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Supreme Court Report: Five Wins and Nine Losses for Free Speech Fans

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Supreme Court Report

Five wins and nine losses for free speech fans

By Joel M. Gora

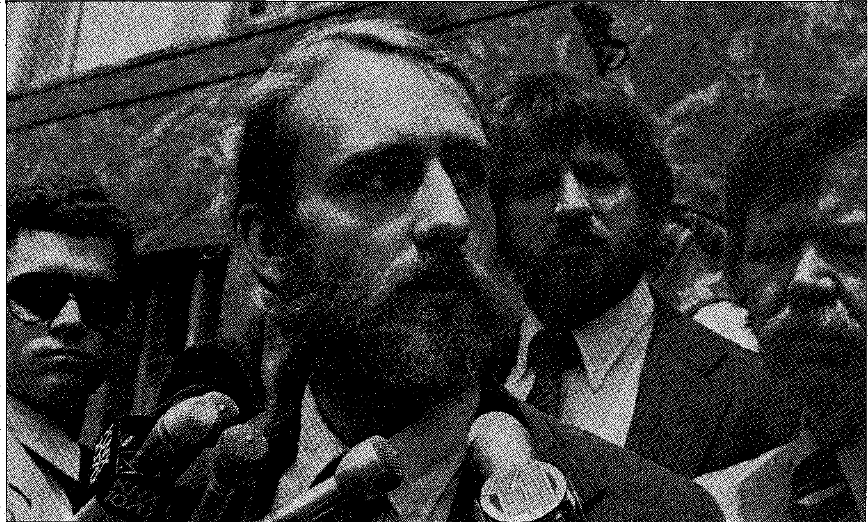
In a few short lines the First Amendment to the Constitution protects free speech, freedom of the press, the right to associate, the right to petition the government, and religious freedom. During its 1984-1985 term, the Supreme Court had occasion to consider almost every one of the amendment's protections and provisions.

The Court decided approximately 20 cases involving claims made under the First Amendment. Most of these cases focused on questions of speech, press, association and petition—rights broadly encompassed under the rubric of freedom of expression.

The Court's dozen-plus freedom of expression cases produced no landmark rulings and few decisions likely to be excerpted at great length in constitutional law casebooks. Nonetheless, in the aggregate the Court's work manifested some intriguing patterns. The Court showed little zest or enthusiasm for honoring First Amendment claims of right. These claims were rejected explicitly in nine cases and fully accepted in but one. In two cases the free speech arguments were upheld in part, while in two other cases the First Amendment claims were deferred in lieu of a favorable decision on nonconstitutional grounds. Viewed by even the most optimistic free speech fan, the Court's term produced a record of five wins and nine losses—hardly a championship First Amendment season. The Court spoke with a clear majority in almost all of these cases, indicating that the justices who are less hospitable to free speech arguments have consolidated their influence on the Court.

Half of the Court's free speech opinions were written by Justices O'Connor (four) and Rehnquist (three); free speech claims were rejected six of the seven times. Chief Justice Burger and Justices White and Powell each wrote for the majority or a plurality on two occasions and Justice Stevens once. Most noteworthy is that for the first time in several years, no significant free speech opinion was written by Justices Brennan, Marshall or Blackmun.

Next month: Freedom of religion

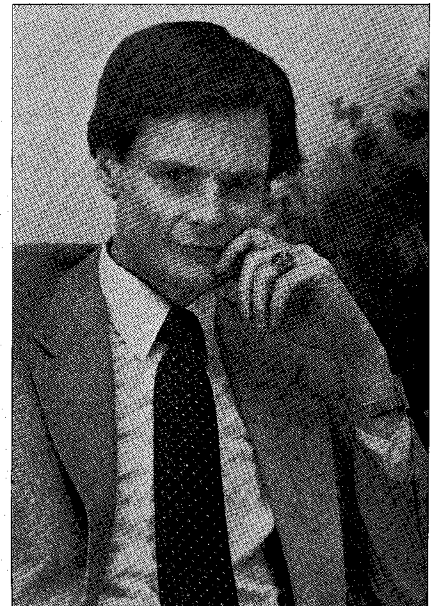


Draft resister David Wayte: He was prosecuted "in spite of," not "because of" his protest activities.

