Chapter 7

The Right to Freedom of the Press

> *"That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments."*
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> —Virginia Declaration of Rights (1776)

The founders of the United States believed a free press was a prerequisite for a free society. James Madison, often called the Father of the Constitution, said it was "one of the great bulwarks of liberty." Thomas Jefferson said if he had a choice between government without newspapers or newspapers without government, he would choose newspapers. It was not mere coincidence, then, that the First Amendment guarantees the right to a free press—"Congress shall make no law abridging freedom of the press"—and links it closely to the right to free speech. To the founders, they were twin pillars of American freedom.

The relationship between a free press and liberty was not an issue before the invention of movable type in the mid-1400s. The printing press provided rulers a new way to spread their authority more quickly and over a wider area, but it also gave opponents the same ability to criticize government. To minimize this threat, the British Crown licensed printers and required official approval before publication. (This form of censorship is commonly called prior restraint.) Even when the licensing law expired in England in 1694, it continued in the colonies, thereby allowing officials to suppress ideas or information they considered harmful. Printers could be punished criminally, for example, if they published unapproved criticisms of the church or state.

During the struggle with Great Britain, colonists used pamphlets, broadsides, and newspapers to make their protests, debate their differences, and rally support for independence. The press was valuable to the revolutionary cause because the printed word reached a much wider audience than sermons, speeches, or letters, the other main avenues for communication. As a result, constitutions in the young states included the right to a free press as a limit on governmental power. The revolutionary generation believed this right was part of their heritage as Englishmen. Greater press freedom had been one result of the seventeenth-century struggle between king and Parliament for supremacy, and the colonists thought the right extended to them through their charters of settlement. An important commentary on the common law at the time of independence declared that "the liberty of the press is. . . essential to the nature of a free state. . . [and] consists in laying no previous restraints upon publications." This understanding served as the foundation for the First Amendment protection.

As with free speech, however, people disagreed almost immediately with the meaning of this right. The 1790s was an especially troublesome decade for press freedom. The nation was on the brink of war with France when Congress passed the Sedition Act in 1798 to punish journalists who criticized, or libeled, the government. Under the claim of protecting national security, more than twenty-five people went to jail, convicted of criminal libel. Critics charged the government with using its power to put down political opposition, but the act

expired before the Supreme Court could consider its constitutionality.

The nineteenth century witnessed an explosion in the number and spread of newspapers and magazines. This rapid increase in publications and a subsequent decline in the price of a newspaper—one penny by the 1850s—changed the nature of journalism. Attacks on parties and politicians declined in favor of human-interest and crime stories. The emergence of the Associated Press, a news-gathering collective, in 1848 and Western Union's transcontinental telegraph in 1861 opened a national market for news. By the end of the century, newspapers had become big businesses, with rival publishers competing for a share of an expanding audience. The power of the press could be seen during the Spanish-American War in 1898, when newspapers owned by William Randolph Hearst and Joseph Pulitzer published vivid accounts of Spanish atrocities in Cuba to stir war fever. Such news sold papers, as did shocking stories about the sordid side of private lives. The popular term for this kind of reporting was "muckraking," but in fact many of the scandalous accounts of the day exposed official graft and corruption, as well as the dire living conditions in urban slums. Some newspapers claimed to avoid the excesses of investigative reporting—the New York Times, for example, sought to be objective by offering only "All the News That's Fit to Print"—but increasingly, journalism was about creating news and not simply reporting it.

This change brought calls for legal restraints, which went unheeded because the popular press enjoyed wide readership. More at risk were papers that challenged the power of the state. Many were progressive and socialist publications that campaigned for reforms considered extreme at the time—labor laws, for example—but which were adopted in later decades. State laws sought to control these publications under "criminal anarchy" statutes, especially after an anarchist assassinated President William McKinley in 1901. Communist party and other leftist newspapers were targets, as were ethnic newspapers, because they challenged strongly held American values. World War I brought further concern about the press, especially when newspapers published items thought to threaten national security, even if the government's definition of threats was overly broad. It was not long before serious-minded people were asking whether the press was too free or too powerful: what, exactly, did the First Amendment protect?

