The Critical Role of the Press: Issues of Democracy

Anthony Lewis

New and subtle dangers threaten the freedom of the American press.

We are here because, nearly 150 years ago, an American newspaper editor defied a mob. Elijah Parish Lovejoy would not give up his opposition to slavery — or his right to express that belief. He paid with his life. I am honored and touched that Colby College has chosen me to help celebrate the Lovejoy tradition.

What is that tradition? The committee concerned here at Colby speaks of "the Lovejoy heritage of fearlessness and freedom." But those words convey a different meaning, a different urgency to every generation. There are no mobs hunting abolitionist editors today; the American press is far more established than when Elijah Lovejoy moved his printing press from Missouri to Illinois in search of freedom to publish; judges have built the First Amendment into a house of many rooms. But there are new dangers to freedom, subtler but no less threatening than a lynch mob.

My subject is those new dangers: the challenges that Elijah Lovejoy would confront and resist today. Let me say first that when I speak of freedom of the press, I do not mean freedom for a special, favored class. In my view the First Amendment is not a device to protect the business of publishing or those involved in that institution alone. It is a safeguard for our whole constitutional system.

That was the profound purpose that James Madison saw in the constitutional guarantees of free speech and a free press. Madison was an influential member of the Constitutional Convention in 1787, and he was the principal author of the First Amendment and the other nine in the Bill of Rights. When a Federalist Congress in 1798 passed the Sedition Act, making it a crime to publish false statements about political leaders that would bring them into disrepute, Madison protested. The act "ought to produce universal alarm," he said, "because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."

Think about that phrase: "the right of freely examining public characters and measures." The language sounds a bit antique, but the idea remains at the heart of the American political culture. Under our republican system of government the people of the United States are its ultimate sovereigns, and they have an essential function in the system: to examine and criticize the work of those who temporarily govern the country.

In other words, more is involved in the First Amendment speech and press clauses than the value of self-expression, important as that is: the right of the soapbox orator or the editor to speak his mind. The working of our political system is involved. For the premise of that system — the Madisonian premise — is that free debate on public issues, however inconvenient it may be for the ruler of the day, improves public policy. Judge Learned Hand put it: The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

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A great Supreme Court decision of modern times, familiar to us all, really made the point about the larger significance of First Amendment freedoms, though not everyone has so understood it. I refer to *New York Times* v. *Sullivan*, the leading libel case decided in 1964. The Court held that the Constitution barred a public official from recovering libel damages for a false statement about him unless he could prove that the statement was made with knowledge of its falsity or

in reckless disregard of the truth. The press has often treated that decision as *its* victory. But it was much more than that. Justice Brennan, writing for the Court, quoted Madison on the essential role of free public discussion in a democratic society. He noted that public officials are immune from libel suits for what they say in the course of their duties. The same must be true, he said, for "the citizen-critic of government: It is as much his duty to criticize as it is the official's duty to administer." Madison's premise still applies.

If the fundamental freedom involved in these issues is that of the people at large, as I believe, not of reporters and editors and publishers as a special class, how should we in the business see ourselves? What is our role in the Madisonian system? I think the best modern answer was given by another member of the present Supreme Court, Justice Powell. In our free society, he said, "public debate must not only be unfettered; it must also be informed." And "an informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. . . . By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment."

Notice that Justice Powell talks about the importance of the press in obtaining information for the public: that is to say, facts about public issues. That may seem obvious to us today, but it is a great change from the past. In Elijah Lovejoy's day, and really for a hundred years after, the struggles over freedom of speech and press turned on the right to express opinions. Lovejoy and hundreds of others were persecuted for beliefs that were considered subversive by authority or that offended the prejudices of the mob. The early Supreme Court cases on freedom of speech, the ones that called forth the transforming dissents of Holmes and Brandeis, were all tests of the right to argue unpopular beliefs: socialism, the religious ideas of the Jehovah's Witnesses and so on. The Supreme Court and the rest of us gradually came to understand the First Amendment as assuring freedom for the crankiest, the most irritating opinion: as Holmes said, "freedom for the thought that we hate."

Today the issue is facts, and that battle is far from won. Reporters and editors who try to provide our sovereign citizens with the information needed to understand and control public policy face menacing obstacles. Two are particularly serious, and I think are growing worse. They are the threat of libel suits and the fanatical effort of the present United States Government to censor information about its most important policies. I list those two threats to freedom of the press in ascending order of danger.

Libel first. It is a battle that seemed to have been won for freedom nearly twenty years ago, when *New York Times* v. *Sullivan* was decided. This country, Justice Brennan said, has "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." But the way libel cases have been going lately is certainly inhibiting the American press.

The libel burden may affect not only the press but local citizens expressing their minds.

