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A Series Of Blows to The Press

The Supreme Court has served notice that the press is not the "fourth branch of government" or anything close to it. In fact, the court's view seems to be that the First Amendment's guarantee of a free press is little more than a nod by the framers of the Constitution in the direction of the idea that a free flow of information is vital to self-government.

In the term just ended, the court dealt the press a series of blows, most of which had a common theme: The media have no privileges beyond those accorded the public at large.

As a result of recent decisions, the press can be subjected to surprise searches by police officers armed with warrants; its access to public institutions is only the access available to the public; it is subject to actions by lower courts that seriously impede the collection and publication of news.

Often the Supreme Court's decisions in press matters are close, and the makeup of the majority and minority varies from case to case. It is clear that there are about as many views of the rights and functions of the press as there are justices.

Occasionally, though, the justices' published opinions provide a revealing glimpse of the basic debate that must go on in the secrecy of their conference room. Such a glimpse was provided in a pair of opinions handed down last month in a case involving press access to a California county jail.

One side—the side now in the ascendancy—was stated by Chief Justice Warren E. Burger, speaking for himself and Justices Byron R. White and William H. Rehnquist. (Justice Potter Stewart, the fourth member of the majority in the 3-to-4 decision, wrote a separate opinion in which he disagreed in part with Burger.) The other side—the losing side these days—was stated by the court's newest member, John Paul Stevens, speaking for himself and Justices William J. Brennan and Lewis F. Powell.

The chief justice got under way with the obligatory bow to the importance of the press. "Beyond question," he said, "the role of the media is important; acting as the 'eyes and ears' of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business."

But—the big but—media people, "like all other components of our society . . . are subject to limits."

"The media," Burger warned, "are not a substitute for or an adjunct of government. . . . We must not confuse the role of the media with that of government . . . ." So much for the "fourth branch" idea.

He drew a sharp distinction between gathering news and distributing it. He noted that in two earlier decisions the court had emphasized the importance

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of informed public opinion and a free press. But, he said, in those cases "the court was concerned with the freedom of the media to *communicate* information once it is obtained; neither case intimated that the Constitution *compels* the government to provide the media with information or access to it on demand."

The court, Burger went on, "did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally."

There is an undoubted right to gather news by any lawful means, he said, "but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."

As a clincher, he quoted a former chief justice, Earl Warren, who said (in a case involving not the press but a ban on travel to Cuba): "The right to speak and publish does not carry with it the unrestrained right to gather information."

Now a dissenting view from Justice Stevens. The preservation of a full and free flow of information, said Stevens, "has long been recognized as a core objective of the First Amendment." For this reason, he said, "the First Amendment protects not only the dissemination but also the receipt of information and ideas."

He rejected Burger's contention that the court should be concerned only with keeping the channels of communications—as opposed to the gathering of the information to be communicated—free of official restraints. "Without some protection for the acquisition of information . . . ," he said, "the process of self-governance contemplated by the framers would be stripped of its substance."

Therefore, he continued, "information-gathering is entitled to some measure of constitutional protection"—a protection that is not for the benefit of the press "but to insure that the citizens are fully informed."

So there you have it: A press protected only in its right to communicate, or a press protected in both its basic functions: the gathering of information, and its dissemination.

Which should it be? For now, the court seems to feel that it should be the former.

As you might expect, I side with Stevens. And so I close with a quotation he used in the opinion just discussed. It is from James Madison, a leader among the framers of the Constitution and its Bill of Rights and the fourth president of the United States:

"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."