1987 WL 342502 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 15, 1987

*1 The Honorable G. Ralph Davenport, Jr.
Member
House of Representatives
Box 1301
Spartanburg, South Carolina 29304

Dear Representative Davenport:
You have inquired as to any potential constitutional problems with respect to H.2592, a bill pending before the General Assembly which would require that the name of an editorial writer be printed with the editorial he writes in any newspaper published in this State. Failure to do so would be a misdemeanor, with certain penalties to be imposed upon conviction therefor. You were particularly concerned about any conflicts with the First Amendment to the United States Constitution, or freedom of the press. While the General Assembly has adjourned for this session, you indicate that you still wish to have a written opinion on your question, as the bill may be resubmitted in future sessions.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. We do identify a potential conflict with the First Amendment in this instance, however.

The First Amendment, made applicable to the States by the Fourteenth Amendment to the United States Constitution, Gitlow v. New York, 268 U.S. 652 (1925), provides that "Congress shall make no law ... abridging the freedom of speech, or of the press...." In addition, Article I, Section 2 of the Constitution of the State of South Carolina provides that "[t]he General Assembly shall make no law ... abridging the freedom of speech or of the press...." In the two decisions located which addressed legislation specifically requiring writers of editorials to be identified, each concluded that such legislation violated the First Amendment of the United States Constitution. In re Opinion of the Justices, 324 A.2d 211 (Del.1974); Opinion of the Justices, 306 A.2d 18 (Maine 1973). In making their determinations, the courts have relied on such landmark First Amendment cases as Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) and Miami Herald Publishing Company v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

The Maine statute addressed by the Supreme Judicial Court of Maine, supra, required that editorials in newspapers published regularly at least 52 times a year must indicate the writer's name in a byline. The court stated:
The principles enunciated in Talley, supra, emphasizing that the important relationship between anonymity and the free exercise of speech and press demands the existence of a compelling governmental interest to justify legislative restrictions upon it, are fully applicable. No compelling State interest is shown which would suggest the mandate of [the legislation] that editorial authorship must be disclosed. [1]

*2 Opinion of the Justices, 306 A.2d at 21.

The Supreme Court of Delaware followed the lead of the Maine court, citing the Talley and Tornillo decisions. The Court stated that the bill under consideration failed the standards established in Tornillo and then continued:
The synopsis accompanying the Bill states a purpose relating to the identity of persons writing editorials "in an attempt to influence legislation or influence the outcome of an election." While an election reform purpose has saved some statutes addressed to anonymity, [citations omitted], that result does not follow here. Both cited cases involved statutes addressed to anonymous distribution of election campaign materials; neither involved a statute addressed to newspapers. Indeed, we are unaware of any case upholding an anti-anonymity statute addressed to newspapers.

In re Opinion of the Justices, 324 A.2d at 214 (emphasis added).

In Tornillo, a Florida statute which required newspapers to provide equal space for response by political candidates whose character or records had been criticized or attacked by the newspapers was held unconstitutional as violative of the First Amendment. Stating that the statute intruded into the function of the newspaper editors, the Court continued:
A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Tornillo, 418 U.S. at 258, 94 S.Ct. at 2840. This is the test referred to in the Delaware case above, which test the statute challenged therein failed to meet. The Court acknowledged that the press is not always responsible or accurate, and both sides of a given issue may not always be presented; this is the risk that must be taken in permitting freedom of the press.

In his concurring opinion, Justice White succinctly addresses the problems which have emerged when the government has attempted to regulate the media:
According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so as government tampering, in advance of publication, with news and editorial content is concerned.... A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed.... We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

*3 Id., 418 U.S. at 259, 94 S.Ct. at 2840. Justice White further noted that while a newspaper may be free of government censorship, it may not escape liability for such actions as publishing libelous statements. Freedom of the press does carry with it a concomitant responsibility in that regard.

Based upon the foregoing, I must advise that H.2592, which would require that the name of an editorial writer be printed with the editorial, would be of doubtful constitutionality. The freedom of speech and the press guaranteed by the First Amendment have served to ensure the liberty of this nation since its birth. No governmental interest so compelling as to necessitate the removal of the cloak of anonymity of editorial writers can be identified; failing this, H.2592 would undoubtedly be found to be unconstitutional.

With kindest regards, I am
Sincerely yours,

T. Travis Medlock
Attorney General

Footnotes

1 The history of identification requirements and subsequent persecutions, as well as the value of anonymity, with respect to writers were analyzed in Talley. Citing the Letters of Junius and the Federalist Papers, the Court noted that "[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes." Talley, 362 U.S. at 65, 4 L.Ed.2d at 563. A compelling governmental interest in requiring the identity of a writer to be disclosed must be shown to overcome the freedoms of speech and the press guaranteed by the Constitution.

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