RECENT CASES

CONSTITUTIONAL LAW — FREE SPEECH — D.C. CIRCUIT UPHOLDS ACCESS RESTRICTION TO MILITARY-RUN NEWSPAPERS ON FORUM ANALYSIS GROUNDS. — *Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008).

Recent decades have witnessed an increasing amount of communication by the state and federal governments.[1] Responding to this increase in communication, the Supreme Court has developed the government speech doctrine in an attempt to make sense of the different roles government can play both as a speaker and as the regulator of private speech.[2] This "recently minted" approach,[3] however, has led to confusion.[4] Recently, in *Bryant v. Gates*,[5] the D.C. Circuit rejected a First Amendment challenge to a Department of Defense decision not to publish certain advertisements in government-operated newspapers distributed on military bases.[6] The panel's decision was grounded in conventional forum analysis.[7] Judge Kavanaugh argued in concurrence, however, that the panel's forum analysis was unnecessary and that the case could have been resolved more easily on government speech grounds.[8] Although Judge Kavanaugh reached the same result, he was wrong to invoke the government speech doctrine. The application of this doctrine in this case suggests a disconcerting expansion of the theory beyond its original purpose: protecting the *government's* ability to communicate in an unfettered fashion. Furthermore, the doctrine provides perverse incentives, which counsel in favor of a narrow construction. Thus, the *Bryant* panel wisely eschewed Judge Kavanaugh's application of government speech analysis to the civilian enterprise newspapers' (CENs) advertising sections. Future courts should reserve the doctrine for clear instances of government expres-

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[1] *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 5–9 (1983).

[2] *See generally* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

[3] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

[4] *See, e.g.*, Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 611–13 (2008) (describing the recent nature of the doctrine and the varying levels of puzzlement surrounding it).

[5] 532 F.3d 888 (D.C. Cir. 2008).

[6] Specifically, the challenge concerned civilian enterprise newspapers (CENs), which are "[n]ewspapers published by commercial publishers under contract with the DoD Components or their subordinate commands." Bryant v. Rumsfeld, No. 04-1125, slip op. at 5 (D.D.C. Mar. 12, 2007) (quoting Department of Defense Instruction No. 5120.4, § E2.1.2.1 (June 16, 1997), *available at* http://www.dtic.mil/whs/directives/corres/pdf/512004p.pdf).

[7] *See Bryant*, 532 F.3d at 894–98.

[8] *See id.* at 898–99 (Kavanaugh, J., concurring).

sion and "go slow in setting [the government speech doctrine's] bounds."[9]

In the 1980s and 1990s, Larry Bryant, then a long-term federal employee, filed a variety of unsuccessful First Amendment claims against the government.[10] In 2004 and 2005, Bryant sued the Secretaries of Defense, the Army, the Air Force, and the Navy in the United States District Court for the District of Columbia, arguing that the defendants had violated his First Amendment rights by rejecting advertisements[11] he had submitted to various military-run newspapers while accepting other political advertisements.[12] Both sides moved for summary judgment.

District Court Judge Kollar-Kotelly noted initially that she agreed with the government's contention that Bryant's claims were probably "fatally underdeveloped."[13] Still, she moved on to the merits of the First Amendment claim. She concluded that neither CENs nor the advertising sections contained therein were public forums for purposes of the First Amendment.[14] Her conclusion could have rested on collateral estoppel grounds,[15] but Judge Kollar-Kotelly proceeded to apply forum analysis to CENs anew.[16] The designation of a given forum, she stated, depends on two factors: "[T]he government's intent in establishing and maintaining the property,"[17] and the nature of the property — that is, whether the government had created a property consistent with expressive activity.[18] Applying these principles and noting the deference typically given the military,[19] the court concluded that CENs were nonpublic forums and were therefore subject only to re-

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[9] Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in the judgment).

[10] *See* Bryant v. Cheney, 924 F.2d 525, 526–27 (4th Cir. 1991); Bryant v. Weinberger, 838 F.2d 465, 1988 WL 4582, at *1 (4th Cir. 1988) (unpublished table decision), *vacated sub nom.* Bryant v. Carlucci, 488 U.S. 806 (1988); Bryant v. Sec'y of the Army, 862 F. Supp. 574, 576–77 (D.D.C. 1994). Like the instant case, these suits arose when the government rejected Bryant's submissions to various government-run media.

