EIGHT GREAT COURT OF THE UNITED STATES DECISIONS ON THE FIRST AMENDMENT

Over the years, the Supreme Court of the United States has decided key cases on the topic of Freedom of Speech and Press. It is argued here that a United States Court of Appeals decision also remains notable over time because it shows continuing power as precedent. Here is a "GREAT EIGHT" list for you to study, seven U.S. Supreme Court decisions, plus one copyright case which never got to the Supreme Court. See whether you agree with the rankings of these cases, presented here in descending order.

1. **Near v. Minnesota, 683 U.S. 697 (1931).** Set boundaries for government use of pre-publication censorship.

2. **New York Times v. Sullivan, 376 U.S. 254 (1964).** Protects media against libel suits by public officials unless they can meet the strict "actual malice" standard of proof. Emphasized the importance of a free press to a free society.

3. **Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).** Explained categories of libel plaintiffs (public official, public figure, private person) and the standards of proof ("fault") they must show to collect compensatory damages, punitive damages, or both.

4. **Grosjean v. American Press Co., 297 U.S. 233 (1936).** Government may tax media like other businesses, but it may not use taxes to punish or discriminate against the press. Two principles: "The power to tax is the power to destroy." Discriminatory taxation of media is forbidden by the First Amendment.

5. **New York Times Co. v. United States, 403 U.S. 713 (1971), the "Pentagon Papers case."** Forty years after the *Near v. Minnesota* decision limited pre-publication censorship, a study classified "Top Secret" and done for the Department of Defense was leaked to *Times* reporter Neil Sheehan. Although the U.S. Supreme Court rejected prior restraint to stop the Times' stories about the "Pentagon Papers," the Court's 6-3 vote boiled down to a statement that the U.S. Department of Justice had not proven its case.

6. **Gitlow v. New York, 268 U.S. 652 (1925)** It may be argued that the *Gitlow* decision was a major step toward nationalizing the First Amendment, toward applying it to the states. Note that the First Amendment's language, beginning with the words "Congress shall make no law . . ." long was held to apply only to the national or federal government.

7. **Rosemont Enterprises, Inc. v. Random House, Inc. and John Keats, 366 F.2d 303 (U.S.C.A., 1966).** Because of the influential Circuit Court of Appeals Judge Leonard P. Moore, his ruling in a "fair use" copyright decision broadened the freedom to use copyrighted works in the public interest. Beside setting that legal precedent, his words on fair use in the *Rosemon*t decision ten years later infleunced the nation's key copyright enactment, the Copyright Act of 1976.

8. **[The dissenting opinion in] Abrams v. United States, 250 U.S. 616 (1919).** During the war hysteria of World War I, Jacob Abrams was convicted of violating the Espionage Act of 1917 and its 1918 "sedition"amendment. In dissent, Justice Oliver Wendell Holmes denounced Abrams' conviction. Justice Holmes adapted the legendary poet John Milton's free speech ideas into what has become a famous free-expression slogan: the

"marketplace of ideas." The passionate statement for freedom in this dissent may be traced to decisions later decisions favoring free expression.

CASE SUMMARIES: "THE GREAT EIGHT"

1. ***Near v. Minnesota,*** 283 U.S. 697 (1931).

Issue: Prior restraint (pre-publication censorship by government). With good reason, prior restraint is called the most hated form of censorship. If government can stop a message completely before it gets to the public, that is far more threatening to freedom than punishment after the fact of publication.

