NAT HENTOFF

The battle of 'Richmond'

"THE AMERICAN PEOPLE won a victory of enormous importance a few weeks ago," Katharine Graham, who chairs the American Newspaper Publishers Association, wrote in August. "Unfortunately, not many of them are fully aware of it."

The victory was a 7-to-1 Supreme Court decision in *Richmond Newspapers* v. *Virginia* declaring that under the First Amendment, the press and the public have a constitutional right to attend criminal trials. Graham was far from alone in her dance around the Liberty Tree. Dan Paul, one of the nation's most respected First Amendment lawyers, called *Richmond* "one of the two or three most important decisions in the whole history of the First Amendment."

And indeed, John Paul Stevens, one of the justices in the majority, trumpeted: "Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with *access to important information* is an abridgment of the freedoms of speech and of the press protected by the First Amendment." (Emphasis added.)

What bothered Katharine Graham, in her message to other newspaper publishers throughout the land, was that most of the stories about *Richmond* have done little to explain to readers why the ruling was a victory for *them*. "I suspect," she said, "that all too many of our readers viewed this decision as just another round in the mystifying wars constantly being fought by an assertive press."

Graham is probably right. Coverage of the Court is customarily so shallow that except for readers of her own *Washington Post*, the *Kansas City Star*, or a few other papers, most of the citizenry have only the vaguest notion, if any, of the portents of *Richmond*—not all of which, by the way, necessarily warrant all the present huzzahs among the press. Although it was not addressed to me, I accept Graham's charge to illuminate, so far as that is possible, the *Richmond* decision.

First, however, why was it necessary? After all, Chief Justice Warren Burger, writing for the overwhelming majority of the Court in *Richmond*, spends many pages on a rather lyrical history of the openness of criminal trials, going back as far as one can trace that institution in Britain and then in the colonies.

As in this declaration of a general court in Kent, in 1313: "The King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and their own welfare." (Emphasis added.)

Coverage of the Court is so shallow that few people have any notion of the Richmond case's importance.

Given the rich and ample precedent for public criminal trials, the July 2, 1980, decision in *Richmond* v. *Virginia* should have been no surprise. But there is a little tangled Court history involved here. Exactly a year before, the Court, in a 5-to-4 vote, ruled that the press and the public can be barred from pretrial hearings, and indeed from criminal trials, under the Sixth Amendment. The Court noted that the Sixth Amendment guarantees the accused the right to a public trial, but that there is no such guarantee in the amendment for the press and public to attend a criminal trial. And there can be times when the accused's fundamental right to a fair trial requires that it be closed.

Actually, the case (*Gannett Co.* v. *DePasquale*) concerned only a pretrial hearing which two men indicted for murder wanted closed lest there be injurious pretrial publicity. The Court's majority decision, however, written by Justice Potter Stewart, appeared to extend the barring of press and public to trials as well as pretrial hearings—if the defendant, the prosecution, and the judge agree.

Have I confused you? Well, it soon became clear that the Court itself didn't know exactly what it meant in *Gannett*. Reacting to press characterizations of the decision as "cloudy" and "incoherent," the Chief Justice made a public point of insisting that the ruling applied solely to pretrial hearings. Justice Harry Blackmun just as publicly disagreed with the Chief, claiming that *Gannett* applies to all proceedings in a criminal case. Three other justices felt impelled to clarify the intent of the decision, thereby muddying it all the more.

Meanwhile, lower courts took *Gannett* as a grand invitation to evict press and public from their proceedings. (In one West Virginia case, the press was barred, but not the public.) During the year before *Richmond* v. *Virginia* was decided, there were more than 270 efforts to close criminal justice proceedings, of which 160 were successful. Of those 160 secret proceedings, 126 were pretrial hearings and 34 were actual trials. Contrast this with Hugo Black's statement in the 1948 case, *In re Oliver*: "We have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."

THE SUPREME COURT MAY or may not follow the election returns but the justices do read the newspapers, and it was evident that unless they said something clear and soon about whether there is a presumption of openness for criminal trials, less and less of a distinction would be made between closing pretrial and trial proceedings.

In *Richmond*, a murder defendant in Virginia was undergoing his fourth trial on the same charge (the three others had ended in mistrials). Fearing that the press would bring some of the testimony

NAT HENTOFF writes a monthly column on civil liberties for INQUIRY. His book The First Freedom: A Tumultuous History of Free Speech in America *was recently published by Delacorte.*

from the previous trials to the jury's attention, the defense attorney, citing *Gannett,* moved to close the trial. The prosecution did not object, and the judge so ordered. The public was also excluded.

