The Press Versus the Government: The "Right to Know" and First Amendment Jurisprudence

Sean P. Scally
Vanderbilt University

Follow this and additional works at: http://scholarworks.law.ubalt.edu/lf

Part of the Law Commons

Recommended Citation
Available at: http://scholarworks.law.ubalt.edu/lf/vol22/iss1/3

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.
The Press Versus the Government: The "Right to Know" and First Amendment Jurisprudence

by Sean Scally

The first forty-five words of the Bill of Rights provide a powerful protective tool for the American press. These mere words are used as both a sword and a shield. Known as the Free Press Clause, the words make the press, specifically, and publishing, in general, the "only organized private business that is given explicit constitutional protection." Thus, the American press, empowered by this protection, should act on behalf of the people in pursuit of knowledge about what the government is doing. The argument follows, then, that citizens of the U.S. have a constitutional "right to know" the truth about their government's activities through their surrogate watchdog: the press.

Recently, the press ran afoul of the federal government in its attempt to provide full coverage of the Persian Gulf War. The Reporters Committee for Freedom of the Press, made up of such journalistic luminaries as Bernard Shaw, Bob Woodward, Tom Brokaw, Peter Jennings, and Dan Rather, issued a 96-page paper citing at least 235 governmental actions which have limited the news media's ability to gather and disseminate news. The news media's legal challenge was that reporters should be permitted nearly unlimited access to information on events occurring in the Gulf. Predictably, the committee made little headway.

Two lawsuits dealing with this challenge were filed in federal court, only to be shot down like errant scud missiles. On January 10, 1991, The Nation Magazine v. United States Department of Defense was filed on behalf of The Nation Magazine, Mother Jones Magazine, The Village Voice, The L.A. Weekly, Pacific News Service, The Texas Observer, and other news organizations, as well as a number of individual journalists.

On February 6, 1991, the Agence-France-Presse (AFP), a wire service of reporters and photographers serving 24 million readers in the United States, also confronted the "right to know" issue by requesting a temporary restraining order in Agence-France-Presse v. United States Department of Defense. Due to the similarity of the issues involved, the U.S. Department of Defense (DOD) successfully moved to join the cases.

Specifically at issue in both of the cases was the DOD's "pooling" regulations, which limit the media's battlefield access to a specified number of press representatives and subject them to certain restrictions. The plaintiffs in both cases did not challenge DOD limitations on information that was admittedly proper for national security reasons. Rather, the plaintiffs questioned whether the media should be denied access to the arena in which American military forces were engaged.

The concept of "combat pools" that would consist of reporters, photographers, and camera operators was created by DOD regulation after the Vietnam War. The Vietnam Conflict era press corps had virtually unlimited access to military activity, which enabled American audiences to observe events daily, including casualties and deaths in vivid and often painful detail.

In the post-Vietnam Conflict era, the press worked under DOD pooling regulations in some form, specifically, during the Grenada and Panama military operations. The pools were permitted to go only where assigned and were always under the control of authorized military escort officers. These officers had the authority, through an instant "security review," to stop interviews or photography at any time they deemed a potential security risk may have existed.

The press pool regulations in effect during the Persian Gulf War were similar to the regulations in effect during previous military operations. The regulations remained in effect until they were formally lifted by the DOD on March 4, 1991. Oral argument was heard in the consolidated The Nation Magazine/Agence-France-Presse case on March 7, 1991.
The press argued that the DOD pooling regulations infringed upon the news-gathering privileges afforded by the First Amendment. The DOD insisted that the federal court dismiss the complaint without reaching the merits of the argument because, among other things, the controversy was moot and, therefore, non-justiciable. In support of this contention, the DOD pointed to the fact that the regulations had been lifted and, as a result, the controversy no longer existed. Judge Leonard B. Sand, in a precisely crafted opinion, acknowledged the DOD's argument that the pooling regulations, having been lifted, left no formal controversy before the court. However, the Judge considered whether this situation was an ongoing controversy so as to make the plaintiffs' challenge "capable of repetition, yet evading review." To decide the issue, the court took note of the evolutionary history of the DOD regulations.

After the Grenada and Panama military operations, the DOD had changed the regulations. The DOD pointed out that such revisions were ongoing to the regulations, and to the extent the DOD deemed appropriate, changes would be made in accordance with suggestions offered by the press.

Judge Sand, therefore, thought it was inappropriate to grant the press injunctive or declaratory relief based upon language in the regulations that may be different if, and when, another military operation takes place. "The possibility of repetition may not occur.... [R]epetition may always be avoided by revision of the challenged conduct." As a result, Judge Sand dismissed both lawsuits as moot on April 16, 1991, holding that "[p]rudence dictates that a final determination of the important constitutional issues at stake be left for another day when the controversy is more sharply focused." In *Flynt v. Weinberger*, Larry Flynt of *Hustler* magazine fame filed suit against Caspar Weinberger individually and in his capacity as Secretary of Defense in the Reagan Administration, because of the policy prohibiting representatives of the press from accompanying the invasion forces during the U.S. intervention in Grenada. Members of the press, who managed to make their own way to the island, were prevented from reporting news of the invasion due to a military-imposed news blackout. Official U.S. government sources issued the only information available to the public about the events occurring in Grenada.

