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Supreme Court Decisions: Hugo Zacchini: Flying in the Face of Press Privilege

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Once again the Court refused to recognize an absolute and unqualified executive privilege in a president. To allow such a privilege would have permitted Nixon to withhold tapes from judicial officers which would roadblock the legal proceedings connected with Watergate.

The opinion distinguished legitimate constitutional privileges relating to military, diplomatic, and national security from mere political expedience. The Court found that most of the presidential materials related more to a public interest in Watergate than to national security or diplomacy. The Court's disbelief in Nixon's claim for executive privilege covering all the materials was bolstered by his demonstrated lack of personal familiarity with all but a few of his presidential materials.

Since the bulk of the recordings and papers related to executive activities in which the public had an interest, the Court found that the tapes were not solely of a personal nature and therefore could not remain under Nixon's exclusive control. The Court agreed that had the former president's materials been of such a type, unrelated to Nixon's public activities, their removal from public scrutiny would be justified.

Conceding that Nixon's privacy deserved some legal protection, the Court believed the PRMPA provided adequate safeguards. Under the Presidential Recordings Act, the materials of former presidents are subjected to screening procedures by government archivists. After screening, purely private information is to be returned to the chief executive and cannot be publicly disseminated. Even Nixon's brief acknowledged how limited the privacy interest of a public official would be in citing *New York Times v. Sullivan*, 376 U.S. 254 (1964), which holds that any individual entering public life voluntarily surrenders some rights of privacy.

With a touch of irony, Nixon, who advanced his early political career by denouncing the Communist Party, relied upon cases brought by members of the Party in his own Fourth Amendment argument. These cases were brought in response to unreasonable government searches of Communist Party members'

homes for extra evidence, unrelated to the offenses with which they were charged.

The Court was not persuaded by the argument that the net effect of the PRMPA amounted to an unreasonable search and seizure of Nixon's property. Under the Act, the scope of the archivists' search and investigation must be restricted. Nixon had stated an alternative of screening a president's materials via judicial review, but the court stated that this would subject him to *greater* public scrutiny.

Nixon's claim that the PRMPA violated his First Amendment rights was also rejected. He claimed the Act restricted his freedom to participate freely in political activity, would hamper his ability to speak freely, and would prohibit him from taking inconsistent positions. The Court expressed confidence in the screening process of the PRMPA and, in his concurring opinion, Justice Powell observed that the original District Court decision recommended actual involvement by Nixon in that process.

Finally, Nixon urged the Act violated the Bill of Attainder Clause. He equated the legislation with the rendering of a guilty verdict and with subsequent punishment without the benefit of a trial. The Court admitted that Title I of the Act was created specifically to control Nixon's materials, but, the Court was quick to add that Title II dealt with recommendations for future presidential materials. Title I was not considered punishment in the traditional sense, since Nixon could still have access to his materials. After reviewing the Congressional committee reports, the Court concluded that the legislative intent was merely to negate the Nixon-Sampson agreement and not to punish Nixon.

Undaunted by this legal setback, Nixon will have yet another case argued before the Court this term. The issue will be whether his presidential tapes, especially those involving the Watergate coverup, may be broadcasted over the airwaves for public consumption.

Hugo Zacchini: Flying In The Face Of Press Privilege

by Andrew S. Katz

Carnival entertainer Hugo Zacchini found that even a man who earns his living by being shot from a cannon can have redress of his legal grievances in the nation's highest court. The United States Supreme Court, by narrowing the scope of news media privilege provided by the First Amendment, gave the "human cannonball" a second chance to seek damages for a tortious appropriation of his performance in *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. 2849 (1977).

Zacchini's appearance as petitioner in the case arose from an incident occurring in August, 1972. He was then engaged to perform his "human cannonball" act on a regular basis at the Geagua County fair in Burton, Ohio. A freelance reporter for a local television station filmed the 15-second act, which involved Zacchini being fired from a cannon into a net some 200 feet away. Prior to the performance the reporter was warned by Zacchini not to make the film. The film clip was shown that evening on the 11 o'clock news, accompanied by favorable commentary.

The performer subsequently brought an action in state court for damages against the station's operator, Scripps-Howard Broadcasting Company. His complaint alleged that the carnival act was "invented by his father and . . . performed only by his family for the last fifty years . . .," that the Broadcasting Company "showed and commercialized the film of his act without his consent . . ." and that this conduct was an "unlawful appropriation of plaintiff's professional property." 97 S.Ct. at 2851. The defendant's motion

for summary judgment was granted by the trial court and the Court of Appeals of Ohio reversed, holding that Zacchini's complaint stated a cause of action for conversion and for common law copyright infringement.

The Supreme Court of Ohio's opinion was looked to for the rule of law in the case. Recognizing Zacchini's right to the publicity value of his performance, the Ohio court nevertheless found the broadcaster was immune from suit because "[a] TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity" 97 S.Ct. at 2852. Judgment was rendered for Scripps-Howard.