Facts: J.M. Near and Howard Guilford were publishing *The Saturday Press*, a Minneapolis "smear sheet" that delighted in attacking public officials. The newspaper published accusations that gangsters controlled gambling in Minneapolis, and bootlegging and racketeering were allowed to flourish because government and police officials were not doing their jobs. *The Saturday Press* also attacked Jews and Catholics. Local authorities found an old, unused statute on the books, one allowed prior restraint of "nuisance" or "undesirable" publications. The statute said that a publisher found guilty of producing such a nuisance sheet could be halted by a judge's injunction to stop all publication activities. The judge made his injunction permanent, but told Near that he could again publish if he could convince the court that he would run a newspaper without objectionable content. Near and Guilford appealed to the Minnesota Supreme

Court, which upheld the trial court's prior restraint order, ruling that freedom of the press did not protect publications "devoted to scandal and defamation."[1]

Legal Question: Is censorship by prior restraint of a newspaper allowed under the First Amendment?

Decision: No, except in crisis situations such as reports of troop movements, or incitement to violence or overthrow of government, or publication of obscene material.

(Vote: 5-4)

Reasons: Chief Justice Charles Evans Hughes delivered the opinion of the Court. Invoking Anglo-American legal history, Hughes found that the English legal scholar Sir William Blackstone would have allowed no prior restraint whatsoever, but would have punished criticism of government *after publication* as seditious libel. Chief Justice Hughes, in a double modification of Blackstone, wrote that prior restraint could be used by government in limited circumstances, but declared that Americans have a right—perhaps even a duty—to discuss and debate the character of conduct of public officers.[2] Hughes wrote that prior restraint could occur in wartime, for example, to suppress information about movements of troop ships. Similarly obscene publications could be halted, as could incitements to violence or threats to overthrow government.

Hughes emphasized the need for a vigilant and courageous press, especially in large cities. Then he wrote: "The fact that the liberty of the press may be abused by

[1] Near v. Minnesota ex rel Olson, 283 U.S. 697, 702-707 (1931).

[2] *Ibid.,* pp. 719-720.

miscreant purveyors of scandal does not make any less the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

Note: The *Near* decision was the first case nationalizing the First Amendment, applying the First Amendment against state actions through the language of the Fourteenth Amendment.

2. ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964).

Issue: The right to criticize public officials and government was at stake here. Background: over the centuries, there have been court cases involving both **seditious libel** and **civil libel.**

Seditious libel is a centuries-old crime with origins in English law. That crime meant you could not rigorously criticize government or government officials, including the English royal family. There have been episodes of seditious libel in the United States, including during wartime (especially World War I, 1917-1918). Civil libel, on the other hand, seeks monetary damages (payments) for injury to reputation. Although seditious libel had been largely abandoned in the United States by the last two-thirds of the 20th Century, civil libel became a major threat to American news media during the nation's civil rights struggles in the 1960s, threatening—through huge libel suit judgments against the press--to turn the nation's news media from watchdogs to lapdogs.

Facts: A full-page editorial advertisement captioned "Heed Their Rising Voices" was published by *The New York Times* in 1963, telling of the struggles of African-American

students to attend Alabama State College in Montgomery. The advertisement complained about the "wave of terror" that confronted the students, and told of violence against Rev. Martin Luther King, Jr. as he led the civil rights movement. Excerpts from this advertisement, paid for and signed by civil rights organizations and listing the names of four Alabama ministers, follow:

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in wide-spread, non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.

In their effort to uphold these guarantees they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. * * *

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shot-guns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission. * * *

Again and again the Southern violators have answered Dr. King's protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" – a *felony* under which they would imprison him for *ten years.* Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. * * *

The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

L.B. Sullivan was commissioner of Public Affairs for the City of Montgomery, one of three elected commissioners. He supervised the police and fire departments and the department of cemetery. Even though Sullivan was not named in the advertisement, he sued for libel in because he supervised the Montgomery County Police Department, people would see him as the person responsible for police action at the Alabama State College campus. Also, he declared that by association, people would tie him to the actions against Rev. King.

