Constitutional Issues

FREEDOM OF THE PRESS

Bernard Schwartz

CONSTITUTIONAL ISSUES

FREEDOM OF THE PRESS

Bernard Schwartz

A HAROLD STEINBERG BOOK

Facts On File
New York • Oxford

Freedom of the Press

Facts On File, Inc.
460 Park Avenue South
New York, NY 10016
USA

Facts On File Limited
c/o Roundhouse Publishing Ltd.
P.O. Box 140
Oxford OX2 7SF
United Kingdom

Library of Congress Cataloguing-in-Publication Data
Schwartz, Bernard, 1923-
Supreme court: freedom of the press by Bernard Schwartz
p. cm. — (Facts on File handbooks to constitutional issues: v. 1)
Includes bibliographical references and index.
ISBN 0-8160-2505-3
1. Freedom of the press—United States. 2. Press law—United States. 3. United States. Supreme Court. I. Title. II. Series.
KF4774.S34 1992 92-9913
342.73'0853—dc20 CIP
[347.3.02853]

A British CIP catalogue record for this book is available from the British Library.

Facts On File books are available at special discounts when purchased in bulk quantities for businesses, associations, institutions, or sales promotions. Please call our Special Sales Department in New York at 212/683-2244 (dial 800/322-8755 except in NY, AK or HI) or in Oxford at 865/728399.

Managing Editor: Mark Gabor

Associate Editor: Mary McCarthy Steinberg

Typesetting: DataWorks Corp.

10 9 8 7 6 5 4 3 2 1

This book is printed on acid-free paper.

Publisher's Preface

According to many political observers, the enduring legacy of the Reagan-Bush presidencies may not be any legislation that Ronald Reagan or George Bush accomplished. The most long-lasting accomplishment may be the fact that between them they have appointed five Justices to the United States Supreme Court (Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, with Justice Rehnquist being appointed as Chief Justice) who will influence the course of constitutional law for the coming decades.

This observation is a reflection of the Supreme Court in the political, social, and economic life of the country — an influence which has never been greater than in the past fifty years. Our entire political structure has been changed by the reapportionment cases that totally altered the manner in which elected representatives are chosen. The Court's decision in *Brown v. Board of Education* ushered in the civil rights revolution.

On other social issues, the changes wrought by the Court have been even greater. Its decisions on abortion affect the life of every American woman. And the entire criminal justice system has been greatly modified by the Supreme Court rulings on such issues as search and seizure, police questioning, and the death penalty.

This is the first book in a series of volumes that will deal with Supreme Court decisions in significant areas of constitutional law. In this volume we examine an area of constitutional law where Supreme Court rulings have affected our lives — freedom of the press. Professor Bernard Schwartz, a leading scholar of the Supreme Court for forty years, examines the basic rules and principles developed through numerous Supreme Court cases that reflect our attachment to the First Amendment guaranty. What is a prior restraint and why is it prohibited by the Constitution? What are the rules on libel and privacy? What can the press report and what can it be prohibited from publishing? What constitutes obscenity?

The materials included in this collection cover not only the basic Supreme Court decisions and the arguments made by lawyers, but unpublished drafts of Supreme Court decisions that show the *process* by which the cases were finally determined. Through this method in this work — and in future volumes dealing with Supreme Court decisions in other areas — we hope to explore the manner in which the Supreme Court affects and changes our society.

Professor Leon Friedman
Hofstra Law School, General Editor

Harold Steinberg
Series Publisher

Introduction

Freedom of the press, says Alexander Hamilton, is the "palladium of liberty." But that is so only because the *ought* of the First Amendment guaranty is transmuted by the Supreme Court into the *is* of positive law. It is judicial enforcement that makes constitutional provisions more than empty words. That is as true of the freedom of the press guaranty as it is of other organic provisions. We have the freest press in the world only because the highest tribunal has given practical effect to the words of the First Amendment.

This book is intended to illuminate the Supreme Court's jurisprudence on freedom of the press. As such, it deals both with the traditional print press known to the Framers and the newer media developed during the present century. It is my hope that it will not only give a concise account of the case law on the subject, but that it will also demonstrate our law's capacity for growth — particularly its adaptation by the Court to changing needs and technological developments that James Madison and his colleagues could not even dimly foresee when they wrote the First Amendment.

