The Purloined Pentagon Papers and Prior Restraint: The Press Prevailed!

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NOTES AND COMMENTS

THE PURLOINED PENTAGON PAPERS AND PRIOR RESTRAINT: THE PRESS PREVAILED!

The event was unprecedented. The greatest leak of classified information in the history of the United States enabled The New York Times to disclose to the world the decision making process whereby the Johnson Administration had escalated the conflict in Vietnam. Sharing the front page of the Sunday edition (June 13, 1971) of The Times with the report of the wedding of Tricia Nixon to Edward Cox, was the first installment in a series about the history of American involvement in Vietnam. A bland headline—VIETNAM ARCHIVE: PENTAGON STUDY TRACES 3 DECADES OF GROWING U.S. INVOLVEMENT—introduced six pages of ponderous text, including columns of secret documents. The Times, consistent with its view of the responsibility of the press, published this information despite its classified nature.

On Monday, June 14, the second installment appeared. The Nixon Administration, seeking to withdraw from Vietnam in orderly and honorable fashion, moved to dam the flow of classified material. Robert C. Mardian, Assistant Attorney General, discussed with Harding F. Bancroft, executive vice president of The Times, the possibility of voluntary cessation of the series. Attorney General John N. Mitchell telegraphed The Times to “respectfully request” that it refrain from further publication, on the ground that such disclosures cause “irreparable injury to the defense interests of the United States,” and return all relevant material to the Government. The intention of the Justice

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1 ID., June 28, 1971, at 11.
3 Id., col. 4.
4 A fundamental responsibility of the press in this democracy is to publish information that helps the people of the United States to understand the processes of their own Government, especially when those processes have been clouded over in a veil of public dissimulation and even deception. ... It is the effort to expose and elucidate that truth that is the very essence of freedom of the press.
6 Id., June 15, 1971, at 1, col. 8.
7 Id., Newsweek, June 23, 1971, at 15.
Department — to obtain court enjoinder if necessary — was made perfectly clear, and the possible penalties for revealing classified information injurious to the national security were cited.\(^8\) *The Times*, constrained by principle to "respectfully decline," then threw down the gauntlet by publishing installment number three.\(^9\)

The impact of publication was tremendous, domestically and internationally. Shock waves reverberated through the White House, the Departments of State, Defense and Justice, and the Congress. The Senate contemplated an investigation of the origins of United States involvement in Vietnam, and the House of Representatives planned to study the classification system. Military sources expressed fear that the documents already published might compromise this nation’s secret codes. Communist governments gleefully exploited the situation, and friendly governments expressed deep concern about the ability of the United States to maintain confidences.\(^10\) At home, distrust of government and disgust with the Vietnam conflict increased.\(^11\)

These extraordinary ramifications of publication elicited an un-

\(^{8}\) *Time*, June 28, 1971, at 17.

The allegedly applicable provision of the Espionage Act states:

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\ldots \text{Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance or note relating to the national defense, or information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States, or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it} \ldots \text{shall be fined not more than $10,000 or imprisoned not more than 10 years, or both.}
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\(^{9}\) *N.Y. Times*, June 15, 1971, at 1, col. 4.

\(^{10}\) The diplomatic reaction was angry. Diplomats from at least five nations—Canada, Germany, France, Thailand and South Vietnam—all inquired officially or unofficially about the leak and the chances that it might happen again. "If diplomatic communications cannot be held in confidence," said one important European leader, "then we have a very serious problem." Canada was particularly upset at having one of its diplomats identified as having run America’s escalation messages to Hanoi. Other documents contained some unvarnished thoughts about friendly nations; one disclosed that Britain, Australia, and New Zealand were filled in fully on the original bombing plans, Canada somewhat less — and South Korea, Taiwan and the Philippines less still. "It is," said one U.S. official, "a disaster for the integrity of government."


President Nixon reportedly was primarily concerned with the possibility that additional security breaches might occur. "His concern goes to the government being able to conduct foreign policy in a confidential way." *Id.* at 15.


Former Ambassador Averell R. Harriman concurred: "If governments can't have private papers kept in confidence, I don't know how you can do business in government." *Time*, June 28, 1971, at 19.

\(^{11}\) *Newsweek*, June 28, 1971, at 12.
precedented response by the Nixon Administration. For the first time in American history, the federal government brought an action to suppress publication of articles by a newspaper. To that end, "that ancient antithesis of a free press, the long discredited practice of 'prior restraint,'" was invoked. Amazingly, a momentous issue had been joined, with Government raising the standard of national security and The Times unfurling the banner of freedom of the press. Resolution of this dramatic confrontation by the Supreme Court of the United States seemed inevitable, and promised clarification of the comparative weights of the Government's right to maintain secrecy and the press's conflicting right to report to the public about governmental operations.

This epic constitutional encounter began before Judge Murray I. Gurfein, of the Southern District Court of New York. The Government initially moved for a temporary restraining order and for return of the contested material, on the ground that publication would irreparably injure the United States, particularly in its foreign relations. Professor Alexander Bickel, of Yale Law School, argued on behalf of The Times that the action was a "classic case of censorship" forbidden under the first amendment. Judge Gurfein granted the temporary restraining order, stopping The Times' disclosures, and ordered a hearing on the Government's motion for a preliminary injunction on Friday, June 18. Importantly, no return of The Times' material was ordered.

