Press - Court Relations: 
The Burger Court and The First Amendment

An Honors Thesis (ID 499)

By

Richard M. Huff

Thesis Director

__________________________
Ralph Baker

Ball State University
Muncie, Indiana
May 22, 1981

Spring Quarter
INTRODUCTION

Thomas Jefferson once quipped that America has chosen neither government without newspapers nor newspapers without government, but both together. It seems only fitting then that these two legitimate powers should struggle for the "upper hand," and indeed they have. Although court-press battles date back quite a number of years, my objective was to discuss the Burger Court's track record in four extremely sensitive press-related areas: prior restraints, special right of access, sanctity of the press, and libel. Trying to refrain from inundating the reader with vast amounts of tedious court dicta and case-by-case examples, I attempted to review the aforementioned topics and analyze the reasons behind the Court's respective positions, as well as offer possible future directions.
The press..."the media of public news and comment, as well as persons employed in these media."^{1} Undeniably a controversial subject today, the press and the freedom thereof was most certainly on the minds of the original framers of the Constitution. They were deeply concerned with the fact that the colonists had immigrated to the United States to escape the oppressive tyrannies of European governments, and that once settled in the New World were accorded very few of the freedoms that they had journeyed so far to obtain. The majority of the framers were of the belief that democracy, as we know it in the United States, is based upon the free exchange of ideas and information. It naturally follows that they equated a free and uncensored press with a democratic press.^{2} Therefore, it came as no surprise that the First Amendment dealt with protecting this freedom, and was enacted so soon after our formal government was established that it and the rest of the Bill of Rights are often considered part of the original Constitution. Stated succinctly, the First Amendment guarantees that "Congress shall make no law...abridging the freedom of speech or of press."^{3} According to the outstanding commentator Zechariah Chaffee, Jr., the First Amendment was intended to protect against the "dilution of speech and press freedoms that were for the most part respected by the colonial courts, and not to create an entity

---


^{3}Ibid., p. 94.
that was previously unknown to the world."\(^4\) However, because of
the somewhat vague and imprecise manner in which these freedoms
were treated by the framers, the history of press freedoms has
been a ceaseless struggle in reaction to executive or legislative
attempts at oppression.\(^5\) Most recently, in fact, much attention
has been directed towards the Burger Court and their alleged ina-
bility to "understand or to acknowledge the constitutional role
of the press and the special privileges required by the press to
fulfill that role."\(^6\) Their recent attempts to adjudicate sensi-
tive areas concerning press rights has been frustrating to many,
disturbing to most, and confusing to all.

Although a number of recent decisions have caused much alarm
in even the most objective and dispassionate circles, it would be
totally irrational to assume that the Burger Court has turned a
"deaf ear" to the rights of the media. On the contrary, it is
generally agreed upon that the high bench regards the function of
the press to be an indispensable one, rather than simply the pro-
cess of gathering, assimilating, and disseminating facts and opin-
ions. They recognize that the press has the unenviable task of
making known and understood to the general public the continual
activities of individuals and government, regardless of its sig-
ificance or importance. In addition to this burdensome task, the

\(^4\)Joseph R. Weisberger, "The Supreme Court and the Press,"

\(^5\)Alfred T. Goodwin, "Press-Court Relations: Can They Be Im-

\(^6\)Philip R. Higdon, "The Burger Court and the Media," Western
press becomes the principle instrument by which public opinion is formed. In other words, the press possesses the power to shape the public's thoughts, expressions, and behavior while carrying on the responsibility of public enlightenment. The harsh reality of this delicate position prevents the Court from regarding the press too lightly. This perhaps has lead to the Burger Court's "take-em-one-at-a-time" attitude that has left the public with little or no direction as to specific press freedoms.

