The Washington Post Democracy Dies in Darkness

Opinion: The 'Let's Go Brandon' Oregonian, a New York judge and the true meaning of the First Amendment

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This is the time of year for talk about the true meaning of Christmas. This year, it seems, we need to talk a bit about the true meaning of the First Amendment as well.

Two otherwise unconnected Christmas week episodes bring freedom of speech to the forefront. First, an Oregon man, Jared Schmeck, who insulted President Biden on a Christmas call with the president and then complained that he was being attacked for exercising "my God-given right to express my frustrations in a joking manner."

Next, a New York state judge, Charles D. Wood, who not only kept in place his blatantly unlawful prior restraint against the New York Times for publishing documents obtained from Project Veritas but also ordered the newspaper to turn over physical copies and destroy any electronic versions of the material.

Let me exercise my Constitution-given right to express my frustrations to suggest that neither individual understands the first thing about the First Amendment.

Schmeck had every legal right, as he says, to be rude to the president while he and the first lady were answering calls to NORAD's Santa tracking center. Schmeck ended the call with "Merry Christmas and 'Let's Go Brandon'" — then insisted he meant "no disrespect" by the obviously disrespectful phrase, whose meaning no longer requires elucidation.

Here we get to the meaning of the First Amendment. It means that here, unlike in authoritarian countries, Schmeck not only has the right to say what he wants about the president, he also can say it directly to him, without fear of being jailed, being fined or being punished by the government in any way.

His freedom of speech is near absolute — just like that of the person who burns an American flag or wears a jacket emblazoned with "F--- the Draft" into a courthouse. No one can punish him — not in America. (At least not yet; see, for example, Donald Trump's threat to "open up our libel laws.")

But it is also fair game for others to criticize Schmeck for what he said. "I am being attacked for utilizing my freedom of

Enforced silence brings us to the even more dangerous — and even more ignorant — event of the past week: Wood's order against the Times. The law here could not be clearer: Nothing is more repugnant to the First Amendment than telling a news organization what it can and can't publish.

The Supreme Court underscored that principle in the 1971 Pentagon Papers case, *New York Times Co. v. United States*, in which the government sought to prevent the Times and The Post from printing classified documents. "These disclosures may have a serious impact," Justice Hugo Black wrote in rejecting that effort. "But that is no basis for sanctioning a previous restraint on the press."

Now comes Justice Wood, who, it is safe to say, is no Justice Black. His ruling came in a libel suit filed against the Times by Project Veritas, the conservative group that runs sting operations to expose alleged liberal bias in various institutions, including the mainstream news media.

The Justice Department is separately investigating the possible theft of a diary belonging to President Biden's daughter, Ashley Biden; the diary ended up in the possession of Project Veritas, which didn't publish the material and offered to return it. The Times, in the course of reporting on that probe, published quotes from memos prepared by a Project Veritas lawyer.

Although the memos were prepared years before the libel suit was filed and were not obtained in conjunction with the case, Wood last month ordered the Times not to publish any additional material from them. In the latest order, which the paper has said it will appeal, he reaffirmed that ruling and further instructed that the Times surrender the disputed material.

The opinion is jaw-dropping in its constitutional illiteracy. Project Veritas has aggressively inserted itself into the political debate; its operations are a legitimate topic for news coverage, yet Wood found that the Times's reporting on the group's legal strategy is not a matter of "public concern." He also determined that Project Veritas had adequately shown that the memos were "obtained by irregular means" — what those of us in the news business generally call reporting.

"[S]ome things are not fodder for public consideration and consumption," Wood wrote. "A client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public. It is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel."

And: "As important as the First Amendment's protection against prior restraint is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern."

No, a thousand times no. The essence of the Supreme Court's teachings on the dangers of prior restraint is that it is not up to judges to determine in advance what is newsworthy. If the Times obtained internal memos, it is as entitled to publish them as it was to publish the classified material in the Pentagon Papers.

Schmeck at least has the defense of not having attended law school. Let us hope that a higher court will soon educate Wood in the meaning of the document he is sworn to uphold.

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