The Wall Street Journal recently described the effect of a single libel suit today on the paper that Elijah Lovejoy founded: the *Alton*, Illinois, *Telegraph*. In 1969 two *Telegraph* reporters got a tip that underworld money was going to a local builder. They wrote a memorandum to a Justice Department investigator in an effort to check the story. The local builder sued for libel in the memo, which he said had led Federal officials to cut off his credit — the memo only, I emphasize, because the *Telegraph* never published a story on the matter. A local jury awarded the builder $9.2 million in damages. In order to appeal, the paper was required by Illinois law to put up a bond of more than $10 million. It entered bankruptcy proceedings. An Illinois appellate court then refused to hear the appeal, saying the case belonged in bankruptcy court. Last year the *Telegraph* settled for $1.4 million.

The headline at the top of *The Wall Street Journal* story was "Chilling Effect." The story said the *Alton Telegraph* had just about stopped looking into wrongdoing by officials — and the *Telegraph* is a paper whose investigative work once led to the resignation of two Illinois Supreme Court justices. Inside the paper, there are all kinds of cautionary rules to ward off heavy libel damages in future. Reporters check with editors before writing letters; reporters' notes are kept to a minimum and often destroyed, to prevent their use by libel plaintiffs. When someone called recently and said there was misconduct going on in a sheriff's office, the editor decided against investigating the story. "Let someone else stick their neck out this time," he said.

I do not need to tell you that the chilling effect of libel suits is not limited these days to the *Alton Telegraph*. It has affected many press enterprises, small and large, print and broadcast. *The Milkweed*, a tiny monthly that reports on the milk industry in Madison, Wisconsin, was sued for $20 million by a milk cooperative for publishing a story, based on government files, about the coop's finances. *The Milkweed* is a one-man operation — Peter Hardin is the owner and one-man staff. It took much of his income and months of his life to fight that suit. He won, but at a terrible cost. The libel burden may affect

not only the press but local citizens expressing their minds, as a case here in Maine has just shown. Three couples in Cape Elizabeth wrote a letter to the police chief complaining that a policeman who was their neighbor had threatened their children and showed a violent temper were sued by the policeman for libel. Last month a jury awarded the policeman $52,300 in damages for that citizens' letter.

At the other end of the scale there is General Westmoreland's $120 million suit against CBS over a program charging that he and his staff juggled figures on enemy infiltration during the Vietnam War to make things look better than they were. The costs of that suit are going to be in the millions, whoever wins. And the potential damages are surely inhibiting, even to an enterprise as large as CBS. I have often wondered where

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libel plaintiffs get those enormous figures in the damages they claim to have suffered. I had a chance recently to ask General Westmoreland's lawyer, Dan Burt, where the $120 million had come from. He said he figured that there were 40 million viewers of the program, and if it were a regular movie they might have paid $3 each.

The more serious point about the Westmoreland suit is the issue of fact to be decided: What were the correct infiltration statistics in the Vietnam War, and were they juggled. I ask myself — I ask you — what such an issue is doing in a courtroom. Should a jury be deciding "the truth" about Vietnam? Every aspect of that war was and is the subject of bitter political debate. In my judgment there is no discrete "truth" to be found by a jury. Under our system — our Madisonian system — such issues are to be decided politically, not by a legal process that may, that almost certainly will, discourage critical debate.

Journalists, like other groups, tend to exaggerate their problems. When they say the First Amendment is crumbling, as they sometimes do, I am skeptical. But I think there is reason for concern about the trend of libel cases these days: the outlandish damages claimed and often awarded by juries, the burdensome cost of defending against the most worthless claim. And now there is doubt about the continuing availability of what has been the last essential protection against outrageous libel judgments: strict review of those judgments by judges of higher courts. The Supreme Court has just heard arguments in a case in which a libel plaintiff maintains that appellate judges should have no power to overturn what he won in the trial court unless it is "clearly erroneous." He won at trial on what I regard as a far-fetched claim, with no showing of any actual injury. If he wins in the Supreme Court, the victory that freedom appeared to have won in *New York Times* v. *Sullivan* will have been undone. It is serious.

But the more serious threat to freedom, the one that should concern us urgently as journalists and citizens, is the secrecy campaign being carried on by President Reagan and his Administration. I use the word campaign deliberately. We are all aware that in the last three years the Federal Government has taken steps to increase secrecy. But I am convinced that they are more than isolated steps. They reflect a methodical, consistent and relentless effort to close off the sources of public knowledge on basic questions of national policy: to upset the Madisonian premise that American citizens must be able to examine public characters and measures.

