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NOTES

A FIRST AMENDMENT-SIXTH AMENDMENT DILEMMA: MANUEL NORIEGA PUSHES THE AMERICAN JUDICIAL SYSTEM TO THE OUTER LIMITS OF THE FIRST AMENDMENT

INTRODUCTION

Our nation's founding fathers feared that secret criminal trials would result in "perjury, the misconduct of participants and decisions based on secret bias or partiality."1 Thus, they included in the Bill of Rights the right to a public trial.2 Throughout history, the media has scrutinized the actions of courts3 thereby protecting the criminal defendant's right to a fair trial.4 However, in modern American society the media can also hinder the achievement of fair criminal trials.5

First, in sensational criminal cases, the "speed of communication and the pervasiveness of the modern news media" can quickly saturate the public with information about the defendant and pre-

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2. U.S. Const. amend. VI.

3. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." Id. at 605 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980)). The press has been called the "handmaiden of effective judicial administration" with regard to criminal trials. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

4. Without publicity, other checks on judicial proceedings such as recordation and appeals would only have the appearance of checking decisions because these other checks would not be scrutinized. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (citing Jeremy Bentham, Rationale Of Judicial Evidence 524 (1827)). For a discussion of how the media checks the American judicial system, see infra notes 28-31.

5. The defendant in highly publicized criminal cases is often convicted by the media rather than by the jury at trial. Eileen F. Tanielian, Note, Battle of the Privileges: First Amendment vs. Sixth Amendment, 10 Loy. Ent. L.J. 215 (1990); see also Sheppard v. Maxwell, 384 U.S. 333 (1966) (murder conviction reversed because pretrial publicity prejudiced the trial so as to deprive the defendant of due process).
trial proceedings. Additionally, society's obsession with sex, violence and suspense keeps the public tuned in to publicized trials involving such elements. As a result, an unbiased jury must often be drawn from a public that retains prejudicial information, most of which is inadmissible as evidence at trial. Thus, the very purpose that public criminal proceedings are meant to serve is often obstructed when pretrial publicity threatens to prejudice a criminal defendant's fair trial.

In order to protect the defendant's right to a fair trial, judges use several methods to prevent the media from gaining access to prejudicial trial information. However, once the media acquires potentially prejudicial information, courts are more restricted in what they can do. In In re Cable News Network Inc., a federal appellate court, for the first time, upheld a judicial order restraining the media from publishing information that it already possessed.

The Cable News Network case arose in anticipation of one of the most publicized criminal trials of the Twentieth Century, the drug-trafficking trial of Panamanian General Manuel Noriega. In this case, the news network (CNN) acquired tapes of phone conversations between the defendant, Manuel Noriega, and his defense at-

7. Sheppard, 384 U.S. at 356 (the press accused the defendant of having illegitimate children, having sexual relations with "numerous" women, being a "barefaced liar" and that he must be guilty because he hired a prestigious criminal lawyer).
8. See id. at 360. In Sheppard, the press publicized the fact that the defendant refused to take a lie detector test, and that one of the witnesses stated that the defendant's wife characterized the defendant as having a "Jekyll-Hyde" personality. Id. at 360-61. Neither of these statements were admissible at trial. Id. at 360.
9. For example, in Sheppard, "the community from which the jury was drawn had been inundated by publicity, hostile to the defendant." Nebraska Press, 427 U.S. at 552-53 (citing Sheppard v. Maxwell, 384 U.S. 333 (1966)); see also Irvin v. Dowd, 366 U.S. 717 (1960) (murder conviction reversed because pretrial publicity including publication of alleged confessions, deprived the defendant of his right to a fair trial).
10. For an explanation of the methods of preventing media access to information about criminal proceedings, see infra note 42.
11. For an explanation of the test that a court must apply to restrain publication by the media, see infra notes 113-14 and accompanying text. One author indicates that the standards set forth in Nebraska Press make it nearly impossible to issue a prior restraint on the media. Robert D. Sack, Principle and Nebraska Press Association v. Stuart, 29 STAN. L. REV. 411, 412 (1977).
13. See generally United States v. Noriega, 752 F. Supp. 1032 (S.D. Fla. 1990), aff'd, 917 F.2d 1543 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). Throughout this article "Cable News Network" will refer to the facts of this case that were before the district, appellate and Supreme Courts.
The government made these recordings when Noriega placed phone calls to his attorney from the Florida prison where he awaited trial. When CNN revealed its intentions to publish the tapes, Noriega sought an injunction against CNN to prevent their broadcast. The United States District Court for the Southern District of Florida temporarily restrained CNN from broadcasting the tapes until the court could determine whether broadcasting the tapes would prejudice Noriega's trial.

The Eleventh Circuit upheld the restraining order, denying CNN's petition for mandamus relief. Then, the United States Supreme Court denied certiorari and permitted the lower court's rulings to stand. Thus, for the first time, our courts upheld a direct prior restraint on the press to prevent prejudice to a defendant.

14. *Cable News Network*, 917 F.2d at 1545. The tapes were audio recordings made by officials at the Metropolitan Correctional Center in Florida where Noriega was held. *Id.* CNN obtained the tapes from an undisclosed third party. *Id.*


16. United States v. Noriega, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990), aff'd, 917 F.2d 1543 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 451 (1990). Once CNN acquired the tapes, it informed Noriega's defense attorney about them in an effort to draw a comment regarding the United States Government's act of recording the attorney-client conversations. *Id.* Noriega's attorney immediately went to the district court and filed for an injunction. *Id.*

17. *Id.* at 1036. The district court issued a ten-day restraining order against publication of the tapes to allow time for the court to review the tapes to determine the prejudicial effect they might have on Noriega's criminal trial. *Id.* The district court also ordered CNN to produce the tapes it possessed for the court to review. *Id.* at 1035.

18. A mandamus is defined as follows: "[T]he name of a writ . . . which issues from a court of superior jurisdiction, and is directed . . . to an inferior court, commanding the performance of a particular act therein specified . . . or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived." BLACK'S LAW DICTIONARY 866 (5th ed. 1979).

The court viewed CNN's "Emergency Motion To Vacate An Unconstitutional Prior Restraint" as a "petition for a writ of mandamus against the District Court to correct an abuse of discretion." In re *Cable News Network, Inc.*, 917 F.2d 1543, 1546 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 451 (1990). The court noted that a temporary restraining order is usually not appealable, thus requiring mandamus relief. *Id.* (citing McDouglas v. Jenson, 786 F.2d 1465, 1472 (11th Cir.), *cert. denied*, 479 U.S. 860 (1986)).

19. In re *Cable News Network, Inc.*, 917 F.2d 1543, 1551-52 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 451 (1990). The court of appeals denied CNN's petition for mandamus because CNN had "shackled" the district court by refusing to turn the tapes over for the district court to review. *Id.*

20. *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451 (1990) (Marshall, J., O'Connor, J., dissenting). Justice Marshall stated in his dissent, "Even more fundamentally, if the lower courts are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established in *Nebraska Press*, then I think it is imperative that we re-examine the premises and operation of *Nebraska Press* itself." *Id.*
in a criminal trial.21

Both the district and appellate courts were properly concerned with affording the defendant a fair trial.22 However, the courts misapplied the law,23 and established a potentially dangerous precedent which authorizes temporary restraints on the press pending a judicial determination of whether the publication should be prohibited.24 This decision was clearly contrary to established precedent.25

This note will demonstrate the district and appellate courts' misapplication of prior restraint precedent and discuss its ramifications. Part I briefly discusses the competing interests of the First Amendment right to freedom of the press versus the Sixth Amendment right to a fair criminal trial and how these Amendments conflict during criminal proceedings. Part II discusses the development of the law of prior restraints. It first discusses the basic premises that developed from the first criminal and civil cases in which prior restraints were at issue. Next, it lays out the burden that the proponent of a prior restraint must satisfy to justify different types of prior restraints. Third, it discusses the recent trend among trial court judges to issue prior restraints on publication which culminated in the Cable News Network decision. Part III analyzes the district court's temporary order prohibiting CNN from broadcasting the tapes, and the court's failure to apply the proper test to justify a prior restraint. It also scrutinizes the appellate court's analysis of prior restraint law in upholding the temporary restraint. Finally, this article concludes that the district court could

21. For a discussion of the cases that reject prior restraints on publication directed at the press, see infra note 123.

22. Cable News Network, 917 F.2d at 1550. The court's concern with Noriega's fair trial is evident in its statement that, "the courts are charged with safeguarding a defendant's right to a fair trial and with cautiously balancing First Amendment and Sixth Amendment interests." Id.

23. For an analysis of both the district and appellate courts' application of prior restraint law, see infra notes 137-207 and accompanying text.

24. The following quotes from periodicals illustrate how this case has caused controversy with respect to freedom of the press. "This is a potentially troubling decision, but only potentially troubling. While the case opens up a narrow area for abuses by judges who want to clamp down on the press, reports of the death of the First Amendment are greatly overstated." Martha Ann Overland, CNN's Tough Stance on Noriega Tapes Leads to Supreme Court Loss, A.B.A. J., Feb. 1991, at 19 (quoting Bert Neuborne, New York University); "[A] dangerous precedent allowing courts to temporarily silence the press will have been set, inviting judges to invoke prior restraint on the most problematic of claims." Court Heads in Dark Direction; CNN Ruling Means Press Has Less Freedom, L.A. TIMES, Nov. 20, 1990, at B6; see also Marcia Chambers, CNN Takes Wrong Tack in Tape Row; The Tale of the Tapes: Bad Law, Bad Case, NAT'L L.J., Dec. 10, 1990, at 13, for a further discussion of the potential problems caused by this case.

25. For a detailed discussion of cases that analyze temporary prior restraints on publication, see infra notes 141-58 and accompanying text.
have reached the same end, enjoining CNN from broadcasting the tapes, without deviating from established precedent.

