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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

Nos. 57, 58 and 59

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE ASSOCIATED PRESS, PAUL BELLAMY, GEORGE FRANCIS BOOTH, ET AL.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled causes in support of the Associated Press and the Tribune Company.

Statement of the Case

In the interest of brevity the Amicus Curiae accepts the statements of the cases as set forth in the briefs of the Associated Press and the Tribune Company.

Interest of the Amicus Curiae

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 600 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country. Many of its members are also members of the Associated Press. Some of them use exclusively the Associated Press service for news of national and international affairs. Some, in addition to being members of the Associated Press, obtain the news services of other press associations. Others are not members of the Associated Press. All are vitally interested in the question presented by this controversy as it affects the business of the press of the United States.

Question Presented

The fundamental issue in this case and the only question discussed in this brief is whether the press or any agency of the press can be held to be so "clothed with a public interest" as to subject it to regulation by the government in the performance of its function of gathering and disseminating information.

Preliminary Statement

The business of the press is that of rendering an indispensable public service through the gathering and dis-

semination in printed form of news, editorial comment and advertising.

News is information about matters of general interest which in an editor's opinion is of sufficient importance to his readers to justify its publication in his newspaper.

Editorial comment is discussion of the news and criticism, constructive and destructive, of the acts or activities of those who appear in the news.

Advertising is information concerning the goods, services or ideas of one who pays to have such information disseminated.

In this controversy we are concerned only with news, because the Associated Press does not prepare and disseminate editorial comment or advertising.

The business of a press association is the gathering of news, its formulation into news dispatches and, in turn, the dissemination of those dispatches to newspapers for the publication of such as the editors thereof deem sufficiently important to their readers to justify publication.

Essentially, the services of a press association constitute one of the vital functions of the press. In fact, as was said by this Court in 1918, the services of a press association consist of "the very facilities and processes of publication." *International News Service* v. *Associated Press,* 248 U. S. 213 at p. 235. Without those services no newspaper in the United States could bring to its readers the

> "prompt, sure, steady and reliable service designed to place the daily events of the world at the breakfast table of millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it * * *"

The Associated Press is a cooperative, non-profit organization created by its member publishers in order that they might have the news of the world at ready command for publication in their newspapers. It has a membership of 1274 newspapers in which are found 81 per cent of the morning newspapers of the United States and 59 per cent of the evening newspapers. The aggregate circulation of these newspapers is 96 per cent of the total morning circulation and 77 per cent of the evening.

Many of the members of the Associated Press also obtain the news dispatches of other news gathering associations of which there are a great many of one sort or another in the United States. The lower court found that of these many other news gathering associations only two, the United Press and the International News Service, are comparable in size and efficiency with the Associated Press. Both of these organizations are organized for profit whereas the Associated Press was organized on a cooperative, non-profit basis by its member publishers.

There is no monopoly of news by any one of the press associations or news gathering agencies. In fact, no claim that there is such a monopoly of news is advanced in this case. All that is sought to be done is to compel the Associated Press to make its news dispatches accessible to any publisher. If this be accomplished, it must be conceded that all other news gathering agencies of every type and description will be compelled to make their property in the form of news dispatches accessible to anyone who desires it.

The broad question of the consequence this would involve in setting up a regulating agency to lay down the terms and conditions of such use of news and the constitutionality of such an arrangement was evaded by the lower court.

Argument

The holding of the District Court that an agency of the press is so "clothed with a public interest" as to subject it to regulation by the Government is repugnant to the guaranty of a free press as embraced in the First Amendment to the Constitution of the United States.

The First Amendment to the Constitution provides:

> "Congress shall make no law * * * abridging the freedom * * * of the press * * *"

This Court has held that the services of a press association to a newspaper or newspapers constitute "the very facilities and processes of publication." *International News Service* v. *Associated Press,* 248 U. S. 213 at p. 235 (1918).

This Court has also held that "the phrase 'affected with a public interest' can in the nature of things mean no more than that an industry, for adequate reasons, is subject to control for the public good." *Nebbia* v. *New York,* 291 U. S. 502 at p. 536 (1934).

This Court also said in the *Nebbia* case:

> "if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." (291 U. S. at p. 534.)

Therefore, the question is presented squarely in this case as to whether the business of the press can be regulated in the manner attempted by the District Court which found that the operations of a press association are so clothed with a public interest that it should be regulated in the public interest.

