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U.S. Department of State
Updated 10:29 EDT - 13 May 2008

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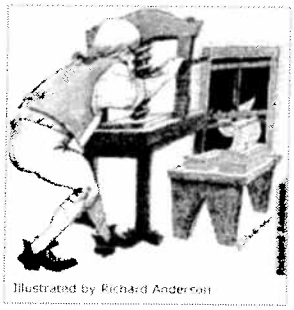
23 June 2008

Freedom of the Press


Illustrated by Richard Anderson

(The following article is taken from the U.S. Department of State publication, *Rights of the People: Individual Freedom and the Bill of Rights*.)

Congress shall make no law . . . abridging the freedom of speech, or of the press.
- First Amendment to the U.S. Constitution

Although a cherished right of the people, freedom of the press is different from other liberties of the people in that it is both individual and institutional. It applies not just to a single person's right to publish ideas, but also to the right of print and broadcast media to express political views and to cover and publish news. A free press is, therefore, one of the foundations of a democratic society, and as Walter Lippmann, the 20th-century American columnist, wrote, "A free press is not a privilege, but an organic necessity in a great society." Indeed, as society has grown increasingly complex, people rely more and more on newspapers, radio, and television to keep abreast with world news, opinion, and political ideas. One sign of the importance of a free press is that when antidemocratic forces take over a country, their first act is often to muzzle the press.

Thomas Jefferson, on the necessity of a free press (1787)

The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

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The origins of freedom of speech and press are nearly alike, because critical utterances about the government, either written or spoken, were subject to punishment under English law. It did not matter whether what had been printed was true; government saw the very fact of the criticism as an evil, since it cast doubt on the integrity and reliability of public officers. Progress toward a truly free press, that is, one in which people could publish their views without fear of government reprisal, was halting, and in the mid-18th century the great English legal commentator, Sir William Blackstone, declared that although liberty of the press was essential to the nature of a free state, it could and should be bounded.

Sir William Blackstone, Commentaries on the Laws of England (1765)

Where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by English law ... the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

But what constituted "blasphemous, immoral, treasonable, schismatic, seditious or scandalous libels"? They were, in fact, whatever the government defined them to be, and in essence, any publication even mildly critical of government policy or leaders could lead to a term in prison or worse. In such a subjective judgment, truth mattered not at all.

The American colonists brought English common law across the Atlantic, and colonial officials had as little toleration for the press as did their masters back home. In 1735, the royal governor of New York, William Cosby, charged newspaper publisher John Peter Zenger with seditious libel for criticizing Cosby's removal of a judge who had ruled against the governor's interests in an important case. Under traditional principles as enunciated by Blackstone, Zenger had a right to publish his criticism, but now had to face the consequences. However, Zenger's attorney, Andrew Hamilton, convinced the jury to acquit Zenger on the grounds that what he had published was true. Although it would be many years before the notion of truth as a complete defense to libel would be accepted in either English or American law, the case did establish an important political precedent. With American juries unwilling to convict a man for publishing the truth, or even an opinion, it became difficult for royal officials to bring seditious libel cases in the colonies. By the time of the Revolution, despite the laws on the books, colonial publishers freely attacked the Crown and the royal governors of the provinces.

Whether the authors of the Press Clause of the First Amendment to the Constitution intended to incorporate the lessons of Zenger's case is debatable, since nearly all the new American states adopted English common law, including its rules on the press, when they became independent. When Congress passed a Sedition Act in 1798 during the quasi-war with France, it allowed truth as a defense to libels allegedly made against the president and government of the United States. The law, however, was enforced in a mean and partisan spirit against the Jeffersonian Republicans. Federalist judges in effect ignored the truth-as-defense provision, and applied it as their English counterparts would have done, punishing the very utterance as a libel. As one example, Matthew Lyons, a Vermont newspaper publisher, criticized President John Adams for his "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." For these comments, he received a $1,000 fine and languished in jail for four months until he could raise the funds to pay the fine.

The Sedition Act expired in 1801, and the federal government, with the exception of some restrictions during the Civil War, did nothing to violate the Press Clause for the next century. Libel gradually became more a matter of civil than criminal law, in which prominent individuals took it upon themselves to institute lawsuits to protect their reputations. Congress passed another Sedition Act during World War I, and as noted in the chapter on free speech, cases arising out of that act were treated primarily as speech and gave rise to the clear-and-present-danger test. But in terms of a free press, we do not get any significant developments until the early 1930s, when the doctrine of prior restraint was reinvigorated. In developing a truly free press, newspapers found they had a powerful ally in the Supreme Court, which turned a single phrase, "or of the press," (contained in the First Amendment to the U.S. Constitution) into a potent shield for press freedom.

