

Speech by Congressman Les AuCoin
February 12 in Salem, Oregon
To the SOCIETY OF PROFESSIONAL JOURNALISTS
and WOMEN IN COMMUNICATIONS

Thank you very much, Dick....and members of the Oregon press. I'd like to tell you that it's a pleasure to be with you tonight. But frankly, when Frank Wetzel gave me my assignment for this evening -- he may have taken care of whatever pleasure there was for me this evening.

You see, what Frank asked me for was your basic analysis of where the nation is at this particular moment in American history.

Then he told me to keep it down to ten or fifteen minutes so the bar could open on time.

Now, I want you to know that I don't mind a challenge, but having spent the last year of my life on the House Banking and Currency Committee, immersed in such cosmic issues as: Regulation Q, the growth of M-1 and M-2 in our monetary policy, to say nothing of the municipal bond market, I can only say that I feel a very special debt to Frank for all that he's done for me tonight.

But I do want you to know that I'm undaunted by this task. And drawing on my work in the Banking and Currency Committee, Frank, I do have a report to give you on the state of the country.

Looking back on the last year, the closing averages on the human scene were mixed.

Brotherhood was down two points.

Enlightened self-interest gained a half.

Political vanity showed surprising movement...while guarded optimism slipped a point in sluggish trading.

Over all, the status quo remained unchanged.

With that, Frank, I thank you and bid you good night.

Seriously, ladies and gentlemen, I do want to say that I appreciate your invitation. We do have some things to talk about tonight. Not all of them are cosmic; but many of them are fundamental.

My purpose this evening is to share some thoughts on where things stand in what has become a growing conflict between the rights of a free press and the interests of government. And also to suggest some things we can do to help resolve the conflict.

No one who has witnessed the events and developments of recent years can doubt for a moment that we have a problem.

- o There were more subpoenas served on reporters for their material in the last 18 weeks of 1975 than in the previous three and a half years, combined.

- o Government subpoenas of newsmen have, in fact, more than tripled in the past two years.

- o Judicial gag orders, involving the doctrine of prior restraint, have increased from two such orders in 1966 ... to 17 in 1973 ... to 28 in 1974 ... to 24 in only the first half of 1975.

- o Moreover, the new Privacy Act is increasingly being used by government agencies to deny reporters access to records. A U.S. Attorney in Tennessee, for example, recently cited the new law as his reason for refusing to disclose background information about defendants in a criminal trial.

- o And then there's Senate Bill 1 -- a measure that's chuckfull of lots of little repealers of the Bill of Rights. This proposed legislation would, among other things, jail for seven years any informer who leaked classified information, not because the information could be shown to cause harm -- but because it had been labeled by someone in the government as "classified."

Do not delude yourselves into thinking these are isolated, random events. There is a pattern here. I'm not suggesting that it's a deliberate pattern; I'm simply suggesting that few things happen by accident -- that there are basic causes, often connected directly to the prevailing public mood. And I'm also suggesting that we have to end this pattern. We cannot let the passage of 200 years make us forget that a free press is a cornerstone in the life of a free people.

I suppose the best evidence of how much we've forgotten -- in terms of what we have accepted -- can be seen in the court-ordered gag rulings I've mentioned.

Recently, in Baton Rouge, Louisiana, a federal district judge, without notice or an opportunity for representatives of the press to offer arguments, issued an order banning all news coverage of a public hearing.

The hearing had to do with the prosecution of a civil rights leader for allegedly plotting to assassinate the mayor of Baton Rouge. The defense charged that the prosecution was designed to harass the civil rights leader because of his political activities.

In defiance of the gag order, two reporters published accounts of the hearing. They were held in contempt and fined \$500 each. Then, on appeal, the U.S. Court of Appeals held the ruling unconstitutional.

A blow for press freedom? Not quite. The Court of Appeals went on to say that, despite the invalidity of the order under the First Amendment, the reporter could still be punished because even an unconstitutional order must be obeyed until set aside on appeal.

When the case went back to the judge, he maintained both his finding of contempt and the punishment, and the Appeals court affirmed it.

I think it's important to look at precisely what's wrong here.

The first thing wrong is: No other single government entity -- legislatures, presidents, or governors -- has the power to take actions which must be obeyed even if held unconstitutional.

