Notre Dame Law Review

Volume 55 | Issue 3 Article 8

2-1-1980

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*In re Halkin**

I. Introduction

The translation of the constitutional language "Congress shall make no law . . . abridging the freedom of speech; or of the press . . ."[1] into a sound and practicable system of law is a task that has often confronted the judiciary with singularly difficult choices between the exercise of free speech and other important public purposes. The response of the courts to these challenges has been steadfast in its insistence that other interests yield to the primacy of the first amendment. Although restrictions on expression have often been advanced in defense of the most urgent public interests, judges have been especially sensitive to the cardinal values behind the constitutional guarantee of freedom of expression. The preeminent role of freedom of speech in an open, democratic society—its indispensability to self-government, its catalytic function in social change, its importance to the cultivation of individual dignity—has dictated a course of extreme caution whenever speech is jeopardized by government infringement.[2]

This reverence is particularly apparent in the judicial reluctance to sanction any form of interference with speech. Where reconciliation of freedom of expression with competing policies ultimately has proven unavoidable, courts have tolerated only finely tuned restrictions, calculated to achieve narrowly defined objectives without impinging needlessly on protected speech.[3] The primary mission of the courts in each first amendment case remains constant: preserve the integrity of the constitutional grant, while fitting "its values and functions into a more comprehensive scheme of social goals."[4]

In re Halkin[5] presented the U.S. Court of Appeals for the District of Columbia Circuit with a dispute similar in form to many previous first amendment controversies, yet unique in several notable respects. The question before the court concerned whether the first amendment limits the permissibility of protective orders which prohibit the dissemination of materials obtained pursuant to the discovery provisions of the Federal Rules of Civil Procedure. Both the lengthy majority opinion and a vigorous dissent considered in detail the fundamental issues raised by the collision between the public interest in protecting the fairness of the discovery process and the constitutional guarantee of freedom of expression. In holding that the dissemination of discovery materials

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* 598 F.2d 176 (D.C. Cir. 1979).

1 U. S. CONST. amend. I.

2 *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 576 (1978).

3 *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Carroll v. Princess Anne, 393 U.S. 175 (1968).

4 *See* T. EMERSON, *supra* note 2, at 9.

5 598 F.2d 176 (D.C. Cir. 1979).

is protected by the first amendment, the *Halkin* court confirmed the viability of the constitutional grant of freedom of speech in contexts in which other interests may press to curtail its safeguards.

II. The *Halkin* Dilemma:

Free Expression vs. Full and Fair Discovery

Halkin arose as a petition for a writ of mandamus to compel the federal district court to vacate an order prohibiting the plaintiffs in *Halkin v. Helms*[6] from releasing to the public documents which they had obtained through discovery. The plaintiffs in the parent case were a group of individuals and organizations who alleged that certain government agencies, principally the Central Intelligence Agency,[7] had conducted programs of illegal domestic surveillance of citizens who opposed the Vietnam War. The plaintiffs contended that these actions deprived them of constitutional and statutory rights, and sought equitable relief and monetary damages.

The dispute arose after the defendants submitted to the plaintiffs certain documents describing the CIA's program of surveillance of anti-war activists pursuant to a discovery request under Fed.R.Civ.P. 34. Though the materials were purged of national security information and other sensitive matter, they contained significant new revelations on the CIA's domestic exploits. Upon learning that the plaintiffs intended to release portions of the material to the press, the defendants sought a protective order under Fed.R.Civ.P. 26(c),[8] claiming that the ensuing publicity would deprive them of a fair trial. The district court granted the motion, ruling that disclosure was "contrary to rules applicable to litigation before this court, and inconsistent with the obligations of the parties and counsel to further the just determination of the matters within its jurisdiction."[9] The order prohibited both the release of the documents themselves and statements by counsel or parties concerning their

6 Civ. No. 75-1773 (D.D.C. June 30, 1977).

7 Hereinafter cited as CIA.

8 FED. R. CIV. P. 26(c) provides:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district when the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden and expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had but only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that the discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret, or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way; (8) that parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