It is also my hope that the book will help people to understand how our highest Court operates. My treatment of cases is not limited to the decisions rendered. Emphasis is also placed upon the Justices' decision-making process — their conference discussions, memoranda and correspondence, and draft opinions. These were obtained from various Justices, law clerks, libraries, and others in connection with my research on the Warren and Burger Courts. The conference scenarios are based upon the notes of at least one Justice who was present. The other documents used are identified, except where doing so would violate the confidentiality of a source. I have been given generous access to the papers of the Justices and I also gratefully acknowledge the help given by the Manuscript Division of the Library of Congress.

I should also note that the book is published without footnotes. The hope is that this will make the work less forbidding to the general reader who is often "turned off" by a mass of legal notes. In a law-dominated society, the subject is too important to be left only to the academic specialists. Perhaps they will miss the arcana of copious footnotes whose presence, in my opinion, would limit the appeal of this book.

Bernard Schwartz
Webb Professor of Law, New York University.

Chapman Distinguished Professor of Law,
University of Tulsa

New York
April 1992

Contents

1

Pentagon Papers and Prior Restraint

Justice Potter Stewart used to say that the press is "the only organized private business that is given explicit constitutional protection." The press is, of course, more than a business. It is the very fulcrum upon which the First Amendment turns; speech, however free, has little impact if it reaches only those within earshot.

The classic modern case on freedom of the press is *New York Times v. United States* — more popularly known as the *Pentagon Papers Case*. It well illustrates the Supreme Court's attitude toward restraints on expression by the press — particularly prior restraints — and it can serve as the starting point for further discussion of enforcement of the constitutional guaranty by the highest tribunal.

Pentagon Papers Case

In 1971 the Government, for the first time, tried to use the courts to censor news before it was printed. This attempt might well have succeeded if one of the Justices' law clerks had not happened to turn on his radio one late June afternoon.

What was to become one of the most widely publicized Supreme Court cases began without fanfare. On Sunday, June 13, 1971, a low-key headline appeared in the *New York Times*: "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement." It was followed by long excerpts culled from a top secret forty-seven-volume history of American involvement in Indochina prepared within the Defense Department.

The study, which was dubbed "The Pentagon Papers," in *Time's* words, "revealed a dismaying degree of miscalculation, bureaucratic arrogance and deception." After a second installment appeared, the Attorney General went to court to suppress further publication. He contended that dissemination would cause "immediate and irreparable harm" to national defense and security.

The lower courts acted with unusual speed. The New York District Court hearing was held on Friday. The district judge who had issued a temporary restraining order against the *Times* on Tuesday lifted the order. Five days later, the court of appeals remanded for further hearing and continued the restraining order pending further decision.

On the day the case was being heard in Manhattan, the *Washington Post* went to press with its own version. Once again, the Justice Department sought an injunction, but the court of appeals in Washington held that the Government was not entitled to any preliminary injunction. It had, however, issued a temporary restraining order pending its decision, and it granted a stay so that the Government could take the case to the Supreme Court. The restraining order was still in force when certiorari (the writ by which Supreme Court review is secured) was sought.

Knowledge of the *Pentagon Papers Case* had, of course, penetrated the Supreme Court's Marble Palace. In most of the Justices' chambers, discussion of the case began the day after the Government filed its initial request for a temporary restraining order. There was substantial speculation about whether the case could be brought to the Supreme Court before the 1970 Term was finished at the end of June 1971. Although virtually everyone outside the Court assumed that the case would ultimately be decided by the Justices, in the Court there was a strong feeling that the best disposition might be a simple denial of certiorari, which meant that the Supreme Court would refuse to hear the case — but that was possible only if both courts of appeals decided completely in favor of the newspapers.

While the case was pending, Justice Hugo L. Black's clerks, returning from dinner at his house, reported that he had said he "never was too fond of injunctions against newspapers." "Even when the national security is involved?" asked his wife. "Well, I never did see how it hurts the national security for someone to tell the American people that their government lied to them," said Black.

The *Times* and *Post* cases were both decided by the lower courts on June 23, 1971. Each of those courts knew what the other was doing; Chief Judges David Bazelon in Washington and Henry Friendly in New York were in regular telephone communication. Late in the morning of June 24, the *Times* filed its application for certiorari and interim relief. It was promptly sent by Justice John M. Harlan to the full Court. The Government's petition for certiorari and interim relief was filed at 7:15 that evening and sent by the Chief Justice to the Justices at their homes.

