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Justice Hopkins and Restraints on the Press

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Justice James D. Hopkins has long been a jurist of great sensitivity to constitutional issues. His remarkable intellect and discerning nature make him capable of anticipating decisions of the United States Supreme Court. These traits are reflected in an important decision rendered by Justice Hopkins in 1976, *New York Times Co. v. Starkey.*[1]

Starkey involved a trial court's gag order in a sensational criminal case. The court had ordered reporters for the *New York Times* and *New York Post* not to report anything about the case except what transpired in the courtroom. Justice Hopkins, speaking for the Appellate Division of the New York Supreme Court, held that the order violated the first amendment. In 1983 that conclusion may seem fairly obvious, but Justice Hopkins' decision preceded the line of cases beginning with *Nebraska Press Association v. Stuart*[2] dealing with gag orders and courtroom closures. The principles of law laid down by Justice Hopkins in the *Starkey* case were echoed by the United States Supreme Court five months later in *Nebraska Press* and in 1980 in *Richmond Newspapers, Inc. v. Virginia,*[3] and to a lesser extent in 1982 in *Globe Newspaper Co. v. Superior Court.*[4] In addition to the Supreme Court's adoption of *Starkey,* courts both within and outside of New York have cited Justice Hopkins' insightful opinion.

The *Starkey* case grew out of a murder trial in Kings County, New York. Six defendants were on trial for the May 23, 1973 murder of Philip Williams, and for kidnapping, robbery, and burglary. On January 13, 1976, the first day of the trial, the

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* Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

1. 51 A.D.2d 60, 380 N.Y.S.2d 239 (2d Dep't 1976).
2. 427 U.S. 539 (1976).
3. 448 U.S. 555 (1980).
4. 102 S. Ct. 2613 (1982).

presiding judge admonished a reporter for the *New York Times* and a reporter for the *New York Post* not to report anything about the case except what transpired in the courtroom. The judge told the reporters " 'not to go into any background at all.' "[5]

Two days later the *Times* printed an article which referred to a prior trial of five of the defendants in Nassau County in which they were convicted of kidnapping and to the conviction of two of the defendants for attempted murder. These convictions stemmed from events which took place the same evening as the alleged murder. The presiding judge told the reporters in the courtroom that his admonition had been an order, not a request, and warned that future disregard thereof would lead to a contempt citation. That afternoon the *New York Times* moved to vacate or stay the order, which the trial judge denied. The *Times* immediately thereafter, on January 15, 1976, commenced proceedings in the appellate division. A member of the appellate division denied the *Times'* request for a temporary restraining order. Five days later the trial judge put his previous admonition in the form of a written order. The order forbade the *New York Times,* the *New York Post,* the *New York Daily News,* and the two reporters orginally in the courtroom from "printing and publishing any criminal background on any or all of the defendants herein and more particularly any matter against these defendants herein and more particularly any matter against these defendants in Nassau County pertaining to these defendants in any proceeding arising out of the subject matter of the within indictment . . . ."[6] On January 23, 1976, the *Daily News* also moved for a stay of the trial judge's order. Just seven days later Justice Hopkins issued his opinion vacating the oral and written orders.

Justice Hopkins' concise, incisive opinion examined the interrelationship between a free press and criminal justice and discussed preferred procedures for determining what actions should be taken to protect a defendant's right to a fair trial. Justice Hopkins recognized that "a responsible press has always been

5. New York Times Co. v. Starkey, 51 A.D.2d at 62, 380 N.Y.S.2d at 241. The facts presented are drawn from the opinion of the appellate division.

6. *Id.* at 63, 380 N.Y.S.2d at 242.

regarded as the handmaiden of effective judicial administration, especially in the criminal field";[7] he also recognized that "the press is the instrument by which the public is informed of current events."[8] He then concluded: "[O]nly the most exigent circumstances warrant the issuance of an order curtailing the right of the press to publish."[9] He summarized his position in typical straightforward, forceful fashion: "[A]n order directing the press not to publish the information ought to be the last resort of the court."[10]

Justice Hopkins next examined the steps to be taken before a trial court can conclude that the requisite exigent circumstances are present:

> No invasion of the freedom of the press should be sanctioned unless it appears clearly on the record that the court has inquired into the potential danger to the defendant if the prejudicial information is published, that on substantial grounds it appears that the defendant will be deprived of a fair trial as a result, and that the danger cannot be avoided or minimized by other means, such as by sequestering the jury, or through proper instructions to the jury.[11]

In the interest of "due process and the delicate accommodation of the constitutional privileges," Justice Hopkins stated that the trial court should make its inquiry before the trial and give notice to the parties and the press.[12] Justice Hopkins emphasized that court action will rarely be necessary. When he applied these principles to the trial court's orders, he concluded that the orders violated the first amendment and he vacated them.

