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Punishing Critics of the High Court

When their egos are wounded by the press, the poohbahs of government, business and society engage in a variety of exercises to set the record straight. Some issue voluminous statements. Others call press conferences.

But the beleaguered big shot who is too fearful of the workaday press to submit to the give-and-take of an open confrontation with knowledgeable reporters often resorts to more devious methods. This is the style favored by Chief Justice Warren Burger, who was appointed by Richard M. Nixon, and whose hate affair with the media we have detailed. In one case, there is evidence that Burger's subordinates may even have resorted to Nixon-style dirty tricks to punish a critical reporter.

A glaring example of the Burger style was his reaction to an unfavorable story written by Dave Beckwith of Time magazine.

When Beckwith disclosed the court's decision on abortion before it was made public, the chief justice all but declared martial law at the court. He went to every employe he suspected of having talked with Beckwith and grilled them.

Employes who confessed that they had spoken with Beckwith were ordered to submit affidavits giving the substance of their conversations. Burger gathered the results of his research on the reporter's sources and methods and put them in a looseleaf binder labeled "Time."

Then the chief justice summoned Beckwith's editors to a dinner meeting.

Characteristically, Burger demanded that his remarks be off the record. Then he announced that there had been a leak at the court and boasted that he had found the source.

Finally, in an incredible *obiter dictum*, the man who is supposed to be the nation's most prestigious interpreter of the law told the Time editors, "Talking to a justice's clerks is the same as tapping his telephone."

In other words, as Burger views matters, a reporter in pursuit of a legitimate news story commits a felony when he simply talks to someone who might be able to furnish the facts.

This astonishing statement could be laughed off as nonsensical if it had not come from the chief justice of the United States, whose attitude sets the pattern for federal court decisions on First Amendment cases.

Another incident, though not so clear-cut, involved an article that was critical of hiring practices at the Supreme Court. It was written by Nina Totenberg for New Times magazine.

A letter to New Times that was printed in part and circulated widely in Washington attacked Totenberg in the most vehement terms. "The Totenberg piece is unforgivable," the letter said at one point. "It is only too bad that journalism does not have a mechanism for disbarment similar to that of the legal profession."

The author was Steven Charen, a graduate student who had spent a summer working with Mark Cannon, Burger's administrative assistant. The letter was written, without authority,

on stationery of the Vera Institute of Justice, a distinguished legal think tank where Charen once worked in a minor capacity.

Charen thoughtfully sent copies to all nine Supreme Court justices, to a television show on which Totenberg was appearing, and to a Washington lawyer who had praised the Totenberg article.

Fearful that her reputation was being irrevocably tarnished, Totenberg called Charen and confronted him. She told our reporters Tom Rosenstiel and David Ansley that Charen had admitted his letter was inspired by court officials. She quoted Charen as saying, "It was their idea." She said he told her that court officials had given him information for the letter, suggested topics he should discuss and instructed him where to send it for best effect.

Charen related a different story. He admitted that court officials had suggested places to distribute his letter. But he denied telling Totenberg that the idea for the letter came from them. "This is ridiculous," he said. "I would never have said that because it is totally untrue." In fact, he said, court officials initially tried to dissuade him from writing the letter.

"Mr. Charen had the idea of writing the letter himself," court spokesman Barrett McGurn told us. Asked if Mark Cannon had suggested persons to whom the letter should be sent, McGurn would say only, "It was neither I nor the chief justice."