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Landmark Communications, Inc. v. Virginia

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Discuss

attack, on first Amend. grounds, of Va provision that makes it a crime for information before Judicial Review Commission to be made public unless & until a formal complaint is filed with the S/Court. Then, entire record is public. May be similar to Grand Jury privacy. Why smear a judge if no complaint is filed?

PRELIMINARY MEMORANDUM

June 9, 1977 Conference
List 1, Sheet 1

No. 76-1450

Appeal from Va. SC
(Carrico; Poff dissenting)

LANDMARK COMMUNICATIONS, INC.

v.

VIRGINIA

State/Criminal

TIMELY

Discuss
This is an appeal.
Grant

SUMMARY: Appellant-newspaper challenges on First Amendment grounds its misdemeanor conviction for violation of a Va. statute which provides for the confidentiality of all papers filed with and proceedings before the Judicial Inquiry and Review Commission (Commission).

FACTS: Art. VI, §10 of the 1971 Constitution of Va.* mandates the Commission "to investigate charges which would be the basis for retirement, censure, or removal of a judge." It also specifies that "(p)roceedings before the Commission shall be confidential." Va. Code §2.1-37.13 provides that "all papers filed with and proceedings before the Commission. . .including the identification of the subject judge . . .shall be confidential and shall not be divulged by any person to

* I helped draft this. (Didn't expect to be a judge!)

anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . ." The statute also subjects to a misdemeanor penalty "any person who shall divulge information in violation of (its provisions)."

On Oct. 4. 1975. appellant published in The Virginian-Pilot--a newspaper of general circulation in the Tidewater area of Va.--an article stating that the Commission had conducted a "formal hearing concerning possible disciplinary action against" a named judge and that the hearing "apparently stemmed from charges of incompetence against the. . .judge." Appellant was tried and convicted for violatio of §2.1-37.13 and fined $500.

DECISION BELOW: Va. SC, one justice dissenting, sustained the constitutionality of the challenged statute. The majority first rejected appellant's claim that the statute must be strictly construed to apply only to the first act of disclosure by an actual participant in the proceedings. The court found that the proscription running against disclosure--until the filing of a formal complaint with Va. SC--is so clear from the statutory language as to render unreasonable an interpretation limiting the language only to participants in the Commission proceedings or to make actionable only the initial disclosur

The court, rejecting appellant's contention--abandoned in this Court--that the law imposed a prior restraint on the press, considered whether the "subsequent punishment" imposed by the statute violated the guarantee of a free press. The court, citing a series of decisions applying the "clear and present danger" test to cases involving publica tions alleged to imperil the orderly administration of justice, rejecte appellant's view that the test must be satisfied by production of "actu facts" to show a clear and present danger. Bridges, et al. involved

*Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harvey, 331 U.S. 367 (1947); and Wood v. Georgia, 370 U.S. 375 (1962).

the common law power of a court to punish allegedly contemptuous out-of-court statements concerning pending cases. By contrast, the court foun the power of a Va. court to impose the instant punishment is fixed by statute. The court concluded that §2.1-37.13 represents a legislative judgment, coupled with the statement of public intent expressed in the Va. Constitution, that a clear and present danger to the orderly administration of justice would be created by premature disclosure of the confidential proceedings of the Commission. The court held "the judgment imposing the sanction in this case is fortified against (appellant's) constitutional attack because it is 'encased in the armor wrought by prior legislative deliberation' [Bridges, 314 U.S. at 261]. . ."

?

Va. SC further found that the challenged statute places the least possible restraint upon the public interest while assuring the effectiv functioning of the Commission. It stressed that, when a formal complaint is filed, the entire record of Commission proceedings becomes public and that the statute does not curtail general comment or criticism concerning a judge or the conduct of judicial affairs.

Justice Poff dissented on the ground that the majority erred in inferring the existence of a clear and present danger from the mere enactment of a penal statute. Noting a "legal presumption" in favor of the First Amendment, the dissent would require evidence--not produce by the Commonwealth in this case--showing a clear and present danger to a legitimate governmental interest in order to justify any statutory exception to the constitutional guarantee. ?

