

South Dakota Newspapers
"We the People"
November 22, 2022

"Near v. Minnesota: Bulwark of Press
Freedom"

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At this juncture in American history, when the citizenry seems to require frequent reminders of the landmark decisions and actions that poured and preserved the foundation of our constitutional democracy, we would do well to recall the transformative importance of *Near v. Minnesota* (1931), in which the Supreme Court delivered a ruling that built a wall of protection for freedom of the press against governmental censorship.

The virtues of *Near v. Minnesota* are exhausting to recount. The Court's decision defined freedom of the press. It trumpeted the indispensable function of the nation's newspapers in informing the citizenry. It infused editors with the courage to report the misdeeds of governmental actors and agencies and defend themselves in the face of intimidation and efforts to bring the watchdog to heel. Just as importantly, if not more so, *Near* was the first decision to firmly adopt the Incorporation doctrine, making the First Amendment Free Press Clause applicable to states through the Due Process Clause of the 14th Amendment.

Near v. Minnesota arose from a state law—the Minnesota Gag Law—enacted in 1925, that aimed to shutter scandalous publications that attacked legislators and other office holders. The law permitted a judge to halt the publication of a newspaper upon a finding that the paper was "obscene, lewd and lascivious," or "malicious, scandalous and defamatory."

The statute was widely praised as a useful remedy for the evils of such publications.

Jay Near, publisher of "The Saturday Press," an aggressive weekly newspaper, was an unsavory character. He was a flaming bigot: anti-Semitic, anti-black, anti-labor and anti-Catholic. His newspaper, with some evidence, had accused Minneapolis officials, including the mayor and the police chief, of engaging in widespread corruption, racketeering, neglect of duty and graft. These stories, among others, made the newspaper the first target of the gag law. After publishing just nine issues, the newspaper was shut down by court order.

Near appealed to the Minnesota Supreme Court, which took a dim view of his brand of journalism. "Our constitution," the court declared, "was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. It is a shield for the honest, careful and conscientious press."

The American Civil Liberties Union and the conservative publisher of the Chicago Tribune, Col. Robert R. McCormick, perceived in the law a grave threat to freedom of the press and the First Amendment's prohibition on prior restraint. The ACLU offered to fund the appeal, but McCormick quickly assembled his legal staff and took the lead in taking the case to the Supreme Court, asserting the right of the journalistic world to inform the citizenry. McCormick rightly understood that leaving to judges the right to determine who was a nice publisher, and who was not, would spell the end of freedom of the press.

Chief Justice Charles Evans Hughes, writing for a 5-4 majority, held the law unconstitutional in a ruling that firmly established freedom of the press against governmental censorship. The law violated the First

Amendment, as applied to the states by the 14th Amendment. Hughes wrote, "This statute raises questions of grave importance, transcending the local interests involved in the particular action." In a historic sentence, Hughes added, "It is no longer open to doubt that the liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

The Hughes Court well understood the consequences for the nation if prior restraint could be easily implemented, and because of the decision it became very difficult to persuade a judge to issue a prior restraint on the press. "The impairment of the fundamental security of life and property by criminal alliances and official neglect," Hughes observed, "emphasizes the primary need of a vigilant and courageous press, especially in great cities." Col. McCormick was so moved by those words that he decided to inscribe them in the lobby of his new building in Chicago, The Tribune Tower.

Prior restraint and censorship strike at the very core of the First Amendment, Hughes explained. Prior restraint is the exception, but the prohibition on censorship is not absolute. It could not be, of course, for no right, including press liberty, is without limits. The Chief Justice listed as exceptions wartime obstruction of recruitment, publication of military secrets, obscenity, incitements to riot or forcible overthrow of the government, and words that "may have all the effect of force."

The Court's concern to protect criticisms of public officials was not shared by the dissenters, the so-called "Four Horsemen," led by the Minnesota native Justice Pierce Butler. But five years later, in a case—*Grosjean v. American Press Co.* (1936)—that involved a Louisiana tax on newspapers, designed to punish critics of Gov. Huey Long, the conservative Horsemen embraced

Chief Justice Hughes' reasoning in defense of freedom of the press, as set forth in *Near v. Minnesota*. In *Grosjean*, Justice George Sutherland wrote for the Court: The people are entitled to "full information in respect of the doings or misdoings of their government; informed public opinion is the most potent of all restraints upon misgovernment."

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