I. THE COMPETING INTERESTS OF THE FIRST AMENDMENT AND THE SIXTH AMENDMENT

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press." This language requires that the public have open access to criminal trials. Holding criminal trials open to the public serves several purposes. First, public trials bring the judicial fact-finding process under the scrutiny of the public eye, thus increasing the integrity of the parties involved in the judicial process. Second, freedom of the press enhances the public's confidence in the judicial system because it "fosters an appearance of fairness" at trials. Also, public access to criminal trials deters attempts by the court or prosecutors to obtain a guilty plea by coercion or other improper means, thus functioning as a check on the judicial system.

However, this First Amendment language can conflict with the Sixth Amendment. The Sixth Amendment states that, "the ac-


27. In re Cable News Network, Inc., 917 F.2d 1543, 1547 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). For additional cases that have required public access to trials, see also Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) [hereinafter Press Enterprise I] (it was improper to exclude the public and press from the trial of a nurse charged with murdering twelve patients); Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) [hereinafter Press Enterprise II] (it was improper to close voir dire proceedings to the press in a trial for the rape and murder of a teenage girl); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982) (statute providing for exclusion of the public from trials for specific sex offenses against victims under eighteen years old found unconstitutional as applied where used to exclude the press from trial of man accused of raping three minor girls); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (improper to close murder trial to the public in view of First Amendment); Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1978) (pretrial hearing to suppress allegedly involuntary confessions and other physical evidence upheld where defendant's rights to a fair trial outweighed press' First Amendment rights).


29. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." Id.

30. Id.

31. Tanielian, supra note 5, at 225 (citing In re Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986)).

32. When the press exercises the rights conferred to it by the First Amendment and the publicity prevents the defendant in a criminal trial from receiving
The accused shall enjoy the right to a speedy and public trial, by an impartial jury.”

One of the most sacred rights and foundations of the American judicial system is that a person may not be deprived of life, liberty or property without a fair and public jury trial. It is the trial judge’s duty to insure an accused’s Sixth Amendment right to a fair trial. When the media’s exercise of freedom of the press threatens to prejudice a defendant’s trial, the First and Sixth amendments conflict.

The authors of the Bill of Rights did not assign a rank of greater importance between the First and Sixth Amendments to guide judges when these corresponding rights conflict. With regard to trials and pretrial proceedings, the trial judge has the difficult task of balancing the First and Sixth Amendment interests. This balancing task becomes especially troublesome when it involves a highly publicized criminal case.

The fair trial guaranteed by the Sixth Amendment, the two amendments conflict. For cases in which this conflict is evident, see generally Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976) (media’s right to publish defendant’s confessions to police officers and other such incriminating information threatened to prejudice the criminal trial); Sheppard v. Maxwell, 384 U.S. 333 (1966) (murder conviction reversed due to media coverage influencing the jury); Irvin v. Dowd, 366 U.S. 717 (1960) (murder conviction reversed because pretrial publicity, including publication of alleged confessions, deprived the defendant of his right to a fair trial).

33. U.S. CONST. amend. VI.

34. Richmond Newspapers, 448 U.S. at 568 (citing 1 JOURNALS OF THE CONTINENTAL CONGRESS 107 (1774)).

[One] great right is that of trial by jury. This provides, that neither life liberty nor property, can be taken from the possessor, until twelve of his unexceptional countrymen and peers of his vicinage, who from that neighborhood may reasonably be supposed to be acquainted with his character, and the character of the witnesses, upon a fair trial, and full inquiry, face to face, in open court, before as many people as chuse to attend, shall pass their sentence upon oath against him . . .

Id.

35. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); see also United States v. Columbia Broadcasting Sys., Inc., 497 F.2d 102, 104 (5th Cir. 1974) (although trial court has a duty to take “strong steps” to protect the right to a fair trial, order prohibiting all sketches of trial scenes was held invalid).

36. For an explanation of how the First and Sixth Amendments conflict, see supra note 32.

37. Nebraska Press, 427 U.S. at 561. The Nebraska Press Court noted that the framers of the constitution were aware of the possible conflicts between the First Amendment and the Sixth Amendment when a fair trial is at issue; they were not willing or able to rank one amendment above the other. Id. The Court therefore decided that it should not establish a priority between the two amendments to be applied in all circumstances. Id.

38. United States v. Columbia Broadcasting Sys., Inc., 497 F.2d 102, 104 (5th Cir. 1974). For cases in which courts balanced the rights of the press and the rights of a defendant, see supra note 27.

39. Nebraska Press, 427 U.S. at 551. “But when the case is a ‘sensational’ one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.” Id.; see also Estes v. Texas, 381 U.S. 532 (1965) (violation of due process where pretrial publicity in-
II. FREE PRESS v. FAIR TRIAL: DEVELOPMENT OF THE LAW OF PRIOR RESTRAINTS

A. Historical Underpinnings of the Law of Prior Restraints

The term "prior restraint" is often used as a blanket statement to refer to any order restricting speech or publication of information. In a judicial trial setting, "prior restraint" can refer to two types of judicial orders. First, a court may order trial participants to forego making extrajudicial statements, or the court may close trial proceedings to the press to prevent media access to trial information. Second, if the press already possesses trial information, a court may order the press to forego publishing that information.

Nebraska Press Ass'n v. Stuart was the first case confronting the constitutional issue of the use of a prior restraint to protect a defendant's right to a fair trial. The Nebraska Press Court based its First Amendment-Sixth Amendment balancing test on principles of

hobits finding true facts); Rideau v. Louisiana, 373 U.S. 723 (1963) (murder conviction reversed where defendant's confession was filmed and broadcast on television before trial); Irvin v. Dowd, 366 U.S. 717 (1961) (murder conviction vacated due to extensive adverse news coverage).

40. Mark R. Stabile, Note & Comment, Free Press-Fair Trial: Can They be Reconciled in a Highly Publicized Criminal Case?, 79 Geo. L. J. 337, 338 (1990) (courts refer to restraints on extrajudicial speech of trial participants and restrictions on media coverage of criminal trials as prior restraints).

41. Pell v. Procunier, 417 U.S. 817, 834 (1974). "It is one thing to say that... government cannot restrain the publication of news... It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to the public generally." Id. (quoted in Petitioner's Application to Stay District Court Restraining Orders Pending Certiorari, No. 90-767, 1990 U.S. Dist. LEXIS, at 9 (Nov. 15, 1990), United States v. Noriega, 752 F. Supp. 1032 (S.D. Fla. 1990), aff'd sub nom., Cable News Network, Inc. v. Noriega, 917 F.2d 1543 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990) (hereinafter Petitioner's Application).

42. Restrictions on extrajudicial speech prevent trial participants from discussing certain or all aspects of a criminal trial outside the courtroom. See In re Dow Jones & Co., Inc., 842 F.2d 603 (2d Cir. 1988) (judicial order prohibited prosecutors, defendants and defense counsel from speaking to the press about the pending criminal trial), cert. denied sub nom. Dow Jones & Co., Inc. v. Simon, 488 U.S. 496 (1988). Courts close criminal proceedings to the press to prevent the press from reporting on the events of the proceeding; see also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (reversed order which excluded the public from criminal trial which included sexual offenses against a minor victim); Stabile, supra note 40, at 338 (describing the differences between restrictions on extrajudicial speech and preventing the media from covering a trial).

43. A restriction prohibiting the media from publishing information is a prior restraint on publication and is "one of the most extraordinary remedies known to our jurisprudence." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976).

44. Nebraska Press, 427 U.S. at 556. "None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair trial and impartial jury, but the opinions on prior restraint have a common thread relevant to this case." Id.
prior restraint law set out in previous cases.\textsuperscript{45}

In \textit{Near v. Minnesota ex rel Olson},\textsuperscript{46} the Supreme Court of the United States maintained that prior restraints are "the essence of censorship."\textsuperscript{47} In \textit{Near}, an attorney accused the publisher of a weekly magazine of publishing "malicious, scandalous and defamatory" articles about politicians and public figures.\textsuperscript{48} Pursuant to a Minnesota statute which declared any "malicious, scandalous and defamatory newspaper, magazine or other periodical" an abatable public nuisance, a Minnesota court enjoined the publisher from continued publication of the material.\textsuperscript{49} That state's highest court upheld the injunction.\textsuperscript{50} In 1931, the United States Supreme Court declared that the statute was an unconstitutional prior restraint on publication.\textsuperscript{51} The Court noted that while "freedom of the press is not an absolute right ... the main purpose of the First Amendment is 'to prevent all such previous restraints on publications.'"\textsuperscript{52}