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Modern Press Clause jurisprudence begins with the landmark case of *Near v. Minnesota* in 1931, and while, at first glance, it would appear to do little more than restate Blackstone's views on prior restraint, in fact it is the first step in building upon that doctrine to create a powerful and independent press.

The state of Minnesota had passed a law, similar to laws in other states, that authorized the suppression as a public nuisance of any "malicious, scandalous or defamatory" publications. In this case, however, the law had been passed to shut down a particular newspaper, the *Saturday Press*, which in addition to carrying racist attacks against blacks and other ethnic groups, had also carried a series of exposes about corrupt practices by local politicians and business leaders. The state court gladly shut down the Saturday Press, which in turned appealed to the Supreme Court. There Chief Justice Charles Evans Hughes applied the reach of the First Amendment Press Clause to the states (it had previously applied only to Congress), and reiterated the idea that no government, except in the case of a wartime emergency, can curtail a newspaper's *constitutional right* to publish. This did not mean that newspapers could not be punished on other grounds, or sued by individuals for defamation. But it laid the groundwork for two significant developments more than three decades later that are the pillars on which a modern free press stands.

The first grew out of the civil rights movement in the 1960s. At that time most states had laws that in effect imposed no prior restraints, but did allow civil suits for defamation of character if the information printed was malicious or even just in error. There had been clashes between civil rights advocates and police in Montgomery, Alabama, and a group of rights organizations and individuals took out

a full page advertisement in the *New York Times* entitled "Heed Their Rising Voices," which detailed the difficulties civil rights workers faced and asked for funds to help the cause. Although I.B. Sullivan, the police commissioner of Montgomery, Alabama, was not mentioned by name in the ad, he nonetheless sued the *Times* on the basis that the ad contained factual errors that defamed his performance of his official duties. A local jury found for Sullivan, and awarded him damages of $500,000 against the Times.

Sullivan had gone against the newspaper not because the errors amounted to very much (one sentence said that Dr. Martin Luther King, Jr., had been jailed seven times, when in fact it had only been four), but because Southerners saw the press as an adversary in the civil rights struggle. Every time protesters were beaten or arrested, the press reported it not only to the rest of the nation but to the world. The *Times* was not only the foremost newspaper in the country, but also one of the largest and most successful. If it could be punished with a heavy fine (and $500,000 was a great deal of money in 1964), then smaller and less prosperous papers would have to think twice about reporting on the civil rights movement. To allow the judgment to stand, in other words, would have a severe "chilling" effect on the First Amendment right of a free press.

Not only did the high court overturn the judgment, but in doing so it went a great deal further than the simple prior restraint rule that had been inherited from Great Britain; it did away with any punishment for publication when the stories involved public officials and the performance of their duties, except when a paper, knowing something was untrue, nonetheless printed it with the malicious intent of harming the official's reputation. While not allowing the press to print anything at all, and while still granting private citizens the right to sue for libel, the decision addressed a major issue of a free press, namely, its ability to report on government and governmental officials fully and freely. That there might be inadvertent mistakes from time to time would not matter; as the Court explained, mistakes often happen in the "hot pursuit" of news. But the citizenry needed to be informed, and threats of libel against a newspaper for doing its job could not be allowed.

Justice William Brennan, Jr., in New York Times v. Sullivan (1964)

We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent. Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially not one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered. . . . Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

The second modern pillar is the so-called Pentagon Papers case, arising out of publication of documents pilfered from the Defense Department by a civilian employee who opposed American involvement in the Vietnam War. The papers were part of a large-scale review that had been ordered in 1967, and they carried no secret information relating to current military activities in southeast Asia. They did, however, expose the mindset of the policy planners as well as errors in judgment that had led to the growing American commitment during the administration of Lyndon Johnson. Although a new president now sat in the White House, Richard Nixon nonetheless opposed the publication of the papers, on the grounds that it might adversely affect national security interests.

The *New York Times* began publication of the Pentagon Papers on June 13, 1971, and when the government secured a temporary injunction shortly afterwards, the *Washington Post* started publication of its copy of the Pentagon Papers. After the government went to court to stop the *Post*, the *Boston Globe* picked up the baton. Since the lower courts disagreed on whether such a prior restraint could in fact be imposed, and since the government wanted to resolve the issue quickly, the Supreme Court agreed to take the case on an expedited basis. Although there have

sometimes been criticisms of the judiciary for its slowness, the justices moved with astounding speed this time. They agreed to take the case on a Friday, heard oral argument the next day, and handed down their decision the following Tuesday, only 17 days after the *Times* had begun publication.

