THE PRESS IN COURT

by A. E. Dick Howard

The First Amendment to the Constitution of the United States consists of a single sentence:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

When that sentence became law in 1791, the clause pertaining to the press rendered Congress powerless to enact any law restraining the press in advance from printing whatever it wanted. That, many people thought at the time, did not mean that the press should escape criminal penalty if it published "seditious libels," "licentious opinions," or "malicious falsehoods." Indeed, in 1798, during the Presidency of John Adams, Congress enacted the Federalist-sponsored Sedition Act. It prescribed a fine and imprisonment for persons convicted of publishing "any false, scandalous, and malicious writing" bringing into disrepute the U.S. government, Congress, or the President.

Was the act, under which 25 persons were eventually prosecuted, constitutional? The Jeffersonian Republicans, at whose publicists it was aimed, thought not. Some of them—including James Madison, the "father" of the Bill of Rights—took an expansive view of freedom of the press. "It would seem a mockery," wrote Madison, "to say that no laws shall be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made."

Thomas Jefferson himself harbored a more complex view. On the one hand, he thought the Sedition Act unconstitutional—and, when he became President, pardoned the 10 Republican editors and printers who had been convicted under the law. On the other hand, as he explained in 1804 to Adams's wife, Abigail, the law's unconstitutionality did not mean that "the overwhelming torrent of slander" in the country was to go unrestrained. "While we deny that Congress have a right to control the freedom of the press," he wrote, "we have ever asserted the right of the States, and their exclusive right, to do so."

A year earlier, New York State had, in fact, indicted a Federalist editor for "seditious libel" against President Jefferson. On the editor's behalf, Alexander Hamilton, though a sup-

porter of the Sedition Act, eloquently reasserted the principles enunciated in 1735 in the John Peter Zenger case.* Hamilton championed the right of the jury (rather than the court) to determine if there had been libel, argued truth as a defense against libel, and defended the right of the press "to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals." In 1805, New York passed a libel law embodying the Hamiltonian view. Other states soon followed suit. Ultimately, Hamilton's position came to prevail throughout the republic. Because the U.S. Supreme Court under John Marshall and his successors offered no guidance, there matters stood.

The Court as Oracle

Indeed, not until the 20th century did the Supreme Court begin actively interpreting the First Amendment's press clause. Even then most of its decisions had to await the 1960s when, amid the divisive tensions of war and rapid social change, Americans acquired a taste for litigation, and the press became more assertive in its coverage of local and national governments. The Supreme Court soon had its hands full.

The Court's freedom-of-the-press cases may be arranged into three principal categories:

¶ Cases in which citizens, of various degrees of renown, seek damages for alleged libels against them by the press.

¶ Cases in which the government seeks to keep the press from publishing what it wants to publish.

¶ Cases in which the press claims special legal privileges, such as the right to refuse to reveal a news source's identity to a grand jury, or the right to be given access to government institutions or proceedings.

A $9.2 million libel judgment in 1980 against the *Alton Telegraph* forced the 38,000-circulation Illinois daily to file for bankruptcy to avoid having to sell its assets. Although a settlement was reached this year and the paper remains in business, the case—which involved a never-published memorandum by two reporters—pointed up a lesson that few in the news business have to learn twice: A successful libel action, painful even to a wealthy defendant, can be fatal to a small one. However, thanks to the First Amendment and the Supreme Court, the press has

*Zenger, a New York printer, was accused of seditious libel. His lawyer, Andrew Hamilton, argued that the press should be free to print truthful criticism of a "bad" governor (meaning the unpopular Governor William Cosby). Hamilton urged the jury to decide the law as well as the facts. The jury did so—and acquitted Zenger.

gained certain protective immunities.

The Supreme Court, under Chief Justice Earl Warren, handed down its most important libel decision in 1964 in *New York Times* v. *Sullivan,* a case involving supporters of the Rev. Martin Luther King, Jr. In 1960, they had placed an advertisement in the *Times* criticizing, with some inaccuracies, officials' handling of civil rights demonstrations in Montgomery, Alabama, and elsewhere in the South. L. B. Sullivan, Montgomery's police commissioner, sued the newspaper and the ad's sponsors (though he himself had not been mentioned in the ad). An Alabama jury awarded Sullivan $500,000. But the Supreme Court, harking back to Alexander Hamilton, ruled that a "public official" seeking damages for a defamatory falsehood relating to his official conduct must prove that the statement had been made with "actual malice"—i.e., with knowledge that the statement was false, or with "reckless disregard" of whether it was or not. Otherwise, the Court contended, would-be critics might not speak out, for fear the truth could not be proven in court, at least not without great expense.

Changing Course

Newspapermen were delighted by this decision—which, said *Times* publisher Arthur Ochs Sulzberger, "makes freedom of the press more secure than ever before"—and their satisfaction grew with each subsequent ruling by the Supreme Court. In 1967, the Court (*Curtis Publishing Co.* v. *Butts*) extended the *Sullivan* principle to cover "public *figures*" (not just *officials*), such as Wally Butts, a former University of Georgia athletic director. Butts had sued Curtis over a *Saturday Evening Post* report that he had given football plays to Alabama rival Bear Bryant. Four years later, in *Rosenbloom* v. *Metromedia,* the Court (by a plurality) extended the *Sullivan* principle still further—to include private individuals involved in matters of "public or general interest."

