Prior Restraints on Speech

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Introduction – Prior Restraints

The term prior restraint is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints.

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

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'

4 Blackstone Com. 151, 152 (1765-69)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. 1 (1791) .

Holmes: Original purpose of First Amendment was "to prevent such previous restraints upon publications as had been practiced by other governments."

Patterson v. Colorado, 205 U.S. 454, 462 (1907).

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Introduction – Prior Restraints

[T]he rule that enjoining defamatory speech violated constitutional norms of free speech and trial by jury was clearly established by 1868 when the Fourteenth Amendment was adopted.

Stephen A. Seigel, Injunctions for Defamation, Juries, and the Clarifying Lens of 1868, 56 Buffalo L. Rev. 655 (2008).

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall every be passed curtailing the liberty of speech or of the press.

Tex. Const. art. 1, § 8 (1876)

It has never been the theory of free institutions that the citizen could say only what courts or legislatures might license him to say, or that his sentiments on any subject or concerning any person should be supervised before he could utter them. Nothing could be more odious, more violative or destructive of freedom, than a system of only licensed speech or licensed printing.
***Ex parte Tucker*, 220 S.W. 75 (Tex. 1920)**

"[O]ur free speech provision is broader than the First Amendment. … Under our broader, guarantee, it has been and remains the preference of this court to sanction a speaker after, rather than before, the speech occurs. … **The presumption in all cases under section eight is that pre-speech sanctions or 'prior restraints' are unconstitutional**."

***Davenport v. Garcia*, 834 S.W.2d 4, 9 (Tex. 1992) (Doggett, J.).**

Restraints on the Media

Near v. Minnesota, 283 U.S. 697 (1931) (5-4):

The Saturday Press temporarily and permanently enjoined under public nuisance law as engaged in business of regularly publishing "malicious, scandalous and defamatory" newspaper or periodical. Enjoined from maintaining the nuisance. Supreme Court held the statute facially unconstitutional as prior restraint, "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." Court recognized narrow exceptions, such as publishing sailing dates of transports during wartime, obscenity, and incitements to violence.

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971):

Organization distributing fliers in town objecting to blockbusting real estate broker's tactics was temporarily enjoined by state courts from passing out literature or picketing "anywhere in the City of Westchester" where broker lived on "invasion of privacy" grounds. Supreme Court vacated the order as a prior restraint, rejecting privacy as adequate grounds. Harlan dissents because state court had only entered temporary, not permanent, injunction.

Restraints on the Media

New York Times Co. v. U.S., 403 U.S. 713 (1971)

The U.S. government sought to enjoin the publication of excerpts from a massive, classified study of its involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of six concurring Justices and the three dissenting Justices expressed views separately, but "every member of the Court, tacitly or explicitly, accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional. The burden on free speech was not reduced because the U.S. sought merely a temporary restraint solely to permit it to study and assess the impact on national security of the documents. See The Post (2017 film).

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)

Supreme Court overturned state court injunction prohibiting news media from publishing or broadcasting accounts of confessions or admissions made by criminal defendant to law enforcement officers or third parties, except members of the press, or other facts "strongly implicative" of the defendant's guilt. "Heavy burden" not met. No evidence or finding that measures short of prior restraint would not have protected the accused's rights to a fair trial.

Restraints on the Media

U.S. v. Noriega, 917 F.2d 1543 (11th Cir), cert denied 498 U.S. 976 (1990)

To impose a prior restraint to protect a criminal defendant's Sixth Amendment right to a fair trial, a district court must make specific factual findings: that there is substantial probability that the defendant's right to fair trial will be prejudiced by the publicity; there is substantial probability that prior restraint would prevent that prejudice; and reasonable alternatives to the restraint cannot adequately protect the defendant's fair trial rights. BUT relief denied because CNN refused to produce tapes for in camera review by court to determine whether broadcast of tapes would threaten Sixth Amendment rights of defendant.

CBS v. Davis, 510 U.S. 1315 (Blackmun, Cir. Justice 1994)

Justice Blackmun granted an emergency stay of a preliminary injunction barring CBS from broadcasting video filmed inside a meat packing plant. A state court issued the injunction because CBS had obtained the video through "calculated misdeeds." Blackmun found the parties seeking the injunction made insufficient showings of potential economic harm and of wrongdoing on the part of CBS to overcome the First Amendment barrier to prior restraints. Extraordinary circumstances justified stay of preliminary injunction because indefinite delay of broadcast would cause irreparable harm intolerable under First Amendment.

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