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Constitutional Law: Should the Law be Black and White When It Comes to Money

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CONSTITUTIONAL LAW: SHOULD THE LAW BE BLACK AND WHITE WHEN IT COMES TO MONEY?

An eye catching magazine cover is like money in the bank. But, if the money is on the cover and not in the bank, criminal sanctions can be imposed as Time Inc. ("Time") discovered in *Regan v. Time.*[1] The February, 1981 cover of *Sports Illustrated*[2] depicted $100 bills falling into and over-stuffing a basketball hoop and net. The design was to attract attention to the inside story regarding "a 'point shaving' scheme in amateur basketball."[3] This depiction in *Sports Illustrated* violated the federal counterfeiting laws.[4] Although at first blush it is hard to recognize the connection between a distorted picture of money and charges of counterfeiting U.S. currency, the federal government has very specific guidelines regarding these matters.[5]

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1. Regan v. Time, Inc., 468 U.S. 641 (1984).

2. *Sports Illustrated* is published by the plaintiff Time, Inc. The specific cover at issue appeared on the cover of the February 16, 1981 edition.

3. Time, Inc. v. Regan, 539 F. Supp. 1371, 1379 (S.D.N.Y. 1982).

4. The Southern District of New York, however, found the counterfeiting laws, 18 U.S.C. § 504(1) and § 474 ¶ 6, unconstitutional. 539 F. Supp. 1371, 1391.

5. Although the counterfeiting laws extend from 18 U.S.C. § 471 to § 509, this case only addresses the constitutionality of § 474 ¶ 6 and § 504. 18 U.S.C. § 504(1)(D) (1983) provides in part:

> postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or coporation for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers or of dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions-
> (i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;
> (ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and
> (iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

18 U.S.C. § 474 ¶ 6 (1983) provides:

> Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of an such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such en-

In *Regan v. Time, Inc.*[6] the Supreme Court examined the federal counterfeiting laws. The Court upheld the major portion of Title 18 of the United States Code section 504(1) which regulates the printing and filming of United States securities, but found that the purpose requirement of the statute was unconstitutional.[7] The Court also discussed the validity of 18 U.S.C. section 474 paragraph 6, which imposes the criminal sanctions for counterfeiting activities. This regulatory scheme was held to be constitutional.[8]

Although the Secret Service[9] had previously warned[10] Time that its use of currency illustrations on various covers violated 18 U.S.C. section

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graving, photograph, print, or impression, except by direction of some proper officer of the United States;

Shall be fined not more than $5,000 or imprisoned not more than 15 years, or both.

6. *Regan*, 468 U.S. 641 (1984).

7. *Id.* at 649.

8. *Id.* at 659.

9. The Secret Service's authority to enforce the counterfeiting laws is derived from 18 U.S.C. § 3056(a) (1983) which states in part: "Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to . . . detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments. . . ."

10. Time was warned as early as December 14, 1970 that a cover of one of its magazines violated the counterfeiting laws. The Secret Service's methods of dealing with these violations varied significantly over the years.

About a month after a TIME magazine cover (December 14, 1970) pictured a one dollar federal reserve note, Time's production department was informed that its cover was illegal. Time was told that it must cease and desist from further violations. Again Time placed a picture of currency on its cover. The July 29, 1974 issue of TIME depicted one-half of a one dollar bill in black and white partly covered by a life perserver. Two months after the cover was published Time's legal department was notified that the cover violated § 504. The section was violated since the size of the currecy did not meet the specified standards. The legal department was warned to cease and desist from further violations.

Time was notified by a letter dated February 24, 1976 that its TIME cover of February 23, 1976 violated § 504. This time, Time was informed that the Department of Treasury "ha[d] taken the position that in order for an illustration to be permissible it must be accompanied by information about the particular [sic] item reproduced and cannot be used for decorative or eye-catching purposes." 539 F. Supp. 1371, 1378 (S.D.N.Y. 1982).

Again on November 18, 1976 Time was notified that a TIME cover violated § 474 ¶ 6. In this instance, the cover of November 1, 1976 depicted colored currency less than one-half the actual size of currency clutched in a human hand. Time was told to cease and desist the use of colored reproductions of currency.

