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THE BILL OF RIGHTS YESTERDAY AND TODAY

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The others who have been asked to comment are practitioners in a field where I claim only to be a student and observer -- if a sympathetic one at that. The blending of such perspectives in marking the Bicentennial of the Bill of Rights seems to me quite appropriate.

What's new these days, one might well ask at the outset, about freedom of the press? Let me offer one rather startling fact that is quite new. The United States Supreme Court will soon begin the 1991-92 October term, without a single constitutionally based media or press case on the docket carried over from last spring. There are several fascinating First Amendment issues facing the Court this fall -- blocking of access to abortion clinics, cross burning on the lawns of black families, leafletting near polling places, New York's "Son of Sam" law[1] applied to royalties from *Goodfellas* -- these and other issues are set for argument during the fall.[2] But none of the pending cases involves the media, print or broadcast.

This is the first time I can recall such a bare docket. Last year at this time, for example, there were at least a couple of media cases, to which others were added later in the year.[3] So it has been for most Supreme Court Terms -- in fact there have been years when the bulk of the docket consisted of media cases.[4] Even if a media case or two is granted certiorari when the Court

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1. *See* N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1991).

2. NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991); Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777 (2d Cir. 1990), *cert. granted sub nom.* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 111 S. Ct. 950 (1991); *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991), *cert. granted sub nom.* R.A.V. v. City of St. Paul, 111 S. Ct. 2795 (1991); Burson v. Freeman, 802 S.W.2d 210 (Tenn. 1990), *cert. granted*, 111 S. Ct. 1578 (1991).

3. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991); Pledger v. Medlock, 111 S. Ct. 41 (1990).

4. For example, the 1978 Supreme Court Term included such major media cases as: Gannett Co. v. DePasquale, 443 U.S. 368 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Herbert v. Lando, 441 U.S. 153 (1979).

convenes a few weeks from now, the docket remains curiously skewed.

What explains this vacuum? I have been wondering since I discovered it. Could it be that all the interesting free press issues have been resolved -- or that the Justices felt they had done enough damage last Term to let up this year? Or has the advocacy of First Amendment lawyers with media clients somehow atrophied in the last six months? None of these theories helps much -- though there may be some reason to suppose that perceptive attorneys are less likely to advise clients to undertake a Kamikaze mission before what seems to be an increasingly hostile Court. Basically, I must confess I do not have any good theories about what has happened, though it is an issue worthy of speculation. Against this background, I would propose briefly to offer a broad view of the major areas of concern to a free press, and a brief assessment of current conditions within each.

Let me start with prior restraint, an old standby in the free press field. Within the past year there have been two major cases,[5] either of which might have reached the Supreme Court but did not -- and in both instances, I would argue, partly because of the posture of the affected media themselves.

The first, of course, was the *CNN/Noriega* case,[6] involving the attempt to block the broadcasting of the tapes which had been surreptitiously recorded of conversations between General Noriega and his attorneys. Surely it was not the media's finest hour, for reasons that only the government's more egregious conduct caused us to forget. But we should recall where matters came to rest last November. While the district court did eventually permit -- indeed ordered the broadcasting of the challenged conversation tapes, that was a pyrrhic victory at best. It came only after the defendant had withdrawn objections to the broadcast. And it was to the trial judge an act of discretion or grace rather than a constitutional imperative.

Effectively, the constitutional phase of the case ended with a federal court of appeals decision condoning a gag on the broadcasting of material of manifest public interest, without the findings that would normally be required to protect in this way a defendant's right to a fair trial.[7] The whole procedure was clearly inconsistent with what the Supreme Court had said in *Nebraska Press Ass'n v. Stuart*[8] and other cases dealing with gags and restraints. At the time, many of us were outraged by such a judgment, and by the Supreme Court's failure to intercede at this admittedly early stage of the case. Many groups tried to help

5. *See infra* notes 6-16 and accompanying text.
6. CNN, Inc. v. Noriega, 111 S. Ct. 451 (1990).
7. *Id.*
8. 427 U.S. 539 (1976).

and none more vigorously than the Reporters Committee and Jane Kirtley -- without being quite clear where help could be applied.

The whole affair ended with a whimper, as you may recall, in early December. CNN's strategy left us all puzzled at best, and dismayed at worst. For some, CNN's error came early in the process, by defying the court order and broadcasting material of marginal news value, thus provoking a needless constitutional collision with potentially disastrous results. For others, the flaw came later, when CNN failed to appeal the judge's order turning over the contested tapes to other news organizations. Under either theory, CNN's actions left standing a judgment[9] that may now make prior restraint cases much more difficult than they have been in all the years since the Supreme Court's seminal decision in *Near v. Minnesota*.[10] Did CNN win? Doubtful. Did freedom of the press suffer? Unquestionably. So I would put down this strange saga as self-inflicted wound number one.

