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Courtside

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COURTSIDE

BY PAUL M. SMITH, KATHERINE A. FALLOW, DANIEL MACH, AND AARON A. BRUHL

As sometimes happens, the most dramatic development at the Supreme Court for First Amendment lawyers in recent weeks probably was the denial of review in reporter's privilege cases arising from the disclosure of the identity of Valerie Plame as a CIA operative—an action that resulted in the jailing of one prominent journalist.

Miller v. United States; Cooper v. United States

Turning away a request to rule on the viability of a federal reporter's privilege, the Supreme Court on June 27, 2005, denied *certiorari* in *Miller v. United States,* No. 04–1507, and *Cooper v. United States,* No. 05–1508. The petitioners—*New York Times* reporter Judith Miller, *Time* magazine reporter Matthew Cooper, and *Time*'s corporate publisher—had been held in contempt of court for refusing to disclose the identities of their confidential sources.

The case arose in the wake of President George W. Bush's statement, during the 2003 State of the Union address, that British intelligence had learned that Iraq had sought uranium from Africa. In July 2003, amid public controversy over the justification for the war in Iraq, former Ambassador Joseph Wilson published an op-ed reporting that in 2002 he had been dispatched to Niger to investigate the matter and had found no credible evidence of such efforts. Shortly thereafter, columnist Robert Novak wrote a piece revealing that "senior administration officials" told him that Wilson had been sent to Iraq on the recommendation of his wife, Valerie Plame, a CIA "operative." Critics of the Bush administration alleged that White House officials leaked the information in order to retaliate against Wilson. The Department of Justice began an investigation into whether administration officials had violated a federal law prohibiting disclosing the identity of a covert agent.

The special counsel heading the investigation opened a grand jury inquiry and subpoenaed several reporters in an effort to determine the source of the leak. Miller, Cooper, and *Time* refused to reveal their sources, claiming that they enjoyed a privilege under the First Amendment and federal common law. The district court rejected those arguments and held the petitioners in contempt, with imposition of sanctions stayed pending the completion of appellate proceedings. On appeal, the D.C. Circuit (Judges Sentelle, Henderson, and Tatel) affirmed the judgment. The court held that *Branzburg v. Hayes*[1] foreclosed the First Amendment argument. The court split three different ways on the common law argument but concluded that, if such a privilege existed at all, the government had made a sufficient showing to overcome it.

The petitions for *certiorari* argued that the lower courts are in disarray in their interpretations of *Branzburg* and in their rulings on the reporter's privilege. The petitions urged the Court to recognize a common law privilege under Federal Rule of Evidence 501 and to clarify or revisit the holding in *Branzburg.* The petitions also renewed the argument, rejected below, that the contempt proceedings violated due process because the courts relied on evidence to which the petitioners never had been given access. The petitioners were supported by *amicus* briefs from dozens of major media and journalists' entities, a libertarian advocacy group, and the attorneys general of thirty-four states and the District of Columbia. The brief of the attorneys general in support of *certiorari* was particularly striking in arguing that the *absence* of a federal privilege frustrated state policies because all of those states (in addition to almost every other state in the country) recognize some form of reporter's privilege.

The Supreme Court, however, declined to accept review. (Justice Breyer did not participate in the decision to deny *certiorari.*) Shortly thereafter, Miller was sent to jail in Alexandria, Virginia; Cooper testified before the grand jury after receiving a direct waiver from his source, Karl Rove; and *Time* released Cooper's notes to the special counsel. The future and scope of the federal reporter's privilege continues to be uncertain, thus prompting renewed efforts to enact federal legislation that will afford protection to journalists similar to that given by forty-nine states and the District of Columbia.