The Supreme Court considered this important question in the early 1930s. An anti-Semitic publisher from the upper Midwest printed a scandal sheet filled with ethnic slurs, and the government sought to shut the paper down. Did hatemongers enjoy the protection of the First Amendment? For the first time since the ratification of the Bill of Rights, the justices faced squarely the question of what freedom of the press means.

Corruption was common in Minneapolis during the 1920s, as it was in nu merous other American cities. It was the era of Prohibition; bootlegging, speakeasies, and gambling were common, and to protect their illegal interests, gangsters paid off local police and politicians. In Minneapolis, the mayor, chief of police, and district attorney were all reputed to be on the mob's payroll. The city's respectable newspapers ignored these rumors, and scandal sheets soon filled the void, luridly describing the prostitution, gambling, and sexual adventures of the city's upper crust who, many people believed, profited from crime and disorder. The *Twin City Reporter* was one of these tabloids, or rags. Its owners, Howard Guildford and Jay Near, practiced a brand of journalism that teetered on the edge of legality and propriety. They had a nose for corruption, but

exposing wrongdoing was frequently a way to further their own self-interests. Jay Near was a pen for hire. His favorite targets were the elites of society, the rich and powerful, whom he always portrayed in the worst light. At the *Reporter*, he found a paper willing to pay for his anti-Semitic, antiblack, and antilabor screeds. For several years, Guildford and Near plied their trade, bribing police for tip-offs and publishing stories under headlines such as "Smooth Minneapolis Doctor with Woman in St. Paul Hotel" and "White Slavery Trade:Well-Known Local Man Is Ruining Women and Living Off Their Earnings." Minority groups and most institutions were attacked as well, usually in crude and hostile terms.

By 1917, the two men tired of their work and left Minneapolis, only to return ten years later with another entry in the weekly newspaper game. They created the Saturday Press and, for their first issue, made plans to report on an alliance with police that allowed the current owner of the *Twin City Reporter* to run an illegal gambling joint. The police chief got wind of their scheme and shut down the paper before it could publish the story. His authority for this action was simply the power of his office. When the *Saturday Press* finally appeared on newsstands, it reported on mob threats and official misconduct. In retaliation, Guildford was gunned down by two assailants. While recovering, he and Near put out an issue that spewed forth hate and bitterness, blaming Jewish mobsters for the corruption and violence that infected the city. "There have been too many men in this city and especially those in official life, who have been taking orders and suggestions from JEW GANGSTERS. . . . It is Jew, Jew, Jew," they wrote, "as long as one cares to comb over the records."

The diatribe persuaded the county attorney, later a three-term governor, to "put out of business forever the *Saturday Press* and other sensational weeklies." He relied upon a 1925 state law, known as the "gag law," that declared such newspapers to be public nuisances and stopped them from publishing unless the stories were not only true but also "published with good motive and for justifiable ends." A local judge granted an injunction, a legal order forbidding Guildford and Near from distributing any paper that attacked public officials. The order was upheld on appeal by the Minnesota Supreme Court, which defended freedom of the press as an ideal even as it denied the Saturday Press a right to publish. "In Minnesota," the state chief justice wrote, "no agency can hush the sincere and honest voice of the press, but our [state] constitution was never intended to protect malice, scandal, and defamation when untrue or published with bad motives or without justifiable ends." Truth alone was not a defense: "There is no constitutional right to publish a fact merely because it is true," the court declared. The law protected the press's liberty, not its right to offend.

Near sought help for an appeal to federal courts from two unlikely allies—Roger Baldwin, liberal founder of the American Civil Liberties Union, a new organization dedicated to promoting individual rights, and Robert McCormick, the conservative publisher of the *Chicago Tribune*. Baldwin especially disagreed with the Saturday Press's content and style, whereas McCormick shared Near's anticommunism and bigotry against immigrants. McCormick and Baldwin agreed on one thing, however—the First Amendment gave Near the right to publish without government censorship.

The Supreme Court decided *Near v. Minnesota* in 1931. Near won. Writing for the 5-to-4 majority, Chief Justice Charles Evans Hughes announced his view of the Minnesota law: "This is the essence of censorship." He acknowledged that the press could make false accusations and damage reputations, but the proper remedy was to sue later under libel laws for monetary damages. It

"The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

—Chief Justice Charles Evans Hughes, *Near v. Minnesota* (1931)

harmed democracy to give government the power to censor because government was often a target of the criticism it sought to suppress.Without the vigorous public debate spurred by the press, truth would be hard to find and liberty would suffer. Of course, the freedom to publish was not absolute, the chief justice continued.During war, for example, government could restrain the press in the interests of national security, but Near's case did not pose this threat. The government could not prevent him from publishing, no matter how offensive or reckless his views were.

