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United States v Noriega: Conflicts between the First Amendment and the Rights to a Fair Trial and Privacy

Eric M. Schweiker†

In *United States v Noriega*,[1] Cable News Network, Inc. ("CNN") obtained, through an undisclosed source,[2] government tapes of telephone conversations between deposed Panamanian leader General Manuel Antonio Noriega and his attorney, Frank Rubino. The government had recorded these conversations while Noriega was detained at the Metropolitan Correctional Center in Dade County, Florida ("MCC").[3] After obtaining the tapes, CNN interviewed Rubino for a story to accompany their broadcast, and allowed Rubino to review portions of the tapes.[4] Upon learning that the tapes contained attorney-client communications, Rubino filed a motion to enjoin CNN from broadcasting the tapes, claiming that broadcasting the tapes would jeopardize Noriega's rights under the Sixth Amendment.

Judge William Hoeveler of the United States District Court for the Southern District of Florida granted Noriega's motion and issued a temporary restraining order ("TRO") barring CNN from disseminating the tapes. Judge Hoeveler indicated that the TRO would continue until a federal magistrate reviewed the tapes to determine if their broadcast would violate Noriega's Sixth Amend-

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[1] 752 F Supp 1032 (S D Fla 1990), aff'd, 917 F2d 1543 (11th Cir 1990), cert denied sub nom, *Cable News Network, Inc. v. Noriega*, 498 US 976 (1990).

[2] CNN never revealed its source, and much conjecture surrounds the identity of this source. See Spencer Reiss, *Eavesdropping on Noriega*, Newsweek 60 (Nov 19, 1990). One commentator suggests that the government may have intentionally leaked the information in an effort to abort the Noriega trial and avoid the admission of evidence that would embarrass the government. See Melville B. Nimmer, *Nimmer on Freedom of Speech* § 4.05[c] at 193 n 20 (Matthew Bender, Supp 1992) ("Nimmer Treatise").

[3] Noriega was awaiting federal charges for participating in an international conspiracy to import cocaine and materials used in producing cocaine into the United States. See *United States v Noriega*, 683 F Supp 1373 (S D Fla 1988).

[4] See *United States v Noriega*, 917 F2d at 1546 n 4.

ment right to a fair trial.[5] The Eleventh Circuit upheld Judge Hoeveler's ruling,[6] and the Supreme Court denied certiorari.[7]

Noriega marks the first time that an appellate court upheld an order preventing the press from publishing information that could compromise a criminal defendant's Sixth Amendment right to a fair trial.[8] Although the court's decision to prevent the press from disseminating information in its possession constituted a prior restraint, the "most serious and least tolerable" infringement on First Amendment rights,[9] allowing CNN to broadcast the tapes in this case would have jeopardized Noriega's Sixth Amendment right to a fair and impartial jury and his right to be free from the disclosure of his trial strategy to the prosecution.[10] Furthermore, CNN's broadcast of the tapes would have threatened Noriega's right to privacy in telephone conversations, guaranteed under federal law by Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 ("Title III").[11] This striking conflict between the First Amendment, the Sixth Amendment, and the right to privacy increases existing tensions between law enforcement agencies, the press, and criminal suspects, and demands a reasoned response from the judicial system.

This Comment argues that Judge Hoeveler and the Eleventh Circuit Court of Appeals erred in granting the TRO because Noriega did not make the showing required under established Sixth Amendment jurisprudence. This Comment recognizes that the court could nonetheless have granted injunctive relief under Title III to protect Noriega's privacy interest in telephone conversations, a restraint which this Comment argues would pass constitutional muster. The Comment suggests, however, that courts should not issue such prior restraints to protect a criminal defend-

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[5] *Noriega*, 752 F Supp at 1032.

[6] *United States v Noriega*, 917 F2d at 1543.

[7] *Cable News Network, Inc. v Noriega*, 498 US at 976.

[8] See *Columbia Broadcasting Systems, Inc. v District Ct*, 729 F2d 1174, 1178 (9th Cir 1983) ("[F]ederal and state appellate courts have held without exception that trial court restraints on the reporting of judicial proceedings failed to meet the requirements [for a prior restraint]."). Before *Noriega*, the courts had not contradicted this statement.

[9] *Nebraska Press Association v Stuart*, 427 US 539, 559 (1976). See also *Near v Minnesota*, 283 US 697, 713 (1931) (the "chief purpose" of the First Amendment is to prevent prior restraints).

[10] The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense." US Const, Amend VI. See Part II for a discussion of the right to a fair and impartial jury and the right to be free from the disclosure of trial strategy to the prosecution.

[11] Pub L No 90-351, 82 Stat 212 (1968), codified at 18 USC §§ 2510-2520 (1988).

ant's privacy rights because such restraints may encourage, rather than deter, the press from broadcasting this material.

Part I of the Comment sets forth the holdings of the *Noriega* decisions. Part II criticizes these holdings and concludes that Noriega failed to make the required showing that CNN's broadcast of the tapes would prejudice his Sixth Amendment rights. Part III describes the circumstances under which the government recorded Noriega's attorney-client conversations and applies Title III to those facts. Part IV concludes that although Title III allows the imposition of a prior restraint, granting such restraints under Title III may create incentives for the press to violate the very Sixth Amendment privacy rights which Title III seeks to protect. The Comment thus concludes that even where constitutionally justified, courts should not use prior restraints to prevent the press from broadcasting private information about a criminal defendant.

I. The *Noriega* Case

A. District Court Decision

Noriega's defense counsel filed its motion for injunctive relief on November 7, 1990. On the next day, Judge Hoeveler granted Noriega a TRO,[12] noting that if CNN published Noriega's attorney-client communications, the court could find itself unable to fulfill its Sixth Amendment duty to impanel a fair and impartial jury.[13] Furthermore, Judge Hoeveler stated that CNN's broadcast of the tapes could disclose Noriega's trial strategy and protected confidences to the prosecution, thus further violating Noriega's Sixth Amendment rights.[14]

Nonetheless, the court acknowledged that preventing CNN from broadcasting the information would constitute a prior restraint.[15] While Judge Hoeveler found that prior restraints are "presumptively unconstitutional,"[16] and that the movant thus bears a "heavy burden" to show that the restraint is justified,[17] he also noted that in *Nebraska Press Association v Stuart*,[18] the Su-

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[12] *Noriega*, 752 F Supp at 1032.