Johanns v. Livestock Marketing Ass'n

In one of the few merits cases last Term involving the First Amendment guarantee of freedom of speech, the Supreme Court in *Johanns v. Livestock Marketing Ass'n,* Nos. 03–1164 and 03–1165, reversed a lower court decision that had invalidated a federal program arranging for a beef promotional campaign funded via a mandatory assessment on all beef producers and importers. The Eighth Circuit, relying on the Supreme Court's prior decision in *United States v. United Foods, Inc.,*[2] had held that this mandatory assessment of fees to fund commercial speech on behalf of the beef industry constituted a form of coerced speech violating the First Amendment. The *United Foods* case, which barred a mandatory assessment to fund mushroom advertising, had in turn distinguished the earlier decision of the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.,*[3] which upheld a mandatory assess-

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ment on growers of California tree fruit on the theory that the generic advertising at issue was part of a larger regulatory program that in effect collectivized the operations of those growers.

In the *Livestock Marketing* case, the Court for the first time addressed the argument that these types of mandatory assessments do not implicate First Amendment concerns because the advertising at issue constitutes "government speech" and the Constitution allows the government to demand that the citizenry, or some subset thereof, fund government speech. (That issue had been raised in *United Foods* but too late to be addressed by the Court.) In an opinion written by Justice Scalia, joined by the Chief Justice and Justices O'Connor, Thomas, and Breyer, the Court accepted the argument that the advertising was really the government speaking and thus the beef producers who objected to funding it lacked a valid constitutional claim.

"Government Speech"

Responding to the argument that the Cattlemen's Beef Promotion and Research Board Operating Committee that actually receives the money and arranges for the advertising is not the government, the Court noted that its activities were comprehensively controlled by the Secretary of Agriculture. Half of the members are selected by the Secretary and every word uttered in an advertisement must be approved by the Secretary. The Court also rejected the argument that speech cannot be government speech if it is funded with a targeted assessment on beef producers. It left for another day the argument that specific advertising violates the First Amendment if it states that the message is being provided by beef producers, rather than the government.

Justice Ginsburg concurred in the result, rejecting the government speech argument and maintaining her prior position that this kind of program can be treated as a permissible form of economic regulation of an industry.

Justice Souter, joined by Justice Stevens and Justice Kennedy, dissented. They relied primarily on the argument that the government may not invoke the government speech argument unless it has revealed to the public its responsibility for the speech at issue—especially when the funding comes from a targeted assessment.

Rumsfeld v. FAIR

On November 29, 2005, the Supreme Court will hear argument in *Rumsfeld v. Forum for Academic and Institutional Rights ("FAIR")*, No. 04–1152, a challenge to a series of federal funding restrictions collectively known as the Solomon Amendment. The *FAIR* case raises several core First Amendment issues, including the contours of the unconstitutional conditions doctrine, the delineation between speech and conduct, and the constitutional limits on government-compelled speech.

In its present form, the Solomon Amendment denies federal funds to any institution of higher education that does not provide military recruiters with access to its campus and students on par with the access available to other employers. The statute not only covers funding from a wide variety of federal agencies—including, among others, the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, and Transportation—but also penalizes a parent university for the actions of any of its "subelements," such as its law school. Consequently, because the military's "don't ask, don't tell" policy openly discriminates against gays and lesbians, the Solomon Amendment presents schools with the choice of either abandoning their long-standing nondiscrimination policies, which cover recruiting as well other core campus activities, or foresaking hundreds of millions of dollars in federal funds.

A broad coalition of law schools, professors, and students challenged the Solomon Amendment, and in a two-to-one decision the Third Circuit enjoined enforcement of the law in November 2004.[4] As an initial matter, the Third Circuit held that the law is properly analyzed within the unconstitutional conditions doctrine, notwithstanding the government's efforts to shield the funding condition from constitutional scrutiny. The court then concluded that the Solomon Amendment interferes with the schools' constitutional rights in two related ways. First, the Third Circuit reasoned, the law dilutes the schools' First Amendment right of associational expression by requiring federally funded schools not only to permit, but actually to facilitate, activities the schools seek to condemn. Second, the court of appeals held, the Solomon Amendment effectuates a system of compelled speech, under which law schools must affirmatively aid military recruiters in disseminating their message. Addressing the government's asserted interest in seeking to raise and support a military, the Third Circuit deemed that interest to be a "vital" one, but noted that the government had offered "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting."[5]

Potential Reverberations

In the Supreme Court, the government advances several arguments that, if accepted, likely would reverberate well beyond this case. For example, the government advocates a narrow view of the unconstitutional conditions doctrine, under which the First Amendment limits Congress's Spending Clause authority only when a funding condition aims "at the suppression of dangerous ideas"; all other speech-related funding conditions, the government argues, are wholly insulated from constitutional review. Under the government's theory, if a funding recipient objects to any given funding restriction, the recipient's only recourse is to decline the funds in question, regardless of the amounts involved or the relationship between the restriction and the funding scheme in question.