Forty years later, the Supreme Court again addressed the issue of prior restraints in \textit{Organization for a Better Austin v. Keefe.}\textsuperscript{53} The Court stated that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."\textsuperscript{54} The \textit{Keefe} Court vacated an injunction which prohibited a neighborhood organization seeking to "stabilize" the racial ratio in the neighborhood from disbursing pamphlets that criticized the respondent's real estate practices.\textsuperscript{55} The Court established that,

\begin{itemize}
\item \textsuperscript{45} See \textit{Nebraska Press}, 427 U.S. at 556-62. For a detailed discussion of the principles which the \textit{Nebraska Press} Court cited from previous civil suits involving prior restraints, see infra notes 46-63 and accompanying text.
\item \textsuperscript{46} \textit{Near v. Minnesota ex rel Olson}, 283 U.S. 697 (1931).
\item \textsuperscript{47} \textit{Id.} at 713.
\item \textsuperscript{48} \textit{Id.} at 703.
\item \textsuperscript{49} 1925 Minn. Laws 285.
\item \textsuperscript{50} \textit{State ex rel. Olson v. Guilford}, 228 N.W. 326 (Minn. 1929), rev'd, \textit{Near v. Minnesota ex rel Olson}, 283 U.S. 697 (1931).
\item \textsuperscript{51} \textit{Near}, 283 U.S. at 723.
\item \textsuperscript{52} \textit{Id.} at 715 (citing \textit{Patterson v. Colorado ex rel. Attorney Gen.}, 205 U.S. 454, 462 (1907)).
\item \textsuperscript{54} \textit{Id.} at 419; see also \textit{Carroll v. Princess Anne}, 393 U.S. 175, 181 (1968) (order restraining "white supremacist" party from holding public rally set aside); \textit{Bantam Books, Inc. v. Sullivan}, 372 U.S. 58, 70 (1963) (commission created to review any piece of literature to decide on its appropriateness for distribution to youths under eighteen violated Fourteenth Amendment).
\item \textsuperscript{55} \textit{Keefe}, 402 U.S. at 420. The \textit{Keefe} Court found that a claim of invasion of privacy was not an adequate basis to enjoin the "Organization for a Better Austin" from peacefully distributing pamphlets to inform the public about the real estate agent's business practices. \textit{Id.} at 419-20. The \textit{Keefe} Court compared the restraint to the one issued in \textit{Near}, holding: "Here, as in that case, the injunction operates not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." \textit{Id.} at 418-19 (cited with approval in \textit{Nebraska Press Ass'n v. Stuart}, 427 U.S. 539, 553 (1976)).
\end{itemize}
"[r]espondent . . . carries a heavy burden of showing justification for the imposition of such a restraint."\(^{56}\)

In *New York Times v. United States*,\(^ {57}\) (the "Pentagon Papers" case), the executive branch of the United States Government sought to enjoin the *New York Times* and the *Washington Post* from publicizing information taken from a documented secret study of the United States' involvement in the Vietnam conflict.\(^ {58}\) The government petitioned the United States District Court for the Southern District of New York for a temporary restraining order to allow the government time to examine the documents and determine if the information contained in them would threaten national security.\(^ {59}\) The district court refused to temporarily enjoin publication.\(^ {60}\) The Supreme Court of the United States affirmed the district court,\(^ {61}\) finding that the government had not met its "heavy burden."\(^ {62}\)

In *Nebraska Press*, the United States Supreme Court interpreted *New York Times* to suggest that the burden on the proponent of a prior restraint is not reduced by the temporary nature of the restraint.\(^ {63}\) Additionally, before issuing a prior restraint, a judge must consider less restrictive alternatives that may mitigate pretrial prejudice.\(^ {64}\) First, a judge may utilize the *voir dire* process

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56. *Keefe*, 402 U.S. at 419.
58. *Id.* at 714.
60. *Id.* at 331. The court continued the restraining order until the government sought a stay from the court of appeals.
63. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The following statement indicates the *Nebraska Press* Court's interpretation of *New York Times*:

The Court's conclusion in *New York Times* suggests that the burden of the Government is not reduced by the temporary nature of a 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 document at issue.

*Id.*
64. *Nebraska Press*, 427 U.S. at 553-54 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-58 (1966)); see also *Levine v. United States District Court*, 764 F.2d 590, 599-601 (9th Cir. 1985) (after an analysis of alternatives, a restraint on extrajudicial speech by parties to the action and their lawyers was revised and upheld), *cert. denied*, 476 U.S. 1158 (1986). For a detailed discussion of each alternative to prior restraints on publication and a recommendation that courts should not
and use "searching questions" to weed out potential jurors with "fixed opinions as to guilt or innocence."\textsuperscript{65} Also, a judge may either grant a change of venue to move the trial to a jurisdiction where the questioned publicity is less influential, or postpone the trial until the effect of the publicity abates.\textsuperscript{66} A third alternative is to sequester the jury to insulate them from the outside influences of the media.\textsuperscript{67} Finally, the trial judge can give "emphatic and clear jury instructions" to direct the jury to consider only the evidence set forth at trial in deciding the issues.\textsuperscript{68} Although each of these alternatives have advantages and disadvantages, and all or none may be applicable in any situation, courts generally consider these alternatives less restrictive and prefer them over prior restraints on publication.\textsuperscript{69}

\subsection*{B. Defining the Burden on the Proponent of a Prior Restraint}

Courts require proponents of prior restraints to satisfy several different tests depending on which type of prior restraint is sought, in order to ensure a fair trial.\textsuperscript{70} This section will track the development of these tests and analyze how the tests differ as the proposed prior restraint differs.

\subsubsection*{1. Prior Restraints Used to Prevent Media Access to Trial Information}

The public has a First Amendment right of access to criminal trials.\textsuperscript{71} Additionally, the United States Supreme Court held that restrain publication by the media, see Report on the Committee on the Operation of the Jury System on "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) [hereinafter Report].

\begin{itemize}
  \item \textsuperscript{65} Nebraska Press, 427 U.S. at 564.
  \item \textsuperscript{66} Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Changing venue or postponement of a trial is effective when the pretrial publicity is geographically limited to the area in which the trial is to take place, or when the publicity will cease within a reasonable time. Levine v. United States, 764 F.2d 590, 600 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986).
  \item \textsuperscript{67} Sheppard, 384 U.S. at 363.
  \item \textsuperscript{68} Nebraska Press, 427 U.S. at 564.
  \item \textsuperscript{69} For a detailed discussion of the advantages and disadvantages of each alternative to prior restraints, see Stabile, supra note 40, at 343-45.
  \item \textsuperscript{70} For a detailed discussion of the tests set forth in different prior restraint cases, see infra notes 74-92, 113-14 and accompanying text.
  \item \textsuperscript{71} Press Enterprise II, 478 U.S. 1, 7 (1986). "[T]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." \textit{Id}. (citing Waller v. Georgia, 467 U.S. 39 (1984)). "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for cen-
the public has a First Amendment right to open pretrial proceedings "unless the party seeking to close the hearing advances an overriding interest that is likely to be prejudiced." However, courts seemingly contravene this right by preventing media access to trial information by: (1) closing trial proceedings or trial records to the media, or by (2) restricting extrajudicial statements by trial participants.  

a. Closure of Trials and Pretrial Proceedings

Press Enterprise Co. v. Superior Court (Press Enterprise II) addressed the concerns involved where a court denied the media access to transcripts of the preliminary hearing of a criminal trial. The Press Enterprise Company appealed to have the transcript released. The California Supreme Court found, however, that the criminal defendant satisfied his burden of showing a "reasonable likelihood of substantial prejudice" to the criminal trial. Therefore, the state court upheld the closure of the preliminary hearing by denying the petitioner's writ.

The United States Supreme Court reversed the California Supreme Court stating that the threat that publicity "might deprive the defendant" of the right to a fair trial is not sufficient to overcome the First Amendment right of access. Where the interest at stake is a defendant's right to a fair trial, preliminary hearings should be closed only when the defendant shows that there is a "substantial probability" of prejudice to the defendant's trial.  


73. See Stabile, supra note 40, at 337-38. (discussing the difference between "gag orders" against extrajudicial statements by trial participants and prohibiting the press from covering a trial).

74. Press Enterprise II, supra note 27, 478 U.S. 1 (1976). The magistrate court granted the defendant's unopposed motion to close the preliminary hearing to the public to insure a fair trial. Id. at 4. After the 41-day hearing, Press Enterprise Company requested the transcript of the hearing but the Magistrate denied this request and sealed the record. Id.

75. Press Enterprise Co. v. Superior Court, 691 P.2d 1026, 1032 (Cal. 1984), rev'd, 478 U.S. 1 (1985). The State of California and the Press Enterprise Company filed a preremptory writ of mandamus to have the transcript released, which the court of appeals and the California Supreme Court denied. Id.

76. Id.

77. Id.


79. Id. at 14. The Court also set forth a second requirement to justify closure of pretrial hearings; The determination must be made that "reasonable alternatives to closure cannot adequately protect the defendant's rights to a fair
Thus, the Court in *Press Enterprise II* concluded that the "reasonable likelihood" test "failed to consider the First Amendment right of access to criminal proceedings." The Court required a showing of "substantial probability" that publication of trial information would prejudice the trial before pretrial proceedings can be closed to the public.

b. Prohibitions on Extrajudicial Speech by Trial Participants

In the context of prohibitions on extrajudicial statements by trial participants, courts have applied two different standards. The first standard, set forth in the Sixth Circuit's 1975 case of *CBS Inc. v. Young*, is that the publicity must pose "a serious and imminent danger to the fair administration of justice" before extrajudicial speech will be prohibited. In *Young*, the district court judge issued an order that all of the trial participants and their friends and relatives were not to discuss any aspect of a highly publicized civil trial with any member of the public or news media. On appeal, the Sixth Circuit applied the "serious and imminent danger" standard and found that because the jury was impaneled in one week with little difficulty, there was no such danger of prejudice. Id.

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80. *Press Enterprise II*, 478 U.S. at 14. The Court also noted that the risk of publicity of pretrial suppression hearings is that the jury will obtain "unreliable or illegally obtained evidence" which the pretrial hearings were designed to exclude. Id. (citing *Gannett v. DePasquale*, 443 U.S. 368, 378 (1979)).

81. Id. at 14-15. *Compare with* Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981) (court denied the press access to audio tapes of conversations between defendants and FBI agents because publication of the tapes would "severely prejudice" the defendant's fair trial on bribery charges).

82. Throughout the rest of this article, the phrase "gag orders" will be used interchangeably with "restraints on extrajudicial statements by trial participants."


85. Id. at 236. The civil action was a consolidated suit against officials from the State of Ohio, Kent State University and members of the National Guard. Id. The suit arose from the deaths of four students and injuries to others in the May 4, 1970 incident when members of the National Guard fired their weapons on Kent State's campus during a student protest over the invasion of Cambodia by U.S. troops. Id.