[13] Id at 1033.

[14] Id at 1034.

[15] Id at 1033.

[16] 752 F Supp at 1033. See also *New York Times Co. v United States*, 403 US 713, 714 (1971).

[17] 752 F Supp at 1033, quoting *Organization for a Better Austin v Keefe*, 402 US 415, 419 (1971).

[18] 427 US at 539.

preme Court indicated that cases involving a defendant's Sixth Amendment right to a fair trial were within "the very narrow range of cases which may justify a restraint."[19]

In *Nebraska Press*, the Supreme Court promulgated a stringent three-part test to determine the constitutionality of prior restraints that attempt to prevent prejudicial pretrial publicity. The Court held that such restraints are valid only where: (1) the nature and extent of the pretrial publicity would impair the right to a fair trial; (2) no less restrictive alternatives would mitigate the effect of the publicity; and (3) a prior restraint would effectively prevent the harm.[20] Although *Nebraska Press* addressed only the prejudicial effect of pretrial publicity on the right to a fair and impartial jury, Judge Hoeveler stated that the "three-prong test in *Nebraska Press* . . . applies as well where the disclosure of the defense and confidential trial strategy is at stake."[21]

The *Nebraska Press* test, as construed by Judge Hoeveler, requires "factual findings based on the content of the speech at issue."[22] Judge Hoeveler concluded that the court could not make these findings unless it reviewed the tapes in CNN's possession.[23] Judge Hoeveler therefore ordered that the TRO continue until CNN produced the tapes and a federal magistrate reviewed them for prejudicial material.[24]

B. Eleventh Circuit Decision

Upon CNN's petition for an "emergency appeal," the Eleventh Circuit affirmed Judge Hoeveler's decision on November 10, 1990.[25] In its decision, the court stated that when confronted with a conflict between First and Sixth Amendment rights, the "primary responsibility" of the district court is to ensure the defendant's right

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[19] 752 F Supp at 1033-34, citing *Nebraska Press*, 427 US at 539.

[20] See *Noriega*, 752 F Supp at 1034, citing *Nebraska Press*, 427 US at 562-68.

[21] 752 F Supp at 1034.

[22] Id. Appellate courts have not hesitated to overrule prior restraints on the basis that the trial judge failed to make adequate factual findings. See, for example, *United States v McKenzie*, 697 F2d 1225, 1227 (5th Cir 1983) (overturning an order consisting of "one sentence . . . not supported by any findings whatsoever"); *Matter of Providence Journal Co.*, 820 F2d 1342, 1351 (1st Cir 1986) (characterizing the district court's failure to make factual findings as "an omission making the invalidity of the order even more transparent").

[23] *United States v Noriega*, 752 F Supp 1045, 1049 n 3 (S D Fla).

[24] Judge Hoeveler agreed with Noriega's objection that direct review of the tapes by the judge could lead to his recusal because he would be exposed to the defense's trial strategy. Thus, the court appointed a magistrate to conduct the review. 752 F Supp at 1034-35.

[25] *Noriega*, 917 F2d at 1543.

to a fair trial,[26] a process over which the trial judge retains "broad discretion."[27] In light of this "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity," the Eleventh Circuit found that the trial judge "may surely take protective measures even when they are not strictly and inescapably necessary."[28]

The Eleventh Circuit, however, rather than adopting the *Nebraska Press* test, applied *Press-Enterprise Co. v Superior Court of California*[29] to the facts in *Noriega*. In *Press-Enterprise*, the Supreme Court held that a court may close a preliminary hearing to the press only if the court specifically finds that: (1) there is a substantial probability that publicity will prejudice the defendant's right to a fair trial; (2) there is a substantial probability that closure would prevent the prejudice; and (3) reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.[30] The *Press-Enterprise* test, although closely resembling the *Nebraska Press* test, requires only a "substantial probability" of harm and a finding that no "reasonable alternatives" exist.[31] In contrast, courts have construed *Nebraska Press* to require that the publicity *will* impair the right to a fair trial and that *no* less restrictive alternatives to a prior restraint exist.[32]

Applying this test, the Eleventh Circuit found that the district court could preclude CNN from broadcasting the tapes if it made the factual findings required by *Press-Enterprise*.[33] Therefore, the Eleventh Circuit continued the TRO until the district court reviewed the tapes.[34]

C. Supreme Court Decision

On November 18, 1990, the Supreme Court, by a 7-2 vote and without opinion, denied CNN's petition for certiorari and its motion to stay the district court order.[35] Justice Marshall, joined by

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[26] Id at 1547.
[27] Id at 1548.
[28] Id at 1549, citing *Gannett Co. v DePasquale*, 443 US 368, 378 (1977).
[29] 478 US 1 (1986).
[30] Id at 14, cited in *Noriega*, 917 F2d at 1549.
[31] 478 US at 14.
[32] See *Noriega*, 752 F Supp at 1035, citing *Nebraska Press*, 427 US at 562-69. See also *Providence Journal Co.*, 820 F2d at 1351 ("As the Supreme Court made clear in *Nebraska Press Association*, a party seeking a prior restraint against the press must show not only that publication will result in damage to a near sacred right, but also that the prior restraint will be effective and that no less extreme measures are available.").
[33] 917 F2d at 1550.
[34] Id.
[35] *Cable News Network*, 498 US at 976.

Justice O'Connor, filed a dissenting opinion.[36] Noting the "heavy presumption" against the constitutional validity of a prior restraint and the "heavy burden" on the movant to show justification for the restraint, Justice Marshall, citing such cases as *Nebraska Press* and *New York Times Co. v United States*,[37] concluded: "I do not see how the prior restraint in this case can be reconciled with these teachings."[38]

D. Decision on Remand

CNN produced the tapes two days after the Supreme Court's denial of certiorari.[39] After reviewing the tapes,[40] Judge Hoeveler found that the tapes contained no material that could prejudice Noriega's Sixth Amendment rights to the extent required by *Nebraska Press*.[41] The court thus lifted the TRO and returned the tapes to CNN.[42]

II. Criticism of the *Noriega* Decision

For three reasons, the district court and the Eleventh Circuit erred in ruling against CNN. First, Judge Hoeveler, without reviewing the tapes, could have made the factual findings necessary to establish that CNN's broadcast of the tapes would not taint the jury pool to the extent required by *Nebraska Press*. Second, Judge Hoeveler erred in failing to require that Noriega meet the burden established in *Nebraska Press* with regard to the violation of his Sixth Amendment right to be free from disclosure of trial strategy. Finally, the Eleventh Circuit erred in applying the *Press-Enterprise* test rather than the more stringent standard for prior restraints demanded by *Nebraska Press*.