Federal and state courts have held that the business of the press was not at common law recognized as an occupation clothed with a public interest. *In re Louis Wohl, Inc.,* 50 F. (2d) 254 (1931); *Friedenberg* v. *Times Publish-*

ing Co., 170 La. 3, 127 So. 345 (1930); *Shuck* v. *Carroll Daily Herald,* 215 Iowa 1276, 247 N. W. 813 (1933); *Matthews* v. *Associated Press,* 136 N. Y. 333, 32 N. E. 981 (1893); *State ex rel. Star Publishing Co.* v. *Associated Press,* 159 Mo. 410, 60 S. W. 91 (1900).

Thus, it is patent on the face of the lower court's decision that it has entered into the legislative field. If it be assumed arguendo that courts may "effect the legislative will" when Congress has failed to declare an activity to be "clothed with a public interest", the answer is that courts are without power to "effect a legislative will" on matters in respect of which Congress is prohibited by the Constitution from legislating.

The press is not like a stock exchange, a commodity exchange, a stockyard, a railroad, an electric utility that can be required to take out a license, obtain a certificate of convenience, or procure a charter with special limitations before it can operate.

If the press itself cannot be regulated, then one of its essential services or functions cannot be regulated in a manner that would restrict its constitutionally guaranteed freedom. The service rendered by the Associated Press to its member publishers is essential to the service which they in turn render to their readers.

After finding that the operations of the Associated Press are so clothed with a public interest as to subject it to control for the public good, the District Court said:

> "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others."

There the District Court left the matter hanging.

It cannot be denied that if the effect of the lower court's judgment is exactly what that court said it was—to compel the members of the Associated Press to make their news

dispatches accessible to others—then that judgment must be followed up by legislation enacted by Congress to create some agency to prescribe the terms and conditions under which news dispatches collected by press associations or by newspapers, collectively or individually, shall be turned over to any and all persons who want to publish those dispatches.

Such a thing is inconceivable in the light of the historic American doctrine of a free press.

The fact that the Associated Press is engaged in the business of gathering news, formulating that news into dispatches and disseminating those dispatches to newspapers for their use does not subject it to the regulatory power of Congress.

As was stated by this Court:

> "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Near* v. *Minnesota,* 283 U. S. 697 at p. 720 (1931).

As applied to this case the *Near* case is authority for the contention that the press as a consideration for doing one thing cannot be compelled to do something else. Yet that is exactly what the lower court has attempted to impose upon those members of the press who in turn are members of the Associated Press in this case. It has ruled that if these publishers continue to use the facilities of the Associated Press, they must, as a consideration for doing so, make the dispatches of the Associated Press accessible to others.

Since the *Near* case was decided this Court has had frequent occasion to pass upon controversies arising under the First Amendment. In one of these cases it said:

> "* * * the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' 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." *Bridges* v. *California,* 314 U. S. 252 at p. 263 (1941).

In another case this Court said:

> "A license tax certainly does not acquire constitutional validity *because it classifies the privileges protected by the First Amendment* along with the wares and merchandise of hucksters and peddlers and treats them all alike. *Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.*" (Emphasis supplied.) *Murdock* v. *Pennsylvania,* 319 U. S. 105 at p. 115 (1943).

In cases since 1930 this Court has held that Congress cannot restrict circulation. *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Lovell* v. *Griffin,* 303 U. S. 444 (1938).

Congress cannot enjoin publication. *Near* v. *Minnesota, supra.*

It cannot require a license as a condition precedent to engaging in the publishing business. *Lovell* v. *Griffin, supra; Murdock* v. *Pennsylvania, supra.*

It cannot regulate, restrict, restrain or control the utterances of the press or limit its circulation. All of the cases herein cited hold uniformly on this point.

This Court has also held that in every case where legislative abridgment of the right of a free press is asserted, courts should be astute to examine the effect of the challenged legislation.

> "*Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.*" (Emphasis supplied.) *Schneider* v. *State,* 308 U. S. 147 at p. 161 (1939).

Congress cannot legislate to protect the freedom of the press. The flat prohibition against the regulation of the press in one direction, as contained in the First Amendment, does not endow Congress with power to regulate it in another direction, even in aid of its freedom. *Powe* v. *United States,* 109 F. (2d) 147 (1940), certiorari denied, March 25, 1940, 309 U. S. 679.

Congress has not legislated in this case. The legislation complained of is that of the District Court.

