The Burger Court Opinion Writing Database

Nebraska Press Association v. Stuart

427 U.S. 539 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 26, 1975

Re: A-426 - Nebraska Press Assoc. v. Stuart, Judge,
District Court of Lincoln County, Nebraska

MEMORANDUM TO THE CONFERENCE:

The motion to vacate Justice Blackmun's (Chambers) order in this case is addressed to the full Court. Since there is no change in conditions since the discussion at last week's Conference, I vote to let the matter remain in its present state. In short, I vote to deny the motion to vacate the November 20 order.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 11, 1975

Re: No. 75-817 - Nebraska Press Association, et al. v. Stuart

MEMORANDUM TO THE CONFERENCE:

Attached is a proposed order as to which Bill Brennan, Bill Rehnquist and I have agreed.

Absent dissent by 9:30 a.m. Friday, December 12, this will be released as a special order at 10:00 a.m. Friday.

Regards,

WEB

Draft
12/11/75

No. 75-817 - Nebraska Press Association, et al. v. Stuart

ORDER

The motion of Nebraska Press Association, et al., for leave to treat their application as a petition for certiorari having been heretofore granted, it is ordered:

1. The petition for certiorari is granted;

2. The motion to expedite is denied.

   Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the motion.

3. The application for a stay is denied.

   Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall would grant the application.

   Mr. Justice White would stay the judgment of the Nebraska Supreme Court to the extent that its order forbade the publication of information disclosed in public at the preliminary hearing in the criminal case out of which this case arose. In this respect, he is in disagreement with the Court's actions in this case today. He joins the Court in granting the petition for writ of certiorari and in ordering plenary consideration of this case, which as he understands it raises issues broader

than the power of the State to enjoin the publication of facts disclosed at a public hearing in a state court. Being convinced that these questions should be decided only after adequate briefing and argument and ample time for mature consideration, he is in agreement that we should not attempt to hear and decide this case prior to the beginning of the criminal trial in early January.

4. Petitioners Nebraska Press Association, et al., are invited to file an amended petition for certiorari on or before December 30, 1975.

NEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1976

Re: 75-817 - Nebraska Press Association v. Stuart, Judge

MEMORANDUM TO THE CONFERENCE:

Enclosed is typewritten draft in which I have undertaken to express the views of all but those who would regard prior restraint barred in all cases and for whatever reason. My own reexamination of all the relevant cases suggests that, unlike the situation in England, such a showing is very difficult to make under the First Amendment as construed by the Court, but neither is it a total impossibility, as yet; and this case does not call for going that far.

Part VI, the dispositive section, is sent out earlier than I would prefer, due to the lateness of the date, as others have noted on some opinions. It is open to accommodation to all views except those which would decide now and forever to bar prior restraint against pretrial publicity.

Since the function of the author of an opinion, particularly in a sensitive area such as this, is to give voice to the positions of five or more Justices, I am prepared to consider other views in order to achieve a Court opinion. Since we want to get the Brennans on that Ferry by July 4 (?), my door is open for conferences on this case to explore any needed accommodation.

I am continuing an effort to condense Part VI.

Regards,

WEB

To: Mr. Justice Brennan
Mr. [illegible]rt
Mr. [illegible]
[illegible]ell/
[illegible]n
[illegible]
[illegible]st
[illegible]

From: The Chief Justice

Circulated: JUN 7 1976

Recirculated: _____

No. 75-817

NEBRASKA PRESS ASSOCIATION, et al.

v.

STUART

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The respondent state District Judge entered an order restraining the petitioners from publishing or broadcasting, among other things, facts "strongly implicative" of the accused in a widely-reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made to the state court in this case violated the constitutional guarantee of freedom of the press.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1976

Re: 75-817 - Nebraska Press v. Stuart

Dear Bill:

If the Conference consensus was as you suggest, to "forever bar prior restraint" on pretrial publicity, I would be prepared to articulate that, but that is not my recollection. I will await other responses.