A. District Court: *Nebraska Press* and a Fair and Impartial Jury

In order to meet the strict standard articulated in *Nebraska Press*, a trial judge must find that "further publicity, unchecked, would so distort the views of potential jurors that twelve could not be found who could, under proper instructions, fulfill their sworn

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[36] Id at 976-77 (Marshall dissenting).

[37] 403 US at 713.

[38] *Cable News Network*, 498 US at 976-77 (Marshall dissenting).

[39] *Noriega*, 752 F Supp at 1048.

[40] Initially, a federal magistrate reviewed the tapes. Judge Hoeveler also reviewed them after Noriega dropped his objection to such review. Id at 1048 n 1.

[41] Id at 1052-54.

[42] Id at 1054.

duty to render a just verdict exclusively on the evidence presented in open court."[43] Because Noriega's trial took place in a large metropolitan area, however, CNN's broadcast of the information it possessed would not have had this prejudicial effect, indicating that the district court's order was therefore invalid.

Lower courts have recognized that in "heterogeneous metropolitan areas," it is "extremely unlikely that [pre-trial publicity] will produce the community-wide prejudice required by *Nebraska Press*."[44] The Southern District of Florida, the forum for Noriega's criminal trial, includes the Miami metropolitan area which, according to 1990 census statistics, has a population in excess of 3.1 million people.[45] Even had the tapes contained prejudicial information, their broadcast would not likely have reached a jury pool potentially exceeding 1 million people and prejudiced their views to the extent that twelve jurors could not have been found to render a just verdict. Furthermore, even if the broadcast of the tapes did create such community-wide prejudice, "other alternatives" under the third part of the *Nebraska Press* test, such as change of venue, could have guaranteed Noriega a fair trial. Judge Hoeveler could have made these findings without reviewing CNN's tapes; thus, he could not legitimately justify the order to produce on those grounds.

B. District Court: *Nebraska Press* and the Disclosure of Trial Strategy

In order to evaluate Noriega's claim that CNN's broadcast of the tapes would violate his right to be free from the disclosure of

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[43] *Nebraska Press*, 427 US at 569. The Supreme Court has recognized that excessive pre-trial publicity may impair a criminal defendant's right to a fair and impartial jury. See *Sheppard v Maxwell*, 384 US 333 (1966); *Estes v Texas*, 381 US 532 (1965); *Rideau v Louisiana*, 373 US 723 (1963); *Irvin v Dowd*, 366 US 717 (1961); *Patterson v Colorado*, 205 US 454 (1907).

[44] *Columbia Broadcasting Systems, Inc. v District Ct*, 729 F2d at 1182 (reversing a district court order temporarily restraining CBS from publishing government surveillance tapes generated in the investigation and prosecution of John Z. DeLorean). See also *In re CBS, Inc.*, 570 F Supp 578 (E D La 1983), where the court held invalid under the First Amendment an order requiring CBS to produce tapes of a *60 Minutes* segment so that the court could evaluate the possible prejudicial effect of the broadcast of the segment on the defendant's Sixth Amendment right to a fair and impartial jury. The court found that only 17 percent of the 3.6 million residents of Dallas, the forum for the criminal trial, regularly watched *60 Minutes*, and that there was "no doubt that 12 impartial jurors could be found from the remaining 'large' Dallas juror-qualifying population who would not have viewed . . . [the relevant] segment." Id at 583.

[45] United States Bureau of the Census, *Statistical Abstract of the United States: 1992* 31 (112th ed 1992).

trial strategy,[46] it is first necessary to determine whether the press's right to be free from prior restraints encompasses the broadcast of privileged attorney-client conversations. The rationale underlying the attorney-client privilege suggests that First Amendment protection should indeed apply.

The attorney-client privilege provides that in order to foster candid communication between an attorney and client, such privileged communications shall not be admissible in court.[47] CNN's broadcast of the tapes, however, would not have made their contents admissible as evidence, and thus would not have frustrated this underlying goal of the attorney-client privilege.

More generally, the attorney-client privilege promotes free communications between an attorney and client by protecting the confidentiality of these communications.[48] Judge Hoeveler, however, correctly noted that Noriega's conversations lost their confidentiality when the government taped them, making the imposition of a prior restraint to protect this interest merely "symbolic and prophylactic."[49] Thus, the attorney-client privilege does not affect CNN's ability to broadcast the tapes to the general public, but does prevent the disclosure of trial strategy to the prosecution,[50] a violation properly evaluated under *Nebraska Press.*

Even under this analysis, there is a strong argument that the TRO met the stringent three-part standard of *Nebraska Press.* First, disclosure of any trial strategy contained in the tapes would certainly have prejudiced Noriega's Sixth Amendment rights if it had reached the prosecution. Second, the conversations, in order to create the required prejudicial effect, need only have reached one member of the prosecution team, rather than taint a large jury

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[46] The Sixth Amendment protects an attorney-client communication from disclosure to the prosecution where it is "intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential." *United States v Melvin,* 650 F2d 641, 645 (5th Cir 1981), citing Edward W. Cleary, ed, *McCormick's Handbook of the Law of Evidence* § 91 (West Publishing Co., 2d ed 1972).

[47] *McCormick on Evidence* § 87 at 314 (West Publishing Co., 4th ed 1992).

[48] Id at 313-17.

[49] *Noriega,* 752 F Supp at 1033.

[50] Judge Hoeveler himself recognized this distinction:

> A secondary purpose behind the attorney-client privilege, and the prohibition of its violation, is to prevent the disclosure of information damaging to the defendant's case—information which, though damaging, is privileged. In this sense, the issue is really one of the right to a fair trial rather than the attorney-client privilege per se.

Id.

pool. Third, no less restrictive alternative existed,[61] and a prior restraint would effectively have prevented the harm to Noriega.

Instead of applying the *Nebraska Press* test, however, Judge Hoeveler simply ordered CNN to produce the tapes for review and refrain from broadcasting them until the review was completed. While requiring CNN to turn over the tapes did not, in itself, constitute a prior restraint, because CNN simply could have produced a copy of the tapes and kept the originals,[62] the order to refrain from broadcasting the tapes did constitute a prior restraint, because it prevented CNN from disseminating information in its possession. Thus, the validity of the restraining order should be analyzed under *Nebraska Press*.

