Loyola of Los Angeles
Entertainment Law Review

Volume 8 | Number 1 Article 9

1-1-1988

Neither Rain, nor Sleet...nor the United States Congress...Will Prevent the U.S. Postal Service from Delivering Hustler Magazine

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NEITHER RAIN, NOR SLEET . . . NOR THE UNITED STATES CONGRESS . . . WILL PREVENT THE U.S. POSTAL SERVICE FROM DELIVERING *HUSTLER* MAGAZINE

"[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[1] No truer words could be spoken regarding one of the latest of Larry Flynt's court battles,[2] where it was established that the right to petition government for a redress of grievances is nearly absolute and will not be restricted merely because the petition takes the form of a magazine such as *Hustler*.[3]

Under Title 39 of the United States Code, section 3008[4] ("the stat-

1. Bridges v. California, 314 U.S. 252, 270 (1941).

2. For an overview of some of Flynt's latest courtroom antics, see U.S. v. Flynt, 756 F.2d 1352 (9th Cir. 1985). In that case, Flynt successfully appealed five judgments of criminal contempt entered by the United States District Court for the Central District of California because there was a substantial question as to his mental capacity to commit contempt. *Id.* at 1362, 1366. One of the contempt charges was issued by a U.S. magistrate when Flynt made a series of obscene remarks at an indictment proceeding in which he was charged with flag desecration and the unlawful wearing of a Purple Heart. *Id.* at 1355. The flag desecration charge resulted when Flynt appeared in court on an earlier, unrelated contempt charge wearing the American flag as a diaper. *Id.*

3. *Hustler* has been described as a "hard-core" men's magazine. *See* Faloona v. Hustler, 607 F. Supp. 1341, 1344 (N.D. Tex. 1985). *Hustler* is offensive, controversial and just plain raunchy. *Id.* The writing style is juvenile, the articles and fiction are at the level of a tabloid newspaper and the photos of nudes are explicit, sleazy and sadistic. *Id.* at 1344 n.9.

4. 39 U.S.C. § 3008. The statute reads:

> (a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addressees thereof.
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> (b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.
>
> (c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

39 U.S.C. § 3008(a)-(c) (1971).

ute"), an addressee who receives any pandering advertisement[5] may request the Postal Service to issue a prohibitory order to the sender. In *United States Postal Service v. Hustler Magazine* ("*Hustler*"),[6] the United States District Court for the District of Columbia held the statute unconstitutional as applied to addressees who are Members of Congress because such an application would violate the sender's First Amendment right to petition the government.[7]

In September 1983, Larry Flynt, publisher and editor of *Hustler* magazine ("the magazine"), mailed a current issue of the magazine to each member of Congress. Each magazine contained subscription advertisements.[8] Flynt enclosed a letter with each mailing in which he described the contents of the magazine as the latest news, sex reviews, pornography and in-depth investigative articles. He further stated that he would continue to send monthly issues of the magazine so that the Members would be well informed on social issues and trends.[9]

As of October 29, 1984, approximately 264 congressional members had complained about these mailings to the Postal Service. In response, the Postal Service issued approximately 264 prohibitory orders addressed to Larry Flynt and Hustler Magazine, Inc. ("Hustler Magazine"). Hustler Magazine continued to send copies of its publication to the Members after having received the prohibitory orders. Flynt again wrote the Members to explain that he would continue to send them the magazine "because I'm exercising my first amendment right to express my political and social views to public officials."[10]

In February 1985, the Postal Service brought an action against Hustler Magazine and Larry Flynt,[11] requesting a declaration that defendants had violated the prohibitory orders and seeking an injunction enforcing the orders. The district court determined that the case turned on whether the word "addressee," as used in the statute, may constitutionally include congressional members.[12] It held that the word "addressee" referred to private citizens, and hence, as applied to members of Congress, the statute was unconstitutional.[13] The court also concluded

5. Pandering is defined as the marketing or purveying of materials by emphasizing their sexually provocative nature. *See* Ginzburg v. United States, 383 U.S. 463 (1966).

6. 630 F. Supp. 867 (D.D.C. 1986).

7. *Id.* at 873.

8. *See supra* notes 4 and 5.

9. *Hustler*, 630 F. Supp. at 868.

