THE TRIAL OF JOHN PETER ZENGER

1735

In 1733 John Peter Zenger became the printer of the ***New York Weekly Journal****, a newspaper that opposed the administration of New York governor William Cosby. Two years later, Zenger was accused of making libelous statements against Cosby. At Zenger's trial his attorney made the now-famous argument that the statements could not have been libelous because they were true. In the dialogue below, Hamilton pleads his case before the prosecuting attorney ("Mr. Attorney") and Judge James DeLancey ("Mr. Chief Justice").*

[1] *Mr. Attorney*. The case before the Court is whether Mr. Zenger is guilty of libeling His Excellency the Governor of New York, and indeed the whole administration of the government? Mr. Hamilton has confessed the printing and publishing, and I think nothing is plainer than that the words in the information are *scandalous, and tend to sedition, and to disquiet the minds of the people of this Province*. And if such papers are not libels, I think it may be said there can be no such thing as a libel.

[2] *Mr. Hamilton*. May it please Your Honor; I cannot agree with Mr. Attorney: For though I freely acknowledge that there are such things as libels, yet I must insist at the same time that what my client is charged with is not a libel; and I observed just now that Mr. Attorney in defining a libel made use of the words *scandalous, seditious, and tend to disquiet the people;* but (whether with design or not I will not say) he omitted the word *false*.

[3] *Mr. Attorney*. I think I did not omit the word *false*: But it has been said already that it may be a libel notwithstanding it may be true.

[4] *Mr. Hamilton*. In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the Court and jury, and to which we have pleaded *not guilty*, and by it we are charged with printing and publishing *a certain false, malicious, seditious and scandalous libel*. This word *false* must have some meaning, or else how came it there? I hope Mr. Attorney will not say he put it there by chance, and I am of opinion his information would not be good without it. But to show that it is the principal thing which, in my opinion, makes a libel, I put the case, if the information had been for printing and publishing a certain *true* libel, would that be the same thing? Or could Mr. Attorney support such an information by any precedent in the English law? No, the falsehood makes the scandal, and both make the libel. And to show the Court that I am in good earnest and to save the Court's time and Mr. Attorney's trouble, I will agree that if he can prove the facts charged upon us to be *false*, I'll own them to be *scandalous, seditious* and *a libel*. So the work seems now to be pretty much shortened, and Mr. Attorney has not only to prove the words *false* in order to make us guilty.

[5] *Mr. Attorney*. We have nothing to prove; you have confessed the printing and publishing; but if it was necessary (as I insist it is not) how can we prove a negative? But I hope some regard will be had to the authorities that have been produced, and that supposing all the words to be true, yet that will not help them, that Chief Justice Holt in his charge to the jury in the case of Tutchin made no distinction whether

Tutchin's papers were *true* or *false;* and as Chief Justice Holt has made no distinction in that case, so none ought to be made here; nor can it be shown in all that case there was any question made about their being *false* or *true.*

[6] *Mr. Hamilton.* I did expect to hear that a negative cannot be proved; but everybody knows there are many exceptions to that general rule: For if a man is charged with killing another, or stealing his neighbor's horse, if he is innocent in the one case, he may prove the man said to be killed to be really alive; and the horse said to be stolen, never to have been out of his master's stable, etc., and this I think is proving a negative. But we will save Mr. Attorney the trouble of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be *true.*

[7] *Mr. Chief Justice.* You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified; for it is nevertheless a libel that it is *true.*

[8] *Mr. Hamilton.* I am sorry the Court has so soon resolved upon that piece of law; I expected first to have been heard to that point. I have not in all my reading met with an authority that says we cannot be admitted to give the truth in evidence upon an information for a libel.

[9] *Mr. Chief Justice.* The law is clear, that you cannot justify a libel . . . in *Coke's Institutes* you'll find informations for libels long before the Court of Star Chamber.

[10] *Mr. Hamilton.* I thank Your Honor; that is an authority I did propose to speak to by and by: But as you have mentioned it, I'll read that authority now. I think it is in *3 Co. Inst.* under title *Libel;* it is the case of John de Northampton for a letter wrote to Robert de Ferrers, one of the King's Privy Council, concerning Sir William Scot, Chief Justice, and his fellows; but it does not appear to have been upon information; and I have good grounds to say it was upon indictment, as was the case of Adam de Ravensworth, just mentioned before by Lord Coke under the same title; and I think there cannot be a greater, at least a plainer authority for us, than the judgment in the case of John de Northampton, which my Lord has set down at large. *Et quia praedictus Johannes cognovit dictam litteram per se scriptam Roberto de Ferrers, qui est de Concilio Regis, qua littera continet in se nullam veritatem,* etc. Now sir, by this judgment it appears the libelous words were utterly false, and there the falsehood was the crime and is the ground of that judgment: And is not that what we contend for? Do not we insist that the falsehood makes the scandal, and both make the libel? And how shall it be known whether the words are libelous, *that is, true* or *false,* but by admitting us to prove them *true,* since Mr. Attorney will not undertake to prove them *false*? Besides, is it not against common sense that a man should be punished in the same degree for a *true libel* (if any such thing could be) as for a *false one*? I know it is said *that truth makes a libel the more provoking, and therefore the offense is the greater, and consequently the judgment should be the heavier.* Well, suppose it were so, and let us agree for once *that truth is a greater sin than falsehood*: Yet as the offenses are not equal, and as the punishment is arbitrary, *that is,* according as