One area, however, in which the Court has been very clear in its reluctance to abridge press freedoms is the issue regarding prior restraint. Seemingly in near total agreement, the Court has insisted that the press, as opposed to the public, shall not be accorded special privileges, but that their right to publish is virtually absolute. Cases involving prior restraints in the form of gag orders with respect to certain proceedings and national security have been ruled upon by the Burger Court. It should be noted that because the conditions of permissible restraints are limited, the Court subjects all systems to the closest scrutiny and places upon them the ponderous burden of justification. In essence, most attempts at prior restraints are presumed constitutionally invalid until proved otherwise. The restraint will normally be upheld if there are no "reasonable but less restrictive alternatives...available," and the activity poses a "clear and present danger" or an "imminent threat to a protected interest."  

7Higdon, p. 595.
The first significant case that was presented before the Burger Court on this subject was Branzburg v. Hayes in which the constitutionality of gag orders in criminal proceedings was discussed. In the past, the Court had publically advocated the control of information concerning trial proceedings released to the press so that the jury would not be subjected to any outside influences or prejudices. In Branzburg, the Court suggested that the press may be barred from "attending or publishing information about trials if such restrictions are necessary...(to protect the rights of the accused)...and insure the defendant a fair trial before an impartial tribunal." As a result, the number of gag orders issued across the country substantially increased, much to the chagrin of the Burger Court. Finally, the Court granted certiorari to consider this issue in Nebraska Press Association v. Stuart which involved a gag order that had been imposed in a Nebraska murder case. The press was prohibited from reporting on three specific subjects, and the order was subsequently upheld by the Nebraska Supreme Court. The Burger Court majority reversed the lower court's ruling on the grounds that the prior restraint had not been constitutionally justified. The Court recognized that while "the right to a fair trial by jury...is one of the most sacred safeguards within the Bill of Rights," the barriers to

---

8 408 U.S. 665 (1972)
9 Higdon, p. 597.
10 427 U.S. 539 (1976)
prior restraints as a means of enforcing that right should remain high. Furthermore, a majority of the Justices hinted at a willingness to consider absolute prohibition of prior restraints on publication of information concerning criminal proceedings in a later case.

Recently, the Burger Court has also granted certiorari to two cases involving state statutes prohibiting members of the press from publicly divulging information concerning certain judicial proceedings. Although the states purported that the statutes were enacted in keeping with the "clear and present danger" standard, the Court again rejected its relevance and held the statutes constitutionally invalid. The first case, Landmark Communications, Inc. v. Virginia, 12 involved a Virginia statute establishing a commission to investigate alleged judicial improprieties. The statute also provided for total confidentiality by prohibiting the release of information concerning the investigation until the commission filed formal charges. A Virginia newspaper, however, published an article that accurately identified a judge as the subject of a formal pending inquiry. The newspaper was found guilty of violating the statute on the grounds that the "premature disclosure of the (commission's) proceedings posed a clear and present danger to the state's legitimate interests in the effective discharge...of justice." 13 The Burger Court agreed that confidentiality promotes the effectiveness of the commission,

12 435 U.S. 829 (1978)
13 Higdon, p. 604.
but reversed the lower court's decision noting that alternative methods were available that would better serve the legitimate state interests. They further noted that the state had failed to justify its attempt to abridge the constitutionally protected right to promote discussion of governmental affairs. 14

In the second case, Smith v. Daily Mail Publishing Co., 15 two West Virginia newspapers were indicted for violating a state statute prohibiting the publishing of names of those involved in juvenile proceedings. The newspapers had published the name of a juvenile who had allegedly murdered a fellow junior high student on the school grounds. Although the West Virginia Supreme Court held that the statute "operated as a prior restraint on speech,"16 the Burger Court referred to the statute as an attempt to punish publication after the fact. Nevertheless, they still held that "the state's interest in protecting the anonymity of a juvenile offender to further his rehabilitation was...insufficient to warrant punishment of newspapers for publishing truthful information about a matter of public significance."17 The Court also noted that while all states provide for some type of confidentiality in such instances, most states have developed alternative methods of protecting juveniles' identities.