CONTENTIONS: Appellant asserts that the publication of truthful statements may not be the subject of civil or criminal sanctions where public affairs are concerned. Rather, the Commission

may withhold what it can and the press may publish what it learns, the balance favoring public discourse. Appellee counters that the Commonwealth has followed the procedure outlined in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975), i.e., to "avoid public documentation or other exposure of private information" where privacy interests in judicial proceedings are to be protected.

?? Appellant finds the clear and present danger test applicable here, but argues that proof of actual facts establishing that the expression in question creates such a danger to the administration of justice is essential. [The Commonwealth offered no such proof at trial.] Appellant emphasizes that there is no support in the legislative history for the court's conclusion that the Va. Gen. Assembly made any finding of a clear and present danger. Appellee tracks the Va. SC on this point.

Appellant attacks the statute as vague arguing that: the meaning of "divulge" is unclear; there is no indication here that the published information consisted of "papers filed with and proceedings before the Commission;" the statute gives no fair warning that it applies to parties who obtain the information after initial disclosure by parties privy to it or that its sweep encompasses the press or that it applies to all information concerning a Commission proceeding whether or not such information was obtained from material before the Commission. Appellant also complains that the statute is unconstitutionally overbroad insofar as it prohibits publication of the charge that impropriety prevented an incompetent judge from having a complaint filed against him. Also, appellant contends that readers of the article repeat what they read at their peril.

Appellee notes that the vagueness issue relating to what materials are encompassed within the statute was not raised in Va. SC and should

not be considered.

DISCUSSION: It appears that some 40 jurisdictions provide for similar judicial review commissions but, according to appellee, only Hawaii and Va. impose criminal sanctions for breach of confidentiality.

Following decision of this case in Va. SC, USDC (ED Va.) (Merhige) issued a TRO restraining prosecution of a Va. TV station under the statute challenged here. The order has since expired. Thereafter, a motion for a TRO against the prosecution of a Richmond publisher was denied by Judge Warriner who, according to appellant, stated his belief that the state law was unconstitutional, but, in light of the Va. SC decision, was unable to find it "patently and flagrantly unconstitutional."

The issue here is substnatial. Appellee suggests that the criminal sanction imposed by Va. is the remedy suggested in the concurring opinions in New York Times Co. v. United States, 403 U.S. 713 (1971). Plenary consideration may be warranted.

There is a motion to affirm.

6/1/77 Goltz Va. SC op in appx.

PJN

6/9/77 Conference Day - Supplemental Brief is in advising Ct that Judge Warriner has now granted a preliminary injunction in that case.

Court Va. Sup. Ct. ..... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 76-1450

Submitted ...., 19... Announced ...., 19...

LANDMARK COMMUNICATIONS, INC., Appellant

vs.

VIRGINIA

4/20/77 - Appeal

I remained out tentatively as I participated in writing the new Va Const.

But I now find that only the validity of statute is at issue, & 3 Justices of Va S/Ct who served with me on Const. Commission did not recuse themselves in this case

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Stevens, J.				✓									
Rehnquist, J.						✓							
Powell, J.								Passed					
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.				✓									
Stewart, J.				✓									
Brennan, J.				✓									
Burger, Ch. J.				✓									

September 20, 1977

No. 76-1450 Landmark Communications v. Commonwealth of Va.

This appeal from the Virginia Supreme Court involves the validity of the Virginia statute that implements the Virginia constitutional provisions with respect to a "Judicial Inquiry and Review Commission".

Section 2.1-37.13 provides for the confidentiality of all papers filed with and proceedings before the Commission. It also provides:

> Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor".

The Virginia-Pilot published an article that identified a judge who had been under investigation by the Commission. The newspaper was prosecuted and convicted of a misdemeanor and the Virginia Supreme Court affirmed the conviction. It sustained the validity of the confidentiality provision against First Amendment and vagueness challenges.

Article 6, § 10 of the Constitution of Virginia requires the General Assembly to create a Judicial Inquiry and Review Commission, and provides that:

Proceedings before the Commission that be confidential.