The Government renewed its motion for return of the classified material on June 16. The Times argued that its documents might enable the Government to discover the newspaper's source, and noted that the Government had copies of the study. Judge Gurfein signed an order instructing The Times to show cause on the following day why it should not be required to produce its material.

The next day, however, the Government failed to obtain inspec-

13 N.Y. Times, June 16, 1971, at 1, col. 8. The memorandum by the Government is printed id. at 18, cols. 6-8.
14 Id. at 18, col. 2. The Times viewed the Government's action as "an unprecedented example of censorship." Id. at 44, col. 1.
15 Id. at 1, col. 8.
16 The material in question was classified under Executive Order 10501, entitled "Safeguarding Classified Information."
18 N.Y. Times, June 17, 1971, at 1, col. 8.
tion of the documents in The Times' possession. Judge Gurfein barred any such "fishing expedition," but persuaded The Times to provide the Government with a list of the materials that it possessed. This early solicitude of The Times indicated the extreme difficulty of the task before the Government, i.e., proving that the danger from continued publication required limitation of the first amendment.

On Friday, June 18, the hearing on the motion for a preliminary injunction was held before Judge Gurfein. United States Attorney Whitney North Seymour presented the issue as

whether, when an unauthorized person comes into possession of documents which have been classified under lawful procedures, that person may unilaterally declassify those documents in his sole discretion.

He argued that further publication would adversely affect "current military and defense plans and intelligence operations and . . . our international relations." Judge Gurfein, however, described the issue as

whether, assuming that in the guise of security . . . a government wishes to suppress matters that might be embarrassing to it domestically, the Government has the right to do that under the First Amendment.

It was apparent that Judge Gurfein had not been convinced at the close of the hearing.

Meanwhile, the Government's problems were multiplying. The Washington Post had somehow acquired portions of the top secret report and published this day an article derived from them. Efforts to convince The Post to cease such disclosures were unavailing, so the Government requested a temporary restraining order from District Court Judge Gerhard A. Gesell. Incredibly, Judge Gesell refused to grant this motion, on the ground that the first amendment prohibits prior restraint "on publication of essentially historical data."

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19 Id., June 18, 1971, at 1, col. 5. The Government maintained that the Freedom of Information Act precluded The Times from obtaining rightful possession. It therefore argued: "The Times cannot claim any greater right to these documents and materials because they are presently in the unlawful and unauthorized possession of The Times." Id. at 14, col. 3.
21 Id. Seymour insisted that the court was "not dealing with matters of closed history but matters which have very current vitality and significance." He expressed deep concern that additional disclosures "would currently adversely affect the military alliances, diplomatic efforts relating to a number of sensitive matters, including military matters, and present and future military and defense plans and strategy." Id., col. 5.
22 Id.
23 Id. at 1, col. 4. Judge Gesell's decision is printed id. at 10, col. 7.
Stunned Government attorneys immediately appealed to the Court of Appeals for the District of Columbia. A three-judge court was convened to consider the appeal. At 1:20 A.M., June 19, some five hours after Judge Gesell issued his opinion, a temporary restraining order was granted, two to one. Judges Spottswood Robinson III and Roger Robb voted to reverse the district court; Judge J. Skelly Wright dissented. The Post was halted from further publication of excerpts from the Pentagon study pending a full hearing before the district court on the Government's motion for a preliminary injunction. Judges Robinson and Robb concluded that "an injunction against publication of material vitally affecting the national security" is permissible under the Constitution and deemed the governmental interest in securing the temporary restraining order more significant than any infringement upon the freedom of the press. Judge Wright vehemently disagreed —

This is a sad day for America. Today, for the first time in two hundred years of our history, the Executive Department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of four most precious freedoms. As if the long and sordid war in Southeast Asia had not already done enough harm to our people; it now is used to cut the heart of our free institutions and system of government.

but the Government had again succeeded in temporarily clamping the lid on its personal Pandora's box.

Any celebration of this achievement was brief, however. Later in the day, Judge Gurfein denied the Government's motion for a preliminary injunction, on the ground that

no cogent reasons were advanced as to why these documents, except in the general framework of embarrassment, would vitally affect the security of the nation.

The court agreed that the Government had an inherent right to bring the action, but accepted the argument of Professor Bickel, The Times' attorney, that the Government had failed to establish a "direct and immediate link" between "the fact of publication" and some "grave

24 Id. The preliminary opinion is printed id. at 10, col. 7.
25 Id., June 20, 1971, at 27, col. 3.
26 Id., col. 4.
27 Id.
event” jeopardizing the United States.\textsuperscript{30} The matter in question not being “absolutely vital to current national security,”\textsuperscript{31} and freedom of the press being essential to the American system of government,\textsuperscript{32} injunctive relief was denied.\textsuperscript{33}

The Government quickly appealed Judge Gurfein’s decision\textsuperscript{34} to the Court of Appeals for the Second Circuit. Judge Irving Kaufman blocked \textit{The Times’} resumption of publication by issuing a temporary restraining order, on the ground that otherwise the appeal would be rendered moot.\textsuperscript{35} Arrangements were made for a three-judge court to hear the appeal,\textsuperscript{36} as the case moved relentlessly toward the Supreme Court.

