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# The Press as an Interest Group: Mainstream Media in the United States Supreme Court

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# The Press as an Interest Group: Mainstream Media in the United States Supreme Court

**Eric B. Easton\***

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## I. INTRODUCTION

The essential role of the press in American politics has been the subject of extensive study since Alexis de Tocqueville wrote that the press “causes political life to circulate through all the parts of that vast territory.”<sup>1</sup> Tocqueville also wrote about the “necessary connection between [political] associations and newspapers,”<sup>2</sup> but never saw the institutional press emerge as a political association – or interest group – in its own right.

This article is the very beginning of an exploration into the proposition that the institutional press uses the litigation process strategically, in much the same way that another interest group might lobby the legislative branch, to shape its own regulatory environment, particularly the First Amendment doctrine within which news workers must

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<sup>1</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94 (R.D. Heffner ed., Signet Classic 1984)(1835).

<sup>2</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 203 (R.D. Heffner ed., Signet Classic 1984) (1840). *See also* DAVID BICKNELL TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 55 (1951).

operate. The purpose of this preliminary work is to examine, quantitatively, the degree of participation and success by the mainstream media in U.S. Supreme Court litigation as parties and amici curiae.

Historically, the press had begun to organize itself for its own political ends by the early twentieth century.<sup>3</sup> By the end of that century, the organizations representing the news media were fully engaged in political action. In a 1947 case, for example, the Supreme Court absolved a journalist of criminal contempt for criticizing a Texas county judge, partly on the ground that judicial officers are insulated from public opinion. In a rather bitter dissent, Justice Jackson referred to the growing power of the press as an interest group:

It is doubtful if the press itself regards judges as so insulated from public opinion. In this very case the American Newspaper Publishers Association filed a brief *amicus curiae* on the merits after we granted certiorari. Of course, it does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one:

This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country. The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts.<sup>4</sup>

Yet the press as advocate for its own interest has hardly been studied at all. One might suggest several interrelated reasons for this relative obscurity:

1. The essence of the press's self-image is public service.<sup>5</sup> The press does not think of itself, nor does it care to be known, as a political actor. Indeed, such a role would strike most working journalists as a conflict of interest; how can the press cover political institutions with detached objectivity while it seeks favor from those same institutions?

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<sup>3</sup> See MICHAEL EMERY & EDWARD EMERY, *THE PRESS AND AMERICA* 574-581 (6th ed. 1988).

<sup>4</sup> *Craig v. Harney*, 331 U.S. 367, 397 (1947).

<sup>5</sup> The preamble to the Society of Professional Journalists Code of Ethics (1996), <http://spj.org/ethicscode.asp?>, reads as follows:

Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty. Professional integrity is the cornerstone of a journalist's credibility. Members of the Society share a dedication to ethical behavior and adopt this code to declare the Society's principles and standards of practice.

2. Accordingly, the press does not generally interact with either the executive or legislative branches in the same way that other interest groups do. While media organizations are not above lobbying Congress for legislation they want – broadcast and cable deregulation, copyright protection, favorable postal rates, open meetings and records laws, and so on – news workers are not comfortable with it. “As a general rule,” wrote *Newsweek’s* Jonathan Alter to begin a recent column arguing for a federal shield law, “journalists shouldn’t be in the business of lobbying Congress.”<sup>6</sup>

3. By contrast, the press campaigns vigorously in the courts for its most important institutional interests, but the scholars whom one might expect to monitor their efforts are AWOL. Media law specialists in law and journalism schools usually focus on substantive law (outputs), rather than political action (inputs), and most political scientists who study the courts have apparently been distracted by theories that ignore institutional dynamics altogether.<sup>7</sup>

Although the legal literature fully describes the efforts of the institutional press to secure various First Amendment privileges and other favorable legal rulings through litigation,<sup>8</sup> there appears to be no systematic study of the press from an interest group perspective. Joseph Kobylka’s work on obscenity<sup>9</sup> comes closest to the approach this article takes in theory, method, and substance. Marc Galanter’s concept of “repeat players”<sup>10</sup> and various works on the effectiveness of amicus briefs<sup>11</sup> have also informed this study.