As required by Alabama libel law, Commissioner Sullivan wrote a letter to the *Times,* demanding a retraction. The ads included errors of fact, which could have been caught and stopped by the *Times's* advertising department. The *Times,* however, responded that it could not see how the statements in the ad reflected on him. In his letter, Sullivan pointed to errors in the ad which blamed him for actions taken by Montgomery police. [See excerpts from the "Heed Their Rising Voices" ad, above.] Those actions included padlocking the college dining hall, and seven arrests of Rev. King. But the dining hall was not padlocked and three of the arrests of Dr. King occurred before Sullivan was elected commissioner. Sullivan wrote similar letters to the four black ministers from Alabama whose names appeared at the bottom of the ad, but they did not reply. The believed, because their names were placed on the ad without their consent, that they had not published anything.[3] Sullivan sued for libel in an Alabama court, and a jury awarded him $500,000. The *New*

[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, at 261 (1964).

York Times appealed, but the Alabama Supreme Court reaffirmed the award. Governor Richard Patterson also sued the *Times* for libel, and also won a $500,000 award.[4]

[**Note**: Legal procedure often is as pivotal as substantive law in court cases. As the saying goes, your rights are only as good as your legal remedies. The libel suits by Sullivan and Patterson took place in Alabama courts because the people who placed the advertisement in *The New York Times* added the names of the four African-American ministers: all were Alabamians. If the libel suits had been limited to the newspaper, a New York corporation, and Alabama plaintiffs Sullivan and Patterson, the case might have been tried in federal court, a court presumably less open to local prejudices. Because there is not federal law of libel, the Supreme Court of the United States dealt with Alabama libel law. Although libel laws vary from state to state, one basic element of any libel suit anywhere is *identification.* One internal rule of the U.S. Supreme Court is that it reaches constitutional issues only as a last resort, when a case cannot be decided on any other basis. So the U.S. Supreme Court could have simply overturned the libel judgment in favor of Sullivan, saying that under the law of Alabama, Sullivan had not been identified. After all, his name was not used, and he was one of hundreds involved in the police and fire departments of Montgomery County. It is evident that the Supreme Court agreed to hear this appeal because it saw great issues at stake, nothing less than freedom of the press and the right to criticize public officials.]

[4]See Dwight L. Teeter, Jr. and Bill Loving, *Law of Mass Communications*, 13th ed. (New York: Foundation Press, 2012), pp. 284-286.

Justice William J. Brennan, Jr., was assigned to write the opinion for the Court. To decide this appeal, he faced numerous issues of law and of fact.

Reasons:

***Advertisements Given Some First Amendment Protection in 1964**: Because Sullivan's libel suit sought damages for an advertisement, his attorney argued that under the precedent of a Supreme Court decision in *Valentine v. Chrestensen* (1942), there was no First Amendment protection for advertising.[5] Sullivan's lawyers argued that factual errors in the advertisement destroyed any possible First Amendment protection for the newspaper. The *Sullivan* decision found that constitutional protection still existed. Justice Brennan wrote that the advertisement had social and informational value: The advertisement, Brennan declared[6]

> * * * communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of highest public concern * * * That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold * * * Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . . The effect would be to shackle the First Amendment.

The Court said the question about the advertisement was whether it forfeited constitutional protection ". . .by the falsity of some of its factual statements and by its alleged defamation. . ." of L.B. Sullivan.

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[5] *Valentine v. Chrestensen,* 316 U.S. 52 (1942).

[6] *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).

***Unintentional Falsity Does Not Destroy First Amendment Protection:** Clearly realizing the importance of this decision to the future of free discussion in the United States, Justice Brennan wrote that the falsity of some statements in the ad did **not** destroy First Amendment protection for the clergymen and for the *Times*. Sullivan's lawyers relied on the Alabama rule of law saying that inaccuracies, even those published in good faith, would destroy the defense of truth. But Justice Brennan concluded for the Court that ". . .erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive * * *."[7]

Nationwide Impact of *New York Times Co. v. Sullivan* (1964)

The *Sullivan* decision ended Alabama's rule that a libel defendant had no legal defense unless he could convince a jury that his statements were completely true. Because Alabama libel law was similar to that in many other states, the U.S. Supreme Court's *Sullivan* decision had a nation-wide effect. The Court declared, "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. The Court further declared its support for free discussion of public officials: "Criticism of their official conduct does not lose its constitutional protection merely because it is effective and hence diminishes their official reputations."[8]

The "Sullivan Rule:" The Constitutional Defense of Actual Malice

[7] Quoted in Teeter and Loving, *op. cit.*, p. 288.

