

# Freedom of the Press

*"If it were left to me to decide whether we should have a government without a free press or a free press without a government, I would prefer the latter."*

—Thomas Jefferson

The First Amendment guarantees freedom of the press. It protects us from government  **censorship** of newspapers, magazines, books, radio, television, and film. Censorship occurs when the government examines publications and productions and prohibits the use of material it finds offensive. Traditionally, courts have protected the press from government censorship. For example, in 1966 the Supreme Court said that "justice cannot survive behind walls of silence." It said this to emphasize our system's distrust of secret trials. In addition to providing information about news events, the press subjects all of our political and legal institutions to public scrutiny and criticism.

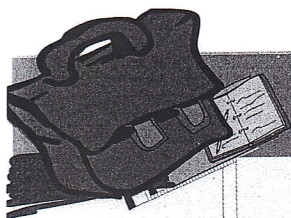
The Constitution's framers provided the press with broad freedom. This freedom was considered necessary to the establishment of a strong, independent press sometimes called "the fourth branch" of government.

An independent press can provide citizens with a variety of information and opinions on matters of public importance. However, freedom of the press sometimes collides with other rights, such as a defendant's right to a fair trial or a citizen's right to privacy. In recent years there has been increasing concern about extremely aggressive journalism, including stories about people's sex lives and photographs of people when they believed they were in a private setting.

*When should the government be allowed to prevent the press from publishing information?*



Among the difficult questions that government and the press have confronted are these: When can the government prevent the press from publishing information? When can the government keep the press from obtaining information? When can the government force the press to disclose information? Is freedom of the press limited in places such as schools or prisons? What happens when the government is the press, as in the case of publicly owned radio and television stations?



## The Case of . . .

### The Televised Candidate's Debate

date for Lieutenant Governor, Forbes won a majority of the counties in the Third Congressional District.

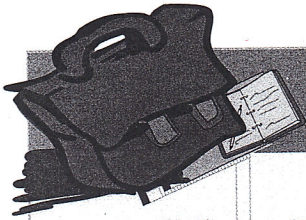
**T**he Arkansas Educational Television Commission, a state-owned public broadcaster, sponsored debates between the major political party candidates for the 1992 Congressional election in Arkansas' Third Congressional District. Ralph Forbes, a ballot-qualified independent, sought permission to participate in the debate. The television station's staff determined that Forbes had not generated enough enthusiasm for his campaign from voters and did not include him in the debate. Forbes sued, contending that his exclusion violated his First Amendment rights.

The television station argued that its decision was a viewpoint-neutral exercise of journalistic discretion. Staff did not invite Forbes because he lacked serious voter support, not because of his views.

Forbes argued that, in this case, the station is owned by the state and therefore the government would be deciding who is and who is not a viable candidate. This, Forbes contends, is a decision that must be left to the voters. In addition, in an earlier campaign when he ran as a Republican party candi-

#### PROBLEM 38.1

- a. What arguments can the television station make to keep Forbes out of the debate?
- b. What arguments can Forbes make that would enable him to participate in the debate?
- c. How should this case be decided?
- d. How important are televised debates between candidates?
- e. Could a third party candidate with only a modest level of support make a difference in the outcome of an election? Explain.
- f. Should our political system do more to encourage participation from candidates who are not in the two major parties? Why or why not?
- g. Should a government-owned television station provide an automatic right of access for debates to all candidates who qualify to appear on the ballot? Give your reasons.



## The Case of . . .

### The Gag Order

**S**ix people were brutally murdered in their home in a small Nebraska town. The murders and the later arrest of a suspect received widespread news coverage. At a pretrial hearing, which was open to the public, the prosecutor introduced a confession and other evidence against the accused. Both the judge and the lawyers believed that publication of the information would make it impossible for the suspect to have a fair trial before an unbiased jury. As a result, the trial judge issued a gag order, which prohibited the news media from reporting the confession and any other evidence against the accused. Members of the news media sued to have the gag order declared unconstitutional and removed.