On June 21, Judge Gesell again disappointed the Government. He denied its motion for a preliminary injunction against \textit{The Post}, on the ground that the Government had not shown “an immediate grave threat to the national security, which in close and narrowly defined circumstances would justify prior restraint on publication.”\textsuperscript{37} Judge Gesell found that further disclosures might adversely affect current and contemplated negotiations,\textsuperscript{38} but was not convinced that there will be a definite break in diplomatic relations, that there will be an armed attack on an ally, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials.\textsuperscript{39}

In these circumstances, the court concluded,

\begin{quote}
there is no basis upon which the court may adjust [the first amendment] to accommodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting.\textsuperscript{40}
\end{quote}

\textsuperscript{30} \textit{Time}, June 28, 1971, at 17.
\textsuperscript{31} \textit{N.Y. Times}, June 20, 1971, at 26, col. 4.
\textsuperscript{32} “The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions.” \textit{Id.} col. 5.
\textsuperscript{33} Significantly, the court asserted that the Government’s action was “no attempt . . . at political suppression.” \textit{Id.}
\textsuperscript{34} \textit{The Times}, understandably, described the decision as “a landmark in the endless struggle of free men and free institutions against the unwarranted exercise of governmental authority.” \textit{Id.}, June 21, 1971, at 28, col. 2.
\textsuperscript{35} \textit{Id.}, June 20, 1971, at 1, col. 8. Judge Kaufman’s order is printed \textit{id.} at 26, col. 6.
\textsuperscript{37} \textit{Id.}, June 21, 1971, at 1, col. 6.
\textsuperscript{38} \textit{Id.}, June 22, 1971, at 1, col. 7. The opinion is printed \textit{id.} at 18.
\textsuperscript{39} \textit{Id.}, at 18, col. 3.
\textsuperscript{40} \textit{Id.}, col. 5.
\textsuperscript{40} \textit{Id.}, col. 7. This sentiment calls to mind the eloquent words of John Marshall,
The Government appealed immediately, and secured extension of the restraining order from a three-judge court. It was announced that all nine judges of the District of Columbia Circuit would hear the appeal on the following day, June 22.41

On June 21, a three-judge court extended the temporary restraining order against The Times and announced that because of its "extraordinary importance" all eight judges of the Second Circuit would hear the appeal.42 United States Attorney Seymour, unsuccessful in his efforts to persuade Judge Gurfein that the circumstances were sufficiently exceptional to justify prior restraint, bolstered his argument on the facts with the legal argument that

[n]ational defense documents properly classified by the Executive, are an exception to an absolute freedom of the press, and should be protected by the courts against unauthorized disclosure.43

Thomas Jefferson was invoked in support of this position:

... All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their Executive functionary only. He of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication.44

The burden of proving the district court judge clearly wrong on the facts prompted the Government to broaden its attack and to redefine the issues.

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41 N.Y. Times, June 22, 1971, at 1, col. 7.
42 Id., col. 8.
43 Id. at 18, col. 1.
44 Letter from Thomas Jefferson to Federal Attorney George W. Hay of the District of Virginia, June 17, 1807, quoted id., cols. 2, 3.
The next day, June 22, with the Second Circuit sitting en banc, Seymour maintained vigorously that further disclosures were so dangerous to the nation as to warrant prior restraint. He argued that such publication would adversely affect efforts to end the conflict in Southeast Asia, negotiations to achieve a lasting peace in the Middle East, American interests in Central Europe, and vital discussions between the United States and the Soviet Union concerning strategic arms limitations. The Times, Seymour charged, was in violation of the Espionage Law, and must be enjoined.

While Seymour inveighed against additional compromises of security to the Second Circuit in New York, Solicitor General Erwin N. Griswold advanced the same and other arguments before the District of Columbia Circuit sitting en banc in Washington, D.C. Asserting that freedom of the press is not absolute, the Solicitor General noted that injunction is available to protect a copyright and spoke of the literary property doctrine. Extraordinary circumstances, he argued, permitted and necessitated injunctive relief, for the first amendment was “not intended to make it impossible for Government to function.”

The rare appearance of the Solicitor General below the Supreme Court level indicated the extreme importance of the case to the Government.

While the courts of appeals heard appeals by the Government, a third newspaper — The Boston Globe — published an article based upon the top secret report. The Justice Department unsuccessfully sought voluntary cooperation and then secured a temporary restraining order from Judge Anthony Julian. Judge Robb, of the District of Columbia Circuit, wondered whether the Government was asking the judiciary to “ride herd on a swarm of bees with a pencil.” Perhaps he was prescient, for newspapers from Miami to Los Angeles published articles derived from the controversial report soon thereafter.

