

THE PENTAGON PAPERS:
A STUDY IN PRIOR RESTRAINT

by

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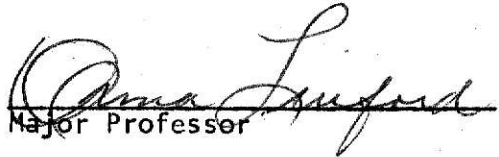
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PART I
INTRODUCTION

CHAPTER I

THE PROBLEM

The First Amendment¹ freedoms of speech, press, assembly and petition are the fundamental freedoms of a democratic political system. Without these liberties, elected officials cannot be effectively held accountable and answerable to the people--responsible government cannot exist. In basic opposition to these fundamental freedoms is the inherent right of any government to self-preservation--the independent desire of any government to survive, and to survive with dignity.²

American society remains as described in Federalist No. 10,³ a diverse society divided into competing "factions," each seeking to implement its own interests. A governmental system built on diverse and conflicting interests needs the maximum amount of tolerance for opposition to official policies and procedures. In this climate of a free market of ideas, criticism of those in power is inevitable. No political leadership enjoys the damage of criticism. Yet there remains a constitutional bar, in the form of the First Amendment, to attempts at suppression.

The First Amendment and Self-Government

First Amendment theory ranges from natural rights justifications to pragmatic explanations. Of all the different theories advanced regarding the justification and purpose of the First Amendment, the one that has the most widespread support and the greatest pertinence to the subject of this thesis is the self-government theory. Thomas Emerson aptly defines the source of

this theory:

Once one accepts the premise of the Declaration of Independence-- that governments "derive their just powers from the consent of the governed"--it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.⁴

The "consent of the governed" did not end with the initial establishment of our government. Democratic government is a living organism that has evolved through the years to adapt to ever-changing circumstances. The consent of the people is likewise a living entity that is subject to change, and by the same token it does not end with the act of voting. Self-government necessarily involves the whole decision-making process that precedes the act of voting or the formation and implementation of policy. The First Amendment is the guarantee that the people can be involved in this process.

This process necessitates a dialogue and, considering the millions of people involved, the news media plays an integral part in the communication of ideas. Printed matter is not only a medium of ideas, it is also a history upon which to make present-day decisions. As such it receives a special protection of its own from the First Amendment. As the population and the government grow in size and complexity the need for the freedom of the press becomes increasingly important. Both the governed and the governors need access to records pertaining to public policy, whether they be facts or opinions, true or false, important or trivial, popular or unpopular.

The Pentagon Papers in Historical Perspective

Suppression of information, whether by the withholding action of policymakers at the source or through judicial proceedings to prevent publication of information already in possession of the publishers, erodes the process of

self-government. This point was brought into sharp focus when, in June, 1971, the New York Times and other prominent newspapers began publication of the "History of United States Decision Making Process on Vietnam Policy," commonly known as the "Pentagon Papers," an historical study commissioned in 1967 by former Secretary of Defense Robert S. McNamara. A dialogue between the government and the people was in process on the Vietnam War. The scattered bits of information from the Pentagon study were not only pertinent to the discussion at hand, they also demonstrated that the government had been misleading the people on the Vietnam War issue. Through a process of admitted over-classification of government documents, the government had twisted the flow of information and had effectively molded public opinion to coincide with its own. This is not self-government. The people were not participating in the decision making process; they were pawns.

The publication of the Pentagon Papers was in effect a criticism of governmental policy and various governmental officials. Much of the information was surely a source of embarrassment to these individuals and to the government as a whole. The result of the Pentagon Papers litigation was hailed as a victory for the freedom of the press. Yet it was more. It culminated a long series of free press cases and substantiated an underlying theme which can be called the freedom to criticize the government.