Regards,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1976

PERSONAL

Re: 75-817 - Nebraska Press Association v. Stuart, Judge

Dear Lewis:

Thank you for your note of June 8.

Part VI is obviously the heart of the case but it presents a clear choice: do we go "whole hog" as Bill Brennan would, or do we let this problem evolve? Byron has articulated what my Part VI plainly implies. However, I am open, as my cover memo suggested, to accommodate those who agree we should take one step at a time. The simplest way is to sit down and go over your ideas on Part VI.

John's memo, incidentally, graphically depicts one of several instances that might call for a restraint. There may be others. We simply are not capable of anticipating all that might develop in the future. The Court has gotten itself into the quicksand over the past 20 years doing just that.

Let's discuss.

Regards,

WEB

Mr. Justice Powell

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1976

Re: 75-444 - Farr v. Pitchess
75-919 - Rosato v. Superior Court of California, Etc.
75-1296 - Cunningham v. Chicago Council of Lawyers

MEMORANDUM TO THE CONFERENCE:

Anticipating somewhat, I give you my comments on cases heretofore held for No. 75-817 - Nebraska Press Ass'n. v. Stuart.

1. No. 75-444 - Farr v. Pitchess

Petr in 1969 was a reporter who obtained a witness's statement from attorneys in the Charles Manson trial; releasing the statement violated a "gag" order entered by the trial court. A good deal of the statement, all of which was published, was found inadmissible. Petr declined to reveal his sources during the trial, citing a California reporter's privilege statute.

After trial, when petr moved into the employ of the District Attorney, the court began another inquiry. Although petr stated that he got the statement from two of the attorneys in the case, he refused to reveal from which two of the six attorneys of record he had obtained it. The judge confined him until he answered (various stays interrupted his jail time), since the judge concluded that the California statute no longer protected petr and that the statute did not protect his solicitation of statements in violation of a court order. Direct appeal was unsuccessful, and we denied certiorari. 409 U.S. 1011 (1972).

Petr then commenced the present §2254 action, having in the meantime refused to purge the contempt by answering. The District Court denied relief, rejecting a number of arguments; CA 9 affirmed, discussing only a Branzburg v. Hayes, 408 U.S. 665 (1971), claim. Petr argues here that the trial judge erred in concluding that Sheppard v. Maxwell fair trial interests were at stake; that petr was protected by the California reporter's privilege statute and could not be stripped of that protection. He also argues that the trial judge should have disqualified

Stylistic changes throughout

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Printed

JUN 25 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-817

Nebraska Press Association et al., Petitioners, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, et al.

On Writ of Certiorari to the Supreme Court of Nebraska.

[June —, 1976]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

I

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news cov-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 28, 1976

Re: 75-817 - Nebraska Press Assn. v. Stuart, Judge

MEMORANDUM TO THE CONFERENCE:

A change in the final paragraph of my June 25 circulation (first printed draft) has brought a request to make what seems to me an acceptable change. Beginning on the 10th line from the bottom on page 29, it would now read:

> "We hold that with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings which were held in public, the barriers have not been overcome; to the extent . . . ."

I should add that the term "orders" in my June 25 circulation was not precisely correct since there was only one "order" under review, i.e., the order as finally approved by the Supreme Court of Nebraska.

Absent prompt response I will proceed.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-817 Nebraska Press v. Stuart

I enclose the opinion concurring in the judgment that I mentioned at yesterday's conference. Its approach, in the Chief's words, is "forever to bar prior restraint against pretrial publicity," which I thought was the conference consensus.

W.J.B. Jr.

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-817

Nebraska Press Association et al., Petitioners, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, et al.	On Writ of Certiorari to the Supreme Court of Nebraska.

