However, the court did require that the regulation establish a prompt review procedure. It "must prescribe a definite brief period" within which the propriety of the submitted material will be determined. ²³

Finally, the court believed that the term "distribution" was unconstitutionally vague. ²⁴ It held that in order for the regulation to be valid, it may "require prior submission only when there is to be a *substantial* distribution of written material. . . ." ²⁵ Anything less than that would not provide a reasonable basis for preventing disruption.

Military Rights. It has been a firmly embedded American tradition that the military be subordinate to the civil government. ²⁶ Yet the civil courts, cognizant of unique military necessities, have been careful not to interfere with legitimate military affairs. ²⁷

Traditionally, conflicts have arisen concerning the extent to which the Bill of Rights is applicable to members of the military. ²⁸ Once

²¹ 440 F.2d at 810.

²² See cases cited at note 18 *supra*.

²³ 440 F.2d at 810.

²⁴ See note 19 *supra*.

²⁵ 440 F.2d at 811.

²⁶ See Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 183 (1962).

²⁷ The courts have been reluctant to interfere with discretionary judgments made by the military within the latter's jurisdiction. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Byrne v. Resor*, 412 F.2d 774 (3d Cir. 1969); *Schonbrun v. Commanding Officer*, F.2d 371 (2d Cir. 1968); *Fox v. Brown*, 402 F.2d 837 (2d Cir. 1968); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y. 1968); *Sanders v. Westmoreland*, 2 S.S.L.R. 3157 (D.D.C. 1969). "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, 345 U.S. 83 (1953). The courts have also refused to proceed in cases where the party seeking relief has failed to exhaust all his administrative remedies. See *Craycroft v. Ferrall*, 408 F.2d 587 (9th Cir. 1969).

²⁸ [I]t is apparent that the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.

United States v. Jacoby, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

It has been held that first amendment rights apply to servicemen, but are more limited than civilian rights when necessary to reasonably safeguard the national interest. See *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). "Does being in the Army curtail or suspend certain Constitutional rights? The answer is unqualifiedly yes." *Raderman v. Kaine*, 411 F.2d 1102, 1104 (2d Cir. 1969). Thus, a serviceman's rights are "conditioned to meet certain overriding demands of discipline and duty." *Burns v. Wilson*,

again, these constitutional protections were the subject of judicial scrutiny by the Second Circuit in the case of *Cortright v. Resor*.²⁹ There appellees were members of an army band whose mission was to assist in maintaining morale and effective community relations.

Appellee Cortright, along with others in the band, had circulated and signed a petition opposing United States involvement in Vietnam. The band's leader admonished the band and warned them that higher officers knew of the signatures. Later, appellee and others distributed a second petition. However, after the new band leader discussed it with individual members and the band as a whole and warned of possible repercussions, Cortright told the civilian sponsors not to publish the names of band members. A final incident occurred while the band was leading a Fourth of July parade. Appellee's fiancée and the wives of four other band members marched behind the parade carrying anti-war

346 U.S. 137, 140 (1953). Where first amendment rights are involved, "the issue always involves the balancing . . . of the competing private and public interests at stake in the particular circumstances." *Dash v. Commanding Gen.*, 307 F. Supp. 849, 853 (D.S.C. 1969).

Thus, the courts have recognized a right of the military to restrict the free expression of servicemen if such restrictions are within reasonable bounds. More often than not, the need for discipline is given as justification. Yet, it has been suggested that free expression is not overly detrimental to military needs.

[F]ree expression is not detrimental to the preservation of effective military discipline. Nothing has been found to indicate that performance of the individual soldier is significantly impaired by his ideological or political beliefs, or that one soldier's exposition of political views measurably influences the beliefs of other soldiers. Some evidence even indicates that free expression may substantially enhance the realization of important military goals and requirements.

Comment, *Military Discipline and Political Expression: A New Look at an Old Bugbear*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 525, 527 (1971).

For a discussion on the traditional view of discipline and the Uniform Code of Military Justice, see Boyce, *Freedom of Speech and the Military*, 11 UTAH L. REV. 240, 257-66 (1968).

It has also been suggested that restrictions upon the right to free expression of servicemen is justified by the requirement of military subordination to the civil government. See Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 188-89 (1957).

Most of the justifications for limiting the serviceman's freedom of expression have weathered the passing of time. While civilian constitutional rights have broadened significantly over the years, the civil courts have allowed the military to restrict the free expression of servicemen under the blanket of necessity of discipline. It has been suggested that the application of civilian standards would not result in the loss of discipline and order. See Lewis, II, *Freedom of Speech—An Examination of the Civilian Test for Constitutionality and its Application to the Military*, 41 MIL. L. REV. 55 (1968). Yet others feel that servicemen should continue to have restrictions placed upon these rights so long as there is a bona fide military necessity. See Brown, *Must the Soldier be a Silent Member of Our Society?*, 43 MIL. L. REV. 71 (1969).

It is evident that there are greater restraints imposed on the soldier's rights to freedom of speech than are placed on civilians in general. It is submitted, however, that these restraints, when viewed from the standpoint of the mission of the armed forces, are reasonable and necessary for both the soldier and his country. So long as the soldier's right to express himself freely is limited only by recognized military necessity, this is all that the soldier and the nation can ask.

