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Right to Know

The three pieces in last month's BULLETIN making the argument that the Constitution confers no right to get information, but only protects the right of publication, must offend and outrage any authority on history or law who has followed the debates on this subject that have been going on in this country 200 years.

The First Amendment is not the sole repository of constitutional and legal rights to gather information about the government or to print it. Neither is the right to print without prior restraint the sole import of that section of the bill of rights, or the sole concern of the Constitution.

The leaders of the American Enlightenment who participated in the formation of the Union were not cynics who would argue the virtue of voicing opinions while neglecting to protect the right to get the information on which to base an opinion. There is more to the constitutional protection of these rights than this. How futile it would have been to have given constitutional and legal protection to circulation of the facts while denying the right to gather the facts. Information is the raw material of opinion, as Woodrow Wilson has pointed out. The gathering of the facts precedes the formation of an enlightened opinion. What folly it would be to provide for mere mechanical dissemination of information and opinion without making any provision for acquiring information or opinion!

(2)

The First Amendment did not mean solely "the right to print without prior restraint", which is the way Blackstone defined freedom of the press. As James Morton Smith has pointed out in FREEDOM'S FETTERS, his history of the Alien and Sedition Law, it meant a great deal more than that. It related to conditions in North America where the government was the servant of the people, not to conditions in England of the Eighteenth Century where the people were the servants of the government.

Smith recounts the statements of Pinckney, Marshall, and Gerry, reproaching the French Directory's efforts to curtail press freedom in this country. He wrote: "Although they all agreed that the absence of censorship was an important part of that freedom, they also asserted the right of the people to participate in free and full discussion of public affairs. They were declarations based on American experience, not on British precedents. They rejected the authoritarian view that the rulers are the superiors of the people". (Page 430, Freedom's Fetters).

A people who mean to enjoy the benefits of a free press must have a government that protects (1) the right to get information, (2) the right to print without prior restraint, (3) the right to print without threat of sanguinary reprisal for mistaken publication, (4) the right of access to the means of publication, (5) the right to distribute.

The right to get information has been asserted and defended under the general theory of popular government, under the specific provisions relating to open courts, and under the First Amendment.

(3)

The right to print without prior restraint was first notoriously offended under the sedition act of the Adams Administration but did not reach a direct decision of the United States Supreme Court until *Near vs. Minnesota*, 150 years after the formation of the Union. The right to print without sanguinary reprisal for "libel" or other offensive publication has been defended in countless First Amendment cases. The right of access to the means of publication (paper, machinery etc) has not been litigated under First Amendment provisions, to my knowledge. The right to distribute (use of mails) frequently has been litigated with First Amendment arguments.

It is perfectly clear, thus, that the Amendment means more than freedom of prior restraint, important as that is. It is also reasonable to argue that no other right involved in press freedom is as solidly circumstanced as this immunity to prior restraint. It is not reasonable to argue that there is no relation between the Amendment and other rights — including the right to know.

Harold Cross, in his excellent *THE RIGHT TO KNOW*, published in 1953, expanded on the First Amendment relation to "gathering news". He said: "The language of the Amendment is broad enough to embrace, if indeed it does not require, the inclusion of a right of access to information of government without which the freedom to print could be fettered into futility. The history of the struggle for freedom of speech and of the press bars any notion that the men of 1791 intended to provide for freedom to disseminate such information but to deny freedom to acquire it".
(Page 132, Cross.)

(4)

To back up his construction of the Amendment, Cross cited page after page of cases: The Cleveland Company vs. Smith (1920); The Times Dispatch vs. Sheppard (1933); The Providence Journal vs. McCoy (1950); the Alamo Motor Lines vs. International Brotherhood of Teamsters (1950); Asbury Park vs. Capibianco (1936). There are many others. In many of these cases, the Courts explicitly backed up access to matters under First Amendment arguments.

Don R. Pember makes much of the fact that the Constitutional Convention, itself, was held in secret. Indeed it was, and Thomas Jefferson and others deplored it. Jefferson wrote to John Adams: "I am sorry they began their deliberations by so abominable a precedent as tying up the tongues of their members. Nothing can justify this example, but the innocence of their intentions, and ignorance of the value of public discussion". (Life of Thomas Jefferson, Randall. Vol. I, Page 487.)

Pember also points out that the Senate, at first, met in secret. So it did, but Senator Maclay and others protested that secrecy and the Congress finally provided for open sessions in 1801. There was an instructive debate in the House on 26 September 1789. Some members protested the presence of the press. Elbridge Gerry of Massachusetts defended "disseminating useful information". Several members thought a motion to bar the press "an attack upon the liberty of the press".