The Constitutional provision does not specify that infringement of the confidentiality may be punished as a crime. Indeed, the constitutional mandate is general in its terms, and is not at issue in this case.*

I have read the principal briefs, and it seems to me that appellant must win on the First Amendment issue. I agree that the public interest probably would be better served if the confidential portion of the Commission's work were confidential. In many ways, it resembles that of a grand jury. If an employee of the Commission divulged confidential information, perhaps penalties could be imposed. But here a newspaper apparently obtained the information by a leak from an unknown source. While its publication may well have been irresponsible, I think it was protected by the First Amendment. As the appellant's brief states: "The Commission may withhold and keep secret what it can; the press may print what it learns." Br. 25.

L.F.P., Jr.

*I was a member of the Constitutional Revision Commisson that included this article. Three present members of the Virginia Supreme Court also were on the Commission: Justices Harrison (Chairman of the Commission), Harman and Cochran. All three of these Justices participated in the decision below. Although I "passed" when the jurisdictional statement was under discussion at our Conference last Term, I now see no reason why I should not participate.

Reviewed: Nancy would hold statute invalid as applied - making it unnecessary to invalidate statute for vagueness or overbreadth.

Here the press published truthful information about a public figure. No ev. that a participant in the proceedings violated the confidentiality provisions of the Act. Record doesn't show how press obtained info.

BENCH MEMO

TO: Mr. Justice Powell

FROM: Nancy Bregstein DATE: Jan. 2, 1978

RE: No. 76-1450, Landmark Communications, Inc. v. Virginia

You suggested that a short memo would suffice in this case; this is just to note my agreement with the view expressed in your Aid to Memory that application of the Virginia statute to appellant violated the First Amendment.

The main question in my mind is whether the Court should adopt either of the broad approaches suggested by appellant and supporting amici, to declare (1) that the press never may be punished for publishing the truth about matters involving public officials or (2) that the statute is unconstitutional on its face, or to take a more limited

stance by saying that the statute was applied unconstitutionally on the facts of this case. The narrowness of the facts as presented here is two-fold: (1) There is no evidence as to how the newspaper got its information, so it can be assumed that there was a leak and that the press merely published information already in its possession; the information published was truthful and merely conveyed accurate information; and the most substantial of the State's interests (encouragement of the effectiveness and proper functioning of the Commission by protecting complainants and witnesses) is not implicated. (2) There is little evidence, if any, of the legislature's assessment of the substantiality of the interests at stake. Nor do we have any assessment of how much confidentiality, if any, would be lost if there were no criminal sanctions for divulging what went on at Commission proceedings. Only two of the 30 or more States that have judicial inquiry commissions provide for criminal penalties for breach of confidentiality. The first observation relates solely to the facts of this case; the second relates to the amount of deference to be accorded to the statute in general.

Although courts can go beyond the particular facts of a First Amendment case involving overbreadth, to consider interests beyond those asserted by the particular parties before the court, I do not think the Court has to reach the overbreadth claim here. Here the statute has been applied in the clearest situation for First Amendment

Need not reach over-breadth issue

protection: truthful publication by a newspaper of information concerning proceedings involving a public official. The Court need only say that this application is unconstitutional. That way the Court need not address whether the State ever may punish a newspaper for truthful reporting of facts about public officials or whether it ever may punish other persons, such as participants in the proceedings, for divulging "confidential" information.

Invalid as applied

My reason for seeking to avoid the latter issue in particular is that it relates to the issues whether a judge may impose a gag order on participants in a criminal trial or bar the public (including the press) from criminal proceedings (e.g., the suppression hearing in the Philadelphia Newspapers case). If the Court were to hold in this case that a participant in a judicial inquiry proceeding could not be punished for leaking information to the press, that would imply that a person could not be punished for disobeying a judge's "gag" order in a criminal trial. (Of course there is the distinction that a criminal trial--and therefore a defendant's rights to a fair trial--is not at issue here.) There are strong arguments, of course, that the participant in the judicial inquiry proceeding may not be held criminally responsible for a leak--because of the guarantee of freedom of speech; but I do not think the Court should decide that question in deciding this case.