Big spenders

The Court's first significant free speech ruling canvassed a politically significant matter, namely, the effort to regulate campaign financing in a manner consistent with First Amendment principles. At issue was a provision of the post-Watergate reforms—the Presidential Election Campaign Fund Act—that limits to $1,000 the amount that an independent political group may spend to support the election of a federally financed presidential candidate. The Democratic Party invoked the law to prevent a conservative group from spending funds to support the 1984 re-election bid of President Reagan, but the Count, 7-2, invalidated the statutory restriction. *Federal Election Commission v. National Conservative Political Action Committee,* 105 S.Ct. 1459.

Finding that independent campaign expenditures "produce speech at the core of the First Amendment" and represent the voices and views of those small contributors who fund the activities, Justice Rehnquist concluded that these expenditures are entitled to "full First Amendment protection." Because independent campaign spending was found to pose no significant danger of "an exchange of political favors" for such uncoordinated spending, the restriction could not be sustained as an antidote to corruption or the appearance of corruption. Even if independent "multimillion dollar war chests" were a problem, Rehnquist said, the law was a "fatally overbroad response to that evil . . . [because] its terms apply equally to informal discussion groups that solicit neighborhood contributions to publicize their views about a particular presidential candidate."



Robert Snyder: His conduct did not demonstrate unfitness or constitute "conduct unbecoming" a member of the bar.

In dissent, Justice White reaffirmed his view that systematic regulation of campaign spending is permissible because the First Amendment "protects the right to speak, not the right to spend. . . ."

Though skeptics might suggest that the Court simply protected the right of well-heeled conservative groups to lobby for favored candidates, the opinion was a strong reaffirmation of First Amendment principles and demonstrated an uncharacteristic willingness to invalidate an act of Congress as facially unconstitutional. But the campaign finance ruling turned out to be the high-water mark, not a bellwether, of the rest of the Court's term. It proved to be the only decision this year to vindicate free speech claims broadly.

Bold dissenters

The Court's next ruling was more indicative of what was to come. The case involved the government's prosecution of antiwar protestors for failing to comply with President Carter's 1980 draft registration requirement. Faced with massive noncompliance, the government adopted an interim policy of "passive" enforcement. Instead of seeking actively to identify the hundreds of thousands of delinquents, the government targeted only nonregistrants whose identities it knew.

But government officials were aware that most of those were young men who had identified themselves in protest letters to the government. If the enforcement policy was likely to target a high percentage of protestors, would this constitute an impermissible punishment for protesting? One such protestor argued it did, but the Supreme Court, by a 7-2 margin, held otherwise. *Wayte v. United States*, 105 S.Ct. 1524.

Justice Powell reasoned that the defendant was prosecuted "in spite of" not "because of" his protest activities. In the early stages of the registration program, the government had no meaningful choice except to prosecute those nonregistrants it knew of, despite the fact that many were protestors who had stepped forward and identified themselves. Any conceivable "penalty" on free speech was cured by the government's "beg policy," which offered each suspected violator a last clear chance to comply and avoid prosecution. To rule for the defendant, the Court feared, "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to protest the law. The First Amendment confers no such immunity from prosecution."

Dissenting, Justices Marshall and

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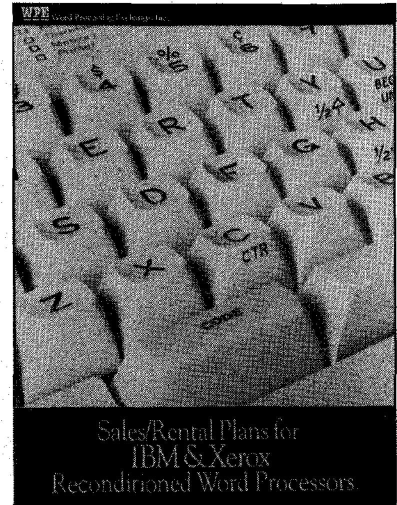

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Brennan thought the defendant was entitled to further discovery—to determine whether top-level government officials, including then presidential counselor Edwin Meese III, did design an enforcement policy intended to target and punish protestors.

Assertive lawyers

Lawyers fared somewhat better before the Court this year than did draft resisters. The Court's docket included three cases in which restrictions on lawyers were challenged under the First Amendment.

Of key interest was the Court's fifth major case involving solicitation and advertising. Ohio bar authorities had imposed sanctions on a Columbus lawyer for a newspaper advertisement describing his availability to represent women injured by the Dalkon Shield intrauterine device. Three features of the advertisement drew disciplinary ire—a drawing of an IUD, the offering of legal advice that claims might not be time-barred, and the statement that "if there is no recovery, no legal fees are owed by our clients."