After the decision, the *Saturday Press* reappeared under a new masthead, "The Paper That Refused to Stay Gagged." Jay Near's triumph notwithstanding, the newspaper folded within twelve months; two years later, he died. His legacy did not come from his sensational stories but from the news he made while pursuing a right to publish his often reckless charges. The case involving his paper established the legal principle that has defined freedom of the press in the United States ever since. The right to a free press means the government cannot censor what the press chooses to publish. Once the press has information it considers newsworthy, the government seldom, if ever, can prohibit its dissemination. At the heart of the First Amendment, in brief, lies hostility to prior restraint—the idea that government officials must approve a story before it can be published.

Recent decades have witnessed a number of cases involving free press claims. Most have focused on the adversarial relationship between the government and the press that emerged during the civil rights movement and Vietnam War. Then and now, state and federal officials at times try to control access to information or to use the threat of libel to stop the press from reporting the news.

The Supreme Court generally has rejected these efforts. For example, when a Montgomery, Alabama, official sued the *New York Times* for libel and sought damages based on minor mistakes made when reporting the truth about the desegregation struggle in the South in the 1960s, the Supreme Court ruled in favor of the press. The First Amendment, the unanimous justices concluded in *New York Times Co. v. Sullivan* (1964), protected the press not only from prior restraint but also from any punishment—imprisonment, fines, or civil damage awards—for reports about a public official's conduct unless actual malice was involved. "Erroneous statement is inevitable in public debate," the Court wrote, and even false statements must "be protected if the freedoms of expression are to have the 'breathing space' that they . . . 'need to survive.'" Giving a wide berth to the press serves a vital public purpose: it preserves open government and allows citizens to hold officials accountable for their actions.

What if the public's right to know runs up against government claims of secrecy for reasons of national security? *Near v. Minnesota* recognized that protecting the nation might trump the right to publish, but under what conditions? This question came up in 1971 when the *New York Times* decided to publish the stolen Pentagon Papers, a secret study proving the government had misinformed the public about its war goals in Southeast Asia and the prospects for victory. President Richard Nixon, for the first time in the nation's history, instructed the government to go to court to stop their publication on grounds that it put the nation's security at risk. The Supreme Court refused this request, in a 6-to-3 vote, in *New York Times Co. v. United States*; it held that the government had not demonstrated a need to stop publication. Prior restraint, a majority of the justices agreed, required extraordinary circumstances.Without a free press, the government could hide its actions from the public, making it difficult for people to hold officials accountable. How this principle will play out in the aftermath of

the events of September 11, 2001, or whether the threat of terrorism requires a different balance between freedom and security, is still unresolved. How do we as a society balance our need for protection against plots to bring us harm with our need for information that allows us to judge whether government's actions are proper? We have reached no fixed answer to this question, and perhaps these issues will have to be addressed case by case, at least initially, until we understand more about the threat we face. Also unsettled is the effect of new technology, such as the Internet, on our understanding of freedom of the press.To date, we continue to embrace open access to information and with it the right of people to publish without restraint in this new medium. This position contrasts sharply with other societies. For instance, in 2006, China banned Internet search firms, such as Google and Yahoo, from doing business in the country unless they blocked access to information the government considered dangerous.

New threats and new technologies have always led to new questions about the extent of our rights. No right is absolute, of course. The right to a free press does not apply equally to obscenity or to a reporter's protection of confidential sources, for example. Student-run publications do not enjoy full First Amendment protection against prior restraint.We impose certain fairness restrictions on television and radio because they use a limited public resource, the airwaves, to broadcast the news.We also recognize that rights at times are in conflict, as when the right to a trial by an impartial jury clashes with the right of a free press to report on an investigation and trial. This issue was a concern in both the trials of O. J. Simpson, who was acquitted in 1995 of killing his ex-wife and another man, and Scott Peterson, convicted of killing his pregnant wife in 2004, to mention two well-known examples. But even as we search for the right balance between rights and responsibilities, we have always held firm on one principle: prior restraints on the press are unconstitutional.