Perhaps as more “new institutionalists” focus on interest groups in the courts,<sup>12</sup> the institutional press will receive greater scrutiny. This article offers a modest beginning to that process. Part II reviews the interest group literature that leads up to this study, while Part III sub-

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<sup>6</sup> Jonathan Alter, *You Shield Us, We’ll Shield You*, NEWSWEEK, July 11, 2005, at 55.

<sup>7</sup> Cornell W. Clayton, *Supreme Court and Political Jurisprudence*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 29-30 (Cornell W. Clayton & Howard Gillman eds., 1999).

<sup>8</sup> E.g., Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225; Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1.

<sup>9</sup> Joseph Kobylka, *A Court-Created Context for Group Litigation: Libertarian Groups and Obscenity*, 49 J. OF POLITICS 1061-1078 (1987).

<sup>10</sup> Marc Galanter, *Why The “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95, 97 (1974).

<sup>11</sup> E.g., Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988); Caldeira & Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. OF POLITICS 782 (1990); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U.PENN. L. REV. 743 (2000).

<sup>12</sup> See Clayton & Gillman, *supra* note 7.

stantively examines its theoretical foundation. Part IV discusses the methodology used for this study, and Part V presents its findings. Part VI offers a brief conclusion and some recommendations for further exploration.

## II. LITERATURE REVIEW

The notion of interest groups as a political force is older than the Republic itself. In Federalist No. 10, Madison ominously defined a faction as: "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Garson discusses Calhoun's theory of the state as "regard[ing] interests as well as numbers, considering the community as made up of different and conflicting interests, as far as the government is concerned, and takes the sense of each through its appropriate organ, and the united sense of all as the sense of the entire community."<sup>13</sup>

Tocqueville defines one form of political association as consisting "simply in the public assent which a number of individuals give to certain doctrines and in the engagement which they contract to promote in a certain manner the spread of those doctrines." Suggesting that "the right of associating in this fashion almost merges with freedom of the press," he asserts that associations so formed are more powerful than the press, attracting more like-minded members and increasing in zeal as they do.<sup>14</sup>

Modern interest group theory is generally traced to Arthur Bentley, whose *The Process of Government* is credited with "developing a theory of government as 'a process in which interest groups are the players and protagonists.'"<sup>15</sup> In fact, Garson cites a number of possibly more deserving progenitors, including Bentley's own teacher, Albion Small, whose writings contain many of the central points of interest group theory: (1) society conceived as composed of a large number of groups; (2) no one of which can claim to represent the general will; hence (3) the need for elections to determine a rough approximation of the collective volition; (4) determined by group forces at various stages of the political process. . .<sup>16</sup>

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<sup>13</sup> G. David Garson, *On the Origins of Interest-Group Theory: A Critique of Process*, 68 AM. POL. SCI. REV. 1505, 1507 (1974).

<sup>14</sup> DE TOCQUEVILLE, *supra* note 1.

<sup>15</sup> Garson, *supra* note 13, at 1512 (quoting the editor's introduction to ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* xiii-xix (Peter Odegard, ed., 1967)).

<sup>16</sup> Garson, *supra* note 13, at 1511.

Wherever the credit or blame may lie, the interest group theory languished for decades before being “resurrected”<sup>17</sup> in mid-century by, among others, David Truman, whose *The Governmental Process: Political Interests and Public Opinion* provides both “a theoretical framework for analyzing group behavior, and the application of group influence in the political process.”<sup>18</sup> Importantly for our purposes, Truman includes a chapter on the role of groups in the judicial process, pointing out that governmental choices are “no less important to interest groups when they are announced from the bench than when they are made in legislative halls and executive chambers.”<sup>19</sup> Truman points out that group interests are “particularly close to the surface” when constitutional questions are resolved,<sup>20</sup> which characterizes the great majority of cases involving the media.

