Freedom of the Press in the Eighteenth Century
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Chief Justice Warren Burger, in Richmond Newspapers v the Commonwealth of Virginia, leaned heavily upon history in his opinion upholding the people's access to court proceedings. Associate Justice Harry Blackmun hailed this resort to legal history as a notable development. It is an emphasis that ought to send the proponents of press freedom to their history books. It is here in the freedoms of the past that we may find the best defense against the encroachments on freedom in the future.

And it is, of course, in our 18th century history that we find the foundation of our freedom of the press and speech. In seeking the meaning of the First Amendment we need to rigorously search the record to find what freedom of the press meant to the men who placed that guarantee in the Bill of Rights.

Thomas M. Cooley, in his "Treatise on Constitutional Limitations" gave this revealing advice: "The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the constitution which guarantees it was adopted....". (P. 429, Thomas M. Cooley, "A Treatise on Constitutional Limitations")

We must be prepared to defend that freedom by becoming thoroughly familiar with just how broad was the freedom that existed up to Dec. 12, 1791, when the adoption of the First
Amendment was proclaimed.

Such a familiarity cannot be acquired readily, but occasions such as this give us a chance to encourage a further inquiry. It is my purpose here today to lay down my own personal assertion as to the breadth of those guarantees and to leave it to you and your generation to produce a more finished examination of the subject. To that end, I begin by saying that it is my own view that the freedom that existed when the First Amendment was proclaimed included:

1. The right of the people (and of their surrogate the press) to acquire information.
2. The right to print information and opinion without prior restraint.
3. The right to print without punishment or reprisal for innocent publication.
4. The right to distribute printed material after publication.

The right of public access to the courts was the most firmly established of American rights in the 18th Century. It derived from generations of English precedent. Magna Charta, adopted on 19 June 1215 stated: "the King's courts of justice shall be stationary, and shall no longer follow his person; they shall be open to everyone; and justice shall no longer be sold, refused or delayed by them. (David Hume, History of England, Edinburgh, 1809, Vol. 1, p. 255)

Sir Thomas Smith, who wrote in 1565, is quoted in Richmond Newspapers v Virginia, as having said that after indictment: "all the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so near as to hear it, and all despositions and witnesses given aloude, that
all men may hear from the mouth of the depositories and witnesses what is said". (Richmond Newspapers v Virginia)

The Chief Justice summarizing judicial process in England concluded that through all earliest times: "one thing remained constant: the public character of the trial at which guilt or innocence was decided".

After examining English precedents, the Chief Justice turned to the practice in Colonial America. There, he found nothing to suggest that the presumptive openness of the trial was not also an attribute of the judicial system of colonial America.

Among other evidences of common practice in this country he cited Chapter 22 of the Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America, adopted in 1676. They stated: "That in all public Courts of Justice for tryalls of causes Civill or Criminal any persons or persons inhabitants of the said province may freely come into and attend the said Courts and heare and be present at all or any such tryalls as shall be there had or passed that Justice may not be done in a corner, nor in any covert manner....". (Fundamental Laws and Constitutions of New Jersey, Julian Boyd, p. 89)

The Chief Justice also cited Virginia practice and quoted the Pennsylvania Frame of Government of 1682 which provided that: "all courts shall be open".

In Independence Hall, in Philadelphia, there is an architectural testimony to the dedication of Colonial America to the open court. As you enter the building, which was built in 1735 as the old state house, you proceed on a central corridor to the left of which is the
chamber where the Constitutional Convention met. To the right is the room where the Supreme Court of Pennsylvania sat. It is separated from the corridor only by three marble arches. There is no door that can be closed. There is an added footnote to this remarkable architectural expression in the fact that the principal figure in the planning and construction of the State House was Andrew Hamilton, the great Philadelphia lawyer who defended Peter Zenger in the New York case. That trial resulted in acquittal and affirmed the right of the jury to judge of libel 50 years before the Fox Libel Law of England.

Manifestly, the First Amendment adopted in 1791, with the long background of open judicial proceedings, was intended to prevent Congress from closing the court rooms of the country governed under the new constitution.