It's also wrong because the very heart of our constitutional history is at odds with laws which use government approval or disapproval to limit the right of expression, except in the most extraordinary cases.

And it's wrong, too, because when government has the power to tell the press what it cannot say -- it's only a short step away from telling the press what it must say.

There are several other things that are fundamentally wrong with most gag orders. By their very nature, they give a single official unparalleled insulation from checks and balances.

Judges alone decide whether such an order should be enforced, whether it has been violated, and whether punishment should be imposed.

More importantly, we are seeing an avalanche of prior restraints coming out of lower courts today without any advance notice to the press or the public, leaving no opportunity to make constitutional arguments based on the First Amendment.

A recent article in THE COLUMBIA JOURNALISM REVIEW,

accurately said that this invests in trial judges a power that, even temporarily unchecked, invites temporary abuse. And the article points out that even temporary interference with the free flow of information, can work, in its words, a "vast repression".

But despite these grave and, one would think obvious shortcomings in the concept of prior restraint, gag orders recently took on an entirely new significance when Supreme Court Justice Blackmun refused to stay a recent Nebraska gag order.

The Blackmun ruling declared, first, that certain information may not be published despite the First Amendment and, secondly, exactly what information could be restrained -- and when, is something judges may decide.

Fortunately, the Blackmun ruling applies immediately only to the Nebraska case; but unless overruled by the Supreme Court it could encourage many other orders of a similar kind.

In the Nebraska case, as in the Pentagon Papers case where he was in the minority, Justice Blackmun was essentially guessing what negative things might happen if the press was left free in its reporting of the news.

That's fine except for one thing -- a study of the First Amendment shows that it allows absolutely no prior judicial restraints of the press based on someone's hunchwork.

Indeed, one of the underpinnings of the Bill of Rights, itself, is that the First Amendment guarantee of free expression is vastly too important to be negated or diluted by simple conjecture.

Holding the press fully liable after the fact is one thing. But government restraints in advance are quite another, and are meant to be used only in the most compelling of circumstances.

There is, of course, a very real reason for the importance that the founding fathers gave to this concept. Democracy, frankly, depends on an open society; and an open society draws its breath from information and ideas that are freely exchanged.

It is in this context that these recent court actions are so disturbing.

But beyond this, it's also interesting to look at the Blackmun ruling in terms of its ironic effects in Lincoln County, Nebraska.

The case in question was a sensational multiple murder which also involved rape. In an attempt to assure an impartial jury, the judge placed a ban prior to the jury trial on the reporting of almost anything about the accused or the circumstances of the case. This included coverage of a preliminary hearing. The press was even forbidden from telling the public in what way its reports were incomplete.

The real irony was that the hearing was open to the public. The sensational charges attracted many local people to the courtroom, who were then of course free to tell their neighbors what had occurred.

In other words, the community generally got its news through rumors spread by hundreds of amateur, word-of-mouth "reporters" -- a process that could have put the defendant's rights in greater jeopardy than the facts, themselves.

This example suggests that the Sixth Amendment guarantee to a fair trial may not be in as great conflict with the First Amendment as some have contended. And there are other equally strong examples.

We all know of cases where it was only the publicity generated from reporters who were determined to dig into the facts that won acquittals for innocent defendants. In such a case in New Jersey, a District Attorney conceded that "had it not been for the tremendous publicity, Witmore (the defendant in the case) would have slipped into the electric chair for a crime he did not commit."

Ladies and Gentlemen, we can only wonder tonight what the outcome of that New Jersey case would have been if a gag order had been issued in that instance.

It seems to me that it's the obligation of the press -- and elected officials alike -- to show the public that side of the question.

The simple truth is that the First Amendment can often be regarded as a great nuisance to a troubled and divided nation that is becoming increasingly impatient for results -- whether those results be a trial verdict in a local community, a strong national defense, or some other equally important objective. The task each of us has -- the cause we must share in common -- is to show that the achievement of any of these results will be without meaning if we short circuit, in the process, the crucial protections of the First Amendment.

It's curious that these curbs on the press are occurring at the same moment that real breakthroughs are being achieved in efforts to guarantee open access to government and its decision-making.

The reform movement in the Congress has led to an open-meetings policy unheard of a few years ago. It's also the driving force behind such other democratic efforts as the new sunshine legislation, financial disclosure requirements, and open campaign reporting.