[8] *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

In *Sullivan*, the Court got beyond the ancient legal tradition in libel of finding "malice" (in the sense of ill will) on the part of a publisher who published something held to be defamatory. Instead, Justice Brennan created a new constitutional standard to be overcome before a public official won a libel case. To win, the public official would have to prove that the offending words were false, and that the publisher knew (or should have known) that they were false. Justice Brennan's words:[9]

> The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Consider some of the changes made in libel laws by *New York Times v. Sullivan:*

- For the first time, advertising was given some First Amendment protection.
- It was established that unintentional falsity no longer would remove constitutional protection from discussion of public officials.
- The tough "actual malice" standard of proof took away public officials' ability to harass the press through libel suits unless they could prove that the publisher knew something was false or published with reckless disregard of whether it was false or not.

[9] *Ibid.,* pp. 279-280.

3. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974): Extending the "Actual Malice" Defense from Public Officials to Public Figures.

Issue: Elected or appointed public officials are not alone in their ability to affect the lives of others. Often, **public figures** get into the news, and sometimes can have as much impact—or more—on the lives of others than do public officials.

Facts: This case arose when Chicago lawyer Elmer Gertz, a man who never held a paid office, was attacked by *American Opinion*, the magazine published by the far-right John Birch Society headed by wealthy candy manufacturer Robert Welch. Gertz came to the attention of Welch and the Birch Society because he was hired by a family whose son had been fatally shot by Chicago Policeman Richard Nuccio. Nuccio was convicted of second-degree murder.[10]

American Opinion reacted by publishing an article declaring that Elmer Gertz was had led a "frame up" of Nuccio, and that the lawyer was part of a communist plot to discredit local police. Gertz was said to be a "Leninist" and a "Communist fronter" with a lengthy criminal record. None of those statements were true, and Gertz—representing himself—sued for libel. Gertz initially won $50,000, but the award was overturned by the U.S. Court of Appeals (7th Circuit)., That court held that because the *American Opinion* article dealt with a matter of public interest, Gertz would have to prove "actual malice" by the magazine. Even though he was a successful lawyer, members of the jury in his libel case had never heard of him. Gertz, who kept a low profile on his lawsuit--

[10] *Gertz v. Robert Welch, Inc*., 471 F.2d 801 (7th Cir.1972); *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), discussed in Teeter & Loving, *op. cit.,* pp. 330-332.

including refusing to be interviewed while his case was being tried before a jury—appealed to the U.S. Supreme Court.

Decision: (5-4) Gertz was a private figure, and would need to prove only negligence [roughly, a jury's opinion of what a libel defendant should not have done] instead of the more rigorous standard of proof of "actual malice." Actual malice requires proof of "knowing falsity or reckless disregard for the truth" on the part of the publisher.

Reasons: Because public officials and public figures have greater access to channels of communication than private individuals, they have a more realistic ability to defend themselves in a controversy. Gertz had never held a paid public office, and the Court denied *American Opinion's* contention that Gertz was a a "de facto public official" as a lawyer because all lawyers are "officers of the court."

Further, Gertz was not a public figure. He was not famous and therefore a public figure. Nor was he a second category of public figure, the person who "voluntarily injects himself into the "vortex" of a public controversy and therefore becomes a public figure for a limited range of issues.[11]

Outcome: On retrial in 1982--a dozen years after he brought his libel suit—Elmer Gertz finally received $400,000.[12] And in its decision, the Supreme Court of the United States set the rules for categorizing libel plaintiffs and explained what each category of plaintiff would have to prove to collect damages in a libel suit.