But then the Supreme Court, under Justice Warren

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Mike Peters/Dayton Daily News.

As this 1979 cartoon makes plain, a succession of "adverse" Supreme Court decisions in recent First Amendment cases aroused the press's ire.

Burger, began to change course. Despite its 1971 decision, the Court in 1974 ruled (*Gertz* v. *Robert Welch, Inc.*) that prominent Chicago attorney Elmer Gertz, who had defended a client in a widely publicized case, was neither a public official nor a public figure—and hence did not need to prove he had been libeled with "malice." Two years later the Court (*Time Inc.* v. *Firestone*) decided that Palm Beach socialite Mary Alice Firestone, who had been party to a highly publicized divorce proceeding, was also not a public figure. Still more sobering for the press was *Hutchinson* v. *Proxmire* (1979), wherein the Court excluded from the "public-figure" realm a Michigan state mental hospital's research director who had received more than $500,000 in federal grants for research into monkey behavior. U.S. Senator William Proxmire had ridiculed Dr. Ronald Hutchinson's research, and Hutchinson had sued the Senator for libel.

Some prominent members of the press, however, were more upset in 1979 by the Court's ruling in *Herbert* v. *Lando* that the First Amendment did not protect CBS News correspondent Mike Wallace and *60 Minutes* producer Barry Lando from having to

answer pretrial discovery questions about their editorial process. The case involved a program questioning the veracity of Anthony Herbert, a former Army lieutenant colonel who had accused the Army of covering up reports of atrocities against civilians in Vietnam. To win his libel case, Herbert, as an acknowledged "public figure," had to prove malice, hence had to probe CBS's decision-making. William A. Leonard, then president of CBS News, said the decision denied "constitutional protection to the journalist's most precious possession—his mind, his thoughts, and his editorial judgment." How a public figure was supposed to prove "actual malice" without inquiring into the journalist's state of mind went unexplained. Eventually, most editors seemed to realize that the *Herbert* decision was a natural corollary of *Sullivan*. It had just taken a while in coming.

Properly 'Chilled'

While the pendulum has swung back toward safeguarding the rights of individuals, nothing the Supreme Court has done of late compares in significance with the 1964 *Sullivan* case. That decision represented an immense shift in favor of the press—one so great that even some newspapermen regret it. Kurt Luedtke, former executive editor of the *Detroit Free Press,* argued before the American Newspaper Publishers Association last spring that, prior to *Sullivan,* "the burden on the press was not at all excessive; the 'chilling effect' which the threat of libel action posed chilled exactly what it was supposed to."

Most newspaper publishers, and their lawyers, accountants, and editors, think otherwise. They want not only to feel free to publish critical articles, but also to be assured that newspapers need not pay vast sums to persons deemed by juries victims of libel. While research by a Stanford law professor, Marc Franklin, has shown that between 1977 and 1980, media defendants won more than 90 percent of libel cases, "winning" is not everything, especially for small papers. Said John K. Zollinger, publisher of the *Gallup Independent,* a 10,795-circulation daily in New Mexico, "We're spending almost 2 percent of our net profit on 'legal.' It's no joke any more. . . . You win and still pay."

If libel is the press's most publicized problem, one even closer to the heart of the First Amendment is "prior restraint"—the chief issue in another cluster of Supreme Court cases.

For centuries, authors and journalists have inveighed against censorship or "gagging" of the press by government. "And though all the windes of doctrin were let loose to play upon the earth," advised John Milton in 1644, "so Truth be in

the field, we do injuriously by licencing and prohibiting to misdoubt her strength." Yet the principle—and the First Amendment embodying it—underwent a severe test in 1971. In June of that year, the *New York Times* began publishing extracts from the "Pentagon Papers," (a classified Defense Department history of U.S. Vietnam involvement), and the Nixon Administration went to court to stop further publication. The Supreme Court, however, by a 6 to 3 vote (*New York Times* v. *United States*) ruled in favor of the *Times*—a landmark decision.

Newsmen in Jail

In subsequent years, journalists savored further gains, even as lawyers and some judges complained of the new "arrogance" of the media. Thus, in 1976 the Supreme Court (*Nebraska Press Association* v. *Stuart*) unanimously ruled invalid a Nebraska judge's "gag order" preventing the press from reporting salient details of a murder trial. And the Court, again unanimously (*Landmark Communications* v. *Virginia*), in 1978 overturned a verdict against Norfolk's *Virginian-Pilot* for publishing, despite state law, an (accurate) account of proceedings before a state judicial review commission. All in all, the press has largely had its way in specific gag order cases, even though the Supreme Court has not ruled gag orders per se unconstitutional.*

A third group of cases tackled by the Supreme Court—dealing with questions of journalistic privilege—has perhaps been the murkiest.