On June 23, the federal appeals courts rendered their decisions. In The Times case the Second Circuit remanded the case to the district court for additional in camera proceedings and determination whether particular items “pose[d] such grave and immediate danger

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46 Id., col. 3; see note 8 supra.
47 Id. at 29, col. 8.
49 N.Y. Times, June 23, 1971, at 23, col. 1. The order is printed id., col. 2.
50 NEWSWEEK, July 5, 1971, at 17.
51 Id.
to the security of the United States as to warrant their publication being enjoined. . . ."52 The court, 5 to 3, thus accepted the Government's argument that prior restraint is not unconstitutional per se, and gave the Government another opportunity to establish the special circumstances necessary to support an injunction. The temporary restraining order issued by the court would remain in effect until June 25, when it would lapse except in regard to those items specified by the Government for consideration by the district court.53

The Government fared very poorly, however, in its action against The Post. Despite the efforts of Solicitor General Griswold, the District of Columbia Circuit, 7 to 2, ruled in favor of The Post, but continued the restraining order to allow an appeal by the Government.54 The Government had failed to overcome the "heavy presumption against" any prior restraint.55 The decision was "fortified" by "substantial doubt" that the courts could provide "effective relief."56 Judge Wilkey dissented from complete affirmance, on the ground that certain documents should be remanded to the district court for specific consideration.57 Judge MacKinnon strongly dissented, suggesting that the court "abdicate[d] [its] responsibility to protect the security of our nation's military and diplomatic activities" and favoring a limited remand.58

The following day, June 24, the Government's motion for a rehearing was denied, 7 to 2, by the District of Columbia Circuit.59 The Post case proceeded toward the Supreme Court, and The Times applied to that Court for a writ of certiorari.60 On June 25, the Court agreed, 5 to 4, to hear the appeals the next day and placed both newspapers under the same restraints imposed upon The Times by the Second Circuit. Justices Black, Douglas, Brennan and Marshall would have permitted the newspapers to resume publication without hearing.

53 Id.
54 N.Y. Times, June 24, 1971, at 1, col. 7.
56 Id.
57 Id. at 2745.
58 Id. at 2744-45.
I would not reward the theft of these documents by a complete declassification. There is a regular method by which access to classified information can be accomplished and in my view the prescribed method should be followed in this as in other instances.
59 Id. at 2745.
60 N.Y. Times, June 25, 1971, at 1, col. 5. The text is printed id. at 13, col. 2.
61 Id., col. 8. The petition is printed id. at 12, col. 3.
oral argument. Nevertheless, the Supreme Court for the first time imposed a prior restraint on newspapers.

The Court convened in an unusual Saturday session to hear oral arguments for two hours. The Government’s request for in camera proceedings was rejected, 6 to 3, as the session commenced, but submission of briefs under seal was allowed. The Solicitor General argued that publication would seriously endanger the nation and stressed the basic right of the Government to function. Invoking the power of the President as Chief Executive and Commander-in-Chief, he portrayed injunctive relief as essential to maintaining the integrity of the Presidency. The copyright and literary property doctrines were mentioned as legitimate exceptions to freedom of the press. Additionally, equitable considerations were raised, with The Times and The Post being described as knowing participants in a breach of fiduciary duty. The Solicitor General was struggling mightily to obtain judicial reconsideration of the ramifications of disclosure of the numerous documents to which the Government specifically objected.

Professor Bickel argued that the Government had failed to prove its case:

... what characterizes every instance in which the Government tries to make its case factually is a chain of causation, whose links are surmise and speculation, all going toward some distant event ...

Under the standard suggested by Bickel, prior restraint is possible only where publication would proximately cause especially serious danger to the United States. In the absence of such circumstances, he argued, application of the severe remedy of prior restraint is clearly unconstitutional.

William R. Glendon, attorney for The Post, advanced essentially the same arguments presented by Professor Bickel. He insisted that the Government had not established its case and reminded the Court

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61 Id., June 26, 1971, at 1, col. 8.
62 Id. at 10, col. 3.
63 Id., June 27, 1971, at 1, col. 8.
64 Id. at 24. A transcript of oral argument is printed id. at 24-26.
65 Id. at 25, col. 3.
66 Id., col. 4. Chief Justice Burger noted the extreme difficulty faced by the Government under this standard: “Can anyone know in any certain sense the consequences of disclosure...?” Id., col. 6. Additionally, the Chief Justice found ironical the newspapers’ claim of secrecy for their sources of information and denial of the same privilege to the Government. Id., cols. 5, 6; see New York Times Co. v. United States, 403 U.S. 713, 751 n.1 (1971).
67 “If the criminal statute ‘chills’ speech, prior restraint ‘freezes’ it.” Id., col. 2.
that *The Post* had not initiated the equity proceeding. The newspapers were pressing their freedom under the first amendment to its farthest boundaries.

Chief Justice Burger, to the disappointment of those preferring an immediate decision, announced that the matter was being taken under advisement. Thus the Court retired to weigh the conflicting interests and to evaluate the evidence.