86. Id. at 240.
The court then issued a mandamus vacating the restraining order.\textsuperscript{87} More recently, in the case of \textit{In re Dow Jones & Co.}, the Second Circuit set forth a standard lower than those previously applied in cases involving orders restraining extrajudicial speech.\textsuperscript{88} This standard states that if there is a "reasonable likelihood that pre-trial publicity will prejudice a fair trial," then the restraining order is justified.\textsuperscript{89}

\textit{Dow Jones & Co.} involved a highly publicized criminal trial of corporate officials charged with fraud and racketeering, among other things.\textsuperscript{90} The Second Circuit made a "critical" distinction between a restraint that directly prevents the press from publicizing information the press already possesses, and restricting the "flow of information" to the press through a restraint on media access to trial information.\textsuperscript{91} The \textit{Dow Jones} court upheld the order restraining extrajudicial speech, applying the lower "reasonable likelihood" of pretrial prejudice standard, because orders restricting media access are less offensive than prior restraints directly on the press.\textsuperscript{92}

\textsuperscript{87} \textit{Id.} at 242 (finding that the order did not limit its restraint to statements that would prejudice the trial but enjoined all statements about the case by any "lawyer, party, witness or court official").

\textsuperscript{88} \textit{In re Dow Jones & Co.}, 842 F.2d 603, 608-09 (2d Cir. 1988), cert. denied \textit{sub nom.}, Dow Jones & Co. v. Simon, 488 U.S. 496 (1988). For a discussion of the "substantial probability" and "serious and imminent danger" standards, see \textit{supra} text accompanying notes 78-87.

\textsuperscript{89} \textit{Dow Jones}, 842 F.2d at 609. The court also noted that the guidelines for criminal trials in the Southern District of New York accepted the "reasonable likelihood" standard as applied to restraints on extrajudicial speech. \textit{Id.} (citing \textit{Report}, \textit{supra} note 64, at 401).

\textsuperscript{90} \textit{Id.} at 605. This trial involved the officials of Wedtech, a military contractor in New York, including U.S. Congressman Mario Biaggi. \textit{Id.} The defendants were also charged with extortion, obstruction of justice, perjury, tax evasion and bribery. \textit{Id.}

\textsuperscript{91} \textit{Id.} at 608-09. The \textit{Dow Jones} court described the distinction between a restraint that directly prevents the press from publicizing information and restrictions on the media's access to trial information as follows:

Although the restraining order in this case limits the flow of information readily available to the news agencies—and for that reason might have an effect similar to that of a prior restraint—the fact that the order is not directed at the news agencies and that they therefore cannot be haled into court for violating its terms deflates what would otherwise be a serious concern regarding judicial censorship of the press. For this reason the order is considerably less intrusive of First Amendment rights than one directly aimed at the press. \textit{Id.} at 608.

The distinction between preventing the media's right of access and prohibiting the media from publishing trial information was implicitly made in \textit{Report}, \textit{supra} note 64, at 401-02 (recommending that courts prohibit media access to trial information to prevent pretrial prejudice, but suggests that courts do not restrain the media from publishing information it already possesses).

\textsuperscript{92} \textit{Dow Jones & Co.}, 842 F.2d at 610-11 (citing Sheppard v. Maxwell, 384 U.S. 333, 363 (1966)) (the court was concerned that the United States Attorney...
In sum, courts have applied two different standards to determine whether prohibiting extrajudicial speech is justified. The United States Supreme Court has yet to decide a case selecting one of these standards over the other. Additionally, the United States Supreme Court established a separate standard in order to determine if closure of a criminal trial proceeding is justified. However, the court in Dow Jones & Co. explicitly made a distinction between preventing the media from obtaining trial information, and restraining the press from publicizing information it has already obtained. The Dow Jones court also suggested that a more stringent standard be applied to the latter restraint. Moreover, the Supreme Court implicitly made the distinction pointed out in Dow Jones in the 1976 case of Nebraska Press Ass'n. v. Stuart when it set forth a clear standard to be applied when a trial court imposes a prior restraint on the press to protect a defendant's fair criminal trial.

2. True Prior Restraints: Nebraska Press and Prohibiting Publication by the Media

In Nebraska Press Ass'n. v. Stuart, the United States Supreme Court addressed for the first time the issue of whether a trial court could restrain the press from publishing information about a criminal case in order to protect the defendant's right to a fair criminal trial was intentionally leaking grand jury secrets to the press which could have prejudiced the trial. The Dow Jones court stated that it is unethical for an attorney to use the press to convey information to the jury unless the attorney believes the information will be supported by admissible evidence. (citing N.Y. JUD. LAW EC 7-25 (McKinney 1975)); see also Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 562 (1976) (prior restraint on publication is "one of the most extraordinary remedies known to our jurisprudence").

93. For a discussion of the standards applied, see supra notes 84-89 and accompanying text.

94. Stabile, supra note 40, at 347. For a detailed discussion of the standards applied in media right to access of trial information cases, see id. at 349-54.


97. For a detailed discussion of the distinction between direct prior restraints on the press and restraints on the media's access to trial information, see supra notes 91-92 and accompanying text.

98. See generally Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976). The Court did not explicitly explain the difference between preventing media access to trial information and prohibiting publication by the press. However, the Court analyzed the prior restraint cases involving civil trials and restraining the media's right of access to criminal trial information. The Court then set forth a standard to be satisfied by the proponent of a prior restraint directly on the press involving publication of criminal trial information that was more stringent than any previously established. Id. For a discussion of the standard set forth in Nebraska Press, see infra notes 113-14 and accompanying text.
The Nebraska Press Court analogized to the prior restraint cases previously discussed and stated that the common "thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Additionally, if "a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time." Censoring the press by prohibiting the publication of information which the press, and therefore the public, already has is "[t]he most offensive aspect" of prior restraints.

Nebraska Press involved the trial of a man accused of murdering six members of a family in a small Nebraska town. The case attracted immediate local and national news coverage. To prevent prejudice to the defendant's trial, the Nebraska Supreme Court upheld an order prohibiting the publication of: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. This


The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

Id.

100. Nebraska Press, 427 U.S. at 559.

101. Id. The fear of being punished for making a statement may deter people from making certain offensive statements, but prior restraints make it impossible for a person or the media to communicate certain information, therefore creating an "immediate and irreversible sanction." Id.

102. Id. The Nebraska Press Court analyzed Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), Organization for a Better Austin v. Keeffe, 402 U.S. 415 (1971), and New York Times Co. v. United States, 403 U.S. 713 (1971) to determine that the "thread running through all these cases is that prior restraints . . . are the most serious and least tolerable infringement on First Amendment rights." Id. at 556-59.


105. Id.

106. Nebraska Press, 427 U.S. at 543-44. Three days after the crimes, both the attorneys for the defendant and Lincoln County requested that the county court issue a restrictive order on the media as to what they should and should not publicize. The county court granted the request prohibiting everyone in attendance of the preliminary hearing from "releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced." Id. at 542. The Nebraska Press Association moved to intervene and asked the district court to vacate the restrictive order. Id. at 543. The district court then entered its own restrictive order, stating that, "be-
order expired when the jury was empaneled.107

On appeal, the United States Supreme Court began its analysis of prior restraint law with the assertion that First Amendment rights are not absolute.108 The Court then set forth the following series of premises previously discussed.109 First, that there is a presumption against the constitutional validity of any prior restraint on publication.110 Second, the "heavy burden" is on the proponent of a prior restraint to show the justification for issuing such an order.111 Third, the temporary nature of a restraint does not reduce the proponent's burden.112

The Court then laid out a three-part test to balance the defendant's right to a fair trial against the right of freedom of the press.113 To justify a prior restraint on media publication, the proponent of a prior restraint on publication must prove: (1) publication will make a fair trial impossible due to the nature and extent of the pretrial news coverage; (2) other measures would not be likely to mitigate the effects of unrestrained pretrial publicity; (3) the restraining order would operate to prevent the threatened prejudice.114

In applying this test, the *Nebraska Press* Court first determined that the trial judge's finding of "a clear and present danger that pretrial publicity could impinge on the defendant's right to a fair trial," was too speculative to satisfy the first prong of the cause of the nature of the crimes charged in the complaint, there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." *Id.* The district judge's order prohibited the reporting of:

(1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault.

*Id.*

Upon application for a writ of mandamus by the Nebraska Press Association, the Nebraska Supreme Court modified the district court's restriction and entered the prohibition of reporting on the three matters. *Id.* at 545 (citing State v. Simants, 236 N.W.2d 794 (Neb. 1975), rev'd sub nom., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).


108. *Id.* at 557 (citing Near v. Minnesota ex rel. Olson, 283 U.S. 697, 708-09 (1931)).

109. *Id.* at 558-59.

110. *Id.* at 558.

111. *Id.* at 558 (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-20 (1971)).

112. *Id.* at 559 (construing New York Times v. United States, 403 U.S. 713 (1971) (per curiam)).

113. *Id.* at 562. The *Nebraska Press* Court stated that the test must be applied to the facts that were before the trial judge when the order was entered. *Id.*

114. *Id.* at 562.
test. Thus, the second prong of the test was not satisfied. Finally, due to the small size of the community in which the trial was to take place, the judge found that the information sought to be suppressed would travel by word of mouth, thus, the public would have access to the information notwithstanding a restraint. Therefore, the Court determined that the media failed to satisfy any aspect of the test and reversed the state court's restraining order.

The concurring opinions in *Nebraska Press* suggest that the test set forth makes prior restraints on publication of information already obtained an impossible order to justify. As stated by Justice White, "there is grave doubt . . . whether orders with respect to the press such as were entered in this case would ever be justifiable." In fact, until 1990, cases in which prior restraints directed at the press were issued have followed *Nebraska Press* in rejecting the restraints on appeal; thus proving Justice White correct. However, there is a presumption that First Amendment

115. *Id.* at 563. The Court noted that while the risk of prejudice from pretrial publicity existed it was not "clear that further publicity would so distort the views of potential jurors that 12 could not be found" that would come to a verdict "exclusively on the evidence presented in open court." *Id.* at 569.