Number two occurred during and just after the Gulf War. Three lawsuits had been filed to challenge the Defense Department rules.[11] One was an ACLU case addressed solely to the restrictions on coverage of events at the Dover, Delaware mortuary.[12] The other two suits challenged the battle-sector rules -- one filed by Agence France Presse,[13] the other by a group of magazines and writers in New York led by *The Nation*.[14] It is *The Nation's* case I would like to recall here. It was first assigned to a judge who would have been quite unsympathetic to the media claims. But it soon moved to Judge Leonard Sand, whose sensitivities to First Amendment issues are well known. (At the height of the war, in fact, the week when President Bush insisted that Saddam Hussein respond to his demands by noon on Thursday, Justice Department lawyers pleaded with Judge Sand for more time to answer the amended complaint. There would be no slippage, he told them -- and to underscore his point, he insisted on a reply by noon on the very same Thursday. The Pentagon attorneys got the message.)

There was not time to carry the dispute beyond preliminary motions. A full hearing could not take place before the hostilities ended. By that time the government claims of mootness were persuasive. Even then, Judge Sand would

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9. 111 S. Ct. at 451.

10. 283 U.S. 697 (1931).

11. *See* EVERETTE E. DENNIS ET AL., *Legal Challenges to the Ground Rules and Supplementary Guidelines, in* THE MEDIA AT WAR: THE PRESS AND THE PERSIAN GULF CONFLICT (Gannett Foundation Media Center, N.Y.), June 1991, at 20-24 [hereinafter DENNIS ET AL.].

12. *Dover Closings Challenged*, WASH. POST, Feb. 23, 1991, at A2.

13. *See* DENNIS ET AL., *supra* note 11, at 21.

14. Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

not dismiss the complaint solely because the war was over. In his brief opinion, ending the case, he cited two factors -- one relating to the change of events in the Gulf, but the other concerning the posture of the plaintiffs in his courtroom.[15]

Despite repeated requests for acceptable alternative rules, he noted, media lawyers had never accepted his invitation, but had consistently taken an "all or nothing" position. "Plaintiffs' only response," lamented Judge Sand, "was that the press be allowed unlimited, unilateral access."[16] One has the distinct feeling that Judge Sand was ready to rule on the merits if only some concessions had been made. Would it unacceptably have compromised principle to propose a pool system that might have been fairer to all reporters? And might not some field review procedure have been envisioned, with assurance of quick turn-around and a prompt judicial resolution of any disagreements?

We will never know, because apparently no such suggestions were made. As a result, the war ended without a ruling. The press adhered firmly to principle, to be sure, but the victory seems to me somewhat pyrrhic: What remains on the books, never successfully challenged, is a set of restrictions more detailed and more intrusive than those of prior wars (or at least the major conflicts). Is this a self-inflicted wound? Might a different strategy have reaped better results? We can do no more than speculate.

Before leaving prior restraints and self-inflicted wounds, one is tempted to say something about the William Kennedy Smith trial.[17] On that subject I would defer to others, save to add one comment that relates closely to my theme: I found it ominous that a Florida prosecutor could be permitted to bandy about and threaten to use as the basis for restraining the press, the very statute that had been struck down in the *Florida Star*[18] case just two years earlier as though that case had never been decided. Beyond that observation, I shall leave other facets of this intriguing case to my colleagues.

What of the other elements of a free press? Surely something should be said about latitude with regard to libel. Here I sense the record is more mixed. On one hand, we have seen absolutely staggering judgments -- $34 million against the *Philadelphia Inquirer* a year or so ago,[19] and this past summer $58

15. *Id.* at 1575.

16. *Id.*

17. *See Weekly Newspaper Charged With Violating Law on Rape*, N.Y. TIMES, May 10, 1991, at A18.

