



3-1-1992

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Recommended Citation

Stephanie H. Izen, *Prior Restraints Revisited: Have the Courts Finally Shackled the Press?*, 12 Loy. L.A. Ent. L. Rev. 535 (1992).

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PRIOR RESTRAINTS REVISITED: HAVE THE COURTS FINALLY SHACKLED THE PRESS?

The Noriega case was a bad case from the day they had an invasion to seize him and then seized his assets. Now he's justified the illegal taping of conversations between a lawyer and client, and a prior restraint. Noriega is going to do more damage to the U.S. Constitution than he ever did as a dictator of Panama.

—Professor Burt Neuborne,
New York University School of Law¹

I. INTRODUCTION

General Manuel Noriega is currently detained at the Metropolitan Correctional Center ("MCC") located in Dade County, Florida.² Apprehended and brought to this country in the controversial American invasion of Panama in 1989, the former dictator awaits sentencing following his convictions of drug trafficking, racketeering, and money laundering by a Florida jury.³ During his incarceration, Noriega made telephone calls from MCC to his attorneys and other members of his defense team. The conversations were allegedly recorded by MCC officials and obtained by Cable News Network ("CNN") from an undisclosed source.⁴

The fact that tapes of these conversations had been made was significant because it raised the possibility that prison officials had compromised General Noriega's right to confidentiality in preparing his defense.⁵ CNN notified Noriega's attorney about the existence of the tapes, and informed him of their intent to air a portion of one of the tapes in an upcoming news report. Noriega's attorney immediately sought an

1. Edward Wasserman, *Noriega Puts Justice System on Trial; Maybe the Government is Trying to Blow Its Case*, LEGAL TIMES, Dec. 3, 1990 (Opinion and Commentary), at 24.

2. *United States v. Noriega*, 752 F. Supp. 1045, 1046 (S.D. Fla. 1990).

3. Larry Rohter, *U.S. Jury Convicts Noriega of Drug-Trafficking Role as the Leader of Panama*, N.Y. TIMES, Apr. 10, 1992, at A1.

4. David Johnston, *Citing Taped Talks, Lawyer for Noriega Wants Case Voided*, N.Y. TIMES, (Late Edition), Nov. 9, 1990, at A1.

5. Anthony Lewis, *Abroad at Home; Despite CNN's Folly*, N.Y. TIMES, Nov. 16, 1990, at A39.

injunction against CNN's newscast,⁶ fearing that the broadcast of the tapes would disclose confidential information protected by the attorney-client privilege.⁷ The court granted Noriega's injunction in *United States v. Noriega* ("Noriega").⁸ From that moment on, "CNN's hot news story became overshadowed by the story of the network's own . . . actions."⁹

Noriega marks the first time in twenty-five years that a federal appellate court has upheld a prior restraint order on the press.¹⁰ The United States Supreme Court has declined to review the decision.¹¹ The ruling has plunged First Amendment law into uncertainty and has called into question the fundamental principles of freedom of speech and freedom of the press. Although the prior restraint was eventually lifted, the legal implications reach further than the ultimate judicial conclusions. In essence, the initial decision suggests, ominously for the press, that the courts' responsibility of ensuring that the accused has a fair trial outweighs the right of the press to publish.¹²

This note analyzes the issues facing the court in balancing CNN's First Amendment right to free speech¹³ against Noriega's Sixth Amendment right to a fair trial:¹⁴ the familiar free press versus fair trial dilemma.¹⁵ Part II of this note details the chronology of the daily court

6. Motion of General Manuel Antonio Noriega for Injunction, *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR).

7. The attorney-client privilege provides that confidential communications between an attorney and a client in the course of the professional relationship cannot be disclosed without the consent of the client. BLACK'S LAW DICTIONARY 34 (2d ed. 1984).

8. 752 F. Supp. 1032 (S.D. Fla. 1990).

9. *How Prior Restraint Came to America*, AM. LAW., Jan./Feb. 1991, at 89, 90.

10. Prior restraint is any prohibition on the publication or communication of information prior to such publication or communication. BLACK'S LAW DICTIONARY 363 (2d ed. 1984). In the case at hand, the prior restraint issue is whether the district court judge could prevent CNN from airing the tapes.

11. *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451 (1990) (O'Connor, Marshall, JJ., dissenting).

12. Stuart Taylor, Jr., *CNN's First Amendment Hubris*, LEGAL TIMES, Nov. 19, 1990, at 23.

13. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

14. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

15. The United States Supreme Court has interpreted the First Amendment to afford special protection against orders that prohibit the publication or broadcast of particular information. Preventing the issuance of orders that impose a previous or prior restraint is the primary purpose of the First Amendment guarantee of free press. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976). See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("The main purpose of the First Amendment is to prevent all such previous restraints upon publication.").

On the other hand, the Sixth Amendment guarantees the criminally accused the right to trial by an impartial jury. The Supreme Court has interpreted this to mean that each juror

proceedings and Part III discusses the rationales underlying the district and appellate courts' decisions. Part IV criticizes the courts' reasoning, concluding that: (1) the district court incorrectly applied precedential case law regarding the proper issuance of prior restraints; and (2) the appellate court further confused the issue by ignoring prior restraint case law, fashioning an entirely improper test in order to uphold the restraint. Part V of this note concludes that a prior restraint was improper in the case at hand because the requirements mandated by precedential law were not first fulfilled. While the result may have been justifiable, the courts' failure to properly analyze the issue at stake in such a vital case rendered the prior restraint unwarranted.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The following chronology intertwines the facts of the CNN news story with the numerous court proceedings surrounding the broadcast of the tapes.

LATE OCTOBER (1990): Marlene Fernandez, a correspondent who works for Spanish CNN ("Noticiero Telemundo CNN"), received several tape recordings containing conversations between General Manuel Antonio Noriega and his family, friends, and legal team.¹⁶ Notifying CNN's main office, Fernandez and reporter John Camp began compiling two reports. The first report suggested that Noriega was attempting to rebuild his power base from prison, and the second focused on the making of the tapes which "rais[ed] the possibility that prison officials had compromised General Noriega's right to confidentiality in preparing his defense."¹⁷ The fact that the government had recorded the

must base his or her verdict solely on evidence presented at trial, without any outside influence through media, news or television. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Although news reports are unlikely to compromise the defendant's right to trial in most cases, some jurors may be affected by publicity in sensationalized criminal cases, resulting in conflict between these two essential rights. This free press/fair trial conflict must be resolved without compromising either right, because the Constitution does not give either right priority over the other. *Nebraska Press*, 427 U.S. at 561.

Judges have used a wide range of options to solve this dilemma, primarily: (1) denying the media the right of access to the information; and (2) issuing a gag order, or restraint on the media. This note concerns the latter option, whereby the media are restricted from disseminating information they possess. Mark R. Stabile, Note, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 338-41 (1990).

16. The circumstances under which the tapes were made still remain murky. So far, the Drug Enforcement Agency, the State Department, and the Panamanian government have been implicated in the potential taping. Wasserman, *supra* note 1.

17. Lewis, *supra* note 5.

Phone calls from federal prisons are routinely and legally tape recorded by prison officials in order to keep an inmate from criminally plotting behind bars. Inmates, including Noriega,

conversations was quickly obscured, however, by the wrangle over CNN's right to broadcast them.