The decision provided the clearest statement yet that government had no business trying to censor newspapers or prevent the disclosure of what might prove embarrassing information. Three of the justices believed the government should never have gotten injunctions in the lower courts, and criticized the lower courts for condoning such an effort at prior restraint. While the Court did not say that in no circumstances could prior restraint be imposed (the exception of clearly sensitive information during emergencies such as wartime remained in place), it was clear that the material in the Pentagon Papers did not fall into that category.

Justice William O. Douglas, concurring in New York Times v. United States (1971)

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. . . . The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. A debate of large proportions goes on in the Nation over our posture in Vietnam. Open debate and discussion of public issues are vital to our national health.

Not everyone agreed, and former general and ambassador to Vietnam Maxwell Taylor expressed the resentment of many in the government at the Court's decision. A citizen's right to know, he declared, is limited "to those things he needs to know to be a good citizen and discharge his functions," and nothing more. But the whole purpose of the Court's decision was, in fact, to allow the citizen to do his duty. Justice Douglas pointed out that there was an important national debate going on over the American role in Vietnam. How were citizens to do their duty and participate intelligently in this debate if they were denied important information?

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The *New York Times*, the *Washington Post*, and other major newspapers, however, are not individuals, but large corporations, with thousands of employees and assets that run into the millions of dollars. How does giving such great latitude to the press – often in the form of business entities – relate to the rights of the people? One needs to recall the words of Justice Brandeis about the duties of a citizen, discussed in the chapter on Free Speech, "that public discussion is a political duty; and that this should be a fundamental principle of the American government." Yet in order to enter that discussion, to carry out one's responsibilities as a citizen, one must be informed. Accurate information will not always come directly from the government, but may be offered by an independent source, and the maintenance of freedom and democracy depends upon the total independence and fearlessness of such sources.

Thomas Carlyle on the press (1841)

Burke said that there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or witty saying; it is a literal fact, – very momentous to us in these times.

By calling the press a "fourth estate," Burke meant that its abilities to influence public opinion made it an important source in the governance of a nation. In modern times, we see the role of a free press differently, but still in quasi-institutional terms. Justice Potter Stewart saw the role of a free press as essential in exposing corruption and keeping the political process honest. His colleague on the high court, William O. Douglas, echoed this sentiment when he explained that the press enables "the public's right to know. The right to know is crucial to the governing process of the people."

Justice Potter Stewart, on the role of a free press (1975)

The Free Press guarantee is, in essence, a structural provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals. . . . In contrast, the Free Press Clause extends protection to an institution.

A good example of how the press fulfills this structural role involves the criminal justice system. Aside from the protection of the rights of the accused, discussed in other chapters, the citizen needs to know if the administrative processes of justice

are working. Are trials fair? Are they conducted with dispatch or are there delays that cause hardships? But the average person does not have the time to go down to the local courthouse and sit in on trials, nor even spend hours watching the telecast of some trials on cable television. Rather information is gathered from the press, be it the morning newspaper or the evening television or radio news. And if the press is barred from attending trials, then it cannot provide that information which "is crucial to the governing process of the people."

But what about the necessity for a fair trial? If the crime is particularly heinous, if local emotions are running high, if excessive publicity may damage the prospects for selecting an impartial jury, then should not the press be excluded? According to the Supreme Court, the answer is no. "Prior restraints on speech and publication," according to Chief Justice Warren E. Burger, "are the most serious and least tolerable infringement on First Amendment rights." Judges have a variety of means at their disposal to handle such issues, including gag orders on the defense and prosecution lawyers, change of venue (location) to a less emotional environment, and sequestering of juries.

The key case in press coverage of trials is known as *Richmond Newspapers, Inc. v. Virginia (1980)*, and it solidified the people's right to know through the efforts of a free press. A man had been arrested for murder, and through a variety of problems, there had been three mistrials. So when the fourth trial began, the judge, prosecution, and the defense attorney all agreed that the courtroom should be closed to both spectators and the press.