[June —, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, in advance of publication,[1] from reporting or commenting on information acquired from public court proceedings, public court records, or other sources about pending judicial proceedings. The Nebraska Supreme Court upheld such a direct prior restraint on the press, issued by the judge presiding over a sensational state murder trial, on the ground there existed a "clear and present danger that pretrial publicity could substantially impair the right of the defendant [in the murder trial] to a trial by an impartial jury unless restraints were imposed." Amended Pet. for Writ of Cert., at 56A. The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad

[1] In referring to the "press" and to "publication" in this opinion, I of course use those words as terms of art that encompass broadcasting by the electronic media as well.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 9, 1976

RE: No. 75-817 Nebraska Press Assn. v. Stuart

Dear John:

Thanks so much for your memorandum of June 9. I think my concurring opinion evinces that I am not unaware of the concerns you express. But my view reflected in the concurrence is that those concerns are cognizable only after publication. For example, I should think the media in your hypothetical would risk criminal prosecution under the Safe Streets Act as well as civil actions under that statute and common law. But the very essence of the prior restraint doctrine is that sanctions must await the publication. Accordingly, I am unable to make exceptions of the kind you apparently are thinking about.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

P.S. At Potter's suggestion I am deleting the last sentence of note 27 at page 30.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1976

No. 75-817, Neb. Press Assn. v. Stuart

Dear Bill,

Please add my name to your concurring opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1975

Re: No. 75-817 - Nebraska Press Association v. Stuart

Dear Chief:

I am considering filing the following statement in the above case in the event the case is set down for argument next year:

"Memorandum of Mr. Justice White.

"I would stay the judgment of the Nebraska Supreme Court to the extent that its order forbade the publication of information disclosed in public at the preliminary hearing in the criminal case out of which this case arose. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In this respect, I am in disagreement with the Court's actions in this case today. I join the Court in granting the petition for writ of certiorari and in ordering plenary consideration of this case, which as I understand it raises issues broader than the power of the State to enjoin the publication of facts disclosed at a public hearing in a state court. Being convinced that these questions should be decided only after adequate briefing and argument and ample time for mature consideration, I am in agreement that we should not attempt to hear and decide this case prior to the beginning of the criminal trial in early January."

Sincerely,

The Chief Justice

Copies to Conference

WB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-9-76

Recirculated: _____

No. 75-817 - Nebraska Press Association v. Stuart

Mr. Justice White, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no farther than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

no changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-10-76

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–817

Nebraska Press Association et al., Petitioners, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, et al. } On Writ of Certiorari to the Supreme Court of Nebraska.

[June —, 1976]

MR. JUSTICE WHITE, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no farther than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1976

Re: No 75-817 -- Nebraska Press v. Stuart

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 11/14/75

No. A-426

Recirculated: _____

Nebraska Press Association et al., Applicants, v. Hugh Stuart, Judge, District Court of Lincoln County, Nebraska. } On Application for Stay.

[November 13, 1975]

MR. JUSTICE BLACKMUN, Circuit Justice.

This is an application for stay of an order of the District Court of Lincoln County, Neb., that restricts coverage by the media of details concerning alleged sexual assaults upon and murders of six members of a family in their home in Sutherland, Neb.; concerning the investigation and development of the case against the accused; and concerning the forthcoming trial of the accused. The applicants are Nebraska newspaper publishers, national newswire services, media associations, a radio station, and employees of these entities.

The accused is the subject of a complaint filed in the County Court of Lincoln County, Neb., on October 19, 1975. The complaint was amended on October 22 and, as so amended, charged the accused with having perpetrated the assaults and murders on October 18. On October 21, the prosecution filed with the County Court a motion for a restrictive order. This motion alleged "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

From: Blackmun, J.

Circulated: _____

Recirculated: 11/21/75

SUPREME COURT OF THE UNITED STATES

No. A-426

Nebraska Press Association et al., Applicants, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska. } On Reapplication for Stay.

[November 20, 1975]

MR. JUSTICE BLACKMUN, Circuit Justice.