9 598 F.2d at 182, n.8. Despite the district court's order, the material it sought to suppress was the subject of an article in the Feb. 22, 1977, edition of the New York Times.

content. Plaintiffs responded by applying to the court of appeals for a writ of mandamus to vacate the order.[10]

On review, the majority in *Halkin* characterized the challenged order as "direct government action limiting speech" and looked to the doctrine of prior restraint for guidance.[11] The court concluded that lawyers and parties retain a large measure of their rights to express themselves freely while engaged in litigation, and that these first amendment rights are not significantly altered when the expression consists of the dissemination of materials obtained through discovery.

The decision prescribes a standard for constitutionally assessing the propriety of protective orders that tamper with the first amendment interests of lawyers and litigants in information received through discovery. The test requires an evaluation of three criteria: the harm posed by dissemination must be "substantial and serious"; the order must be "narrowly drawn and precise" and there must be no alternative means available to protect the public interest threatened, which intrude less directly on expression.[12] Examining the order under this standard, the majority found it seriously defective, and remanded the case to the district court for reconsideration.

III. Protective Orders as Prior Restraints

Both the majority and the dissent in *Halkin* recognized that the challenged protective order possessed many of the characteristics of a prior restraint, the most rigidly scrutinized type of interference with free expression.[13] In classic, common law form, prior restraints were unreviewable administrative censorship or licensing schemes which required that certain types of speech be approved in advance by a supervisory authority.[14] By their very nature, these systems fostered widespread abuse and oppression. The first amendment was adopted with the objective of precluding their rebirth under the Constitution.[15]

This profound suspicion of prior restraint remains undiminished today, rooted in an appreciation of their peculiarly inhibitive effect on speech. Although the threat of punishment for speech may understandably deter its exercise, prior restraints on expression have an even more pronounced chilling impact on free expression, chiefly for three reasons.

First, prior censorship is characteristically prone to malignant excesses. As the Supreme Court has noted, "It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is so finely drawn that risks of freewheeling censorship are formidable."[16]

Secondly, where imposed, prior restraints are not regulated by the wide array of procedural guarantees inherent in a criminal prosecution.[17] Prior in-

10 In accord with its standard practice, although the court viewed the petition favorably, the case was remanded for action by the district court consistent with the majority opinion.

11 598 F.2d at 183.

12 *Id.* at 191.

13 Chief Justice Burger described prior restraint as "the least tolerable infringement on First Amendment rights." 427 U.S. at 559.

14 *See* T. EMERSON, *supra* note 2, at 504.

15 Near v. Minnesota, 283 U.S. 697, 713 (1931).

16 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

17 427 U.S. at 559.

terference with expression exerts an "immediate and irreversible sanction,"[18] while a criminal penalty or defamation judgment may be deferred until the completion of an often exhaustive appellate review process, thereby dampening its impact.

Finally, and perhaps most significantly, the ability to issue a prepublication restraint empowers government authorities to shroud from sight information potentially worthy of public appraisal.[19] Even where the prohibition is temporary, the damage can be acute, since the state is able to moderate the impact of a revelation through control of the timing of public dissemination.[20] Often the choice of when to disseminate can be as crucial to the effect of information on public affairs as the choice of what to disseminate. The participation of government in this decision-making process plainly offends the principles that are represented in the constitutional protection of freedom of speech.[21]

Alert to these concerns, and anxious to preserve the guarantee of freedom of speech in general, courts have displayed consistent hostility toward prior obstruction of expression in any form. The common law concept of prior restraint has accordingly been extended to include judicial orders accomplishing the same result.[22] Parties seeking to impose a prior restraint must initially overcome an extraordinarily heavy presumption against its validity.[23] Prior restraints will be upheld only in certain "exceptional cases,"[24] and ample procedural safeguards must be observed to minimize the suppression of protected speech.[25] Current decisions suggest that prior restraints will be void unless (i) the result the restriction is designed to prevent is clearly harmful and reasonably certain to occur without the intrusion; (ii) the scope of the restraint is scrupulously tailored to avoid overbreadth; and (iii) no alternatives are available that impinge less directly on expression.[26]