While in *Gannett* the justices (except for Lewis Powell) had focused on the Sixth Amendment, in *Richmond Newspapers* they got the trial doors open again for the public and the press by concentrating on the First. Said the Chief Justice: "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."

And then Burger said something else that the press may not have expected. He mentioned, however warily, the press's right of access to information. It has long been clear that the press has a nearly absolute right to publish whatever information it gathers without censorship, without prior restraint. Any punishment of the press for what it publishes—libel, obscenity—must come after the printing. But the Court in the past has been notably cool to what the press considers the essential corollary right of *access* to information. Even Justice Stewart, a sometime friend of the press, noted in his renowned 1974 Yale Law School speech that: "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."

Yet now, in *Richmond,* the Court says the press has at least enough of a constitutional right of access to prevent a judge from barring reporters from a criminal trial. (Unless that judge has damn good reasons in terms of the defendant's constitutional rights. More of which anon.)

Of all the justices who had something of their own to say in *Richmond* (there were four concurring opinions and one dissent), John Paul Stevens was the most emphatic about the "right of access" breakthrough. Stevens had fought unsuccessfully for such a First Amendment right of access to prisons in *Houchins* v. *KQED* (1978). There he had quoted James Madison: "A popular Government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives."

Therefore, Stevens went on: "It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."

Accordingly, in the *Richmond* case, Stevens was practically crowing. ("This is a watershed case.") However, he couldn't resist a dig at his brethren for not having had this First Amendment revelation when it came to access to prisons. ("The plight of a segment of society least able to protect itself.")

There is considerable doubt, however, that the majority of the brethren are even now anywhere near Stevens's view that the press's First Amendment right of access extends beyond courtrooms. Brennan and probably Marshall would go along, but I do not yet share the leaping optimism of some First Amendment lawyers that *Richmond* will inexorably open the prisons and other restricted governmental domains. To be sure, there are seeds in some of the various opinions in this case that could flower into a much broader First Amendment right to access; but as Jack Landau of the Reporters Committee for Freedom of the Press observes, "There have been seeds that have been sown before which have dried up and shriveled away."

STILL, THERE IS THE clear victory for open courtrooms. Except: Burger ends the majority opinion by saying that criminal trials must be public "absent an overriding interest articulated in findings." In other words, absent a compelling argument for closing the proceedings by the defense or by the prosecution. (An illustration of the latter might be the need to protect the identity of an undercover witness.)

In the abundance of *Richmond* opinions it is exceedingly difficult to find any sure guidelines on what "overriding interests" could lead a judge to balance away the First Amendment rights of the press and the public to attend a trial. However, in a close analysis in the *National Law Journal,* James Goodale, long the resident constitutionalist at the *New York Times* and now in private practice, has come up with a likely set of guidelines for future cases.

On the basis of *Richmond* as well as previous opinions by the justices, Goodale believes that there is a majority on the Court (probably six votes) for a test that would allow the closing of a trial if the defense were able to show: (1) immediate and irreparable damage to the defendant's fair trial rights, (2) no available alternatives to booting out the press and public, and (3) the likelihood that closure would be effective and there would be no leaks.

But what about pretrial hearings? In *Richmond,* the Chief Justice explicitly distinguished the case from *Gannett.* The latter, Burger persisted in saying, had to do with only *pretrial* hearings. This case has to do with *trials.*

Courts can still close pretrial hearings that might reveal hair-raisingly improper police methods.

So *Gannett* has not been overruled. Yet some 90 percent of all criminal cases are decided, one way or another, at pretrial hearings. It's certainly worth having the victory of *Richmond;* but lower courts will still be able to close, for instance, suppression-of-evidence hearings, which might reveal, among other things, hair-raisingly improper police methods.

Nonetheless, there appear to be—and I am somewhat more cautious about this prediction than are most analysts of *Richmond*—overtones of the decision that will lead eventually to the opening of most pretrial procedures. Soon after *Richmond,* the Vermont Supreme Court declared that although that decision does not expressly apply to pretrial hearings, "it would seem fair to infer that it does." Without losing a beat, however, the Vermont court went on to say that recognizing a First Amendment right of access to any judicial proceeding doesn't mean recognizing it as an absolute right. "Other interests" must be weighed against it.