Certiorari was granted by the Supreme Court to consider whether the First and Fourteenth Amendments immunized Scripps-Howard from damages for its alleged infringement of Zacchini's state-law "right of publicity." Supreme Court review was permitted because, in reaching its decision, the Supreme Court of Ohio had relied heavily on the First Amendment principles established in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times v. Sullivan*, 376 U.S. 374 (1964).

To the Ohio Court these cases meant that the press is privileged to report matters of legitimate public interest even if such reports intrude on private matters,

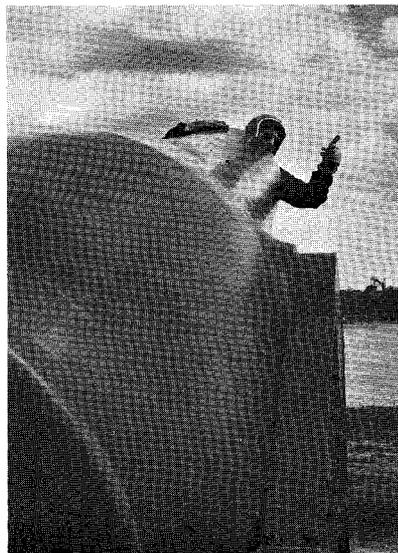


photo by George Martin Kripner

concluding that the press is similarly immunized ". . . When an individual seeks to publicly exploit his talents while keeping the benefits private." 97 S.Ct. at 2853. However, the United States Supreme Court reversed the Ohio decision to the extent it had found immunity for Scripps-Howard required by the First and Fourteenth Amendments.

Justice White, writing for the majority, reviewed these landmark defamation cases and concluded they do not recognize a media privilege to televise an entertainer's entire act without his consent. These cases involved persons seeking damages for being placed in a "false

light;" nobody with a name having commercial value and no claim to a right of publicity was involved. The State's interest in permitting a right of publicity is in protecting the proprietary interest of the individual in his act, partly to encourage him to continue entertaining. The interest protected in a defamation suit is that of reputation. In the final analysis, the opinion notes, the entertainer is not concerned with how much publication has been done, as in a case of defamation, but rather "who gets to do the publishing." 97 S.Ct. at 2856.

The opinion expressed concern about the substantial threat to the economic value of Zacchini's performance posed by the broadcast of his entire act without compensation. "The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee," the opinion declared. 97 S.Ct. at 2857.

Although the Court was unwilling to draw the line between media reports that are protected and those that amount to an "appropriation," it was certain that "the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent." 97 S.Ct. at 2857. The opinion concluded that even though the First and Fourteenth Amendments do not require it, the State of Ohio could privilege the press as a matter of its own law.

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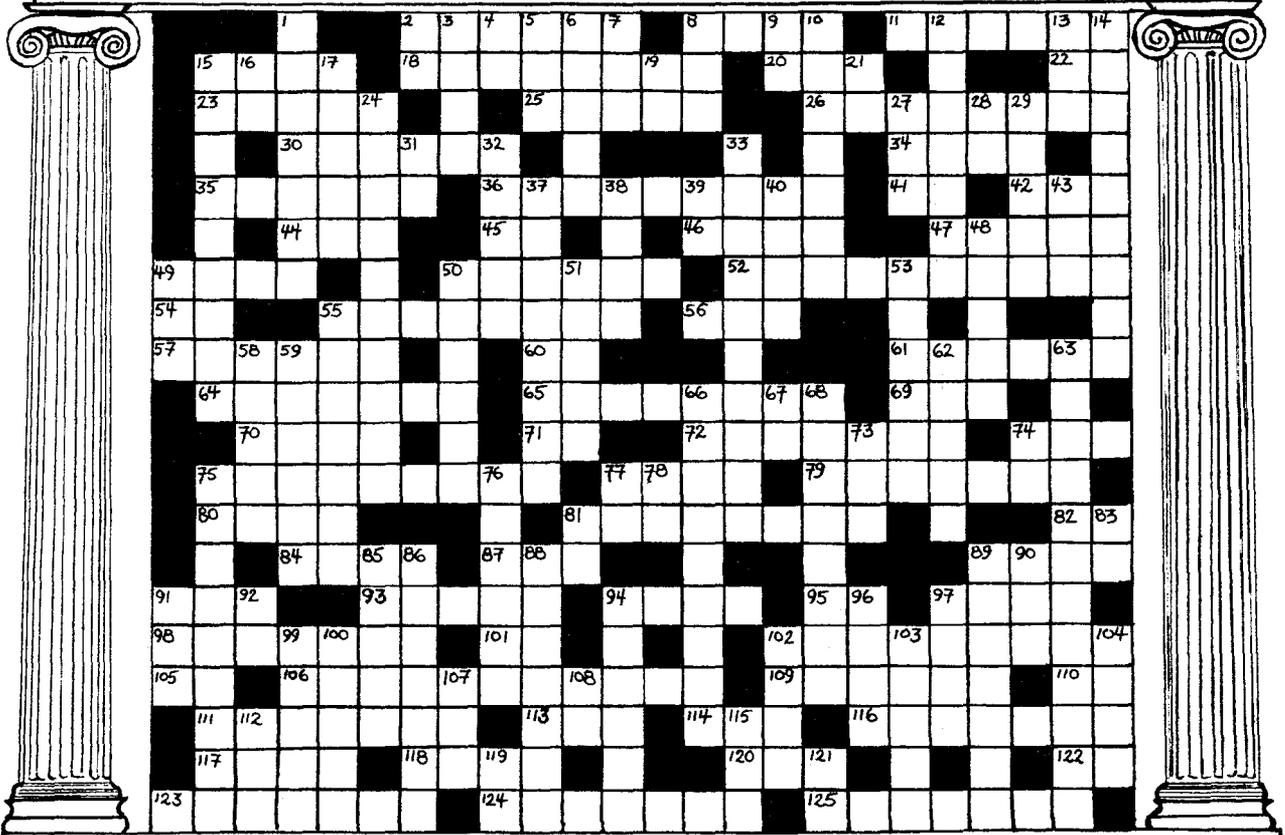
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ACROSS:

- | | | |
|--------------------------------|--|-------------------------------------|
| 2. Seize Property | 44. Some Law Students' Goal | 70. Immediately (in a Hospital) |
| 8. Dull | 45. Reg. Nurse | 71. Wonder St./ Land of Opportunity |
| 11. Against | 46. Greek Portico | 72. Brings into Harmony |
| 15. Unwritten | 47. Rarity During Exams | 74. Water State |
| 18. City and Falls | 49. Imitation; Suffix | 75. Professionally Immoral |
| 20. Bobby Orr's Milieu | 50. Capable; Socially Correct | 77. Source of Ruin |
| 22. Not Them | 52. Basics | 79. Parsley Sprig, Lemon Wedge |
| 23. Computerized Law | 55. Louis XIV; Early Times | 80. Pater; French |
| 25. Follow | 56. Characteristic of: Suffix | 81. Chief Support |
| 26. Periods of Decline | 57. Extort | 82. Des Moines St. |
| 30. Loathes | 60. Mail on the Farm: Abbr. | 84. Law Enforcers in San Diego |
| 34. Eight; Prefix | 61. Menacing Epithet | 87. First Chief Justice |
| 35. Although | 64. Most Recent | 89. Executive Overseer: Abbr. |
| 36. Impediment | 65. Term Describing Transfer of Property to Church | 91. Old Nuclear Watchdog |
| 41. Annually: Lat. | 69. Owns | 93. Water Lily |
| 42. With In, Against the Thing | | |

- 94. Noncontractual Civil Wrong
- 95. Is Operating
- 97. Land Extension
- 98. Dean of 94 Across
- 101. Blood Collecting Org.
- 102. Word with Tears or Rock
- 105. 43d Element: Abbr.
- 106. Relating to a Nonparty Lawsuit
- 109. Blinker
- 110. Media Blurb
- 111. Inability to Articulate Words
- 113. Debt Acknowledgment
- 114. Mutilate
- 116. Roots
- 117. Sutured
- 118. Beer Crustacean
- 120. Jr. Officers
- 122. Position Preposition
- 123. Devisee is One
- 124. Estate, Realm
- 125. Gratifies

- 12. Pariah
- 13. Remorse
- 14. Action for Breach of Parol or Simple Contract
- 15. Aroma Detection
- 16. Regarding
- 17. Printed Defamation
- 19. Gold: Lat.
- 21. Wt. Unit
- 24. Catchword
- 27. Hit
- 28. That One
- 29. Andrea _____
- 31. Comb. Form of Ear
- 32. Bush
- 33. Willless Decedents
- 37. Casual
- 38. Speaker's Platform
- 39. In the Manner That
- 40. Value
- 43. Elongated Fish
- 48. Perjurers
- 49. And so Forth
- 50. Bitter Cold
- 51. Con/disjunctive
- 53. Beneath Earth's Surface
- 55. Chided
- 58. Intermediate
- 59. Fathers
- 62. Possesses Not: Contraction
- 63. Groups of Islands
- 66. Affected Pose
- 67. From Naples: Abbr.

- 68. Worthless
- 73. Denial
- 74. Exists
- 75. Capitals
- 76. Renounce
- 77. Preliminary Degree
- 78. In the Meantime: Lat.
- 81. Possessory Adjective
- 83. Antitank: Abbr.
- 85. Allegations
- 86. Rodents, Family Gliridae
- 88. Attribute
- 89. Depresses
- 90. Wire Service
- 91. City Habitat: Abbr.
- 92. Silver State: Abbr.
- 94. Group of Performers
- 96. First Real Law School Hiatus
- 97. Strike Money
- 99. Unstressed Vowel
- 100. Must Not: Contraction
- 102. Type of App. Review
- 103. Climate
- 104. Site of First Eviction
- 107. Equality
- 108. Toward
- 112. Pin Down; Throw
- 115. Bass or Molson
- 119. Type of Year
- 121. English Diarist's Initials

DOWN

- 1. Liable to be Assessed
- 2. Indefinite Article
- 3. Row
- 4. 73d Element: Abbr.
- 5. Mature
- 6. Criterion of Judgment
- 7. Time Units: Abbr.
- 8. Compass Direction
- 9. Suffix for Inert Gas
- 10. Since