The court's characterization of the order in *Halkin* as a form of prior restraint was appropriate in light of its practical effect. The cumulative impact of the order is closely reminiscent of many of the hazards that the heavy presumption against prior restraints is designed to avoid. The order was imposed without the protections of the criminal process; its impact was immediate and pronounced, while willful violations would have resulted in an almost certain conviction for contempt.[27] If obeyed, damage to first amendment rights is real and irreparable. Though issued in connection with the discovery process,

18 *Id.*

19 *See* T. EMERSON, *supra* note 2, at 504.

20 427 U.S. at 559.

21 *See* text accompanying note 2 *supra.*

22 Court orders can have the impact of administrative prior restraints through the operation of the "collateral bar" rule, which prohibits those who violate a court injunction from later raising the order's constitutionality as a defense in a subsequent contempt proceeding. Thus, the order to refrain from speaking must be obeyed, or a conviction for contempt will be virtually certain to follow. Walker v. Birmingham, 388 U.S. 307 (1967).

23 *See* 427 U.S. at 559; 393 U.S. at 181.

24 283 U.S. at 716. Chief Justice Hughes offered as examples of such cases orders by a government preventing "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.*

25 *See, e.g.,* Freedman v. Maryland, 380 U.S. 51, 58 (1965).

26 *See* 427 U.S. 539 (1976); 420 U.S. 546 (1975); Kingsley Books v. Brown, 354 U.S. 436 (1957); *See also* L. TRIBE, *supra* note 2, § 12-33.

27 *See* note 20 *supra.*

the challenged order represented a sufficient threat to protected speech to warrant close judicial scrutiny.

IV. First Amendment Rights in the Discovery Process

The determination by the court that the order in *Halkin* operated as a prior restraint was preliminary to the resolution of the central issue of whether first amendment rights were assertable in the dissemination of discovery materials. If, as the defendants contended, these rights were of a sharply limited nature, then an order restricting the release of the documents would be valid. The majority approached the problem with a two-step analysis. At the outset, the court evaluated the scope of first amendment rights of participants in litigation with regard to extrajudicial comment in general. The court then focused on the state of these rights when the particular act of expression by litigants involves only the dissemination of discovery matter.

A. *Judicial Restraints on Parties and Counsel: Extrajudicial Comment*

Although it is clear that persons who resort to the courts for relief do not forfeit their first amendment rights, the exact extent of these rights has yet to be delineated. The *Halkin* court relied heavily on the leading case on the question, *Chicago Council of Lawyers v. Bauer,*[28] which outlines the strong first amendment interests existing in extrajudicial comment by lawyers and litigants.

In *Bauer,* the Seventh Circuit acknowledged the value of litigation as a form of expression in itself, as well as a means to redress individual grievances. Civil trials present frequent occasion for the exercise of legitimate first amendment rights. The *Bauer* court also observed:

> Civil litigation in general often exposes the need for government action or correction. Such revelations should not be kept from the public. Yet it is only the attorney who will have this knowledge or realize its significance. . . . Therefore, we should be extremely skeptical about any rule that silences that voice.[29]

Recognizing that statements by parties and their attorneys fall solidly within the ambit of constitutional protection, the *Halkin* court considered what circumstances justify judicial restriction of such comment. The Supreme Court has left this issue unsettled by twice inviting judges to resort to the use of no-comment orders to parties and lawyers when necessary, but without indicating the extent to which this device is limited by the first amendment.[30] Lower federal courts faced with this problem have been relatively uniform in their refusal to authorize restraining orders to lawyers and litigants without a showing of a clear and imminent threat to a fair trial posed by extrajudicial com-

28 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976).
29 *Id.* at 258.
30 The Supreme Court has twice suggested no-comment orders to counsel as a means to combat prejudicial pretrial publicity. 427 U.S. at 564; Sheppard v. Maxwell, 384 U.S. 333, 360 (1966).

ment.[31] In *Bauer,* the Seventh Circuit held that the rights of lawyers to comment publicly could be limited only upon a showing of a "serious and imminent threat of interference with the administration of justice."[32]

The majority in *Halkin* also relied on two other federal court of appeals decisions nullifying restrictions on out-of-court statements by participants in litigation, *Chase v. Robson*[33] and *CBS, Inc. v. Young.*[34] As in *Bauer,* both cases demanded that a rigorous burden be surmounted before a restraining order would be issued.

