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THE FIRST AMENDMENT: FREEDOM OF SPEECH

First Edition

by

David L. Hudson, Jr.

Legal Almanac Series

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Chapter 1

A History of the First Amendment

§ 1:1 Early development of the first freedom

The First Amendment—sometimes called "the First Freedom"—serves as the blueprint of personal liberty. Justice Benjamin Cardozo once wrote that it was "the matrix, the indispensable condition, of nearly every other freedom."[1] Without freedom of speech, individuals could not criticize government, practice religion, speak out against abuses, assemble together for common causes and "petition the government for redress of grievances."

However, the First Amendment was not the *original* first amendment. Originally, Virginian congressman James Madison—who later became the fourth President of the United States—submitted 12 amendments for consideration by his colleagues in the U.S. House of Representatives. The First Amendment initially was Madison's third amendment, but the U.S. Senate failed to pass the first two amendments, elevating the First Amendment to its position as the first freedom.

Madison's original first amendment dealt with the ratio for determining how many members would serve in the House of

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[Section 1:1]

[1]*Palko v. Connecticut*, 302 U.S. 319, 327 (1939).

Representatives. For the first 100, there would be one representative for every 50,000 people. Madison's original second amendment dealt with congressional pay, not the right to keep and bear arms (our current Second Amendment). Madison's original second amendment read: *"No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."* Congress later passed this measure more than 200 years later in 1992, making it the 27th Amendment.

Whatever its original position, the First Amendment serves a supreme purpose in constitutional law. Americans have come to expect that they have free-speech rights, though they don't always support the rights of those with whom they disagree. To quote author Nat Hentoff, they act as if there is "free speech for me, but not for thee."[2] The First Amendment—as the rest of the Bill of Rights—was not always in the United States Constitution. Recall that when the so-called "Founding Fathers" met in secret in Philadelphia, Pennsylvania, originally to simply revise the Articles of Confederation (our country's first Constitution) they weren't really thinking about freedom of speech, press, assembly and petition. They thought more about the structure of government, about creating a central, federal government that had sufficient authority to bring stability to the fledging country.

The immediate problem facing the Founding Fathers was that the existing constitution—the Articles of Confederation—was not getting the job done. It created a loose confederation of states without a central, cohesive government that could control the varying interests of the different states. The mercantile states of the northeast often did not have the same interests as the agrarian Southern states.

Originally, the men who met in Philadelphia were there to "revise the Articles of Confederation." They were not supposed to create an entirely new constitution. Nevertheless, that is exactly what they did. They went well beyond their stated mission to revise the Articles of Confederation and created an entirely new Constitution—what we call now the United States Constitution.

The bulk of the Philadelphia Convention dealt with the structure of the new government, and particularly the three branches of government. Much discussion was had over the al-

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[2]Nat Hentoff, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other*, New York, 1992.

location of power in the two branches of Congress—what became the U.S. Senate and the U.S. House of Representatives. Much discussion took place over whether the President would be one person or something like a three-person body. Great debate took place over the different powers of the different branches. No discussion took place over a Bill of Rights until near the very end of the convention.

Toward the end of the convention in September 1787, the future fifth vice-president of the United States, Elbridge Gerry from Virginia, made a motion to include a bill of rights in the document. The measure was shot down without any extended discussion. In other words, the Bill of Rights was dead on arrival upon its first mention. This lack of a bill of rights caused George Mason, another delegate from Virginia, to refuse to sign the document. Mason had authored the Virginia Declaration of Rights in 1776, which contained many individual freedoms, such as freedom of the press and religion.[3]

However, for the Constitution to become the law of the land, the states had to ratify, or approve, this new charter for the country. Many political leaders failed to support the document; some because it gave too much power to the central government, and others because it failed to include a Bill of Rights. The ratification process over the Constitution was a bitter fight and it barely passed in key states, like Massachusetts and Pennsylvania. During the debates, some pro-Constitutionalists responded to the argument that the Constitution should be opposed because it didn't provide any protection for persons' individual liberties. These leaders promised that if the state would ratify the Constitution, that Congress would add a Bill of Rights.

Supporters of the Constitution argued that there was no need to add a Bill of Rights, because the Constitution itself was a bill of rights. After all, the document provided that there should be no *ex post facto* laws, no bills of attainder, and no religious tests for public offices. All three of these provisions are similar in type to what later became the Bill of Rights. However, this argument did not satisfy many of the people and their political leaders. They wanted a more explicit listing of the Bill of Rights—something akin to what was in various state declarations of rights.

Madison, who had played a key role in the Constitutional

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[3]*See* William O. Douglas, *An Almanac of Liberty*, Garden City, New York, 1954, at p. 359–360.

Convention, later adopted the strategy of supporting the addition of a Bill of Rights in order to support the new Constitution. Historian Robert A. Goldwin wrote an excellent book on this subject with the subtitle "How James Madison Used the Bill of Rights to Save the Constitution."[4] Initially, Madison was not a supporter of a bill of rights, viewing it as a mere "parchment barrier." However, after more thinking on the subject and an interesting correspondence with his friend and mentor Thomas Jefferson—who was overseas as a U.S. ambassador to France—Madison became the chief exponent of the Bill of Rights.

On June 8, 1789, Madison introduced his initial version of the Bill of Rights in a speech to Congress, referring to them as the "Great Rights of Mankind." Madison took the bulk of his proposed amendments from existing state constitutions. Several state constitutions protected the right to freely practice religion, the right to speak without abuse and the right to be free from unreasonable searches and seizures. Madison culled together this list of amendments from freedoms in existing state constitutions in so-called state declarations of rights.