[11] Bryant's advertisements were highly critical of U.S. conduct in Iraq. *See Bryant*, No. 04-1125, slip op. at 3–4.

[12] *See id.* at 1–2. Bryant also claimed that the government had violated his Fifth Amendment right to due process. *Id.*

[13] *Id.* at 10.

[14] *Id.* at 10–23.

[15] *Id.* at 11–12.

[16] *See id.* at 12. Judge Kollar-Kotelly also noted specifically that her decision did *not* rest on government speech grounds; in this case, she concluded, the military did not exercise the sort of editorial discretion that was essential to a finding of government speech. Furthermore, since the district court in Bryant's 1994 case had rejected the government's argument that the CENs constituted government speech, such an argument was collaterally estopped here. *Id.* at 12 n.5.

[17] *Id.* at 15 (quoting Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988)) (internal quotation mark omitted).

[18] *Id.*

[19] *Id.* at 18 (citing Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

view for reasonableness and viewpoint-neutrality.[20] Judge Kollar-Kotelly held that the restrictions on CEN advertising sections were in fact reasonable and viewpoint-neutral: the provisions protected the military from appearing beholden to political causes or candidates.[21] Quickly denying Bryant's other claims,[22] Judge Kollar-Kotelly granted summary judgment for the government.[23]

The D.C. Circuit affirmed.[24] Writing for the panel, Judge Ginsburg[25] sought first to identify the relevant forum. He concluded that the forum at stake was the advertising section of each CEN, not the newspaper as a whole.[26] Judge Ginsburg then applied forum analysis to the advertising sections, agreeing with the district court that the constitutional "'touchstone' for determining whether the Government has designated a forum public is its 'intent in establishing and maintaining' that forum."[27] In determining the government's intent, Judge Ginsburg noted, a reviewing court must consider both "the Government's 'stated purpose'" and "objective indicia of intent."[28] He concluded that the advertising sections of CENs were nonpublic forums: the advertising sections were meant to promote the flow of information between commanders and their troops, as opposed to fostering communication or assembly by the public.[29] He rejected Bryant's argument that the government had opened CEN advertising sections to the public by accepting political advertisements. The two ads that Bryant alleged to be political in character[30] were insufficient to show

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[20] *See id.* at 18–23.

[21] *Id.* at 25.

[22] *See id.* at 26–34. Specifically, Judge Kollar-Kotelly ruled for the government on Bryant's claims that the Department guidelines were unconstitutionally overbroad or vague, *id.* at 26–29, that the guidelines granted unbridled discretion to the CEN licensor, *id.* at 29–30, and that the government's actions violated Bryant's Fifth Amendment right to due process, *id.* at 33–34.

[23] *Id.* at 37.

[24] *Bryant*, 532 F.3d 888.

[25] Judge Ginsburg was joined by Judges Brown and Kavanaugh.

[26] *Bryant*, 532 F.3d at 895. *Contra Bryant*, No. 04-1125, slip op. at 21–22 (holding that CENs and advertising sections contained therein were nonpublic forums).

[27] *Bryant*, 532 F.3d at 895–96 (quoting Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988)).

[28] *Id.* at 896 (quoting *Stewart*, 863 F.2d at 1016–17 (emphasis omitted)) (internal quotation marks omitted). These indicia include "the nature of the property, its compatibility with expressive activity, and the consistent policy and practice of the government." *Id.* (quoting *Stewart*, 863 F.2d at 1016–17) (emphasis omitted).

[29] *Id.* at 896–97 (noting that CENs are intended to improve morale, internal cooperation, and assistance to servicemembers and their families).