Like Truman, Martin Shapiro sees the Supreme Court as something of a protector for groups who may be under-represented in the legislative or executive branches, either because they are still inchoate as interest groups or because they have lost their political battle in those arenas.<sup>21,22</sup> Shapiro’s major work on freedom of speech and the First Amendment, however, barely mentions the institutional press in either category; indeed, the relatively heavy use of the Court by the media might be seen as an example of a third category of “clientele”: groups that are institutionally unsuited to lobbying the political branches. Twenty years later, however, Shapiro had no difficulty analyzing the Supreme Court’s constitutional libel doctrine in terms of government regulation of an industry – the press.<sup>23</sup>

Finally, Galanter’s distinction between “haves” and “have nots”<sup>24</sup> among litigating parties provides an interesting theoretical perspective for considering the success of the institutional press as it has for a number of studies of court outcomes.<sup>25</sup> Media companies and associations are obviously “repeat players” by Galanter’s standards, and their oppo-

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<sup>17</sup> *Id.* at 1514.

<sup>18</sup> Roland Young, Book Review, 278 ANN. AM. ACAD. OF POL. & SOC. SCI. 200, 201 (1951).

<sup>19</sup> TRUMAN, *supra* note 2, at 480.

<sup>20</sup> *Id.* at 494.

<sup>21</sup> *Id.* at 487.

<sup>22</sup> MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 36-37 (1966).

<sup>23</sup> Martin Shapiro, *Symposium: New Perspectives in the Law of Defamation: Regulatory Analysis*, 74 CAL. L. REV. 883 (1986).

<sup>24</sup> Galanter, *supra* note 10.

<sup>25</sup> Herbert M. Kritzer, *Martin Shapiro: Anticipating the New Institutionalism*, in THE PIONEERS OF JUDICIAL BEHAVIOR 433 (N. Maveety ed., 2003). See also IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

nents run the gamut from the federal government to private individuals claiming libel or invasion of privacy.

### III. THEORY

Interest group theory rejects the presumption that government tries to advance the public interest, and rather adopts Madison's assertion that "all participants in the political process act to further their self-interest."<sup>26</sup> While the institutional press most assuredly sees its self-interest as co-extensive with the public interest, at least with respect to First Amendment issues, that hardly negates the application of the theory to this multibillion-dollar enterprise. The theory, moreover, sees government regulation as a commodity to be "purchased" by interest groups who stand to benefit from favorable regulatory terms,<sup>27</sup> typically by expending resources on lobbying, campaign contributions and presumably litigating.

As informed by Galanter's "repeat player" concept, interest group theory would predict that the media would be highly successful in influencing the courts to "regulate" favorably. The press is readily recognizable as an interest group "which has had and anticipates repeated litigation, which has low stakes in the adjudication of any one case, and which has the resources to pursue its long-run interests."<sup>28</sup> The press certainly has "ready access to specialists," given the experience and prestige of the media defense bar, and for the most part, the press is free to choose whether or not to seek review of an adverse decision in the lower courts. Accordingly, we would expect "a body of 'precedent' cases – that is, cases capable of influencing the outcome of future cases – to be relatively skewed toward those favorable" to the press.<sup>29</sup>

Indeed, Loffredo points out that the Court has "displayed exceptional sensitivity toward elite communicative modes," including, "to a lesser extent, the prerogatives of the mass media."<sup>30</sup> Overall, however, the legal literature suggests that although the media has been remarkably successful in doctrinal areas involving content regulation – notably

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<sup>26</sup> E.R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?* 101 *YALE L.J.* 31, 35 (1991).

<sup>27</sup> *Id.*

<sup>28</sup> Galanter, *supra* note 10, at 98.

<sup>29</sup> *Id.* at 98-102.

<sup>30</sup> Howard Gillman, *Reconnecting the Modern Court to the Historical Evolution of Capitalism*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 251 (Howard Gillman ed., 1999) (citing Mark Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 *OHIO ST. L.J.* 731, 804 (1997) (quoting Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 *U.PENN. L. REV.* 1277, 1364 (1993))).

prior restraint, libel, and privacy cases – it has not fared as well in newsgathering cases, including such issues as access to government records and invocation of testimonial privilege. That is what this study was expected to show, and it does.

Blanchard attributes this apparent anomaly to the Court's refusal to extend any special privilege to the institutional press that is not available to the general public, a posture derived from the historic idea that the press is merely an extension of public speech.<sup>31</sup> Alternatively, Helle argues that the answer lies in the struggle between the press and the government for, respectively, access to and control of information.<sup>32</sup> Helle's reading of the cases appears to be most compatible with interest group theory, with the government in these cases acting as an offsetting interest group.<sup>33</sup> This study might shed a little light on each of these hypotheses.