Harold L. Nelson "can't name any of the Founders who had any notion that the First Amendment might include the right to gather news freely". There is not space here to deal with all of them

(5)

who thought there was a right to gather news, but let us take up some of them. Here are some statements from Thomas Jefferson on the duty of government to disclose:

"My own opinion is that government should by all means in their power deal out the material of information to the public in order that it may be reflected back on themselves in the various forms into which public ingenuity may throw it". (The Writings of Thomas Jefferson, Memorial Edition. Page 121).

"The first misfortunes of the Revolutionary War induced a motion to suppress or garble the account of it. It was rejected (in the cabinet) with indignation. The whole truth was given in all its details, and there never was another attempt in that body to disguise it". (Writings, Memorial Edition, Volume XIII, 264).

"The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institutions. To punish these errors too severely would be to suppress the only safeguards of public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people". (Papers of Thomas Jefferson, Vol. II, Page 48-9).

"No experiment can be more interesting than that we are now trying, and which we trust will end in establishing the fact that man may be governed by reason and truth. Our first object should therefore be, to leave open to him all the avenues of truth. The most effectual hitherto found, is the freedom of the press".

(6)

(Writings of Jefferson, Lipscomb Edition, Vol. XI, Page 33).

"Your fellow citizens think they have a right to full information, in a case of such great concernment to them. It is their sweat which is to earn all the expenses of the war, and their blood which is to flow in expiation of the causes of it". (Letter to Elbridge Gerry, Jan. 26, 1799).

In 1795, when the Jay Treaty came before the Senate, the text was printed by Bache, in violation of secrecy rules, and Jefferson praised Senator Stevens T. Mason of Virginia for giving the treaty to Bache, calling it a "bold act of duty in one of our senators". (Letter to Randolph, Sept. 6, 1795).

It has to be acknowledged that Jefferson believed a private side of government papers did exist, but he construed that sector narrowly.

He did not invoke the "First Amendment" every time he referred to "freedom of the press", or to its right to gather information not did he need to do so. He had supported a First Amendment from the beginning, and, probably saw it chiefly as the assurance required to prevent suppression by prior restraint "after" information had already been gathered. To construe this position as an indication that he did not believe the government should give out information, or that he was indifferent to gathering information, is ridiculous. If the press could not gather information, it, and the public, would gain nothing by measures to allow it to disseminate the facts it could not obtain. Jefferson better understood the inseparable connection between a free press and a free society

(7)

than any of his predecessors, contemporaries or successors in American public life.

Thomas Jefferson was familiar with the press of the American colonies, and with the press of Europe. Everything that can be discovered of his views shows how well he understood the importance of obtaining information about government and the importance of disseminating it. The long struggle to get information out of colonial legislatures surely had colored his views - the disclosures of the secret proceedings of the Massachusetts legislature by Sam Adams, the breach of security in the publication of Bernard's letters to the British government - the fight for access was long and bitter. But the American government newly set up was one in which the access was furthered by the very amateur character of the government. There had been no time to construct a vast bureaucracy. Local government was kept open by its popular character - how could a town meeting withhold information from the citizens all of whom were present? To suggest that Jefferson and the other founding fathers were indifferent to the necessities of openly conducted government is to exhibit ignorance of the period. They were alert to the whole problem of informing the people.

James Madison emphasized the access to information in many utterances. Perhaps the most pertinent and emphatic of his statements is contained in a letter he wrote to W.T. Barry, 4 August 1822. It is reprinted in *The Complete Madison*, Saul Padover (ed.), Harper & Brothers, New York, 1953, p. 337. Madison wrote: "Knowledge will forever govern ignorance. And a people who mean to be their own

(8)

governors, must arm themselves with the power knowledge gives. 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".

These and other statements from the founding fathers, of course, did not use the terminology of the news room, or refer to "news gathering" as such, they were talking about "information", and the means of "acquiring" it. To interpret this as comprehending news gathering is not misconstruing the plain language they used, or the vernacular of their own times.

Thomas Cooley, in modern times, has had precisely the view they had of the First Amendment and all the devices of the Constitution to open proceedings of government. Cross quotes him as saying: "The evils to be prevented were not the censorship of the press merely, but any action of the governemnt by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens". (Constitutional Limitations (8th ed. 1927) pp 885,886).

There is a constitutional link between the right to gather and the right to publish news, notwithstanding the report of the Gannet experts. That right is implicit in popular government, it is explicit in constitutional provisions relating to the public's access to proceedings, and it is clearly implied in the First Amendment which would be an exercise in futility in a society where there was no access to government proceedings or records.