The *Halkin* court's finding that extrajudicial comment is constitutionally protected is in accord with applicable precedent and is duly attentive to the undeniable first amendment interests associated with the adjudicative process. The common thrust of the available decisions posits that public remarks during litigation, like speeches on a street corner, should be suppressed only to protect an important competing interest. No convincing rationale exists for muzzling lawyers and parties at the will of the trial judge solely because of their status as participants in a judicial proceeding. The majority's position is appropriately oriented toward the content of the public statements, thereby avoiding formalistic distinctions based on the role of the speaker. Labeling a lawyer as an officer of the court offers no insight into the value his extrajudicial statements may have in informing the public, or the danger they may pose to significant countervailing interests. The court's balancing analysis is more instructive for first amendment purposes, weighing the value of the speaker's remarks against the prospect of injury to significant rivaling considerations.

B. *Judicial Restraints on Parties and Counsel; Dissemination of Discovery Material*

Having found that out-of-court utterances by parties and their counsel are protected from impermissible interference by the first amendment, the court turned to the statements forbidden by the challenged order. For the dissent, the fact that the order restrained the dissemination by counsel and parties of discovery materials produced a critical difference in the levels of first amendment protection available. The thesis of the dissenting opinion is that discovery materials, regardless of content, reside in a unique category of information with respect to the first amendment, in which the rights to freedom of speech of those who possess them are conditional on the power vested in the trial court by the Federal Rules of Civil Procedure. According to this view, dissemination of materials obtained through discovery could by restricted simply upon a showing of "good cause" under rule 26(c).[35]

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31 *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); CBS, Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

32 522 F.2d at 249.

33 435 F.2d 1059 (7th Cir. 1970). *Chase* involved an order prohibiting lawyers and parties in a criminal case from making any comment regarding the jury, the merits, the evidence, the witnesses, or the rulings of the court. The Seventh Circuit found no sufficient basis for the order, and condemned it also as overbroad.

34 522 F.2d 234 (6th Cir. 1975). *CBS, Inc.* was a petition for a writ of mandamus to vacate a trial court's order preventing litigants and their attorneys from making any comment on a pending case. The Sixth Circuit termed the order a "direct prior restraint" on freedom of expression, invalid unless there could be shown some serious and imminent threat to a fair trial posed by statements of the parties. *Id.* at 239.

35 FED. R. CIV. P. 26(c).

The majority maintained, however, that the rights of lawyers and litigants to freedom of expression are not fundamentally altered simply because the information they seek to publicize is obtained through discovery. Looking to the Supreme Court's decision in *New York Times v. United States*[36] the court rejected the notion that first amendment protection for a particular act of expression is somehow dependent on the source of the information, rather than on the nature of its content.

In *New York Times,* the Supreme Court ruled that the publication of stolen materials could not be obstructed by a judicial order without a clear showing of harm to an important competing interest.[37]

The majority found further support for its position in *United States v. Marchetti,*[38] in which the Fourth Circuit held that the publication of materials obtained in breach of a security agreement could not be prevented by the government, if the materials were not classified state secrets. The *Halkin* court persuasively reasoned that if first amendment rights were cognizable in these materials, then plainly they must exist with at least equal force in discovery materials.

Judge Bazelon's majority opinion also pointedly identified the distinction between first amendment rights of access to information and first amendment rights while in possession of information. The Supreme Court has thus far declined to create a first amendment right of access to sources of information, or to information in the custody of another.[39] Once access has been obtained in some manner, however, speech concerning such information is fully shielded from government intrusion by the first amendment, regardless of the means of acquisition.[40] Justification for the imposition of a prior restraint must derive from reasons other than the identity of the source of the material. The application of this principle to *Halkin* is apparent: although the Court may deny access to discovery matter without reference to the first amendment, restrictions on a party's use of information in his possession must carefully avoid impingement on his constitutional rights.