NOVEMBER 6: CNN first contacted the Criminal Division of the Justice Department, which refused to comment on the tapes.¹⁸ Then, CNN met Frank Rubino, Noriega's attorney, and played him a tape of what seemed to be a conversation between Noriega and his defense team.¹⁹ After listening to the tape off-camera, Rubino agreed to give an on-camera interview to CNN.²⁰ During this interview, Rubino replayed a short portion of the tape, identified the voices of Noriega and a member of his defense team, and described generally the substance of the conversation on the tape.²¹ Rubino expressed shock that the government had taped these private conversations, and called the tapes "a horrendous violation of [Noriega's] constitutional rights."²²

NOVEMBER 7: Rubino called reporter Camp and requested written assurances that CNN would not broadcast the tapes, fearing that media disclosure would irreparably impair Noriega's right to a fair trial.²³ CNN refused. CNN told Rubino that the first of several tapes was set to be aired the next day.²⁴ That evening, Rubino filed an emergency motion in federal district court in Miami to prohibit the broadcast of the tapes.²⁵

NOVEMBER 8: At 7:00 a.m., CNN aired the first segment of its report, which focused on the existence of the tapes themselves and possible governmental misconduct in the taping, but which did not contain any of the allegedly privileged material.²⁶ At the 8:30 a.m. hearing, dis-

are informed of this policy. Each time an inmate uses the telephone, he is required to notify his guards of the nature of his calls. Calls from an inmate to his legal team are monitored unless the inmate states that the call is legal business and asks that it not be monitored. Noriega had signed an acknowledgment of this. Johnston, *supra* note 4.

"The mystery is whether the government taped calls to his lawyers' office with Noriega's consent, or by inadvertence, or by design." Taylor, *supra* note 12. If the recording was purposeful, evidencing government misconduct, taping the conversations may have been enough to result in dismissal of the indictment. On the other hand, Noriega may have legally waived his expectation of privacy if he had not followed proper procedure and informed the guard whom he was calling.

18. *Noriega Tapes* (CNN television broadcast, Nov. 8, 1990).

19. *How Prior Restraint Came to America*, *supra* note 9, at 90.

20. *Id.*

21. *Id.*

22. Johnston, *supra* note 4.

23. Camp also stated that Rubino said he was worried that he might have waived his privilege the day before when he disclosed the contents of the tapes for the press. *How Prior Restraint Came to America*, *supra* note 9, at 90.

24. *Id.*

25. Motion of General Manuel Antonio Noriega for Injunction, *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR).

26. Johnston, *supra* note 4. This first segment referenced two calls that Noriega had made

trict court Judge William Hoeverler was presented with the task of balancing Noriega's Sixth Amendment right to a fair trial against CNN's First Amendment right to be free from prior restraint against broadcast.²⁷ Noriega's attorney argued that prior restraint was merited because of the privileged nature of the conversations on the tapes but indicated that his main concern was with possible governmental misconduct.²⁸ The government claimed that although the prosecution team knew of the tapes' existence, the prosecutors remained untainted because they had not heard any information contained on the tapes.²⁹ The government also announced that it would begin an immediate investigation of the tapes' release.³⁰ CNN contested Noriega's prior restraint motion on three grounds: (1) Noriega had failed to meet the heavy burden of proof required for issuance of a prior restraint; (2) other alternatives could protect Noriega's interests; and (3) the prior restraint would be ineffective in protecting Noriega's interests.³¹

Judge Hoeverler rejected CNN's arguments and stated that he had to listen to the tapes in order to determine the potential threat to Noriega's right to a fair trial.³² CNN declined the court's request to turn over the tapes, contending that the court should instead obtain the tapes from the government, who was responsible for the improper taping.³³ Before recessing, the district court orally ordered CNN not to telecast the attorney-client-privileged tapes pending its ruling.³⁴ CNN filed an emergency motion with the Eleventh Circuit Court of Appeals to vacate the district court's order.³⁵

from prison: one to the Cuban Embassy, the other to an ex-Panamanian official named "Luchio." The substance of the conversation with Luchio arguably could have been interpreted as an instance of Noriega making covert reference to re-establishing his power base in Panama while still in prison. *Id.*

27. *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990).

28. Transcript of Hearing Before the Honorable William M. Hoeverler, United States District Judge, Nov. 8 and 9, 1990, at 4, *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR) [hereinafter Transcript].

29. *Id.* at 16.

30. *Id.* at 81.

31. *How Prior Restraint Came to America*, *supra* note 9, at 91.

32. Transcript, *supra* note 28, at 66.

33. CNN stated that because the government had done the taping, the *government's* tapes should be reviewed to see if they contained any attorney-client conversations that would be damaging to Noriega if disclosed. Judge Hoeverler reluctantly agreed to have the government compile a log of its tape recordings, but added: "[If] there are 20 or 10 or so, we can have them [the actual tapes] reproduced . . . if there are 150 that presents us with a different problem." *Id.* at 95.

34. *Id.*

35. Emergency Motion of Appellant CNN, *United States v. Noriega (In re CNN and Turner Broadcasting System)*, 917 F.2d 1543 (11th Cir. 1990) (Nos. 90-5927, 90-5932).

Later that day, the district court issued a written order continuing the earlier oral prior restraint that barred telecast of the tapes until the court could review them, and directed CNN to produce the tapes to the court.³⁶ CNN opposed the production order on First Amendment grounds.³⁷ Before submitting the written order, Judge Hoeveler heard oral arguments and agreed to stay the portion of the order directing CNN to produce the tapes, pending appellate review of the prior restraint issue.³⁸ Additionally, the district court ordered the government to identify the number of attorney-client-privileged tapes in its possession in order to facilitate review by the court.³⁹

NOVEMBER 9: After CNN's first telecast, government prosecutors denied that any improper taping of Noriega's attorney-client communications had occurred.⁴⁰ CNN wanted to run the portion of the tape it had played for Rubino to show that the government could indeed have recorded the information. In deciding to air a second segment, CNN explained, "Our credibility was on the line. We felt it became necessary to go beyond just what we had shown."⁴¹

Meanwhile, the government provided district court Judge Hoeveler with a list of all of Noriega's conversations that the prison had recorded. He found the list too voluminous and of no help in evaluating the phone conversations CNN had planned to air.⁴² The court determined that CNN's production of the tapes would be "the more efficient alternative"⁴³ because "pursuing the alternative of reviewing the government's tapes would be 'physically impossible' in less than a month."⁴⁴ After hearing arguments, however, the district court again stayed the order compelling production of the tapes.⁴⁵

The district court issued a supplemental written order holding that

36. *United States v. Noriega*, 752 F. Supp. 1032, 1035 (S.D. Fla. 1990).

37. *How Prior Restraint Came to America*, *supra* note 9, at 91-92.

38. Transcript, *supra* note 28, at 92, 100. Thus, the court of appeals' ruling was *incorrect* in stating that CNN willfully refused to produce the tapes in light of the district court's order. See *infra* notes 190-91 and accompanying text.

39. Transcript, *supra* note 28, at 95.

40. Johnston, *supra* note 4.

41. *How Prior Restraint Came to America*, *supra* note 9, at 91.

42. Transcript, *supra* note 28, at 105. Moreover, the court noted that a review of the tapes in the government's possession did not necessarily determine whether disclosure of the tapes in CNN's possession would harm Noriega's right to a fair trial. The court believed that CNN may have possessed other conversations not shown on the government's log. *United States v. Noriega*, 752 F. Supp. 1032, 1035 n.1 (S.D. Fla. 1990).

43. *United States v. Noriega*, 752 F. Supp. 1032, 1036 (S.D. Fla. 1990).

44. Transcript, *supra* note 28, at 107. This effectively shifted the burden of proof to CNN. See *infra* notes 144-46 and accompanying text.

45. Transcript, *supra* note 28, at 119-120.

its prior restraint, now called a temporary restraining order ("TRO"), would remain in effect for up to ten days, or such lesser time as required by the district court to review CNN's tapes.⁴⁶ Later that evening, however, CNN went forward with the telecast of the second segment,⁴⁷ moments after Judge Hoeveler had warned CNN's lawyer he would fine CNN if it violated his order barring the broadcast.⁴⁸ As Judge Hoeveler was leaving the courthouse, he remarked to a reporter that CNN was in contempt.⁴⁹

NOVEMBER 10: The district court reconvened amidst a flurry of activity. Noriega moved for a finding of contempt against CNN on the ground of the previous night's telecast.⁵⁰ Concurrently, CNN moved to have Judge Hoeveler recused from the case based on his "contempt" comment the previous night. Subsequently, the district court stayed all proceedings pending the appellate court's review.⁵¹

The day's major event was the ruling of the Eleventh Circuit Court

46. *United States v. Noriega*, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990).