If it be argued that Congress has the power to regulate the activities of the Associated Press under the broad powers of the commerce clause of the Constitution, then the answer is to be found in the considerations incident to the proposal and the ratification of the First Amendment. As the late Mr. Justice Holmes said many years ago:

> "Upon this point a page of history is worth a volume of logic." *New York Trust Co. et al.* v. *Eisner,* 256 U. S. 345 at p. 349 (1921).

In fact, the debates over the ratification of the Constitution demonstrate beyond doubt that the proponents of the original Constitution argued that there was no necessity for a provision preserving the freedom of the press in that document because silence thereon denied any such power to Congress. They conceded, however, that if the power to regulate commerce had been intended to apply to the press, then an amendment would be essential in order that the liberty of the press should be preserved inviolate. They denied any such intention however.

This argument did not carry weight with the citizens of the newly created republic. They insisted upon and obtained a provision in the Constitution preserving the press from just such an order as was entered by the District Court in this case. Upon this point it is well to review the historical background of the First Amendment.

Historical Background

When the original Federal Constitution was adopted by the Convention in Philadelphia in September, 1787, it contained no bill of rights, and so strong was the feeling throughout the country against the new constitution unless a bill of rights were made a part thereof, that it never would have been ratified by the requisite number of states, had it not been for the promise that adoption of such a bill of rights, in the form of amendments to the constitution, would be made the first order of business of the new Congress, with early submission of the proposed new amendments to the states for ratification. This promise was kept, and on September 25, 1789, even before all the states had ratified the constitution itself, Congress adopted amendments containing a bill of rights, and these were in due course ratified by the states. To all practical intents and purposes, therefore, the first ten amendments to the Constitution of the United States may be considered a part of the original document. Stevens, *Sources of the Constitution of the United States,* p. 213; Story, *Commentaries on the Constitution of the United States,* I, 211, Sec. 203.

A freedom-of-the-press provision was proposed in the Philadelphia convention by Messrs. Elbridge Gerry and Charles Pinckney, but was defeated by a vote of 6 states to 5. Neither the journal of the Convention nor Madison's notes thereof, however, contain the debates on this provision, and while the matter was one of considerable discussion in the sessions of the state conventions called to ratify the new constitution, the meager available records of those sessions, contained in *Elliot's Debates,* also unfortunately fail to give the debates. According to the Congressional Journal, the clause was adopted by Congress in the First Amendment to the Constitution practically as a matter of course, and without debates, and the journals

of the legislatures of the several states show that this amendment was ratified by each in the same way.

The debates on the freedom-of-the-press clause in the Constitution of the United States, therefore, are to be found only in the recorded speeches and contemporaneous writings during the very active compaign for ratification of the original Constitution by the state conventions, when the Federalists, among whose leaders were Hamilton, Jay and Wilson, advocated its ratification as it stood, and the Republicans led by Jefferson, Lee and Smith, demanded a bill of rights as a condition precedent to ratification. All of the discussion was of course not recorded, and is accordingly not available.

There can be no question, however, but that in the discussion the demand for a freedom-of-the-press clause in the Constitution, was repeatedly, earnestly and forcefully urged, on the primary ground that its absence left the press open to restraint of its freedom. The Federalists argued that since Congress had no right to legislate on subjects not delegated to it for that purpose, and accordingly since it had no right to regulate the press, there was no need for such a protective clause in the Constitution. The Republicans simply answered that both the direct and implied powers of Congress were very broad, among those rights being an almost unlimited power of taxation, through which, as the history of England amply proved, the freedom of the press could be as effectively abridged as through censorship or licensing legislation.

It must be borne in mind, of course, that the argument of the Republicans prevailed, and the freedom-of-the-press clause was incorporated in the Constitution pursuant to their demand.

Stevens, in his *Sources of the Constitution of the United States* (p. 221), traces the origin of the demand for the freedom of the press clauses in the American con-

stitutions to the laws and usages of England, and demonstrates the correctness of his statement by showing that the debates in Pennsylvania with reference to a freedom of the press clause in the Constitution of that State, just prior to the adoption of the First Amendment to the Constitution of the United States, pointed specifically to the English abuses.