How the Court Operates

To understand how the Supreme Court dealt with the Pentagon *Papers Case*, one must understand how the Court itself operates. The Justices sit from October to late June or early July, in annual sessions called terms, with each term designated by the year in which it begins. Cases come to the Court from the U.S. courts of appeals and the highest state courts, either by appeals or petitions for writs of certiorari. Technical rules govern whether an appeal or certiorari must be sought. The Justices have virtually unlimited discretion in deciding whether to take an appeal or grant certiorari (or cert, as it is usually called in the Court). Each year the Justices decide to hear only a fraction of the cases presented to them. Thus, in the 1970 Term, when the *Pentagon Papers* certiorari petitions asking the Supreme Court to review the court of appeals decisions were filed, the Court granted review in 214 cases out of 4,212 on its docket. In 1955, Justice Felix Frankfurter had asked another Justice, "Wouldn't you gladly settle for one in ten — such is my proportion — in granting petitions for certiorari?" By the time the *Pentagon Papers Case* arose, the proportion granted had declined to one in twenty.

Following an unwritten rule, when at least four of the nine Justices vote to take a case, certiorari is granted or the appeal is taken. However, if the case elicits fewer than the required four votes, the case in question is over and the last decision of the state court or lower federal court becomes final. In recent years some Justices have urged that changes be made in the Rule of Four, on the ground that it results in the Court agreeing to hear too many cases.

Thus, Justice John Paul Stevens recently proposed that five votes be required to grant certiorari. That would certainly cut down the number of cases taken by the Court. But it would also eliminate important cases which the Court should decide. If a five-vote rule had been in effect during the Warren Court years, at least one of the most important Warren Court decisions, *Baker v. Carr*, which Chief Justice Earl Warren once described as "the most important case of my tenure on the Court," would never have been decided. Only four Justices voted to hear that case.

For those few cases the Supreme Court agrees to take, written briefs will be submitted by the opposing lawyers, and then the attorneys for both sides will appear for oral argument in which they present arguments in favor of affirming or reversing the lower court decision. The arguments are presented publicly in the ornate

courtroom. Each side usually has half an hour, and the time limit is strictly observed. Once a lawyer was arguing his case in the last half hour before noon. He was reading to the Justices from his notes and did not notice the red light go on at his lectern, signaling that his time had expired. Finally, he looked up. The bench was empty; the Justices had quietly risen, gathered their black robes, and gone to lunch.

As far as the public is concerned, the postargument decision process in the Court is completely closed. The next time the outside world hears about the case is when the Court is ready to publicly announce its decision; simultaneously, the majority opinion and any dissents or concurrences are distributed. But in that interim period between oral argument and the announcement of the Court's decision, much has gone on. First, the Justices have "conferenced." When Warren E. Burger became Chief Justice, these conferences were held on Fridays. More recently, Wednesday sessions have been held as well. The privacy of the conference is one of the most cherished traditions at the Court. Only the nine Justices may attend. In addition to the conference discussion, ideas are exchanged by the Justices through the circulation of draft opinions and memoranda. Such a memo, sent to all the Justices, is usually titled *Memorandum to the Conference*.

After the vote is taken at the conference, the case is assigned by the Chief Justice, if he is in the majority, either to himself or to one of the Justices for the writing of an opinion of the Court. If the Chief Justice is not in the majority, the senior majority Justice assigns the opinion. Justices who disagree with the majority decision are free to write or join dissenting opinions. If they agree with the result but differ on the reasoning, they can submit concurring opinions. Opinions are usually issued in the name of individual Justices. Sometimes per curiam (literally, "by the court") opinions are issued in the name of the Court as a whole. That, we shall see, is what happened in the *Pentagon Papers Case*, though each of the Justices also wrote an individual opinion explaining the decision from his own point of view.

The last stage is the public announcement of decisions and the opinions filed by the Justices. The custom used to be to have decisions announced on Mondays (a tradition that began in 1857); hence, the press characterization of "decision Mondays." In 1965, this was changed to announcing decisions when they were ready.

When decisions are announced, the Justices normally read only a summary of their opinions, especially when they are long. But some insist on reading every word, no matter how much time it takes. On June 17, 1963, Justice Tom C. Clark was droning through his

lengthy Court opinion in the case involving the constitutionality of Bible reading in public schools. Justice William O. Douglas, who could stand it no longer, passed Justice Black a plaintive note: "Is he going to read all of it? He told me he was only going to say a few words — he is on p. 20 now — 58 more to go. Perhaps we need an anti-filibuster rule as badly as some say the Senate does."