The overall success of the press in these cases would also seem to comport with findings that "amicus briefs filed by institutional litigants and by experienced lawyers . . . are generally more successful than are briefs filed by irregular litigants and less experienced lawyers,"<sup>34</sup> although the authors "cautiously" interpret their findings as more supportive of what they call the "legal model" of judicial decision-making than the interest group model. Of the three models they considered – legal, attitudinal, and interest group – only the legal model would favor "filers who have a better idea of what kind of information is useful to the Court"; the interest group model, as they conceive it, would give the edge to the side that generates the greater number of briefs, regardless of the quality of the information.<sup>35</sup> This hypothesis, too, is testable to some extent in this study.

Still, the primary purpose of this article was exploring the cases rather than testing hypotheses, and raising questions rather than producing answers. Perhaps it has accomplished a little of both.

#### IV. METHODOLOGY

In discussing external pressures and the Court's agenda, Charles Epp points out that the American Civil Liberties Union's support for constitutional litigation "profoundly affected the Supreme Court's

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<sup>31</sup> Blanchard, *supra* note 8, at 226.

<sup>32</sup> Helle, *supra* note 8, at 1-2.

<sup>33</sup> Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in *IN LITIGATION*, *supra* note 25.

<sup>34</sup> Kearney & Merrill, *supra* note 11, at 750.

<sup>35</sup> *Id.*

agenda” between 1917 and the early 1930s.<sup>36</sup> He notes that the ACLU “offered to sponsor appeals in *Near v. Minnesota*,<sup>37</sup> but a wealthy publisher stepped in and took over financing.”<sup>38</sup> That wealthy publisher was none other than Col. Robert R. McCormick of the *Chicago Tribune*, who then headed the Committee on Freedom of the Press of the American Newspaper Publishers Association,<sup>39</sup> which he dragged kicking and screaming all the way to Washington on *Near*’s behalf.

*Near v. Minnesota* became the first important instance of interest group litigation by the institutional press to reach the U.S. Supreme Court, but it is only one of 100 Supreme Court cases in which the mainstream, institutional press played a direct role as party or amicus (see Appendix A). These cases, which comprise the database used in this study, were selected by examining every case that appeared in *Congressional Quarterly’s CQ Supreme Court Collection, Cases-in-Context: Speech, Press, and Assembly*,<sup>40</sup> supplemented by the tables of cases in two leading media law texts.<sup>41</sup>

The first step in constructing the database was to identify participation in the case by mass circulation news media – primarily newspapers, magazines, broadcast outlets, and cable television services – as well as their corporate owners and associations formed by those corporations and the principal actors within them. Where such actors were parties to the litigation, such as *New York Times v. Sullivan*,<sup>42</sup> the cases were automatically included. Otherwise, both LEXIS and Westlaw databases were consulted to determine whether mainstream media actors filed or signed onto amicus briefs.

Cases in which the only media actors could not fairly be described as “mainstream” or “institutional,” such as the World War I sedition cases or most obscenity cases, are excluded from the database. Some very important media law cases, such as *Gertz v. Robert Welch, Inc.*,<sup>43</sup> were excluded under this criterion. Also excluded are cases in which the press appears as both plaintiff and defendant, particularly copyright and unfair competition cases. Where different cases were consolidated

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<sup>36</sup> Charles Epp, *External Pressure and the Supreme Court’s Agenda*, in SUPREME COURT DECISION-MAKING, *supra* note 7, at 266.

<sup>37</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>38</sup> Epp, *supra* note 36, at 267.

<sup>39</sup> FRED W. FRIENDLY, MINNESOTA RAG 79 (1981).

<sup>40</sup> Supreme Court Collection, <http://library.cqpress.com/scc>.

<sup>41</sup> MARC A. FRANKLIN, ET AL., MASS MEDIA LAW: CASES AND MATERIALS (6th ed., 2000), and DWIGHT L. TEETER & BILL LOVING, LAW OF MASS COMMUNICATIONS (11th ed., 2004).