Most state constitutions—then and now—begin with a declaration of rights. In many of these documents, the state constitutions declared the necessity of the freedoms later found in the First Amendment. For example, Section 12 of the Virginia Declaration of Rights, adopted in 1776, provided: "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments."

The Pennsylvania Constitution, adopted in 1777, provided in Article XII of its Declaration of Rights: "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." Article XVI provided: "That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance."

Similarly, Article XV of the North Carolina Constitution provided: "That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to he restrained" and Article XVIII provided: "That the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."

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[4]Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution*, Washington D.C., 1998.

Section XV of the Vermont Declaration of Rights provided: "That the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government—and therefore the freedom of the press ought not to be restrained."

These examples illustrate that the freedoms found in the current First Amendment were often found in several different provisions of existing state declaration of rights. Madison gathered together these freedoms, which eventually culminated in the First Amendment.

The 45 words of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The First Amendment contains five freedoms in its text—religion, speech, press, assembly and petition. Though not stated in the text, the First Amendment also protects freedom of association.[5]

Many scholars describe the amendment as consisting of two basic freedoms: freedom of religion and freedom of expression, grouping speech, press, assembly and petition together. This book focuses on freedom of expression with an emphasis on freedom of speech. A forthcoming volume of the Legal Almanac series will focus on freedom of religion.

Congress approved the Bill of Rights in a resolution on September 25, 1789, and sent the amendments out to the various state legislatures to determine its fate. On December 15, 1791, Virginia approved the Bill of Rights and the Bill of Rights was officially ratified and added to the end of the U.S. Constitution.

§ 1:2 First free-speech battle

Law school classes examining the First Amendment often begin with the Supreme Court's early free-speech decisions in the 20th century, as that marks the period when the Court began issuing First Amendment decisions. But, free-speech controversies occurred much earlier. Law professor and historian Michael Kent Curtis has explained: "Controversies over free speech and press did not begin with judicial cases

[5]*NAACP v. Alabama*, 357 U.S. 449 (1958).

during and after World War I as some students of constitutional law might assume."[1]

The country's commitment to free speech was sorely tested before the dawn of the 19th century. One of the ironies of early American history is that many of the early political leaders supported the Bill of Rights and the First Amendment, but also supported a measure that dramatically reduced the level of free-speech protection—the Sedition Act of 1798.

To understand the background and the adoption of the Sedition Act of 1798 requires an understanding of early American politics and the development of the two-party political system in the country. In the late 1790s, the United States developed what we view as commonplace today: the two-party political system. For the country's first eight years under the new Constitution, the country united behind former Revolutionary War hero and "Father of the Country," George Washington. In his farewell address in 1793, Washington warned against rising factions or political parties. "Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally," Washington told the country. "The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism."[2]

However, political differences quickly emerged among members of Washington's cabinet. Most notably there was a split between Washington's Vice President John Adams and his Secretary of State Thomas Jefferson. Adams became the leader of the so-called Federalist Party, while Jefferson became the leader of the so-called Democratic-Republican party.

Adams and the more conservative Federalist Party favored a policy of supporting Great Britain, while Jefferson and the more liberal Democratic-Republican Party leaned more toward greater support of France. The country featured a hotly contested Presidential election in 1796, with Adams narrowly prevailing over Jefferson. However, the Constitution at the time provided that the person with the most votes became

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[Section 1:2]

[1]Curtis, The Curious History of Attempts to Suppress Antislavery Speech, Press and Petition in 1835–1837, 89 Nw. U. L. Rev. 785, 788 (1995).

[2]Available online at the Avalon Project at http://avalon.law.yale.edu/18th_century/washing.asp.

President and the person with the next highest number of votes became Vice President—even if they were from different political parties. Imagine John McCain serving as Barack Obama's vice president, or Jimmy Carter serving as Ronald Reagan's vice president. That can't happen today because of the 12th Amendment to the Constitution.

The Adams administration had great difficulty dealing with the French government. France and the United States had bitter disagreements over various aspects of foreign policy, leading to the fear that the country could be plunged into an official war. The Federalist Party—led by President Adams—believed that the opposing political party—the Democratic-Republican party led by Vice-President Jefferson—was undermining its authority.

The Congress, with a Federalist majority, passed a law known as the Sedition Act of 1798, which made it a crime to publish "false, scandalous, and malicious writing against the government of the United States, or either house of the Congress of the United States, or the President of the United States." Notably absent from the measure was the crime of defaming the Vice President of the United States (Jefferson, the leading Democratic-Republican).

The Federalist government used the Sedition Act of 1798 to silence leading Democratic-Republican newspaper editors, such as Benjamin Bache (the grandson of Benjamin Franklin), James Callendar, Thomas Cooper, Matthew Lyon—who was also a member of the U.S. House of Representatives from Vermont—and others.[3]

The Sedition Act of 1798

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any persons shall unlawfully combine or conspire together, with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing or executing his trust or duty, and if any person or persons, with intent as aforesaid, shall counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt shall have the proposed effect or not,

[3]James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties*, New York (1956).

he or they shall be deemed guilty of a high misdemeanor, and on conviction, before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years; and further, at the discretion of the court may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

SEC. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

SEC. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in Republication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

SEC. 4. And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: Provided, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force.

APPROVED, July 14, 1798.

Section three of the Sedition Act provided that the defendant—the person charged with violating the Sedition Act of 1798—had the burden of proving that his contested statements were true. This is antithetical both to modern First Amendment law and defamation law—where the government or the