[11] *Gertz v. Robert Welc h, Inc.,* 418 U.S.362-364 (1974).

[12] *Gertz v. Robert Welch, Inc*., 680 F.2d 527 (7th Cir.1982).

- Private figures need to prove only negligence by the publisher to collect compensatory damages, which are a jury's idea of compensation for harm to reputation. Private individuals have to prove actual malice to collect punitive damages. (Punitive damages—as the term implies—are assessed by a jury to punish a publisher for outrageous conduct, and generally result in high-dollar damage awards.)

- Public Officials and Public Figures must prove actual malice to collect either compensatory or punitive damages.

Elmer Gertz? He used his libel winnings for trips around the world.

4. Grosjean v. American Press Co., 297 U.S. 333 (1936). "No discriminatory taxation on media."

Issue: Discriminatory taxation: Taxation is a fighting word in America. That was especially true during the American Revolution, when this slogan became famous: "No Taxation Without Representation" (against British taxation of American colonies). Taxes on printing in England were called "taxes on knowledge. In 1765, American colonists famously resisted stamp taxes, saying they damaged freedom of the press.

Facts: Fast-forward to the 1930s, when the colorful if dictatorial Huey "Kingfish" Long was governor of Louisiana. Long's political machine controlled the legislature, but not some newspapers. In fact, 12 of the 13 largest newspapers in Louisiana—all newspapers having a circulation of more than 20,000 a week—were editorially opposed to Governor Long. The

Long-controlled legislature passed a statute to put a special 2 percent license tax on all periodicals having a circulation of more than 20,000 copies per week. The nine newspaper publishers who produced the larger-circulation newspapers targeted by the tax sued, claiming that the special tax violated the First Amendment rights of the newspapers.

Issue: Can a discriminatory tax hitting political foes of a government official withstand First Amendment scrutiny.

Decision: (9-0) A unanimous Supreme Court of the United States

Reasons: (Justice George Sutherland, for the Court, with apparent drafting help from the younger, far more liberal, Justice Benjamin Nathan Cardozo.)

The Court's opinion quoted from the legendary 19th Century American constitutional scholar, Judge Thomas Cooley. The Court quoted Cooley:[13]

> "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Grosjean v. American Press Co. remains the leading case awarding the media constitutional protection from discriminatory taxation. And that is important, for as the Court said in

[13] *Grosjean v. American Press Co*., 297 U.S. 233, 249 (1936), quoting 2 *Cooley's Constitutional Limitations* (8th ed.) p. 886.

Grosjean, "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[14]

5. New York Times Co. v. United States, 403 U.S. 713 (1971).

Facts: It was June 15, 1971, and U.S. District Judge Murray I. Gurfein's first day after confirmation by the Senate. An enormous and problematic case landed in Judge Gurfein's court, as *The New York Times* had started publishing stories based on a 47-volume study of U.S. involvement in Vietnam after getting legal advice and studying the documents for three months, published an article on Sunday, January 13, 1971 headlined : "Vietnam Archive: Pentagon Study Traces Three Decades of Growing U.S. Involvement." The administration of President Richard M. Nixon had Attorney General John Mitchell send a telegram to the *Times,* urging that publication of such articles stop. *The Times* refused and Times columnist James Reston wrote, "For the first time in the history of the Republic, the Attorney General of the United States has tried to suppress documents he hasn't read about a war that hasn't been declared."[15] Judge Gurfein issued a temporary restraining order [translation: a prior restraint order to stop publication of the articles, refusing to issue a full injunction until a U.S. Court of Appeals could hear the matter. Meanwhile, other newspapers, including the *Washington Post* and the St. Louis Post-Dispatch, also published articles on what came to be called the Pentagon Papers.

After two weeks of censorship, the Supreme Court of the United States—acting with amazing haste for that ponderous body—voted 6-3 to lift the restraining order and to allow

[14] *Ibid.,* p. 251.