[30] Bryant offered as evidence of the public nature of the forum two advertisements that the CENs had accepted: one, an advertisement inviting service members to a book signing by former Senator Robert Dole; the other, an advertisement inviting military members to apply to be FBI agents. *Id.* at 894. Neither of these ads, Judge Ginsburg concluded, "ha[d] any political content or otherwise indicate[d] [that] the Government intended to open the forum for general expressive use." *Id.* at 896–97.

that the government had consistently allowed "expressive advertisements . . . , political advertisements . . . , or any advertisements like Bryant's; indeed, its policy and practice [had] consistently been to exclude such advertisements."[31] Having concluded that the CEN advertising sections were nonpublic forums, Judge Ginsburg found the regulations to be reasonable. The content restriction on political advertising "ensure[d] that advertising furthers (or at least does not hinder) the mission of a military command or installation, which is obviously a legitimate goal."[32] The D.C. Circuit thus affirmed the district court's conclusion that the restrictions did not violate the First Amendment.

Judge Kavanaugh concurred.[33] He accepted the government's argument that the military newspapers were nonpublic forums, but he wrote separately to suggest that "there [was] a far easier way to analyze this . . . case under the Supreme Court's precedents."[34] The military-operated newspapers, Judge Kavanaugh concluded, were best classified as government speech. The same conclusion applied to the advertising sections, even though they represented government compilation of third-party messages.[35] Therefore, Judge Kavanaugh argued, "forum analysis [did] not apply and the Government may favor or espouse a particular viewpoint."[36] Citing both Supreme Court and D.C. Circuit precedent, he concluded that "the Government 'has largely unlimited power to control what is said in its official organs . . . or in organs that it officially endorses, even if this control is exercised in a viewpoint-based way.'"[37] Thus, he argued, *Bryant* was an easy case. The military could apply viewpoint-based control in running its newspapers, and forum analysis was especially inappropriate given the deference accorded military determinations of internal procedure.[38]

As the district court and D.C. Circuit opinions indicated, *Bryant* was an unremarkable case on forum analysis grounds. Judge Kavanaugh, however, should not have applied government speech analysis to the CEN advertising sections. His doing so represents a potentially serious and troubling expansion of the doctrine. Previous cases in which the Supreme Court and inferior courts have invoked the doctrine involved instances of clear government communication — the dissemination of a message. The CEN advertising sections featured

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[31] *Id.* at 897.

[32] *Id.* Judge Ginsburg also quickly dismissed Bryant's contention that the regulations were viewpoint discriminatory. *Id.* at 897–98.

[33] *Id.* at 898 (Kavanaugh, J., concurring).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 898–99.

[37] *Id.* at 899 (omission in original) (quoting EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 410 (3d ed. 2008)).

[38] *Id.*

no such government message. Furthermore, an expansive government speech doctrine creates perverse incentives for both policymakers and judges. These incentive effects counsel in favor of construing the doctrine narrowly. Together, these factors suggest that Judge Kavanaugh should have applied only forum analysis to the CEN advertising sections, rather than eliding the differences between government speech and government's use of media to enable private communication.

The government speech doctrine has evolved as courts have distinguished between private speech on government property and the government's own speech. Courts have traditionally applied forum analysis to deal with the former category[39] and, as government communication has increased, have devised and elaborated upon the government speech doctrine to deal with the latter.[40] The government speech doctrine holds that with respect to government's "expressive conduct . . . the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[41] Thus, judicial review of governmental control of its own speech is limited: "[G]overnment has largely unlimited power to control what is said in its official organs . . . or in organs that it officially endorses, even if this control is exercised in a viewpoint-based way."[42] Although the doctrine's stark public-private distinction is questionable,[43] the government speech doctrine is now an integral part of modern First Amendment jurisprudence.[44]

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[39] *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 230–90 (3d ed. 2007); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

[40] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (holding that the placement of a monument in a public park was government speech and not susceptible to Free Speech Clause scrutiny); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–62 (2005) (holding that the high degree of governmental control exercised over an administrative message promoting the consumption of beef rendered the message immune from Free Speech Clause review); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–75 (1998); Rust v. Sullivan, 500 U.S. 173, 192–200 (1991).

[41] *Summum*, 129 S. Ct. at 1131; *accord Johanns*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."). Courts have noted, however, that the government's ability to speak is restricted by the constraints of the Establishment Clause, *see* Corbin, *supra* note 4, at 615–18, and ultimately by political accountability, *see* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

[42] VOLOKH, *supra* note 37, at 410.