When Justice Hopkins appropriately concluded that "an order directing the press not to publish the information ought to be the last report of the court," there was not much law from the Supreme Court directly supporting his position. In *Times-Picayune Publishing Co. v. Schulingkamp*,[13] Justice Powell, sit-

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7. *Id.* at 64, 380 N.Y.S.2d at 243, (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

8. New York Times Co. v. Starkey, 51 A.D.2d at 64, 380 N.Y.S.2d at 243.

9. *Id.*

10. *Id.* at 64, 380 N.Y.S.2d at 243-44.

11. *Id.* at 64, 380 N.Y.S.2d at 243.

12. *Id.* at 64, 380 N.Y.S.2d at 244.

13. 419 U.S. 1301 (July 29, 1974) (Powell, J., in-chambers opinion).

ting as a circuit justice, stayed a state trial court order which imposed various restraints on reporting, including a ban on reporting what transpired in pretrial hearings, until after a jury was selected. Except for this in-chambers opinion by a single justice, the leading cases dealing with highly publicized trials had found that the press was not adequately restricted. In *Sheppard v. Maxwell*,[14] the Supreme Court held that Dr. Sam Sheppard had not received a fair trial on the charge of murdering his wife, in part because "newsmen took over practically the entire courtroom,"[15] and the court should have adopted stricter rules concerning the use of the courtroom by newsmen.[16] In *Estes v. Texas*,[17] the Supreme Court held that permitting the televising of trials denied due process.

Five months to the day after Justice Hopkins rendered his *Starkey* decision, the Supreme Court likewise adopted a last resort approach in *Nebraska Press Association v. Stuart*.[18] The Supreme Court reviewed a gag order in a trial for the murder of the six members of a rural Nebraska family in their home. The order under review by the Supreme Court prohibited reporting of confessions or admissions made by the accused or of facts strongly implicative of the accused until the jury was impaneled.[19] The order differed from the *Starkey* order in that it prohibited dissemination of information obtained from judicial proceedings as well as other sources. The Supreme Court held that the part of the order restraining information obtained in the courtroom was clearly invalid;[20] the analysis went to that part of the order directed at other information.

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14. 384 U.S. 333 (1966).

15. *Id.* at 355.

16. *Id.* at 358.

17. 381 U.S. 532 (1965).

18. 427 U.S. 539 (1976).

19. *Id.* at 545. This was the order as modified by the Nebraska Supreme Court. The original order, issued by a county judge, prohibited everyone in attendance at a pretrial hearing from releasing for public dissemination any testimony given or any evidence adduced. *Id.* at 542. A state district judge modified the order, limiting its effect only until the jury was impaneled, and prohibiting reporting of a confession by the accused, statements the accused had made to others, a note he had written the night of the crime, certain aspects of medical testimony, the identity of the victim of an alleged sexual assault or the nature of the assault, and the exact nature of the restrictive order itself. *Id.* at 543-44.

20. *Id.* at 568, 570.

Chief Justice Burger, writing for the majority, in effect said that an order directing the press not to publish information should be the last resort. In applying the law to the facts of the case,[21] Chief Justice Burger concluded that the trial judge could reasonably find a danger to the accused's fair trial right,[22] but the record did not support an implicit finding that less restrictive alternatives were inadequate. Such less restrictive alternatives could have included a change of venue, a postponement of the trial, a searching voir dire, emphatic jury instructions to consider only courtroom evidence, and sequestration of jurors.[23] Chief Justice Burger also said it was unclear whether the gag order would have protected the accused's right[24] and furthermore, the order was vague.[25] The Chief Justice concluded: "We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary."[26] Justice Hopkins' interpretation of the law, which he delivered in *Starkey* just two weeks after the case came to his court, had been adopted by the Supreme Court.[27]

The other major point that Justice Hopkins made in *Starkey* was the need for a record to justify a restraint. In *Nebraska Press* the Supreme Court closely examined the record to determine whether the gag order was justified.[28] Later Supreme Court cases in a slightly different context have emphasized how essential findings on the record are to a restriction on press access to

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21. *Id.* at 562-70.

22. *Id.* at 562-63.

23. *Id.* at 563-64.

24. *Id.* at 565-67.

25. *Id.* at 568.

26. *Id.* at 569. Justice Brennan, in a concurring opinion joined by Justices Stewart and Marshall, would oppose any gag orders. They felt alternatives would always be adequate. *Id.* at 572-73, 588 (Brennan, J., concurring).

27. The United States Supreme Court reaffirmed the *Nebraska Press* principle in Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam). Last year the Supreme Court reiterated the last resort rule in a slightly different context. In Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982), the Court invalidated a Massachusetts statute that mandated closed courtrooms during the testimony of a minor who was a victim of a sexual assault. Justice Brennan, writing for the majority, stated that there must be a case-by-case determination of whether the state's interest in protecting a minor's well-being necessitates closure. *Id.* at 2621.