#### PROBLEM 38.2

- a. What happened in this case? Why did the judge issue a gag order?
- b. Should judges be able to close criminal trials to the press? If so, when and why?
- c. Which is more important: the right to a fair trial or the right to freedom of the press? Explain your answer.
- d. As a practical matter, how could the court protect the rights of the accused without infringing on the rights of the press?

### PROHIBITING PUBLICATION

In the Case of the Gag Order, the judge was concerned about the defendant's Sixth Amendment right to a fair trial. The reporters were concerned about their First Amendment right to freedom of the press. This case presented a conflict between two important constitutional rights: free press and fair trial.

In 1976, the U.S. Supreme Court decided that the gag order was unconstitutional. The Court held that the trial judge should have taken less drastic steps to lessen the effects of the pretrial publicity. The Court suggested postponing the trial until a later date, moving the trial to another county, questioning potential jurors to screen out those with fixed opinions, and carefully instructing the jury to decide the case based only on the evidence introduced at the trial.

If the gag order had been approved, it would have amounted to a **prior restraint** (censorship before publication) on the press. Attempts to censor publications before they go to press are presumed unconstitutional by the courts. Prior restraint is only allowed if (1) publication would cause a certain, serious, and irreparable harm; (2) no lesser means would prevent the harm; and (3) the prior restraint would be effective in avoiding the harm.

A few years after the gag order case, the U.S. Supreme Court ruled that the public and the press usually have a right to attend criminal (and probably civil) trials. Trials can only be closed if there are very important government interests at stake and no less-restrictive way to satisfy those interests.

Another example of a government attempt to impose censorship before publication took place in 1971, when a government employee gave top-secret documents about origins of the Vietnam War to several newspapers. The documents outlined America's past conduct of the war in Vietnam. The government sued to block publication of the so-called Pentagon Papers, but the Supreme Court refused to stop publication. It said that the documents, although perhaps embarrassing, would not cause "direct, immediate, and irreparable harm." However, if the documents had, for example, contained a secret plan of attack during a time of war, the Court might have blocked publication.

### PROBLEM 38.3

A state law made it a crime to publish the name of any youth charged as a juvenile offender. A newspaper published an article containing the name of a juvenile charged with the murder of another youth. The newspaper learned the name of the arrested youth by listening to the police radio and by talking to several witnesses to the crime.

- What is the state's interest in having and enforcing this law?
- What is the newspaper's interest in publishing the juvenile's name?
- How should the conflict be resolved?



*After completing an analysis of the Vietnam War, Defense Department official Daniel Ellsberg released portions of the study to The New York Times. The government tried to block its publication saying that national security would be threatened. This photo was taken in 1971.*



Does your state have a Freedom of Information Act? If so, what information is covered by the act? How can a citizen get information under the act?

## DENYING THE PRESS ACCESS TO INFORMATION

Another way in which the government tries to control the press is by denying the public access to certain information. Some people argue that denying access to information does not violate the rights of the press. Others contend that freedom of the press implies a right to obtain information.

To protect the public's access to government information, Congress passed the *Freedom of Information Act* (FOIA) in 1966. This law requires federal agencies to release information in their files to the public. The law allows citizens to obtain government information and records unless the material falls into the category of a special exception. Exceptions include information affecting national defense or foreign policy, personnel and medical files, trade secrets, investigatory records, and other confidential information.

The purpose of the law is to allow citizens to learn about the business of government. Federal agencies must respond to requests for information within 20 days. Agencies that refuse to release unprivileged information can be sued in federal court.

If you want to request information under the *Freedom of Information Act*, send a letter to the head of the agency or to the agency's FOIA officer. For a sample letter requesting information under the *Freedom of Information Act*, see Figure 38.1. An agency's address can be found in the *United States Government Manual* or in Appendix F. Write "Freedom of Information Request" on the bottom left-hand corner of the envelope.