47. At the heart of the controversy was this second broadcast containing the allegedly privileged communication between Noriega, Rubino's secretary, and Rubino's paralegal. In this conversation, Noriega referred to two witnesses, Alfredo Sanchez and Felipe Camarago, whom he believed could testify against him. David Johnston, *Order Against CNN Broadcast Is Upheld*, N.Y. TIMES, Nov. 11, 1990, § 1, at 20.

Not only did CNN risk sanctions themselves for airing the segment, but as one reporter put it, "CNN's decision to violate the court order has put all of the press in jeopardy. It runs the risk of inflaming judges against an arrogant press." Lewis, *supra* note 5.

48. *How Prior Restraint Came to America*, *supra* note 9, at 91.

49. *United States v. Noriega*, 752 F. Supp. 444, 446 n.1 (S.D. Fla. 1990). This formed the basis for CNN's recusal petition.

50. Transcript of Hearing Before the Honorable William M. Hoeveler, United States District Judge, Nov. 10, 1990, at 13, *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR). CNN disputed the contempt proceedings, based on its belief that it did not telecast attorney-client-privileged communications in violation of the court's order. CNN reiterated that it felt Rubino had waived any attorney-client privilege by listening to the tapes. *How Prior Restraint Came to America*, *supra* note 9, at 92.

Alternatively, CNN had reason to believe that in the face of a threatened contempt motion, a patently unconstitutional restraining order could be violated. The First Circuit vacated a finding of criminal contempt against the *Providence Journal* for publication of illegally obtained wiretaps about a deceased mobster. In the *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987) (*en banc*), *cert. dismissed*, 485 U.S. 693 (1988). The court of appeals found that the Fourth Amendment was not a sufficient basis and "could not conceivably support the restraint against publication." *Id.* at 1349. This case has come to stand for the principle that a patently unconstitutional prior restraint may be violated if it is transparently invalid. Thus, CNN had reason to believe that the prior restraint would be overturned, taking the contempt proceedings along with it.

51. In spite of strong threats, Judge Hoeveler did no more than toy with fining CNN. Transcript of Hearing Before the Honorable William M. Hoeveler, United States District Judge, Nov. 12, 1990, at 29-32, *United States v. Noriega*, 752 F. Supp. 444 (S.D. Fla. 1990) (No. 88-79-CR). The Chief Judge of the District Court denied CNN's recusal motion. *United States v. Noriega*, 752 F. Supp. at 449.

of Appeals, which upheld the TRO and ordered CNN to produce the tapes for review.⁵² In the court's words, "CNN has shackled the district court by refusing that court's reasonable request to . . . [turn over] the audio tapes it has in its possession No litigant should continue to violate a district court's order and attempt to have that district court's order reviewed at the same time."⁵³

NOVEMBER 11-12: On Sunday night, the attorneys at CNN held a midnight caucus to begin preparing their briefs for certiorari to the United States Supreme Court.⁵⁴ The next morning, CNN returned to the district court with an offer of compromise: CNN would turn over a log of the tapes in its possession to the court, so that its log could be compared to the government's log to pinpoint the dates and times of the allegedly damaging conversations.⁵⁵ Judge Hoeveler declined CNN's request, stating he would wait to review the tapes "until after the Supreme Court had taken a position."⁵⁶ Dejected, CNN could only wait.

NOVEMBER 15-18: CNN filed two briefs with the Supreme Court: one to stay the restraining order that the district court had issued, the other to grant certiorari to consider the prior restraint as unconstitutional. In a final blow to CNN, the Supreme Court in a 7-2 decision denied the stay and refused to grant certiorari.⁵⁷

NOVEMBER 20 AND THEREAFTER: Following the Supreme Court's denial of certiorari, the district court proceeded to review the tapes. Ironically, the aftermath involving the tapes themselves was anticlimactic after the whirlwind surrounding the prior restraint. CNN turned over the tapes, which were transcribed and translated by the district court. A federal magistrate reviewed the manuscript and lifted the restraint, finding that nothing was so damaging in the content of the tapes as to impair Noriega's right to a fair trial.⁵⁸ Soon afterward, over

52. *United States v. Noriega*, 917 F.2d 1543, 1552 (11th Cir. 1990).

53. *Id.* at 1551-52. The district court had orally stayed the order requiring CNN to produce the tapes. The matter of the order, however, was not before the appellate court. See *infra* notes 190-91 and accompanying text.

54. *How Prior Restraint Came to America*, *supra* note 9, at 93. Interestingly, CNN convinced Floyd Abrams, the attorney who successfully argued the Pentagon Papers case, to argue the briefs if the Supreme Court granted certiorari. *Id.*

55. Transcript of Hearing Before the Honorable William M. Hoeveler, United States District Judge, Nov. 12, 1990, at 4-5, *United States v. Noriega*, 752 F. Supp. 444 (S.D. Fla. 1990) (No. 88-79-CR).

56. *Id.* at 29.

57. *Cable News Network, Inc. v. Noriega*, 111 S. Ct. 451 (1990) (O'Connor, Marshall, JJ., dissenting).

58. *United States v. Noriega*, 752 F. Supp. 1045, 1053-54 (S.D. Fla. 1990). In fact, the tapes were so jumbled and incomprehensible, the court found them neither newsworthy nor prejudicial. *Id.* at 1053. For this reason, CNN chose not to air the tapes after the prior re-

protests from CNN, other media organizations were allowed to obtain copies of the tapes from the court.⁵⁹

Six months later, Rubino sought a dismissal of the indictment against Noriega based on the government's improper taping of the phone calls.⁶⁰ After a fact-finding hearing on the merits of the tapes themselves, the district court denied the dismissal.⁶¹

III. SUMMARY OF THE COURTS' REASONING

A. *The District Court's Reasoning*

The district court's quandary began "[w]ith the unfortunate and difficult task of resolving a conflict between two fundamental constitutional rights: the First Amendment right of the press to be free from any prior restraint on speech, and the Sixth Amendment right of an accused to a fair trial."⁶² In this case of first impression, the court noted that the damaging information could not only hamper the selection of an impartial jury, but it could also reveal the defendant's trial strategy to the prosecution.⁶³ Although the court acknowledged the privilege issue and the possibility that disclosure would reveal the protected confidences, the court opted to frame the "issue at stake . . . more properly . . . as the defendant's right to a fair trial."⁶⁴

In doing so, the district court was better able to justify its imposition

straint issue was decided. This confirmed that the issue at hand was the restraint, not the tapes themselves.

59. *United States v. Noriega*, 752 F. Supp. 1037 (S.D. Fla. 1990). The Miami Herald Publishing Company; Post-Newsweek Stations, Florida, Inc., d/b/a WPLG Channel 10; Gannett Satellite Information Network, Inc. (USA Today); Gannett Co., Inc.; and the Associated Press brought a collective action requesting the transcripts of the Noriega tapes. *Id.* CNN asserted a proprietary interest in the transcripts, and "urge[d] the court to either destroy the transcripts or surrender them to CNN for its exclusive use." *Id.* at 1038. The court rejected CNN's argument, and turned over the tapes. *Id.* at 1045.

60. *United States v. Noriega*, 764 F. Supp. 1480, 1482 (S.D. Fla. 1991).

61. *Id.* Noriega moved to dismiss the indictment, asserting violations of the Sixth Amendment, the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act, and Rules 16 and 17 of the Federal Rules of Criminal Procedure. *Id.* at 1482. The court found that Noriega's constitutional rights were not violated with respect to the claims asserted under the Fourth and Sixth Amendments. *Id.* The court found that the Title III claim, based upon improper disclosure of intercepted communications, was improper in the context of a motion to dismiss. The court did find that the prosecution's method of obtaining the recordings and its failure to disclose these conversations in the course of discovery violated Rules 16 and 17, but, since no resulting prejudice occurred, it denied the motion. *Id.*

62. *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990).