The dissent relied on *International Products Corp. v. Koons,*[41] decided before *New York Times,* and dicta in *Rodgers v. United States Steel Corp.,*[42] to buttress its contention that first amendment interests in discovery materials are fundamentally limited in nature. In *Koons,* the Second Circuit stated that there was "no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes."[43] The majority interpreted the

36 403 U.S. 713 (1971).

37 The government in that case failed to demonstrate that the release of a Pentagon report on the conduct of the Vietnam War threatened national security. The government contended unsuccessfully that the embarrassment to American foreign policy connected with the report was sufficient to warrant its suppression. *Id.* at 714.

38 466 F.2d 1309 (4th Cir.), *cert. denied,* 409 U.S. 1063 (1972).

39 Saxbe v. Wash. Post Co., 417 U.S. 843 (1974). In a recent decision, the court also declined to grant the press a right of access to a criminal preliminary hearing based on the sixth amendment. Subsequent decisions may clarify the significance of this ruling. Gannett Co., Inc. v. DePasquale, 99 S. Ct. 2898 (1979).

40 *See* text accompanying note 37 *supra.*

41 325 F.2d 403 (2d Cir. 1963).

42 536 F.2d 1001 (3d Cir. 1976).

43 325 F.2d at 407.

Koons language to mean that a properly drafted protective order, supported by a sufficient showing of good cause, could be compatible with the first amendment.[44] Judge Bazelon argued, moreover, that broader construction of *Koons* would imply that parties waived their first amendment rights when they engaged in discovery. The majority held that if such an implied waiver did occur, it was in any case void as an unenforceable prior restraint.[45]

The majority's decision that first amendment protections attach to the dissemination of discovery materials is consistent with its holding on the rights of lawyers and litigants and clearly preferable to the dissent's strained argument for conditional rights in such information. No convincing basis exists for substantially excluding speech concerning discovery matter from first amendment protection. A refusal to acknowledge more than partial first amendment interests in discovery materials would conflict with the Supreme Court's grant of full protection from impermissible prior restraints to stolen information in *New York Times*.

A special distinction involving discovery materials would assign an inflated significance to the Federal Rules of Civil Procedure, despite the fact that the promulgation of the rules did not signify the announcement of revised constitutional doctrine. With respect to at least one section of the rules, the discovery sanction provisions described in rule 37, the Supreme Court has explicitly held that the rule "must be read in light of the provisions of the fifth amendment that no person shall be deprived of property without due process of law."[46] The Court's unambiguous statement appears to eliminate any reasonable grounds for a claim that the rules conferred new powers on the courts, or reinterpreted the large body of first amendment law.

The majority was not indifferent to the need to prevent disruption of the trial court's control over the discovery process. The court declined, however, to override legitimate first amendment rights to preserve that control. The strength of the majority's position lies in its allowance for protection of the right of freedom of speech without significant impairment of the court's authority to regulate the discovery process.

V. Rule 26(c) "Good Cause" and the First Amendment

The conclusion of the majority that the district court's order operated as a prior restraint, coupled with its decision that first amendment rights are assertable in the dissemination of discovery materials did not complete the court's analysis. The majority proceeded to articulate a standard for determining under what circumstances the exercise of these rights could be restricted by a protective order. By necessity, Fed.Rule Civ.P. 26(c) vests considerable discre-

44 This view of *Koons* was also adopted in a federal district court decision holding that a party does have First Amendment rights in information about in the discovery process. Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977).

45 The Fourth Circuit had earlier held that the agreement signed by Marchetti, a government employee, waiving his first amendment rights, was void to the extent that it precluded him from releasing to the public nonclassified material.

The *Halkin* plaintiffs received the materials free of any express conditions on their use. *Halkin* should not be understood as holding that no conditions placed in advance on use of discovery matter could be valid.