An application for stay of the order dated October 27, 1975, of the District Court of Lincoln County, Neb., resulted in my issuance of a chambers opinion, as Circuit Justice, on November 13. In that opinion I indicated that the issue raised is one that centers upon cherished First and Fourteenth Amendment values; that the challenged state court order obviously imposes significant prior restraints on media reporting; that it therefore came to me " 'bearing a heavy presumption against its constitutional validity,' " *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971); that if no action on the application to the Supreme Court of Nebraska could be anticipated before December 1, there would be a delay "for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly assert"; that, however, it was highly desirable that the issue should be decided in the first instance by the Supreme Court of Nebraska; and that "the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty." I stated my ex-

WB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1975

MEMORANDUM TO THE CONFERENCE

Re: A-426 - Nebraska Press Assn. v. Stuart

Another district judge in Nebraska has issued a gag order in a murder case and has done so, apparently, in partial reliance on my November 20 in-chambers opinion. Counsel is calling this to the attention of the Court. I have asked Mr. Lorson to circulate this to the Conference and to Mr. Ginty.

We are also advised that the Supreme Court of Nebraska finally got around to doing what it perhaps should have done some time ago. Apparently a 17-page opinion was issued December 1. Mr. Lorson is waiting for a copy. Hopefully, it will be here today or tomorrow and will be circulated.

Harry

cc: Mr. Ginty

A-426 - Nebraska Press Association, et al. v. Stuart

On November 21, 1975 the petitioners filed a motion with the full Court to vacate in part Mr. Justice Blackmun's stay order filed herein on November 20, 1975. Inasmuch as the order of November 20 was directed solely to the order dated October 27, 1975 of the District Court of Lincoln County, Nebraska and by its terms was subject to such action as might subsequently be taken by the Supreme Court of Nebraska, and inasmuch as the Supreme Court of Nebraska on December 1 issued its order in the matter and Mr. Justice Blackmun's order has thereby expired and is no longer effective, the petitioners' motion is denied. This denial, of course, is without prejudice to the Court's consideration of the petitioners' further application for stays and for other relief filed with this Court on December 4, 1975 and presently pending.

W.O.D.

December 5, 1975

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 11, 1975

Re: No. 75-817 - Nebraska Press Association, et al.
v. Stuart

Dear Chief:

My only suggestion -- and it is not a very serious one -- is that paragraph 4 contain an additional sentence granting leave to the respondents, or any of them, to file such response as they feel might be indicated by January 15, 1976. (If they choose not to act, that is all right with me. I just do not want them to feel foreclosed.)

Sincerely,

Harry

The Chief Justice

cc: The Conference

June 3, 1976

Re: No. 75-817 - Nebraska Press Assn v. Stuart

Dear Chief:

I have added a few items to your proposed footnote 2. The result is enclosed for your consideration.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1976

Re: No. 75-817 - Nebraska Press Association v. Stuart

Dear Chief:

I can join an opinion along the lines of that circulated June 7. It is my understanding that you are endeavoring to condense part VI.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 6, 1975

No. A-426 Nebraska Press Association
v. Stuart

Dear Harry:

Your proposed order is fine with me.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1976

No. 75-817 Nebraska Press

Dear Chief:

You inquire whether a majority of the Conference is willing in this case "to forever bar prior restraint on pretrial publicity".

In my view, it is not necessary to go so far - certainly in the case before us. Nor did I understand that a majority of the Conference voted to hold that never, under any conceivable circumstances, would a court have the power to restrain prejudicial publicity even for the briefest period of time. I have not thought that our previous decisions justify such a sweeping final conclusion.

I would agree, of course, that there can be no restraint against the publication of any information that occurs in open court or that becomes a part of the public record. Cox settled as much.