63. *Id.* at 1033.

64. *Id.* The court commented that the main purpose of the attorney-client privilege was to protect uninhibited communication between attorney and client and that this was violated the very moment that the tapes were received by the government. *Id.* Immediately thereafter,

of a prior restraint on CNN. As the district court noted, "[a] prior restraint is presumptively unconstitutional, with the movant bearing the 'heavy burden of showing justification for the imposition of such a restraint.'⁶⁵ . . . This does not mean, however, that no situation exists in which a prior restraint on the press is justified."⁶⁶ One such situation may arise in ensuring a criminal defendant's right to a fair trial in the face of excessive pre-trial publicity. In these cases, courts have adopted the test formulated in *Nebraska Press Ass'n v. Stuart* ("*Nebraska Press*"),⁶⁷ which states that before a restraint may be issued, the court must find that: (1) the nature and extent of pre-trial publicity impairs the defendant's right to a fair trial; (2) no less restrictive alternative measures exist which would mitigate the effects of the publicity; and (3) a prior restraint would effectively prevent the harm.⁶⁸

Noriega's attorney reported that portions of the tapes contained "discussion[s] of witnesses, defense investigation[s], and trial strategy at the core of Noriega's defense,"⁶⁹ which would jeopardize Noriega's right to a fair trial if disclosed. Since the content of CNN's tapes was not before the district court, the court concluded that it was "impossible to assess, at this stage, the precise extent to which Noriega's right to a fair trial would be hampered by disclosure."⁷⁰ While stating that further inquiry was required, the court nonetheless sustained the prior restraint until the court could review the tapes in CNN's possession.⁷¹

The district court's supplemental order, which was issued to clarify its decision, reiterated the necessity of examining the tapes' contents to determine the "nature and extent of potential damage [to Noriega] before dissemination."⁷² Because CNN had resisted turning over the tapes to the court, Judge Hoeveler explained that "the court was in effect being asked to make a factual determination without being allowed to review the facts."⁷³ In the court's view, it was unfair to allow CNN to "benefit from its refusal to disclose the content of the tapes."⁷⁴ Therefore, Judge Hoeveler continued the restraining order for ten days, or any lesser time

Rubino and Noriega would be wary of conducting forthright conversations over the MCC phones, thus producing the exact disincentive the privilege was designed to overcome.

65. *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

66. *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990).

67. 427 U.S. 539 (1976).

68. *Id.* at 562-68.

69. *United States v. Noriega*, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990).

70. *Id.*

71. *Id.*

72. *Id.* at 1036.

73. *Id.* at 1035.

74. *United States v. Noriega*, 752 F. Supp. 1032, 1035 (S.D. Fla. 1990).

for review of the tapes.⁷⁵

B. *The Court of Appeals' Reasoning*

The Eleventh Circuit Court of Appeals first addressed the issue of whether the district court was justified in entering the TRO in order to maintain the status quo of the case pending a decision on the merits.⁷⁶ The appellate court noted that the balancing of First and Sixth Amendment rights in a "sensational" case was not an easy task, but concluded, based on Fifth Circuit precedent, that the lower court's main responsibility was to ensure the accused's right to a fair trial.⁷⁷ The appellate court articulated that in order to effectuate a fair trial, the lower courts are afforded broad discretion, which may include "restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations."⁷⁸

After thus delineating the lower court's duty, the Eleventh Circuit analyzed the press' right of access to pre-trial proceedings.⁷⁹ First, the court determined that the information on the tapes should be weighted according to whether the matter has historically been open to the press and the public.⁸⁰ Applying this analysis, the court noted that communications between a criminal defendant and his defense counsel historically have been private; even if not privileged, they have not been open to the public.⁸¹ Next, relying on *Nixon v. Warner Communications, Inc.* ("*Nixon*"),⁸² the court asserted that the press "has no right to information about a trial superior to that of the public,"⁸³ and thus, the press had

75. *Id.* at 1036.

76. *United States v. Noriega*, 917 F.2d 1543, 1546-48 (11th Cir. 1990). Several matters were before the court of appeals: an appeal from the oral order from the morning of November 8 (the initial issuance of the temporary restraining order ("TRO")); two written orders (one contained the TRO from the afternoon of November 8th, the other contained the supplemental order that continued the TRO for 10 days); and a last-minute petition, attached by CNN for recusal of Judge Hoeverler, based on his "contempt" comment. The oral order was immediately dismissed for lack of jurisdiction. *Id.* at 1546. The recusal petition was conclusively denied, with no discussion of the merits. *Id.* Thus, the only issue remaining was the TRO.

77. *United States v. Noriega*, 917 F.2d 1543, 1547 (11th Cir. 1990).

78. *Id.* at 1548 (citing *U.S. v. C.B.S., Inc.*, 497 F.2d 102 (5th Cir. 1974); *U.S. v. Schiavo*, 504 F.2d 1 (3d Cir. 1974)).

79. The appellate court's confusion of right to access with right to dissemination was a fundamentally incorrect analysis. See *infra* notes 176-89 and accompanying text.

80. *United States v. Noriega*, 917 F.2d 1543, 1547-50 (11th Cir. 1990).

81. *Id.* at 1547 n.6.

82. 435 U.S. 589 (1978).

83. *Id.* at 609.

no right to broadcast information that would harm a defendant's right to a fair trial.

The appellate court then relied on the test in *Press Enterprise Co. v. Superior Court* ("*Press Enterprise II*")⁸⁴ in order to determine if the pre-trial publicity would hamper the defendant's right to a fair trial. In *Press Enterprise II*, the Supreme Court upheld a trial court's decision to close a preliminary hearing to protect the defendant's right to a fair trial. Analogizing the *Noriega* case to a closure case,⁸⁵ the Eleventh Circuit directed the district court to apply the *Press Enterprise II* test, which permits closure if: (1) a substantial probability exists that the defendant's right to a fair trial will be prejudiced by the publicity; (2) a substantial probability exists that closure would prevent that prejudice; and (3) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.⁸⁶

Last, the appellate court addressed the issue of the attorney-client privilege and how it related to the district court's analysis of potential harm to Noriega.⁸⁷ The appellate court suggested that whether the communications between Noriega and his defense counsel were privileged, "while not necessarily dispositive of whether such communications should be publicly broadcast," would be relevant to the district court's assessment of potential harm to Noriega's right to a fair trial.⁸⁸ Ultimately, the appellate court found that the lower court needed to hear the tapes in order to make its determination, and thus ordered the immediate production of the tapes held by CNN, while concurrently upholding the restraint.⁸⁹

IV. ANALYSIS

It goes without saying that criminal trials involving high-profile figures generate a great deal of press coverage and publicity. Protected under the First Amendment, the media engage in news gathering in order to report to the public. First Amendment free press rights guarantee the media the ability to do its job, without fear of repercussions in its

84. 478 U.S. 1 (1986).

85. In a closure case, the court typically denies the media access to court proceedings. *See id.*

86. *Press Enterprise II*, 478 U.S. at 14. The appellate court again improperly focused on a closure case that denied the media access to court proceedings, rather than relying on prior restraint cases. The district court realized the appellate court's folly, and completely ignored the *Press Enterprise II* case when it eventually lifted the restraint.

87. *United States v. Noriega*, 917 F.2d at 1550-51.

88. *Id.* at 1551.

89. *Id.* at 1551-52.

news reporting.⁹⁰ In fact, “[t]he press does not just publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism.”⁹¹ The public depends on the media for timely and accurate disclosure of any actual or apparent misconduct by a governmental agency.⁹²

Thus, CNN’s desire to telecast information concerning alleged governmental misfeasance in a major criminal case involving General Noriega suggests that *more* protection should have been afforded to CNN to publish what it had learned.⁹³ As stated in *Elrod v. Burns*,⁹⁴ “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁹⁵ As legal scholar A. Bickel commented, “If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it”⁹⁶ Further, “[p]rior restraints fall on speech with a brutality and finality of their own. Even if they are ultimately lifted, they cause irreparable loss—a loss in the immediacy, the impact, of speech A prior restraint stops more speech more effectively.”⁹⁷

A. District Court Failed to Meet the Nebraska Press Test

1. Prior Restraint Presumptively Unconstitutional

Noriega involves an unprecedented prior restraint on publication.