46 Societe Internationale, Etc. v. Rogers, 357 U.S. 197, 209 (1958).

tion in the trial judge to monitor the progress of discovery. The rule itself requires only a showing of "good cause" to issue a protective order.[47] The ostensible object of the rule is to permit discovery to be conducted in an equitable manner, free from abuses by litigants in unjustifiably refusing discovery or seeking to employ it for some improper purpose.[48] The provision most nearly referring to the situation in *Halkin,* rule 26(c)(7), states that a court may order, upon a showing of good cause, "that a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only in a designated way."[49] The language suggests that the drafters contemplated the rule to apply primarily to restrictions on the use of commercial information, a class of speech receiving significantly less constitutional protection than the reports on governmental acts suppressed in *Halkin.*[50] The rule is silent on the permissibility of restricting the use of noncommercial information obtained through discovery.

Quite clearly, the first amendment demands a different type of inquiry than the sort a court might pursue in deciding whether to strike an improper interrogatory. The bare language "good cause" furnishes inadequate guidance to trial judges weighing motions for orders that restrict freedom of speech. The majority remedied this difficulty by importing into the framework of rule 26(c) a three-part test for evaluating the propriety of protective orders that function as prior restraints. In essence, the court ruled that a far more stringent type of "good cause" must be shown before an order infringing on free speech may lawfully issue.

The first criterion of the court's standard requires that the harm the order is intended to prevent be substantial and serious. The determination of the nature and extent of the putative harm threatened will often be pivotal to the decision to issue the requested order. Such an assessment will unavoidably entail a balancing of the strength of the first amendment interests at stake against the urgency of the interests imperiled by disclosure. As the majority suggested, different levels of first amendment protection accompany different types of materials. Strong policy interests militate against the release of national security information.[51] Parties may claim only limited rights to disseminate trade secrets, commercial information,[52] or material that intrudes needlessly on legitimate privacy rights of third parties.[53] In contrast, political expression and information contained in public records[54] are sheltered by the foremost of first amendment protections. Balanced against these interests are the various competing considerations that disclosure may endanger, most typically the fairness of the pending proceeding.[55]

47 FED. R. CIV. P. 26 (c).
48 *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036, at 267 (1970).
49 FED. R. CIV. P. 26 (c).
50 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).
51 466 F.2d at 1316-17.
52 *See* note 50 *supra.*
53 The Supreme Court has not ruled directly on the question of the degree to which the privacy interests of others may limit the exercise of first amendment rights. At least one state court has held that third party privacy rights do pose a limit on freedom of speech. Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969).
54 *See* Landmark Communication, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978); Cox Broadcasting v. Cohn, 420 U.S. 469, 495-96 (1975); Mills v. Alabama, 384 U.S. 214, 218-19 (1966).
55 The majority opinion observed that the right to a fair trial is decidedly more pronounced in criminal

Secondly, the majority established that a specific demonstration of fact be made showing a concrete threat to an important countervailing interest. The requirement that the order be aimed precisely at the prevention of a certain and immediate threat is similar to the burden to be met to justify any prior restraint. In the *Halkin* case, the defendants failed to show the harm to their right to a fair trial justified the suppression of information concerning alleged government misconduct.

In the discovery context, a serious shortcoming of this type of requirement is avoided by minimizing the judicial guesswork in predicting the harm to be caused by the speech challenged. Judge Bazelon suggested that material could be studied by the court in camera to enable a more precise determination of the extent of the harm threatened, and consequently a more appropriately circumscribed order.

Finally, the majority's standard mandates that the trial court find no other means of avoiding the threatened harm are available which impinge less directly on expression, a requirement found in other freedom of speech cases as well as in other areas of constitutional law.[56] In this setting, the majority assures that trial courts will exhaust other options to effectively guard competing policy interests before turning to the imposition of a prior restraint.