Employing the basic framework developed in the commercial speech and advertising cases, Justice White, for a shifting majority, ruled that the illustration and the legal advice were truthful, not misleading and that their inclusion in a newspaper ad posed none of the dangers associated with in-person solicitation, which can be more broadly regulated.

Accordingly, bar authorities could not prohibit all such communication, but instead would have to show in any particular case that the advertisement was deceptive, misleading or overreaching. The Court did rule, however, that lawyers could be required to disclose that a contingent fee client might still have to pay litigation costs; that would avoid the potentially misleading impression that the legal representation might be a "no-lose proposition."

En route to these rulings, Justice White went out of his way to reject criticisms of the profession frequently leveled by Chief Justice Burger and other critics. White observed, "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265.

Justice White also rejected the notion that use of an illustration in an advertisement automatically undermined the dignity of the profession and could be barred for that reason alone. "[T]he mere possi-

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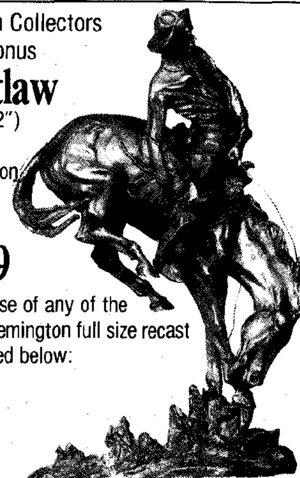

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bility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."

Harsh language

Dignity and decorum also were involved in the second "lawyer's rights" case the Court heard this year. A North Dakota lawyer wrote a letter to a federal court official, complaining in harsh language of the difficulties that court-appointed criminal defense attorneys had in receiving compensation from the courts. The letter was forwarded to the chief judge of the Eighth Circuit, who found the comments "totally disrespectful" and demanded an apology from the attorney. When none was forthcoming, the court suspended the lawyer from practice in the courts of the Eighth Circuit for six months for his "contumacious conduct." The Supreme Court unanimously reversed.

Though the lawyer challenged his suspension on both due process and free speech grounds, Chief Justice Burger deflected those arguments, holding instead that the lawyer's action did not demonstrate unfitness or constitute "conduct unbecoming" a member of the bar within the meaning of the relevant disciplinary provisions. Although members of the bar should "cast criticisms of the system in a professional and civil tone, . . . a single incident of rudeness or a lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct" or unfitness to practice, he said. *In re Snyder*, 105 S.Ct. 2874.

Given Justice White's ode to the adversary process in the Ohio lawyer's advertising case, the outcome of the Court's third ruling involving lawyers and the First Amendment is somewhat surprising. At issue was a Civil War-era enactment that limits to $10 the fee that may be paid to an attorney or agent who represents a veteran receiving benefits from the Veterans Administration for service-connected death or disability claims. The restriction makes it practically impossible for a claimant to obtain counsel to press the claim, except on a pro bono basis.

Although Justice Rehnquist's opinion primarily addressed and rejected the veterans' due process contentions, the Court, 6-3, also overruled the argument that the $10 cap violated the First Amendment right to organize, petition and seek legal vindication in the courts. The Court found that the individual's interest in retaining counsel to press legal claims was an attenuated First Amendment proposition and was essentially inseparable from the due process contentions that had been rejected in favor of a government interest in a streamlined claims process.

In dissent, Justice Stevens took the majority to task: "The Court does not appreciate the value of individual liberty. . . . In my view, regardless of the nature of a dispute between the sovereign and the citizen . . . the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless." *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180.

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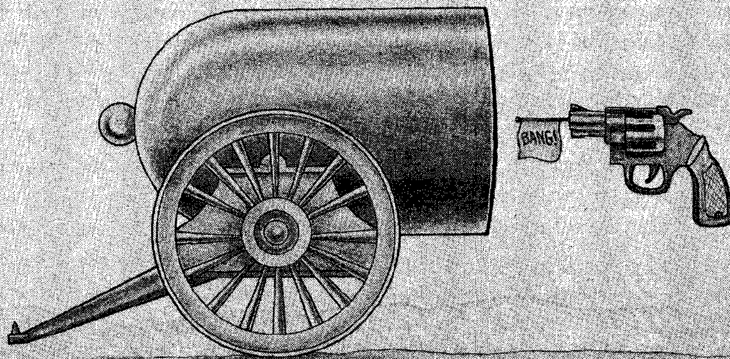

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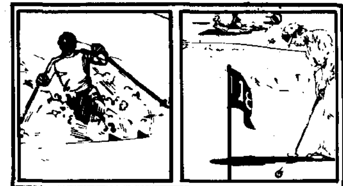

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Presumptuous publishers

Two of the Court's more important cases each involved a situation where First Amendment claims were enmeshed in a complex, federal statutory web.