The fact that Judge Hoeveler ordered that the TRO should remain in place only as long as it took the court to review the tapes in CNN's possession does not change the analysis under *Nebraska Press*. The *Nebraska Press* Court itself stated that "the burden on the [movant] is not reduced by the temporary nature of a restraint."[63] The restraint, therefore, albeit short-lived, still must meet the stringent requirements of *Nebraska Press*.

Instead of applying *Nebraska Press*, however, Judge Hoeveler relied on principles of "fundamental fairness" to justify the TRO. Although noting that a showing of "clear, immediate, and irreparable danger to Defendant's right to a fair trial" is necessary before a prior restraint will issue,[64] Judge Hoeveler found that it would be "fundamentally unfair" to allow CNN to broadcast the tapes simply because it would not turn them over to the court to make the necessary factual inquiry.[65] To do so would "allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented

[61] Although sequestering the prosecution team may have been an alternative to a prior restraint, Judge Hoeveler noted that it was not a viable alternative because it "can be expected to require at least a few days to put in place." *Noriega*, 752 F Supp at 1049 n 2.

[62] See Nimmer Treatise § 4-28 at 190 (cited in note 2) (noting that CNN had no proprietary interest in the tapes because the tapes themselves belonged to the government, while any proprietary interest in the attorney-client conversations belonged to Noriega).

[63] *Nebraska Press*, 427 US at 559.

[64] *Noriega*, 752 F Supp at 1035. See also *New York Times*, 403 US at 730 (Stewart concurring) ("direct, immediate, and irreparable damage" is necessary to justify a prior restraint); 403 US at 726-27 (Brennan concurring) ("only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event [justifying a prior restraint] can support even the issuance of an interim restraining order").

[65] 752 F Supp at 1035.

this court from reviewing the content of the tapes in its possession."[56]

Judge Hoeveler's conception of "fundamental fairness" contradicts established prior restraint jurisprudence. Generally, a TRO may issue only to protect the status quo.[57] In a prior restraint case, the status quo protects the press's First Amendment right to publish information in its possession at any time it chooses, unless the movant meets the heavy burden articulated in *New York Times* and *Nebraska Press*.[58] A prior restraint therefore "disturbs the status quo and impinges on the exercise of editorial discretion."[59] The stringent *Nebraska Press* test protects this status quo and the essential First Amendment right to remain free from prior restraints.

Courts have recognized that the right to be free from prior restraints is a fundamental First Amendment right because prior restraints present problems that are not posed by post-publication punishment. First, a prior restraint prohibits speech before it is spoken. Thus, while post-publication punishment "chills" speech, a prior restraint "freezes" it for the duration of the injunction.[60] Second, the "collateral bar" rule prevents the enjoined party from challenging the constitutionality of the injunction in a contempt proceeding.[61] That party thus faces a "trilemma of chilling effects": (1) it may comply with the injunction and accept the suppression of its speech; (2) it may appeal the order directly, but obey the restraint in the interim; or (3) it may ignore the injunction but thus lose its right to challenge the constitutionality of the order.[62] Courts, in promulgating such stringent tests as that in *Nebraska Press*, have properly recognized that the press deserves a high degree of protection from this unique chilling effect.

Judge Hoeveler, therefore, should not have used his conception of "fundamental fairness" to eviscerate the protections provided by *Nebraska Press*. Indeed, Judge Hoeveler's approach amounts to a system of judicial censorship that restrains the press whenever it has exclusive possession of material which a defendant alleges may prejudice his Sixth Amendment rights. Although strict

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[56] Id.

[57] *Granny Goose Foods, Inc. v Brotherhood of Teamsters*, 415 US 425, 439 (1974).

[58] See Nimmer Treatise § 4-28 at 191 (cited in note 2).

[59] *Providence Journal*, 820 F2d at 1351.

[60] *Nebraska Press*, 427 US at 559, citing Alexander M. Bickel, *The Morality of Consent* 61 (Yale University Press, 1975).

[61] See *Walker v City of Birmingham*, 388 US 307, 321 (1967) (applying collateral bar rule to freedom of expression cases).

[62] Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan L Rev 539, 553 (1977).

enforcement of the *Nebraska Press* test where the press is the sole possessor of the material at issue may make it difficult for the movant to meet the required burden,[63] CNN should not be denied its fundamental right to be free from prior restraints simply because its information was unavailable from other sources.

Although denying prior restraints to defendants in this situation may lead to an occasional publication that violates a defendant's Sixth Amendment rights, Judge Hoeveler's proposed system would result in recurring violations of the press's fundamental First Amendment right to be free from prior restraints. The use of prior restraints to protect Sixth Amendment rights should thus be limited to those situations in which the moving party fulfills the heavy burden enunciated in *Nebraska Press.*

C. Eleventh Circuit: *Press-Enterprise* and *Nebraska Press*

The Eleventh Circuit's decision was based on two erroneous assumptions. First, the court's initial premise that the "primary responsibility" of the district court is to protect the criminal defendant's Sixth Amendment rights at the expense of the press's First Amendment rights is incorrect. Indeed, the Supreme Court has recognized that the "authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[64] Although rejecting the position that First Amendment rights always take precedence over a criminal defendant's right to be free from prejudicial publicity, the *Nebraska Press* Court found it "clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."[65]

Second, the Eleventh Circuit erred in applying the *Press-Enterprise* test. *Press-Enterprise* governs the press's limited First

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[63] FRCP 65(b) states, in pertinent part:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition . . . .

FRCP 65(b). Thus, Noriega could have obtained an ex parte TRO had he been able to identify in an affidavit particular conversations on the CNN tapes that would violate his Sixth Amendment rights. Nonetheless, it is unlikely that Noriega or his attorney remembered the contents of all of their conversations during Noriega's stay at the MCC, making this burden quite difficult to fulfill.

[64] *Nebraska Press*, 427 US at 561.

[65] Id.