<sup>42</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>43</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

into a single opinion, they were generally treated as separate cases for purposes of this study.

Among the media players that feature prominently in this study are the *New York Times*, *The Washington Post*, the *Chicago Tribune*, and a few other active newspapers; *Time* and occasionally a few other magazines; broadcast television networks, including ABC, NBC, CBS, and PBS; and cable outlets such as Turner Broadcasting (also part of Time-Warner). Organizational players include ANPA and its successor Newspaper Association of America, American Society of Newspaper Editors, Associated Press Managing Editors, National Association of Broadcasters, Radio-Television News Directors Association, and Reporters Committee for Freedom of the Press (see Table 7). Although civil liberties groups such as the American Civil Liberties Union often represent similar positions in media-related litigation, they are not the primary focus of this article.

Once the cases were selected, they were divided into three categories: (1) cases involving content regulation (prior restraint, libel, privacy, etc.), (2) cases involving newsgathering (access to records, open courtrooms, testimonial privilege, etc.), and (3) cases involving simple business regulation (tax, antitrust, subscription sales, etc.). For each case, the principal opponent of the media's position was classified, using a variation on Galanter's scheme, as the federal government, other governmental entities, other "repeat players," or "one-shotters."

Other independent variables include whether the media actor was a party, an amicus, or both; how many amicus briefs were filed on each side of the case; and which of the leading media actors participated in each case. The outcome of the case, whether the press won or lost, is treated as the dependent variable for most calculations.

## V. FINDINGS

Overall, the press has been successful more often than not, although by a relatively small margin. Of the 100 cases analyzed, the press won 53 and lost 47. However, the press has been considerably more successful in dealing with content-regulation cases than with newsgathering cases. Of the 70 content regulation cases, the press won 43 and lost 27, while in the 24 newsgathering cases, the press won only 6 and lost 18. This certainly comports with the findings of Blanchard and Helle, although, alone, it says nothing about the reasons why this would be true.<sup>44</sup>

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<sup>44</sup> See *supra* text accompanying notes 31-33.

TABLE 1 – OUTCOME BY TYPE OF CASE

	Won		Lost		Total	
Content Regulation	43	61.4%	27	38.6%	70	70%
Newsgathering	6	25.0%	18	75.0%	24	24%
Business Regulation	4	66.7%	2	33.3%	6	6%
Total	53	53.0%	47	47.0%	100	100%

Chi square = 10.000, 2 df,  $p = .007$

As noted above, some member of the institutional press was either a party to the litigation, participated as a friend of the court, or both, in all 100 cases analyzed. The press was significantly more successful when it was a named party, winning 43 or 56.6% of the 76 cases in which it was a named party, compared to only 10 or 41.7% of the 24 cases in which the press was represented only through amicus briefs.

It did not seem to matter at all whether the press as party litigant was supported by additional press amici or not, although it was more common for press party litigants to have press amici support than not. While this in no way detracts from Kearney and Merrill's findings on the importance of amicus briefs,<sup>45</sup> it does suggest some advantage to party status for which amicus briefs cannot compensate.

TABLE 2 – OUTCOME BY PARTY STATUS OF PRESS

	Won		Lost		Total	
Party+Amici	25	56.8%	19	43.2%	44	100%
Party Only	18	56.3%	14	43.7%	32	100%
Total Party	4	56.6%	33	43.4%	76	76%
Amicus Only	10	41.7%	14	58.3%	24	24%
Total	53	53.0%	47	47.0%	100	100%

Chi square = 6.339, 1 df,  $p = .012$

The media were also far more successful as petitioner than as respondent, winning 38 of 54 cases or 70.4% as petitioner, compared to 10 out of 36 cases or 27.8% as respondent, probably for reasons having less to do with characteristics of the press than with the theory that the Supreme Court is more likely to review decisions it wishes to reverse.<sup>46</sup> That notion finds some support in the fact that, in the 10 cases that reached the Court on direct appeal from a district court, the press won 5 of 7 cases as appellee and lost all 3 cases as appellant. In other words,

<sup>45</sup> See *supra* text accompanying notes 34-35.

<sup>46</sup> H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 280 (1991).

the Court affirmed 8 of 10 cases on direct appeal when it did not have the discretion to deny certiorari.