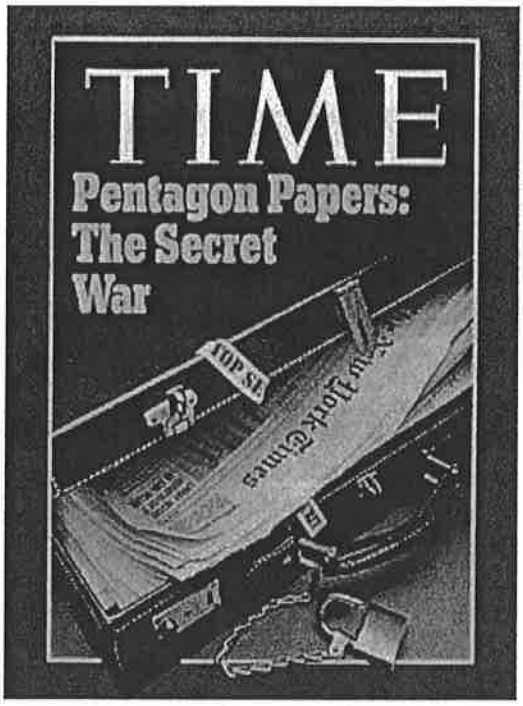
the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know whether the libel is *true* or *false*, that they may by that means be able to proportion the punishment? For would it not be a sad case if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie as for writing or publishing a truth? And yet this (with submission), as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine *that truth makes a worse libel than falsehood*, and must follow from his not proving our papers to be *false*, or not suffering us to prove them to be *true*. But this is only reasoning upon the case, and I will now proceed to show what in my opinion will be sufficient to induce the Court to allow us to prove the truth of the words which in the information are called libelous. And first, I think there cannot be a greater authority for us than the judgment I just now mentioned in the case of John de Northampton, and that was in early times, and before the Star Chamber came to its fullness of power and wickedness. In that judgment, as I observed, the *falsehood* of the letter which was wrote is assigned as the very ground of the sentence. And agreeable to this it was urged by Sir Robert Sawyer in the trial of the seven bishops, *that the falsity, the malice, and sedition of the writing were all facts to be proved*. But here it may be said Sir Robert was one of the bishops' counsel, and his argument is not to be allowed for law: But I offer it only to show that we are not the first who have insisted that to make a writing a libel, it must be *false*. And if the argument of a counsel must have no weight, I hope there will be more regard shown to the opinion of a judge, and therefore I mention the words of Justice Powell in the same trial, where he says (of the petition of the bishops, which was called a libel, and upon which they were prosecuted by information) that *to make it a libel, it must be false and malicious and tend to sedition;* and declared, *as he saw no falsehood or malice in it, he was of opinion that it was no libel.* Now I should think this opinion alone, in the case of the King, and in a case which that King had so much at heart and which to this day has never been contradicted, might be a sufficient authority to entitle us to the liberty of proving the *truth* of the papers which in the information are called *false, malicious, seditious and scandalous*. If it be objected *that the opinions of the other three judges were against him*, I answer that the censures the judgments of these men have undergone, and the approbation Justice Powell's opinion, his judgment and conduct upon that trial has met with, and the honor he gained to himself for daring to speak truth at such a time, upon such an occasion, and in the reign of such a King, is more than sufficient in my humble opinion, to warrant our insisting on his judgment as a full authority to our purpose, and it will lie upon Mr. Attorney to show that this opinion has since that time been denied to be law, or that Justice Powell who delivered it has ever been condemned or blamed for it in any law book extant at this day, and this I will venture to say Mr. Attorney cannot do. But to make this point yet more clear, if anything can be clearer, I will on our part proceed and show that in

