Tribune Media Services

FREEDOM OF THE PRESS

. . . *or of the* **PRESS**, . . .

Thomas Jefferson believed so strongly in freedom of the press that he once said: "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." Like freedom of speech, freedom of the press is essential to a democratic government. A free press ensures that citizens have the information they need to make sound decisions—even when the government wishes otherwise.

Traditionally, freedom of the press applied to the printed word, including pamphlets, books, newspapers, and magazines. But today, freedom of the press protects other media, such as radio and television. However, certain media are subject to more restrictions than others.

ENGLISH ROOTS

In the late fifteenth century, the art of printing spread rapidly across Europe, aided by the invention of movable type by Johann Gutenberg, a German artisan. With printed material more widely available, censorship soon followed. Monarchs and religious leaders were afraid of the political power that came with a free press.

In England, church officials could suppress heretical books by the 1520s, and Henry VIII issued the first list of banned books in 1529. He also created a licensing system for all books in 1538. As of 1559, all new written works had to be submitted for censors' approval under the order of Henry's daughter, Queen Elizabeth I.

In 1644, John Milton, a renowned Puritan poet and writer, criticized England's licensing system in his oft-quoted essay, *Areopagetica:* "[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?" However, Parliament did not abolish the licensing system until 1694.

Another restraint on freedom of the press, developed by the English courts, was the doctrine of seditious libel—"the intentional publication, without lawful excuse or justification, of written blame of any public man, or of the law, or of any institution established by law." The supposed justification for punishing seditious libel was that criticism of the government led to revolution and unrest. Even if writers told the truth, they could be punished, for "the greater the truth, the greater the libel." Truthful criticism would be most likely to provoke the people to take action against the government.

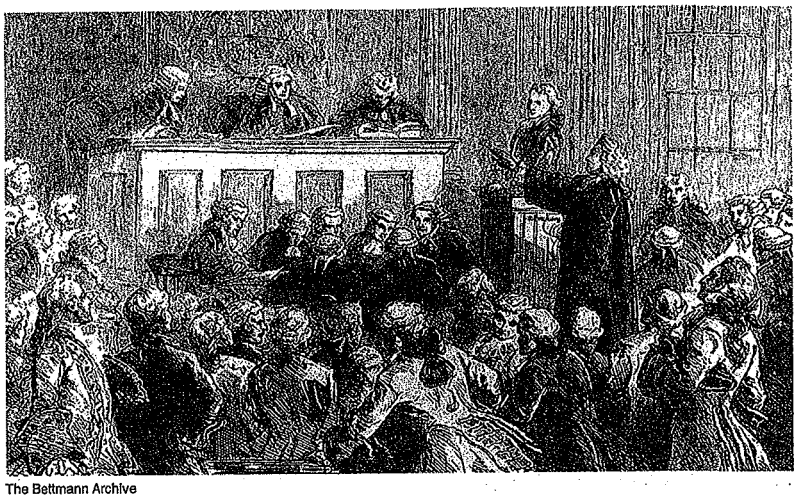
FREE PRESS IN AMERICA

The colonial press was licensed, just as in England, and Americans were prosecuted for seditious libel as well. But the crown's defeat in a famous seditious libel trial in New York put a halt to such prosecutions.

THE ZENGER TRIAL. A German immigrant who knew little English, John Peter Zenger was the printer of a New York newspaper. Zenger acted as a front for several lawyers who anonymously wrote many articles in his newspaper criticizing the royal governor. Zenger refused to reveal the identity of the writers and was prosecuted for seditious libel, which carried a possible death sentence. At Zenger's trial in 1735, his attorney argued that truth should be a defense against the charge. Said the attorney in his closing argument to the jury:

> The question before the Court and you gentlemen of the jury is not of small or private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every freeman that lives under a British government on the main of America. . . . [B]y an impartial and uncorrupt verdict, [you will] have laid a noble foundation for securing . . . that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power . . . by speaking and writing truth.

The jury acquitted Zenger, and seditious libel prosecutions virtually ended. But colonial legislatures still had licensing powers.



The Bettmann Archive

Andrew Hamilton defends John Peter Zenger at his trial in 1735 for seditious libel.

AFTER THE REVOLUTION. The Virginia Declaration of Rights was the first state constitutional protection of freedom of the press after the Revolutionary War. Five states listed freedom of the press in their suggested amendments to the U.S. Constitution of 1787, and freedom of the press became part of the First Amendment when the Bill of Rights was ratified in 1791.

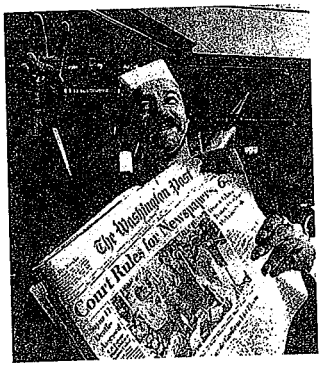
PRIOR RESTRAINT

The most basic principle of a free press is that government may not, except in extraordinary circumstances, exercise prior restraint or censor a work *before* it is published. Government may sometimes punish certain writings after they are published, however.

NEAR V. MINNESOTA (1931). In *Near v. Minnesota*, which incorporated freedom of the press to apply to the states, the Supreme Court struck down a state law that authorized prior restraints. The law allowed local courts to issue an injunction to stop publication of any periodical designated as a "nuisance." A weekly newspaper had been enjoined under the law when it ran articles charging that local officials were guilty of corruption. The Court declared that upholding such prior restraint "would be but a step to a complete system of censorship." But the Court also warned that prior restraint might be permissible in certain cases of national security, such as publishing the "sailing dates of transports or the number and location of troops."

