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New York Times v. U.S.  
a/k/a  
The **PENTAGON PAPERS** Case

**NEW YORK TIMES CO. v. UNITED STATES**  
**SUPREME COURT OF THE UNITED STATES**  
**403 U.S. 713**  
**June 30, 1971**  
**[5 - 4]**

**OPINION: PER CURIAM...**We granted certiorari in these cases in which the **United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study** entitled "History of U.S. Decision-Making Process on **Viet Nam Policy.**"

The Executive Branch is seeking to stop publication of top secret information that someone within government has leaked. Although the Court will not enjoin the press from publishing on 1<sup>st</sup> Amendment grounds, if published, the newspapers run the risk of being criminally prosecuted under certain Congressional Acts.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption

against its constitutional validity." *Near v. Minnesota*<sup>1</sup>. The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*. The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree...

**CONCURRENCE:** Justice Black/Douglas...I adhere to the view that the Government's cases... should have been dismissed...when...first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment...In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment...For the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country...

The Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms...In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge...The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly...Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law...abridging the freedom...of the press..." **Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.**

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy...**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. **In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Viet Nam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do...** The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice Black, your construction of...the First Amendment is well known,

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<sup>1</sup>Case 1A-P-1 on this website.

and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say...that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true...There are other parts of the Constitution that grant powers and responsibilities to the Executive, and...**the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.**"

And the Government argues in its brief that in spite of the First Amendment, "**the authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.**"

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security."...**To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure."** No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time...

**CONCURRENCE:** Justice Douglas/Black...[T]he First Amendment provides that "Congress shall make no law...abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U.S.C. §793(e) provides that "whoever having unauthorized possession of, access to, or control over any document, writing...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**...the same to any person not entitled to receive it...shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

**The Government suggests that the word "communicates" is broad enough to encompass publication.**

There are eight sections in the chapter on espionage and censorship, §§792-799. In three of those eight "publish" is specifically mentioned: §794(b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates ...the disposition of armed forces."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense

installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available...or publishes" the described material.

**Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.**

**The other evidence that §793 does not apply to the press is a rejected version of §793.** That version read: "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy." **During the debates in the Senate the First Amendment was specifically cited and that provision was defeated.**

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending *18 U.S.C. §793* states in §1(b) that:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."

Thus Congress has been faithful to the command of the First Amendment in this area.

**So any power that the Government possesses must come from its "inherent power."**

The power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "to declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press...

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security. *Near v. Minnesota* repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information...A debate of large proportions goes on in

the Nation over our posture in Viet Nam. That debate ante-dated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*<sup>2</sup>...

**CONCURRENCE:** Justice Brennan...[O]ur judgments in the present cases may not be taken to indicate the propriety, **in the future**, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government...

The error that has pervaded these cases from the outset was the granting of **any** injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. **But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.** Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*<sup>3</sup>, during which times "**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.**" *Near v. Minnesota*. Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature...In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment -- and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

**CONCURRENCE:** Justice Stewart/White...In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater

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<sup>2</sup>Case 1A-S-12 on this website.

<sup>3</sup>Case 1A-S-2 on this website.

constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

**True or False:**

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| In a democracy, the Free Press has an obligation to enlighten " <i>We, the People.</i> "         | T F |
| In a democracy, " <i>We, the People</i> " have an obligation to enlighten ourselves.             | T F |
| In a democracy, " <i>We, the People</i> " have an obligation to hold the Free Press accountable. | T F |

**Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. 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.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. **If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully.** It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that **it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national**



**defense.**

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

**But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.**

**CONCURRENCE:** Justice White/Stewart...I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. **I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.** Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these...At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press...

**It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country.** But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

**What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do...** When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense. Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to "filter out the news to the people through some man." However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed...

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and **must face the consequences if they publish.** I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint...

**It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. *Youngstown Sheet & Tube Co. v. Sawyer*<sup>4</sup>. It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings...**

**DISSENT:** Chief Justice Burger...**In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances -- a view I respect, but reject -- can find such cases as these to be simple or easy.**

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<sup>4</sup>Case 2-13 on this website.



The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute...

**DISSENT:** Justice Harlan/Burger/Blackmun...This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment...In order to decide the merits of these cases properly, some or all of the following questions should have been faced:...

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near v. Minnesota*.

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired.

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of –

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions...; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues -- as important as any that have arisen during my time on the Court -- should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court...**It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted.** This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."...

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty: "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 impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers."

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power...Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned -- here the Secretary of State or the Secretary of Defense -- after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state.

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

"The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. 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."

**...Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long**

**enough to act responsibly in matters of such national importance as those involved here.**

**DISSENT:** Justice Blackmun...At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material...is concerned, let it be published and published forthwith if the newspapers...still feel the urge so to do...The First Amendment...is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and **I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions.** First Amendment absolutism has never commanded a majority of this Court. What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck* :

"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."

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides...[T]hese cases and the issues involved and the courts, including this one, deserve better than has been produced thus far...

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey...concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, **"could clearly result in great harm to the nation,"** and he defined "harm" to mean **"the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate"**...I hope that damage has not already been done. If, however, damage has been done, and **if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,"** to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then **the Nation's people will know where the responsibility for these sad consequences rests.**

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