VI. Consequences of *Halkin*: The Remaining Vitality of 26(c)

Although the dissent warned that the majority's standard robs 26(c) of its meaning, this concern seems to overstate the probable impact of *Halkin*. The underlying premise of the court's holding is merely that the language of the rule must be interpreted with the governing assumption that the federal rules do not supersede constitutional protection of individual liberties. Under the majority's constitutional standard for issuing protective orders that curb expression, it seems evident that orders can be drafted which permissibly prevent public disclosure when necessary to prevent abuse of the discovery system. Judge Bazelon remarked that judges should experience "no difficulty" in drafting orders covering specifically identified materials in conformity with the first amendment.[57] The court added that a protective order could be tailored to avoid the infirmities associated with judicial prior restraints in all but "unusual circumstances."[58]

The crucial ingredient in the court's formula may be the type of speech under attack. At stake in *Halkin* was the attempted release of highly newsworthy documents pertaining to government activity, an act of political expression that summons to its defense the highest first amendment protections.[59] Disputes over the release of genuine trade secrets or confidential information,

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cases than in civil litigation, and courts generally must be more watchful for danger of prejudice. *See* text accompanying note 39 *supra*.

56 *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (state regulation of commerce).

57 598 F.2d at 194.

58 *Id.* In camera inspection of documents should provide useful assistance in this task.

59 *See* 435 U.S. at 838-39; 420 U.S. at 495-96; 384 U.S. at 218-19.

however, raise a considerably different issue and concern more restricted first amendment interests.[60]

The potential effect of *Halkin* on the federal discovery system is also limited by the infrequency with which similar cases arise. As the scarcity of precedent on which the panel could rely indicates, it is an atypical case in which the first amendment has been interposed as an objection to restrictions on the use of discovery information. The principal function of 26(c) is to determine what limitations should be imposed on the scope of discovery, not to define what limitations should be placed on the use of information produced.[61] Where parties have sought prohibitions on extrajudicial use, they have done so primarily to safeguard commercial confidences.[62] *Halkin* represents the exceptional situation in which undeniably strong first amendment rights exist in the discovered materials. When these interests are threatened with encroachment by overreaching protective orders, *Halkin* compels courts to undertake a mandatory analysis and make specific findings before interfering with speech. The net impact of the majority's test is to accommodate highly valued first amendment rights without disrupting the firm control that courts exert over the discovery process.

VII. Conclusion

In re Halkin confronted the District of Columbia Circuit with a clash between a trial court's extensive power to police the civil discovery process and the individual's fundamental right to free speech. Acknowledging the threat to protected speech embodied in the district court's order, the majority perceived that the resolution of the case depended on an initial inquiry into the scope of first amendment rights retained by persons who resort to the courts for redress. The court's conclusion that these rights may be fully exercised in the absence of a clear showing of a palpable danger to some significant competing interest, combined with the Supreme Court's holding in *New York Times,* points inevitably to the further conclusion that these rights are not diminished when the expression consists of the dissemination of discovery matter. The extension in *New York Times* of protection from prior restraint to materials obtained by theft discredits the dissent's view that such protection is drastically limited in the case of discovery materials because they have been obtained under the auspices of a trial court. Significantly, both *Halkin* and *New York Times* involved attempts to suppress the release of information concerning highly questionable government activity.[63] The disclosures in both cases were acts of political expression that activated the broadest constitutional protection.

The standard adopted in *Halkin* for determining the propriety of orders restricting public disclosure of discovery information is consistent with constitutional standards for evaluating the permissibility of other prior restraints. The test incorporates within the context of the discovery system the means by

60 436 U.S. at 455-56.
61 *See* 8 C. WRIGHT & A. MILLER, *supra* note 48, § 2035, at 260 (1970).
62 *Id.* § 2043, at 300.
63 403 U.S. at 714.

which the court may weigh the first amendment interests of litigants and parties against countervailing considerations, without undue detriment to the discovery process or inhibition to free speech. After *Halkin,* the alternative of imposing a restraining order remains open to the trial court, but its use is not insulated from first amendment limitations. Where conflict between the first amendment and the discovery system arises, *Halkin* affirms that the federal rules must bend, if only slightly, to accommodate the constitutional guarantee of freedom of speech.

Thomas M. Byrne