The local newspaper filed suit challenging the judge's ruling, and in a major decision the Court balanced the interests of the First and Sixth Amendments against each other – the right of a free press as against the right of a fair trial –and found that they were compatible. The Sixth Amendment guarantee of "a speedy and public trial" meant not only the protection of the accused against secret Star Chamber trials, but also the right of the public to attend and witness the trial. Since it was manifestly impossible for all of the people of Virginia, or even of Richmond, to attend the trial, then the press had to be admitted to report on the proceedings, and to help ensure that the trial had been carried out fairly.

Chief Justice Warren E. Burger, in Richmond Newspapers, Inc. v. Virginia (1980)

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chose to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "The First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas. What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Although this case dealt with a criminal trial, the same philosophy applies to civil trials as well. Oliver Wendell Holmes (a Supreme Court justice from 1902 to 1932) commented that public scrutiny provided the security for the proper administration of justice. "It is desirable," he wrote, "that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Recent technological developments have brought the notion of public attendance at a trial into a new setting. Although at present there is no constitutional right to have cameras in the courtroom, many states have passed laws that permit the broadcasting of trials. When television first began, this was impracticable because of the size of the cameras, the necessity for bright lights, and the need to connect everyone to a microphone. Today, the entire courtroom can be covered by a few

small cameras that are practically hidden, with controls in an adjacent room or in a parked van. Although begun as an experiment, TV coverage of trials has proven quite popular, and there is an American cable television network known as Court TV that broadcasts trials as well as commentary by lawyers and law professors. In this instance, the media continue to serve as the intermediary between the public and the justice system, but in a new way that gives the viewer a better sense of what is happening.

(In a similar manner, proceedings of both houses of Congress, congressional hearings, and state legislatures are normally carried on cable networks, in particular C-SPAN, another example of the media serving to connect the people with the business of the government.)

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The concept of a "right to know" inferred from the First Amendment Speech and Press Clauses is a relatively new one in American political and judicial thought, but once again we can see democracy and its attendant liberties not as a static condition, but one that evolves as society itself changes. The "people's right to know" is intimately involved with press freedom, but it rests upon the broader concerns of democracy. If we take democracy to mean, as Abraham Lincoln put it, a "government of the people, by the people, and for the people," then the government's business is in fact the people's business, and this is where the structural role of a free press and the democratic concerns of the citizenry intersect. It is not a straightforward proposition. Neither the people nor the press ought to know everything that goes on in the government. Matters relating to national security, foreign affairs, and internal debates about policy development are not, for obvious reasons, amenable to public scrutiny at the time. As law school professor Rodney A. Smolla, an authority on the First Amendment, has written, "Democratic governments should be largely open and transparent governments. Yet even the most open and democratic government will in certain settings require some measure of secrecy or confidentiality to function appropriately."

While this sounds commonsensical, the fact of the matter is that there are two competing forces at work. On the one hand, government officials at every level, even in a democratic society, would just as soon not share information with the press or the public; on the other, the press, backed by the public, often wants to secure far more information than it legitimately needs. To resolve this tension, the U.S. Congress passed the Freedom of Information Act, commonly called FOIA, in 1967. The law passed at the behest of press and public interest groups who charged that existing federal law designed to make information available to the public was often used to just the opposite effect. As the law has been interpreted, the courts have consistently ruled that the norm is for information to be made public, and that federal agencies must respond promptly and conscientiously to requests by citizens for information. Supplementing the federal law, all states have passed similar Freedom of Information statutes, regarding the workings of state government and its records.

Under the law, both individual citizens and the press may file FOIA requests, but in practice the vast majority are submitted by the press. One individual, even a trained researcher, can track down only a limited number of leads upon which to base an FOIA request, while newspapers and television stations, with large staffs, can put teams to work on a problem; they also have the resources to pay for the copying costs of large numbers of documents. Clearly it is beyond the capacity of the media, print as well as broadcast, to investigate every governmental transaction, cover every trial, report on every legislative hearing, but that very impossibility is what makes a free press essential to democracy. An individual can benefit from the combined coverage that goes out on wire services or is published by the local press, watch hearings or trials on television, and even benefit from the many news and commentary sites on the Internet. Not since humans lived in small villages has it been possible for a single citizen, if he or she desires, to be so well informed about the workings of the government. This knowledge is what enables that person to cast an intelligent ballot, to sign a petition for or against some proposal, write letters to the legislature, and in general fulfill the obligations of a citizen. And it would be impossible without the presence of a free press.