116. *Id.* at 565. The Court found that there was insufficient evidence for the Nebraska Supreme Court to conclude that none of the alternatives to prior restraints would have protected the defendant's right to a fair trial. *Id.* For a detailed discussion of the alternatives to prior restraints, see *supra* notes 64-69 and accompanying text.

117. *Id.*

118. *Id.* at 567. The Court found that rumors traveling by word of mouth in the small community would probably be less accurate than news reports and possibly more damaging to the defendant's fair trial than accurate news reports.

119. *Id.* at 569-70. The Court asserted that its conclusion in this case "results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint, a fair trial will be denied." *Id.* at 569.

120. Sack, *supra* note 11, at 412. "Indeed, a reading of the concurrences of Justices Brennan, Marshall, and Stewart together with the concurring opinions of Justices White and Stevens gives every reason to hope that 'gag' orders directed at the press are headed toward the richly deserved oblivion from whence they recently emerged in this country." *Id.* See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11, at 858-59 (2d ed. 1988) (the *Nebraska Press* test is a "virtual bar to prior restraint on reporting news about crime").


122. In the 1990 case of *Cable News Network*, a prior restraint on publication directed at the media withstood appellate review for the first time. *In re Cable News Network Inc.*, 917 F.2d 1543 (11th Cir. 1990), *cert.* denied, 111 S. Ct. 451 (1990).

123. The following cases rejected prior restraints on publication: Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam) (order en-
rights are not absolute, and the fact that the *Nebraska Press* Court set forth a test implies that cases may exist in which a prior restraint on publication may be justified.

C. 1990: An Unsettling Trend in the Law of Prior Restraints

In a surprising reversal of previous judicial restraint, 1990 saw several trial court judges willing to issue prior restraints on publication. The 1990 prior restraint cases have "eroded" the fifteen years of confidence conferred to the media by the *Nebraska Press* case.

The prior restraints on publication issued in 1990, with one ex-
ception, were all reversed on appeal.\textsuperscript{128} The exception is \textit{Cable News Network}, where both the United States Court of Appeals for the Eleventh Circuit and the U.S. Supreme Court upheld an injunction against CNN, prohibiting it from broadcasting audio tapes it had in its possession.\textsuperscript{129} This case is controversial because it contradicts established precedent.\textsuperscript{130} \textit{Cable News Network}, along with the other 1990 cases on prior restraints, brings this area of law "back to the forefront of judicial consciousness."\textsuperscript{131} A closer look at this case demonstrates that it is inconsistent with the prior holdings in this area of law.

\section*{III. Analysis of the Temporary Restraint on CNN}

No prior restraint on publication has ever survived the scrutiny of the \textit{Nebraska Press} test.\textsuperscript{132} Aware of this, the district and appellate courts in \textit{Cable News Network} sought to justify the prior restraint enjoining CNN without being the first court to find that the \textit{Nebraska Press} test was satisfied.\textsuperscript{133} In doing so, the district court ordered a temporary prior restraint, unsupported by precedent,\textsuperscript{134} and claimed that it had not ruled on the merits.\textsuperscript{135} However, as is demonstrated in this section of the article, had the court applied the \textit{Nebraska Press} test and found that the facts actually justified a temporary prior restraint, the court would have chosen the lesser of two evils.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{128} For an explanation of the 1990 prior restraint cases that were reversed on appeal, see \textit{supra} note 126.
\item \textsuperscript{129} See \textit{supra} notes 12-21 and accompanying text for a detailed description of the facts of \textit{Cable News Network}.
\item \textsuperscript{130} For periodical articles that illustrate the First Amendment controversy caused by \textit{Cable News Network}, see \textit{supra} note 24.
\item \textsuperscript{131} Resnick, \textit{supra} note 128, at 3. "'[I]n an odd sort of way, the very clarity of the law has led to a lack of focus on it.'" \textit{Id.} (quoting Floyd Abrams, First Amendment expert).
\item \textsuperscript{132} For cases in which prior restraints on publication were imposed but rejected on appeal, see \textit{supra} note 126.
\item \textsuperscript{133} The district and appellate courts justified the temporary restraint imposed on CNN by stating that the district court needed to review the tapes before it applied the \textit{Nebraska Press} test, to determine if a broadcast of the tapes would have prejudiced Noriega's trial. \textit{In re Cable News Network, Inc.}, 917 F.2d 1543, 1550 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 451 (1990).
\item \textsuperscript{134} For a discussion of other courts' analyses of temporary prior restraints, see \textit{infra} notes 141-54 and accompanying text.
\item \textsuperscript{135} \textit{Cable News Network}, 917 F.2d at 1550 (citing United States v. Noriega, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990), \textit{aff'd}, 917 F.2d 1542 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 451 (1990)).
\item \textsuperscript{136} The decision in \textit{Cable News Network} authorizes lower federal courts to issue temporary prior restraints on publication without satisfying the requirements set forth in the \textit{Nebraska Press} test. Moreover, the \textit{Cable News Network} Court failed to set forth any requirements to be satisfied before imposing such a restraint. Had the \textit{Cable News Network} Court applied the \textit{Nebraska Press} test and found the restraint justified, then at least a temporary restraint on publica-
A. Presumptions and Assertions

The Eleventh Circuit Court of Appeals, in *Cable News Network*, upheld the district court’s unsupported implied presumption that a temporary restraining order on the press is not considered a prior restraint.\(^{137}\) The appellate court stated that it was “fundamentally unfair” for CNN to claim that Noriega failed to show a “clear and immediate” harm when this was due to CNN’s refusal to release the tapes to the court for review.\(^{138}\) Additionally, the court stated that “the Supreme Court’s pronouncements on the doctrine of prior restraint suggest that a factual inquiry is required.”\(^{139}\) The court then interpreted this premise to suggest that a temporary prior restraint on publication can be issued while the factual inquiry is taking place.\(^{140}\)

In *New York Times*, however, the United States Supreme Court clearly stated that temporary restraints on the media are the same as, and subject to the same scrutiny as, other prior restraints on publication.\(^{141}\) In *New York Times*, the Court rejected the government’s request for a temporary restraint on publication of top secret government documents.\(^{142}\) As in the present case, the government sought to temporarily restrain publication in order to review the questioned information to assess the probability of adverse

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\(^{137}\) See id. at 1547. The *Cable News Network* court emphasized that the order against CNN was not the requested injunction but only a temporary restraining order. *Id.* The appellate court then upheld the temporary restraining order until the district court could listen to the tapes and apply the test required to justify a prior restraint on publication. *Id.* at 1552. This implied that the temporary restraining order was not a prior restraint to be put to the rigorous *Nebraska Press* test. “The court herein wishes to emphasize that its order was not an injunction on the merits of the request for an injunction, but rather, a temporary restraint until such time as the Magistrate could review the tapes and permit this court to make a determination on the merits. . . .” *Id.* at 1547.

\(^{138}\) *Cable News Network*, 917 F.2d at 1547. In reply to the district court’s order to produce the tapes, CNN stated that the court should acquire the tapes from the government rather than CNN. *Id.*

\(^{139}\) *Id.* at 1546-47.

\(^{140}\) The circuit court affirmed the district court’s temporary restraining order after it decided that a factual inquiry regarding the tapes was necessary. *Id.* at 1552.

\(^{141}\) *New York Times* v. United States, 403 U.S. 713 (1971) (per curiam). The premise that courts should scrutinize temporary restraints on the media just as other prior restraints on publication is evident in the *Nebraska Press* Court’s interpretation of *New York Times*. See *Nebraska Press Ass’n* v. *Stuart*, 427 U.S 539, 559-59 (1976).

impact.\textsuperscript{143} The only relevant distinction between the cases is that, in \textit{New York Times}, the competing interest was an adverse impact on national security;\textsuperscript{144} whereas the competing interest in \textit{Cable News Network} was the Sixth Amendment right to a fair trial.\textsuperscript{145} The \textit{Cable News Network} court should have followed \textit{New York Times} by concluding that temporary restraints are nonetheless prior restraints on publication.\textsuperscript{146}

The court in \textit{Cable News Network} could also have looked to \textit{In re CBS, Inc.}\textsuperscript{147} In this case, CBS intended to air a segment of their "60 Minutes" program about the misconduct of seven police officers regarding their investigation of the death of another officer.\textsuperscript{148} The broadcast was to take place about three weeks prior to the criminal trial of these officers for their misconduct.\textsuperscript{149} The trial judge requested that CBS produce a transcript of the segment for the judge's review \textit{in camera}\textsuperscript{150} to determine if the broadcast would prejudice the defendant's trial.\textsuperscript{151} When CBS refused to produce the transcript, the trial court enjoined it from broadcasting the segment.\textsuperscript{152}