the case of Sir Samuel Barnardiston, his counsel, notwithstanding he stood before one of the greatest monsters that ever presided in an English court (Judge Jeffreys) insisted on the want of proof to the *malice* and *seditious intent* of the author of what was called a libel. And in the case of Tutchin, which seems to be Mr. Attorney's chief authority, that case is against him; for he was upon his trial put upon showing the truth of his papers, but did not; at least the prisoner was asked by the King's counsel whether he would say they were *true*? And as he never pretended that they were true, the Chief Justice was not to say so. But the point will still be clearer on our side from Fuller's case, *for falsely and wickedly causing to be printed a false and scandalous libel, in which (amongst other things) were contained these words,* "Mr. Jones has also made oath that he paid 5000 more by the late King's order to several persons in places of trust, that they might complete my ruin, and invalidate me forever. Nor is this all; for the same Mr. Jones will prove by undeniable witness and demonstration that he has distributed more than 180,000 in eight years last past by the French King's order to persons in public trust in this kingdom." Here you see is a scandalous and infamous charge against the late King; here is a charge no less than high treason against the *men in public trust* for receiving money of the French King, then in actual war with the Crown of Great Britain; and yet the Court were far from bearing him down with that Star Chamber doctrine, *to wit, that it was no matter whether what he said was true or false;* no, on the contrary, Lord Chief Justice Holt asks Fuller, "Can you make it appear they are true? Have you any witnesses? You might have had subpoenas for your witnesses against this day. If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. If you have any witnesses, I will hear them. How came you to write those books which are not true? If you have any witnesses, produce them. If you can offer any matter to prove what you have wrote, let us hear it." Thus said and thus did that great man Lord Chief Justice Holt upon a trial of the like kind with ours, and the rule laid down by him in this case is *that he who will take upon him to write things, it lies upon him to prove them at his peril.* Now, sir, we have acknowledged the printing and publishing of those papers set forth in the information, and (with the leave of the Court) agreeable to the rule laid down by Chief Justice Holt, we are ready to prove them to be true, at our peril.

[11] . . . But to conclude; the question before the Court and you gentlemen of the jury is not of small nor private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty; and I make no doubt but your upright conduct this day will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

New York Times Co. v. United States (1971)

Historical Background



Over the years the Supreme Court has disagreed on the limits that can be placed on the 1st Amendment guarantees of freedom of speech and press. In 1971, the Court faced these issues again in a case brought by the *New York Times*. The newspaper had obtained a copy of documents known as "The Pentagon Papers"—an internal Defense Department report that detailed government deception with regard to the Vietnam War. The Pentagon Papers surfaced at a time when the American people were deeply divided on the question of United States involvement in the war. The *New York Times* fought for the right to publish the papers under the umbrella of the 1st Amendment.

Circumstances of the Case

The Pentagon Papers, officially known as "History of U.S. Decision-Making Process on Viet Nam Policy," were illegally copied and then leaked to the press. The *New York Times* and the *Washington Post* had obtained the documents. Acting at the Government's request, the United States district court in New York issued a temporary injunction—a court order—that directed the *New York Times* not to publish the documents. The Government claimed that the publication of the papers would endanger the security of the United States. The *New York Times* appealed the order to the United States Supreme Court, arguing that prior restraint—preventing publication—violated the 1st Amendment.

Constitutional Issues

Are the freedoms provided by the 1st Amendment absolute? Did the threat to national security outweigh the freedom of press guaranteed by the 1st Amendment? Did the publication of the Pentagon Papers in fact pose a threat to national security?

Arguments

For the *New York Times*: The 1st Amendment's guarantee of freedom of the press protects the newspaper in the publication of these documents. One of the few restraints on executive power in matters of national defense is a knowledgeable population. The press must be free to inform the American people. In addition, the Government has failed to show that publication of the Pentagon Papers would endanger national security.

For the United States: The 1st Amendment does not guarantee an absolute freedom of the press, especially when the nation's security is involved. The Court must strike a balance between the fundamentally important right to a free press and the equally

important duty of the Government to protect the nation. Allowing the publication of these documents would establish a dangerous precedent for future cases involving national security.

Decision and Rationale

By a 6-3 decision, the Court ruled in favor of the *New York Times*. In the judgment, the Court cited a prevailing precedent, noting: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." In other words, the Court would not be favorably disposed to stifling the press on the order of the government.

Justices Hugo Black and William Douglas, members of the majority, held that the 1st Amendment is absolute. Justice Black called it "unfortunate" in his view "that some of my Brethren [fellow justices] are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding," he wrote, "would make a shambles of the First Amendment."

Justice Byron White, joined by Justice Potter Stewart, believed that while there are situations in which the 1st Amendment may be abridged, they had to "concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system." Although the justices thought that the *New York Times* had probably gone too far in publishing the Pentagon Papers, they found nothing in the law to prevent the newspaper from doing so.

Deferring to responsibilities of the Executive, Chief Justice Warren Burger dissented. Given those vast responsibilities, Burger noted, the Executive also had to be given broader authority. "In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive," Burger wrote. "Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy."

The decision reinforced the Court's stance against prior restraint and has often been noted in subsequent prior restraint cases. In the spring of 2000, a Texas district court judge ordered the Associated Press (AP) not to publish a story about a state-guaranteed loan to a Texas shrimp farm. Lawyers for the AP cited the *New York Times* case in their argument. The judge lifted the order after two days of hearings.