[15] *New York Times*, June 16, 1971.

publication to resume. The six-Justice majority refused to leave the injunctions in effect against both the Times and by that time *The Washington Post*, agreeing on this statement quoting Bantam Books v. Sullivan:[16]

> "Any system of prior restraints comes before this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58 * * * (1963); see also Near v. Minnesota ex rel Olson, 283 U.S. 697 * * * (1931).

Even so, the Court showed major divisions in deciding this case. The Court decided the issue with the vote of only six Justices, but with split votes. Two, Justices Hugo L. Black and William O. Douglas expressed their loathing for prior restraint. Douglas wrote, "The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in Near v. Minnesota * * *"[17]

Although not a First Amendment absolutist ("no law means no law") like Justice Black or Justice Douglas, Justice William J. Brennan Jr. declared that prior restraint was allowable only in times of peril, as when the nation was at war. Brennan wrote that "every restraint issued in this case, whatever its form, has violated the First Amendment—an d not the less so because the restraint was justified as necessary to examine the claim more thoroughly."[18] Justices Byron White and Potter Steward joined the six-Justice majority with evident reluctance. White declared that if the published material was punishable under the Espionage Act of 1917, "I

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[16] *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971).

[17] Ibid., p. 724 (1971).

[18] *Ibid.,* at 727.

would have no difficulty in sustaining convictions . . ."[19] Justice John Marshall Harlan wrote that the Court should have taken more time to decide such an important issue.[20] Justice Harry Blackmun added his own savage indictment of the press for endangering the lives of American soldiers and prisoners of war in Vietnam and for interfering with negotiations to end the war.

Although claims that publishing the Pentagon Papers would irreparably harm the United States, that was not the case. As T*imes* columnist Anthony Lewis wrote five years after the Pentagon Papers decision, "the Republic still stands. Today, hardly anyone can remember a single item of the papers that caused all the fuss."[21]

[Note: The leak Rand Corporation employee Daniel Ellsberg gave to *New York Times* reporter Neil Sheehan was more like a stream than a leak. The Vietnam study consisted of 47 volumes, averaging around 200 pages each, for a total of more than 9,400 pages. But the Pentagon Papers "leak" was dwarfed in 2010 by a veritable Niagara Falls of classified information let loose on world media: the WikiLeaks scandal. WikiLeaks, an international website with servers in a variety of locations, all outside of the U.S., was created by Australian Julian Assange. WikiLeaks gathered secret U.S. documents by the tens of thousands, and then made them available to a variety of news outlets, including *The New York Times*, *The Guardian* of the United Kingdom, and German's Der Spiegel. Suggestions that the U.S. use the Espionage Act of 1917 to quell the leaks generally came to nothing, until a U.S. citizen downloaded thousands of U.S. diplomatic cables, and sent them to

[19] *Ibid.,* at 735-736.

[20] *Ibid.,* , at 753.

[21] Anthony Lewis, "Congress Shall Make No Law," New York Times, Sept. 16, 1976, p.39.

WikiLeaks electronically after smuggling the secrets out of a U.S. government facility disguised as a Lady Gaga CD. This high-volume leaker, PFC Bradley Manning, was being prosecuted under the Espionage Act in 2012.

6. Gitlow v. New York, 268 U.S. 652 (1925)

Issue: Could the First Amendment be nationalized?

Facts: Benjamin Gitlow was accused of violating New York's criminal anarchy law. Under that statute, criminal anarchy was defined as promoting the doctrine that organized government should be overthrown by force or violence, or that executive heads of government should be assassinated. Gitlow was convicted under that New York statute, and the U.S. Supreme Court ruled that the New York jury was justified in finding Gitlow guilty under the criminal anarchy statute.