In \textit{In re CBS}, where "the only stated purpose . . . for the order . . . was to aid the court in deciding whether to enjoin the scheduled broadcast," the District Court for the Eastern District of Louisiana found that the injunction and the production order were unconstitutional prior restraints on the press.\textsuperscript{153} Therefore, according to

\begin{itemize}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.} Additionally, the competing interest of national security is at least as compelling as the Sixth Amendment right to a fair trial. See Petitioner's Application, \textit{supra} note 41, at LEXIS *15. For a further discussion of the government's request for an injunction to protect national security, see \textit{Nebraska Press}, 427 U.S. at 558-59.
\item \textsuperscript{146} See Petitioner's Application, at LEXIS *39.
\item \textsuperscript{147} \textit{In re C.B.S., Inc.}, 570 F. Supp. 578 (E.D. La. 1983), \textit{appeal dismissed sub nom.}, United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984).
\item \textsuperscript{148} \textit{Id.} at 579.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{In camera} means: "In chambers; in private." \textit{BLACK'S LAW DICTIONARY} 866 (5th ed. 1979). The judge sought to inspect the transcript in his chambers, excluding others to determine its potential for prejudice. \textit{In re CBS}, 570 F. Supp. at 579.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} The district court also held CBS in contempt of court for refusing to produce a transcript of the "60 Minutes" segment. \textit{Id.} This case was before the District Court for the Eastern District of Louisiana because the Eastern District appointed private attorneys to prosecute CBS for criminal contempt. \textit{Id.} at 580. The court ordered the contempt charges dropped because the production order was invalid and CBS had a "good faith" belief that it was invalid. \textit{Id.} at 583.
\item \textsuperscript{153} \textit{Id.} at 581-83. The court viewed the judge's desire to review the transcript as "wishing to act as reviewing 'editor'" in violation of the media's First Amendment right. \textit{Id.} at 582 (citing Goldblum v. National Broadcasting Corp., 584 F.2d 904, 906-7 (9th Cir. 1979)).
\end{itemize}
New York Times and In re CBS, temporary injunctions on publication for the purpose of “determining whether or not to issue an injunction” are unconstitutional prior restraints on speech.154

Moreover, the assertion that courts can issue a temporary restraint on publication until a court determines the potential for pretrial prejudice conflicts with two principles Nebraska Press clearly set forth. The first principle is the “heavy presumption” that prior restraints on publication are constitutionally invalid.155 The second is the rule that the proponent of a prior restraint has the “heavy burden” of demonstrating that such an order is justified, which burden is not reduced by the temporary nature of the restraint.156 District courts, circuit courts and the Supreme Court have applied these principles in prior restraint cases, concluding that any prior restraint is unconstitutional until the proponent of the restraint satisfies the burden of justifying it.157 In fact, the In re CBS court asserted that it was implicit that the defendants could not meet their burden to adequately support a prior restraint if it was necessary for the court to examine the transcript to determine if the publicity would be prejudicial.158

Applying these principles to Cable News Network, the temporary injunction imposed on CNN was a prior restraint on publication which should have been presumed unconstitutional.159 Additionally, the necessity for the trial court to request production

154. Id. at 582. For a detailed discussion of a temporary prior restraint used to allow time for a court to determine whether certain information would prejudice parole proceedings and a civil suit if publicized, see also Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1979) (court found that an order to “submit the film for viewing by the court” to determine whether an injunction should be entered to prohibit the broadcast of such film was a “sweeping prior restraint of speech”).


156. Id. at 558-59.

157. See id. at 539 (defendant in a murder trial required to prove that pretrial publicity would prejudice his trial); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (United States Government required to prove that publication of government documents would have frustrated national security to justify a temporary restraint); Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1979) (petitioner denied temporary injunction because he did not prove that the broadcast of a film would have prejudiced the jury of a pending civil suit); In re CBS, Inc., 570 F. Supp. 578 (E.D. La. 1983) (appellate court vacated court production order of television show transcript for judicial review for potential prejudicial impact on criminal trial), appeal dismissed sub nom. United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984).

158. In re CBS, 570 F. Supp. at 581. The court reasoned that “it is clear” that the defendants did not satisfy the Nebraska Press test to support their “motion for a silence order,” because if they had, it would have been “unnecessary” for the judge to examine the transcript. Id.

159. See Nebraska Press, 427 U.S. at 558. For an application of the Nebraska Press test to the facts in Cable News Network, see infra notes 162-207 and accompanying text.
of the tapes to determine the potential for pretrial prejudice implies that the court did not find that Noriega satisfied his heavy burden. However, as is discussed next, neither the district court nor the court of appeals attempted to apply the Nebraska Press test to the facts that were before the district court to determine if Noriega had satisfied his burden.

In sum, a court cannot order a temporary restraining order on publication to allow the proponent of the prior restraint time to justify the requested order. This would be issuing a prior restraint to determine if a prior restraint should be issued. This is contrary to the mandate of Nebraska Press and its progeny.

B. Application of the Nebraska Press Test

In Cable News Network, neither the district nor appellate courts' analyses applied the Nebraska Press test. Moreover, the appellate court failed to make the distinction between restricting the media's right of access to a trial and prior restraints on publication of information already in the media's possession. An application of the three-part Nebraska Press test to the facts before the district court reveals that the court could have followed the established precedent to reach the same conclusion.


161. The conclusion of Nebraska Press and its progeny is that any prior restraint comes into court constitutionally invalid until the proponent proves the necessity of the restraint. See Nebraska Press, 427 U.S. at 570. The circuit court in Cable News Network upheld a temporary restraint against publication until CNN produced the tapes for the court to examine. In re Cable News Network, Inc., 917 F.2d 1543, 1552 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). The logical inference from this is that the court presumed a temporary prior restraint was constitutional until CNN proved it was unconstitutional by showing that conversations on the tapes would not prejudice Noriega's trial. For further analysis of where the court put the burden of proof, see Petitioner's Application, supra note 41, at LEXIS *14.

162. The district court set forth the Nebraska Press test, but stated that it must hear CNN's tapes to apply the test. United States v. Noriega, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990), aff'd, 917 F.2d 1542 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990); see also In re Cable News Network, Inc., 917 F.2d 1543 (11th Cir. 1990) (circuit court never cited the Nebraska Press test in its analysis), cert. denied, 111 S. Ct. 451 (1990).

163. The appellate court cited Nebraska Press only twice in the entire opinion and does not refer to the Nebraska Press test. Cable News Network, 917 F.2d at 1548-49. Additionally, the opinion consistently applied premises from "right of access" cases rather than cases in which prior restraints were issued on publication of information the media already possessed. Id. at 1548-49.

164. The conclusion the district court reached was that it could enjoin CNN from broadcasting the tapes. Noriega, 752 F. Supp. at 1034.
1. Would the Nature and Extent of the Pretrial Publicity Have Made a Fair Trial Impossible?

The first prong of the Nebraska Press test requires the court to find that publication of the questioned information would prejudice the criminal defendant's fair trial.165 However, in Cable News Network, the appellate court set out a different test for justifying the trial court's restraining order.166 The court cited the test from Press-Enterprise II, which involved a restraint on the media's right of access to pretrial information.167 Not only did the court in Cable News Network cite an inappropriate test, it failed to apply the test. Instead, the court stated a series of premises unrelated to the application of the test, all cited from right of access cases involving the media.168

In order to properly issue a prior restraint, the trial judge had to find that the broadcast of the tapes would have denied Noriega a fair trial.169 The district court could have reached this conclusion had it analyzed the information it possessed instead of waiting to further examine the tapes. The court knew that the tapes contained conversations between Noriega and his defense attorney, and that at least some of the conversations discussed prospective witnesses as well as other aspects of Noriega's defense.170 The district


166. The appellate court stated that a court must find: "1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by the publicity; 2) there is a substantial probability that closure would prevent that prejudice; and 3) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." Cable News Network, 917 F.2d at 1549 (citing Press Enterprise II, 478 U.S. 1, 14 (1986)).

167. Id. For a discussion of the facts and holding in Press Enterprise II, see supra notes 74-81 and accompanying text.

168. The Cable News Network opinion cited Press Enterprise II, 478 U.S. at 14, which stated, "[C]losure is essential to preserve higher values and is narrowly tailored to serve that interest." Cable News Network, 917 F.2d at 1548. The court then cited Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 430 (5th Cir. 1981) which stated, "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. Additionally, the court quoted Levine v. United States, 764 F.2d 590 (9th Cir. 1985): "[T]he Sixth Amendment's guarantee of an impartial jury ... is an obligation of the nation, not the accused." Id. at 1550. For a discussion of why the media's right to access of trial information is irrelevant to the facts of Cable News Network, see infra note 200 and accompanying text.


170. The district court stated that "[w]hat is known at this point is that at least some of the tapes contain discussions of witnesses and certain other aspects of Noriega's defense." United States v. Noriega, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990), aff'd, 917 F.2d 1543 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). The district court learned this when Noriega's attorney told the court what was on the tapes which CNN had played for him on November 6, 1990 and when CNN broadcasted segments of the tapes in its newcast on November 8, 1990. Petitioner's Application, supra note 41, LEXIS at *26.
court could have found that further broadcast of the tapes would have provided portions of Noriega's defense strategy to the prosecution. The court then should have ruled that a fair trial would be impossible because the prosecution would have pretrial access to defense strategy information.\footnote{171}

The appellate court agreed with the district court, stating that the district court needed to actually listen to all the tapes CNN possessed \textit{in camera} to determine whether the taped information was within the attorney-client privilege or would prejudice Noriega's trial.\footnote{172} This statement demonstrates that neither the district court nor the court of appeals ever reached the required finding that broadcasting the tapes would have prejudiced Noriega's trial.\footnote{173} Rather than temporarily restraining the broadcast, the district court, based on the facts it did know, should have determined that such a broadcast would have prejudiced Noriega's trial.\footnote{174} Thus, the first prong of the \textit{Nebraska Press} test could have been satisfied without the district court having to listen to the rest of the tapes.

