

Excerpts, Testimony of John Roberts, nominee for Chief Justice

SEN. PATRICK LEAHY: It will probably become night court before we get done.

We talked just briefly about the First Amendment yesterday. And it's written primarily in terms of speech. But in a free and democratic nation, access to information, I think, is extraordinarily important, too.

Our framers knew that maximum knowledge is power. Actually, that was the maxim the administration used as the model for what was somewhat Orwellian, Total Information Awareness Program, until a Republican Congress. And I supported this, shut it down, because it was asking too much knowledge about individual Americans.

I also spoke about we, the people. If we, the people, know what our government's doing, why it's doing it, we can hold the government accountable and should.

So I worry about administration -- I'm not going into a specific case, but I'm worried about an administration that spreads misinformation, that is declaring more things secret and spending billions of dollars doing that, far more than any administration in history, probably all administrations put together. It punishes the whistleblowers. It bars the press and cameras from so many different events.

And I believe very strongly that the people want to know what's going on. The courts are, if at all possible, supposed to take their side in making sure they know what's going on. Because our government should not be able to hide things unnecessarily from the people.

No matter who's in power, the people should know what's going on.

So I would like to know how you would approach such a case. Let me give you a few examples.

In the last couple of years, the administration fought to prevent the media from covering coffins returning from Iraq. It fought to keep disturbing images of U.S.-run prisons in Iraq from the media. And just last weekend, actually after they lost the initial bout in court, it abandoned its zero-access policy regarding scenes of devastation in New Orleans.

As you know, most of America found out what was going on in New Orleans really from the press not from our government, at least the first few days.

There's been a number of reasons, excuses, which seem to change day by day, for why these things are being blocked. I'm not going to ask you to evaluate them.

But my question is this: If the government seeks to broadly exclude media from access to images or events of public interest or concern, does the First Amendment require the government to justify that denial of access? And if so, what kind of standards -- not any particular case, but what kind of standards does the court have to apply?

ROBERTS: Senator, I haven't dealt with a lot of First Amendment access cases. I studied one about media access to prisons, for example; the issue about whether the media had a right of access to prisons -- they wanted to report on it. And so I'm not terribly familiar with the precise levels of scrutiny that apply.

There is, obviously, a balancing of sorts between particular interests, when you are dealing with governmental operations. And there's some perfectly valid reasons for excluding media.

On the other hand, simply disagreement about whether it's an appropriate issue for the public to see would not strike me as a very compelling governmental interest.

And I think the courts regularly balance these sorts of things when they get an issue about a challenge by the media saying their First Amendment rights are being violated because of a particular exclusion.

And again, I'm not terribly familiar with the precise legal standards or how they have developed since the prison access case that I'm familiar with, but it does require a consideration and weighing. And the values of the First Amendment, obviously, are something that have to be given careful weight by the court, for the very reasons that you have discussed.

Because the First Amendment serves a purpose. It's not there just because the framers thought this was in general a good idea. It serves a purpose with respect to the government. It provides access to information and allows the people in a free society to make a judgment about what their government is up to.

LEAHY: Like the chairman, I was a prosecutor. And if we move a little bit out of the prison situation, which raises all other kinds of questions and abilities to limit access, let's just go to something that the public might easily have access to, if they could just walk in there.

Suppose the government -- I'll use something like Katrina. Suppose they felt that the rescue operations of the government, whether it's state, local or federal, was being handled in an inept way, or evacuees are being mistreated. Does that give them a right to bar the media, who may want to expose that?

ROBERTS: I think it's a general...

LEAHY: How would you analyze the claim, without citing a particular case?

The media comes and says, Look, the government screwed up. We're trying to get in there to take pictures to show how they screwed up and they say, 'You can't come in.' How would you analyze a claim like that?

ROBERTS: Well, you know, I do start with a general principle in this area. And I think it was Justice Brandeis who talked about, you know, sunlight being the best disinfectant.

And I think that's a lot of what the framers had in mind in guaranteeing freedom of speech and the other rights that go along with it. They appreciated the benefits that would come from public awareness. That's an important principle.

And, again, this is not an area that I feel completely up to speed on the precedents. And I obviously, if I were in a position as a judge and had to decide a particular case, would study them and become aware.

But my recollection is that there is great difficulty whenever you try to distinguish between public rights and media rights. And that if it's a situation in which the public is being given access, you can't discriminate against the media, and say, as a general matter, that the media don't have access, because their access rights, of course, correspond with those of the public. And as you said, they're in a position -- if there are a handful of people who might be able to have access, the media is in a position to make that information or knowledge, or whatever, available on a broader basis.