10. *Id.*

11. *Id.* at 869. Other named defendants were LFP, Inc. and Larry Flynt Publications. *Id.*

12. *Id.*

13. *Id.* at 869, 875.

that congressional members have a reduced privacy interest because they are elected officials, and that the right to petition the government is paramount to that interest.[14]

The district court began its analysis by discussing the Supreme Court's holding in *Rowan v. United States* ("*Rowan*").[15] There, the Court found the statute constitutional on its face.[16] However, in *Rowan* the addressees were householders; therefore, the district court distinguished it from *Hustler* where the addressees were members of Congress.[17] In *Rowan*, the Supreme Court balanced the sender's right to communicate with the addressee's right to be "left alone in the home."[18] It confirmed the householder's right under the statute to exercise control over unwanted mail.[19] Thus, it rejected the argument that the vendor had a constitutional right to send unwanted mail into the home of another.[20]

In *Hustler*, the district court pointed out the *Rowan* Court's repeated interpretation of the word "addressee" as "householder."[21] It also emphasized that subsequent Supreme Court decisions confirmed the *Rowan* Court's limited goal of protecting the privacy interests of householders.[22]

The court found that the *Rowan* interpretation of "addressee" as "householder" clearly conformed with the intent of Congress when it enacted the statute.[23] The legislative history clarified that the statute was enacted in response to complaints of private citizens who were faced with

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14. *Id.* at 873.

15. 397 U.S. 728 (1970). The appellants were distributors, publishers, owners and operators of mail order businesses. They contended that the statute in question violated their constitutional right to communicate. The Court stated that the statute was enacted in response to public outcry regarding the receipt of mail deemed to be lewd and salacious in character. A declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee. *Id.* at 732. In rejecting appellants' argument, the Court concluded that no one has the right to press even "good" ideas on an unwilling recipient in his home. *Id.* at 739.

16. *Id.* at 737. At the time of the *Rowan* decision, the statute was codified as 39 U.S.C. § 4009 (1964).

17. *Hustler*, 630 F. Supp. at 869.

18. *Rowan*, 397 U.S. at 736.

19. *Id.* at 737.

20. *Id.* at 738.

21. *Hustler*, 630 F. Supp. at 869.

22. *Id.* at 870. To support its point, the district court cited Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 542 n.11 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 n.4 (1975); Cohen v. California, 403 U.S. 15, 21 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). *Id.*

23. *Id.*

the problem of receiving unsolicited, sex-related material in the mail. The court stated:

> It is abundantly clear from the legislative history that Congress' primary concern in approving legislation to limit offensive mail matter was to protect families. . . . In its final version, the bill struck the the proper balance between the individual's right to privacy in his home or other place of abode and a sender's right to communicate.[24]

The court in *Hustler* then balanced the Members' privacy interests against Flynt's First Amendment right to petition Congress. It discussed the unique role of congressional representatives, thereby distinguishing them from private citizens. As elected representatives of the people, Members of Congress should take care to be informed about concerns of their constituents. Thus, the court noted, a representative cannot "be let alone" without neglecting his or her duty as a representative.[25] Further, it found that Members of Congress do not enjoy the same measure of privacy as do ordinary citizens.[26] By assuming their offices, the Members forfeit certain claims to privacy they might otherwise assert.[27] In sending the magazine to the Members' offices, Flynt did not threaten the privacy of their homes.[28]

When it analyzed the other side of the balance, the court found Flynt's right to communicate with elected representatives to be stronger than the right to communicate with private persons in their homes. Flynt was exercising his First Amendment right to petition the government. The court explained that the right to petition is one of the most precious of the liberties guaranteed by the Bill of Rights, and it will be fiercely upheld where there is no conflict with other legitimate interests.[29] The court stated that there was no legitimate governmental interest in restricting Flynt from sending the magazine to Members of Congress. Rather, such a restriction would only serve to benefit the individual members who held what the court termed an "understandable dislike" for the magazine.[30] Further, the Postal Service's prohibitory order was based purely on the content of the communication, and would therefore not meet the content-neutrality requirement by which the government

24. *Id.* at 870 n.4.
25. *Id.* at 871.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 872.
30. *Id.* at 873.

must abide when restricting protected speech.[31] Weighing Flynt's constitutional right to petition Congress against the reduced privacy interest of the representatives in their offices, the court held that the statute was not a valid basis upon which to prohibit all further mailings of the magazine to the Members.[32] In rendering its decision in favor of Flynt and Hustler Magazine, the court upheld the First Amendment right to petition Congress for a redress of grievances.[33]

Historically, petitioning was a means of political participation for disenfranchised groups.[34] In colonial America, the right of citizens to petition government was an affirmative, remedial right which required governmental hearing and response.[35] Antebellum Congresses,[36] however, dedicated to the institution of slavery, were hostile to abolitionists' grievances and refused to respect petitioners' right to legislative hearing.[37] Proponents of the "gag" rules[38] successfully challenged the right to hearing, seemingly collapsing the right to petition within the broader right of freedom of expression.[39]