14 Meiklejohn, p. 807.
15 99 S. Ct. 2667 (1979)
16 Higdon, p. 606.
17 Ibid., p. 607.
The last subsection of prior restraints in which the Burger Court has had the opportunity to review concerns injunctions in the name of national security. In the past, the Court has recognized the possibility of justified prior restraints in times of war to promote national security. Consequently, when the Nixon Administration sought to enjoin The New York Times, the Washington Post, et al from publishing Daniel Ellsberg's "Pentagon Papers," they claimed that such publication would be detrimental to the war effort and to national security as a whole. The Burger Court, in an extremely hasty and ill-prepared decision, voted to dismiss the complaint on the grounds that the government had failed to meet its "heavy burden of showing justification for prior restraint in this case." Acclaimed as a victory for the press, the decision was rather meaningless in that all nine Justices filed separate opinions combining vague generalizations while neglecting to offer any guidelines whatsoever for deciding related cases in the future.

As stated earlier, the Burger Court appears to be heading in a detectable direction in the area of prior restraints. With certain key advocates of the absolutist approach possibly stepping down from the bench in the near future, it is safe to assume that the inclination towards prohibiting prior restraints per se is dead. In addition, the Court seemingly is attempting to shy away from establishing specific guidelines with regard to this issue.

opting instead for the traditional case-by-case adjudication on merit alone. From all indications, nothing in the Burger Court's recent opinions suggest that the constitutional barriers to prior restraint will soon be lowered.

Just as it is difficult to determine the Court's direction in the area of prior restraints, the problem is exacerbated when analyzing the question concerning the press' right of access to certain information. In the past, the press has attempted to incorporate the societal importance of freedom of the press into the ideal of the public "right to know." They steadfastly maintain that they possess a constitutional right of access to judicial proceedings, public records, and governmental facilities and persons incarcerated therein. The Burger Court, however, has repeatedly rejected these contentions by insisting that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."20

Perhaps the most controversial and misunderstood decision of late was Gannett Co. v. DePasquale21 in which the Court ruled that in certain circumstances judges may close their courtrooms to the public and the press.22 The majority felt that the key issue was the delicate balancing of the press' and the public's right of access to the proceedings with the defendants' constitutional right to a fair trial. They rejected the press' claim that the


2199 S. Ct. 2898 (1979)

22"Open and Shut Cases," Newsweek, 27 August 1979, p. 69.
Sixth Amendment's guarantee of a "public trial" creates the right of access to that trial on the part of the public.\textsuperscript{23} The majority held that the guarantee of a "public trial" as expressed in the Sixth Amendment pertains to the rights of the accused, not the public. The problem, however, began when Justice Stewart, writing for the majority, stated that "members of the public have no constitutional right...to attend criminal trials."\textsuperscript{24} Across the country, journalists were immediately outraged and expressed concern over the Court's attempt to "unmake the Constitution." A closer examination of Gannett reveals that it involves only pretrial hearings and does not require court closures, but rather permits them. In other words, it is left to the discretion of the presiding judge to accept closure motions, and there is no evidence at this time to suggest a significant increase in closed pretrial hearings. One possible explanation is that many state courts are bound by state constitutions and statutes that require open judicial proceedings.\textsuperscript{25} Regardless, if the Burger Court endorses the American Bar Association's guidelines calling for open proceedings except where "the premature release of courtroom information would present a clear and present danger to the fairness of a trial,"\textsuperscript{26} court closures will soon become a thing of the past.

\textsuperscript{23}Higdon, p. 624.
\textsuperscript{24}"Open and Shut Cases," p. 69.
\textsuperscript{25}Goodwin, p. 636.
\textsuperscript{26}Ibid., pp. 636-637.
Along these same lines, the Burger Court unanimously ruled last February that a Florida plan permitting television coverage of criminal trials does not automatically deny the defendant's right to a fair trial.27 Regarded as a significant victory for the press, this decision is an obvious contradiction to the Warren Court's image of anti-television resulting from rulings in cases such as the trial of Billie Sol Estes. In this 1965 decision, the Court overturned the conviction of the Texas financier because the presence of the cameras had adversely affected the jurors and witnesses and deprived Estes of a fair trial.28 Nowadays, the disruptive nature of broadcasting equipment has been minimized by technological improvements, thus prompting thirty states to allow some courtroom broadcasts.29 It should be noted, however, that this decision merely allows states to experiment, but does not guarantee camera crews a right of access to the courtroom.30 The Burger Court has continually reiterated the fact that this ruling is only applicable to state courts, and it is extremely unlikely that Chandler will "open up" the federal courts in the near future. As of this time, it is impossible to predict the effect that cameras will have on judges, jurors, and witnesses. It will be interesting to follow the effects of this decision especially since the Court has placed the burden of


proof on the defendant to demonstrate that the television coverage compromised the jury's ability to judge fairly and adversely affected the trial participants.