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But can the press go too far? Any liberty carried to an extreme can lead to license. While there are many who applaud the work of the press in uncovering governmental corruption, they also bemoan the invasions of privacy that have

accompanied the drive to know everything about all public officials and personalities. The concern is real, and it has been answered primarily by the courts, who have on the one hand expanded the parameters of the First Amendment and, at the same time, placed some limits on it. While news organizations tend to bemoan each and every one of these limits as somehow undermining the constitutional guarantee of a free press, on the whole most of these restraints indicate a commonsense attitude that a free press is not free from all normal restraints on society. These restraints involve limits on reporters keeping their sources confidential when the state needs evidence in criminal prosecutions, liability for civil action in cases where private individuals and not public officials are defamed, and limits on access to certain governmental facilities, such as prisons. In addition, the press has complained that when the United States has been involved in military operations, reporters have been denied access to the front lines. Perhaps the best way to look at this is to ask whether these same restraints, placed on an individual, would make sense, and in most cases they do. It's difficult to conceive of a compelling reason for letting any individual walk around a prison, or stroll up to the front lines of a battle. While we expect the press to gather information for us, we also recognize that there are limits on that ability.

There has also been criticism of the invasion of privacy of public officials, with the press reporting on matters that have little or nothing to do with their ability to conduct the business of their offices. In recent years, particularly with the growth of the Internet and cable television, there have been countless stories about the private lives of government officials, from the president on down, and a lively debate over how far this trend will or should go. The public spectacle is disturbing to many people, who believe there should be a sharp distinction between the public and the private, with full spotlights on the public behavior and a total disregard of the private life. Others respond that there can be no such distinction. How men or women conduct their private lives is a key to their moral character, which in turn is a factor that people have the right to consider when voting for public officials.

In the late 1980s, reporters uncovered a story about a U.S. senator planning to run for president who was having an extra-marital affair. The story sank any hopes he might have had for higher office, and he castigated the press, charging that "this is not what the Founding Fathers had in mind 200 years ago." While his charge struck many people as true, in fact the same type of expose-minded press dogged the footsteps of some of the Founders. Both Alexander Hamilton and Thomas Jefferson found their amorous affairs the subject of vicious press articles, yet neither one thought that the answer lay in muzzling the press.

Hamilton responded to the stories by using the press himself, and while admitting to an affair with Maria Reynolds, refuted other charges against him. Just before he met his death, Hamilton defended a New York publisher who had been convicted in a trial court of libel. Hamilton delivered a ringing defense of the values of a free press, declaring that "the liberty of the press consists of the right to publish with impunity Truth with good motives, for justifiable ends." Jefferson, on the other hand, chose to remain silent about allegations of his liaison with one of his slaves, Sally Hemmings. Yet even when he believed the press was filled with nothing but invective against him and his allies, he maintained his faith in the necessity of a free press in a democratic society. "They fill their newspapers with falsehoods, calumnies and audacities," he told a friend. "I shall protect them in their right of lying and calumniating."

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At the beginning of the 20th century, new technology has transformed some of the old verities and assumptions about the role of a free press. For many years, for example, radio and television were treated as less protected parts of the press, since it was erroneously believed that there were severe technical restrictions on how many stations could be carried on the airwaves. As a result Congress decided, and the courts agreed, that the airwaves belonged to the public, and that stations would be licensed to broadcast on certain frequencies. In return for these licenses, radio and later television stations had to submit to certain government regulations that often hamstrung them in their ability to either gather news or to air editorial opinion. The development of cable and satellite distribution systems has put an end to the notion of broadcasting as a limited resource, and the broadcast media has begun to take its full place alongside traditional print media.

The arrival of the Internet raises many questions whose answers will not be known for years to come. For the first time in history, a single person, with a minimal investment, can put his or her views out, not only before the local populace, but

before the entire world! While one person may not have the news-gathering capacity of a newspaper or television station, in terms of opinion he or she can shout quite loudly to anyone who wants to listen. Moreover, some individuals have formed Internet news services that provide specialized information instantaneously about politics, weather, the stock market, sports, and fashion. In addition to the print and broadcast media, the world now has a third branch of the press, the on-line service.

In terms of the rights of the people, one can argue that there is no such thing as too much news. Across the masthead of many American newspapers are inscribed the words from Scripture, "You shall know the truth and the truth shall make you free." The Founding Fathers believed that a free press was a necessary protection of the individual from the government. Justice Brandeis saw a free press as providing the information that a person needed to fulfill the obligations of citizenship. Probably in no other area is the nature of a right changing as rapidly as it is in the gathering and dissemination of information by the press, but the task remains the same. The First Amendment's Press Clause continues to be a structural bulwark of democracy and of the people.

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