In doing so, we have endorsed the people's right to know as a fundamental liberty in a free and democratic society.We also have kept faith with our history. When the First Congress was debating the amendments that became the Bill of Rights, a continuing theme was the deep and abiding link between knowledge and freedom. Without the ability to know what was happening, without a free press, self-government was not possible—and without self-government, liberty was not possible. Public knowledge made government accountable to the people, the final authority in a democratic republic. It was this understanding that prompted Edmund Randolph, a revolutionary leader from Virginia, to remind James Madison of how indispensable this right was to the nation's future. "The liberty of the press," he wrote, "ought not to be surrendered but with blood."

"A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

—Justice George Sutherland, *Grosjean v. American Press Co.* (1936)

"Democracy Must Know the Truth"

J. P. Tumulty was secretary to the President during Woodrow Wilson's administration. In this role, he served as Wilson's liaison to the press.When Congress was debating the Espionage Bill of 1917, Tumulty warned Wilson that the bill, which made it a crime to publish reports that interfered with U.S. military success or gave encouragement to the enemy, was perceived as an attempt to control the press. In a letter dated May 8, 1917, he reminded the President about the bad experience with the Alien and Sedition Acts of 1798 and argued that "the more completely the attempt to censor the press is killed, the better for the cause of freedom." Tumulty's advice notwithstanding, the act passed and resulted in numerous convictions, especially of antiwar socialist editors and writers. The tension noted by Tumulty in 1917—press freedom versus protection of war secrets—continues today, as witnessed by the debate over a New York Times revelation in 2006 of the mining of telephone records by the National Security Agency as part of the federal government's antiterrorism efforts.

The path of the Espionage Bill will be made more difficult by the memorandum issued yesterday by the State Department and distributed broadcast, warning all officials not to talk with newspapermen "even on insignificant matters of fact or detail." I know how strongly you feel on the matter of a strict censorship but I would not be doing my full duty to you and the Administration if I did not say to you that there is gradually growing a feeling of bitter resentment against the whole business, which is daily spreading. The experience of the Administration of President Adams in fostering the Alien and Sedition Laws bids us beware of this whole business. Of course there is a great difference between the situation that confronts us and that which confronted some of your predecessors; but the whole atmosphere surrounding the Espionage Bill is hurtful and injurious, because of the impression which has gained root with startling intensity that the bill is really a gigantic machine, erected for the despotic control of the press and that the power provided for in the bill must of necessity be delegated by the President and that the press will be controlled by a host of small bureaucrats who will interpret the president's instructions according to their own intellects. I have gathered during the last week editorial comment from various journals throughout the country which have been our firmest supporters and they are unanimous in condemning what they consider to be the unjust features of this legislation. . . . The American people are called to a mighty effort to save the world from an attempt at autocratic domination. Great sacrifices are before them. They are ready to endure whatever is necessary for the work in hand. But if they are to try their hardest, they must know that no effort is wasted; that public offices are administered with faith and efficiency. Public judgment must be passed on those who are weak and those who are strong in the Government. When a department requires reorganization, the people must know it, other wise it might not be reorganized. In fight for the truth, democracy must know the truth. The more completely the attempt to censor the press is killed, the better for the cause of freedom. The press has no desire to expose military secrets. It wants America to win. . . .

Sincerely yours,
Tumulty

First Amendment Violations

In June 1971, the New York Times published the first installment of the so-called Pentagon Papers, a classified 7,000-page document on the conduct of the Vietnam War, which had begun in 1964. The report revealed that the government had kept information about the conduct of the war from the American public. The Nixon administration secured a lower court order temporarily restraining publication of further installments, but the judge denied a permanent injunction, or order to stop publication. The government appealed, contending that publication would endanger the troops and undermine the peace talks then underway. The Supreme Court heard the case immediately and voted 6 to 3 to deny the government's request. In New York Times Co. v. United States *and* United States v. Washington Post Co. *(1971), Justice William Brennan wrote a concurring opinion in which he argued that even halting publication temporarily to review the issues constituted an unconstitutional prior restraint of the press.*

The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war,". . . during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication.". . . Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.