Approximately nine months after a FORTUNE magazine cover, bearing a reproduction of colored currency enclosed within a money clip, Time was telephoned by a Secret Service agent. Time's legal department was informed that "the illustration violated § 474 and § 504 . . . and that he had been instructed to give Time a 'slap on the wrist'." 539 F. Supp. 1371, 1379.

On two specific occasions editors of Time's magazines altered covers after being advised by the Secret Service. On September 10, 1965 a cover of TIME which was to have a color reproduction of a ten dollar bill, instead carried a black and white artists rendering of the bill. Again in 1977, Time was advised that a proposed FORTUNE cover depicting colored one hun-

474 paragraph 6 and section 504, Time published the cover of *Sports Illustrated*. The Secret Service notified Time's legal department of the violation and of the need for the Service to collect all "plates and materials used in connection with the production of the cover."[11] Shortly thereafter, Time brought suit against Donald Regan,[12] Secretary of the Treasury, in the United States District Court for the Southern District of New York seeking both a declaratory judgment that the Title 18 provisions were unconstitutional and an injunction to prevent the Secret Service from enforcing the provisions.

The government appealed from the district court's ruling, that both section 474 paragraph 6 and section 504 were unconstitutional,[13] directly to the Supreme Court.[14] The district court first determined that Time's reproductions were, in fact, protected speech under the First Amendment. Since section 504 created exceptions to section 474 paragraph 6 based on the content or subject matter of the message, the district court found that section 504 was not a valid time, place, and manner restriction. The court also concluded that the publication and purpose restrictions of section 504 were vague, and specifically, that the purpose restriction was "open to varying interpretation. . . ."[15] Therefore the court held that the restrictions "intrude[d] unnecessarily upon [Time's] freedom of speech"[16] and held section 504 to be unconstitutional.

Additionally, the district court found section 474 paragraph 6 to be unconstitutional. Since the section included *all* likenesses of currency regardless of their "capacity to deceive or act as a vechicle for counterfeiting,"[17] the court determined that the section was overbroad. Although the district court recognized the governmental interest in preventing counterfeiting, the court concluded that a more "narrowly

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dred dollar bills violated the counterfeiting laws. The editors modified the cover. 539 F. Supp. 1371, 1379.

11. *Regan*, 468 U.S. at 646.

The Secret Service also "requested the names and addresses of all printers who prepared the cover. . . ." 539 F. Supp. 1371, 1379.

12. Regan as Secretary of the Treasury was named as a defendant, along with the Director of the Secret Service, the Attorney General, the U.S. Attorney for the Southern District of New York and the Special Agent in charge of the Secret Services New York Field Office.

13. 539 F. Supp. 1371 (S.D.N.Y. 1982).

14. A direct appeal is statutorily authorized under Title 28 § 1252. Section 1252 in part states: "Any person may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

15. *Id.* at 1390.

16. *Id.*

17. *Id.* at 1387.

tailored means" was necessary.[18]

The Supreme Court, agreeing in part with the district court, recognized that the two sections of Title 18 had to be reviewed as a unit. Since the criminal liability aspect of section 474 would only be relevant when a section 504 requirement was not satisfied, the Court reasoned that if section 504 were held to be constitutional then so must section 474.

As a time, place and manner regulation, section 504 was scrutinized under the three part test enunciated in *Heffron v. International Society for Krishna Consciousness.*[19] For such a regulation to be valid it must: (1) "not be based upon either the content or subject matter of speech;"[20] (2) "serve a significant governmental interest;"[21] and, (3) "leave open ample alternative channels for communciation of the information."[22]

The Court decided to look at each clause of section 504 separately to determine the constitutionality of the entire section. First, the Court analyzed the purpose requirement. The Court stated that, since the purpose requirement precluded certain photographs if they were not found

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18. *Id.*

19. 452 U.S. 640 (1981).

As stated in *White House Vigil v. Clark*, the *Heffron* analysis does not include the least-restrictive-alternative requirement. In the majority opinion of *Clark* a footnote pointed out that in *Regan* the Supreme Court did not mention that a valid time, place, manner restriction must be narrowly tailored. However, the Circuit Court noted that had the Court meant to alter the test it would have done so explicitly. White House Vigil v. Clark, 746 F.2d 1518, 1528 n.81 (D.C. Cir. 1984) (The district court upheld three National Park Service regulations which restricted demonstrations in front of the White House.)