Amendment right of access to court documents and proceedings.[66] *Noriega*, however, did not involve the closure of court documents or proceedings, but instead addressed a prior restraint against information already in the press's possession. Indeed, Justice Stevens, dissenting on other grounds in *Press-Enterprise*, recognized that the press is entitled to a higher degree of protection if the information is already in its possession,[67] a position that many lower courts have followed.[68]

While commentators have debated the validity of this distinction between access and prior restraint,[69] it remains a settled principle of law that the *Nebraska Press* and *Press-Enterprise* tests are not interchangeable. While *Press-Enterprise* allows a court to deny access upon a showing of a "substantial probability" of harm, the imposition of a prior restraint requires a showing of "clear, immediate, and irreparable" harm.[70] Furthermore, *Press-Enterprise* requires only a showing that "reasonable alternatives" do not exist, while a prior restraint requires a court to determine whether any means short of a restraining order would prevent the harm.[71] Therefore, courts addressing prior restraints cannot rely on *Press-Enterprise*, but instead must apply the more stringent *Nebraska Press* test.

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[66] 478 US at 14.

[67] Justice Stevens argued:

> [I]t bears emphasis that the First Amendment right asserted by petitioner is not a right to publish or otherwise communicate information lawfully or unlawfully acquired. That right . . . may be overcome only by a governmental objective of the highest order attainable in a no less intrusive way. The First Amendment right asserted by petitioner in this case, in contrast, is not the right to publicize information in its possession, but the right to acquire access thereto.

Id at 17-18 (Stevens dissenting) (citations omitted).

[68] See *United States v Klepfer*, 734 F2d 93, 96 (2d Cir 1984) ("This is not a case of prior restraint; the issue concerns access to information."); *Fort Wayne Journal-Gazette v Baker*, 788 F Supp 379, 383 (N D Ind 1992) ("[T]he right to publish or otherwise communicate information lawfully or unlawfully acquired, is accorded more protection than . . . the right to acquire access to information.") (internal quotations omitted).

[69] Compare Bickel, *The Morality of Consent* at 79-82 (cited in note 60) (stating that the government's right to keep material confidential would be overpowering if it included the right to prevent the dissemination of that material once it fell into the hands of the press), with Cass R. Sunstein, *Government Control of Information*, 74 Cal L Rev 889, 902-904 (1986) (criticizing Bickel's approach and concluding that "[t]he sharp distinction between rights of access and rights of publication . . . rests on unstable foundations").

[70] See note 60 and accompanying text.

[71] *Nebraska Press*, 427 US at 563.

III. TITLE III AND *NORIEGA*

Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")[72] governs the interception, use, and disclosure of wiretap information obtained in a criminal investigation.[73] Title III, although not addressed in any of the *Noriega* opinions, has strong implications for any case, such as *Noriega*, which involves wiretaps.

A. The Interception of Noriega's Conversations

The MCC, for security reasons, automatically recorded all inmate calls made from the institution, with the exception of "properly placed calls to an attorney."[74] Due to the nature of the system used to record these calls, unmonitored calls could only be made from staff telephones rather than inmate telephones.[75]

Because of Noriega's special status as a controversial and well-known figure, the government installed a personal telephone outside of his cell.[76] A label on this telephone advised Noriega that all calls, with the exception of "properly placed" calls to an attorney would be recorded,[77] and Noriega signed a consent form to this effect.[78] Nonetheless, Judge Hoeveler found that MCC personnel did not adequately inform Noriega that a "properly placed call to an attorney" must be made from a staff telephone, and Noriega, although informing the MCC staff when he was calling his attorney, made all calls to his attorney from his personal telephone.[79] These calls were automatically recorded.[80]

B. Application of Title III to Noriega

After Judge Hoeveler returned the tapes of Noriega's conversations to CNN, Noriega moved to dismiss his indictment on the grounds that the government's taping of his attorney-client conversations violated his Sixth Amendment right to counsel, and that the taping of his conversations with other parties violated Title

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[72] 18 USC §§ 2510-2520 (1988).
[73] See 18 USC § 2511(1) (1988).
[74] *United States v Noriega*, 764 F Supp 1480, 1482 (S D Fla 1991).
[75] Id at 1483.
[76] Id.
[77] Id.
[78] 764 F Supp at 1485.
[79] Id at 1485-86.
[80] Id.

III.[81] In denying this motion, Judge Hoeveler ruled that the taping of Noriega's conversations with parties other than his attorney fell under two exceptions to the broad prohibition against non-authorized wiretapping in Title III: (1) the interception by "an investigative or law enforcement officer in the ordinary course of his duties;"[82] and (2) the situation in which "one of the parties to the communication has given prior consent to such interception."[83]

Judge Hoeveler's opinion, however, suggests that the government indeed violated Title III in intercepting Noriega's attorney-client conversations. Although holding that the attorney-client conversations at issue did not create the requisite prejudice for a Sixth Amendment violation,[84] Judge Hoeveler found that Noriega was not "sufficiently informed of the procedures for making an unmonitored, unrecorded [attorney-client] call so as [to] make any expectation of privacy unreasonable."[85] Noriega thus had a "reasonable expectation of privacy" in these conversations and did not truly consent to their interception.

Furthermore, contrary to Judge Hoeveler's assertion, the interception of attorney-client conversations was not within the "ordinary course of duty" of prison officials. Judge Hoeveler held that the interception of the third-party conversations was in the ordinary course of duty because it was "based on legitimate security considerations" reflected in "MCC's established [interception] policy."[86] MCC policy, however, explicitly prohibited the recording of properly placed attorney-client conversations.[87] Thus, because MCC failed to adequately notify Noriega of the proper procedure for placing a unrecorded call,[88] the interception of Noriega's attorney-client conversations was not within the ordinary course of prison officials' duties. Thus, these conversations were intercepted in violation of Title III.

IV. Title III and Prior Restraints

Some scholars suggest that a prior restraint may be justified where the press acquires information with knowledge that the sup-

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[81] Id at 1480.
[82] 764 F Supp at 1490, citing 18 USC § 2510(5)(a)(ii) (1988).
[83] Id at 1491, citing 18 USC § 2511(2)(c) (1988).
[84] Id at 1489.
[85] Id at 1487.
[86] 764 F Supp at 1491.
[87] Id at 1482.
[88] Id at 1486.

plier of the information obtained the information unlawfully.[89] Furthermore, courts have held that a prior restraint may be valid where the press's disclosure of information would violate a statute providing for injunctive relief that protects interests that justify a prior restraint.[90]

As discussed in Part III, the government's taping of Noriega's attorney-client conversations violated Title III. This raises two possible grounds for restraining CNN from publishing the material. First, CNN may have obtained the material with knowledge that the government made the tapes unlawfully. Second, Title III's provision for injunctive relief may apply to CNN's disclosure of the tapes, and may protect interests that justify a prior restraint.