Yes

Nor is it necessary for the Court to say that no State interest would be sufficient to punish a newspaper

for divulging confidential information. The State's interest would have to be of the highest order, of course, and such an interest rarely if ever is found; but there is no need to pre-judge that case now.

The questions mentioned above are harder than the question presented here, and should be left open. Another question that the Court need not decide here is whether, assuming that a participant could be punished for divulging confidential information, the press could be punished for soliciting such a leak. Since there is no evidence that that is what happened here, the Court can treat the case as one involving publication of information already in the possession of the press, even though the case is not as strong as Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, where the information truly was "public" and made so by the State.

Yes

We can treat case as one in which press obtained info. w/o a party to proceeding have leaked it.

My first preference would be to decide the case on a straight First Amendment basis and not to reach the vagueness or overbreadth challenges. There may be some pressure, however, to reach the overbreadth claim, because otherwise the statute remains on the books and chills the First Amendment rights of others, such as the participants in the proceedings. Since a party has standing to make an overbreadth claim for others, it seems that appellant has standing to challenge the entire statute, not just its application to Landmark. But since the Court will hold the

statute unconstitutional as applied, there does not seem to be any need to reach other issues as well. They would be unnecessary to the decision.

N.B.

76-1450 LANDMARK v. VIRGINIA Argued 1/11/78

Abrams (appellant)

Not an access case - newspaper make no claim to right of access.

Not a privacy case - judge was public officer.

Truthful publication - no libel issue

Reasons of Va S/Ct are "real ones" and may be appropriate as to "participants".

Publication of a leak from G/Jury ~~or~~ also would be protected by 1st Amend. (But Abrams agreed could distinguish G/J case because of its history & its concern with criminal trials).

Krulp (Ant A/G)

Different from N.Y.T. case - no prior restraint here; only subsequent punishment.

WJB + TM - absent. 9 remained
Reverse ~~6~~ 7 - 0 Out

76-1450 LANDMARK COMMUNICATIONS v. VIRGINIA Conf. 1/13/78

The Chief Justice Reverse

Statute was construed by Va Ct to apply to anyone who divulges confidential information.

? Imp. State interest is to protect persons who make complaint & witnesses who ~~testify~~ testify.

Also judge should be protected as well as judicial system.

But as to non-participants, violates 1st Amend R

Mr. Justice Brennan

absent

Mr. Justice Stewart Reverse

Would limit to newspapers.

Participants could be punished but we don't have this Q before us.

No need to say whether press has greater rights than members of public.

Mr. Justice White Reverse

Non participants have ≥ 1st amend Rts as much as press.

Mr. Justice Marshall Reverse letter 1/16/78

Absent

Mr. Justice Blackmun Reverse

Mr. Justice Powell

<u>Out</u> in view of my having served on Virginia <u>Const</u>. Commission

Mr. Justice Rehnquist <u>Reverse</u>

no distinction bet. press & others

Mr. Justice Stevens <u>Reverse</u>

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1450, Landmark Communications, Inc. v. Virginia

I vote to reverse the judgment of the Supreme Court of Virginia. When the State seeks to punish criminally the making of truthful statements about public officials relating to their performance of their public duties, it must meet a very stringent burden of justification. In my view, the State has failed to meet this burden. All of the interests asserted by the State relate to the maintenance of the confidentiality of Judicial Commission proceedings, and such confidentiality can be maintained by methods less burdensome to clearly protected speech than the method at issue here.

With regard to defining the interest protected, I would prefer not to place too much weight on the fact that this case involves a newspaper. The statute at issue applies to any person who divulges Commission information, so that, for example, an individual who reads about a Commission proceeding in the newspaper and repeats it to a friend would apparently have violated the statute. I would hold that such an individual is as much protected as is the newspaper, rather than giving the press any special protection in the circumstances of this case.

T.M.

March 15, 1978

No. 76-1450 Landmark Communications v. Virginia

Dear Chief:

Please show at the end of your next draft that I took no part in the decision of this case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
1/24/78								
1st draft 3/15/78			Join CJ 3/15/78		Join CJ 3/20/78	out	Join CJ 3/22/78	Concurring opinion 1st draft 4/13/78
2nd draft 3/22/78								

76-1450 Landmark Communications v. Va.