Certiorari, Conference, and Arguments

Our discussion of the *Pentagon Papers Case* had reached the point where applications for certiorari had been filed in the Supreme Court on June 24, 1971. The next morning (Friday, June 25), the Justices met in conference to consider the applications. Justices Black, Douglas, William J. Brennan, and Thurgood Marshall were prepared to deny certiorari and vacate the temporary restraining orders issued by the lower courts. The Chief Justice and Justices Harlan, Byron R. White, and Harry A. Blackmun wanted the cases set for argument the following week. Harlan had, indeed, circulated a proposed order that would have denied the *Times*'s application "pending further order of this Court." The issue was ultimately resolved in accordance with the view stated by Justice Stewart, who urged the Court to grant certiorari and continue the stays, but to set argument for the following morning. An order to that effect was issued in the early afternoon.

Justice Brennan had gone to the conference determined to note his opposition to continuing the stays. Three Justices joined him on this and the Court's order contained the notation that Justices Black, Douglas, Brennan, and Marshall would vacate all temporary restraining orders and deny certiorari. The Chief Justice had strongly opposed these Justices' action, but they wanted their opposition to continuing the stays on the public record.

The record in the *Post* case had arrived shortly after the order issued; the record in the *Times* case, which included a complete copy of the secret study, arrived with armed guards about 8:00 P.M. Justices Brennan and White stayed to look at the secret papers and did not leave until 10:30. Other members of the Court looked over the *Pentagon Papers* the next day — except for Justice Black, whose absolutist view of the First Amendment (which prohibited *any* interference at all with freedom of expression) made the documents' content immaterial.

As soon as Justice Brennan arrived at the Court the next morning, Saturday, June 26, he drafted a brief per curiam (an opinion

delivered in the name of the Court, not that of a Justice) affirming the lower court in the *Post* case and reversing it in the *Times* case. The oral argument took place from 11:00 A.M. to 1:00 P.M.

Like all Supreme Court sittings, the session began when the entrance of the black-robed Justices through the red velour draperies behind the bench was announced. At the sound of the gavel all in the crowded courtroom rose and remained standing while the Court crier intoned the time-honored cry, "Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court."

The Court Chamber itself is the most impressive room in the Supreme Court building. It measures 82 by 91 feet and has a ceiling 44 feet high. Its 24 columns are of Siena Old Convent marble from Liguria, Italy; its walls are of ivory vein marble from Alicante, Spain; and its floor borders are of Italian and African marble. Above the columns on the east and west walls are carved two marble panels depicting processions of historical lawgivers. Of the eighteen figures on the panels only one is famous as a judge, and he is the one American represented: John Marshall. His symbolic presence strikingly illustrates the Supreme Court's role as primary lawgiver in the American system.

The room is dominated by the Justices' long, raised bench, straight until 1972, when the Chief Justice had it altered to its present "winged," or half-hexagon, shape. Like all the furniture in the room, the bench is mahogany. Behind the bench are four of the massive marble columns. A large clock hangs on a chain between the two center ones. In front of the bench are seated, to the Court's right, the pages and clerk, and, to the Court's left, the marshal. Tables facing the bench are for counsel. Behind the tables is a section for members of the bar and a much larger general section for the public, with separate areas for the press and distinguished visitors.

After the Justices took their seats in their plush black leather chairs, the Chief Justice leaned forward and announced, in his mellow bass, that the Court denied the Government's motion to conduct part of the argument in camera (with the public and press excluded). He then stated, "Mr. Solicitor General, you may proceed."

Oral arguments in the Supreme Court are often dramatic events, participated in by leading attorneys. That was certainly true of the *Pentagon Papers* argument, which had all the drama associated with the landmarks of Supreme Court jurisprudence. Yet it was not the headlined argument on the merits by Solicitor General Erwin

N. Griswold or Professor Alexander M. Bickel that really influenced the decision. Instead the most important event during the argument was an exchange, which went almost unnoticed, between Justice Brennan and Solicitor General Griswold.

The exchange began when the Justice asked whether it was not "correct that the injunctions so far granted against the *Times* and the *Post* haven't stopped other newspapers from publishing materials based on this study or kindred papers?" Griswold replied that it was his understanding that everything published in other papers was based upon materials in the *Times* and *Post*.

Brennan then asked whether other papers did not have copies of the *Pentagon Papers* or access to the study. Griswold answered that he did not know. But then he conceded, "There is a possibility that anybody has it."

Brennan said that, in view of this, "I've always thought that the rule was that equity has to be rather careful not to issue ineffective injunctions. And isn't that a rule to be, a factor to be considered in these cases?" Griswold, however, said, "there is nothing in this record, or known outside the record, which would indicate that this injunction would be useless."