TABLE 3 – OUTCOME BY PRESS AS PETITIONER/RESPONDENT

	Won		Lost		Total	
Petitioner	38	70.4%	16	29.6%	54	100%
Respondent	10	27.8%	26	72.2%	36	100%
Total	48	100%	42	100%	90	100%

Chi square = 15.744, 1 df,  $p = .000$

Much has been written about the American Civil Liberties Union as amicus,<sup>47</sup> and its presence in cases involving the institutional press certainly appears to have affected the outcome. The press significantly improved its winning percentage when the ACLU lined up on the same side, winning 75.8% of the time. Moreover the press lost 5 of the 6 cases in which the ACLU argued against the press position.

TABLE 4 – OUTCOME BY ACLU PARTICIPATION

ACLU Position	Won		Lost		Total	
Pro Press	25	75.8%	8	24.2%	33	84.6%
Anti Press	1	16.7%	5	83.3%	6	15.4%
Total	26	66.7%	13	33.3%	39	100%

Chi square = 7.977, 1 df,  $p = .005$

Looking at the opposition, the press did much better against state and local agencies, including trial courts, winning 23 of 34 cases or 67.6%, than against the federal government, winning only 8 of 24 or 33.3%. This certainly comports with Kritzer's findings that the federal government is, indeed, the proverbial 800-pound gorilla, but it does not reflect the considerably smaller advantage he attributes to state and local government entities. The explanation may lie in the "linkage" Kritzer found between the success rate of state and local government entities and the resources of their opponents.<sup>48</sup>

Even most state attorneys general do not command the legal talent that the institutional press can assemble. The lawyers mobilized on behalf of the press, such as Floyd Abrams, James Goodale, Jane Kirtley, Bruce Sanford, Lee Levine, and others, comprise a literal "Who's

<sup>47</sup> See Epp, *supra* note 36; SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

<sup>48</sup> Kritzer, *supra* note 33.

Who” of the media law bar. The press faced only a half-dozen non-governmental “repeat players” and won 4 of the cases.

TABLE 5 – OUTCOME BY TYPE OF OPPONENT

	Won		Lost		Total	
Federal Government	8	33.3%	16	66.7%	24	24%
Other Government	23	67.6%	11	32.4%	34	34%
Other Repeaters	4	66.7%	2	33.3%	6	6%
One-Shotters	18	50.0%	18	50.0%	36	36%
Total	53	53.0%	47	47.0%	100	100%

Chi square = 7.235, 3 df,  $p = .065$

Perhaps the greatest surprise was the finding that the institutional press only broke even against 36 so-called “one-shotters” that it faced in Court. This flies in the face of all the variations on the Galanter theme. Looking more closely at the individual cases, however, suggests two possible explanations. One explanation involves the four newsgathering cases,<sup>49</sup> where the losing record is easily understood in light of the discussion above.

The second explanation is more complicated. The press won 11 libel cases against one-shotters and lost 11, won 3 privacy cases and lost 2, won 2 prior restraint cases and lost 1, won 2 other content-related cases and lost all 4 newsgathering cases. Most of the libel cases were decided after 1964 when the Court revolutionized libel law in *New York Times v. Sullivan*. Nearly all of the cases that followed made important doctrinal refinements to answer constitutional questions raised by the *Sullivan* prescription: what is “actual malice,” who is a “public figure,” etc.

Thus, one suspects these cases, which account for 22 of the 36 one-shot cases, were accepted and resolved almost without regard to the litigants as the Court wrestled with very technical questions of pure law. Two of the non-libel cases, which involved privacy and intentional infliction of emotional distress, could also be explained as refinements of the *Sullivan* doctrine.

Yet another unexpected finding from this study was the relatively small difference in press case outcomes among the Warren, Burger and Rehnquist Courts – the only Courts with enough press cases for comparison – despite the marked conservative trend from 1953 to 2005.

<sup>49</sup> The cases were *Estes v. Texas*, 381 U.S. 532 (1965) (cameras in courtrooms); *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (broken promise of confidentiality); *Wilson v. Layne*, 526 U.S. 603 (1998) and *Hanlon v. Berger*, 526 U.S. 808 (1998) (police ride-alongs).