We have a dramatic example at hand: the exclusion of the press from the invasion of Grenada. I make no point here of some special privilege for reporters; I do not believe in that. The point, rather, is the one made by Justice Powell: that in the modern world the public necessarily relies on the press to find out what is going on. To keep reporters away from Grenada was to keep the public ignorant, and that was exactly the idea. Moreover, it worked. This is not the place to argue the merits of the invasion, the need for it. But the Reagan Administration was able for a week to control most of the facts bearing on those questions, to assure that during that crucial period the public heard only its version of events — and formed a lasting judgment on that basis. And so we heard that U.S. forces were bombing and shelling with surgical precision and thus had avoided causing civilian casualties — only to learn at the end of a week that a mental hospital had been bombed. We were told by the admiral in charge, Wesley McDonald, that there were at least 1,100 Cubans on Grenada, all "well-trained professional soldiers"; at the end of the week the State Department agreed with the Cuban Government's estimate that fewer than 800 of its nationals were on Grenada — and said only about 100 were "combatants." President Reagan said that the Soviet Union had "assisted and encouraged the violence" in Grenada, the bloody *coup*, but there is simply no evidence of such a Soviet role.

I take those few examples from many in an important story by Stuart Taylor Jr. in *The New York Times* of Sunday, November 6. It filled a full page inside the paper — I wondered myself why it was not on page 1 — with careful, meticulous reporting of the inaccurate and unproven statements made by Administration officials during the Grenada operation, and of the facts concealed. But will public awareness ever catch up with the truth? I doubt it. The reporter who has covered Ronald Reagan longer than anyone, and with a good deal of sympathy, Lou Cannon of *The Washington Post*, wrote:

"Reagan & Company believe that they won a pair of glorious victories on the beaches of Grenada two weeks ago. The first was the defeat of the ragtag Grenadian army and band of armed Cuban laborers. The second was the rout of the U.S. media. Reagan's advisers are convinced that the media are vir-

tually devoid of public support in their protests of both the news blackout of the invasion and the misleading statements made about it."

Yes, indeed. The President and his men have good reason to feel that way. Anyone in the press who thought the public loved all of us and our business — and you would have to have been pretty silly to think that — must have been disabused in the Grenada affair. John Chancellor said his mail was running 10 to 1 against the protests that he voiced against the exclusion of reporters, and I think that was not untypical. Standing up for the proposition that the press has a right — no, a duty — to examine the officially-stated premises of a war is not going to be easy. But then it was not easy for Elijah Lovejoy to stand up to the mob in Alton, Illinois.

I do not mean to put overwhelming emphasis on Grenada. It is part of a pattern whose significance is much greater as a whole. For example, President Reagan's preference for secret wars is not limited to Grenada. He is encouraging and financing one against Nicaragua, and doggedly resisting Congressional efforts to end the covert character of that war. We have learned lately that he has also undertaken a secret military plan of significance in the Middle East: to finance a special forces unit in Jordan that would deal with trouble throughout the region.

Secrecy in government more generally has been an objective of the Administration from the day it took office. The President, by executive order, has broadened the system for classifying documents; under the new rules and attitudes thousands of documents of the 1950's are being withheld from historians. The Energy Department is proposing to punish the disclosure of all kinds of *un*classified information related to nuclear energy — some of it, such as plans to dispose of nuclear waste, information that has been and should be subject to public debate. The Administration has greatly weakened the Freedom of Information Act by bureaucratic devices in administering it. By executive decisions it has kept Americans from traveling to Cuba and protected us from the dangerous opinions of such would-be visitors as the Rev. Ian Paisley of Northern Ireland and Salvador Allende's widow.

But the most important single action by President Reagan to insulate the government from informed criticism was his order last March imposing on more than 100,000 top officials in government a lifetime censorship system that would make them, even after leaving government service, submit for clearance substantially everything they want to write or say on national security issues: books, articles for newspaper Op Ed pages, even fiction. Before Cyrus Vance or Henry Kissinger could write about a disaster in Lebanon or an invasion of Grenada, he would have to submit to censorship — very possibly by officials of a politically different Administration.

The practical consequences of such a censorship system would be forbidding. The C.I.A., with a much narrower system focused on a single agency, has had a burden clearing manuscripts and has often been accused of delays and arbitrariness. How will it work when not one but many different agencies

Elijah Parish Lovejoy

Born in Albion, Maine, and a 1826 graduate of Colby College, Elijah Parish Lovejoy was an editor who crusaded against slavery. He published strong anti-slavery views in the *Observer*, a weekly in St. Louis, and continued his crusading journalism in Alton, Illinois, where mobs destroyed three of his presses.

Lovejoy was killed the day before his thirty-fifth birthday while guarding another new press; he is considered to be the first martyr to freedom of the press in the United States. In his life and in his death, he helped to advance the cause of abolition in the North.

To honor and preserve the memory of Elijah Parish Lovejoy, since 1952 Colby College has annually selected a member of the news profession to receive the Lovejoy Award. The recipient may be an editor, reporter, or publisher whose integrity, professional skill, and character have, in the opinion of the judges, contributed to the country's journalistic achievement.

