

SILBERMAN, *Senior Circuit Judge*, dissenting in part: Global Witness (Appellee) falsely insinuated that former Liberian officials (Appellants) took bribes from Exxon. It admitted that it had *no evidence* that Exxon had contacted Appellants, directly or indirectly, with respect to the alleged payments. And the evidence Global Witness did have suggested the payments at issue were proper staff bonuses, not bribes. Nevertheless, the Majority creates a whole new theory of the case—one not advanced by any Party—that the Appellants were bribed not by Exxon, but by their *own* principal, the National Oil Company. According to the Majority, its new narrative is so unassailable that, even at the 12(b)(6) stage, it precludes an inference that Global Witness harbored subjective doubts as to the implied accusation of bribery.

I

As Global Witness explained, “this is a story of bribery.” J.A. 58. Bribery, as it is commonly understood, involves a *quid pro quo*. See *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); accord J.A. 82 (“[A] payment given so a public servant will undertake an official act.”). As such, bribery has three necessary components: A briber, a bribee, and an exchange. In Global Witness’s story, it seems obvious that Exxon was the briber, Appellants were the bribees, and the trade was \$35,000 to ensure the deal goes through. Without one element, there is obviously no bribery. In other words, if no briber—or no bribe—then no bribee.

In its cross-appeal, Global Witness contends that its Report was not even defamatory—it simply raised questions. Of course, Appellants disagree, claiming that the Report, *Catch me if you can*, falsely insinuated that they took bribes from Exxon to approve the Block 13 deal.

The district court easily determined that Global Witness’s story contained the defamatory implication that

Indeed, the day after the Alabama court's verdict, the *Alabama Journal* (a Montgomery paper) celebrated the result. An editorial trumpeted that the case would cause the "reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns." *Id.* at 34. "The Times was summoned more than a thousand miles to Montgomery to answer for its offense. Other newspapers and magazines face the same prospect." *Id.* Even before the Supreme Court issued the *Times* decision, a second suit filed by a mayor—based on the same ad—had already resulted in another \$500,000 verdict against *The Times*. *Id.* at 35. And three additional suits remained pending. *Id.* CBS had similarly been sued for \$1.5 million over a televised program that depicted the difficulties of African Americans in registering to vote. *Id.* at 36. By 1964, southern officials had filed almost \$300 million in libel suits against the northern press. *Id.*

One can understand, if not approve, the Supreme Court's policy-driven decision.⁷ There can be no doubt that the *New York Times* case has increased the power of the media. Although the institutional press, it could be argued, needed that protection to cover the civil rights movement, that power is now abused. In light of today's very different challenges, I doubt the Court would invent the same rule.

As the case has subsequently been interpreted, it allows the press to cast false aspersions on public figures with near

⁷ It should be noted that precisely *what* should have been done is a matter of debate. See, e.g., Richard A. Epstein, *Was New York Times v. Sullivan Wrong*, 53 U. CHI. L. REV. 782, 791 (1986); see also Lewis Green, *The New York Times Rule: Judicial Overkill* 12 VILLANOVA L. REV. 725, 735 (1967).

impunity.⁸ It would be one thing if this were a two-sided phenomenon. *Cf. New York Times*, 376 U.S. at 305 (Goldberg, J., concurring) (reasoning that the press will publish the responses of public officials to reports or accusations). *But see* Suzanne Garment, *The Culture of Mistrust in American Politics* 74–75, 81–82 (1992) (noting that the press more often manufactures scandals involving political conservatives). The increased power of the press is so dangerous today because we are very close to one-party control of these institutions. Our court was once concerned about the institutional consolidation of the press leading to a “bland and homogenous” marketplace of ideas. *See Hale v. FCC*, 425 F.2d 556, 562 (D.C. Cir. 1970) (Tamm, J., concurring). It turns out that *ideological* consolidation of the press (helped along by economic consolidation) is the far greater threat.⁹

⁸ *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 769 (1985) (White, J., concurring):

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

⁹ We once explained why major American cities lost their second mainframe papers due to market forces. *See generally Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir.), *aff'd*, 493 U.S. 38 (1989). That second paper was sometimes right of center, e.g., *The New York Herald Tribune* and *The Washington Star*, leaving the residual paper in a local monopoly position. As large American cities became heavily Democratic Party