And so it is that we are in fact in the grip of strong and perplexing, and somewhat confusing cross-currents in this country today.

I do not come to you tonight to explain them. In my judgement, few, if any of us can.

But in terms of the role of Congress, I for one, cannot see how one can support sunshine laws on the one hand and not also carry a commitment to fight the "gag law" syndrome in whatever form it takes. If secrecy is anathema to democracy, we have an equal obligation to first reveal decision-making, and then to let it be fully reported.

Congress can do its part to address the problem by taking these steps:

- o It can pass a pure, undiluted, unqualified press shield law, to protect a reporter's confidential sources and ensure that future sources of information which the public deserves to know are not intimidated into silence.

- o Secondly, through its new oversight responsibilities, the Congress must determine where existing laws, such as the Privacy Act, are being used by government agencies to bury the facts -- and then enact perfecting amendments to end such abuse.

And, although it's important not to overreact until the Supreme Court rules on the issue, the Congress can if necessary enact legislation to restrain judges from abusing their powers to invoke prior restraints of the news.

Mr. Benno C. Schmidt, Jr., writing in the COLUMBIA JOURNALISM REVIEW, suggests that a precedent might be the Norris-LaGuardia Act of 1932 which stopped another abuse of judicial orders that coincidentally also had to be obeyed even if overturned. The problem addressed by that law was similar to the problem today. Lower courts were issuing temporary restraining orders -- usually without notice or argument -- to unfairly stifle, in this case, the aims of Labor. And because in the reporting of the news -- as in labor disputes -- timing is often critical, a temporary order not to publish can cripple the role of the press just as a temporary order not to strike was often enough to oppress the labor movement in the 1930's.

These, ladies and gentlemen, are certain specific steps I think Congress can take to help resolve the problem. But there's more that must be done.

And now that I've said some things which you perhaps like to hear, let me make a few comments you may not want to hear.

I am no Pollyanna when it comes to the press. I've spent a few years in the newsrooms myself, and I've been close enough to the press to see its warts. They were once my warts, too. I've seen the "pastpot compromises". The "business office musts". And the banner head exaggerations for the sake of street editions.

I know -- and you know -- that there have been times when the press has done an unconscionably poor job. Men have been lynched with words. America did get into Vietnam and other misadventures. Why? Because at least in part, the press failed to exercise its duty to fully report the facts that often lurk behind the government press release. And the prophesy may indeed be fulfilled this year that in the post-Watergate era the press will become a prisoner of events again -- an unwitting partner to the politician who plies his trade, not on the basis of issues or ideas, but rather by charging that his opponent is a bigger crook than he is.

These are the kinds of shortcomings that permit the press to fall short of its highest definition -- that of the fourth estate.

Ladies and gentlemen, the extent to which the press ignores shortcomings of this kind is the extent to which appeals for public understanding of its' role as the fourth estate may fall on deaf ears. And the real danger here is that the loss of public confidence in you may also mean the loss of confidence in the First Amendment.

At a moment when the Nation is deeply troubled, when it is in the grip of some disturbing cross-currents, it does not strike me as being far-fetched to voice such concern for the future of the First Amendment. Because I think we can see today -- in this country -- traces of things that have ultimately brought other nations down. When there is disorder, people ultimately hunger for order. When there is fear and complexity, people begin to demand safety and simplicity. And when there is indecision and drift, people soon cry out for strength and forcefulness.

A clear look at history, not to mention the fresh example of India, tells us that in such circumstances one

of the first casualties is the right of free expression, what we know as the First Amendment. In such circumstances, the cure, when it comes -- and it usually comes from government -- is often far worse than the disease. Jack Anderson was more right than wrong when he said, "The basic nature of government is to oppress the people; while the duty of the press is to see that it doesn't".

Each of the "four estates" operates in the final analysis in the arena of public approval.

The press cannot in the long run perform its duty unless its deeds match the lofty definition it gives itself. And as you face the challenges ahead, the press -- responsible elected officials -- have an obligation to remind the nation that "free press" is not an end unto itself. It is a means through which we remain a free people.

Congress has some things to do to ensure your freedoms. And, if you'll pardon me for saying so, you have some things to do as well.

If we both succeed, then maybe the next time we meet, we'll be able to report to each other that in the "closing averages on the human scene," enlightenment gained a half.

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