THE PENTAGON PAPERS. National security was at issue in the famous "Pentagon Papers" case, which involved top-secret documents on the history of the Vietnam War. Daniel Ellsberg, a former Pentagon employee, illegally copied the Pentagon Papers and leaked them to *The New York Times* and *The Washington Post,* which published excerpts from the documents. The U.S. government obtained a court order forbidding further publication of the Pentagon Papers, the first time in American history that the federal government successfully used a prior restraint.

The newspapers appealed to the Supreme Court in the case of *New York Times v. United States* (1971). The Court held that the government had not proven that publishing the Pentagon Papers would jeopardize national security, thus not overcoming the "heavy presumption" against prior restraints. Wrote Justice Hugo Black: "In the First Amendment, the [Founders] gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors."



UPI/Bettmann

The chief pressman for The Washington Post *celebrates the Supreme Court's decision in the "Pentagon Papers" case.*

FREE PRESS VS. FAIR TRIAL. Sometimes freedom of the press can conflict with other rights, such as a defendant's right to a fair trial under the Sixth Amendment. Pretrial publicity can prejudice the community so much that it is impossible to find an impartial jury. But even the defendant's right to a fair trial does not justify prior restraint, held the Supreme Court in *Nebraska Press Association v. Stuart* (1976). In that case, a county judge had issued a "gag order" preventing the media from reporting certain inflammatory details of a murder trial. The Supreme Court struck down the gag order, noting that "a prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutionality." Judges may take certain measures to ensure a fair trial, such as keeping the jury in isolation or changing the location of the trial, but they are not allowed to use prior restraints on the media.

PERMISSIBLE PRIOR RESTRAINTS. In a few cases, the Supreme Court has upheld prior restraints. In *Snepp v. United States* (1980), for example, the Court upheld a Central Intelligence Agency (CIA) rule that forbade agents from ever publishing information about the CIA without its approval, even when no longer employed by the agency.

LIBEL

Prior restraint is a way that the government can limit free press. But individuals can also restrict freedom of the press through libel suits,

charging that their reputations have been damaged through false information. When laws make libel easy to prove, the press is often reluctant to publish information in fear of potential lawsuits.

In *New York Times v. Sullivan* (1964), the Supreme Court made libel harder to prove when public officials are involved. *The New York Times* had published an ad by a civil rights group that accused the police in Montgomery, Alabama, of conducting a "wave of terror" against blacks. The ad contained some errors about specific details of police action, and the city commissioner in charge of police, L. B. Sullivan, sued the *Times* for libel. A local Alabama jury awarded him $500,000 in damages.

The Supreme Court unanimously overturned the libel judgment. The Court held that in cases where a public official was criticized for official conduct, errors of fact alone were not enough to prove libel, nor was carelessness in printing the error. To win a libel suit, a public official had to prove the error was made with actual malice, "that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Actual malice is very difficult to prove in libel cases. In later decisions, the Court extended the actual malice standard in libel cases to public figures, as well as public officials. In 1991, the Court held that public figures could sue for libel if they were misquoted to such an extent that there was a "material change in the meaning" of what they actually said.

CONFIDENTIALITY

At least since John Peter Zenger refused to reveal the names of his writers, the press has claimed the right to deny certain information to the government. Today, reporters often claim that freedom of the press guarantees their right to withhold the names of their confidential sources. Without confidentiality, the reporters argue, many sources would not reveal information vital to the public interest.

But the Supreme Court has held that, in criminal cases, reporters have no special privileges under the First Amendment to refuse to testify. The Court held in *Branzburg v. Hayes* (1972) that reporters "like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." Many states, however, have enacted shield laws that give reporters some protection against revealing confidential information.

But what if the press breaks its promise of confidentiality to a source? In 1991, the Supreme Court ruled that news organizations can be sued by sources to whom they had promised confidentiality.

MOTION PICTURES, RADIO, AND TELEVISION

Freedom of the press is not limited to the printed word, but applies to all mass media: forms of information such as film, radio, television, and newspapers that affect large numbers of people. However, print media receive more protection under the First Amendment than do films, radio, and television.

At first, the Supreme Court did not consider movies to be protected by freedom of the press. In 1915, the Court ruled that "the exhibition of moving pictures is a business, pure and simple," and "not . . . part of the press of the country." Many states established movie review boards after this decision to judge films acceptable to community standards. But in 1952, the Supreme Court extended First Amendment protection to motion pictures. Today, the film industry has its own rating system for violence and sexual themes.

Radio and television are regulated by the Federal Communications Commission (FCC). As the Supreme Court noted in *Red Lion Broadcasting v. FCC* (1969), "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." In *Red Lion,* the Court upheld the power of the FCC to regulate broadcasting more than newspapers and other print media, because radio and television use the airwaves, which are public property that may be controlled by the government. While the First Amendment applies to broadcasting, the Court held in *Red Lion,* "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

However, improved technology has increased the availability of channels and thus lessened the government's role in regulating a formerly scarce commodity. In addition, the rise of cable television, which transmits through wires rather than broadcasts over the public airwaves, created a new hybrid of free speech. In 1994, the Supreme Court ruled that, because it does not use the airwaves, cable television is entitled to greater protection than broadcasting, although it still does not receive as much protection as newspapers.

FREEDOM OF ASSEMBLY AND PETITION

. . . or the right of the people **PEACEABLY TO ASSEMBLE,** *and to* **PETITION THE GOVERNMENT** *for a redress of grievances.*

This clause of the First Amendment protects the right of the people to assemble peacefully and to ask the government to solve certain problems.