In *Clark* the majority continues and states that a zone of constitutionality exists within which the regulation must fall. Therefore although an agency's regulations must be well tailored the agency is given discretion in determining policy goals and techniques to serve those goals. *Id.* at 1531.

The dissent argued that once the majority stated that the zone existed, it failed to establish the zones parameters. In the dissent, Judge Wald concluded that the majority was too deferential to the agency policy determinations. Rather, a "court must look to see if the burden on speech is approaching an unreasonable level, or a serious loss to speech is being imposed for a disproportionately small governmental gain." *Id.* at 1544.

20. *Id.* at 648 (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)). *See*, Carey v. Brown, 447 U.S. 455, 470 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 99 (1972); Niemotko v. Maryland, 340 U.S. 268, 282 (1951); White House Vigil v. Clark, 746 F.2d 1518 (D.C. Cir. 1984).

21. *Id.* at 649 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. at 771 (1976)). *See*, Linmark Assn, Inc. v. Willingboro, 431 U.S. 85, 93 (1977); Grayned v. City of Rockford, 408 U.S. 104 (1972); Kovacs v. Cooper, 336 U.S. 77, 104 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941); White House Vigil v. Clark, 746 F.2d 1518 (D.C. Cir. 1984).

22. *Id.* at 648 (quoting *Virginia Pharmacy Bd.*, 425 U.S. 748, 771). *See*, Kovacs v. Cooper, 336 U.S. 77, 87 (1949); White House Vigil v. Clark, 746 F.2d 1518 (D.C. Cir. 1984).

to be "philatelic, numismatic, educational, historical or newsworthy,"[23] the regulation discriminated based upon content. In other words, "[t]he permissibility of the photograph [was] . . . 'dependent solely on the nature of the message being conveyed.' "[24] Therefore, the purpose requirement did not meet the first part of the *Heffron* test[25]and was held to be unconstitutional.

Next, the Court turned to the publications requirement. The initial inquiry was whether the Court should address the constitutionality of this requirement since Time qualified under the provision. The Court concluded that Time did not have standing with regard to this issue, since Time had no difficulty, presently or in the foreseeable future, in meeting the requirement. Therefore, the issue was only of "passing concern."[26]

Time argued that it should have standing regarding this issue. Since the publication requirement made the statute overbroad, Time contended that, although they had no difficulty in meeting the requirement, they could still challenge its constitutionality on the behalf of non-publishers. However, the Court rejected this argument stating that "an overbreadth challenge can only be raised on behalf of others when the statute is *substantially* overbroad."[27] (emphasis added). In other words, the Court concluded that under *New York v. Ferber*[28] a challenge for standing such as Time's, was allowable only when "the statute [was] unconstitutional in a substantial portion of the cases to which it applies."[29]

Time presented a number of examples to indicate that the statute would be unconstitutional in a substantial portion of cases by abridging first amendment rights. For example, Time stated:

> [E]qually banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a

23. 18 U.S.C. § 504(1)(D) (1982).

24. *Regan*, 468 U.S. at 648 (quoting Carey v. Brown, 447 U.S. 455, 461 (1980)).

25. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). *See supra* note 19 and accompanying text.

26. *Regan*, 468 U.S. at 650.

27. *Id.*

28. New York v. Ferber, 458 U.S. 747 (1982).

In *Ferber* the Court discussed the rationale behind limiting the overbreadth doctrine. The Court identified that although a chilling effect upon speech created by an overly broad statute was a weighty concern, contervailing policies also existed. For example, the court's emphasis to maintain the personal nature of constitutional rights, McGowan v. Maryland, 336 U.S. 420, 429 (1961), and to maintain prudential limits on constitutional adjudication. *Ferber*, at 767. Therefore, for a party to have standing arguing an overbreadth challenge, the party must show that the statute is "substantially" overbroad.

29. *Regan*, 468 U.S. at 650.