2. \textit{Would Alternative Measures Have Been Likely to Mitigate the Effects of Pretrial Publicity?}

The second prong of the \textit{Nebraska Press} test is that the court must determine that no alternatives to prior restraint would mitigate the pretrial prejudice.\footnote{175} Neither the district court, in ordering the restraint, nor the court of appeals, in upholding it, examined the alternatives to a prior restraint to determine whether less restric-

\footnote{171. This analysis assumes that none of the defense information and strategy would have been made available to the prosecution notwithstanding broadcast of the tapes.}

\footnote{172. \textit{In re Cable News Network Inc.}, 917 F.2d 1543 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). The court analyzed the attorney-client privilege and stated that the privilege is invoked if the communication is: "(1) intended to remain confidential and (2) under the circumstances, was \textit{reasonably} expected and understood to be confidential." \textit{Id.} at 1551 (citing United States v. Bell, 776 F.2d 965, 971 (11th Cir. 1985)). The court then stated that the district court should determine whether or not Noriega waived his attorney-client privilege. \textit{Id.} at 1551. This question arose because it was alleged that Noriega signed a release at the prison authorizing the recording of all his telephone conversations. \textit{Id.}

\footnote{173. For an explanation of the reasoning that if the court needed to look further to determine the potential for pretrial prejudice, it necessarily follows that the proponent of the prior restraint did not satisfy its burden, see \textit{supra} note 158.}

\footnote{174. In hindsight, when the district court finally listened to the tapes, it determined that none of the conversations on the tapes would have prejudiced Noriega's fair trial by either: (a) influencing the jury, or (b) infringing on Noriega's right to effective assistance of counsel. See United States v. Noriega, 752 F. Supp. 1045 (S.D. Fla. 1990).

\footnote{175. \textit{Nebraska Press Ass'n v. Stuart}, 427 U.S. 539, 563 (1976).}
tive measures could have protected Noriega's rights.\textsuperscript{176}

In examining less restrictive alternatives, it is important that publication of the Noriega tapes not only risked influencing potential jurors, but also threatened to release Noriega's defense strategy to the prosecution.\textsuperscript{177} In fact, the threat to the Sixth Amendment right to effective assistance of counsel seems to have been the district court's main concern in preventing prejudice to Noriega's trial.\textsuperscript{178}

Three alternatives to prior restraints used to control the jury are the \textit{voir dire} process, jury instructions and sequestering the jury.\textsuperscript{179} The district court could have utilized the \textit{voir dire} process and jury instructions to attempt to prevent potential jury prejudice.\textsuperscript{180} Additionally, it could have sequestered the jury to prevent them from hearing the feared pretrial publicity. However, the jury's knowledge of Noriega's defense strategy would be unlikely to seriously affect the jurors' ability to render a fair verdict.\textsuperscript{181} Additionally, Noriega did not attempt to show that the jury would be prejudiced by such knowledge.\textsuperscript{182} This is because the defense was not concerned that the jury would use the trial strategy information against him.\textsuperscript{183} The court worried that the prosecution would use

\textsuperscript{176} For a discussion of the alternatives available to the court, see \textit{supra} notes 64-69 and accompanying text.

\textsuperscript{177} \textit{Noriega}, 752 F. Supp. at 1034. The district court stated that "another distinct aspect of the right to a fair trial is at issue," which is the potential for damage to Noriega's fair trial if his strategy is disclosed to the prosecution. \textit{Id.} The court also noted that it was difficult for Noriega's attorney to explain to the judge just how damaging the information on the tapes would be without further explaining the defense strategy in the presence of the prosecution. \textit{Id.} This would "bring about the very problem he seeks to avoid." \textit{Id.}

\textsuperscript{178} The United States Constitution guarantees the right of a criminal defendant "to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI; \textit{see Noriega}, 752 F. Supp. at 1034. Noriega's attorney told the court "that the portions of the tapes he heard involved discussion of witnesses, defense investigation, and trial strategy at the core of Noriega's defense." \textit{Id.}

\textsuperscript{179} \textit{Nebraska Press}, 427 U.S. at 564.

\textsuperscript{180} \textit{See} \textit{id.}

\textsuperscript{181} Information about Noriega's defense strategy would not necessarily influence Noriega's trial adversely with regard to unbiased jurors. \textit{See} Levine v. United States District Court, 764 F.2d 590, 592-93 (9th Cir. 1985), \textit{cert. denied}, 476 U.S. 1158 (1986). In fact, an order was upheld enjoining the defense attorney from releasing the defense strategy to the media for the purpose of positively influencing the public with regard to the defendants in \textit{Levine}. \textit{Id.} at 601. Additionally, "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically . . . to an unfair trial." \textit{Nebraska Press}, 427 U.S. at 565.


\textsuperscript{183} There is no indication in the district court or appellate court opinions that Noriega's defense attorney was concerned that the information on the tapes would bias the jury. This is evident in the district court's statement that
the information against Noriega. Thus, although these alternatives may have prevented jury prejudice due to knowledge of the defense strategy, they could not have prevented trial prejudice caused by the prosecution using the defense strategy, knowledge that it would not have but for publication.

Other alternatives sometimes considered by courts include a change of venue or postponement of the trial. However, a change of venue or postponement of the trial would not have been effective in preventing the prosecution from gaining access to Noriega's defense strategy. Any national broadcast of the defense strategy could not be confined only to the Southern District of Florida. Therefore, Noriega's defense strategy would be accessible to prosecutors in any district. Additionally, the effects of revealing the defense strategy to the prosecution would not subside over the passage of time. Once the prosecution gained access to Noriega's defense strategy, postponement of the trial would do nothing to prevent the use of that knowledge.

Both the district court and the court of appeals failed to consider whether the trial court had any viable alternatives to the prior restraint issued. Had the courts examined the potential alternatives to prior restraints, they would have found that none of the available alternatives could have prevented the prosecution from utilizing Noriega's defense strategy at trial. The judicially-developed defense counsel could not disclose everything it heard on the tapes because this would disclose the defense strategy to the prosecution causing "the very problem he seeks to avoid." Noriega, 752 F. Supp. at 1034.

184. Id.
186. See Levine v. United States, 764 F.2d 590, 592-93 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986). When publicity is not geographically limited, "change of venue . . . would simply have no effect on the problem." Id. at 600. Accordingly, a change of venue is effective only when "publicity surrounding a trial is centered on a specific geographical location." Id. The district court would not have avoided trial prejudice if it had transferred Noriega's case, including the prosecution, to another district if the prosecution team had knowledge of the defense strategy. Moreover, the prosecutors in other districts would have had knowledge of Noriega's defense strategy due to the national broadcast of the tapes.
187. This was not a situation where the public's hostile disposition toward the defendant will relax as publicity and public attention diminishes. See Sheppard, 384 U.S. at 363. There is no indication that the prosecution would ignore or forget the defense strategy and investigation information if it were published.
188. Postponing a trial to prevent prejudice due to pretrial publicity "would be appropriate only if the publicity is temporary." Levine, 764 F.2d at 600.
189. See Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 563-64 (1976) for the alternatives to prior restraints on publication. For a detailed discussion of additional alternatives to prior restraints on publication, see Report, supra note 64, at 400-1 (lists prohibitions on extrajudicial statements of trial participants and restriction of media access to trial information as alternatives to prior restraints).
oped alternatives are not helpful in preventing the kind of trial prejudice that threatened in *Cable News Network.*\(^{190}\) Thus, had the district court or the court of appeals examined the alternatives, it would have found that the second part of the *Nebraska Press* test was satisfied: No less restrictive alternatives would have mitigated the effects of the pretrial publicity.

3. **Would This Prior Restraint Have Prevented the Prejudice to Noriega's Trial?**

Finally, neither the district court nor the court of appeals applied the third part of the *Nebraska Press* test to determine if a restraining order would have effectively protected Noriega's fair trial.\(^{191}\) The prosecutors told the district court that no members of the "trial team" had any knowledge of the tapes.\(^{192}\) The district court could then have ordered the government not to release any tapes it had of conversations between Noriega and his attorney.\(^{193}\) Thus, only CNN's broadcast of the tapes would have made the taped conversations available to the prosecution. The injunction could have prevented the prosecution from gaining access to the defense

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190. *Cable News Network* is the first case to face a situation where the media desired to publish attorney-client communications that would prejudice a trial if released. United States v. Noriega, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990), aff'd, 917 F.2d 1542 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990). The district court noted that the precedent cases "discussing the doctrine of prior restraint are, therefore, of somewhat limited precedential value to the facts of this case." *Id.* *Cable News Network* differs in the aspect of available alternatives to prior restraint because the means by which Noriega's trial might be prejudiced involves the opposing counsel, not the jury. The alternatives to prior restraints set forth *supra*, notes 64-69, were developed in order to prevent jury bias. *See Nebraska Press*, 427 U.S. at 563-65 (1976). These alternatives were not set forth in contemplation of trial prejudice due to the unfair advantages involved where one side of a law suit unjustly acquires the other side's trial strategy. *Id.* For a further discussion of how alternatives to prior restraints prevent trial prejudice, see also Sheppard v. Maxwell, 384 U.S. 333 (1976).

191. Neither the district nor appellate courts examined the third prong of the *Nebraska Press* test because neither court conceded that the injunction which the district court ordered was a prior restraint as defined by precedent. *See generally In re Cable News Network, Inc.*, 917 F.2d 1543 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990).

192. *Petitioner's Application, supra* note 41, LEXIS at *37. On petition to the United States Supreme Court, CNN claimed that because the district court did not investigate whether "other members" involved in the prosecution had any knowledge of the tapes, that it was "unknown" whether the prosecution had knowledge of the tapes. *Id.* Nevertheless, the Supreme Court disagreed because it refused to grant certiorari. *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451 (1990).

193. *Petitioner's Application, supra* note 41, LEXIS at *28. The district court ordered the government to relay the number of these tapes it possessed and the government complied. Thus, the court could have entered a second order prohibiting the government from releasing the tapes to the prosecution or press. *See id.*
strategy, thus, preventing the prosecution's use of that knowledge to prejudice Noriega's trial.

Therefore, had the district court applied the *Nebraska Press* test to the facts it was aware of, it could have found that Noriega had satisfied all three prongs of the test. First, Noriega's trial would have been prejudiced had the prosecution gained knowledge of the defense strategy. Second, no alternatives to prior restraints would have effectively mitigated such prejudice. Finally, a prior restraint would likely have prevented the pretrial prejudice.