The second widely debated issue regarding special press access involves government facilities and persons incarcerated therein (i.e. prisons and prisoners). In the past, the Burger Court has repeatedly insisted that no special press privileges exist under the First Amendment. Consequently, in 1974, they ruled in Pell and Saxbe that there "was no First Amendment right of access beyond that given to the general public." In these two related cases, the Court rejected press challenges to state and federal prison policies forbidding interviews with individual inmates relying on past rulings that the First Amendment right to gather news does not provide the press with unrestrained access to all newsmaking events. In a more recent decision, Houchins v. KQED, Inc., the Court reiterated Pell and Saxbe in holding that the press "has no special right of access to government information to inform the public because the public itself has no constitutional right to the information." With a slight hint of disdain, the majority emphatically rejected the press' contention

34Ibid., p. 326-327.
3598 S. Ct. 2588 (1978)
36Higdon, p. 620.
that they are a constitutionally protected investigative arm of the public, thereby adhering to the doctrine of press and public being on the same constitutional footing. Judging from the more recent decisions, as well as some "off-the-record" remarks made by certain Justices, it is apparent that the Burger Court will be disinclined in the future to construe the press clause of the First Amendment to accord any special constitutional rights of access.

The last issue regarding special press access involves claims of a right on the part of the press and the public to inspect public documents and records. In Nixon v. Warner Communications, Inc., the press petitioned the Court to inspect or copy tape recordings of White House conversations admitted as evidence during the Watergate trials of Mitchell, Haldeman, Ehrlichman, Parkinson, and Mardian. Again, however, the majority refused to recognize a constitutional or common law right of the press or public to review the tape recordings. They held that the common law right of access to judicial records "did not authorize release of the tapes from the district court's custody." The Court also noted that although they recognized a general but not absolute right to inspect and copy judicial records and documents, the decision of the issue of access should be left to the trial court. This particular issue of special press access, as well as the previous two, appears to be heading toward somewhat of a "dead

---

37 435 U.S. 589 (1978)
38 Higdon, p. 629.
end" with regard to the Burger Court. As stated earlier, some
of the Justices have openly expressed an air of contempt for the
press insisting that they are accorded too many freedoms as it
is. Again, it appears unlikely that the Burger Court will reverse
its direction in the near future with regard to this particular
area of the press clause.

As do prior restraints and the right of access, the third
area of discussion—the sanctity of the press—elicits much heated
debate. When analyzing the question regarding the sanctity of
the press, it is important to keep in perspective three subtopics:
searches of newsrooms, protection of confidential sources, and
disclosure of journalists' thoughts. Perhaps the most contro-
versial case to confront the Burger Court in this area was Zurcher
v. Stanford Daily.\(^{39}\) The action resulted from a brief skirmish
between student demonstrators and campus police at the Stanford
University Hospital. Because some of the officers received injur-
ies, the police secured a warrant to search the offices of the
Stanford Daily in hopes of obtaining photographs to be used in
identifying students involved in the incident. The search was
conducted, but no relevant pictures were obtained. The Stanford
Daily subsequently brought suit against the policemen who con-
ducted the search claiming that the First Amendment provides the
press with special protection against searches.\(^{40}\) The lower
courts held that the warrant "should not have been issued without

\(^{39}\) 436 U.S. 547 (1978)