> $20 bill; a green, six-foot enlargement of the portrait of George Washington on a $1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, 'In God We Trust,' on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a 'shrinking' dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation.[30]

However, after analyzing the evidence presented, the Court concluded that "the legitimate reach of section 504 'dwarfs its arguably impermissible applications' to non-publishers"[31] since the government had never interpreted the statute so as to prevent Polaroid snapshots of children holding currency.[32] Therefore, Time could not maintain standing with regard to the publications requirement.

The Court had now concluded that the purpose requirement was unconstitutional and that the constitutionality of the publications requirement would not be determined at this time; however, the Court still had to determine the constitutionality of section 504 as a whole. Despite the district court's determinations that all of section 504 was invalid, the Supreme Court held that the remaining sections of the statute could survive without the purpose requirement. The basis for this conclusion was predicated upon well developed case law.[33] These cases favored a presumption of statutory severability and the maintenance of any constitutional part of a legislative scheme.

One ingredient in this determination was the conclusion that congressional intent would be maintained if the statute were indeed severed. Prior to the counterfeiting legislation, any person who wanted to use a reproduction of currency had to obtain special permission from the Secretary of the Treasury. After reviewing Senate and House documents, the Court decided that congressional desire was to codify the Treasury

30. *Id.* at 683 (quoting Brief for Appellee at 5-6).

31. *Id.* at 652 (quoting *Ferber*, 458 U.S. at 773).

32. *Id.* at 651 n.8.

33. *See* El Paso & Northeastern R.R. Co. v. Gutierrez, 215 U.S. 87 (1909); Buckley v. Valeo, 424 U.S. 1 (1976); U.S. v. Jackson, 390 U.S. 570 (1968); Champlin Refining Co. v. Corp. Comm'n of Oklahoma, 286 U.S. 210 (1932). These precedents include a number of principles. For example, in *El Paso* the Court found that "whenever an act of Congress contains unobjectionable provisions severable from those found to be unconstitutional, it is the duty of th[e] court to so declare, and to maintain the act in so far as it is valid." *El Paso*, 215 U.S. at 96. Also, in *Buckley* the Court stated that "the invalid part [of the regulation] may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 1098 (quoting *Champlin*, 286 U.S. at 234).

Department's exceptions to section 474[34] and to "ease the administrative burden [of granting special permission] without hindering the Government's efforts to [prevent] counterfeiting. . . ."[35] One issue still remained: whether the remaining sections of 504 on their own were constitutional.

The Court analyzed the remaining provisions regarding size and color requirements under the three-part time, place, and manner regulation test.[36] First, the Court concluded that the regulation did not invalidate speech based upon its content or subject matter. Rather, the limitations only "restrict[ed] . . . the manner in which the illustrations [could] be presented."[37] Both the size and color limitations were found to serve significant governmental interests[38] in that the limitations helped to prevent potential counterfeiters from employing the actual currency plates and the limitations diminished access to the negatives and plates.[39]

Consequently, the majority held that, although the district court was correct in finding the purpose requirement of section 504 unconstitutional, it was incorrect in its conclusion that the size and color requirements were also unconstitutional. Accordingly, section 474 and 504 were held to be constitutional in all other respects.

Justice Brennan, in his concurring opinion,[40] found that the majority's narrow construction of the regulatory scheme neither "remain[ed] faithful to congressional intent nor [rid] the legislation of constitutional difficulties."[41] Instead, having reviewed the Senate and House reports himself, Justice Brennan boldly described Justice White's opinion as "legislative draftsmanship."[42] Justice Brennan stated that Justice White's actions included "simply deleting the crucial language [of the

34. S. REP. NO. 2446, 85th Cong., 1st Sess. 5 (1958); H.R. REP. NO. 1709, 85th Cong., 1st Sess. 3 (1958), *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS 5268, 5272.

35. *Regan*, 468 U.S. at 654.

36. *Heffron*, 452 U.S. at 648. *See supra* note 19 and accompanying text.

37. *Regan*, 468 U.S. at 656.

This finding is consistent with a number of cases. *See* Kovacs v. Cooper, 336 U.S. 77 (1949), (noise restriction on public streets do not violate individual first amendment rights; cities have valid interest in maintaining tranquility on public thoroughfares); and, Baldwin v. Redwood City, 540 F.2d 1360, 1368-69 (9th Cir., 1976), *cert denied*, 431 U.S. 913 (1977), (size restriction of political signs/posters upheld as not infringing upon first amendment rights; restriction furthered legitimate municipal interests).

