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# “Or of the Press”<sup>†</sup>

By  
POTTER STEWART\*

I turn this morning to an inquiry into an aspect of constitutional law that has only recently begun to engage the attention of the Supreme Court. Specifically, I shall discuss the role of the organized press—of the daily newspapers and other established news media—in the system of government created by our Constitution.

It was less than a decade ago—during the Vietnam years—that the people of our country began to become aware of the twin phenomena on a national scale of so-called investigative reporting and an adversary press—that is, a press adversary to the Executive Branch of the Federal Government. And only in the two short years that culminated last summer in the resignation of a President did we fully realize the enormous power that an investigative and adversary press can exert.

The public opinion polls that I have seen indicate that some Americans firmly believe that the former Vice President and former President of the United States were hounded out of office by an arrogant and irresponsible press that had outrageously usurped dictatorial power. And it seems clear that many more Americans, while appreciating and even applauding the service performed by the press in exposing official wrongdoing at the highest levels of our national government, are nonetheless deeply disturbed by what they consider to be the illegitimate power of the organized press in the political structure of our society. It is my thesis this morning that, on the contrary, the established American press in the past ten years, and particularly in the past two years, has performed precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution. I further submit that this thesis is

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supported by the relevant decisions of the Supreme Court.

Surprisingly, despite the importance of newspapers in the political and social life of our country the Supreme Court has not until very recently been called upon to delineate their constitutional role in our structure of government.

Our history is filled with struggles over the rights and prerogatives of the press, but these disputes rarely found their way to the Supreme Court. The early years of the Republic witnessed controversy over the constitutional validity of the short-lived Alien and Sedition Act, but the controversy never reached the Court. In the next half century there was nationwide turmoil over the right of the organized press to advocate the then subversive view that slavery should be abolished. In Illinois a publisher was killed for publishing abolitionist views. But none of this history made First Amendment law because the Court had earlier held that the Bill of Rights applied only against the Federal Government, not against the individual states.

With the passage of the Fourteenth Amendment, the constitutional framework was modified, and by the 1920's the Court had established that the protections of the First Amendment extend against all government—federal, state, and local.

The next fifty years witnessed a great outpouring of First Amendment litigation, all of which inspired books and articles beyond number. But, with few exceptions, neither these First Amendment cases nor their commentators squarely considered the Constitution's guarantee of a Free Press. Instead, the focus was on its guarantee of free speech. The Court's decisions dealt with the rights of isolated individuals, or of unpopular minority groups, to stand up against governmental power representing an angry or frightened majority. The cases that came to the Court during those years involved the rights of the soapbox orator, the nonconformist pamphleteer, the religious evangelist. The Court was seldom asked to define the rights and privileges, or the responsibilities, of the organized press.

In very recent years cases involving the established press finally have begun to reach the Supreme Court, and they have presented a variety of problems, sometimes arising in complicated factual settings.

In a series of cases, the Court has been called upon to consider the limits imposed by the free press guarantee upon a state's common or statutory law of libel. As a result of those cases, a public figure cannot successfully sue a publisher for libel unless he can show that the publisher maliciously printed a damaging untruth.<sup>1</sup>

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1. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Court has also been called upon to decide whether a newspaper reporter has a First Amendment privilege to refuse to disclose his confidential sources to a grand jury. By a divided vote, the Court found no such privilege to exist in the circumstances of the cases before it.<sup>2</sup>

In another noteworthy case, the Court was asked by the Justice Department to restrain publication by the *New York Times* and other newspapers of the so-called Pentagon Papers. The Court declined to do so.<sup>3</sup>

In yet another case, the question to be decided was whether political groups have a First Amendment or statutory right of access to the federally regulated broadcast channels of radio and television. The Court held there was no such right of access.<sup>4</sup>

Last Term the Court confronted a Florida statute that required newspapers to grant a "right of reply" to political candidates they had criticized. The Court unanimously held this statute to be inconsistent with the guarantees of a free press.<sup>5</sup>

It seems to me that the Court's approach to all these cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. Between 1776 and the drafting of our Constitution, many of the state constitutions contained clauses protecting freedom of the press while at the same time recognizing no general freedom of speech. By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

It is also a mistake to suppose that the only purpose of the

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2. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

3. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

4. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

5. *Miami Herald Publ. Co. v. Tornillo*, 94 S. Ct. 2831 (1974).

constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a "market place for ideas," a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee.