\(^{40}\) Epps, p. 320.
proof that a subpoena would have been impracticable." The Burger Court majority, however, reversed insisting that the First Amendment does not afford additional protection to reporters beyond the general safeguards provided by the Fourth Amendment (i.e. probable cause with respect to the place being searched and the things to be seized, as well as overall "reasonableness"). They further noted that because warrants are issued to search property and not people, there need be no special precautions taken as long as the evidence seized is properly identified. The press was outraged and immediately condemned the decision because of its possible "chilling effects" on the gathering of the news. Even a few of the Justices recognized the possibility of the decision disrupting newspaper operations by exposing reporters' sources, destroying the confidence of informers, and limiting their willingness to communicate. The majority, however, was unconvinced that abuses would result, and that press sources would "dry up." Instead, they stood their liberal ground concluding that because "the Constitution does not explicitly provide the press with any special privileges in regards to searches, there are none."

The Burger Court has also dealt with another aspect of the sanctity of the press by mandating disclosure of journalists'

---

41 Meiklejohn, p. 805.
42 Epps, pp. 319-321.
44 Epps, p. 321.
thoughts in certain circumstances. *Herbert v. Lando*\(^{45}\) involved a libel action filed by a former army officer after being portrayed in a dishonorable manner on a major television news show. The majority reasoned that because Herbert was a "public figure," he could not prevail in a libel suit without showing that the material was published with actual malice (i.e. knowledge or reckless disregard of its falsehood).\(^{46}\) Therefore, the Court authorized the defendant to respond to questions regarding his state of mind as to the veracity of his sources prior to publication of the defamatory material.\(^{47}\) Although this decision received unwarranted criticism, there would be obvious difficulty in determining malice without scrutinizing the process by which the press checks the truthfulness of reports they receive. Furthermore, a contrary ruling could have resulted in "irresponsible and unprofessional journalists...(enjoying)...effective First Amendment immunity from libel actions, and public figures who had been unfairly maligned would...(be)...left without any remedies."\(^{48}\)

Again, the recent decisions of the Burger Court in this area illustrate the relative lack of success that the press has had when claiming special privileges under the First Amendment. It seems very plausible that the direction the Court is heading with

\(^{45}\) 441 U.S. 153 (1979)

\(^{46}\) Weisberger, p. 849.


\(^{48}\) Goodwin, p. 637.
with regard to the sanctity of the newsroom and confidential sources could have a significant "chilling effect" on the assimilation and dissemination of news. The area of libel deserves a much closer analysis and a brief discussion is forthcoming. It should be noted, however, that the press' future in this area is not totally dismal due to the state and federal legislation that has been introduced to nullify the Stanford Daily decision. This proposed legislation would protect the press only from third party search warrants in which the subject is not suspected of a crime, and when there is no probable cause to believe that the evidence would be destroyed if a warrant was not issued. 49

The last area of the press clause in which the Burger Court has had to wrestle with the question of special constitutional privilege concerns libel. The approach that the Burger Court has pursued represents a striking contrast to the ideals that were initiated by the Warren Court. In fact, many contend that the Burger Court has seized virtually every opportunity to strip from the media the very constitutional protections in defamation cases that the Warren Court worked so fervently to attain. 50

In the landmark decision New York Times Co. v. Sullivan,51 the Warren Court majority ruled that a public official is prohibited from recovering damages from the press for defamatory falsehoods unless proof of actual malice can be established. 52

---

49 Higdon, p. 646.
50 Ibid., p. 656.
51 376 U.S. 254 (1964)
52 Leventhal, p. 9.
Court initially attempted to expand on this proposition by holding in *Rosenbloom v. Metromedia, Inc.*\(^{53}\) that purportedly libelous statements by the media concerning matters of general or public interest enjoy constitutional protection subject to the actual malice test "regardless of the plaintiff's status."\(^{54}\) In 1974, however, the Nixon appointees instigated a significant shift of opinion with respect to constitutional protection in media libel cases. The transition began with *Gertz v. Robert Welch, Inc.*\(^{55}\) in which the Court explicitly rejected the *Rosenbloom* concept that the plaintiff's status bore little relation to the values protected by the First Amendment. They reiterated *Sullivan* by insisting that the constitutional privilege applies only to public officials or public figures. They then attempted to establish specific guidelines for determining a public official/figure by limiting the scope of libel plaintiffs to (1) persons with such fame or notoriety that they may be considered public figures for all purposes, or (2) persons who have thrust themselves into some specific public controversy. Lastly, the majority recognized some limited constitutional protection for the media even in private figure plaintiff cases by requiring proof that the defendant was negligent before liability is established.\(^{56}\) The significance of *Gertz* lies in its narrowing of the definition of the public

---

\(^{53}\) 403 U.S. 29 (1971)

\(^{54}\) Higdon, p. 659.