In one of these cases, *Lowe v. Securities and Exchange Commission*, 105 S.Ct. 2557, the SEC sought to invoke the powerful restrictions of the Investment Advisors Act of 1940 to enjoin a convicted investment counselor from publishing an investment newsletter. The Court was asked to decide whether such a classic prior restraint violated freedom of the press. The Court, however, was able to avoid these broad issues by statutory construction.

Extensively probing the legislative history, Justice Stevens found that the act targeted those who provided "personalized" investment advice and information, and because of First Amendment concern, Congress supplied an exclusion for investment analysis offered by any "financial publication of general and regular circulation." Finding that the newsletter came within this exception, the Court concluded that the Act gave the SEC no authority to restrain future publication of the newsletter.

The other case involved an unusual copyright action brought by two giants of the publishing world against a liberal political journal. The *Nation* had obtained a copy of the about-to-be-published memoirs of former President Gerald R. Ford. It quickly published an article that highlighted many of the significant revelations in the memoirs —particularly events surrounding the pardon of former President Nixon—and frequently quoted from the manuscript. Claiming violation of their prepublication copyright interests, both Harper & Row Publishers and *Reader's Digest* sued. The *Nation* insisted that the story was exceptionally newsworthy, that the quotations constituted fair use under the Copyright Act, and that First Amendment values required extra protection for reporting matters of such high public concern.

The Court, 6-3, disagreed. Justice O'Connor found that the Copyright Act itself reconciled the First Amendment values by protecting the expression, creativity and scholarship of writers, subject to the fair use of the copyrighted material allowed critics and commentators. The Court declined to create "what amounts to a public figure exception to copyright." Three dissenters charged that the result

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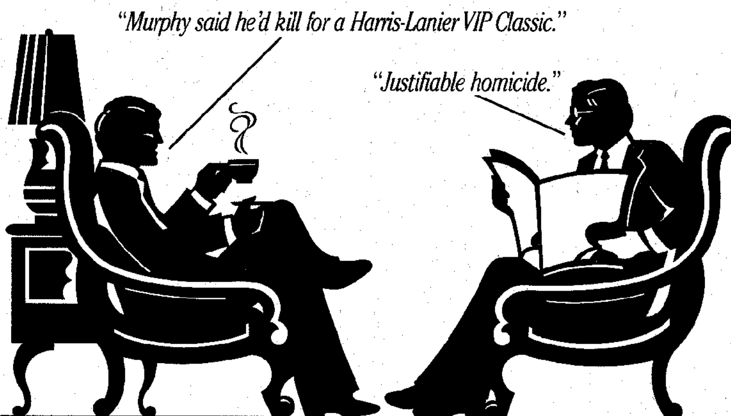