Today, the right to petition government does not include a corresponding duty to listen to or respond to petitioners' grievances.[40] It guarantees a presentative right: a right of access to government in order to voice grievances and express opinions.[41] "What a Senator does with petitions is absolutely within his discretion and is not a proper subject of judicial inquiry, even if it might appear that he be grossly abusing that discretion."[42]

Although it seems inconsistent that the court would devote so much of its opinion to defending the right to petition while also affirming the

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31. *Id.* The content-neutrality requirement prohibits the government from regulating public expression on the basis of its message, content or point of view. *See generally* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

32. *Id.*

33. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. AMEND. I.

34. Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 576 (1987).

35. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986).

36. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (UNABRIDGED) 76 (2d ed. 1979) defines antebellum as "before the war; specifically, before the American Civil War."

37. Higginson, *supra* note 35 at 143.

38. *Id.* at 158. The gag rules prevented Congress from receiving or in any way considering petitions praying the abolition of slavery.

39. *Id.* at 143.

40. Minnesota State Bd. v. Knight, 465 U.S. 271, 285 (1984).

41. Higginson, *supra* note 35 at 165.

42. *Id.* at 143 n.2 (citing Chase v. Kennedy, No. 77-305-T, mem. op. at 2 (S.D. Cal. July 11, 1977), *aff'd*, 605 F.2d 561, *cert. denied*, 444 U.S. 935 (1979)).

Members' right to discard the magazines without even looking at them,[43] it was correct in so doing.[44]

The court clearly explained that Congress enacted the statute in order to protect the privacy interests of private persons in their homes.[45] That intent, coupled with the fact that the government attempted to abridge the First Amendment right to petition government, should have been sufficient alone to render a decision favorable to defendants. Instead, the court muddled its analysis by engaging in an unnecessary balancing act.

Ordinarily, government has no power to restrict expression because of its message or content.[46] Any government action aimed at communicative impact is presumptively at odds with the First Amendment[47] and will be held unconstitutional unless the speech falls into a category unprotected by the First Amendment.[48]

If a government regulation is aimed at the non-communicative impact of an act, it will be constitutional as long as it does not unduly restrict the flow of information and ideas.[49] It is usually only when a regulation appears to be content-neutral that a court will resort to balancing.[50] In such a case, the extent to which the communication is in

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43. *Hustler*, 630 F. Supp. at 874. "Members are not forced to read the magazine or other of the mail they receive in volume. We cannot imagine that Congressional offices all lack wastebaskets." *Id.*

44. *But see* Hodgkiss, *supra* note 34 at 576. The author argues that the duty to respond is essential to make petitioning a meaningful right. If the government has no duty to consider or respond to petitions, the right contributes little to democratic decisionmaking and would guarantee no more than the freedom of speech. "Defining the right to petition as merely a right to come forward is similar to saying that citizens can vote but candidates with the most votes will not necessarily take office, or that plaintiffs can file lawsuits but defendants have no duty to answer."

45. *Hustler*, 630 F. Supp. at 870. The legislative history confirms that Congress intended to protect the privacy of persons in their homes. *See* H.R. Rep. No. 722, 90th Cong., 1st Sess. 68 (1967).

46. Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972).

47. Tribe, AMERICAN CONSTITUTIONAL LAW 581 (1978).

48. *Id.* at 582. There are several categories of speech which the Supreme Court has declared unprotected by the First Amendment. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation of private persons). *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech that is both directed to and likely to incite lawlessness). *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (defamation of a public official regarding official conduct when made with reckless disregard for the truth). *See* Roth v. United States, 354 U.S. 476 (1957) (obscenity). *See* Terminiello v. Chicago, 337 U.S. 1 (1949) (fighting words that incite the person to whom they are addressed to violence). In *Hustler*, the court noted that "[d]efendants in their mailings are and continue to be subject to federal and state laws concerning obscenity. Presumably, defendants are well aware of this fact." 630 F. Supp. at 875 n.7.