\(^{55}\) 418 U.S. 323 (1974)

\(^{56}\) Higdon, p. 660.
figure to presumably include only those persons whose names are already "household words."

This idea was reiterated in *Time, Inc. v. Firestone*\(^{57}\) when the Court held that the plaintiff was not a public figure and had to shoulder the burden of proving only negligence. In other words, if a matter was not of significant public interest according to Gertz standards, then the actual malice test would not be applicable regardless of the plaintiff's status.\(^{58}\) This case represented a substantial blow to the applicability of the actual malice test, as did a more recent decision, *Wolston v. Reader's Digest Association*.\(^{59}\) In this case, the Burger Court reversed a lower court's holding that the plaintiff, an alleged espionage agent, was a public figure who failed to establish actual malice. Instead, the majority concluded that "any person who engages in criminal conduct... (does not)... automatically become a public figure for purposes of comment on a limited range of issues relating to his conviction."\(^{60}\) The Court failed, however, to determine whether the passage of time may convert a public figure into a private figure. Some of the Justices did allude to favoring more time to decide this issue, so perhaps it will be dealt with in a subsequent case. At the present time, it seems fairly obvious that the Burger Court is intent upon limiting the scope of the public

---

\(^{57}\) 424 U.S. 448 (1976)

\(^{58}\) Higdon, p. 663.

\(^{59}\) 99 S. Ct. 2701 (1979)

\(^{60}\) Higdon, pp. 663-667.
official/figure definition by denying the press special constitutional protections in all but the most extreme cases.

Although it is most difficult to determine the Burger Court's direction in any specific area regarding the press, these nine Justices (in varied combinations) have established a fairly clear message: the First Amendment does not provide the press, as opposed to the public, with any special privileges. With this in mind, it seems noteworthy that the Burger Court also recognizes the press' right to publish as virtually absolute. It comes as no surprise, however, that many journalists regard the recent Court decisions as unjustly constrictive. Journalists tend to view the First Amendment's guarantees of press freedoms as absolute, and any qualification of these guarantees, no matter how insignificant, as unacceptable. 61 A substantial amount of tension between the Court and the press could be reduced by more careful interpretation and application of recent decisions, and by realizing that these holdings have only reaffirmed the core of the First Amendment—the right to publish.

On the other side, the Court could alleviate some tension by accepting the fact that the press is a vitally important function in American society. Furthermore, by publicizing judicial decisions, the press gives those decisions added credibility and legitimacy. Because the ultimate test of a court's persuasiveness is the degree to which the public accepts and follows its decisions, the courts depend upon the press to communicate their reasoning

61 Goodwin, p. 638.
to the public. In other words, the authority of the "least dan-
gerous branch" of government is linked to the vitality of the press. Therefore, I would suggest that the key word in regard to the future of these two adversaries should be tolerance.

As a final note, it seems entirely plausible that court-press relations could eventually become a ceaseless tug-of-war over the press clause. Because of the dynamic nature of the First Amendment, I must again emphasize that it is difficult, if not virtually impossible to discern the future of press law. However, as in any area of the law where a balancing of interests approach is adopted, the resulting lack of uniformity creates much uncertainty. Thus, when analyzing any facet of court-press relations, whether it be prior restraints, right of access, sanctity, or libel, perhaps the most logical advice that one could heed is to do what most Court followers do—have patience and adopt a "wait and see" attitude.

---
62 Goodwin, pp. 640-642.
63 Epps, p. 318.