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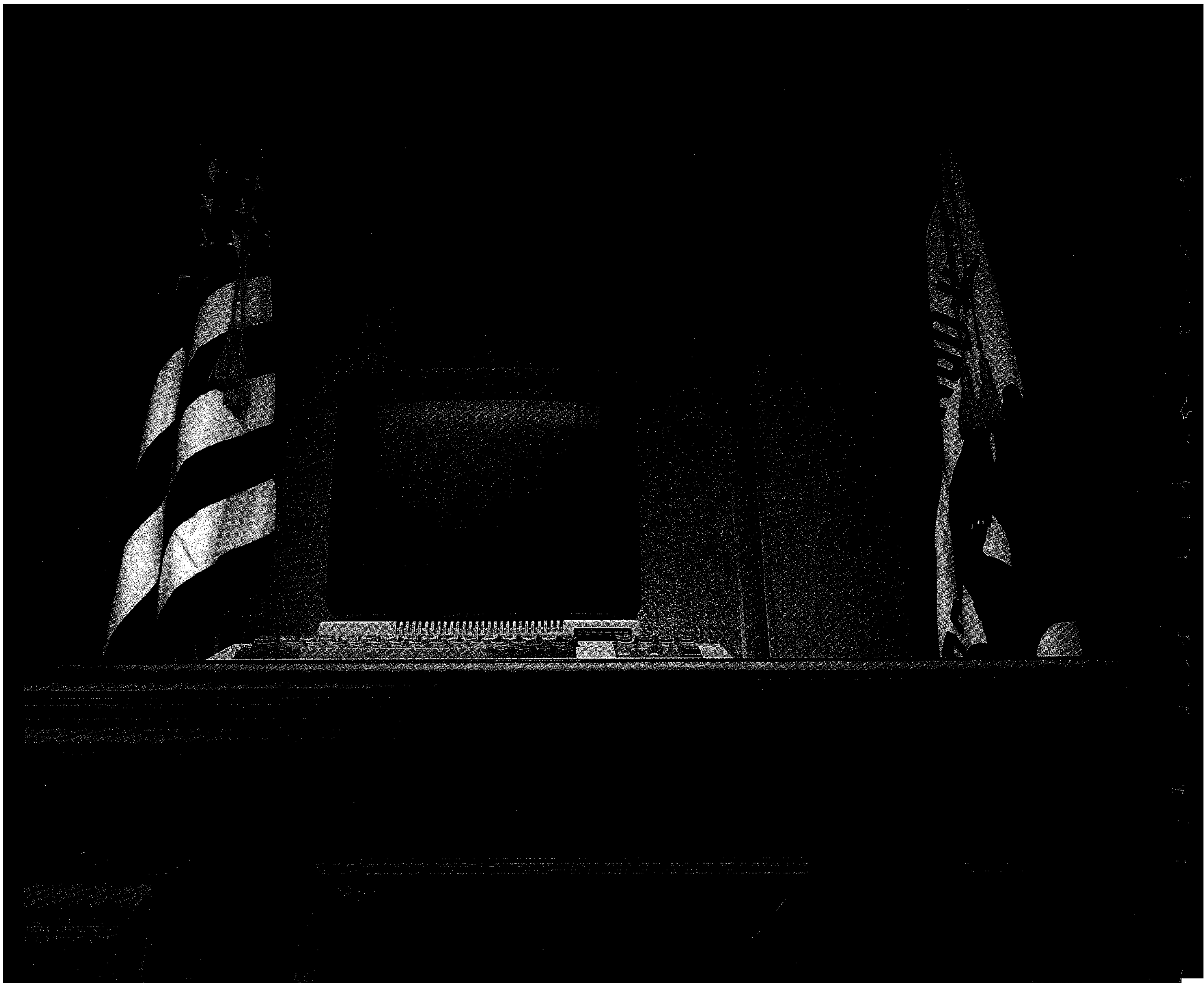

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improperly protected the financial interests of high public officials in controlling vital information at the expense of "the robust debate of public issues" and the public's assessment of the performance of such officials. *Harper & Row Publishers v. Nation Enterprises*, 105 S.Ct. 2218.

Defamation defendants

The Court's major libel ruling last term also tends to restrain the dissemination of information. While public interest in libel law has focused recently on major lawsuits brought by Generals Westmoreland and Sharon, the Court's ruling came in a much different context. Dun and Bradstreet negligently prepared an inaccurate credit report about a small Vermont construction company. The company sued for defamation and obtained a state court damage judgment that a sharply divided Supreme Court upheld. *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 105 S.Ct. 2939.

The long-awaited decision was expected to resolve whether the First Amendment limits on libel suits against news media were also available to nonmedia defendants like Dun & Bradstreet. Although five different justices went on record eschewing a media-nonmedia distinction and concluding that the press enjoyed no greater protection than any other speaker under the First Amendment, that position did not provide the common ground of decision, because four of those justices were in dissent. The Court also refrained from determining the general status of commercial speech with respect to defamation suits.

Instead the Court ruled on a point with far greater potential impact on journalism. It held that the special limitations on excessive damage awards in defamation suits did not apply in suits brought by private individuals or entities over defamatory statements on "matters of purely private concern." The Court reasoned that such matters were far removed from the core First Amendment interest in robust debate on public issues. Finding that a credit report about a small company, privately circulated to a handful of Dun and Bradstreet subscribers, was not a "matter of public concern," the Court sustained the damage award. Though the decision may be limited to contexts like commercial credit reporting, it nonetheless evidences a willingness to make it easier for defamation plaintiffs to recover damages.