38. *Heffron*, 452 U.S. 640, 649. The second part of the *Heffon* test.

39. The governmental interests were served because black and white illustrations only require one negative and plate; while, color illustrations require multiple negatives and plates. *Regan*, 468 U.S. at 657.

40. Justice Brennan was joined by Justice Marshall. Justice Powell joined by Justice Blackmun, and Justice Stevens also wrote separate opinions concurring in part and dissenting in part.

41. *Regan*, 468 U.S. at 661.

42. *Id.* at 665.

statute] and using the words that remain as the raw materials for a new statute of his own."[43] Such a harsh conclusion was due to Brennan's determination that the purpose requirement "play[ed] *the* central role in the availability of the exemption."[44] (emphasis added).

In fact, as Justice Brennan pointed out, even the government read the clause as a single standard. The government stated that the clause was " 'descriptive and illustrative rather than prescriptive and mandatory'."[45] Therefore, the requirements were not severable in Brennan's opinion; but rather, if it was determined that the purpose requirement was unconstitutional, the publication requirement must be unconstitutional as well.

The main thrust of Justice Brennan's argument is that section 504 is not written in the disjunctive. Rather, in section 504 the purpose and publication restrictions are combined by the word "in". Justice Brennan concluded that the selection of the word "in" was dispositive of congressional intent. He reasoned that since Congress chose not to write the clause as an either/or regulation, Congress' intent was for both the requirements to be satisfied. Therefore, for Justice Brennan, Congress' intent was for only publishers to be exempted from section 504's strict ban when the illustrations were used for "philatelic, numismatic, educational, historical or newsworthy purposes."[46]

In addition, Justice Brennan concluded that interpreting the requirements as a unit "ascribes far more rationality to Congress than would any suggestion that, in order to obtain the benefits of the exemption, an illustration must literally 'appear in one of the enumerated publications'. . . ."[47] Brennan could not justify any reason why Congress would prefer illustrations within "articles, books, journals, newspapers or albums"[48] over similiar illustrations on leaflets, billboards, posters or banners.

Justice Brennan agreed that, once the purpose requirement was found unconstitutional, the Court had to examine the remaining sections of section 504. Unlike Justice White however, Justice Brennan concluded that, since Time raised the issue of the statutes overbroad applications, the Court could not ignore it. Rather, overbreadth challenges should be entertained when there is a concern that "persons whose ex-

43. *Id.* at 673.
44. *Id.* at 671.
45. *Id.* at 674 (quoting Brief for Appellants 28).
46. 18 U.S.C. § 504 (1983).
47. *Regan*, 468 U.S. at 675.
48. 18 U.S.C. § 504 (1983).

pression is constitutionally protected may . . . *refrain* from exercising their rights for fear of criminal sanctions. . . ."[49] Therefore, the Court should have remanded the case to allow Time to argue the implications of the newly formed regulation,[50] since Time could not have foreseen that the Court would sever the provisions of the statute.

Unlike the majority, Brennan proceeded to analyze the publications requirement and found it to be facially unconstitutional. Since the majority's reconstructed regulation would impose criminal liability despite a lack of unlawful intent, Brennan reasoned that the scheme was "susceptible [to] sweeping and improper application."[51] Brennan imagined that an individual who knew of the majority's decision or spoke with a competent attorney would refrain from using an illustration of currency upon a billboard, placard or leaflet because such items were not included in the list of publications. On the other hand, if such an illustration were contained in any one of the section's enumerated publications it would be protected. Brennan concluded that the first amendment's protection should not so easily turn on where an illustration is placed.[52]

In addition, Brennan disagreed with the majority that the second part of the *Heffron* test,[53] that a significant government interest is served, was satisfied. The government advaned two reasons for implementation of the statute stating that both reasons increased the efficiency of the Secret Service. First, the government contended that "the ban on illustrations prevented the creation of 'facsimiles' that, however innocent their purpose, could be passed off as genuine pieces of currency."[54] Brennan, however, could not understand how the "distorted and discolored pictures . . . Time . . . placed on its cover [could] have a serious capacity to deceive."[55]

Second, the government claimed that without the regulations, counterfeiters would have easier access to legitimate printers, which could supply the counterfeiters with easy alibis. Again Brennan could not reconcile how the distorted and discolored plates of Time could be used to reproduce deceiving replicas. Additionally, and more importantly, Brennan could not explain how the exclusion of non-publishers advanced this governmental interest.