**History of the First Amendment**

The landmark decision which would soon be announced, would depend upon interpretation of the first amendment. Hence, a brief review of its history is in order. This is especially necessary in light of the statement by Zechariah Chafee "that the framers had no very clear idea as to what they mean by 'the freedom of speech or of the press' . . . ." 69

The idea of prior restraint was inspired by the invention of printing in the fifteenth century. The rapid development of this new means of mass communication prompted religious and civil leaders to seek control over it. In 1501, Pope Alexander VI established a policy of prior restraint by banning unlicensed printing. In Great Britain, where the American doctrine of prior restraint developed, printing was controlled by the Crown.70 The licensing system was established in the colonies, much to the distress of the colonists, and later, taxation on circulation of and advertising in newspapers was applied to suppress publication of matter to which the Crown objected. This restriction on freedom contributed to the dissatisfaction which culminated in the American Revolution.71

On September 14, 1787, at the Constitutional Convention, Charles Cotesworth Pinckney and Elbridge Gerry moved to incorporate in the Constitution a declaration "that the liberty of the Press should be Inviolably observed." Roger Sherman spoke against the motion, on the ground that the press was not within the scope of congressional power. It was defeated, 7 to 4.72 When the proposed Constitution was published, however, there was an insistent demand for the incorporation of a bill of rights which *inter alia* would guarantee freedom of speech and of press.73 Indeed, ratification most probably could not

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68 "We were brought in kicking and screaming, I guess." *Id.* at 26, col. 2.
70 Emerson, *supra* note 12, at 650.
have been achieved without the promise that Congress immediately would propose amendments including these guarantees and submit them to the states for ratification.

The First Congress kept this promise. It proposed on September 25, 1789 the amendments constituting the Bill of Rights, which the states ratified in due course. James Madison had introduced in the House a version of the first amendment under which

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[t]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.\]

Freedom of the press, Madison believed, should be inviolable by the federal government and by the states. Significantly, the first amendment as finally drafted read: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The phrase, freedom of speech, however, was not defined, although contemporary interpretations were contradictory. Blackstone had written that

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[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.
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But the Supreme Court of Pennsylvania had offered this construction:

What then is the meaning of the Bill of rights, and the Constitution of Pennsylvania, when they declare, "That the freedom of the press shall not be restrained," and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?" However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen

\[74\] 1 ANNALS OF CONG. 434 (1834).
\[75\] Id. 485.
\[77\] 4 W. BLACKSTONE, COMMENTARIES *151-52 (1769). Lord Mansfield concurred, in King v. Dean of St. Asaph, 3 T.R. 428, 431 (1784): ""The liberty of the press consists in printing without any previous license, subject to the consequences of law."" But Professor Chafee described the Blackstonian interpretation as "thoroughly artificial, and wholly out of accord with a common sense view of the relations of state and citizen." Z. CHAFFEE, FREEDOM OF SPEECH 9-10 (1920).
a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licensor. The same principles were settled in England, so far back as the reign of William the Third, and since that time, we all know, there has been the freest animadversion upon the conduct of the Ministers of that nation.78

Later, Justice Story would view the first amendment this way:

[T]he language of this Amendment imports no more than that a man shall have a right to speak, write or print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace or attempt to subvert the Government.79

It was clear that freedom of the press was guaranteed under the first amendment, but uncertain what specific activities were covered by that umbrella. The task of clarification logically devolved upon the United States Supreme Court.

In 1897 the Court construed this freedom narrowly. It was found "perfectly well settled" that the Bill of Rights merely enumerated pre-existing rights which are "subject to certain well-recognized exceptions arising from the necessities of the case." These exceptions being implicit, freedom of speech and press under the first amendment did not allow "publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation ...."80 Thus, the Court did not read the first amendment as absolute.

A unanimous Court announced the famous "clear and present danger" test in the landmark case of Schenck v. United States81 in 1919.

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79 H J. Story, Commentaries § 1880, at 597-98 (2d ed. 1851).

There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such, that, like the king of England, it could do no wrong, and was free from every, and afforded a perfect sanctuary for every abuse; that, in short it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer, with regard to the rights and duties belonging to governments generally.

Id., § 1884, at 600.


Therein, a conviction under section 4 of the Espionage Act was affirmed. The defendant had conspired to obstruct the United States recruiting system and, toward that end, distributed circulars to drafted men. The Court, per Justice Holmes, made this analysis:

[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.\(^2\)

Rather than interpret the first amendment as “a semantic straitjacket,”\(^3\) the Court subordinated the interest of free speech to another value, i.e., the Government’s right to function.\(^4\)

It was not until 1931 that the Court was called upon to interpret the doctrine of prior restraint under the Constitution, in *Near v. Minnesota*.\(^5\) A state statute, commonly known as the Minnesota Gag Law, enabled that state to seek injunctions against future publications of “malicious, scandalous and defamatory” matter.\(^6\) Issuance of an injunction under this law was held inconsistent with freedom of the press\(^7\) as made applicable regarding state action under the fourteenth

\(^{2}\) 249 U.S. at 51-52.


\(^{4}\) Even James Madison had observed that it was “vain to oppose constitutional barriers to the impulse of self-preservation.” *The Federalist No. 41*, at 251 (H. Lodge ed. 1888) (J. Madison).