On the facts of this case, I have no difficulty in concluding - as I voted at Conference - that the prior restraint approved by the Nebraska Supreme Court was violative of the First Amendment. I could support this conclusion in a fairly brief opinion without the degree of "balancing" included in your first draft. I would simply decide the case before us, and say that it is unnecessary to determine there never could be a prior restraint on pretrial publicity. Of course, as you have stated, the presumption is against any such restraint and one who asserts a need for it bears a heavy burden indeed.

Although I have not had an opportunity to read Bill Brennan's opinion with any care, there seems to be language

in it which goes beyond prior restraint with respect to pretrial publicity. I see no occasion to indicate a view as to the invalidity of prior restraint in other possible situations.

This is a rather long response to your inquiry. I have thought this desirable to indicate also that I have some difficulty with the way your Part VI is written, as it seems to speak somewhat more broadly than the specific facts of this case require. Nor can I join Bill's opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

June 9, 1976

No. 75-817 Nebraska Press

Dear Chief:

If I get too far out of line in this case, you might cite an article I published in the American Bar Journal on the subject of fair trial/free press some 11 years ago.

The article rarely turns up in the literature perhaps because the title is not descriptive: "The Right to a Fair Trial," 51 American Bar Association Journal 534 (June 1965).

You might have one of your law clerks take a look at it. I have not reread it with any care, and I don't promise not to be the victim of "evolving standards" of allowing the media to do as it pleases.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

LFP/gg 6-18-76

From: Mr. Justice Powell

Circulated: JUN 21 19??

Recirculated: _____

No. 75-817 NEBRASKA PRESS v. STUART

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the state or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity. *

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives

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* In Times-Picayune Publishing Corp. v. Schulingkamp 419 U.S. 1301, 1307 (1974), a Chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

1st DRAFT printed

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 21 1976

SUPREME COURT OF THE UNITED STATES

No. 75-817

Nebraska Press Association et al., Petitioners, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, et al. } On Writ of Certiorari to the Supreme Court of Nebraska.

[June —, 1976]

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the state or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity.*

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fair-

*In *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1307 (1974), a in-chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 8, 1975

Re: No. A-26 - Nebraska Press Association v. Stuart

Dear Harry:

Please join me.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 22, 1976

Re: No. 75-817 - Nebraska Press Association v. Stuart

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1976

Re: 75-817 - Nebraska Press Association v. Stuart, Judge

MEMORANDUM TO THE CONFERENCE

Bill Brennan's concurrence comes closer to expressing my views than does the opinion prepared by the Chief Justice. I am not prepared, however, to state quite as positively as he does at the bottom of page 27 and in the last full sentence on page 33, that there could never be a case in which any restraint would be appropriate. Consider, for example, the possibility of surreptitious recording of strategy conferences between the defendant and his lawyer. Perhaps there is a constitutional right to publish even that kind of information, but I hesitate to decide the most extreme cases in the abstract without the benefit of argument.

Where this leaves me at the moment, I am not quite sure. However, if the drafts remain as they are I will probably write separately and briefly.

Respectfully,

JPS

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

No. 75-817 - Nebraska Press Association, et al. v. Stuart

From: Mr. Justice Stevens

Circulated: JUN 21 1976

Recirculated: _____

MR. JUSTICE STEVENS, concurring.

For the reasons eloquently stated by Mr. Justice Brennan, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See Ashwander v. Valley Authority, 297 U.S. 288, 346-347 (Brandeis, J., concurring). I do, however, subscribe to most of what Mr. Justice Brennan says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: 6/24/76

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–817

Nebraska Press Association et al., Petitioners, *v.* Hugh Stuart, Judge, District Court of Lincoln County, Nebraska, et al. — On Writ of Certiorari to the Supreme Court of Nebraska.

[June —, 1976]

MR. JUSTICE STEVENS, concurring in the judgment.

For the reasons eloquently stated by MR. JUSTICE BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See *Ashwander* v. *Valley Authority*, 297 U. S. 288, 346–347 (Brandeis, J., concurring). I do, however, subscribe to most of what MR. JUSTICE BRENNAN says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.