18. Florida Star v. B.J.F., 491 U.S. 524 (1989).

19. *See Settlement Reached in Record Libel Award*, N.Y. TIMES, June 30, 1991, at 18.

million against a Dallas television station[20] (this one apparently settled somewhere between that amount and the $10 million pre-trial offer the plaintiff had rejected). And a *Wall Street Journal* reporter's insinuation about a business executive's judgment cost the paper $2.25 million in libel damages, despite a full and contrite retraction printed the very next morning.[21]

On the other hand, media comment about public figures and public officials seems to have had more breathing space of late -- presumably reflecting the wider acceptance of the *New York Times*[22] privilege and its legal progeny.[23] The point is not lost on one who lives in Virginia, and follows the point and counterpoint about Governor Wilder and former Governor Robb. So here perhaps is one area in which the Supreme Court has had fewer cases of late because the lower courts have been more consistent or conscientious in applying principles the High Court has set forth. If so, that may be one small bright spot in an otherwise fairly gloomy sky.

The same cannot be said of another area I suspect we would all consider vital to a free press -- that of access to information. Of course a great many access issues are statutory or administrative and not constitutional -- as I would argue even with regard to the filming of executions at San Quentin, about which we have heard much of late. But there are a few issues that do have quasi-constitutional import. Here one would expect more recognition at the Supreme Court level.

Take the issue of access to juvenile court proceedings and records as a prime example. Last year the Court declined to consider two absolutely perfect juvenile court access cases.[24] Of course the Court rejected thousands of other potentially important cases as well. But this is an area of special interest, even apart from the rapidly burgeoning juvenile docket. In the past, the Justices have been reticent either to declare their views on the status of juvenile courts, nor on the types of proceedings to which the public's right of access applies. Given that propensity in the past, I will confess I fully expected the Court would have taken one of the juvenile access cases last Term.

The other access issue on which I would have expected to see more activity

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20. *Id.*

21. *See* Alex S. Jones, *Despite Correcting the Error, Newspaper Loses Libel Case*, N.Y. TIMES, May 24, 1991, at B6.

22. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

23. *See* Monitor Patriot v. Roy, 401 U.S. 265 (1971); Baer v. Rosenblatt, 383 U.S. 75 (1966).

24. *In re* T.R., 556 N.E.2d 439 (Ohio 1989), *cert. denied*, 111 S. Ct. 386 (1990); Courier-Journal & Louisville Times, Co. v. F.T.P., 774 S.W.2d 444 (Ky. 1989), *cert. denied*, 111 S. Ct. 232 (1990).

is that of confidential sources. At a time of what the recent Reporters Committee study[25] tells us is an unprecedented volume of subpoenas, one would expect on the Supreme Court docket a case of broader import than *Cohen*[26] and the issue of damages for breaking a promise of anonymity. A bit like the citizen frustrated by the policeman tending to trivial matters, I would suggest there are real issues in the source protection area, far more important than *Cohen's* peripheral focus.

Here the search for villains is harder. Surely media lawyers have not been complacent; who could forget the picture of Ben Bradlee, shortly before his retirement, proudly accompanying Linda Wheeler into the court that was about to rule on her contempt for refusing to reveal confidential information about a Washington drug raid? The *Los Angeles Times* seems to have been equally aggressive in protecting reporter Richard Serrano for refusing to tell where he got the internal Los Angeles Police Department report on the beating of Rodney King.[27] Yet one cannot fairly fault the Supreme Court either. It's not that the Justices have avoided the issue. In fact, apart from *Cohen*, I find no confidential source case of which Supreme Court review was even sought last year, despite what we know to be an abundance of major cases in the lower courts.

Finally, a word about broadcasting seems in order. We may forget that the growth of the First Amendment docket during the 70s and 80s came disproportionately from broadcasting litigation.[28] Here too there is no shortage of important issues, some of which may in fact reach the Court this year. Leading the list is the FCC's effort to extend the "indecency" ban throughout the broadcast day -- an effort which the Federal Court of Appeals in Washington has now held unconstitutionally vague.[29] There are also some cable issues going well beyond last Term's judgment upholding Arkansas' differential tax on cable systems.[30] These and other issues surely call for attention, and seem curiously absent from a docket that in earlier years would have been brimming with broadcast issues.

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25. *See generally Agents of Discovery: A Report in the Incidence of Subpoenas Served in the News Media in 1989* (Reporters Committee for Freedom of the Press 1991).

26. Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991).

27. *Judge Fines L.A. Times Reporter*, WASH. POST, May 31, 1991, at A4.

28. *See* F.C.C. v. League of Women Voters, 468 U.S. 367 (1981); Houchens v. KQED, Inc., 438 U.S. 1 (1978); F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

29. *See* Paul Farlin, *Indecency Ban by FCC Overturned; Broadcast Standard "Unconstitutionally Vague", Court Rules*, WASH. POST, May 18, 1991, at A1.

30. Leathers v. Medlock, 111 S. Ct. 1438 (1991).