Says Floyd Abrams, the nation's top-seeded First Amendment attorney: "We

are probably back to where we were two years ago with open trials, and now and then a closed pretrial suppression hearing, when a criminal defendant can make a strong showing."

THERE IS ONE POTENTIAL danger in *Richmond*, according to Abrams. If he's right, this could be one of the First Amendment's costliest victories. On the one hand, there is the seeming breakthrough in terms of establishing a First Amendment right to access for the press. Justice Stevens celebrated the occasion with a fanfare of infinite possibilities: "Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."

Remember, however, that this breakthrough is set in the context of judicial proceedings—whether trial or pretrial—in which the balancing of colliding constitutional interests is a common practice. The Court, in *Richmond*, has established a strong presumption of openness in trials, but it has not made access an absolute First Amendment right. On Sixth Amendment grounds, a defendant may still be able to convince a judge to banish the press.

If Abrams is right, this could be one of the First Amendment's most costly victories.

What disturbs Floyd Abrams is that, as time goes on and the concept of access rights expands, the courts—having become accustomed to balancing First Amendment rights of access against other interests—may well begin to extend that balancing act into the area of prior restraint.

"What the press has now," says Abrams, "is a nearly absolute right to print whatever it can get. During the first stage of the Pentagon Papers case, for instance, Federal District Judge Murray Gurfein asked Alexander Bickel, a lawyer for the *Times*, why that eminently respectable newspaper would want to print such material. Bickel told him, 'Your honor, with all respect, you have no right to ask me that question.' Bickel was correct. The *Times*, whatever its motivation, whatever it thought of the material, had a First Amendment right to go ahead and publish.

"But in right to access cases," Abrams continues, "judges are going to be asking—as, in let's say, a suit about a prison—'Why do you want to go in there?' Judges will be deciding whether the press has 'reasonable' grounds for access. Now, once judges start making rules as to what is 'reasonable' for the press to cover and what is not, we're going to be in a bad way. This kind of judicial thinking could slide over to some future Pentagon Papers or *Progressive* case. Is the newspaper being 'reasonable' in its intention to print? Is it being 'responsible'?"

For Floyd Abrams's fears about *Richmond* to materialize into a weakening of prohibitions against prior restraint would require federal judges capable of confusing these two quite separate areas of First Amendment law. However, having listened to and debated a number of federal judges at various symposiums and conferences in the past couple of years, I too am afraid that such confusable jurists are not in short supply.

One unequivocally positive result of *Richmond*, however, may have been to disabuse judges and justices of the illusion that reading a transcript of a court hearing is as good as being there. One of Potter Stewart's justifications for excluding the press from the pretrial hearing in *Gannett* was that the journalists on the story nonetheless had no problem "accurately and completely" informing the public later because a transcript had been made available to them.

In *Richmond*, Mr. Justice Brennan observed forcefully that "the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, 'recordation . . . would be found to operate rather as cloak than check. As cloak in reality, as check only in appearance.'"

Not much of a victory, you might say—this piercing of the pretensions of a transcript. But at least it's a clear victory. ❑

POLITICS

TOM BOURNE

Bleeding the self-employed

THE INTERNAL REVENUE Service is the sweetest little moneymaker the federal government ever had. The cost of running the agency, *Fortune* magazine reported earlier this year, is forty-six cents for every $100 collected. With margins like that, Chrysler could buy out the entire Japanese auto industry. For the IRS, however, it's just not good enough.

Flushed with their own success, the tax boys now dream of collecting $600 million annually by bringing self-employed persons into the withholding system. "Withholding benefits not only the government but taxpayers by providing a gradual and systematic way for taxpayers to pay their taxes and insuring the social security coverage that they need and are entitled to." That's what Donald C. Lubick, Assistant Secretary of the Treasury for Tax Policy, told the House Subcommittee on Select Revenue Measures last June. Lubick was testifying in favor of HR 5460, a bill that would require individuals and businesses to withhold a "modest" 10 percent from fees paid to independent contractors.

Since 1943, when the "pay as you go" plan was approved by Congress, self-employed people have paid their taxes in advance, quarter by quarter. Then, in 1972, the IRS spent some $2 million on a survey of 5152 self-employed persons and found that 47 percent of all independent contractors did not report any of the compensation they had received. And 62 percent did not pay into the social security fund as provided by the Self-Employment Contribution Act (SECA). Superficially, the survey seemed to portray all self-employed workers as chiselers and tax cheats. A closer exami-

TOM BOURNE is a free-lance writer in southern California.