On October 27, 1983, two days after the invasion, the press ban was lifted and a limited number of press representatives were permitted access to the island, subject to similar pooling requirements imposed in the recent Persian Gulf War. The civilian airport at Grenada was opened on November 7, 1983, and press travel restrictions and pool censorship were eliminated by the DOD.

The press in the Grenada case sought declaratory and injunctive relief from the initial press ban, but unlike the press in the Persian Gulf situation, did not challenge the DOD press pool regulations. Specifically, the press wanted an injunction to prohibit the military from "preventing or otherwise hindering Plaintiffs from sending reporters to the sovereign nation of Grenada to gather news..." and a declaration that "the course of conduct engaged in by Defendants, ... in preventing Plaintiffs, or otherwise hindering Plaintiffs' efforts to send reporters to the sovereign nation of Grenada for the purpose of gathering news is in violation of the Constitution [sic] laws, and treaties of the United States..." The Federal District Court for the District of Columbia dismissed the request for an injunction as moot because, at the time of trial, the press had unlimited access to Grenada. On the question of declaratory relief, the court was required to look closely at the facts and apply the technical requirements of the mootness doctrine.

Without mentioning the weighty notion of whether the public via the press had a right to know the activities of the military in the Grenada situation, the court stated that the press had to prove both aspects of the exception to the mootness doctrine in order to have its case heard by the court. The exceptions to having a case dismissed due to mootness occur when (1) the controversy is capable of repetition, yet evades review, and (2) the defendant voluntarily ceases the challenged activity.

The court reasoned that because there was no expectation that the controversy would recur, the situation did not fall within the exception. "The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not..."
likely to be repeated."\textsuperscript{21}

Although it was unnecessary to express an opinion on the second exception, the court nevertheless stated that the challenged activity was voluntarily terminated by the government when the military lifted the news blackout. Also, the court observed that the ban on news coverage was contingent upon the exercise of executive discretion, and, therefore, was not a "fixed and definite" government policy.\textsuperscript{22} Under this rationale, the policy could be altered in the event of future military conflicts. This \textit{dicta} foreshadowed Judge Sand's opinion in the Persian Gulf case.

The press in \textit{Flynt} appealed the district court's dismissal of its case with prejudice. The U.S. Court of Appeals for the D.C. Circuit upheld the district court's dismissal for mootness, but vacated that court's opinion because it "improperly considered and offered judgments on the underlying merits of the dispute."\textsuperscript{23} In vacating the opinion, the appellate court left open an avenue for the press to amend its complaint for the press the freedom of publishing facts without granting the symbiotic freedom to investigate matters.

\begin{quote}
"[I]t would make little sense to grant the press the freedom of publishing facts without granting the symbiotic freedom to investigate matters ..."
\end{quote}

Clause must contain additional protection to the freedom of speech already granted to the general population, lest it be a mere constitutional redundancy.\textsuperscript{26} Furthermore, such a redundancy would not be consistent with the Framers' obvious care in creating the document. Moreover, it would make little sense to grant the press the freedom of publishing facts without granting the symbiotic freedom to investigate matters and determine which facts to publish. Properly employed, the "right to know" theory protects this symbiotic relationship.

As a "reporter" of human events, the journalist should be bound to a multiplicity of ideas that comprise his or her "belief system" or "professional ideology."\textsuperscript{27} These ideas include the dedication to social responsibility,\textsuperscript{28} the search for truth,\textsuperscript{29} objectivity,\textsuperscript{30} enlightened skepticism,\textsuperscript{31} the public's right to know,\textsuperscript{32} and the view that journalism can be an instrument of public education.\textsuperscript{33}

In Aristotelian terms, the "good" stemming from the "right to know" is knowledge. Our constitutional form of government is modeled upon the premise that to be enlightened with knowledge is a "good thing." For example, our due process guarantee in criminal law provides an accused individual with the right to know the nature and cause of the charges\textsuperscript{34} and the names of the witnesses making the accusation.\textsuperscript{35} Thus, the Constitution gives credence to the notion that the "right to know" is a good thing.

James Madison set out the fundamental importance of such knowledge long ago:

A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.\textsuperscript{36}

In the context of most recent First Amendment jurisprudence, the Supreme Court has recognized that the rights of the viewers and listeners of mass media are paramount.\textsuperscript{37} In a case involving pornography, the Supreme Court upheld an individual's constitutional right to possess such material in the privacy of the home and announced that "[i]t is now well established that the Constitution
protects the right to receive information and ideas.”38 In another case, the Court reasoned that consumers have a right to know price information on prescriptions from their pharmacists.39

