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Editor, New York Times:

E. Barrett Prettyman, Jr., has 20-20 hindsight on the First Amendment in his op ed article of January 22.

His earlier record made the right to slander within the United States a right of the CIA. So that we might survive as a nation, no less.

In the suit brought against a CIA operative in 1968 Prettyman teamed with Paul R. Connally, partner in the Edward Bennett Williams law firm, to immunize CIA operatives from slander uttered "in the line of duty," in the words of the court decision (upheld by the Supreme Court April 19, 1971).

Contemporaneous reporting is pertinent today because of the encouragement to illicit and anti-Constitutional CIA acts:

"The CIA's immunity defense raised controversy over the agency's proper domestic role..." And the circuit court found the slander "legitimate measures to protect the secrecy of America's foreign intelligence sources..."

What was called "national security" was served by the slander of an Estonian emigre, "a lecturer on the evils of Communism" by calling him a Soviet agent.

And <u>within</u> the United States this then became "legitimate measures to protect the secrecy of America's foreign intelligence sources..."

Thanks to Mr. Prettyman and Mr. Connally the CIA was encouraged in acts that are subversive of fundamental rights and are a step toward the police state.

For "national security," of course.

Sincerely,

Harold Weisberg

(Quotes from Washington Post 6/7/69,4/20/71. If your morgue has other stories, I'd appreciate copies, thanks.)

Press Freedom: Legal Threats

NYT 1/22/75

By E. Barrett Prettyman Jr.

WASHINGTON—A body of law is developing that poses a serious threat to our traditional view of the First Amendment. Yet this development has received little attention not only by those most directly affected—the press—but by the ultimate beneficiaries of the First Amendment, the public. It is known as the Dickinson doctrine.

This doctrine holds that a reporter must, on penalty of being held in criminal contempt of court, obey an order not to publish accounts of open court proceedings, even if that order is ultimately ruled unconstitutional by an appellate court. It raises the fundamental question of who is to decide whether or not to publish, and when: the courts or the media?

That this should be a burning issue, and one that should concern not only the media but every thinking American, is evidenced by the rash of prior-restraint orders across the country over the last few years.

Recently, John R. Bartels, a distinguished Federal judge in New York, seriously proposed that all Federal courts enter blanket orders, backed by the contempt power, prohibiting the media from publishing, not only during trial but for thirty days in advance of it any information about an accused criminal's prior record or character.

Surely it should be obvious from a long line of cases that direct prior restraints on the press are in violation of the First Amendment except in the most narrow and extraordinary circumstances. Yet we find a Federal judge proposing an all-inclusive gag order, entered without relation to the facts of a particular situation, which would restrain all publication of certain information for a substantial period of time.

The rule should be that the press publishes at its peril in the face of a prior restraint. If the press is right, and the order is in violation of the Constitution and thus void, the press should not be punished for violating that void order. That is precisely what several state courts held prior to the Dickinson ruling.

On the other hand, if the press is wrong, and the order turns out to be valid, the press must suffer the consequences for violating the order.

Until the Supreme Court definitively rules on the Dickinson doctrine, the Reporters Committee for Freedom of the Press and knowledgeable attorneys representing the media are mounting a counteroffensive. As soon as a judge even implies that a gag order may be imminent, the media are demanding a hearing, the right to present evidence and an argument on the law, a written order from the court accompanied by detailed findings of fact and conclusions of laws, and an immediate appeal.

In other words, the media are demanding the same type of hearing that the Supreme Court has held others are entitled to when about to be restrained from taking action. The Third Circuit Court of Appeals has

Sculpture by Karen Breschi

recently given impetus to this new demand, granting the press a hearing on procedural rather than constitutional grounds.

The Dickinson doctrine arose in the following manner: In 1971 a hearing was held in Federal court in Louisiana to determine whether certain state criminal proceedings should be enjoined. Although the Federal hearing was in open court, the judge ordered the media not to print or publicize any news whatever about the proceedings. Two reporters, Larry Dickinson and Gibbs Adams, violated the order and printed stories about the proceedings. The Fifth Circuit Court of Appeals found that the lower court's gag order was constitutionally invalid, illegal and void.

However, the Fifth Circuit also held that the order had to be obeyed until overturned on appeal. Since it had not been obeyed, the reporters were guilty of criminal contempt. Last year, the Supreme Court, with only one published dissent, refused to hear the case.

The Fifth Circuit assumed in the Dickinson case that a "slight" delay in publication while an appellate court is empaneled to review the lower court's gag order works no harm to the public's "right to know." There are several answers.

First, it should be clear to all students of American history that even a slight delay in the publication of some news can be harmful and in many instances can moot the very purpose of publication.

Second, it simply is not true that appellate courts can act quickly in all, or even a majority, of cases. Delays of more than five weeks, for example, were encountered in a recent New Orleans case as the press sought to overturn a gag order through two appeals.

But each of these points is almost irrelevant when compared with the all-important question of who is to decide whether or not to publish, and when. The real answer to the Dickinson doctrine is for the Supreme Court to overrule it. Then the media can once again move freely in the role designed by the Constitution.

E. Barrett Prettyman Jr. is a Washington lawyer.