[43] Commentators and courts have noted the false dichotomy created by the Supreme Court in its seminal government speech decision, *Rust v. Sullivan*, 500 U.S. 173. As Judge Luttig noted, "circuit courts . . . have struggled . . . because they have assumed, in oversimplification, that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time." Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 244–45 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); *see also* Corbin, *supra* note 4, at 607 ("The trouble with this dichotomy is that not all speech is purely private or purely governmental.").

[44] *See Summum*, 129 S. Ct. 1125.

Judge Kavanaugh's conclusion that the CEN advertising sections were government speech, however, appears to signal a potentially significant expansion of the doctrine. While both the Supreme Court[45] and the D.C. Circuit[46] have sensibly held that the government speech doctrine may apply even when the government selects among private speakers to send its own message, it is another thing entirely to apply the doctrine to situations where the government is not communicating as such but is merely facilitating expression between selected private speakers. Government expression *through* private speakers — whether the government chooses between private speakers to send a message[47] or co-opts the monies of private speakers to send its own message[48] — ought properly to be contrasted with governmental action that simply *promotes* private communication. In the former context, private parties serve as conduits for public expression, and their communication is properly deemed government speech. In the latter, government allows some, but not all, private parties to use a government medium to communicate with the public, but it does not use the medium for government messages.[49]

The *Bryant* advertising sections fall into the latter category. As the D.C. Circuit panel and district court noted and the examples of advertising Bryant provided made clear,[50] the advertising sections — in contrast with the rest of the newspaper — functioned as vehicles for private parties to offer information that would enable servicemembers to make commercial or career decisions.[51] Such private speech did not

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[45] *See Forbes*, 523 U.S. at 674 ("Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others.").

[46] *See* People for the Ethical Treatment of Animals, Inc., v. Gittens, 414 F.3d 23, 28 (D.C. Cir. 2005).

[47] *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 203–05 (2003) (plurality opinion) (holding that public libraries have wide-ranging discretion in choosing the materials to place on their shelves); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 585–86 (1998) (holding that the NEA, having limited resources, necessarily has to discriminate among private speakers); *Gittens*, 414 F.3d at 28; *see also* Bezanson & Buss, *supra* note 2, at 1385–87.

[48] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553, 559–60, 562–63 (2005) (holding that compelling cattle producers to fund a government message promoting generic industry advertising does not violate the First Amendment).

[49] *Compare id.* at 560 ("The message . . . is effectively controlled by the Federal Government itself."), *and id.* at 562 ("[T]he government sets the overall message to be communicated and approves every word that is disseminated . . . ."), *with Bryant*, 532 F.3d at 897 ("These two advertisements are . . . insufficient to show the DoD has anything approaching a 'consistent policy and practice' . . . of permitting expressive advertisements . . . ; indeed, its policy and practice have consistently been to exclude such advertisements." (citation omitted) (quoting Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1017 (D.C. Cir. 1988) (emphasis omitted))).

[50] *See supra* note 30.

[51] *See Bryant*, 532 F.3d at 894 (listing examples); Bryant v. Rumsfeld, No. 04-1125, slip op. at 19 (D.D.C. Mar. 12, 2007) ("The stated purpose of advertisements in CENs is to 'guide command

clearly represent government expression. The lack of control over the content of the messages distinguishes this case from *Johanns v. Livestock Marketing Ass'n*;[52] there, the Supreme Court applied the government speech doctrine to a challenged promotional campaign because the government controlled the message completely.[53] Furthermore, the content of the CEN advertising sections was not compiled to express a particular governmental viewpoint.[54] The obvious counterargument here — that the advertising sections in the CENs *were* expressive — is belied by the government's contradictory contention that the advertising sections had wholly excluded expressive advertisements.[55] Government speech doctrine was thus inapposite.