Access to Legislatures

Interesting light is shed on the importance of access to legislative proceedings in a letter Thomas Jefferson, in Williamsburg, wrote to John Adams, in Philadelphia, on May 16, 1777: "The journals of congress not being printed earlier gives more uneasiness that I would ever wish to see produced by any act of that body, from whom alone I know our salvation can proceed. In our assembly even the best affected think it an indignity to freemen to be voted away life and fortune in the dark." (The Adams–Jefferson Letters, Vol. 1, p. 4)

Curiously enough, access to legislative proceedings in England and the Colonies was longer in arriving than access to judicial proceedings. The British parliament invoked secrecy at first to
protect members against reprisal of the monarch for statements made in the House. Later, the secrecy persisted and printers were punished under repeated secrecy resolutions until 1771 when the House let the prohibition on publication lapse after being challenged by John Wilkes.

In the colonies, the Massachusetts General Court customarily invoked secrecy until June 3, 1766 when on motion of James Otis the proceedings of the Massachusetts General Court were opened to the public, so citizens might hear the Stamp Act debates.

The New York Assembly in October 1749 passed this declaration: "Resolved that it is the undoubted right of the people of this Colony to know the proceedings of their representatives in General Assembly and that any attempt to prevent their proceedings being printed or published is a violation of the rights and liberties of the People of this Colony".

State constitutional provisions and contemporary court opinions can be construed generally as giving implicit sanction to access but there are also in the period when the First Amendment was adopted many explicit sanctions of access to government.

The Pennsylvania Constitution in Article 1, Section 5, states: "That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof".

The Delaware Constitution, Article 9, Section 7, states: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in public capacity, and any citizen
may print on any subject...."

A notable decision of Pennsylvania Justice Jasper Yeates in 1805 (Republica v Dennie 4 Yeates, 267) has some very explicit language. He describes the seventh section of the ninth article of the State Constitution as: "the solemn compact between the people and the three branches of government, — the legislative, executive, and judicial powers." He quotes the article: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of the government, and no law shall ever be made to restrain the right thereof".

The Continental Congress did meet in secret and the members subscribed to an oath to maintain secrecy about their proceedings — but this was a reasonable precaution since the members were engaged in a revolutionary enterprise for which they might have had condign punishment visited upon them by the British government.

Later the Constitutional Convention also met behind closed doors and Thomas Jefferson, then in Paris, wrote to John Adams on August 30, 1787 and said: "I am sorry they began their deliberations by so abominable a precedent as that of 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".

After the Constitution was adopted, the House of Representatives met with open doors but the Senate did not regularly admit the people until 1793. As the new state governments were set up they generally provided for the open sessions of their legislatures and courts.

One of the most frequent arguments against the First Amendment
was the argument that all the rights it assured were already protected because Congress lacked the power to curtail the liberty of the press. The argument that it would not curtail access to legislative proceedings was made with especial force by William Jackson in a session in June 1789. The Congressman argued: "The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given to Congress to regulate this subject as they can commerce or peace, or war. Has any transaction taken place to make us suppose such an amendment is necessary? An honorable gentleman, a member of this House, has been attacked in the public newspapers on account of sentiments delivered on this floor. Have Congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, although the Constitution provides that a member shall not be questioned in any place for any speech or debate in the House? No; these things are offered to the public view, and held up to the inspection of the world. These are principles which will always prevail. I am not afraid nor are other members. I believe our conduct should meet the severest scrutiny. Where, then, is the necessity of taking measures to secure what neither is, or can be in danger?" (P. 441, Vol. 1 Annals)

Mr. Jackson obviously thought access to legislative proceedings and the right to comment on them already secure at the time the First Amendment was being debated.
Access to Executive Departments

Access to the proceedings and papers of the executive branch of the government has no such long and conclusive historical foundation. Thomas Jefferson, in his first inaugural, promised Congress detailed information, including the public payroll. On Feb. 17, 1801 a roster of federal officials and agents was made public. In 1806 Congress required all federal departments to report the names of clerks employed year by year and the sum given to each. The very philosophy of a government of the people had to include the right of people to know about their own government. Jefferson wrote in that spirit to Andrew Ellicott, on Dec. 16, 1800: "My own opinion is that government should by all means in their power deal out the materials 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".