Id. at 109.

²⁹ 447 F.2d 245 (2d Cir. 1971), *rev'g* 325 F. Supp. 797 (E.D.N.Y. 1971).

signs. This resulted in spectator hostility and disorder. Four days later, the second band leader announced ten duty changes for the band and attributed them to their anti-war activities.³⁰

After Cortright and others asked for a rescission of these changes, they were informed that they were based on sound military judgment and were in no way punitive. However, the band leader was subsequently reprimanded for representing these changes as punishment.

Thereafter, because the band was believed overstuffed³¹ and since it was believed that Cortright's actions were detrimental to the morale, discipline and efficiency of the band, Cortright was transferred to the band at Fort Bliss, Texas. Cortright brought a complaint against his commanding officer but this was found to be without merit.³²

Appellee commenced this action in which the district court issued a writ of mandamus cancelling the transfer order.³³

The circuit court, in a 2 to 1 decision, reversed and dismissed the complaint.³⁴ The court first determined that the alleged violation of an army regulation, stating a policy that changes in station be made only on military necessity, was not available to appellee since the regulation was adopted for economic reasons and not to protect servicemen.³⁵

The court then held that the transfer was not an unconstitutional infringement on first amendment rights. It was determined that although one is not stripped of all his rights by joining the military, still,

³⁰ It appears that up until this time the band had been in a favored position. The changes were all proper under army regulations. 447 F.2d at 248.

³¹ Up until August 1969, the authorized size of the band was 64. However, it was to be reduced to 42 members by May 1970. *Id.* at 247, 249.

³² Appellee brought that action under Article 138 of the Uniform Code of Military Justice. 10 U.S.C. § 938 (1964).

³³ 325 F. Supp. 797 (E.D.N.Y. 1971). This action was commenced the day after appellee filed his complaint with the army: the proceedings were held in abeyance until the army inquiry was completed. *Id.* at 805.

Five other band members who had received transfer orders to Vietnam and Korea intervened, but their orders were sustained by the district court.

³⁴ The court did not have to pass on the district court's finding that deprivation of free speech "almost by definition" satisfies the \$10,000 jurisdictional amount (28 U.S.C. § 1331 (1970), giving original jurisdiction to district courts where the matter in controversy exceeds \$10,000 "and arises under the Constitution, laws, or treaties of the United States") since appellant did not challenge the alternative jurisdiction (28 U.S.C. § 1361 (1970), original jurisdiction with regard to mandamus to compel officers, employees, or agencies of the United States to perform duties owed). The court determined that its decision would not be affected by the more limited jurisdiction under section 1361.

³⁵ 447 F.2d at 251. Thus appellee could not depend upon decisions requiring the military to abide by its own regulations, *e.g.*, *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969).

Although the courts have declined to review the merits of decisions within the area of discretion delegated to administrative agencies they have insisted that where the agencies have laid down their own procedure and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved.

Id. at 145.

a soldier's rights are not precisely the same as a civilian's.³⁶ The court felt that appellee, by arranging for his fiancée and others to accompany the band, must have foreseen that disorder would follow and was therefore subject to discipline although a civilian would not have been.³⁷ The court also said that since the orders were legal, the case did not warrant a finding that there had been a "chilling" of the right to protest.³⁸

Relying on *Orloff v. Willoughby*,³⁹ the court then concluded that it should not interfere with transfer orders, valid on their face, without "a stronger showing than Cortright's."⁴⁰

Judge Oakes, dissenting, conceded that a soldier's rights are more limited than a civilian's, but felt that, since they are entitled to basic civil rights and since the courts have some power to interfere with military actions, the court should abide by the trial court's findings unless they are "clearly erroneous."⁴¹

³⁶ See note 28 *supra*. Ambiguity has developed around this issue since the United States Supreme Court has never decided the same.

One of the missions of the Band, into which Cortright had voluntarily enlisted, was "to assist in maintaining an effective community relations program through participation in suitable local events." This had been thwarted And General Higgins was entitled to take suitable measures to avoid a similar performance in the future.

447 F.2d at 253.

However, a civilian cannot be convicted of breach of the peace simply for voicing unpopular views that may create a disturbance. See *Terminiello v. Chicago*, 337 U.S. 1 (1946).

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Id. at 4.

³⁸ In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the Court granted an injunction to restrain the defendant from prosecuting or threatening to prosecute for alleged violations of a statute which by its terms was vague, uncertain, and overbroad. Abstention on the Court's part would have resulted in a "chilling effect" upon first amendment rights since such "may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." However, in *Younger v. Harris*, 401 U.S. 37 (1971), the Court determined that a "chilling effect," in and of itself, was not sufficient to prohibit state action.

Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Id. at 51.

³⁹ 345 U.S. 83 (1953). In *Orloff*, the Court determined that it must be "scrupulous not to intervene with legitimate army matters." *Id.* at 94.

⁴⁰ We hold only that the Army has a large scope in striking a proper balance between servicemen's assertions of the right of protest and the maintenance of the effectiveness of military units to perform their assigned tasks

447 F.2d at 255.

The court was also fearful that many unmeritorious claims might follow a different holding. *Accord*, *Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 (2d Cir. 1968).

⁴¹ Findings of fact shall not be set aside unless clearly erroneous, and due regard