Identify the records you want as accurately as possible. Although you are not required to specify a document by name, your request must reasonably describe the information sought. The more specific and limited the request, the greater the likelihood that it will be processed without delay. You are not required to demonstrate a need or even a reason for wanting to see the information. However, you are more likely to receive the documents if you explain why you want them. Some states have laws similar to the FOIA. These provide citizens with access to state agency files.

### PROBLEM 38.4

Rumors about the federal prison had circulated for years. Former prisoners claimed that rape, suicide, murder, and mistreatment were all common occurrences. The warden denied the allegations but refused to provide any information about prison conditions.

A newspaper asked permission to inspect the prison and interview the prisoners, but the warden denied the request. The newspaper then asked the federal government for information about the prison. The newspaper asked for a list of inmates and for information about anyone who had died or been injured while in custody. The government refused to provide any information.

The newspaper then did two things. It filed suit seeking admission to the prison, and it filed a *Freedom of Information Act* request for information about the prison.

- a. How would you decide this lawsuit? Explain.
- b. What are the newspaper's rights under the *Freedom of Information Act*? How would you decide its request for information?
- c. What rights or interests does the prison administration have in this case?
- d. Draft a letter to the government (Federal Bureau of Prisons) seeking information under the FOIA.

Agency Head or FOIA Officer  
 Title  
 Name of Agency  
 Address of Agency

Re: *Freedom of Information Act* Request

Dear \_\_\_\_\_:

Under the provisions of the *Freedom of Information Act*, 5U.S.C. 522, I am requesting access to (identify the records as clearly and specifically as possible).

If there are any fees for searching for, or copying, the records I have requested, please inform me before you fill the request. (Or: . . . please supply the records without informing me if the fees do not exceed \$ \_\_\_\_\_.)

**[Optional]** I am requesting this information (state the reason for your request if you think it will assist you in obtaining the information).

**[Optional]** As you know, the act permits you to reduce or waive fees when the release of the information is considered as "primarily benefitting the public." I believe that this request fits that category and I therefore ask that you waive any fees.

If all or any part of this request is denied, please cite the specific exemption(s) that you think justifies/justify your refusal to release the information, and inform me of the appeal procedures available to me under the law.

I would appreciate your handling this request as quickly as possible, and I look forward to hearing from you within 20 days, as the law stipulates.

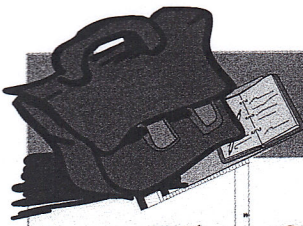
Sincerely,

Signature  
 Name  
 Address

**Figure 38.1**  
**Sample FOIA Letter**

## REQUIRING THE PRESS TO DISCLOSE INFORMATION

The government and the press also sometimes disagree over the extent to which the First Amendment protects a reporter's sources of information. This conflict arises because people may give reporters confidential information that is important to a news story. If the people thought they would be identified, they might be less likely to give journalists this information. In one case a reporter was summoned before a grand jury and asked questions about a crime. The journalist knew this information based on a confidential conversation. The journalist requested a **qualified privilege** that would have allowed him not to reveal the identity of the source of the confidential information. The Supreme Court refused to extend any special First Amendment right to journalists in this situation. The Court did say that states could pass "shield" laws that would give journalists such a privilege. More than half the states have done this, but even the shield laws can come into direct conflict with other very important constitutional rights.



### The Case of . . .

## The Shield Law

In 1976 the *New York Times* published a story suggesting that a doctor had murdered several patients. As a result, New Jersey authorities investigated the case and charged the doctor with murder.

Defense attorneys asked the *New York Times* to turn over the names of all persons who had been interviewed during the investigation and any other information it had. The defense contended that it could not properly prepare its case without this information. The *New York Times* and the reporter who conducted the investigation refused to turn over any

information. They argued that the First Amendment and a New Jersey law that protected a reporter's sources of information allowed them to withhold any unpublished material in their possession.

### PROBLEM 38.5

- a. What rights are in conflict in this case?
- b. Should the judge allow the reporter to withhold the information sought by the defense attorney? Why or why not?