A. Prior Restraints and Unlawfully Obtained Information

Title III expressly prohibits law enforcement officials from disclosing wiretaps obtained in violation of its provisions.[91] Although this amounts to a prior restraint against the law enforcement official, commentary and Supreme Court precedent suggest that such a restraint is constitutionally permissible.[92] The settled constitutionality of this restraint against a government official suggests

[89] See Archibald Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv L Rev 1, 11 (1980). In *New York Times Co. v United States*, Justice Harlan suggested that the Court determine "[w]hether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired." 403 US at 754 (Harlan dissenting).

[90] See notes 102-03 and accompanying text. In *United States v Progressive, Inc.*, 467 F Supp 990 (W D Wis 1979), the district court held that publication of an article that described the procedure for making an atomic bomb could be enjoined under the Atomic Energy Act of 1954, 42 USC §§ 2011 et seq (1954). The court found that the injunctive provisions of 42 USC §§ 2274(b) and 2280 applied to the article at issue, and that the threat to national security justified a prior restraint. 467 F Supp at 993.

[91] Title III allows for disclosure of wire, oral, or electronic communications by law enforcement officials only where such communications are obtained "by any means authorized by this chapter." 18 USC §§ 2517(1)-(2) (1988). Noriega's attorney-client conversations were obtained in violation of Title III, and their disclosure would thus be prohibited under the statute.

[92] See Dan B. Dobbs, 2 *Law of Remedies* § 7.3(5) at 327 (West Publishing Co., 2d ed 1993) ("[W]hen the information being published is obtained by improper means such as theft or trespass, or is obtained properly but in a fiduciary or confidential relationship, the injunction is quite proper, even though it stops publication."); *Snepp v United States*, 444 US 507 (1980) (former CIA agent who breaches an employment contract by publishing information without agency clearance may be enjoined to submit future writings for prepublication clearance).

that the press could legitimately be restrained as the knowing recipient of such unlawfully obtained information.[93]

In order to succeed in this argument, however, the movant must show that the press had knowledge that its source obtained the information unlawfully.[94] In *Noriega*, CNN did have reason to know that the tapes of Noriega's attorney-client conversations were made in violation of Title III. In fact, CNN claimed that the tapes were newsworthy precisely because they revealed that the government had unlawfully recorded Noriega's conversations.[95]

Case law suggests that the First Amendment does not allow the imposition of a prior restraint to prevent the disclosure of information when the press has reason to know that its source obtained the information unlawfully. In *Landmark Communications, Inc. v Virginia*,[96] for example, the Supreme Court examined a Virginia statute that provided criminal sanctions for the disclosure of information regarding confidential proceedings in a judicial misconduct investigation.[97] The Court held that such punishment of a newspaper's publication of truthful information regarding the proceedings violated the newspaper's rights under the First Amendment.[98] Although the Court did not challenge the state's ability to keep the proceedings confidential,[99] it nonetheless found that this power did not entitle the government to restrain true information obtained in violation of the confidentiality provision.[100]

Like CNN, the newspaper in *Landmark* had reason to know that its source acted in violation of a valid statute.[101] Nonetheless, the *Landmark* Court held that the First Amendment protects disclosure of information obtained in this manner from post-publication punishment, a lesser sanction than a prior restraint.

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[93] See note 91 and accompanying text.

[94] See Cox, 94 Harv L Rev at 11 (cited in note 89) (noting that this argument is strongest where the recipient induced the violation, weaker where the publisher was a passive recipient, and probably untenable if the publisher was ignorant of the violation).

[95] See CNN's Petition for Writ of Certiorari, No 90-767 at 8-9 (Nov 15, 1990), in LEXIS (Genfed library, Briefs file).

[96] 435 US 829 (1978).

[97] Id at 831.

[98] Id at 838.

[99] Id at 841.

[100] The *Landmark* Court rested much of its holding on the fact that the speech at issue related to the conduct of a government official, speech that "lies near the core of the First Amendment." 435 US at 838. Nonetheless, the Court did not indicate that other speech would be entitled to less protection.

[101] See id at 832 (noting that the newspaper's managing editor knew that it was a misdemeanor for anyone participating in the proceedings to divulge information about those proceedings).

Landmark indicates, therefore, that a prior restraint preventing CNN from publishing the information in its possession would violate the First Amendment, even if CNN knew that its source had violated Title III.

B. Title III as the Basis for a Prior Restraint

The Supreme Court has been unwilling to order a prior restraint absent a statute specifically providing for injunctive relief.[102] Even if a statute provides injunctive relief, a prior restraint will not pass constitutional muster unless the statute protects one of the few interests that justify this relief.[103] Thus, two inquiries must be made under Title III: (1) whether the statute provides injunctive relief to prevent the disclosure of unlawfully recorded conversations; and (2) whether Title III protects interests that justify a prior restraint.

1. *Injunctive relief under Title III.*

Section 2520(a) of Title III provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate."[104] "Appropriate relief" includes "such preliminary and other equitable or declaratory relief as may be appropriate."[105] Any person who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection" violates Title III.[106]

CNN's actions fall within Title III's provisions for injunctive relief because CNN "endeavor[ed] to disclose" the tapes of Noriega's attorney-client conversations: CNN manifested the intent to broadcast the tapes when it asked Rubino for his comments

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[102] See *New York Times*, 403 US at 718 (Black concurring); 403 US at 730 (Douglas concurring); 403 US at 730 (Stewart concurring); 403 US at 740 (White concurring); 403 US at 745 (Marshall concurring).

[103] See *Providence Journal*, 820 F2d at 1349 n 51 ("Even if Congress had authorized the issuance of a prior restraint under . . . Title III, a court could issue such an order only if the restraint met the standards articulated by the Supreme Court. Obviously, Congress cannot abrogate by statute the protection accorded the press under the First Amendment.").

[104] 18 USC § 2520(a) (1988).

[105] 18 USC § 2520(b)(1) (1988).