Although the bias against the Republican Party—not just controversial individuals—is rather shocking today, this is not new; it is a long-term, secular trend going back at least to the '70s.¹⁰ (I do not mean to defend or criticize the behavior of any particular politician). Two of the three most influential papers (at least historically), *The New York Times* and *The Washington Post*, are virtually Democratic Party broadsheets. And the news section of *The Wall Street Journal* leans in the same direction. The orientation of these three papers is followed by *The Associated Press* and most large papers across the country (such as the *Los Angeles Times*, *Miami Herald*, and *Boston Globe*). Nearly all television—network and cable—is a Democratic Party trumpet. Even the government-supported National Public Radio follows along.

As has become apparent, Silicon Valley also has an enormous influence over the distribution of news. And it similarly filters news delivery in ways favorable to the Democratic Party. See Kaitlyn Tiffany, *Twitter Goofed It*, *The Atlantic* (2020) (“Within a few hours, Facebook announced that it would limit [a *New York Post*] story’s spread on its platform while its third-party fact-checkers somehow investigated the information. Soon after, Twitter took an even more dramatic

bastions, so too did the local dominant paper. See Gentzkow and Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 *ECONOMETRICA* 35 (Jan. 2010).

¹⁰ Who can forget Candy Crowley’s debate moderation? See, e.g., Noah Rothman, *Candy Crowley’s Debate Moderation Exemplifies Why Americans Do Not Trust Their Media*, *Mediaite* (Oct. 17, 2012); Dylan Byers, *Crowley fact-checks Mitt*, *Politico* (Oct. 17, 2012).

stance: Without immediate public explanation, it completely banned users from posting the link to the story.”¹¹

It is well-accepted that viewpoint discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992). But ideological homogeneity in the media—or in the channels of information distribution—risks repressing certain ideas from the public consciousness just as surely as if access were restricted by the government.

To be sure, there are a few notable exceptions to Democratic Party ideological control: *Fox News*, *The New York Post*, and *The Wall Street Journal*’s editorial page.¹² It should be sobering for those concerned about news bias that these institutions are controlled by a single man and his son. Will a lone holdout remain in what is otherwise a frighteningly orthodox media culture? After all, there are serious efforts to muzzle *Fox News*. And although upstart (mainly online) conservative networks have emerged in recent years, their

¹¹ Of course, I do not take a position on the legality of big tech’s behavior. Some emphasize these companies are private and therefore not subject to the First Amendment. Yet—even if correct—it is not an adequate excuse for big tech’s bias. The First Amendment is more than just a legal provision: It embodies the most important value of American Democracy. Repression of political speech by large institutions with market power therefore is—I say this advisedly—fundamentally un-American. As one who lived through the McCarthy era, it is hard to fathom how honorable men and women can support such actions. One would hope that someone, in any institution, would emulate Margaret Chase Smith.

¹² Admittedly, a number of Fox’s commentators lean as far to the right as the commentators and reporters of the mainstream outlets lean to the left.

visibility has been decidedly curtailed by Social Media, either by direct bans or content-based censorship.

There can be little question that the overwhelming uniformity of news bias in the United States has an enormous political impact.¹³ That was empirically and persuasively demonstrated in Tim Groseclose's insightful book, *Left Turn: How Liberal Media Bias Distorts the American Mind* (2011). Professor Groseclose showed that media bias is significantly to the left. *Id.* at 192–197; *see also id.* at 169–77. And this distorted market has the effect, according to Groseclose, of aiding Democratic Party candidates by 8–10% in the typical election. *Id.* at ix, 201–33. And now, a decade after this book's publication, the press and media do not even pretend to be neutral news services.

It should be borne in mind that the first step taken by any potential authoritarian or dictatorial regime is to gain control of communications, particularly the delivery of news. It is fair to conclude, therefore, that one-party control of the press and media is a threat to a viable democracy. It may even give rise to countervailing extremism. The First Amendment guarantees a free press to foster a vibrant trade in ideas. But a biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness—to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press' power.

¹³ The reasons for press bias are too complicated to address here. But they surely relate to bias at academic institutions.