Moreover, there is an explicit assumption, even on the part of the government, that the American people have the right to know at least some of the activities of its government. This is evidenced by the Freedom of Information Act, state reporter shield laws, and sunshine statutes.40 However, the Supreme Court has also held, in some cases directly and in others by implication, “that riders on public buses have no right to receive [political] campaign ads; that on certain highways the occupants of automobiles have no right to receive billboard ads; that television viewers have no right to receive advertising for cigarettes; that the public has no absolute right to receive messages via sound truck, or in privately owned shopping malls.”41

Thus, while the public’s right to know has not been legally granted an unqualified stamp of approval, the imprint of the right to know nevertheless exists in our society, albeit at some undefined level. As one observer noted, “the contours of the right to know remain obscure.”42

To paraphrase James Madison, our government is not worth a plugged nickel without the proper tools to acquire information about the activities of the government and disseminate it to the real governors: the people. The press argue that it is uniquely chosen by the Framers to accomplish this objective, as evidenced by the protection granted by the Free Press Clause. The question that has now been posed in the aftermath of the Persian Gulf War is whether the press can successfully challenge the rules promulgated by the U.S. Department of Defense using the ethereal concept of the public’s right to know as the “pry bar” to permit media access.

It has been observed that the spirit of the First Amendment and the method in which it has been interpreted make the public’s right to know “an integral part of the system of freedom of expression.”43 This concept is arguably “entitled to support by legislation or other affirmiative government action.”44

It is likely, however, that the most that will be offered to those who champion the right to know is simply the key to the courthouse door. The amorphous nature of the beast defies any realistic articulation of legal standards. As former Supreme Court Justice Potter Stewart observed: “The Constitution establishes the contest, not its resolution.”45 Such clashes, he notes, are part of the woof and warp of a constitutional system that accommodates both the iron rigidity of the rule of law as well as the human nature of individuals who must live by that law.46

The public’s right to know, derived from a generous reading of the Free Press Clause, creates the requisite standing for the press to challenge our government, but it does not appear to guarantee victory. Justice Stewart said that the Constitution itself “is not [a] Freedom of Information Act, [nor is it] an Official Secrets Act.”47

At any rate, a fundamental question of First Amendment jurisprudence remains unanswered. Specifically, to what extent may the United States government restrict access by the press to a military operation, if the notion is accepted that the press acts as surrogate for the people? Based upon the case law, it is unlikely that the press can overcome the military’s motion to dismiss on the grounds of mootness. It appears that the Defense Department need only argue that the pooling regulations are subject to ongoing revision and, as such, they will not be the same in a subsequent conflict.

Endnotes
1 "Congress shall make no law . . . abridging the freedom . . . of the press . . . .” U.S. Const. amend. I.
5 Id.
6 Id. at 1561.
7 Id. at 1563.
10 Id. (citing Southern Pac. Terminal v. Interstate Commerce Comm’n, 219 U.S. 498, 515 (1911)).
11 Id.
13 Id. at 1575.
15 Id. at 58.
16 Id.
17 Id. at 58, n. 1.
18 Id. at 58.
19 Id. at 59 (citing Weinstein v. Bradford, 423 U.S. 147, 148 (1975)).
20 Id. (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)).
21 Id.
23 Flynt, 762 F.2d at 135.
25 Encyclopedia Britannica, Inc., 9 Annals of America 406 (1968) (quoting R. Sherman, The Sherman Letters 191-93 (Thomdike. 1894)). To put Sherman in proper light, it is helpful to note his comment: “I say with the press unfettered as now we are defeated to the end of time. ’Tis folly to say the people must have news.” Id.
26Stewart, supra note 2, at 633.


28Id. at 221, 270, 275-76.

29Id. at 70-71, 117-18, 140.

30Id. at 150-53, 165-66, 319-20.

31Id. at 59-60, 84, 185.

32Id. at 59-60, 84, 185.

33Id. at 50-53, 100-01.

34Id. at 70-71, 117-18, 140.

35Id. at 59-60, 84, 185.


38Id. at 367, 390 (1969).

39Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)(the court decided that pharmacists had a right to publish prescription drug prices, while leaving for another day the issue of the right to receive information).


41Beth, supra note 40, at 883 (citations omitted). It must be observed that nearly all of the "negative" right to know legal challenges involve commercial speech, upon which the Supreme Court has allowed reasonable restraints on the time, place, or manner in which the message is delivered to a recipient. Id.

42Justice Stewart found that we correctly rely "as so often in our system we must, on the tug and pull of the political forces in American society." Id.

43Emerson, Legal Foundations of the Right to Know, supra note 36, at 2.

44Id.

45Stewart, supra note 2, at 636.


47Id. ("So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.").

About the Author:

Sean P. Scally resides in Nashville, Tennessee and is the Assistant Attorney General for the State of Tennessee in charge of the Tax Division. Mr. Scally is a member of the Maryland, Tennessee, Pennsylvania, and Washington, D.C. Bars and possesses an LL.M./Taxation from Georgetown University Law Center, an M.A. in literature from The Johns Hopkins University, a J.D. from Washburn University, and a B.S. in communications from Middle Tennessee State University. At the time of writing this article, Mr. Scally was serving a two-year appointment as attorney-advisor to the Honorable William A. Goffe of the United States Tax Court.