In 1958, Marie Torre, a *New York Herald Tribune* television columnist, refused to divulge the identity of a CBS executive whom she had quoted as saying that singer Judy Garland had "an inferiority complex" and was "terribly fat." As a result, Torre was cited by the judge for contempt of court (Garland, in those pre-*Sullivan* days, had sued CBS) and eventually served a brief jail term. During the tumultuous 1970s, perhaps a dozen newsmen went to jail rather than reveal in court their sources for stories. The newsmen included William T. Farr of the *Los Angeles Times*, Peter J. Bridge of the *Newark Evening News*, and Myron J. Farber of the *New York Times*. Farber, at the murder trial of a New Jersey doctor, refused to turn over his reportorial

*In a related category of cases, government seeks to force the press to publish what it does not wish to publish. Here, the Supreme Court has sharply distinguished between the electronic and print media. In *Red Lion Broadcasting Co.* v. *FCC* (1969), the Court upheld FCC regulations requiring radio and TV stations to give reply time to individuals criticized on the air. But in *Miami Herald* v. *Tornillo* (1974), the Court ruled that Florida's "right of reply" statute requiring newspapers to print a political candidate's reply to editorial criticism violated the First Amendment.

notes to a judge (although, it emerged, the reporter had signed contracts to write a book on the case). Farber's newspaper articles had been instrumental in the doctor's indictment. The jury found the doctor not guilty.

Journalists have argued that to gather news, they need to be able to preserve the anonymity of their sources. The First Amendment, they assert, puts them in a different category from other citizens. The Supreme Court, however, in a 5 to 4 decision (*Branzburg* v. *Hayes*, 1972) ruled that even a newspaper reporter (in that case, for the Louisville *Courier-Journal*) must respond to a grand jury subpoena and answer questions relevant to a criminal investigation. The *Branzburg* ruling did not prevent state legislatures from enacting so-called shield laws of varying strengths, designed to protect reporters from being forced to reveal their sources. After *Branzburg*, 11 states amended existing shield laws or created new ones; 15 others retained shield laws already on the books.

Searching Newsrooms

Privilege of another sort was the issue in 1978 when the Supreme Court, in a 5 to 3 decision, ruled that the First Amendment does not bar police, if they have a warrant, from searching newspaper offices for evidence of crime. (The case, *Zurcher* v. *Stanford Daily*, involved the Stanford University student newspaper, and the evidence sought was photographs of a clash between demonstrators and police.) *Los Angeles Times* editor Bill Thomas said at the time that Justice Byron White's written opinion showed he "neither cares much nor knows much about the problems of the press." Critics—notably the American Newspaper Publishers Association and the American Society of Newspaper Editors — appealed to Congress, which in 1980 passed a law requiring police, in most situations, to get a subpoena before searching newspaper offices for criminal evidence.

Perhaps the most ambitious First Amendment claim advanced by the press has been that it has a "right" to gather news—a right, that is, to have access to government agencies, documents, and deliberations.

The Burger Court has not embraced this notion eagerly. The Court has ruled that journalists have no constitutional right to interview prison inmates (*Pell* v. *Procunier*, 1974) or to inspect local jails (*Houchins* v. *KQED*, 1978). Most disturbing, from the press's point of view, was the Court's 5 to 4 decision in 1979 to uphold the closing, to both public and press, of a pretrial suppression-of-evidence hearing in a murder case. Justice Potter

Stewart's majority opinion in *Gannett Co.* v. *DePasquale* actually revolved around the Sixth Amendment (with its guarantee of a public trial) rather than the First. (The Court said a trial was "public" for the benefit of the accused rather than the public.) But David F. Stolberg, a Scripps-Howard executive, said the decision was "so violative of our whole Anglo-American tradition of open government that the minority position must eventually prevail. In the meantime, it is not just a press fight—it is a freedom fight."

Newspapermen are prone to enshrine freedom-of-the-press as an absolute—and to become apoplectic when judges do not display a similarly single-minded zeal in *their* defense of the First Amendment. In fact, however, there are other freedoms, notably those in the other amendments in the Bill of Rights. When various rights conflict, courts must seek a resolution. In any event, the Supreme Court in 1980 (*Richmond Newspapers* v. *Virginia*) assuaged some of the fears inspired by *Gannett* with a decision assuring press and public of access to criminal trials, unless there be an "overriding interest" for closure.

When it comes to the First Amendment, the men and women of the press are—as is natural and no doubt useful—the first to take alarm when their prerogatives are even marginally encroached upon. But the Supreme Court over the past two decades has hardly been bent on gutting the press clause of the First Amendment.

The Court, to be sure, has manifestly rejected the notion that the press should enjoy any "preferred status" under the First Amendment (and so has insisted that journalists can be called to testify before grand juries). And in balancing a person's stake in his good name against the press's right to publish, the Court has unmistakably tended to limit the 1964 *Sullivan* ruling, in favor of individuals and their reputations.

However, when—as in the Pentagon Papers and later cases—government has tried to restrain the press from, or punish it for, publishing information already in its possession, the Court has strongly defended the press and its freedom. As Floyd Abrams, a media attorney and frequent critic of the Supreme Court, concluded in 1980: "The American press has never been more free, never been more uninhibited, and—most important—never been better protected by law."