Postargument Conference

Justice Robert H. Jackson once said that the Court's argument begins where that of counsel ends. That was certainly true when the Justices met in conference to discuss the *Pentagon Papers Case* on the merits. The postargument conference itself was held on Saturday, June 26, soon after the conclusion of the oral arguments, after the Justices had had a brief lunch.

The conference room itself was a large rectangular chamber at the rear of the Court building, behind the courtroom. One of the longer walls had two windows facing Second Street. The other, with a door in the middle, was covered with bookshelves containing reports of decisions of the Supreme Court and federal courts of appeals, as well as copies of the *United States Code* and *U.S. Code Annotated*. Along one of the shorter walls was a fireplace, above which hung a Gilbert Stuart portrait of Chief Justice John Marshall in his robes. To the left of the portrait was a forest painting by John F. Carlson. On the opposite wall hung two landscapes by Lily Cushing, a beach scene and another forest scene. Chief Justice Burger told me that he had these paintings hung for Justice Douglas, always noted for his love of the outdoors.

In the center of the conference room ceiling was an ornate crystal chandelier, and at one end of the room stood a table around which the Justices sat, with the Chief Justice at the head and the others ranged in order of seniority, the most senior opposite the Chief, the next at the Chief's right, the next at the Senior Associate's right, and so on. In the ceiling above the chandelier were bright fluorescent lights — one of the improvements installed by Chief Justice Burger.

The *Pentagon Papers* conference began with the usual handshakes exchanged by the Justices. The formal greetings could not, however, mask the underlying tension, both because of the public controversy surrounding the case and the fact that, as soon became apparent, the Justices were sharply divided on the merits.

Chief Justice Burger complained about what he was to call the "unseemly haste" with which "these cases have been conducted" — the "panic basis" on which the courts had acted, as he put it at the conference. On the merits, however, Burger said that he would decide for the Government, as did Justices Harlan and Blackmun. The latter stated that the *Pentagon Papers* contained "dangerous material that would harm this nation." He added, somewhat gratuitously, that he had "nothing but contempt for the *Times*" for publishing the classified study.

On the other side, Justice Black declared that the "President had deluded the public on Vietnam." Black asserted that it would be "the worst blow to the First Amendment to enjoin these publications." Justices Douglas and Brennan also spoke strongly in favor of the newspapers and were supported by Justice Marshall. Less certain in their presentations were Justices Stewart and White. According to White, the publication had caused "much damage" and he indicated that the newspapers had violated the espionage laws. On the other hand, he did point out that prior restraints on the press were "rare."

The Justices had been discussing the case for about an hour and the conference thus far was inconclusive — with a four-three-two lineup prevailing (Black, Douglas, Brennan, and Marshall for the newspapers, the Chief Justice, Harlan, and Blackmun for the government, and Stewart and White in between). At about 2:30, however, one of Justice Black's clerks called the Brennan chambers. He had just heard on his car radio that the Government had obtained a temporary restraining order against the *St. Louis Post-Dispatch*. Since Justice Brennan was the only Justice who had seemed interested in this question at oral argument, he said, he was relaying the information to his office.

This news, sent immediately to the Justices in the conference room, was the catalyst for the final decision. The new restraining

order had been issued while the Solicitor General was stating that, as far as he knew, no further orders would be necessary. Griswold clearly did not know what other papers had what materials. In fact, copies of the *Pentagon Papers* had also been given to the *Boston Globe*, *Chicago Sun-Times*, *Christian Science Monitor*, and *Los Angeles Times* and they had begun to print them. The likelihood that any injunction would be futile had become very real. A federal judge likened enforcement to "riding herd on a swarm of bees."

When Justices White and Stewart heard about the *Post Dispatch* injunctions, they quickly told the conference that they would vote for the Brennan-drafted per curiam, which now had a six-Justice Court behind it. The opinion was sent to the printer late that afternoon and announced on the afternoon of June 30.

By then Justice Douglas had left for his summer home in Goose Prairie, Washington, but he had left behind his concurring opinion. Justice Black concurred in it after Douglas's draft was revised to meet Black's objections to a section declaring the Vietnam War unconstitutional. Justice Brennan also wrote an opinion, which he sent to Justice Black, who phoned back to say that he did not disagree with "a phrase, a word, or a comma." Despite this, Black said, he would write separately. By then, the opinion floodgates were opened and each Justice issued a separate opinion. Each explained the decision from its author's own point of view.