Disclosures of executive material that authorities had sought to conceal was a frequent object of dispute during colonial times. Governor Bernard's plans for quartering British troops was released by the Massachusetts Council on Oct. 10, 1768 and the Governor protested that: "no civilized government on earth could function when its intimate deliberations were canvassed by Tavern politicians and censured by News Paper libellers".

On April 3, 1769 Governor Bernard's confidential letters to the British ministry were divulged and this created so much furore that he was recalled. On June 2, 1773, Governor Thomas Hutchinson's confidential letters to Thomas Whatley, former undersecretary of treasury, were revealed. Benjamin Franklin got them from an
unknown English source, not yet discovered. Publication caused Hutchinson's resignation.

In the long struggle for independence access to transactions of government were frequently sought and often obtained despite resistance. So the American community had a long history of seeking and obtaining access to information by the time the Bill of Rights was adopted. Obviously, they could not have intended to set up a government surrounded with the sort of executive secrecy which they had been contending against for a generation.

In the words of Cooley the First Amendment was intended also to: "guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation was the general purpose....". (P. 422 Treatise)

Cooley also says: "The evils to be guarded against (by the First Amendment) were not the censorship of the press merely, but any action of the government 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". (P. 422 Treatise)

It would be difficult to enumerate an action of government more effective in obstructing this general discussion than the withholding of information about the very acts of government that are the current object of the most intent inquiry, at any given time.
Prior Restraint

The Eighteenth Century view on prior restraint, in the American colonies, was assuredly that of Blackstone, precluding the courts from taking notice of writings intended for publication. It was a matter so generally understood and consented to that it was 150 years before a case involving prior restraint reached the United States Supreme Court in Near v Minnesota. As Cooley has pointed out: "the mere exemption from previous restraint cannot be all that is secured by the constitutional provisions inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publication". (421 Treatise)

Punishment for Publication

The 18th Century was a time of diminishing imposition of punishment for publication resented by government, both in England and in the Colonies.

Richard Buel, Jr., has described the relaxation in England: "As a consequence of concerted action by the London population, by certain magistrates, and by the printers of the city — all of whom actively challenged the government's attempt to restrict expression — controls imposed on printers and authors began to loosen in the mid-eighteenth century. Juries showed themselves ever more unwilling to convict for seditious libel, and the press became virtually free from the control of both houses of Parliament,"
while the courts ruled against the issuance of general warrants to seize evidence in seditious libel cases. Admittedly, most of the gains were more de facto than de jure. For instance, the law did not recognize the right of juries to decide whether or not a publication had printed sedition until Fox's Libel Act of 1792, and Parliament never explicitly renounced the power to punish for breach of privilege. But after 1771 it rarely exercised the power, and excused itself when it did with the pretense that parliamentary debates had been misreported". (P. 68, The Press and the American Revolution)

In the American colonies the power to control the press through the courts diminished more rapidly than it did in England. Buel describes the differences in his work. Colonial juries had more reason to balk the crown's efforts against colonial printers. Because the printers were more dispersed here than in England where they were concentrated in London, authority could not act as readily against them. England had a common legal system while the colonies differed in their laws. People wishing to print offensive matter could find a jurisdiction with a more tolerant attitude if one province proved difficult. Prosecutions for seditious libel came to an end in the 1730s with the Zenger case — 50 years before the Fox Libel Act effectively ended them in England. Executive officials could not bend the judicial machinery to their will as Governor Crosby attempted to do in New York where he jailed Zenger, prosecuted on an information when he could not get a grand jury to indict, and disbarred attorneys Zenger engaged to defend him. In the later colonial period only one grand jury indictment was obtained against
a printer. Officials saw that efforts to get unanimous jury verdicts were impossible. Government prosecution of the press for publication alleged to be wrongful came to an end in the colonies, and in this additional sense, the press was free. It amounted to being "free" to attack the British government, of course; free to weld the people of the colonies into a united force against colonialism; but, nevertheless free from the punishment for innocent publication.

