Doctrine of Press Freedom Goes Back to the 1700's

By LESLEY OELSNER

In the 1620's a newspaper publisher in England was sent to jail for printing without a license. In the 1640's another publisher was jailed for "interpreting" a speech made in Parliament.

The first American newspaper died in 1690, only one issue old; its publisher, like his predecessors in London, had failed to get the Crown's permission to say the things he wanted to say.

But somewhere around 1700 a new theory developed, seeping into the common law of England and then America. To laymen it was "freedom of the press"; to lawyers it was "freedom from prior restraints."

What it meant, in America at least, from the time it was incorporated into the First Amendment of the Constitution, was that newspapers could go to press with a story without first going to the government for a permit. In practice, this means that government has moved after publication, not before.

The battles between press and government continued, but, in recent years especially, they mostly involved more peripheral issues. Must a newsman reveal his sources? How much of a trial can a reporter report? May a newspaper be convicted of libel if it has, without malice, misreported a politician's speech?

The doctrine of prior restraints had been a long time in the making, and until Tuesday's suit by the Justice Department against The New York Times, the doctrine had been pretty much taken for granted.

"It's the rule," says Tom Emerson, professor at Yale Law School and an expert on the doctrine. "Except in cases of obscene movies, the application of the doctrine to the press has always been considered certain."

During wartime, to be sure, there is always a great deal of censorship. But in this country it has often been, to some extent, voluntary. The reporter filing from the front must send his copy through the Army censor, but the newspaper's home office, on its own, refrains from printing certain information it might have.

This is done generally for fairly obvious reasons: the newspaper of a port city, say, does not write about specific troop movements from that port because the information might help the enemy.

Actions Criticized

And when the Government has disapproved of a newspaper's war coverage, its response has usually come after the fact: in Vietnam, for instance, a few correspondents have lost their press credentials for violating certain restrictions on information.

At times the Government's action, even of this kind, has brought great criticism. During the Civil War, two New York papers were suspended for a few days for publishing a false Presidential proclamation about the draft and five papers lost their postal privileges after a Federal grand jury had decided they were "rebel sympathizers."

In World War II there were two famous incidents in which newspapers disagreed with the United States Government. The first came when The Chicago Tribune reported that a secret Japanese code had been broken. The Government threatened to jail the publisher but did not.

Later, The Chicago Tribune and several other newspapers printed an article estimating the size and strength of the Japanese fleet; a grand jury was told to determine whether the papers had used confidential information. When the grand jury decided no law had been broken, the case was dropped.

The Government never explained the reasoning behind its actions in these cases.

But what the cases did do, perhaps mistakenly, was strengthen the feeling that the doctrine of prior restraints — in which the government moves against a paper after it has printed a story, rather than before — was unshakable.

This feeling had already been strengthened somewhat, back in 1931, by a decision of the United States Supreme Court involving a Minnesota newspaper. In that case (Near v. Minn.) the state had enjoined a newspaper from publishing certain articles about local government; it had acted under a state law that specifically allowed such injunctions.

The Supreme Court ruled the Minnesota statute unconstitutional. It was an abridgement of the First Amendment guarantee of freedom of the press, the court said, because "the chief purpose of the guarantee [is] to prevent previous restraints upon publication."

If the articles turned out to be libelous, the theory was, the person libeled could always sue for damages.

The decision, however, did leave room for exceptions—among them, cases involving obscenity or during war. In wartime, it said the Government would be entitled to prevent "obstruction to its recruiting service" or publication of the location or the number of troops.

That is the loophole, the question on which the case between The Times and the Justice Department depends —whether or not this situation is "exceptional" enough, in the court's words, to warrant a departure from the essential guarantee of the First Amendment.