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49. *Regan*, at 684 (quoting Gooding v. Wilson, 405 U.S. 518, 521 (1972) (emphasis added)).

50. *Id.* at 680 n.18.

51. *Id.* at 683 (quoting Bigelow v. Virginia, 421 U.S. 809, 816 (1975)).

52. See Brennan's discussion generally, 468 U.S. 684-690.

53. *Heffron*, 452 U.S. 640, 649.

54. *Regan*, 468 U.S. 687 (quoting Brief for Appellant 21 at 34-35).

55. *Id.*

Therefore, although Justice Brennan agreed with the majority that the purpose requirement was unconstitutional he would have held that the entire statute was unconstitutional. Justice Powell and Justice Blackmun also would have affirmed the district court's ruling that section 504 was unconstitutional in its entirety. This decision was based on the conclusion that the purpose requirement was "essential to the statutory plan;"[56] and, "that Congress would not have enacted the remaining provisions of section 504 without [the purpose] clause."[57] Justice Powell and Justice Blackmun reached this decision without examining the constitutionality of the remaining requirements of section 504.

Justice Stevens brought a totally different perspective to the situation. Stevens argued that the majority and both Justice Powell and Justice Brennan gave the statute a construction which was too narrow. Rather, the purpose requirement should be read as asking the question of "whether the image is being used to convey information or express an idea"[58] rather than if it were newsworthy. For Justice Stevens, such an interpretation would effectively protect "substantially all legitimate uses of reproductions of currency and exclude those that [were] illegitimate."[59] Therefore, the question is whether the reproduction is being used to communicate an expression protected by the First Amendment rather than "for some non-communicative purpose, e.g. to facilitate counterfeiting."[60]

As to the size and color requirements Justice Stevens agreed with the majority. Unlike Justice Brennan, Stevens believed both requirements protected governmental interests. Although Time argued that the color requirement was overbroad and "irrational as applied to any color other than"[61] the color of currency, Justice Stevens concluded that a black and white illustration was sufficient. Stevens reasoned that since "United States currency is not very colorful"[62] the impact of a black and white illustration as compared to a colored illustration would be minimal to its communicative value.

Regarding the size requirement Justice Stevens concluded that the requirement fulfills a significant governmental interest. Since the government interest is to prevent deception the size requirement diminishes any deceptive impact.

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56. *Id.* at 692.
57. *Id.*
58. *Id.* at 698.
59. *Id.* at 700 n.3.
60. *Id.* at 700.
61. *Id.* at 701 n.5.
62. *Id.* at 701 n.6.

ANALYSIS

As Justice Brennan put it, the majority "sought to sever select words from a single integrated statutory phrase and to transform a modifying clause into a provision that can operate independently."[63] This "judicial surgery"[64] creates uncertainty in all legislative schemes. Now, any plaintiff questioning a legislative scheme will have to brief all the possibilities. For example, Time did not fully investigate the implications of a statute that only governed publishers, without regard to the purpose for publication, since it could not have foreseen the Court's masterful sleight of hand.

Justice White, when discussing the Supreme Court's reluctance to address the publications requirement, based it upon the need for judicial restraint. However, it seems that the Court's desire to re-write the counterfeiting statute is, in fact, judicial activism. Rather than interpreting the statute as written, the Court's desire to twist the clauses to conform to an either/or regulation seems to go against congressional intent.[65]

Justice Stevens' proposal that the statute was being too narrowly constructed by the other Justices, also creates uncertainty. Justice Stevens concluded that the question was whether the illustration expressed an idea; but, who is to decide this issue is unanswered. The Secret Service is given no guidelines in determining when the illustration does just that. Rather, it seems such a broad reading could be used to circumvent politically critical art or other illustrations if the Secret Service determines an idea or information is not being conveyed.

