Memorandum

Chron

Subject	Date
Possible Topics For "First Amendment" Speech	February 9, 1982

To Tex Lezar From Carolyn B. Kuhl CBK

Ken asked me to suggest topics which might be included in a speech centered on First Amendment issues. I have included for your consideration those which come to mind, without much qualitative judgment.

Several issues which have arisen in the past year arguably have First Amendment overtones:

FOIA Amendments
Snepp Guidelines
Reporter Subpoenas
Publication of Classified Documents (Leaks)

Summarized below are some of the legal doctrines in the area of First Amendment law which bear upon one or more of these issues:

1. Right of Access: In Branzburg v. Hayes, 408 U.S. 665 (1972), the Court seemed to recognize some protection for newsgathering under the First Amendment. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Id., at 681. However, in Pell v. Procunier, 417 U.S. 817 (1974), the Court, in a 5-4 decision, held that the First Amendment did not confer upon the media a special right of access to information not shared by members of the public generally. And a three-judge plurality opinion in Houchins v. KQED, Inc., 98 S. Ct. 2588 (1978), states that the language of Branzburg "in no sense implied a constitutional right of access to news sources," id. at 2595, and rejects the "assertion that the public and the media have a First Amendment right to government information," id. at 2597.

Questions of "right of access" arguably arise with regard to the Snepp Guidelines and the FOIA Amendments.

Sources: J. Barron & C. Dienes, Handbok of Free Speech and Free Press §§ 8:4, 8:12-8:13 (1979); BeVier, An Informed Public or Informing Press: The Search for a Constitutional Principle, 68 Calif. L. Rev. 482 (1980); Jeffries, Rethinking Prior Restraint, unpublished paper delivered at Jan. 9, 1982 Conference of the Center for Law and National Security, University of Virginia School of Law, at pp. 39-41.

2. Press Privilege: In an address on November 2, 1974, Justice Stewart expressed the view that there are important differences in the protections provided by the speech and press clauses of the First Amendment. Stewart, "Or of the Press", 26 Hastings L.J. 631 (1975). He is joined in this view by Professor Melville Nimmer. Nimmer, Introduction -- Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech, 26 Hastings L.J. 639 (1975).

Branzburg v. Hayes, supra, appears to reject the concept of a special immunity for the press in the context of a grand jury subpoena requiring a journalist to reveal his sources. A dissenting opinion by Justice Stewart, joined by two other Justices, would have recognized a qualified press privilege, and Justice Douglas, also dissenting, would have recognized an absolute privilege. Herbert v. Lando, 441 U.S. 153 (1979), overturned the holding of the Second Circuit, 568 F.2d 974 (1978) (Kaufman, J.), that the editorial process of a media defendant in a libel case is absolutely privileged.

Some lower courts, however, have recognized a press privilege derived from the First Amendment. In Vermont v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974), the Vermont Supreme Court recognized a qualified First Amendment privilege to protect the newsgathering process in a case where the reporter was subpoenaed by a criminal defendant. In Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert. denied, 417 U.S. 938 (1974), the court held that in civil cases the need for the reporter's testimony should be balanced against his claim that the public's right to know is impaired.

Some of the problems raised by a First Amendment press privilege are discussed in Lange, The Speech and Press Clauses, 23 UCLA L.Rev. 77 (1975), and in AEI, Freedom of the Press (AEI Round Table) at pp. 5, 7, 33-38, 40-44 (1976).

The Justice Department has special standards it applies before it asks to have subpoenas issued for reporters' testimony; although I am sure we do not take the position that these are required by the First Amendment. Also, the FOIA is premised on an equality between the "right to know" of private individuals and of members of the press.

Additional Sources: J. Barron & C. Dienes, supra, §§ 8:2 - 8;10.

3. Prior Restraint Doctrine: In a paper presented to the Conference of the Center for Law and National Security, University of Virginia School of Law, on January 9, 1982, Professor John Jeffries suggests that the First Amendment doctrine of prior restraint, as it is expressed in current cases, has no historical precedent, and that forbidding injunctions against publication because they are "prior restraints" "focuses on a constitutionally inconsequential consideration of form and diverts attention away from the critical substantive coverage." Id. at 36. Under Professor Jeffries' analysis, the Pentagon Papers case was wrongly decided insofar as it refused to enjoin a publication which could have been subjected to a constitutionally valid criminal penalty.

Professor Jeffries' paper discusses the implications of his analysis for enforcement of government secrecy agreements (Snepp guidelines). His analysis also has implications for prevention of publication of classified material.

4. Judicial Restraint: A recent article by Professor Philip Kurland of the University of Chicago argues that a number of familiar First Amendment doctrines "created" by the Court find no support in the Constitution and result in a "transfer of legislative function, in the balancing of competing social interests, to the judiciary." Kurland, The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses, 29 Drake L. Rev. 1, 8 (1979). He cites, for example, the "clear and present danger" test, the concept of right of access to a "public forum," and the First Amendment "right to silence."

Professor Kurland's thesis obviously fits the Attorney General's theme of judicial restraint, although I am not certain I see as much problem in the First Amendment area as in others the Attorney General has discussed in prior speeches.

cc: Ken Starr
John Roberts

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

January 11, 1982

TO: Ann Collins
OLA

FM: Carolyn B. Kuhl CBK

RE: December 22, 1981 letter from Congressman Toby Moffett to Brad Reynolds

I'm certain the Civil Rights Division will have this response prepared for Brad Reynolds' signature, but just in case, you might let them know that they should.

cc: John Roberts
(w/attachment) Thanks

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December 22, 1981

Dear Mr. Reynolds:

Last week, the President stated in a press conference that he had no objection to voluntary affirmative action plans sponsored by private industry. As a consequence of President Reagan's statements in this regard, I am writing to urge your own commitment to voluntary affirmative action, as embodied in the Weber decision.

The Department of Justice has been, for the past several decades, active in the protection of basic civil rights. It is welcome, therefore, to have the President's support for voluntary affirmative action plans. As Director of the Civil Rights Division, you are in the position to ensure that voluntary plans remain an important part of the nation's civil rights policy. I hope you will fulfill that role.

You have, of course, expressed sentiments to the contrary. It has been reported that your view of the Weber affirmative action decision is that it is "at war with the American ideal of equal opportunity." Furthermore, statements have been attributed to you that the Weber case was "wrongly decided" by the Supreme Court and should be challenged.

The "American ideal of equal opportunity" is a fairly new one, and one which did not arise from a vacuum. This nation suffered human bondage and legally sanctioned racial prejudice for over 300 years. The enormity of the injustice requires a remedy equally as comprehensive. Using the Civil Rights Act as a basis, the federal court system has upheld affirmative action as one remedy to past patterns of discrimination and racial barriers. The Supreme Court, in the Weber case, decided that Title VII of the Civil Rights Act permits private employers and unions "voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."

A private business which adopts voluntary plans is committed to the objective of equal employment opportunity and has identified within its structure barriers to both minorities and women. As the Commission on Civil Rights reported in Affirmative Action in the 1980s: Dismantling the Process of Discrimination:

> Affirmative action plans do not confine their efforts to identifying and "making whole" specific individual victims of discrimination; rather, they identify and change those discriminatory organizational practices and conditions that produce victims in the first place.

The President recognized, from his spontaneous remarks at the press conference,

the essential justice in promoting equal opportunity through voluntary affirmative action. In light of President Reagan's apparent support for maintaining this civil rights remedy, I sincerely hope you will reevaluate your opposition to the Weber decision.

Sincerely,

Toby Moffett
Member of Congress

Mr. William Bradford Reynolds
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

TM/ar