49. TRIBE, *supra* note 47 at 582.

50. *Id.*

fact inhibited is balanced against the interests served by enforcing the regulation.[51]

The *Rowan* case is a good example of a case where balancing was justified because at issue was the validity of a regulation enacted to protect the privacy of the home — a content-neutral regulation. The case could have been analyzed by explicitly balancing the degree of curtailment upon the sender's First Amendment right to communicate against the equally legitimate rights of addressees to privacy in their homes and control over their property.[52] When a content-neutral regulation does not involve a public forum, the government's burden of justification is minimal.[53] "[T]he Constitution tolerates (and may even compel) placing the homeowner's right to exclude unwanted views above the speaker's desire to intrude them."[54]

The *Hustler* case did not involve householders' privacy interests or any other interest that might be legitimately balanced against Flynt's First Amendment right to petition the government. Rather, the government attempted to impede his communications with Congress solely because of the offensive nature of the magazine.[55] The court specifically said that the restriction was content-oriented.[56] Upon that recognition, it should have unequivocally held for the defendants.[57] The first section of the opinion established that the privacy rights guaranteed by the statute do not apply to addressees who are Members of Congress.[58] The court conceded that there were no other legitimate interests to consider on the government side of the balance.[59] Nonetheless, it took the balancing approach.

It has been proposed that whenever "core petitioning activity" is at issue, there can never be a justification for time, place and manner re-

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51. *Id.* at 683.

52. The *Rowan* court did not engage in an explicit balancing, yet it stated:

> [T]he right of every person to be let alone must be placed in the scales with the right of others to communicate. . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.

307 U.S. 728, 736-37 (1970).

53. TRIBE, *supra* note 47 at 684.

54. *Id.* at 694.

55. *Hustler,* 630 F. Supp. at 873.

56. *Id.*

57. Albeit, the court did not discuss the content-based nature of the restriction until after it had balanced the First Amendment rights of Flynt with the "limited privacy rights" of members of Congress while serving in their official roles.

58. *Hustler,* 630 F. Supp. at 871.

59. *Id.* at 873.

strictions (content-neutral regulations) because no legitimate government interests could be affected by the core petitioning activities themselves.[60] "Core petitioning activity" is simply the preparing, signing and transmission of a written petition to government.[61] Any protection of activities beyond core petitioning is derived from constitutional rights other than the right to petition.[62] On the facts, Flynt was involved only with core petitioning activity when he sent the magazines to Congress.[63] Accordingly, the court should have upheld the right categorically instead of balancing.

> Where the grievance is against government and private interests are not subject to injury, the right should be preserved in nearly absolute form. Any offense a member of government might take on account of petitions containing obscenity or sexually oriented speech, inaccurate statements on commercial matters or criticisms and political statements by subordinates obviously cannot be of sufficient gravity to justify an encroachment on the right.[64]

The court reached the same result by balancing as it would have reached had it categorically ruled against the application of the statute. However, the use of the balancing approach in a case such as *Hustler* is questionable. In the words of Professor Laurence Tribe:

> If the judicial branch is to protect dissenters from a majority's tyranny, it cannot be satisfied with a process of review that requires a court to assess after each incident a myriad of facts, to guess at the risks created by the expressive conduct, and to assign a specific value to the hard-to-measure worth of particular instances of free expression. The results of any such process of review will be some "famous victories" for the cause of free expression but will leave no one very sure that any particular expression will find a constitutional shield. . . . The balancing approach is . . . a slippery slope; once an issue is seen as a mat-

60. Smith, *"Shall Make No Law Abridging . . ." An Analysis of the Neglected But Nearly Absolute Right of Petition*, 54 U. CIN. L. REV., 1153, 1191 (1981).

61. *Id.*

62. *Id.* For instance, if petitioning occurs at a demonstration, the demonstration will not necessarily be given absolute protection under the right to petition because it goes beyond the scope of core petitioning activity. Instead, the demonstration is protected by other First Amendment rights such as freedom of expression, assembly and association. As such, the demonstration may be regulated via reasonable time, place and manner restrictions.

63. In any event, the government never contended that Flynt was not engaged in petitioning activity.

64. Smith, *supra* note 60 at 1193.

> ter of degree, first amendment protections become especially reliant on the sympathetic administration of the law. . . . [W]hen the government's concern is with message content, it has proven both possible and necessary to proceed categorically.[65]

It may be unsettling to consider that the right to petition the government guarantees nothing more than the right to freedom of expression: a right to speak, but not a right to be listened to. But this is a logical and efficient interpretation of the right, despite the fact that it is not what the Framers of the Constitution intended. Given the tremendous growth of the country and corresponding expansion of governmental functions over the last two hundred years, it would be an onerous burden on government officials should they be required to consider and respond to every petition. Moreover, the right of every adult citizen to vote ensures responsiveness from elected officials; therefore, it is unlikely that petitions with majority support will fall into the Congressional wastebaskets along with the latest issue of *Hustler* magazine.

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65. TRIBE, *supra* note 47 at 583-84.