Decision: Gitlow was guilty, but in a side comment Justice Edward Terry Sanford wrote for a seven-man majority of the Court:[22]

> [W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental rights and "liberties" protected by the Fourteenth Amendment from impairment by Congress.

Reasons: Sanford and his six brethren believed that Gitlow's words were so dangerous to established order that his conviction must be upheld. Justices Oliver Wendell Holmes and

[22] Gitlow v.New York, 268 U.S. 252, 272 (1925).

Louis D. Brandeis dissented, arguing that the "Manifesto" posed little threat to harm society. But Justice Sanford's reasoning that the First Amendment was applicable to states though the Fourteenth Amendment was crucial in development of First Amendment interpretation. The Fourteenth Amendment to the Constitution was adopted in 1868 to try to protect a newly freed former slave population from Southern states. Section 1 of the Fourteenth Amendment says:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

This approach helped nationalize the First Amendment, making possible the first two landmark decisions listed above, *Near v. Minnesota* (1931) on prior restraint and *New York* Times v. Sullivan (1964) on libel.

7. Rosemont Enterprises, Inc. v. Random House, Inc. and John Keats, 366 F.2d 303 (2nd Cir., 1966).

Issue: Can use of copyrighted material in popular media, without permission of the copyright owner, be protected by the defense known as fair use?

Facts: The powerful Random House book publishing firm was publishing an unauthorized biography of the famous oilfield tycoon, aviator and airplane designer, airline owner, and movie producer Howard Hughes. [Some of you may remember Leonard DiCaprio's

portrayal of the legendary Howard Hughes in the movie "Aviator."] Somehow, aides to Hughes, by the 1960s an aged eccentric living with uncut hair, fingernails and toenails on the top floor of a high-rise building he owned in Las Vegas, got a copy of the printed "galley proofs" of the biography. The aides and lawyers serving Hughes in 1965 incorporated a firm, Rosemont Enterprises, which had the stated goal of producing an authorized biography of the legendary multi-millionaire. Hughes was willing to go to great lengths to try to guard his privacy, and his associates threatened to "make trouble" if Random House continued with the book project.

Studying the pre-publication galley proofs in 1966, Hughes's employees found that the manuscript quoted extensively from a series of three articles by Stanley White in January and February editions of *Look* magazine. *Look* had gone out of business, but copyright in that defunct magazine was owned by its publisher, Cowles Communications.

On May 20, 1966, Rosemont Enterprises bought the rights to the Look articles, informed Random House of this, and on May 25, brought a copyright infringement lawsuit against Random House.

Under federal copyright law, if a copyright owner learns that unauthorized use of that property ("copyright infringement") is about to occur, the copyright owner can seek an injunction to halt publication. Random House claimed in vain that this was a fair use in the public interest, but the trial court granted the injunction. Fair use, the trial court said, was limited to "materials used for purposes of criticism or comment or in scholarly works of scientific or educational value." Because the trial court found that the Random House

biography was for a popular (not scholarly) market, Random House no fair use privilege to make use of copyrighted material. Random House appealed to the U.S. Court of Appeals, 2d Circuit.

Legal Question: Was extensive use of excerpts from the *Look* article by Random House a fair use?

Decision: Yes. Public interest considerations--the public's interest in knowing about a rich and powerful entrepreneur—"should prevail over possible damage to the copyright holder."

Reasons: Despite extensive copying and paraphrasing from the *Look* articles (which taken together totaled 13,500 words, or between 35 and 39 pages if published in book form, while the book amounted to 166,000 words or 304 pages. Judge Moore wrote, "there is considerable doubt whether the copied and paraphrased materials constitutes a material and substantial portion of those [*Look* magazine] articles.