The Decision

Technically speaking, the *Pentagon Papers* decision is contained in the per curiam opinion which had been drafted by Justice Brennan just before the oral argument in the case. The per curiam denied the injunction against the newspapers. It stated that any prior restraint of the press bears a heavy presumption against validity; the Government thus carried a heavy burden of showing justification for the imposition of such a restraint. In this case, the per curiam concluded, the Government had not met that burden.

The Court divided six-to-three in the *Pentagon Papers Case*. As already indicated, each of the Justices wrote a separate opinion explaining the decision from his own point of view; none of the majority opinions was concurred in by more than two Justices. One can, nevertheless note three broad divisions in the Court: 1) that the First Amendment bars any restraint upon newspaper publication, regardless of the nature of the material published; 2) that the First Amendment bars an injunction against the publication involved in

the case, but may not do so where disclosure will result in direct, immediate, and irreparable damage to the nation; 3) that the "pernicious influence" of publication is primarily for the executive branch of government to determine, and the courts should defer to the executive determination on the impact of disclosure on national security.

The *Pentagon Papers* decision marks the most dramatic assertion of the principle that the press may not be subjected to prior restraints. At the same time, it is plain that the decision is not based upon an absolutist view of that principle. In the first place, the newspapers concerned were subject to temporary injunctions that prevented them from publishing the *Pentagon Papers* pending decision by the courts in the matter. Even more important is the indication in the opinions that six of the Justices would have upheld the issuance of an injunction in certain circumstances. As stated in three of the concurring opinions, there is a narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden — where "disclosure . . . will surely result in direct, immediate, and irreparable damage to the Nation or its people." The example given is that of publication that will imperil the safety of a troop transport. It is this exception that provides the legal justification for wartime censorship.

It must, however, be emphasized that the question of whether the exception applies is one for judicial resolution. The majority rejected Justice Harlan's dissenting contention that the judiciary may review only to the extent of satisfying itself that the subject matter of the dispute does lie within the foreign-relations power. If the Executive seeks a judicial remedy against the press, it must submit the basis upon which that remedy is sought to full scrutiny by the judiciary.

One may, however, argue that such a result overlooks what Justice Harlan's dissent termed "the 'pernicious influence' of . . . disclosure." At the time of the case, it was perhaps possible to make such an argument, since it was not really known whether the publication would have any adverse impact upon national security. Today, it is easier to reject the argument, since, so far as we know, no damage was done by the newspapers' action. Indeed, we were told in a 1991 *New York Times* article by Erwin Griswold, who had argued the case as Solicitor General, that the copies of the Pentagon Papers turned over to the newspapers did not contain the four volumes which the Government considered "most troublesome." In addition, in the volumes delivered, materials relating directly to security had been blocked out. The result, says Griswold, was that "the newspapers did

not print at the time any items about which the Government was concerned." Hence, Griswold concludes, "In hindsight, it is clear to me that no harm was done by publication of the *Pentagon Papers*."

First Amendment and Prior Restraint

Freedom of the press as a constitutional guaranty is primarily American in origin. To be sure, by the time of the American Revolution, that freedom had also come to be recognized in English law. But that was not because the freedom was based upon any constitutional provision. Indeed, freedom of the press is a typical example of the growth of rights in the English system. Control of the press in England was originally exercised through the Star Chamber. Although that tribunal was one of the first victims of the Long Parliament in 1641, its abolition did not mean press freedom. Censorship survived the Civil War and was given statutory foundation by the Licensing Act of 1662. Still, even that law was an important step forward, since the licensing power now depended not on any claim of inherent executive authority, but on statute law. Then, in 1695, the House of Commons refused to renew the Licensing Act. Consequently, the system of compulsory licensing of all publications, rigorously enforced since Tudor times, expired, and the English press has since been legally free from prior restraints. In Macaulay's phrase, the press "was emancipated from the censorship soon after the Revolution; and the government immediately fell under the censorship of the press." Yet this was brought about, not by constitutional declaration, but by the simple fact that Parliament failed to renew a statute.

In this country, the situation was different. The very first American constitution, that adopted in Virginia in June 1776, contained a Declaration of Rights that specifically guaranteed "freedom of the Press [as] one of the greatest bulwarks of liberty." Similar provisions were included in other state constitutions adopted during the Revolutionary period. The original United States Constitution did not, of course, contain any Bill of Rights. The omission was one of the principal grounds of attack upon the new organic instrument by those who opposed ratification. To quiet the opposition, John Marshall tells us, "In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government." Five of the ratifying conventions in the states included a freedom of the press