[106] 18 USC § 2511(1)(c) (1988).

on the tape. Moreover, CNN had reason to know that the tapes were obtained in violation of Title III because its primary interest in broadcasting the tapes was to show that the government had unlawfully recorded Noriega's attorney-client conversations.[107] Thus, Title III provides Noriega with an injunctive remedy against CNN.

The Supreme Court, however, has held that as a condition to statutory injunctive relief, the movant must show that he would be entitled to an injunction under general principles of equity.[108] Noriega would meet this requirement because Title III protects privacy interests that, under equitable principles, justify injunctive relief. Indeed, the legislative history of Title III indicates that a main purpose of the statute was to "protect[ ] the privacy of wire and oral communications."[109] Moreover, the Supreme Court has noted that "the protection of privacy was an overriding congressional concern" in the passage of Title III.[110]

These privacy interests meet the standards that equity requires for injunctive relief. Traditionally, a preliminary injunction will not issue absent a showing of "irreparable harm."[111] Violations of privacy rights inherently cause irreparable harm, because "such rights are often truly irreplaceable."[112] Thus, CNN's "clear, immediate, and irreparable" threat to Noriega's privacy rights justifies the imposition of a TRO.

2. *Privacy interests and prior restraints.*

Two courts have held that the privacy interests protected by Title III do not justify a prior restraint in light of the press's competing First Amendment rights. In *Matter of Providence Journal Co.*,[113] the First Circuit stated in dicta that Title III would not support a prior restraint[114] because "publication [that] would

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[107] CNN's Petition For Writ of Certiorari, No 90-767 at 8-9 (cited in note 95).

[108] *Hecht Co. v Bowles*, 321 US 321, 329-30 (1944); *Rondeau v Mosinee Paper Co.*, 422 US 49, 61 (1975).

[109] Omnibus Crime Control and Safe Streets Act of 1967, S Rep No 1097, 90th Cong, 2d Sess 66 (1968).

[110] *Gelbard v United States*, 408 US 41, 48 (1972).

[111] *Rondeau*, 422 US at 61. Although courts have deemphasized the importance of irreparable harm in recent permanent injunction cases, it remains significant in cases involving preliminary relief. Dobbs, 2 *Law of Remedies* § 2.11(2) at 253 (cited in note 92).

[112] Dobbs, 2 *Law of Remedies* § 2.11(1) at 252 (cited in note 92).

[113] 820 F2d at 1342.

[114] The *Providence Journal* court did not reach the issue of whether Title III justified a prior restraint because it found that the statute did not provide injunctive relief. See id at 1349. *Providence Journal*, however, was argued on September 11, 1986, and decided December 31, 1986. Congress enacted the injunctive remedy of Section 2520(b)(1) on October 21,

prove embarrassing or infringe [plaintiff's] privacy rights is . . . an insufficient basis for issuing a prior restraint."[115] Furthermore, in *In re King World Productions, Inc.*,[116] the Sixth Circuit found that the Title III injunctive remedy did not supersede the press's First Amendment right to be free from prior restraints.[117]

Nonetheless, other courts have held that privacy interests may justify a prior restraint. In *Near v Minnesota*,[118] for example, the Supreme Court enumerated certain "exceptional cases" that could justify a prior restraint.[119] Although the Court noted that it was not concerned with "questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity,"[120] the Court favorably cited an article suggesting that equitable relief should be available to protect individual privacy rights.[121]

Additionally, in *Commonwealth v Wiseman*,[122] the Massachusetts Supreme Court held that an injunction was proper to prevent the broadcast of a film showing psychiatric inmates in situations that "would be degrading to a person of normal mentality and sensitivity."[123] The court found that broadcast of the tapes would constitute a "massive, unrestrained invasion" of the patients' privacy

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1986. Therefore, the *Providence Journal* court may not have considered the new provision in its decision of the case, and may have reached a different conclusion had it considered the new enactment.

[115] 820 F2d at 1350.

[116] 898 F2d 56 (6th Cir 1990).

[117] See id at 59:

> Nothing in . . . [Title III] itself allows a complaint alleging a violation of [Title III] or an actual violation of [Title III] to supersede the press's exercise of their first amendment rights. While [Title III] proscribes certain conduct, it in no way provides for a prior restraint of the press in their exercise of first amendment rights even if the press's conduct clearly violates [Title III].

[118] 283 US at 697.

[119] Id at 716. The *Near* Court indicated three interests that would justify a prior restraint: (1) the publication of material crucial to national security, such as the sailing dates of transports or the number and location of troops; (2) the enforcement of the "primary requirements of decency" against obscene publications; and (3) the protection of the community against "incitements to acts of violence and the overthrow by force of orderly government." Id. This list is not exhaustive. See *Nebraska Press*, 427 US at 561 (holding that, under certain circumstances, a violation of a criminal defendant's Sixth Amendment rights may justify a prior restraint).

[120] *Near*, 283 US at 716.

[121] Id at 716 n 7, citing Roscoe Pound, *Equitable Relief Against Defamation And Injuries To Personality*, 29 Harv L Rev 640 (1916).

[122] 356 Mass 251, 249 NE2d 610 (1969).

[123] 249 NE2d at 615.

rights, and that the filmmaker had failed to obtain valid consent releases from the patients as the Commonwealth required.[124]

In *Cullen v Grove Press, Inc.*,[125] however, the court found that it could not restrain the broadcast of the *exact same film* at issue in *Wiseman* without violating the First Amendment. The *Cullen* court found that the condition of a psychiatric hospital was a matter of "legitimate public interest"[126] and, relying on *Time, Inc. v Hill*,[127] concluded that it could not restrain the press from disseminating this information unless the movant showed that the filmmaker knew that the tape falsely depicted the condition of the hospital or had acted in reckless disregard of the truth.[128] The court denied injunctive relief because the movant failed to make such a showing.

The conflict between *Wiseman* and *Cullen* bears strongly on the questions at issue in *Noriega*. As in *Cullen*, CNN claimed that the government's unlawful taping of Noriega's attorney-client conversations was a matter of public interest and was clearly authentic. This suggests that *Cullen* should control, and that the court could not protect Noriega's privacy rights through injunctive relief.