In addition, the federal petitioners challenge the basic premises underlying respondents' expressive association claim. Addressing the respondents' asserted associational rights, the government invokes the Court's seminal decision in *United States v. O'Brien*,[6] and argues that the schools' recruiting functions and nondiscrimination policies simply are not expressive conduct entitled to any constitutional protection. If accepted on its terms, the government's

argument could effectively narrow the class of conduct falling within the ambit of the First Amendment.

Finally, the government is pressing a limiting view of the compelled speech doctrine. Building on the Court's recent decision in *Johanns v. Livestock Marketing Association*[7] (discussed above), the federal defendants contend that the doctrine is inapplicable to the Solomon Amendment, because the expression in question is "government speech" and, therefore, entirely beyond the purview of the First Amendment. This case thus presents the Court with its first opportunity to elaborate on newly clarified "government speech" theory.

Whether the Court will accept the government's invitation to reshape free speech doctrine in the context of the *FAIR* case, of course, remains unclear. But given the complex, intersecting First Amendment issues at play in *FAIR*, the free speech bar undoubtedly will follow the case with great interest.

Tory v. Cochran

On May 31, 2005, the United States Supreme Court in *Tory v. Cochran*[8] vacated a broad injunction obtained by famed lawyer Johnnie Cochran preventing a former client from picketing and publicly speaking about Cochran, holding that the injunction lacked justification after Cochran's recent death and was an unconstitutional restraint on the client's First Amendment rights. The Court did so, however, without passing on the more significant First Amendment questions presented by the case.

The case grew out of a successful defamation action brought in California by Cochran against Ulysses Tory. The state trial court found that Tory had engaged in an extended campaign of unlawful defamatory activity, and further that he had used such defamatory speech in at attempt to coerce Cochran into paying him a monetary "tribute" to desist from his activities. The court issued an injunction preventing Tory and his associates from picketing Cochran's offices and from making any oral statements about Cochran in any public forum. The California Court of Appeal affirmed, and the Supreme Court granted certiorari to determine "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."

While the case was pending, and after oral argument, Cochran died. Counsel for Cochran and his widow, who was substituted as respondent, moved the Court to dismiss the case as moot. In a seven-to-two opinion, the Court vacated the judgment of the California Court of Appeal. Justice Breyer, writing for the majority, first held that the case did not become moot upon Cochran's death. Noting that no California law automatically invalidated the injunction, and that Tory could not know whether the injunction was void until a court ruled on it, the Court observed that the injunction continued to restrain Tory's speech and therefore presented an ongoing controversy.

But the Court went on to note that, although it did not moot the case, Cochran's death did make unnecessary any consideration of "petitioners' basic claims." "Rather," the Court explained, "we need only point out that the injunction, as written, has lost its underlying rationale," which was to prevent Tory from coercing Cochran to pay him a tribute. As a result, the injunction as written became "an overly broad prior restraint upon speech, lacking plausible justification." Justice Thomas, joined by Justice Scalia, dissented, arguing that the writ of certiorari should have been dismissed as improvidently granted, and criticizing the majority for "strain[ing] to reach the merits of the injunction after Cochran's death."

Endnotes

1. 408 U.S. 665 (1972).
2. 533 U.S. 405 (2001).
3. 521 U.S. 457 (1997).
4. 390 F.3d 219 (2004).
5. *Id.* at 245.
6. 391 U.S. 367 (1968).
7. 125 S. Ct. 2055 (2005).
8. 125 S. Ct. 2108 (2005).