In the light of the foregoing, the speeches in the controversy over the ratification of the Federal Constitution in Pennsylvania assume considerable importance in the instant discussion. The argument of the Federalists is summed up in an address delivered at Philadelphia on October 6, 1787, by James Wilson, who had been a delegate from Pennsylvania to the National Constitution Convention:

> "When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve * * * But in delegating foederal powers, another criterion was necessarily introduced and the congressional authority is to be collected, not from tacit implication, but from the positive grant, expressed in the instrument of union * * * This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: * * * *For instance the liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the foederal government, to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the import should be general in its operation.*" (Emphasis supplied.) Ford, Paul Leicester,

Pamphlets on the Constitution of the United States, published during its discussion by the people, 1787-1788, Brooklyn, 1888, p. 156-157.

Prompt answer was made to Wilson, in an address at Philadelphia on November 3, 1787, by Eleazar Oswald, Revolutionary patriot and Lieutenant Colonel of the Continental Army:

"To the Citizens of Philadelphia:

"The important day is drawing near when you are to elect delegates to represent you in a convention, on the result of whose deliberations will depend in a great measure your future happiness.

"This convention is to determine whether or not the commonwealth of Pennsylvania shall adopt the plan of government proposed by the late convention of delegates from the different states which sat in this city * * *

"The objections that have been made to the new constitution are these: * * *

"*The Liberty of the Press is not secured, and the powers of Congress are fully adequate to its destruction, as they are to have the trial of libels, or pretended libels against the United States, and may by a cursed abominable Stamp Act (as the Bowdoin administration has done in Massachusetts) preclude you effectually from all means of information. Mr. W. has given no answer to these arguments.*" (Emphasis supplied.) Address made at Philadelphia, Nov. 3, 1787 by "An officer of the Late Continental Army", reprinted in the "Independent Gazeteer", Nov. 6, 1787. *Pennsylvania and the Federal Constitution,* Ed. by J. B. McMaster and F. D. Stone, Phila. 1888, p. 179, 180, 181.

In the controversy in New York, the spokeman of the Federalists was John Jay, who had been a delegate to the

Philadelphia convention. Jay published a pamphlet containing an argument almost identical to that made by James Wilson in Pennsylvania. Among the leaders of the Republicans in New York was Melancthon Smith, delegate from the State to the Continental Congress and the Constitutional Convention. Smith had prepared a pamphlet on the proposed constitution, and when Jay's pamphlet appeared, Smith added a postscript to his own, for the specific purpose of challenging Jay's position on the freedom of the press, and of demonstrating that the absence of a constitutional provision guaranteeing this fundamental right to the people, left Congress free to abridge it.

> "Since the foregoing pages have been put to the press, a pamphlet has appeared, entitled, 'An address to the people of the State of New York, on the subject of the new constitution, etc.' * * *
>
> "'We are told (says the author), among other strange things, that the liberty of the press is left insecure by the proposed constitution * * * It is absurd to construe the silence of this, or of our own constitution relative to a great number of our rights into a total extinction of them; silence and a blank paper neither grant nor take away anything.'
>
> "It may be a strange thing to this author to hear the people of America anxious for the preservation of their rights, but those who understand the true principles of liberty, are no strangers to their importance. The man who supposes the constitution, in any part of it, is like a blank piece of paper, has very erroneous ideas of it. He may be assured every clause has a meaning, and many of them such extensive meaning, as would take a volume to unfold. The suggestion that the liberty of the press is secure, because it is not in express words spoken of in the constitution * * * is puerile

> and unworthy of a man who pretends to reason. We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, etc., and therefore the constitution ought to have stipulated for its freedom * * * ''
>
> Postscript to
>
> ''An address to the people of the State of New York: showing the necessity of making amendments to the constitution proposed for the United States, previous to its adoption. By a Plebeian. Printed in the State of New York; MDCCLXXXVIII, 8 vo-pp. 26.''
>
> ''Written by Melancthon Smith of New York, a member of the Continental Congress (1785-88), and of the New York State Convention, in which he opposed, but ultimately voted for the ratification of the new Constitution.'' Ford, Paul Leicester *Ibid.,* p. 111, 113, 114.

Following the ratification of the First Amendment, Mr. Madison, its author, said of that guaranty:

> ''The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.'' Report on the Virginia Resolutions, *Madison's Works,* Vol. 4, p. 543.

From the foregoing brief historical resume no conclusion can be reached other than that if Congress is without power to restrain the press then certainly the courts are without power to ''effect the legislative will'' in such a manner as to result in such regulation of the press as was ordered by the District Court in this case.

Conclusion

For the reasons given the order of the District Court should be set aside and the case remanded with directions to dismiss the complaint of the United States.

Respectfully submitted,

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