\(^{6}\) 283 U.S. at 722-23.
The Court noted the paucity of previous attempts to apply prior restraints to criticism of public officials and, looking to the "operation and effect" of the statute in question, decided that the injunction constituted an unconstitutional prior restraint.

Chief Justice Hughes, author of the majority opinion in the 5 to 4 decision, observed that freedom from prior restraint is not absolute, however. He recognized an exception in time of war and then stated:

No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.

Thereafter, the Chief Justice cited obscene matter as another exception to the general prohibition against prior restraint, for reasons.

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88 Id. at 707; see Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 481 (1926).
89 Id. at 718.
90 Id. at 703.
91 Id. at 716, citing Schenck v. United States, 249 U.S. 47, 52 (1919).
92 Id., citing Z. Chafee, Freedom of Speech 10 (1920). Professor Chafee rejected the idea of an absolute ban on prior restraint, on the ground that thereunder the Government could not "prevent a newspaper from publishing the sailing dates of transports or the number of troops in a sector." Id. 9-10.

However, Chafee also believed that it is a disastrous mistake to limit criticism to those who favor the war. Men bitterly hostile to it may point out evils in its management like the secret treaties, which its supporters have been too busy to unearth. ... The history of the last five years shows how the objects of a war may change completely during its progress, and it is well that those objects should be steadily reformulated under the influence of open discussion not only by those who demand a military victory, but by pacifists who take a different view of the national welfare. Further argument for the existence of this social interest becomes unnecessary if we recall the national value of the opposition in former wars.

Id. 36-37.

Chafee stated:

Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Id. 38.

Later, Chafee restated his position in light of subsequent scientific developments:

Nevertheless, the search for truth cannot be absolutely immune from legal interference. ... Plans of battleships and atomic energy formulas cannot be passed out to the public; the truer they are, the worse the disclosure. In short, the attainment of truth is not the only purpose for which the community exists. Truth may have to be sacrificed to some more important social need, just as the drafted soldier is required to sacrifice his right to personal liberty and perhaps to life for the sake of national safety.


For a general discussion of considerations concerning governmental restrictions, see 1 Z. Chafee, Government and Mass Communications 33-61 (1947).
similar to those justifying the above exception. Additionally, subversion and incitements to violence were beyond the pale of constitutional protection. None of these exceptions was applicable, however, so the Chief Justice's analysis is but dictum.

Subsequently, a unanimous Court struck down a state tax upon certain newspapers under the prior restraint doctrine, in *Grosjean v. American Press Co.* It was held clear that such taxation, reminiscent of the colonial period but previously unknown in the United States, was an infringement upon freedom of the press precluded under the fourteenth amendment. While declining to hold prior restraint unconstitutional per se, the Court created a "heavy presumption against" its constitutionality.

Against this background, *New York Times Co. v. United States* and *United States v. The Washington Post Co.* were decided.

**THE DECISION: VICTORY FOR THE PRESS**

The Court extended its term for the first time in fourteen years to complete its prompt deliberations upon these extraordinary cases. On June 30, in a 6 to 3 decision, the Court denied the Government's request for an injunction, thus freeing the newspapers to resume publication. In an unsigned per curiam opinion, followed by an unprecedented nine separate opinions, the Court restated the "heavy presumption against" prior restraint and concluded that the Government had failed to meet its "heavy burden." The decision of the District of Columbia Circuit was affirmed, and the Second Circuit was directed to affirm the district court's decision.

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93 283 U.S. at 716. The Court does not cite Chafee for this proposition, but it may be significant that Chafee made the same point immediately following the statement for which he was cited. Z. CHAFEH, FREEDOM OF SPEECH 10 (1923).

94 "The constitutional guarantee of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force.' *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 [1911]." 283 U.S. at 716.

95 297 U.S. 233 (1936).


98 NEWSWEEK, July 12, 1971, at 16.

99 N.Y. Times, July 1, 1971, at 1, col. 8. The Times regarded the decision as "a ringing victory for freedom under law." *Id.* at 46, col. 1.


102 *Id.*
Justice Black, concurring

Justice Black, with whom Justice Douglas joined, reasserted his view that oral argument was unnecessary for proper disposition of these cases. He saw “every moment's continuance of the injunctions . . . [as] a flagrant, indefensible, and continuing violation of the First Amendment.” The contention that “specific and emphatic guarantees” incorporated in the Bill of Rights could be qualified by provisions in the original Constitution was vigorously rejected as a heinous “perversion of history.” Justice Black steadfastly maintained that the press is enabled under the first and fourteenth amendments “to publish news, whatever the source, without censorship, injunctions, or prior restraint.”

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. Justice Black dismissed as “bold and dangerously far-reaching” the idea that the judiciary should limit freedom of the press “in the name of equity, presidential power and national security . . . ,” for

[the guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

The Times, The Post, and other newspapers which published articles based upon the top secret report received the Justice's compliments for fulfilling the alleged mission allegedly foreseen for them by the "Founding Fathers."