Nonetheless, unlike the condition of the psychiatric hospital at issue in both *Wiseman* and *Cullen*, which could not have been adequately conveyed without showing the film, CNN did not have to air the Noriega tapes in order to inform the public of the government's behavior. CNN could have instead aired a report stating that it possessed government tapes of conversations between Noriega and his attorney. Therefore, CNN could have facilitated public debate about the government's behavior in *Noriega* without broadcasting Noriega's attorney-client conversations.[129]

Thus, restraining the broadcast of the tapes at issue in *Noriega* does not involve "an injunction against the communication of ideas," but rather concerns the disclosure of unlawfully ob-

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[124] Id at 615-16. More recently, *Huskey v National Broadcasting Co., Inc.*, 632 F Supp 1282 (N D Ill 1986), held that injunctive relief may be available to prevent the broadcast of videotapes that invade a prisoner's right to privacy where the tapes were made without the prisoner's consent and where the broadcaster had both been informed that federal regulations prohibit filming inmates without their consent and had contractually agreed to abide by these regulations. Id at 1294-95.

[125] 276 F Supp 727 (S D NY 1967).

[126] Id at 729.

[127] 385 US 374 (1967).

[128] *Cullen*, 276 F Supp at 729.

[129] In fact, the *Wiseman* Court recognized that the condition of mental hospitals was a matter of public concern, but found that public discussion of this issue did not require the press to embarrass identifiable patients. 249 NE2d at 615-16.

tained wiretaps, a "private wrong"[130] for which Title III provides injunctive relief. Because CNN knew that the tapes were recorded unlawfully, an injunction preventing the broadcast of the tapes would have been available under Title III and consistent with the First Amendment.

C. The Adverse Incentives of Prior Restraints That Protect the Privacy Rights of Criminal Defendants

Although prior restraints may be constitutionally justified where they prevent the press from disseminating truthful information that could violate a defendant's privacy rights, these restraints raise troubling policy concerns. If courts issue prior restraints before the press in fact makes the information public, the number of privacy violations may actually increase, because such a rule would create an incentive for the press to release the information before the defendant learns that it exists.

For example, CNN did not have to take the Noriega tapes to Rubino before broadcasting them. If CNN had known that Noriega could obtain an injunction, it may have simply followed this course and faced the possibility of damages under Title III. Freeing CNN from the possibility of a prior restraint, in contrast, would give CNN the opportunity to establish a dialogue with Noriega. This dialogue would promote an exchange of information between the defendant and the press and allow the defendant to explain how disseminating the information may invade his privacy rights. This in turn would allow the press to make an informed editorial decision as to whether to broadcast the information.

Although it may seem unfair to force the victim to wait for publication before suing for damages,[131] this remedy is preferable to a system that relies on the extraordinary remedy of prior restraints. The judicial system often relies on the editorial integrity of the press to refrain from publishing highly prejudicial material.[132] Although such self-enforcement will necessarily be imper-

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[130] See *Huskey*, 632 F Supp at 1294 (noting the distinction between these two types of communications).

[131] See id at 1296 ("It is no answer for NBC to tell Huskey to wait for a telecast and then sue for damages.").

[132] See *Nebraska Press*, 427 US at 560 ("The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers."); *Providence Journal*, 820 F2d at 1353 n 75 ("Although the Journal's actions are not in keeping with its long and distinguished history of responsible journalism they cannot form the basis for [punishment].").

fect, it is preferable to a system that forces the press to quickly decide whether to reveal that it possesses material that may violate a defendant's privacy interests and run the risk of a prior restraint, or to publish the material and run the risk of post-publication sanctions.

Although CNN's decision to broadcast the Noriega tapes after consulting with Noriega's attorney may have been an error in editorial judgment, it is likely that CNN would have simply broadcast the tapes if it had known that a prior restraint was available. Thus, the "irreparable harm" that the restraint was intended to prevent would have occurred.[133] While prior restraints may be necessary under the narrow circumstances articulated in *Nebraska Press* to protect a defendant's Sixth Amendment rights, the legal system should rely on the editorial discretion of the press to protect the defendant's privacy interests.

CONCLUSION

This Comment concludes that *Noriega* was incorrectly decided. The district court erred in two ways: first, it failed to make the factual findings required by *Nebraska Press* that could have been made without reviewing the tapes that CNN possessed, and that would have established that the broadcast of the tapes would not violate Noriega's right to a fair and impartial jury; and second, the district court did not require Noriega to meet the proper burden with regard to his right to be free from the disclosure of trial strategy. Furthermore, the Eleventh Circuit erred in adopting the *Press-Enterprise* test, which regulates the press's limited right of access to court documents and proceedings, rather than the *Ne-*

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[133] In some situations the press may not be able to disseminate all the information at issue in a short period of time. See, for example, *New York Times*, 403 US at 759-60 (Blackmun dissenting) (the Pentagon Papers comprised forty-seven volumes, and the New York Times began to publish excerpts before the case began). In such a situation, a prior restraint could prevent the continued dissemination of the prejudicial material.

This argument is inapposite for two reasons. First, it is unlikely that material prejudicial to a criminal defendant's privacy rights will be so lengthy as to require dissemination over an extended period of time. For example, while it would have taken CNN several days to broadcast all the tapes in its possession, Noriega's privacy interests were violated as soon as the first excerpt was published. Second, a prior restraint cannot minimize the damage to privacy rights after the first dissemination of the material. If the press knows that the movant will be able to obtain a prior restraint after dissemination of a portion of a long document or tape, the press will have an incentive to publish as much of that document or tape as possible immediately. Moreover, the press will first publish that portion that is of the greatest public interest. In most situations, this also will be the most prejudicial portion. Thus, the availability of a prior restraint after limited dissemination of material creates the same adverse incentives as the availability of a pre-publication restraint.

braska Press test, which provides greater protection to the fundamental right to be free from prior restraints. Thus, the Supreme Court should have granted certiorari and reversed.

Title III, however, could have justified a prior restraint in *Noriega*. The government violated Title III when it recorded the conversations between Noriega and his attorney, a violation of which CNN had knowledge. Noriega, therefore, could have obtained injunctive relief under Title III.

Nonetheless, imposing a prior restraint in this situation would have caused more privacy violations than it would have prevented because the availability of prior restraints encourages the press to make potentially prejudicial information public before the criminal defendant learns of its existence. Therefore, while prior restraints may be appropriate to protect constitutional rights under limited circumstances such as those defined in *Nebraska Press*, granting prior restraints to prevent violations of privacy rights would actually encourage violations of these rights. The costs of this remedy would therefore outweigh its benefits, making the adoption of such a remedy an unwise development in First Amendment jurisprudence.