90. Lewis, *supra* note 5.

91. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

92. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 606 (1976) (Brennan, J., concurring). As Justice Brennan noted, a temporary restraining order postpones publication, and an appeal can cause further delay that may “destroy the contemporary news value of the information the press seeks to disseminate.” *Id.* at 609.

93. As the Supreme Court stated in *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), “Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government [T]he function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.” *Id.* at 491-92.

94. 427 U.S. 347 (1976).

95. *Id.* at 373.

96. *Nebraska Press*, 427 U.S. at 559 (quoting A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975)). “When a prior restraint is imposed by means of a court order, the speaker is immediately sanctioned [by being silenced]. In contrast, the criminal sanction of a speaker who has violated an unconstitutional statute is deferred until all avenues of appellate review have been exhausted, and the civil sanction is deferred until the judgment becomes final.” Diane Pappas, Note, *First Amendment Protection of Criminal Defense Attorneys’ Extrajudicial Statements in the Decade Since Nebraska Press Association v. Stuart*, 8 WHITTIER L. REV. 1021, 1023 (1987).

97. *Nebraska Press*, 427 U.S. at 559 (quoting A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975)).

Prior restraints have been described as "one of the most extraordinary remedies known to our jurisprudence."⁹⁸ Accordingly, the Supreme Court views prior restraint on the press with a heavy presumption against their constitutionality.⁹⁹ In the face of Sixth Amendment concerns such as those advanced here, the Supreme Court has held that prior restraint on news media is clearly invalid.¹⁰⁰

In *Near v. Minnesota* ("*Near*"),¹⁰¹ the United States Supreme Court rejected a prior restraint against an anti-Semitic publication that disturbed the "public peace" and provoked "assaults and the commission of crime," emphasizing that such orders should be granted only in "exceptional cases."¹⁰² Chief Justice Hughes suggested that prior restraints might be granted only in narrowly defined circumstances, for example, if the published information would threaten national security.¹⁰³

More recently, in *New York Times Co. v. United States* ("*New York Times*"),¹⁰⁴ the Supreme Court rejected requests for prior restraint against the publication of the Pentagon Papers, which were alleged to have been stolen from the government and to contain highly sensitive national security information.¹⁰⁵ A concurring opinion, particularly apposite to the nature of CNN's news coverage here, pointed out that "[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information."¹⁰⁶ The Supreme Court stated that *any* system of prior restraints of expression is presumed invalid¹⁰⁷ and imposes a heavy burden of justification upon the government for the imposition of such a

98. *Nebraska Press*, 427 U.S. at 562.

99. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968) (citing *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

100. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

101. 283 U.S. 697 (1931).

102. *Id.* at 716.

103. *Id.* For example, a restraint may be issued on the publication of sailing dates of transports or the number and location of troops in time of war. *Id.* (citation omitted).

104. 403 U.S. 713 (1971) (per curiam). The Supreme Court reaffirmed its hostility toward prior restraint and in dicta recognized *only* a narrow military exception as *Near* had done. The potential injury to an accused's Sixth Amendment rights "could never be considered so direct, immediate, and irreparable" as the damage to our military or national security, the *sole exception* that may justify a prior restraint. *Nebraska Press*, 427 U.S. at 604 (Brennan, J., concurring). See, e.g., *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). In the *Progressive* case, the district court enjoined publication of a magazine article on the basis of national security; the article revealed technical material on how to manufacture a hydrogen bomb. *Id.*

105. *New York Times*, 403 U.S. at 714-18 (Black, J. & Douglas, J., concurring).

106. *Id.* at 723-24.

107. *Id.* at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

restraint.¹⁰⁸

In *Nebraska Press Ass'n v. Stuart*,¹⁰⁹ the news media were restrained from publishing information about a grisly sex murder trial in a small, rural community based on the claim that a defendant's right to a fair trial could not survive the media's publicity.¹¹⁰ The suppressed information in *Nebraska Press* involved far more potential prejudice than in the instant case: the media there had obtained the defendant's taped confession to the crime itself, together with admissions that the defendant had made to third parties.¹¹¹ Yet, noting that the primary purpose of the First Amendment was to prevent prior restraint, the United States Supreme Court set forth an exacting test to be met before a prior restraint may be issued:

- (1) the nature and extent of pre-trial publicity must impair the right to a fair trial;
- (2) no less restrictive alternative measures exist which would mitigate the effects of the publicity; and
- (3) a prior restraint would effectively prevent the harm.¹¹²

In *Nebraska Press*, the Supreme Court ultimately vacated the restraining order on the media, noting that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."¹¹³ Additionally, the Court emphasized that "the protection against prior restraint should have particular force as applied to reporting of criminal proceedings."¹¹⁴

In *Columbia Broadcasting Systems, Inc. v. United States District Court ("CBS")*,¹¹⁵ a post-*Nebraska Press* decision on all fours with the case at hand, the Ninth Circuit Court of Appeals vacated an order restraining CBS from disseminating or broadcasting surveillance tapes

108. *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

109. 427 U.S. 539 (1976).

110. *Id.* at 543-44.

111. *Id.* at 567-68.

112. *Id.* at 562-68. The strictness of this test has caused one commentator to state that the decision in *Nebraska Press* acts as a virtual bar to the use of prior restraints on the media as a method of resolving the free press/fair trial conflict. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 858-59 (2d ed. 1988).

113. *Nebraska Press*, 427 U.S. at 559. In fact, a review of the various opinions in *Nebraska Press* suggest that five justices felt that a prior restraint could never be sustained in connection with a claim that publication would deny a criminal defendant his right to a fair trial. Justice White stated that "there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570.

114. *Id.* at 559. In fact, "the publication of information relating to alleged governmental misconduct . . . has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 110 S. Ct. 1376, 1381 (1990).

115. 729 F.2d 1174 (9th Cir. 1983).

made in the investigation of John DeLorean.¹¹⁶ The court of appeals held that the lower court had failed to meet the requirements set forth in *Nebraska Press*.¹¹⁷

In issuing a restraining order, the district court in *CBS* had relied on its finding that DeLorean's case had generated enormous publicity and that telecast of the tapes would necessarily have a devastating effect on the defendant's Sixth Amendment right to a fair trial.¹¹⁸ The court of appeals denounced this finding as speculative, reasoning that speculation over whether a jury would be prejudiced by the impact of the media was not enough to satisfy the first prong of the *Nebraska Press* test.¹¹⁹ In the Ninth Circuit's words, "[W]hile it is speculation that the telecast would impair the defendant's Sixth Amendment right, [the only] certainty is that the restraining order would violate freedom of the press."¹²⁰

In analyzing the second prong of the *Nebraska Press* test, the district court in *CBS* concluded that no alternative methods were adequate to remove the taint of the publicity on potential jurors.¹²¹ The court of appeals, however, found the record infirm for failure to even consider other alternatives. The appellate court deemed the district court's statement that "much thought and analysis had been devoted to the consideration of alternatives"¹²² entirely unpersuasive and discounted the lower court's finding that no effective alternatives to the restraint existed. The Ninth Circuit chastised the district court for what it saw as a conclusory treatment of one option and total disregard of alternative choices.¹²³

Finally, the appellate court in *CBS* found that the district court had not met the third part of the *Nebraska Press* test because it had failed to

116. The facts of *CBS* are virtually identical to the case at hand. The *CBS* case involved a series of surveillance tapes filmed by the Federal Bureau of Investigation implicating John Z. DeLorean in a cocaine transaction. After DeLorean was charged with drug conspiracy, CBS obtained copies of the video tapes from an independent source and intended to televise nationally the tapes on *60 Minutes* and *The CBS Evening News*. After DeLorean's counsel was informed of the proposed telecast, he filed in district court for a restraining order, contending that the telecast would be prejudicial to the defendant's Sixth Amendment right to a fair trial. See *id.* at 1176-77.