In setting up the three branches of the Federal Government, the Founders deliberately created an internally competitive system. As Mr. Justice Brandeis once wrote:<sup>6</sup>

The [Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

The primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches. Consider the opening words of the Free Press Clause of the Massachusetts Constitution, drafted by John Adams:

The liberty of the press is essential to the security of the state.

The relevant metaphor, I think, is the metaphor of the Fourth Estate. What Thomas Carlyle wrote about the British Government a century ago has a curiously contemporary ring:

Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact—very momentous to us in these times.

For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.

It is this constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.

Consider first the libel cases. Officials within the three governmental branches are, for all practical purposes, immune from libel and slander suits for statements that they make in the line of duty.<sup>7</sup> This immunity, which has both constitutional and common law

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6. *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion).

7. *See Barr v. Matteo*, 360 U.S. 564 (1959).

origins, aims to insure bold and vigorous prosecution of the public's business. The same basic reasoning applies to the press. By contrast, the Court has never suggested that the constitutional right of free *speech* gives an *individual* any immunity from liability for either libel or slander.

In the cases involving the newspaper reporters' claims that they had a constitutional privilege not to disclose their confidential news sources to a grand jury, the Court rejected the claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half. But if freedom of the press means simply freedom of speech for reporters, this question of a reporter's asserted right to withhold information would have answered itself. None of us—as individuals—has a “free speech” right to refuse to tell a grand jury the identity of someone who has given us information relevant to the grand jury's legitimate inquiry. Only if a reporter is a representative of a protected *institution* does the question become a different one. The members of the Court disagreed in answering the question, but the question did not answer itself.

The cases involving the so-called “right of access” to the press raised the issue whether the First Amendment allows government, or indeed *requires* government, to regulate the press so as to make it a genuinely fair and open “market place for ideas.” The Court's answer was “no” to both questions. If a newspaper wants to serve as a neutral market place for debate, that is an objective which it is free to choose. And, within limits, that choice is probably necessary to commercially successful journalism. But it is a choice that government cannot constitutionally impose.

Finally the Pentagon Papers case involved the line between secrecy and openness in the affairs of Government. The question, or at least one question, was whether that line is drawn by the Constitution itself. The Justice Department asked the Court to find in the Constitution a basis for prohibiting the publication of allegedly stolen government documents. The Court could find no such prohibition. So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.

But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.<sup>8</sup> The public's interest in knowing about its government

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8. Cf. *Pell v. Procunier*, 94 S. Ct. 2800 (1974); *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811 (1974).

is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself.

It is quite possible to conceive of the survival of our Republic without an autonomous press. For openness and honesty in government, for an adequate flow of information between the people and their representatives, for a sufficient check on autocracy and despotism, the traditional competition between the three branches of government, supplemented by vigorous political activity, might be enough.

The press could be relegated to the status of a public utility. The guarantee of free speech would presumably put some limitation on the regulation to which the press could be subjected. But if there were no guarantee of a free press, government could convert the communications media into a neutral "market place of ideas." Newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice.<sup>9</sup>

Such a constitution is possible; it might work reasonably well. But it is not the Constitution the Founders wrote. It is not the Constitution that has carried us through nearly two centuries of national life. Perhaps our liberties might survive without an independent established press. But the Founders doubted it, and, in the year 1974, I think we can all be thankful for their doubts.

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9. Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).