103 Id. at 715; see Black & Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U.L. Rev. 549 (1962).
104 Id. at 716; but see Dennis v. United States, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring):

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry.
105 Id. at 717.
106 Id.
107 Id. at 718-19.
108 Id. at 717.
Justice Douglas, concurring

Justice Douglas, with whom Justice Black joined, restated his absolutist interpretation of the first amendment and specifically condemned the stays issued in the course of litigation as infringements upon freedom of the press. He found no statute barring publication of the material in question, and no inherent power in the Government to obtain injunctive relief in the interest of national security. The war power being inapplicable, for want of a declaration of war by Congress, there was no possible basis for invocation of prior restraint to preclude what Justice Douglas acknowledged might be "a serious impact" of disclosure.

Justice Brennan, concurring

Justice Brennan wrote a separate opinion to advise the lower courts not to grant temporary restraining orders suppressing publication under similar circumstances.

The First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Justice Brennan recognized "a single, extremely narrow" area in which freedom from prior restraint is subordinated to the national interest in time of war and perhaps in circumstances tantamount to war. He concluded, however, that the Government had failed to prove that publication would result in "a nuclear holocaust" or "an event of that nature." No injunction or restraining order should issue, Justice Brennan announced, before the Government proves that publication of contested material will result "inevitably, directly and immediately" in a grave event, e.g., destruction of a transport. Each restraint im-

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109 Id. at 724.
110 Upon examination of the legislative history, Justice Douglas concluded that 18 U.S.C. § 793(e) (1964) (see note 8 supra) did not apply to the press. While the word publish had been used in other provisions in the Espionage Act, it was omitted in the above section. Additionally, a version of that section which would have encompassed publication had been rejected. Id. at 720-22.
111 Id. at 723, citing Near v. Minnesota, 283 U.S. 697 (1931).
112 Id. at 722, citing U.S. Const. art. I, § 8.
113 Id.
114 Id. at 724-25.
115 Id. at 725-26.
116 Id. at 726, citing Near v. Minnesota, 283 U.S. 697, 716 (1931); Schenck v. United States, 249 U.S. 47, 52 (1919).
117 Id. Additionally, Justice Brennan deemed the Government's copyright argument inapposite, on the ground that copyright protects form of expression only. Id. at n.9.
118 Id. at 726-27.
posed upon the press as the cases proceeded toward final resolution by the Supreme Court was lamented as unconstitutional,\textsuperscript{119} and the haste with which the proceedings were conducted was applauded as essential.\textsuperscript{120}

\textit{Justice Stewart, concurring}

Justice Stewart, with whom Justice White joined, initially recognized the "enormous power" of the Executive regarding national defense and international relations. He viewed "an enlightened citizenry" as "the only effective restraint" upon said power, and "an informed and free press" as necessary to public awareness.\textsuperscript{121} At the same time, however, he recognized as "elementary" the proposition that confidentiality and secrecy are essential to the maintenance of effectual foreign relations and effective national defense.\textsuperscript{122} Justice Stewart's resolution of this conflict was to place the responsibility with the power.

\textit{[T]he Executive must have the largely unshared duty to determine and preserve that degree of internal security necessary to exercise that power successfully.}\textsuperscript{123}

Nevertheless, Justice Stewart concluded that the Court could not enjoin publication of information in violation of the national interest, for the Government had not definitely proved that the result would be "direct, immediate and irreparable damage to our Nation or its people."\textsuperscript{124}

\textit{Justice White, concurring}

Justice White, with whom Justice Stewart joined, emphasized that the first amendment does not preclude prior restraint in the national interest under all circumstances. He believed that disclosure of certain documents cited by the Government would cause "substantial damage to public interests," but did not believe that the Government had satisfied "the very heavy burden" prerequisite to prior

\begin{itemize}
\item \textsuperscript{119} Id. at 727.
\item \textsuperscript{120} Id. at 725.
\item \textsuperscript{121} Id. at 727-28.
\item \textsuperscript{122} Id. at 728.
\item \textsuperscript{123} Id. at 729.
\item \textsuperscript{124} Id. at 730.
\end{itemize}

Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

\textit{Id.}

\begin{itemize}
\item \textsuperscript{123} Id. at 729.
\item \textsuperscript{124} Id. at 730.
\end{itemize}
Without congressional authorization, Justice Stewart was unwilling to accept the proposed standard of "grave and irreparable injury to the public interest." He stressed, however, that the burden of proof necessary to support criminal sanction is less than that required for prior restraint, and ameliorated his discomfiture with the hopeful statement that "a responsible press may choose never to publish the more sensitive materials."

Justice Marshall, concurring

Justice Marshall acknowledged the President's broad powers as Commander-in-Chief and in the area of international relations. While conceiving of possible situations in which the President's inherent and implicit powers would support prior restraint, however, he declined under the separation of powers doctrine to grant a preliminary injunction in these circumstances. Justice Marshall noted that at least twice the Congress declined to enact laws which would have enabled the President to forbid, or forbidden, publication of classified information without proper authorization. Although recognizing that 18 U.S.C. § 793(e) may be applicable to publication, he would not usurp the power of Congress to make law.