117. *Id.* at 1178.

118. *Id.* at 1176.

119. *Id.* at 1179-80.

120. James Gaspich, Note, *John Z. DeLorean v. The Media: The Right to a Fair Trial Without a Prior Restraint upon the Media*, 15 GOLDEN GATE UNIV. L. REV. 81, 95 (1985).

121. *Columbia Broadcasting Sys., Inc. v. United States Dist. Court*, 729 F.2d 1174, 1179 (9th Cir. 1984).

122. *Id.* at 1182.

123. The court criticized the district court for its cursory consideration and subsequent rejection of extensive voir dire as a viable alternative, while concurrently failing to address any other options. *Id.*

show that a prior restraint would prevent the harm.¹²⁴ While acknowledging the enormous national publicity that the DeLorean case generated, the Ninth Circuit rejected the contention that dissemination of the video tapes would be prejudicial.¹²⁵ The court concluded that even when pre-trial publicity is widespread, adverse news coverage alone does not necessarily result in an unfair trial.¹²⁶ Relying on *Nixon v. Warner Communications, Inc.*,¹²⁷ the court noted that although the Watergate tapes may have generated perhaps the most pervasive pre-trial publicity ever, it would still be possible to empanel an impartial jury.¹²⁸ It is important to note that despite the broadcast of the tapes in *CBS*, DeLorean was acquitted by the jury.¹²⁹

2. District Court Lacked Evidentiary Justification to Issue Prior Restraint

As Justice Marshall's dissent in *Cable News Network v. Noriega*¹³⁰ aptly stated:

The court issued this [prior restraint] order without any finding that suppression of the broadcast was necessary to protect Noriega's right to a fair trial, reasoning that no such determination need be made unless and until CNN surrendered the tapes for the court's inspection [T]his case is of extraordinary consequence for freedom of the press If the . . . courts are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we re-examine the premises of [the law itself].¹³¹

Judge Hoeveler issued the prior restraint on CNN without even minimal compliance with the burden unambiguously imposed by *Nebraska Press*. Instead, the district court relied on a series of speculative

124. *Id.* at 1183-84.

125. *Id.* at 1180.

126. *Columbia Broadcasting Sys., Inc. v. United States Dist. Court*, 729 F.2d 1174, 1179 (9th Cir. 1983).

127. 435 U.S. 589 (1978).

128. *CBS*, 729 F.2d at 1179-80. The court cited several well-publicized cases that were not prejudiced despite massive publicity. *Id.* See *infra* note 169.

129. This showed that the publicity's adverse effects may be avoided by careful jury selection, jury instructions, and other forms of jury control. See *infra* note 155 and accompanying text. See also Scott A. Hagen, Note, *KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga*, 3 UTAH L. REV. 739, 751-53 (1985) (for empirical study of effective jury instructions to overcome heavy adverse publicity).

130. 111 S. Ct. 451 (1990).

131. *Id.*

inferences and possibilities to justify its restraint. The court implied that restraint was justified because CNN had obtained taped conversations between Noriega and his defense team, and because some of the information on the tapes might have been protected by the attorney-client privilege.¹³² (Noriega may have waived the privilege, however, by failing to follow proper prison procedure.)¹³³ Without any firm proof, the court concluded that these possibly privileged communications, if disclosed to either the government (who had done the taping) or the public, might reveal information that could endanger Noriega's right to a fair trial.¹³⁴

In its reliance on speculation, the district court ignored the first requirement of *Nebraska Press*, which rejects the notion that a prior restraint can be supported by speculative concern that some harm will occur as a result of publication.¹³⁵ Under this prong of *Nebraska Press*, the publicity *must* impair the defendant's right to a fair trial.¹³⁶ Here, the district court had a fair idea of the content of the tapes, and could at least have made an assessment of the harm based on the comments of Frank Rubino during the initial hearing—comments that the court echoed in its own order.¹³⁷ The court, however, failed to do so. As in *CBS*,¹³⁸ speculation over whether a telecast of tapes is likely to prejudice the defendant's Sixth Amendment rights is inadequate to satisfy the first prong of the *Nebraska Press* test. While the harm to Noriega was speculative, the restraint was certain to freeze CNN.

Similarly, the trial judge in *Nebraska Press* found that, although the sensational murder trial would generate "intense and pervasive pre-trial publicity" that "might impair the defendant's right to a fair trial,"¹³⁹ such a conclusion was necessarily speculative because it involved factors "unknown and unknowable"¹⁴⁰ and did not satisfy the degree of certainty that prior restraint requires.¹⁴¹ Applying this rationale to the *Noriega* case, the district court's finding that "it was impossible to deter-

132. *United States v. Noriega*, 752 F. Supp. 1032, 1034-35 (S.D. Fla. 1990).

133. *See supra* note 17 and accompanying text.

134. *United States v. Noriega*, 752 F. Supp. 1032, 1035-36 (S.D. Fla. 1990).

135. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-63 (1976). The government contended that a prior restraint was necessary to preserve the status quo because neither the court nor Noriega knew the precise contents of the tapes. *See Transcript, supra* note 28, at 81. Preserving the status quo does not begin to approach the high standard of certainty the court has required before issuing a restraint. *Nebraska Press*, 427 U.S. at 559-60.

136. *Columbia Broadcasting Sys., Inc. v. United States Dist. Court*, 729 F.2d 1174, 1180 (9th Cir. 1984).

137. *See supra* notes 69-71 and accompanying text.

138. 729 F.2d 1174 (9th Cir. 1984).

139. *Nebraska Press*, 427 U.S. at 562-63.

140. *Id.*

141. *Id.* at 569.

a. Sequestration of the Prosecution Could Have Eradicated Any Harm by Disclosure

The court could have prevented any harm to Noriega's ability to obtain a fair trial resulting from improper disclosure to the prosecution by requiring the government prosecutors to take steps to avoid being tainted by any broadcast information. Sequestering the prosecution is routinely done in a wide variety of cases where the government seeks to avoid the taint of prosecutorial misconduct or improper electronic surveillance.¹⁵¹ In fact, the United States Attorney General's office indicated at the November 10th hearing that it was proceeding to do just that.¹⁵² The court, however, inexplicably chose not to exercise this option until November 21st—after the restraint had been lifted.¹⁵³ By that time, it was too late for the sequestration of the prosecution to have any bearing on the restraint proceedings.¹⁵⁴

b. Numerous Alternatives Existed to Remedy Any Potential Tainting of Possible Jurors

Courts have used a variety of methods to combat the perceived risk of prejudicial publicity tainting the jury pool. These include: change of venue, careful voir dire of prospective jury members, specific judicial instructions, sequestration of the trial participants, and postponement of

(9th Cir. 1983) (incomplete consideration of the *Nebraska Press* analysis was cause for reversal of the restraining order).

See also *In re Russell*, 726 F.2d 1007 (4th Cir. 1984), cert. denied, 469 U.S. 837 (1984). The court, "by merely concluding that alternatives of postponement, change of venue, and jury control were infeasible was not responsive to the *Nebraska Press* requirement of degree of certainty that these or other measures would not be effective." Pappas, *supra* note 93, at 1029.

151. The alternative of insulating the prosecution to prevent tainting it with defense information has been successfully applied and judicially approved. For example, the independent counsel's office in the Iran-contra affair had prosecutors who shut themselves off from Oliver North's highly publicized testimony. See *Weatherford v. Bursey*, 429 U.S. 545, 554-56 (1977); *U.S. v. Poindexter*, 698 F. Supp. 300, 312-13 (D.D.C. 1988), vacated in part, rev'd in part on other grounds sub nom. *U.S. v. North*, 910 F.2d 843 (D.C. Cir. 1990).

