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From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later

by
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In just seven law review pages, Potter Stewart's classic "Or of the Press" essay provokes a lot of thought. Writing in 1974,[1] mere months after the Watergate impeachment proceedings and the resignation of President Richard Nixon, Justice Stewart makes two related assertions: (1) that the so-called Press Clause[2] of the First Amendment was designed to serve a government-checking function, by facilitating systematic scrutiny and criticism of the three branches of government to uncover and prevent abuse of government power; and (2) that because of this checking function, the Press Clause ought to be understood as a "structural" provision of the Constitution that gives the "organized press—the daily newspapers and other established news media—" some rights that the rest of us do not necessarily enjoy under the Speech Clause[3] of the First Amendment.

Much has happened in the realm of the First Amendment, as well as in constitutional law and politics more generally, in the 25 years since Justice Stewart wrote "Or of the Press." Today seems a particularly fitting time to take a close second look at Justice Stewart's ideas, given the recently-concluded impeachment affair that sparked so many people to draw parallels to and distinctions from the Watergate affair that inspired Stewart's reflections. And so, with memories of Bill Clinton, Ken Starr and Monica Lewinsky still quite fresh, I shall try in the next few paragraphs to sketch my own (admittedly tentative)

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1. The essay was written and delivered in the Fall of 1974. *See* Potter Stewart, "Or of the Press," Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), *in* 26 HASTINGS L. J. 631 (1975).

2. U.S. CONST. amend. I ("Congress shall make no law... abridging the freedom... of the press....").

3. U.S. CONST. amend. I. ("Congress shall make no law... abridging the freedom of speech....").

thoughts on the two big points Justice Stewart advanced a quarter century ago.

Constitutional developments of recent decades have borne out the correctness and centrality of Justice Stewart's first big point—that criticism of government is fully protected expression that lies at the heart of the First Amendment. Of course, the notion that the First Amendment was designed to promote speech in order to check government abuse had been suggested even before 1974 and had often been thought to be an unstated but powerful explanation for many Court holdings, but lately the Court has been quite explicit. For example, in *Texas v. Johnson*,[4] Justice Brennan writing for the Court affirmed his remarks in *New York Times Co. v. Sullivan*[5] a quarter century earlier that "[i]t is as much [a citizen's] duty to criticize as it is the official's duty to administer. As Madison said, 'the censorial power is in the people over the Government, and not in the Government over the people.'"[6] He then applied this teaching to Gregory Johnson's expressive (though perhaps distasteful) conduct by remarking: "Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."[7]

In his essay, Justice Stewart speculates that our Republic might have been able to survive even without the checking function facilitated by the First Amendment.[8] I am not so sure. In any event, I—like Justice Stewart—am very thankful the Founders built into the Constitution the structural protection for government scrutiny and criticism. Indeed, I would have placed more faith in the safeguards the Founders set up than we have in recent years. Had we truly understood the power of the checking function Justice Stewart describes, we would have relied on the system in place that led to a satisfactory resolution of Watergate—a strong First Amendment coupled with Congressional oversight and impeachment authority—instead of enacting the monstrous Independent Counsel Act that has haunted us for over a decade.[9] In fact, those of us who favor letting the Act die this Summer

4. 491 U.S. 397, 408-10 (1989)(prohibiting Texas from punishing flag burning).

5. 376 U.S. 254 (1964).

6. *Id.* at 282 (citations omitted).

7. *Johnson*, 491 U.S. at 411. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invoking many examples of citizen criticism of government officials as epitome of core First Amendment-protected activity); *id.* at 421 (Stevens, J., concurring in the judgment) ("Speech about public officials or matters of public concern receives greater protection than speech about other topics.").

8. Stewart, *supra* note 1, at 636.

9. For a discussion of some of the incentive problems created by the Act, to say nothing of the flaws Justice Scalia powerfully pointed out in his dissent in *Morrison v. Olsen*, 487 U.S.

do so in large part because we trust that the checking function protected by the First Amendment will enable Congress to police Presidential abuse such that the costs (of all kinds) of an Independent Counsel are simply unnecessary to bear.[10]

Potter Stewart's identification of the checking function is thus a deep constitutional insight. If Justice Stewart is to be faulted—and this brings me to Stewart's second main assertion—it is for not extending his insight far enough. Justice Stewart identifies the "structural" checking function underlying the Press Clause, but sees no such function underlying the Speech Clause under which the rest of the world lives. Thus, for Stewart, the "organized press" has special First Amendment rights the rest of us do not enjoy.

Let me explain briefly why I am disinclined to follow Justice Stewart here.[11] To begin with, I see the checking function as animating the Speech Clause as well as the Press Clause, so that the Press is entitled to no "special" protection. As Professor Anderson put it in the best historical work on the Press Clause,

> That the press clause has a distinct history does not mean, of course, that it must be given a meaning different from the speech clause today, or even that it had a different meaning in 1791. It is

654, 697 (1988)(Scalia, J., dissenting), *see* Vikram David Amar, *Some Questions and Answers Concerning Justice Blackmun's Federalism and Separation of Powers Cases*, 26 HASTINGS CONST. L.Q. 153 (1998), and Vikram David Amar, *The Truth, the Whole Truth, and Nothing but the Truth about 'High Crimes and Misdemeanors' and the Constitution's Impeachment Process*, 16 CONST. COMMENTARY 403 (1999).