Indeed, the press was most successful in the Rehnquist Court, winning 16 of 29 cases or 55.2%, and least successful in the Burger Court, before which the press won 26 of 51 cases or 51%.

TABLE 6 – OUTCOME BY COURT (CHIEF JUSTICE)

	Won	Lost	Total
Fuller	0	2	2
White	0	1	1
Hughes	2	0	2
Stone	2	0	2
Vinson	1	1	2

	Won		Lost		Total	
Warren	6	54.5%	5	45.5%	11	100%
Burger	26	51.0%	25	49.0%	51	100%
Rehnquist	16	55.2%	13	44.8%	29	100%

The study also found that amicus briefs submitted by the press or urging the same position taken by the press more than doubled the number of amicus briefs taking the opposing position, 267 to 118. Of the major press participants, the Newspaper Association of America (formerly the American Newspaper Publishers Association) was the most active, with 35 amicus briefs submitted or signed, followed closely by the Reporters Committee for Freedom of the Press, with 30 briefs and three appearances as a named party.

Table 7 lists the 16 leading press participants.

TABLE 7 – LEADING PRESS PARTICIPANTS

Participant	As Party	As Amicus
Newspaper Association of America / ANPA	0	35
Reporters Comm. for Freedom/Press	3	30
American Society of Newspaper Editors	0	28
Radio Television News Directors Assn.	2	22
National Association of Broadcasters	0	24
Columbia Broadcasting System (CBS)	5	17
National Broadcasting Company (NBC)	3	19
Society of Prof. Journalists/SDX	0	21
New York Times	2	18
Chicago Tribune	1	18
Washington Post	3	15
Los Angeles Times	1	15
National Newspaper Association	0	13
Magazine Publishers Association	0	11
Associated Press, AP Managing Editors	0	11
Time, Inc.	4	5

## VI. CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

This study has only scratched the surface of what promises to be a goldmine of information that is as deep as it is wide. Vertically, the study should be expanded to include certiorari decisions, as well as decided cases, and federal and state courts at every level. Horizontally, further study might compare pure speech and non-mainstream press cases to see how the results might vary in the absence of a coherent interest group. More work is needed to explain why individuals do so much better against the institutional press than theory would predict.

There can be little doubt that the institutional press is an interest group to be reckoned with in the Supreme Court, its aversion to such a designation notwithstanding. Over the past century, and especially since 1964, the press has secured for itself the greatest legal protection available anywhere in the world. While some of that protection has come from Congress, by far the greatest share has come from the Supreme Court's expansive interpretation of the First Amendment's Press Clause.

## VII. APPENDIX – CASES USED IN THIS STUDY

- 44 Liquormart v. R.I.*, 517 U.S. 484 (1996)  
*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)  
*Associated Press v. Walker* 389 U.S. 28 (1967)  
*Ark. Educ. Television Comm'n. v. Forbes*, 523 U.S. 666 (1998)  
*Ark. Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987)  
*Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002)  
*Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004)  
*Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002)  
*Bartnicki v. Vopper*, 532 U.S. 514 (2001)  
*Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967)  
*Bigelow v. Virginia*, 421 U.S. 809 (1975)  
*Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984)  
*Branzburg v. Hayes*, 408 U.S. 665 (1972)  
*Breard v. Alexandria*, 341 U.S. 622 (1951)  
*Butterworth v. Smith*, 494 U.S. 624, (1990)  
*Calder v. Jones*, 465 U.S. 783 (1984)  
*Cantrell v. Forest City Publ'n Co.*, 419 U.S. 245 (1974)  
*CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)  
*CBS v. FCC*, 453 U.S. 367 (1981)  
*Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)  
*Citizen Publ'n Network v. United States.*, 394 U.S. 131 (1969)  
*Cohen v. Cowles Media*, 501 U.S. 663 (1991)  
*Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)  
*Craig v. Harney*, 331 U.S. 367 (1947)  
*Curtis Publ'n Co. v. Butts*, 388 U.S. 130 (1967)  
*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)  
*El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993)  
*Estes v. Texas*, 381 U.S. 532 (1965)  
*Farmers Educational and Cooperative Union of America v. WDAY*, 360 U.S. 525 (1959)  
*F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984)  
*F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)  
*Florida Star v. B.J.F.*, 491 U.S. 524 (1989)  
*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979)  
*Globe Newspaper v. Super. Ct.*, 457 U.S. 596 (1982)  
*Greater New Orleans Broan. Ass'n v. United States*, 527 U.S. 173 (1999)