152. Transcript of Hearing Before the Honorable William M. Hoeveler, United States District Judge, Nov. 10, 1990, at 4, *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR).

153. *United States v. Noriega*, 752 F. Supp. 1045, 1048 (S.D. Fla. 1990).

154. The court ordered the sequestration of the entire prosecution team, including members of the Justice Department, investigators, document handlers, and witnesses, but not until November 21, three days after the prior restraint was orally lifted by the court! The reason given by the district court for not starting this process earlier was that an "effective and complete sequestration" would "require at least a few days to put in place" *United States v. Noriega*, 752 F. Supp. 1045, 1049 n.2 (S.D. Fla. 1990).

mine . . . the extent to which Noriega's right to a fair trial would be hampered by disclosure"¹⁴² could not justify prior restraint under *Nebraska Press*. Thus, since the defense produced no evidence to demonstrate the adverse consequences, the possibility of harm coming to the defense strategy from a telecast of the tapes was entirely speculative.

Unjustifiably, the district court and the Eleventh Circuit Court of Appeals blamed CNN for this lack of evidence, even though CNN had no obligation to come forward with any information.¹⁴³ In any case involving a prior restraint, the party seeking the restraining order is the one who must show with a degree of certainty that the restraining order is necessary to insure the defendant a trial before an impartial jury.¹⁴⁴ Moreover, the temporary nature of the restraint does not reduce Noriega's burden of justification.¹⁴⁵ Here, the district court reversed this burden of proof by requiring CNN to come forward with the tapes and prove that they contained no prejudicial information,¹⁴⁶ although it was Noriega's obligation, not CNN's, to demonstrate the existence of harm. The district court's shifting of the burden of proof to the censored party was squarely at odds with decisions requiring the movant to justify the prior restraint.

3. Failure to Investigate Alternatives

The district court also failed to meet the second requirement of *Nebraska Press*, which requires a court to consider whether viable alternatives to prior restraint exist.¹⁴⁷ The First Amendment bars issuance of a prior restraint if less drastic measures will adequately protect the defendant's right to a fair trial.¹⁴⁸ Under this principle, the district court was required to articulate specific findings as to why other measures would not suffice to protect the defendant's Sixth Amendment rights.¹⁴⁹ The court's failure to address less severe alternatives was reason alone to reverse its decision.¹⁵⁰

142. *United States v. Noriega*, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990). In fact, it appeared that the court restrained CNN because it believed it was "fundamentally unfair for CNN to benefit from not producing the tapes," thus precluding the court from "knowing the precise contents of the speech sought to be protected." *Id.* at 1035-36.

143. See *infra* note 188 and accompanying text.

144. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557-59 (1976).

145. *New York Times Co. v. United States*, 403 U.S. 713, 714-15 (1971) (Black, Douglas, JJ., concurring).

146. *United States v. Noriega*, 752 F. Supp. 1032, 1034 (S.D. Fla. 1990).

147. *Nebraska Press*, 427 U.S. at 562-65.

148. *Id.* at 563-65.

149. *Id.* at 553-55.

150. *Columbia Broadcasting Sys., Inc. v. United States Dist. Court*, 729 F.2d 1174, 1182-83

the trial until dissipation of any prejudicial effects of publicity.¹⁵⁵ The district court in this case not only failed to consider these alternatives, but also failed to show that no alternatives could have been devised to avoid or limit the possible effects of prejudicial publicity arising from CNN's broadcast. The mere existence of the tapes should have provided sufficient reason for the district court to evaluate the appropriateness of remedies short of a prior restraint.

4. Questions Regarding Efficacy of the Restraint Left Unanswered

In order to analyze the potential effectiveness of a prior restraint, it is first necessary to understand which of the defendant's rights are jeopardized. Under the Sixth Amendment, a criminal defendant has the right to counsel and the right to a fair and speedy trial. The right to counsel has been interpreted to encompass not only the right to effective legal representation, but also the right to speak freely with an attorney without fear that confidential information will be disclosed.¹⁵⁶ Any confidential communications between an attorney and a client are protected from discovery under the attorney-client privilege.¹⁵⁷

In the instant case, Noriega claimed that his right to effective counsel included the right to keep secret from the prosecution his trial strategy and tactics. He asserted that this right could be jeopardized by broadcast of the tapes containing conversations with his defense attorney. Noriega failed, however, to present evidence supporting this hypothesized result. Even if Noriega were able to demonstrate a legitimate threat to the secrecy of his trial strategy, alternatives existed that would have adequately protected this interest.¹⁵⁸ Moreover, the effectiveness of the restraining order in preventing prosecutorial discovery of the defense strategy is in serious doubt. While not established during the court proceedings, it is highly likely that the prosecution already *had* access to some of the tapes because the tapes had travelled a circuitous route through several governmental agencies and foreign governments to reach CNN.¹⁵⁹ If the prosecution had already heard the tapes, any desire to keep information secret from the prosecution did not justify prior restraint in this case.

According to Noriega, the court had a duty to ensure that the attor-

155. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976). See also *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966).

156. Linda Greenhouse, *Prior Restraints and Right to Counsel Entangle Noriega Legal Case*, N.Y. TIMES, Nov. 9, 1990, at A20.

157. BLACK'S LAW DICTIONARY 34 (2d ed. 1984).

158. See *supra* notes 149-52 and accompanying text.

159. Transcript, *supra* note 28, at 123-24.

ney-client conversations were not revealed.¹⁶⁰ Noriega argued that because an accused's right to communicate privately with counsel is of constitutional dimension,¹⁶¹ any broadcast of the tapes would constitute a per se invalid intrusion of his constitutional rights. This argument, however, incorrectly characterizes the privilege held by Noriega. The attorney-client privilege is not founded in the Constitution, but is a common law creation,¹⁶² derived from a policy seeking to encourage full and frank discussion between a client and his lawyer.¹⁶³ The district court acknowledged that this interest in forthrightness was "frustrated by the very fact of [the government's] invasion."¹⁶⁴ Once CNN received the tapes, the purpose of the privilege was thwarted, and no subsequent prior restraint could salvage the defendant's interest in confidentiality.¹⁶⁵

A criminal defendant's right to a fair trial under the Sixth Amendment is the critical third prong in *Nebraska Press*. The right to a fair trial, however, does not mean the right to a perfect trial.¹⁶⁶ Even pervasive adverse publicity does not invariably lead to the conclusion that a defendant received an unfair trial.¹⁶⁷ To prove a trial was unfair, the court must find that it was impossible to find twelve jurors who could render an impartial verdict based on the evidence presented in the case, rather than on the influence of potentially biased media coverage.¹⁶⁸ Abundant legal precedents¹⁶⁹ hold that "it is possible to find an impartial jury to try almost anyone, no matter how notorious the defendant or highly publicized the case."¹⁷⁰

Nebraska Press has been the strongest case in favor of a prior restraint based on harm caused by adverse pre-trial publicity. There, the Supreme Court rejected a plea to halt publication of an alleged mur-

160. *Id.* at 68.

161. *Id.* See also Motion of General Manuel Antonio Noriega for Injunction, United States v. Noriega, 752 F. Supp. 1032 (S.D. Fla. 1990) (No. 88-79-CR).

162. 8 WIGMORE EVIDENCE § 2290 (McNaughton rev. 1961).

163. *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

164. United States v. Noriega, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990).

165. Moreover, the impact on this privilege (if not waived) came from the government's interception of the conversations, not CNN's actions in telecasting information about possible governmental misconduct.

166. *Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1244 (7th Cir. 1984).

167. See *infra* note 169 and accompanying text.

168. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976).

169. United States v. Myers, 635 F.2d 945 (2d Cir. 1980) (recent "Abscam" case where despite widespread publicity, including a telecast of surveillance tapes, less than one-half of prospective jurors indicated they had ever heard of Abscam); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (where court noted it would be possible to empanel a jury whose members had never even heard of the Watergate tapes).