After Judge Moore's dissent in the *Rosemont Enterprises* case, courts (and the Copyright Act of 1976 have emphasized the importance of a national interest in an informed public. For example, look at the famous "Zapruder case," *Time, Inc. v. Bernard Geis* 63, *Associates* decision in 1968.[23] On November 22, 1963, Abraham Zapruder and his family were standing on a grassy knoll near a tall warehouse building, the Texas School Book Depository in Dallas. Zapruder had found this spot to use a cheap 8 millimeter home-movie camera to record the passage of a motorcade carrying President John F. Kennedy. As the motorcade came into view. Zapruder started his camera, an assassin's shots rang out, fatally wounding the

[23] *Time, Inc., v. Bernard Geis Associates,* 293 F.Supp. 130 (S.D.N.Y. 1968)

President and recording the actions of others in that Lincoln convertible, Mrs. John F. Kennedy and Governor Tom Connally of Texas. Connally also was wounded, but survived.

Zapruder's low quality images were important, and he knew it. He turned over two copies to the United States Secret Service. *Life* magazine paid Zapruder $150,00 for the original film and all three copies, including two in the possession of the Secret Service. *Life* had exclusive photos of the death of the President. After registering the films with the U.S. Copyright Office, on November 29, 1963, *Life* published a major photo spread, with 30 pictures, and Zapruder photos appeared in two other issues of the magazine. All three issues were registered with the Copyright Office.

In 1967, the Bernard Geis publishing company asked *Life* magazine for permission to publish selected frames in Josiah Thompson's book, *Six Seconds in Dallas*. Life refused, so the publisher offered to pay the magazine a royalty equal to the profits from publication of the Thompson book. Frustrated, Thompson and his publisher decided to copy certain frames anyway, and a charcoal sketch artist was hired to make copies of 22 copyrighted frames. After *Six Seconds in Dallas* was published, Time, Inc.—parent company of *Life* magazine—sued for copyright infringement.

The court held that the book publisher had acted in good faith trying to secure rights from Life magazine, even offering to pay the magazine its proceeds from the book. Furthermore, following the reasoning of Judge Moore in *Rosemont Enterprises,* Federal district judge Inzer B. Wyatt wrote,[24]

[24] Time, Inc. v. Bernard Geis Associates, 293 F.Supp. 130, 131-134 (1968).

There is public interest in having the fullest information available on the theory entitled to public consideration. While doubtless the theory could be explained with sketches * * * [not copied from copyrighted pictures] the explanation actually made in the Book with copies [of the Zapruder pictures] is easier to understand.

8. [Justice Holmes's Great Dissent in . . .] Abrams v. United States, 250 U.S. 616 (1919).

Issue: Even though Jacob Abrams's World War I protests caused him to be convicted under the Espionage Act of 1917 and its "Sedition" amendment of 1918, this case resulted in a might dissent spelling out Justice Oliver Wendell Holmes view of the core meaning of the First. Please note that Holmes is famously remembered for his unanimous 9-0 opinion for the Court in *Schenck v. United States* (1919). In that case, Holmes asserted that speech not punishable in peacetime could be punished during a war. "The most stringent protefection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[25] Famous statement or not, Holmes's Schenck majority opinion—which perhaps was written in hopes of protecting some protesters, did not do so. Schenck was convicted under the Espionage Act, as were others. The remainder of the Court moved to more a more punitive approach, gauging the speaker's intent (a prosecutor's delight!) and getting past "present danger" to possible danger.

[25] Schenck v. United States, 247 U.S. 47, 51 (1919).

Holmes and another great Justice, Louis D. Brandeis, dissented from this mnoire punitive approach by the Court. Consider this moving excerpt from Holmes's dissent in *Abrams v. United States*:[26]

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution now vainly invoked by them. [Abrams and co-defendants.] * * I*
>
> Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premises or your power and want a certain result you naturally express your wishes in law and sweep away all opposition. * * * But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own beliefs that the ultimate good desired is best reached by free trade in ideas --that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution. It is an experiment, as all life is an experiment. Every year if not every day we wager our salvation upon some prophecy based upon imperfect knowledge.

[26] *Abrams v.United States,* 250 U.S. 616, 621 (1919).