The Court's other libel decision also rejected a claim of special First Amendment immunity. The issue was whether a North Carolina businessman who wrote

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letters to the president of the United States and his aides attacking a lawyer under consideration for a federal prosecutor's position could claim absolute immunity under the First Amendment's infrequently invoked petition clause. Giving short shrift to historical evidence that the clause was designed to protect people who communicate grievances to high government officials, the Court unanimously rejected a claim of absolute immunity from defamation suits arising from this kind of communication. Chief Justice Burger found all of the First Amendment's protections to be of equal moment and declined to elevate one provision to special status. *McDonald v. Smith*, 105 S.Ct. 2787.

Intrepid interlopers

In two cases the Court expanded the federal government's power to determine who will be allowed entry to federal property for free speech activities. Both decisions were written by Justice O'Connor, and each sustained the power to declare federal property "off limits" to some speakers.

In *United States. v. Albertini*, 105 S.Ct. 2897, the Court ruled that inviting the general public to an annual open house at a normally restricted military base in Hawaii did not transform the facility into a full-fledged "public forum" for anyone's expressive activities. As a result, a person who entered the base that day and engaged in a peaceful antiwar demonstration could be punished for violating a 9-year-old "bar order" that had been imposed for committing illegal acts and that excluded him from re-entering the base without express permission. Justice O'Connor stated that even during the open house, the military did not surrender control over the installation and would be given wide latitude in determining how best to regulate entry upon the base. The First Amendment does not assign to the judiciary "the authority to manage military facilities throughout the nation," she said.

The Court's final decision of the year involved access to government property not to protest but to solicit charitable contributions as part of the Combined Federal Campaign, an officially sponsored charity drive aimed at federal employees. President Reagan by executive order limited participation to "traditional charities" and excluded groups that try to influence elections and the determination of public policy "through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."

Various civil rights and environmental defense groups objected and claimed that by sponsoring the charity drive the government had created a "limited public forum" and could not exclude compatible organizations like themselves without strong justification.

Once again, Justice O'Connor disagreed and, for a 4-3 Court, held that no public forum for all charitable organizations had been created. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral," she said. *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 105 S.Ct. 3439.

The Court found it reasonable for the government to exclude nontraditional, advocacy charities in order to prefer

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groups who spend funds on direct services to the needy and to avoid solicitation by "controversial" charities. But because a few nontraditional groups such as the U.S. Olympic Committee had been permitted to participate in the campaign, there was a possibility that the civil rights groups' exclusion was the product of impermissible viewpoint censorship. The matter was remanded for further evidence on that point.

The dissenters objected that the Court had placed too great an emphasis on the government's interest as property holder and too little weight to permitting compatible free speech uses of that property. The ban on advocacy groups also constituted disguised censorship: "Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo."

Apt conclusion

The federal charity case marked an apt conclusion to the year's free speech cases. It manifested the Court's general lack of receptivity to free speech claims and deference to "reasonable" government restrictions on free speech, unless the speaker can meet the burden of showing that government had an illicit motive in suppressing the particular speech. While the Court cannot quite be characterized as hostile to First Amendment values, its decisions lack Justice Cardozo's appreciation of freedom of speech as "the indispensable condition of nearly every other form of freedom."

Indeed, the Court's approach to free speech claims is reflected in a case the Court did not decide. An Oklahoma statute prohibited teachers from "advocating, soliciting, imposing, encouraging or promoting" homosexual activity in a way that might come to the attention of school officials or children. The advocacy could result in the loss of one's job. Even the normally conservative 10th Circuit, applying settled First Amendment principles, concluded that the statute was facially unconstitutional. But the Supreme Court, after briefing and argument, divided 4-4, affirming the decision below. Though this disposition technically vindicated the free speech claimant, it is surprising, even considering the politically sensitive issues, that a majority of justices could not be mustered for a ruling upholding free speech on the merits. **Journal**

Joel M. Gora is a professor at Brooklyn Law School, where he teaches constitutional law and civil liberties.

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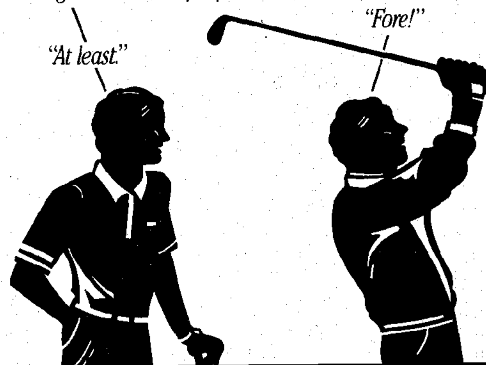

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