Justice Stevens' remarks that the requirement, that the image must convey information or express an idea, can be easily met. Stevens concluded that an illustration "used in connection with a news article . . . meets th[e] condition unless the editor's use of the image bears no ra-

63. *Id.* at 667.

64. *Id.* at 661 (quoting Welsh v. United States, 398 U.S. 333, 351 (1970) (Harlan, J., concurring in result)).

65. The legislative history states: "Paragraph (1) of section 504 of the United States Code, as it would be amended by the bill, will specifically permit such illustrations for numismatic, educational, historical, and newsworthy purposes and will obviate the necessity of obtaining special permission from the Secretary of Treasury in each case where the use of such illustration is desired." It continues and states: "[t]he instant legislation will not permit the printing of facsimiles in the likeness of paper money or other obligations, but would limit reproductions to illustrations in publications." S. REP. NO. 2446, 85th Cong., 1st Sess. 5 (1958); H.R. REP. NO. 1709, 85th Cong., 1st Sess. 3 (1958), *reprinted in* 1958 U.S. CODE. CONG. & ADMIN. NEWS 5268, 5272. Therefore the purpose requirement seems to open up an area where such illustrations may be used and then the publications requirement limits the broader area. Consequently, the statute with only the publications requirement does not fulfill congressional intent but rather modifies it substantially.

tional relationship to the information or idea he is trying to convey."[66] As Justice Brennan notes, "one picture is worth a thousand words."[67] Do we want to allow the Secret Service to determine what exactly those words are and if they have a rational relationship with the idea being conveyed?

If one would read section 504 as Justice Stevens suggests, it seems that the purpose and publication requirements are unnecessary. Rather, the statute should have said that any communicative illustrations must meet the following size and color requirements etc. Since other provisions of Title 18 make it a crime to counterfeit with an intent to defraud,[68] this restated statute would seem sufficient.

Therefore, both the majority's re-writing of the statute and Justice Stevens' proposal create uncertainty for those who want to depict U.S. currency. Justice Brennan's request to remand the case, so that Time could fully argue the unconstitutionality of the publication requirement, would have served everyone's best interest. Had the Court been confronted with full arguments regarding the publication requirement it is possible that it would not have concluded that "the legitimate reach of section 504 'dwarfs its arguably impermissible applications.' "[69]

As the majority reconstructed the statute, publishers (or at least those listed in section 504) may reproduce illustrations of currency as long as the other provisions are met. Therefore, the reproductions must still be in black and white, must still meet the size requirements and all negatives and plates must be destroyed after final use. Although black and white distorted one-hundred dollar bills falling into and over-stuffing

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66. *Regan*, 468 U.S. at 699.

67. *Id.* at 513.

68. Section 471 states in part: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or utters any obligation or other security of the United States, shall be fined. . . ." Section 472 states in part: "Whoever, with intent to defraud, passes, alters, publishes, or sells [or attempts to do so] . . . shall be fined. . . ." Section 473 states in part: "Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation . . . with the intent that the same be passed, published, or used as true and genuine, shall be fined. . . ." Also § 474 ¶ 4 states: "Whoever has in his control, custody, or possession any plate, stone or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use . . . [s]hall be fined. . . ." Section 476 states in part: "Whoever . . . takes, procures, or makes an impression, stamp, or imprint of, from or by the use of any tool, implement, instrument, or thing used or fitted or intended to be used in printing, stamping, or impressing . . . shall be fined. . . ." And a final example, § 491(a) states in part: "Whoever . . . issues, or passes any . . . other thing similiar in size and shape to any of the lawful coins or other currency of the United States . . . shall be fined. . . ." 18 U.S.C. §§ 471-474, § 476, § 491 (1982).

69. *Id.* at 652 (quoting *Ferber*, 458 U.S. at 773).

a basketball hoop may not have the same artistic appeal or impact as green distorted bills, publishers are still restricted.

In today's technologically advanced society the idea that distorted illustrations and their negatives and plates would be used by modern counterfeiters is hard to reconcile. Although the Court is willing to re-write legislation, the Court is not willing to force the legislature to do so by holding a poorly written statute unconstitutional. Therefore, black and white money may be on the cover, but greenbacks must still be in the bank.

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