28. Nebraska Press Ass'n v. Stuart, 427 U.S. at 562-70.

courtroom information. *Richmond Newspapers, Inc. v. Virginia*[29] makes clear that before a trial can be closed to the press and public, the trial judge must articulate in findings the overriding interests requiring closure. In *Richmond Newspapers* a trial judge had closed a murder trial. The plurality opinion of Chief Justice Burger held that the first amendment right of access to trials was violated because the trial judge had not recognized the existence of the right, had not inquired into alternatives, and had made no findings to support closure.[30]

It is not surprising that Justice Hopkins' *Starkey* opinion, the harbinger of Supreme Court cases on the subject of gag orders, has been cited by courts even outside the State of New York. The Supreme Court of Ohio relied heavily on *Starkey* in invalidating a gag order in a case it decided shortly before the *Nebraska Press* decision was rendered. In *State ex rel. Beacon Journal Publishing Co. v. Kainrad,*[31] two persons accused of participating in a murder were granted separate trials. One defendant's trial began on January 26, 1976, and the other trial was to begin before another judge on February 9, 1976. Shortly after the first trial began, the judge who was to preside at the second trial entered an order prohibiting the press from reporting statements made at the first trial concerning the second defendant. In analyzing the first amendment claim of a newspaper, the Ohio Supreme Court observed that the instant case was directly on point with *Starkey* and quoted extensively from it. That court particularly emphasized Justice Hopkins' proclamation that "[a]ll other measures within the power of the court to

29. 448 U.S. 555 (1980).

30. 448 U.S. at 580-81. When *Richmond Newspapers* is compared to Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the requirement of findings may be the major principle of *Richmond Newspapers*. The Court in *Gannett* held that closure of a pretrial hearing did not violate whatever first amendment rights a news organization had. *Id.* at 392. The trial court in *Gannett*, like the trial court in *Richmond Newspapers*, did not inquire into alternatives to closure, Gannett Co. v. DePasquale, 55 A.D.2d 107, 110, 389 N.Y.S.2d 719, 723 (4th Dep't 1976), so perhaps it is the requirement of findings that distingiushes *Richmond Newspapers* from *Gannett*. Chief Justice Burger distinguished *Richmond Newspapers* from *Gannett* on the basis that *Gannett* involved *pre*trial proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 564 (emphasis added). No justice had joined the Chief Justice's concurrence in *Gannett*, which mentioned the relevance of the fact that pretrial proceedings were involved. Gannett Co. v. DePasquale, 443 U.S. at 394 (Burger, C.J., concurring).

31. 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976).

insure a fair trial must be found to be unavailing or deficient. . . . In short, an order directing the press not to publish the information ought to be the last resort of the court."[32] The *Beacon Journal* case was a four-to-three decision, but the basis of the dissenting opinion was that the issue was moot; none of the justices took issue with Justice Hopkins' analysis.[33]

In an Iowa Supreme Court case, *Des Moines Register & Tribune Co. v. Osmundson*,[34] a trial judge had restrained all persons from revealing identities of jurors in a murder trial. In an opinion effectively vacating the order, the Iowa Supreme Court observed that *Starkey* had applied the *Nebraska Press* test even before the decision was rendered.[35]

In *New York Times Co. v. Starkey*, Justice Hopkins wrestled with a difficult, and at that time unchartered, constitutional issue. Courts have long tried to resolve the conflicts in our system between the rights of a fair trial and a free press.[36] I have personally dealt with that issue myself.[37] Justice Hopkins' opinion in this area of competing constitutional values of free press and fair trial is commendable. The opinion is particularly praiseworthy because he rendered an excellent opinion in less than two weeks. It is a comment both on his intellectual capacity and his diligence that he was able to produce that perceptive opinion in a matter of days. Perhaps Justice Hopkins shared the feeling about prior restraints on the press that was expressed by Justice Black in the *Pentagon Papers*[38]case: "[E]very moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."[39]

I have long known Justice Hopkins as an outstanding jurist and scholar. His opinion in *New York Times Co. v. Starkey* rep-

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32. *Id.* at 354, 348 N.E.2d at 698.

33. *Id.* at 359, 348 N.E.2d at 701 (Corrigan, J., dissenting).

34. 248 N.W.2d 493 (Iowa 1976).

35. *Id.* at 500.

36. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547-51 (1976).

37. United States v. Blanton, Nos. 81-5643, 81-5644, 81-5645 (6th Cir. Feb. 11, 1983); *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676, 679 (8th Cir. 1980) (Gibson, J., concurring).

38. New York Times Co. v. United States (The Pentagon Papers case), 403 U.S. 713 (1971).

39. *Id.* at 715 (Black, J., concurring; joined by Douglas, J.).

resents his sensitivity to fundamental constitutional rights, his deep knowledge and understanding of constitutional issues, and his diligence. Pace University School of Law was fortunate to have a man of Justice Hopkins' stature, experience, and ability serve as its Acting Dean.