- Greenbelt Pub. v. Bresler*, 398 U.S. 6 (1970)  
*Grosjean v. American Press Co.*, 297 U.S. 233 (1936)  
*Hanlon v. Berger*, 526 U.S. 808 (1999)  
*Harte-Hanks Comm'ns v. Connaughton*, 491 U.S. 657 (1989)  
*Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)  
*Hustler v. Falwell*, 485 U.S. 46 (1988)  
*Herbert v. Lando*, 441 U.S. 153 (1979)  
*Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)  
*Hutchinson v. Proxmire*, 443 U.S. 111 (1979)  
*In re Pappas*, 402 U.S. 942 (1971)  
*Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)  
*Kissinger v. Reporters' Comm. For Freedom of Press*, 445 U.S. 136 (1980)  
*Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988)  
*Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978)  
*LAPD v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999)  
*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)  
*Masson v. New Yorker Magazine*, 501 U.S. 496 (1991)  
*Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)  
*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)  
*Minneapolis Star and Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983)  
*Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971)  
*Near v. Minnesota*, 283 U.S. 697 (1931)  
*Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976)  
*Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977)  
*Nixon v. Warner Commc'ns*, 435 U.S. 589 (1978)  
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)  
*New York Times Co v. United States*, 403 U.S. 713 (1971)  
*Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971)  
*Okla. Pub. Co. v. Dist. Ct. of Okla.*, 430 U.S. 308 (1977)  
*Patterson v. Colorado*, 205 U.S. 454 (1907)  
*Peck v. Tribune Co.*, 214 U.S. 185 (1909)  
*Pell v. Procunier*, 417 U.S. 817 (1974)  
*Pennekamp v. Florida*, 328 U.S. 331 (1946)  
*Phila. Newspapers v. Hepps*, 475 U.S. 767 (1986)  
*Pittsburgh Press Co. v. Pittsburgh Comm. On Human Relations*, 413 U.S. 376 (1973)  
*Press-Enter. v. Sup. Ct. of Cal.*, 464 U.S. 501 (1984)

- Press-Enter. v. Sup. Ct. of Cal.*, 478 U.S. 1 (1986)  
*Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969)  
*Regan v. Time, Inc.*, 468 U.S. 641 (1984)  
*Reno v. ACLU*, 521 U.S. 844 (1997)  
*Reno v. Condon*, 528 U.S. 141 (2000)  
*Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)  
*Rosenblatt v. Baer*, 383 U.S. 75 (1966)  
*Rosenbloom v. Metromedia*, 403 U.S. 29 (1971)  
*Sable Commc'ns of Cal., Inc v. FCC*, 492 U.S. 115 (1989)  
*Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974)  
*Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)  
*Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979)  
*Snepp v. United States*, 444 U.S. 507 (1980)  
*Time, Inc. v. Firestone*, 424 U.S. 448 (1976)  
*Time, Inc. v. Hill*, 385 U.S. 374 (1967)  
*Time, Inc. v. Pape*, 401 U.S. 279 (1971)  
*Times Mirror Co. v. Sup. Ct. of Cal.*, 310 U.S. 623 (1940)  
*Toledo Newspaper v. U.S.*, 247 U.S. 402 (1918)  
*United States DOJ v. Reporters Comm. For Freedom of the Press*,  
489 U.S. 749 (1989)  
*United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595 (1982)  
*United States v. Am. Library Assn.*, 539 U.S. 194 (2003)  
*United States v. Caldwell*, 408 U.S. 665 (1972)  
*United States v. Edge Broadcasting*, 509 U.S. 418 (1993)  
*United States v. RTNDA*, 395 U.S. 367 (1969)  
*United States v. Wash. Post Co.*, 403 U.S. 713(1971)  
*Wilson v. Layne*, 526 U.S. 603 (1999)  
*Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979)  
*Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977)  
*Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)