Freedom from reprisal or punishment for publication did not really exist for publications supporting British rule in the colonies.

The press and the people of the American colonies, by the time the First Amendment was adopted, had long enjoyed another aspect of press freedom — the freedom to distribute. Benjamin Franklin, owner of the *Pennsylvania Gazette*, and William Hunter of the *Virginia Gazette*, in 1753 were jointly appointed to the office of Deputy Postmaster General for the colonies and they greatly enlarged the system of postroads and improved the mails. (Arthur M. Schlesinger, *Prelude to Independence*, P. 6) By 1764 the mail moved three times weekly each way between Philadelphia and New York. Schlesinger says that with good luck a writer could obtain an answer from his correspondent the next day. When Franklin was removed as Deputy Postmaster General in 1774, the American patriots feared more than ever that an unfriendly administration of the mails would handicap their political activities. Postmasters could open letters and hamper the delivery of objectionable matter. The *Boston Gazette* and other papers, according to Arthur M. Schlesinger, feared that: "our newspapers, those necessary and important Alarms in Time of
Public Danger, may be rendered of little Consequence for want of Circulation". William Goodard of the *Maryland Journal* set about organizing a "Constitutional" mail system. He announced it on Feb. 2, 1774, and soon had it operating. The Continental Congress took it over on July 26, 1775 and named Benjamin Franklin Postmaster General. On Christmas Day, the British postal headquarters in New York, cancelled all its delivers throughout the continent". (Schlesinger, P. 195)

The relation of government to the press in the earlier situations we have discussed (access to information, prior restraint, and penalties for publication) finds the government under restraints. It is not to interfere with citizens. The maintenance of the postal service involves the government both negatively and affirmatively. It is to provide a service. And it is not to withhold it unjustifiably.

The patriots blamed the British postal service for deliberately interfering with the mails. After the new United States government took over, similar complaints were not long in coming. The Anti-Federalists who opposed the adoption of the Constitution thought their mail interfered with. During the Civil War period, abolitionist papers were obstructed by postmasters. Congress has had to make laws regulating the use of the mails. Many cases under the laws concern access to the mails. Most of them involve second class matter. Beginning in 1879 Congress required, among other things, that second class matter must: "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers". This provision has raised nice
questions about whether in enacting this law Congress has made laws restricting freedom of the press under the First Amendment. Alleged obscenity has also been a frequent source of dispute. Inability to obtain distribution at reasonable rates through the mails clearly constitutes a limitation on the freedom of publications. All the prior rights assured avail little if they amount to no more than the privilege of piling up printed material in a warehouse. The framers of the First Amendment included men who had participated in setting up postal services and clearly they understood the right of citizens to distribute printed matter as one of the rights it comprehended. The duality of the matter, involving as it does both negative restraints and affirmative responsibilities has made construction of this principle difficult for the courts.

In summary then, it seems to me clear that the framers of the First Amendment had in mind the freedoms that in their time represented freedom of the press, and that these then-existing rights included (1) the right to get information from the courts, the legislature, and the executive; (2) the right to print it without prior restraint; (3) the right to print without punishment for innocent publication or publication offensive to government; (4) and the right to distribute printed matter through the mails.

Freedom of the press, to be sure, was not construed in the same way throughout the pre-revolutionary period. "Liberty of the press" for an interval, seems to have been construed by printers to mean "liberty" to print all sides of issues and all manner of opinion. It came gradually to mean liberty to criticize the British government in the period before the American Revolution. After the
Revolution, and after the adoption of the Constitution and the First Amendment, its meaning moved toward the modern concept of a more libertarian nature, after a few aberrant detours like the Sedition Act.

Cooley's succinct phraseology states my case: "The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the constitution which guarantees it was adopted....". That is, I believe, the sound, the logical, and the correct construction to place upon the few words that James Madison persuaded Congress to put into the Bill of Rights.