170. Greenhouse, *supra* note 156.

derer's confession before trial.¹⁷¹ Prejudice to the future jury was a real possibility: the case involved multiple necrophilic murders that had taken place in a rural town of only 850 people.¹⁷² The Supreme Court held, however, that restraining publication was unconstitutional, even on those sensational facts.¹⁷³ Noriega's claim of jury prejudice in the present case is feeble. In the words of one commentator, "CNN's broadcast of the tapes could add no more than a feather's weight to the negative image of General Noriega already imprinted on the minds of Americans."¹⁷⁴ If Oliver North, John DeLorean, and the Watergate defendants all obtained fair trials in the face of massive nationwide publicity,¹⁷⁵ so too can General Noriega. Even assuming in a worst-case scenario that Noriega confessed to the crimes with which he is charged in the conversations intercepted by the government—a restraining order should not have been issued because there was no showing that any of the requirements of *Nebraska Press* were satisfied.

B. *The Appellate Court's Decision*

1. Erroneous Analysis Under Inapplicable Case Law

The Eleventh Circuit initially violated its duty when it failed to ensure that the lower court had satisfied each of the requirements of *Nebraska Press* before issuing the prior restraint.¹⁷⁶ Rather than addressing the exacting standards set forth in *Nebraska Press*, the court of appeals fashioned a weaker constitutional test from the Supreme Court's "access" cases. Using this lower standard, the appellate court determined that the temporary restraining order imposed on CNN was constitutional because it had met the lower burden of proof imposed by that test.¹⁷⁷ This reconstruction of the proper test represents a fundamental misun-

171. *Nebraska Press*, 427 U.S. at 570.

172. *Id.* at 542.

173. *Id.* at 570.

174. Lewis, *supra* note 5. The former dictator is extremely disliked by the American public for his notorious dictatorship and drug trafficking involvement. Even President Bush "has called him a 'thug' and 'narco-terrorist.'" *Id.*

175. See, e.g., *U.S. v. Haldeman*, 559 F.2d 31, 61-62 (D.C. Cir. 1976) (even the intensive publicity surrounding Watergate did not prevent the empanelling of impartial jurors).

176. The appellate court must look to see that the trial court made each of the determinations as described. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-66 (1976).

177. In fact, the court of appeals even went so far as to suggest that the trial judge may take protective measures "even when they are not strictly and inescapably necessary," because the trial judge has an affirmative duty to minimize the effects of prejudicial publicity. *United States v. Noriega*, 917 F.2d at 1549. This statement is simply untrue—a court must make specific findings that there is a clear and immediate danger of irreparable harm to the defendant before any restraint may be taken. *Nebraska Press*, 427 U.S. at 568-69.

derstanding of the law; the right of the press to be free from prior restraint is distinct from, and afforded stronger protection than, the media's right of access to governmental information.¹⁷⁸

In its decision, the court of appeals erroneously analyzed the prior restraint issue as a question of the media's right of access to information about the *Noriega* case. The Eleventh Circuit relied on the decision in *Nixon v. Warner Communications, Inc.*,¹⁷⁹ which concerned broadcasters' efforts to obtain access to copies of the Nixon tapes, rather than a prior restraint on the media. Based on *Nixon*, the Eleventh Circuit in *Noriega* reasoned that the district court could properly issue a prior restraint prohibiting CNN from broadcasting the information it possessed¹⁸⁰ because the general public has "no right of access to private communications between a defendant and his counsel."¹⁸¹ Further, the court held that the media is entitled to no more information than the public.¹⁸² As a result of this legal error, the court of appeals' analysis ignored CNN's First Amendment right to be free from prior restraint and gave unnecessary weight to the concerns advanced by Noriega.

The above reasoning directly conflicts with prior case law, which has repeatedly stressed the significant distinction between the exacting standards applicable in determining the constitutional validity of prior restraint and the level of judicial inquiry required in determining a First Amendment right to access. By confusing the two standards, the court of appeals completely disregarded the mandates of *Nebraska Press*,¹⁸³ *New York Times*,¹⁸⁴ *Near*,¹⁸⁵ and similar cases. In *Gannett Co. v. DePasquale* ("*Gannett*"),¹⁸⁶ on which the *Noriega* appellate court relied in upholding the prior restraint against CNN,¹⁸⁷ the Supreme Court specifically distinguished the First Amendment issues presented by access claims from the more stringent standards that govern the question of prior restraint. In *Gannett*, the Court held that the lower court's orders

178. With a prior restraint, a court or other governmental official is attempting to prohibit the media from disseminating or publishing information the media has already obtained. In an access case, the newspaper or telecaster is attempting to obtain information that is in the government's possession. Pappas, *supra* note 93.

179. 435 U.S. 589 (1978).

180. *United States v. Noriega*, 917 F.2d at 1548, 1552.

181. *Id.* at 1548.

182. *Id.*

183. 427 U.S. 539 (1976).

184. 403 U.S. 713 (1971).

185. 283 U.S. 697 (1931).

186. 443 U.S. 368 (1979).

187. *United States v. Noriega*, 917 F.2d at 1549-50.

excluding the public and press from a pre-trial suppression hearing presented a different question from that found in a restraint case:

Nebraska Press Association v. Stuart is of no assistance . . . in this case. The *Nebraska Press* case involved a direct prior restraint imposed by a trial judge on the members of the press, prohibiting them from disseminating information about a criminal trial. Since "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication," the Court held that the order violated the constitutional guarantee of a free press The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access.¹⁸⁸

In light of the distinct standards applicable to prior restraints, the Eleventh Circuit's decision to be "guided"¹⁸⁹ by cases involving court access was simply inexplicable.

2. Ordering CNN to Turn over the Tapes Was an Issue Not Before the Court

The court of appeals' order continuing the prior restraint seemed to indicate a belief that CNN's First Amendment claims should be rejected because CNN had not turned over the tapes for the district court's review. The appellate court expressed its irritation in the last line of its decision: "No litigant should continue to violate a district court's order [to turn over the tapes] and attempt to have that district court's order reviewed at the same time."¹⁹⁰ The appellate court seemed to think that CNN had violated two orders—the temporary restraining order and the order to produce the tapes. Although the network had refused to turn over its tapes, Judge Hoeveler had stayed that order pending appellate review,¹⁹¹ so technically no violation occurred. Additionally, the issue of a violation of the temporary restraining order was not directly before the Eleventh Circuit. The appellate court's ruling on matters other than the

188. *Gannett Co.*, 443 U.S. at 393 n.25 (citations omitted). (See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (1980) (Brennan, J., concurring) (recognizing that governmental efforts to restrain communications are different from access claims).

189. *United States v. Noriega*, 917 F.2d at 1549.

190. *Id.* at 1552.

191. Transcript, *supra* note 28, at 119-20.

constitutionality of the prior restraint constituted yet another legal blunder.

V. CONCLUSION

The harm that Noriega feared would result from the telecast was caused by the government's conduct, not by CNN's actions, and could have been eliminated by means less intrusive than an egregious infringement on CNN's First Amendment rights. Although Noriega may have been justified in seeking a prior restraint to protect his attorney-client-privileged information, Noriega made no showing that a CNN telecast would certainly have caused additional harm beyond that already inflicted by the government's recording of his conversations. Additionally, alternatives to prior restraint were both readily available and numerous. Further, no judicial balancing analysis of the efficacy of the restraint occurred, although the restraint in fact constituted a swift and silencing remedy. Focusing solely on the pre-trial publicity, the courts failed to use their resources to remedy the real wrong: the fact that the tapes had been made at all. The courts should have directed their energies to finding out how the tapes had come into existence. CNN merely disclosed the wrong that had taken place. Gagging CNN only served to punish a news medium that had faithfully executed its role of reporting on criminal proceedings and allegations of unlawful governmental actions. What occurred was a classic example of shooting the messenger. In a case of this magnitude, the shot was surely felt by press and other media around the world.

*Stephanie H. Izen**

* The author wishes to dedicate this article to her family for their love, support and encouragement.