Furthermore, the deleterious incentive effects of the doctrine counsel in favor of using a cautious approach, rather than assuming substantial equality between application of the government speech and nonpublic forum doctrines.[56] Consider first the incentives that a robust government speech doctrine would provide to policymakers. The power to discriminate on the basis of viewpoint is a substantial one that a rational government seems unlikely *not* to use to its advantage.[57] Imagine that the Department of Defense *repealed* the regulations[58] (including the ban on political advertising) that Bryant challenged, thereby allowing political communication into the pages of CENs and their advertising sections. Applying forum analysis, discrimination among submissions *might* be constitutional; as Judge Ginsburg noted in his opinion for the panel, the answer to such a question would depend on the government's consistent policy and practice with respect to the forum, although viewpoint discrimination would be precluded. Under Judge Kavanaugh's expansive and deferential gov-

members to outlets where they may fulfill their purchasing needs' . . . ." (quoting Department of Defense Instruction No. 5120.4, *supra* note 6, § 6.2.1.1.5)).

[52] 544 U.S. 550.

[53] *Id.* at 560–62.

[54] *Cf.* United States v. Am. Library Ass'n, 539 U.S. 194, 204 (2003) (plurality opinion) (noting that public libraries enjoy wide-ranging discretion to pick materials that, in the government's opinion, benefit the community).

[55] *See Bryant*, 532 F.3d at 896–97.

[56] *Cf.* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in the judgment) ("Because the government speech doctrine . . . is 'recently minted,' it would do well for us to go slow in setting its bounds . . . ." (citation omitted) (quoting *id.* at 1139 (Stevens, J., concurring))).

[57] The Free Speech Clause, as opposed to statutory provisions, does not operate as a substantive constraint on government's ability to communicate. *See, e.g.*, Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 385 (1983) (reviewing YUDOF, *supra* note 1) ("When government misuses its power to communicate we do have a problem, but this does not mean that we have a first amendment problem."); *see also* Corbin, *supra* note 4, at 607.

[58] Or imagine, for purposes of the hypothetical, that a government agency merely failed to enact such regulations and then operated a newspaper containing both editorial and advertising content.

ernment speech analysis, such viewpoint discrimination *would* be constitutional, and absent statutory constraints, a rational government would almost certainly use such a power. Without constitutional or statutory handicaps, a self-interested government would likely privilege political insiders at the expense of outsiders — that is, the government at the expense of the people.[59] An expansive government speech doctrine thus provides policymakers with a strong incentive to make political appeals through government media, exacerbating entrenchment problems.[60]

The incentive effects that an expansive government speech doctrine would provide to judges are also troubling. The most important of these is the likelihood of overapplication of the doctrine as a decision rule when forum analysis is more appropriate. Because government speech doctrine is a much simpler analytical framework for courts to apply,[61] it seems likely that lower courts will opt to use it more often if circuit courts — and, most importantly, the Supreme Court — do not keep it tightly cabined; applying a public choice analysis to judges suggests that they will pursue adjudicatory techniques that will reduce their own costs.[62] Furthermore, given the relative unlikelihood of success of a government speech–based challenge compared with a forum-based challenge, there will be fewer cases for judges to decide, which is likely to influence the self-interested adjudicator.[63]

The lack of expressive content of the CEN advertising sections and the problematic incentive effects of the government speech doctrine suggest that the *Bryant* panel correctly applied forum analysis; Judge Kavanaugh should not have gone further. Ultimately, future courts must carefully distinguish between government expression and government conduct that facilitates private speech. Doing otherwise may endanger the protection provided speech by the First Amendment.

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[59] One can imagine under a government speech regime, for example, messages arguing for U.S. involvement in this or that foreign conflict and denigrating the efforts of protestors.

[60] *Cf.* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502, 552 (1997) (noting the incentive that legislators have to protect their own power by limiting criticism of government).

[61] *See Bryant*, 532 F.3d at 898 (Kavanaugh, J., concurring) ("[T]here is a far *easier* way to analyze this kind of case under the Supreme Court's precedents." (emphasis added)).

[62] *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 20 (1993) (noting that judges, like other rational actors, will display "an aversion to any sort of 'hassle,' as well as to sheer hard work"); *see also* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 187 (1991) (noting district court judges' concern that new sentencing guidelines would increase their workload).

[63] That is, plaintiffs will be deterred on the margin by their decreased chances of success in a world where government speech doctrine plays a larger role relative to forum analysis. This, in turn, would seem more likely to lead to a relatively reduced judicial workload than in a world where forum analysis is the baseline. *Cf.* Cohen, *supra* note 62, at 187.