Chief Justice Burger, dissenting

Chief Justice Burger viewed most critically the manner in which the Court had resolved the conflict of the imperative of a free and unfettered press . . . with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. He deplored as "unseemly" and "frenetic" the haste with which the proceedings were conducted, concluding that "needless," "frenetic," and "unwarranted" pressure had vitiated them. Without knowing all

125 Id. at 730-31.
126 Id. at 732.
127 Id. at 733.
128 Id.
130 Id. at 742-43.
131 Id. at 746.
132 Id. at 745.
133 Id. at 748. The Chief Justice recognized the "universal abhorrence of prior restraint." Id.
134 Id. at 749.
the facts, the Chief Justice was unprepared to consider the merits; he therefore favored affirmance of the remand by the Second Circuit and continuance of the temporary restraining order against *The Post*. The *Times*, which had deferred publication for several months, was assailed for compelling "a parody of the judicial process," and for fail[ing] to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents . . . to report forthwith, to responsible public officers.

Possible criminal sanctions for disclosure and retention of matter classified in the interest of national defense, were noted.

**Justice Harlan, dissenting**

Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined, deemed the speed with which the Court disposed of the cases as "almost irresponsibly feverish." He listed several important questions which had not received proper consideration due to the speed with which the litigation was decided. Reluctantly reaching the merits, he favored affirmance of the Second Circuit, on the ground that the Government did not have adequate opportunity to prove its case in the district court, and reversal of the District of Columbia Circuit, for failing to grant proper deference to classification. The restraints upon the press would be continued, because the doctrine of prior restraint does not preclude the courts from preserving the status quo in order to permit proper disposition.

Justice Harlan observed, under the separation of powers doctrine, that judicial review of the actions of the Executive in the area of international relations is extremely narrow in scope. He would limit the

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185 *Id.* at 752.
186 *Id.* at 750, 752.
187 *Id.* at 751.
188 *Id.* at 753. Justice Harlan recalled the pertinent admonition of Justice Holmes to courts deciding cases evoking great public interest:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting), quoted *id.* at 752-53.
189 *Id.* at 753-55.
190 *Id.* at 755-56.
191 *Id.* at 758-59.
192 *Id.* at 758.

*[T]he very nature of executive decisions as to foreign policy is political, not*
scope of judicial review here to determination of whether "the subject matter of the dispute does lie within the proper compass of the President's foreign relations power." The only additional safeguard would be the requirement of "actual personal consideration" by the Secretary of State or the Secretary of Defense in support of the determination that disclosure will "irreparably impair the national security. . . ."\textsuperscript{144}

\textbf{Justice Blackmun, dissenting}

Justice Blackmun lamented the "frenetic pace" of the proceedings.\textsuperscript{145} While willing to allow publication of most of the classified material,\textsuperscript{146} he was deeply concerned that disclosure of some documents might eventuate in what Judge Wilkey deemed "great harm to the nation," \textit{i.e.}, "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate. . . ."\textsuperscript{147} Justice Blackmun refused to interpret the first amendment as an absolute and advocated the use of a balancing test.\textsuperscript{148} He warned of possible criminal sanction\textsuperscript{149} and implored the press to be responsible.\textsuperscript{150}

\textbf{CONCLUSION}

Let us forego the temptation toward emotional charges of treason or tyranny, recognize the conflict between freedom of the press and national security as a profound constitutional problem, and endeavor to reconcile these fundamental principles. Freedom of the press is judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

\textsuperscript{143} Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948), quoted id. at 757-58.

\textsuperscript{144} President Washington had aptly described the situation in his message to the House of Representatives, in which he declined to provide information about the negotiation of the Jay Treaty:

\begin{quote}
\textit{The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely unpoltic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.}
\end{quote}

\textsuperscript{145} J. Richardson, Messages and Papers of the Presidents 194-95 (1899), quoted id. at 756-57.
essential to the American way of life: it reflects both the individual interest in expression and the social interest in dissemination of information and opinion. General denial of this freedom, enshrined in the first amendment in 1791, is inconceivable. The attempt to stifle criticism is a matter of the gravest concern.

Freedom of the press, however, is contingent upon continuation of the Government. As such, it must be subordinated in the national interest when the alternative is destruction of the nation. It is clear that freedom of the press may not be infringed to prevent embarrassment to the Government. Under what circumstances may disclosure be enjoined when the danger imminent in it is more than mere embarrassment but less than Armageddon?

It seems that the above question can only be answered according to the facts of each case. Delineation between embarrassment and grave danger, however, must be made deliberately and dispassionately. Upon a showing that the matter in question had been classified in the national interest, a temporary restraining order should issue. The Government should be given adequate opportunity to prove its case. The doctrine of prior restraint should not be construed to prevent the courts from determining whether publication would so jeopardize the national security as to warrant injunction. Classification in the name of national security should be deferred to as sufficient basis for restraint upon publication, unless it is unreasonable to conclude that disclosure endangers the national security. The personal consideration of the Secretary of State or the Secretary of Defense could be required as a prerequisite to the granting of a preliminary injunction. The rarity of significant security breaches permits such a procedure.