Prior restraint essay sample

Government

Question Presented

Is it constitutional for the government to prohibit the publication of a classified Senate Committee Report based on information concerning CIA intelligence-gathering in Iran?

Short Answer

Yes. Prior restraint may be allowed when the information to be disseminated is detrimental to national security. Publication of these intelligence reports will give enemy-states and enemy-non-state-parties access to information that would otherwise be classified. Analogous to the exceptional situations presented in *Near v. Minnesota* , 283 U. S. 697 that warrant prior restraint, the information involved in this case will greatly prejudice the defense efforts of the United States. For obvious public purposes, this publication cannot be allowed.

Statement of Facts

On September 25, 2006, the Los Angeles Times was able to somehow obtain a copy of a classified Senate Committee Report without the government’s consent. The said report contains CIA-gathered information regarding Iran and the Middle East, particularly the following:

- Evidence shows that Iran is beginning a nuclear weapons program but it still lacks the necessary components to build and deploy a nuclear bomb.

- The U. S. is conducting intelligence-gathering operations in several countries including Saudi Arabia, Syria and Iraq. It also lists the names of three CIA agents who are acting as spies in Iraq.
- That Osama bin Laden enjoyed watching “ Friends” and frequently dresses like Jennifer Aniston.

Discussion

Prior restraint is an official government restriction on the press or any other form of expression in advance of actual publication or dissemination. Prior restraint is generally presumed to be unconstitutional because they amount to censorship, which is against the First Amendment to the U. S. Constitution. Prior restraint is considered worse than subsequent punishment because the latter offers the protection of substantial and procedural due process while the former does not. In *Nebraska Press Association v. Stuart* , 427 U. S. 539 (1976), the Supreme Court said “…

A criminal penalty or a judgment… is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law’s sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘ chills’ speech, prior restraint ‘ freezes’ it at least for the time.”

Subsequent punishment penalizes persons who choose to engage in harmful speech but only after the circumstances have been heard in a court of law.

Prior restraint forbids the speech and destroys it even before it is uttered. Prior restraint paralyzes the speech even before fairly evaluating its content. On the other hand, subsequent punishment allows all types of speech to be uttered without prejudice to any consequences the government might impose on those who choose to use their freedom irresponsibly.

The U. S. Supreme Court has developed four tests in determining whether a government restriction on the freedom of expression is proper or not.

The first test is the so-called *Clear and Present Danger Rule* , which was formulated by Justice Holmes in *Schenck v. United States* , 249 U. S. 47 (1919) thus: " The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantial evils that Congress has a right to prevent. It is a question of proximity and degree." This test is the most appropriate in this case involving national security.

The clear and present danger in this case is the capture, torture and assassination of the three spies named and a violent or tactical reaction by the Iranian government (i. e. hiding their nuclear weapons program more effectively). The Congress has the power to create laws and regulations for the defense of the citizens of the United States and this restriction is a valid exercise of such power.

The second test was the standard for obscenity set forth by Justice Brennan, Jr. in *Roth v. United States* , 354 U. S. 476 (1957), which says: "...whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient

interest.” This standard would later be superseded by the *Miller Test* proposed by Justice Burger in *Miller v. California* , 413 U. S. 15 (1973). The three criteria that have to be satisfied in order to justify state regulation are: 1) the average person, applying contemporary community standards (not national standards, as some prior tests required), must find that the work, taken as a whole, appeals to the prurient interest;

2) the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and 3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. This test is mostly inapplicable in this case because Justice Brennan’s test dealt with obscenity while this case deals with national security. However, this test might be applicable to the extent where the Report mentions that Osama Bin Laden enjoys dressing up as Jennifer Aniston. That item might be tested under the Brennan standards on whether the publication of such item should be allowed or not. As to the other items, the test is wholly inapplicable.

The third test is known as the *O’Brien Test* , which was enunciated by Chief Justice Warren in *U. S. v. O’ Brien* , 391 U. S. 367, 20 L. Ed. 2d 672 (1968), thus: “ when a regulation prohibits conduct that combines “ speech” and “ nonspeech” elements, “ a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

The regulation must 1) be within the constitutional power of the government to enact, 2) further an important or substantial government interest, 3) that

interest must be unrelated to the suppression of speech, and 4) prohibit no more speech than is essential to further that interest.” Although it is possible to apply this test in this scenario, it will probably work against the government because the restriction it seeks to impose is directly upon the “ speech element”. There is no “ non-speech element” that is being restricted by the government even if the purpose is for national security.

The fourth test is the absolutist view imposed by Justice Black in *New York Times Co. v. United States* , 403 U. S. 713 (1971) where he said: “ The word “ security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.” He maintains the view that the First Amendment must never be violated for security reasons. Justice Black’s test is extremely rigid and unpractical. It no longer applies to present-day conditions where technological advances have provided the world with, virtually, a limitless access to information.

Any information published by the newspaper will probably be stored in the internet to which people all over the world have access. If the information reaches the wrong hands it will not only endanger the country’s efforts to disarm Iran of nuclear weapons but also the lives of the three spies who were identified in the Report. This is exactly why the information was classified in the first place. It provides a tactical advantage for the United States and furthers its goals. The people’s right to be informed of these secrets does not outweigh their right to be protected from the evils that probably might materialize if such secrets fall into the wrong hands.

A perfectly civil option of the government would be to talk to the Log Angeles Times and reason with them. Perhaps if the government will explain its side, the educated and intelligent editors of the Times would understand the compelling necessity to keep this information classified.

If the Los Angeles Times fails to respond to reason, another option of the government would be to file a criminal case for espionage or treason based on the illegal acquisition of government secrets and its unauthorized dissemination. However, this option would be unwise because by the time the court has made a conviction, the damage sought to be prevented would have already happened. By such time, the three spies named could be dead and the Iranian government would have bolstered their security measures, precluding the U. S. from any further surveillance.

A third option would be an injunction against publication and confiscation of the stolen Senate Committee Report based on infringement of the intellectual property of the government. If the government can show probable cause that the Report has been stolen, copied and set for publication without the permission of the author (e. g. The U. S. Government), then the materials to be used for the infringing acts may be confiscated and destroyed. This is a more prudent remedy because it ensures quick results.