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Tom Braden

Court's First Amendment ruling no major victory for the press

WASHINGTON — What the Supreme Court has done in upholding the First Amendment rights of The New York Times and The Washington Post is not as great a victory for freedom of the press as it seems or as newspaper editorials are proclaiming.

Indeed, a reading of the opinions of all nine justices suggests that the First Amendment may be — to use a phrase often associated with it — in clear and present danger.

Moreover, the opinion of Mr. Justice White in which Mr. Justice Stewart concurred may well comfort Atty. Gen. John Mitchell as he considers the possibility of taking his revenge.

Mr. Justice White seemed to take pleasure in pointing out the various laws under which Mr. Mitchell might proceed to bring criminal action against the press.

The result may be construed as a setback to what Yale law professor Thomas I. Emerson has called the "gradual progress toward acceptance of the view that the First Amendment affords complete protection to all forms of expression."

That view was stated flatly only by Justices Black and Douglas. Black made it absolute: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment," he wrote. And he continued, "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."

Mr. Justice Brennan indicated that he might impose prior restraint when the government could show "proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . ." Since Mr. Justice Marshall's opinion did not directly confront the issue of the First Amendment, but disputed the presidential power to issue an injunction, the line-up of the court was really 6 to 2 against an absolute right to publish.

The language of the First Amendment, "Congress shall make no law," would seem to give the press and the people that right. Justice Black argues that this is what the founders intended and Alexander Meicklejohn, who taught Emerson, Black and other students of the First Amendment, spent most of his life trying to demonstrate that absolute right of expression was essential to self-government and key to the social change without which a modern nation could not survive.

But the court majority has never agreed. Until 1925, the Supreme Courts upheld the convictions for those who advocated violent overthrow of the government. It was not until that year and the famous dissent in the Getlow case by Oliver Wendell Holmes that a new doctrine began to emerge.

Holmes suggested the test of "clear and present danger," and for a time, this test became the norm. But in the 1950s, Justices Frankfurter and Vinson began to substitute in cases against Communists the doctrine of "balancing" the interest of the government in national security against the values of free expression.

This seems a fair definition of the yardstick which Justices White and Stewart applied in the Times-Post cases. While they could not bring themselves to "balance" in favor of the government on the issue on prior restraint, their opinions serve notice — along with those of the three dissenters — that the Supreme Court is by no means ready to accept the First Amendment as meaning what its words say it means.