The thirty-one previous recipients of the award include six Nieman alumni:

1953 — Irving Dilliard, NF '39, editorial page editor, *St. Louis Post-Dispatch*

1959 — Clark R. Mollenhoff, NF '50, reporter, Cowles Publications, Washington, D.C.

1963 — Louis M. Lyons, NF '39, Curator, Nieman Foundation

1967 Edwin Lahey, NF '39, chief correspondent, Knight Newspapers, Inc., Washington, D.C.

1978 — Clayton Kirkpatrick, editor, *The Chicago Tribune,* and Jack Landau, NF '68, director, Reporters Committee for Freedom of the Press, Washington, D.C.

1983 — Anthony Lewis, NF '57, syndicated columnist, *The New York Times*; Lecturer on Law, Harvard University.

(Positions listed are those held at the time of the individual's selection for the award.) Lovejoy Selection Committee Emeriti Members include Dwight E. Sargent, NF '51, and John Hughes, NF '62. □

are involved in looking over the same proposed article or book? When a daily newspaper is waiting for a timely piece? What professors or journalists will be interested in a few years of government service — that traditional and useful American role of the in-and-outer in government — if the result would be to tie them forever to a requirement that they submit much of their work to censors before anyone else could see it?

You might think that such concerns would be on the minds of the Federal officials planning this massive censorship structure, but I do not think they are: not at all. The planners of the Reagan censorship will be entirely content if former officials are effectively unable to write for *The New York Times* or *The Boston Globe*, if manuscripts are tied up for years in a censorship labyrinth, if independent-minded men and women are discouraged from going into public service. They *want* to reduce public discussion of national security issues, and they are focused on that aim with fanatical purpose. They want the power to decide those issues themselves, in secret.

> Where is the legal authority for the President of the United States to impose a lifetime censorship system on officials apart from Congressional statutes?

Notice something about the secrecy measures I have mentioned: Every one of them was taken without asking Congress for legislation. Where is the legal authority for the President of the United States to impose a lifetime censorship system on officials apart from Congressional statutes? In my opinion there is none. Why didn't this President ask Congress for such a system if it was urgently needed? The answer is evident: He knew he could not demonstrate the need, and he knew Congress would say "no" to the idea. And the same evasion of Congress is there in so many other instances: the covert war on Nicaragua, the use of bureaucratic devices to cripple the Freedom of Information Act, the refusal to invoke the War Powers Act in Lebanon or Grenada. That consistent practice — the attempt to exercise power by Executive action — shows again that more is at stake here than freedom of the press. The integrity of our constitutional system is at stake.

What can we do about the campaign for secrecy in government? There is a tendency in liberal America, and I am not immune from it, to look to the courts to save us from dangers to liberty. But in this situation it would be folly to rely on judges. The reason is simple. The Reagan Administration's secrecy measures are cloaked in claimed needs of national security, and judges are extremely reluctant to take a hard look at such claims. The Supreme Court, for example, told by the Executive that Philip Agee, a C.I.A. renegade, was threatening the country by his speech-making abroad, upheld the revocation of his passport in an opinion saying that Mr. Agee was not engaged in "speech." Where there is talk of "national security," we cannot expect the Supreme Court to do much for the First Amendment — and even less if there is a second Reagan Administration and Justices William Clark and William French Smith join the bench.

Some lawsuits are unavoidable. But the press should certainly not rush into them with any great confidence in this area — not, for example, try to bring a test case challenging the exclusion of reporters from Grenada: an idea that I have heard is under discussion and that I think would fail disastrously.

What else, then? I think there is no alternative to fighting the threat of repression in the arena of Congress and public opinion. And despite the public's skepticism about the press these days, I believe there is hope in such a battle. The Senate, a Republican Senate, has recently adopted an amendment barring implementation of the lifetime censorship order until next April 15, while Congress studies it. There is a concern, a sensitivity that can be reached — *if*. The if, in my judgment, is a convincing demonstration that what is involved is not just a fight between the press and the rest of the country, a fight between Us and Them, but is a struggle to preserve the rights of all citizens in a democracy.

The press has not always been effective or even adequately concerned about issues of democracy when its own ox is not being gored. You may see bigger headlines when a newspaper loses a case in the Supreme Court than when the President issues a sweeping order designed to impose on government a system of prior restraint just like the English press licensing system that the Framers of our Constitution thought they were excluding forever from this country. To my astonishment, a columnist in *The Wall Street Journal* actually welcomed the Reagan censorship order as "a fine idea."

But I think editors and reporters mostly now do understand that freedom is indivisible, that the press weakens its own safety if it cares only about itself or separates itself from the public interest in free and informed debate. A complicated and deadly serious challenge faces those today who would follow the example of Elijah Parish Lovejoy. □