Thus, the district court should have applied the *Nebraska Press* test and enjoined CNN from broadcasting the tapes. A proper injunction would have prohibited the broadcast of the tapes until after Noriega's trial. However, the court also should have allowed CNN to rebut Noriega's proof that the tapes contained trial strategy by showing that the tapes also contained conversations which would not be prejudicial to Noriega's trial. Such a ruling would have enjoined CNN from broadcasting the tapes until the district court could examine the rest of the information contained on the tapes. This would have accomplished exactly the same restraint that the district court ordered, without deviating from the established precedent. However, the district, appellate and Supreme courts' actions in ordering and upholding a prior restraint on media publication, without applying the *Nebraska Press* test, leaves future courts without a test to apply where the criminal defendant requests a temporary restraint on publication.

**C. Impact of Attorney-Client Privilege**

In affirming the district court's temporary injunction, the appellate court inappropriately applied an analysis set forth in the

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194. The district court's statement that, "[p]erhaps this alone is enough to sustain an interim injunction during the course of the trial," demonstrates that the court almost came to this conclusion when it considered that it knew the tapes contained conversations about trial strategy and potential witnesses. United States v. Noriega, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990), aff'd, 917 F.2d 1542 (11th Cir. 1990), cert. denied, 111 S. Ct. 451 (1990).

195. Any order enjoining publication by the press to protect a defendant's fair criminal trial must be "narrowly tailored to serve that interest." *Cable News Network*, 917 F.2d at 1549 (citing *Press Enterprise II*, 478 U.S. 1, 13-14 (1986)). That such an injunction must be narrow is significant because the *Cable News Network* court noted that the district court's order could have been construed to not only prohibit broadcast of the tapes, but also news reports about the tapes. *Id.* at 1546. The district court had proof that the tapes contained trial strategy that should not be broadcast. *Noriega*, 752 F. Supp. at 1034. A narrow injunction would allow CNN to broadcast any taped conversations that would not publicize the defense strategy.
media right of access cases to the attorney-client privilege. The court reasoned that because the public was not entitled to the attorney-client communications, and the media is not entitled to information "superior to that of the general public," it was justified in restraining CNN from broadcasting the tapes. However, whether CNN had a right of access to the tapes was irrelevant to the issue of whether it could publish the tapes it already possessed. Thus, the court of appeals should not have relied on the media right of access analysis.

Additionally, the court of appeals hinted that the district court could prohibit publication based solely on the attorney-client privilege. While the attorney-client privilege is an important right in

196. *Cable News Network*, 917 F.2d at 1547-50. For a discussion of cases involving the media's right to access, see supra notes 71-97 and accompanying text.

197. *Id.* at 1548.

198. *Id.* (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978)).

199. Kenneth Starr et al., *The Noriega Tapes: Was It Right to Temporarily Ban Their Broadcast?*, A.B.A. J., Feb. 1991, at 37 (criticizing the courts application of attorney-client privilege and prior restraint law). The appellate court looked to *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981), in which the Fifth Circuit Court of Appeals denied the media access to audio tapes made during an FBI investigation. *Cable News Network*, 917 F.2d at 1548. The appellate court cites *Belo* to support its assertion that the press has no greater right of access to information than the general public. *Id.* The court then decided that, "it is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." *Id.* at 1549.

200. The media right of access cases analyze the circumstances under which a court should refuse to allow the press the right to obtain prejudicial information. The standards set forth in right of access cases are not applicable where the media already has the information and the court wishes to prohibit publication. *See In re Dow Jones & Co., Inc.*, 842 F.2d 603, 608-9 (2d Cir. 1988) (court made distinction between restraints on publication and restraints on media access to trial information), *cert. denied sub nom.*, Dow Jones & Co., Inc. v. Simon, 488 U.S. 946 (1988); *cf.* *Press Enterprise II*, 478 U.S. 1 (1986) (it was improper to exclude the public and press from the trial of a nurse charged with murdering twelve patients); *Press Enterprise I*, 464 U.S. 501 (1984) (it was improper to close *voir dire* proceedings to the press in a trial for the rape and murder of a teenage girl); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (statute providing for exclusion of the public from trials for specific sex offenses against victims under eighteen years old found unconstitutional as applied where used to exclude the press from trial of man accused of raping three minor girls).

201. In analyzing whether the district court could issue the requested injunction, the court of appeals stated that the district court needed to listen to the tapes to determine "whether the attorney-client communications are privileged or, while not privileged, are of such a nature that disclosure would impair Noriega's Sixth Amendment rights." *Cable News Network*, 917 F.2d at 1550. The word "or" in that statement implies that if the district court found either of the two mentioned conditions, the prior restraint could be ordered. However, the court then contradicts itself, stating that even if the "communications between Noriega and his defense counsel are privileged," this is "not necessarily
our judicial system,\textsuperscript{202} the fact that particular information may be privileged, in and of itself, is irrelevant to the justification of a prior restraint on publication.\textsuperscript{203} The issue to be considered in defining the "nature and extent"\textsuperscript{204} of pretrial publicity is whether the information, if publicized, will deny the defendant a fair trial.\textsuperscript{205} Privileged information between attorney and client may, coincidentally, be information that would prejudice a defendant's trial. Alternatively, privileged information may have no influence whatsoever on a trial, or may even be advantageous to the defendant if released.\textsuperscript{206} Thus, although the information is privileged, this is not dispositive of the fact that it would make a fair trial impossible. The \textit{Nebraska Press} test is dependent on the results which the publicized information would produce in relation to the criminal trial, not the status of the information as privileged or not privileged between attorney and client.\textsuperscript{207}

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\textsuperscript{202} The court of appeals stated that the attorney-client privilege serves the purpose of facilitating "open and complete communications between a client and his attorney" by preventing "disclosure of their confidential communications." \textit{Id.} at 1550. It also prevents disclosure "of information damaging to the defendant's case." United States v. Noriega, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990), \textit{aff'd}, 917 F.2d 1542 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 451 (1990).

\textsuperscript{203} For an explanation of the relationship between the attorney-client privilege and the effect that publication of privileged information has on a defendant's fair trial, see \textit{infra} notes 204-207 and accompanying text.

\textsuperscript{204} Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563 (1976).

\textsuperscript{205} \textit{Id.} at 569. Judge Learned Hand stated the court must decide whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." \textit{Id.} at 562 (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), \textit{aff'd}, 341 U.S. 494 (1950)). Thus, applying Judge Learned Hand's weighing process to the \textit{Nebraska Press} test requires that the court find that the defendant's fair trial will surely be prejudiced if media publication is to be restrained. See \textit{Nebraska Press}, 427 U.S. at 562.

\textsuperscript{206} Information such as trial strategy that the prosecution would not have knowledge of at trial, would prejudice a defendant's trial if the prosecution received such information prior to trial. See \textit{In re Cable News Network, Inc.}, 917 F.2d 1543 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 451 (1990). However, communication between attorney and client may be advantageous to the defense if released to the public. This was true in \textit{Levine}, where the defense counsel was releasing defense strategy information to the press in an effort to positively influence the public. \textit{Levine v. United States}, 764 F.2d 590 (9th Cir. 1985), \textit{cert. denied}, 476 U.S. 1158 (1986).

\textsuperscript{207} The status of information as privileged does not fully explain the nature of the information in relation to its potential to prejudice a fair trial. \textit{Cf. Levine v. United States}, 764 F.2d 590 (9th Cir. 1985) (defense attorney released attorney-client communications that could have prejudiced the jury in favor of the defense), \textit{cert. denied}, 476 U.S. 1158 (1986). The district court also noted that Noriega's Sixth Amendment right to effective assistance of counsel "has already been frustrated by the very fact of invasion." United States v. Noriega, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990), \textit{aff'd}, 917 F.2d 1542 (11th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 451 (1990). The attorney-client privilege was violated by the government when they recorded the conversations. \textit{Noriega}, 752 F. Supp. at
Thus, the Eleventh Circuit Court of Appeals misapplied the attorney-client privilege in two ways. First, it reasoned that because the public had no right of access to privileged information, neither did CNN. This reasoning fails because CNN did not request access to the potentially privileged information, it asked to broadcast the information it already possessed. Second, the court implied that publication of information between attorney and client could be enjoined solely on the basis that it is privileged. However, the Nebraska Press test required that before a prior restraint on publication can be ordered, regardless of the attorney client privilege, the court must find that the information, if published, would make a fair trial impossible.

CONCLUSION

In Cable News Network, the court confronted issues never before faced in other prior restraint cases. First, the potential broadcast of Noriega's conversations with his attorney, which would have made his defense strategy available to the prosecution, threatened to prejudice his criminal trial. Moreover, the defense claimed that the taped conversations were protected by the attorney-client privilege. Additionally, the tapes were not available for the court to examine in order to determine if all the information they contained would have made a fair criminal trial impossible.

Consequently, Cable News Network is potentially dangerous precedent for future prior restraint cases. In an effort to achieve justice, the district, appellate and Supreme Courts decided that temporary prior restraints on publication are not subject to the stringent test set forth in Nebraska Press.

Had the district court applied the Nebraska Press test to the facts that were before it, the court could have concluded that Noriega satisfied the test. It then could have issued a narrow prior restraint enjoining the broadcast of only prejudicial information. As long as the injunction allowed CNN to show that the tapes also contained conversations that would not have prejudiced Noriega's trial in order to rebut Noriega's proof, the restraint on CNN would have then been justified by existing precedent. In the future, courts may further infringe on the freedom of the press as a result of the Cable News Network case.

Lance R. Peterson

1033. The district court added that an injunction "would go nowhere toward preventing the harm which has already occurred..." Id. "Once announced to the world, the information lost its secret characteristic, an aspect that could not be restored by the issuance of an injunction..." Id.