10. Those persons who favor renewal of the Act do so in part because they do not trust in the First Amendment. For example, Ken Gormley, a proponent of a revised Independent Counsel Act, thinks that the events that led to the resignation of President Nixon were fortuitous—that if more important college football games were played the day of the infamous "Saturday Night Massacre," the public would not have been as engaged and enraged, and history could have taken a different turn. *See* Dialogue Between Akhil Reed Amar and Ken Gormley, *Should We Ditch the Independent Prosecutor Law?*, SLATE (Feb. 16, 1999) <http://www.slate.com/dialogues/99-02-17/dialogues.asp?iMsg=2>. *See generally* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997)(depicting the events surrounding the Saturday Night Massacre). I think that while the timing of particular events in the downfall of President Nixon were fortuitous, the ultimate outcome was dictated by irresistible forces—including the awesome power of the free political expression—once the scandal was uncovered.

11. I note that the Court has thus far failed to afford the Press any special First Amendment protection since Justice Stewart wrote. Justice Brennan in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting) observed that six members of the Court in that case "agree today that, in the context of defamation law, the [First Amendment] rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." Thus, Justice Stewart's statement in 1974 that "the Court has never suggested that the constitutional right of free *speech* gives an *individual* [unconnected to the Press] any immunity from liability for either libel or slander," Stewart, *supra* note 1, at 635, may no longer be true.

> possible that checking government power was also the purpose of the speech clause.[12]

In this regard, I do not really agree with Justice Stewart that a problematic "constitutional redundancy" would result unless the Press Clause were interpreted to mean something different than the Speech Clause.[13] The First Amendment's enumeration of rights of speech and press could easily be understood to ensure that all manners of political expression be protected for "structural" reasons.[14] Indeed, the only state constitution that contained provisions for both freedom of speech and freedom of the press prior to enactment of the federal Bill of Rights made clear that the two provisions were employed for the same end.[15]

So for these reasons, I don't see the difference between the Press and Speech clauses that Justice Stewart saw. I reject his argument for special press protection for another reason as well—how could anyone (including the Founders) have ever given a coherent and principled definition of "the Press" itself?[16] Justice Stewart offers one definition—"the daily newspapers and other established news media"[17]—but his definition is immediately problematic. Would pamphleteers in 1787 qualify under his definition? Even if they would, surely radio and TV stations would not, given that they were not "established news media" in the eighteenth century. And yet Justice Stewart, later in his essay, includes electronic media within the zone of his protection—as well he must, given TV's role in the Watergate episode on which Justice Stewart relies.[18] If "established" does not mean established at the time of the First Amendment, what does it mean? How would Justice Stewart feel about CNBC or MSNBC, the upstart and self-styled *anti-establishment* TV stations so important in pursuing the Lewinsky perjury matter? And even if one were to stretch "established" to include them, what of Matt Drudge, and his internet-based "Drudge Report"—the real moving force behind public mobilization in Monicagate? Surely the internet is not "established news media"—or is

12. David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 534 (1983).

13. Stewart, *supra* note 1, at 633.

14. It bears noting here that the "other" Speech clause of the Constitution, Article I, section 6's admonition that members of Congress not be "questioned" outside Congress for "any Speech or Debate in either House," is clearly *structural* in character—safeguarding open and robust debate by Congresspersons free from fear of viewpoint-based reprisal or censor.

15. "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Declaration of Rights art. XII (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 266 (1971).

16. *See, e.g., Dun & Bradstreet*, 472 U.S. at 781-83 & nn.6-7 (1985) (Brennan, J., dissenting)(discussing First Amendment difficulties lurking in any attempt to define media).

17. Stewart, *supra* note 1, at 631.

18. *Id.* at 633 (discussing access to channels of radio or television).

it? First Amendment jurisprudence frowns on laws whose vagueness creates substantial uncertainty about whose expressive conduct will be protected and whose will not. I don't think we ought to interpret the First Amendment itself so as to raise the ultimate vagueness issue.[19]

19. None of this means, of course, that in any particular case the institutional-press identity of an actor may not be relevant. For example, consider *Wilson v. Layne*, 119 S.Ct. 1692 (1999)(holding that media ridealongs violate defendant's Fourth Amendment rights notwithstanding First Amendment protection of the Press). To the extent that ride-alongs are justified by the education and information about police conduct that such ride-alongs provide, perhaps one could argue that including CNN in a ride-along may be more "reasonable"—within the meaning of the Fourth Amendment's ban on "unreasonable searches"—than including Vik Amar, who can inform and educate a much smaller slice of the public. Or conversely, perhaps one can argue that taking CNN along makes the search more "*un*reasonable" because the privacy of the person being searched is compromised much more than it would be by taking along Vik Amar. Either way, the identity, mission and audience of CNN may become relevant to the constitutional analysis, but this does not create the kind of sharp dichotomy of First Amendment rights Justice Stewart advocates.