In the early years of the American republic, criticism of the government was prosecuted as seditious libel. The definition of seditious libel varied over the years, but judging by actual prosecutions the crime consisted of criticizing the government: its form, constitution, officers, laws, symbols, conduct, policies, etc.⁵ It was thought that this criticism would lower the public's esteem for government. In the seventeenth and eighteenth centuries,

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prosecution for seditious libel became the English government's principal instrument for controlling the press.⁶ This practice was repeated in the United States with the passage of the infamous Sedition Act of 1798 which punished false, scandalous, and malicious writings against the government. Repudiation of this Act initiated the vigorous debate that finally led to the disavowal of the concept of seditious libel. Libel prosecutions in the United States will be covered in Chapter III, where an attempt will be made to show that the Supreme Court has finally adhered to the view of Professor Chafee:

The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America.⁷

Criticism of government officials has not been limited to elected officials. Since federal judges and many state judges are appointed, and since they have the unique opportunity to rule on what the law is, this study includes a section on the use of the contempt of court power to suppress criticism of the courts. A judge's capacity to rise above a personal attack made upon him or his rulings gives added strength to the freedom of the press. The Supreme Court rulings on these contempt of court cases will be explored in Chapter IV.

With rare exceptions the freedom of the press means, at the minimum, that there shall be no previous restraints upon publications, while the government may punish publishers for publication of criminal matter. As will be demonstrated in the libel cases and the contempt of court cases, subsequent punishment is now greatly limited in areas relating to public policy. Governmental attempts to prevent publication in advance are rare. The Pentagon Papers cases, which are covered in Chapter VI, prompted the only Supreme Court deci-

sion concerning attempts ever made by the federal government. There has been one Supreme Court decision involving an attempt by a state government to enjoin publication. This and a related case will be considered in Chapter V.

Another issue that is intimately involved in the concept of a free press is the people's right to know or freedom of information. Since the Pentagon Papers were classified top secret, this issue was touched upon in a few of the separate opinions of the Supreme Court. The constitutionality of the national security classification system has never been ruled on by the federal courts. The classification system and its effects on the freedom of the press will be explored in Chapter VII.

Before going on to the Supreme Court rulings in these free press cases, a summary of the First Amendment doctrines will be given in the next chapter. These doctrines apply to speech and assembly cases as well as to the press. They do not apply to forms of expression that have been ruled to be outside the protection of the First Amendment.⁸

One further comment on the meaning of the press is necessary. In 1947 Zechariah Chafee wrote:

[H]ither to "the press" has been interpreted rather narrowly by the courts. They have been inclined to limit it to the popular sense of newspapers (and probably books and pamphlets), without embracing other media of communication such as motion pictures and the radio . . . There is such a strong tradition in favor of the immunity of printed matter from governmental interference that courts are much quicker to jump on restraint upon newspapers than restraints upon novel media which lack the benefit of the tradition. This difference in attitude is important in connection with motion picture censorship and control of the radio . . .⁹

This study will interpret "the press" just as narrowly.

This Study

Purpose and Scope

This study is about the freedom of the press and specifically the right to criticize the government. The discussion is focused on the circumstances presented by the dispute over the publication of the Pentagon Papers. The assumption upon which this study is based is that in order to have a system of free expression necessary to self-government, the press must be allowed to voice its criticisms with maximum immunity. The main purpose of this thesis is to demonstrate that the Supreme Court not only had ample precedent upon which to base its ruling in the Pentagon Papers cases, but also that the development of constitutional law in the area of freedom of the press has been a clear, consistent and conclusive repudiation of the kind of governmental censorship involved. As the discussion develops to conclusion, it becomes obvious that the findings have future, as well as historical value.

Source Materials

The major source materials for the study are the Supreme Court opinions found in the United States Reports. Secondary materials consisted of books by legal theorists and legal historians, law review articles, and articles from both scholarly and popular periodicals. Useful commentary on the Pentagon Papers case is not yet available; in fact, this study pulls together much material that the scholarly journals have yet to publish.

Approach

The analysis of the subject matter is largely traditional in nature. The approach of the study is historical, legalistic, theoretical, descriptive, and critical. Each of these approaches is used to the extent and in the manner most useful to the discussion.

FOOTNOTES

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.", U.S. CONST. amend. 1.

2. Except where otherwise noted, the opinions set forth in this introduction are those of the author.

3. THE FEDERALIST NO. 10 (J. Madison).

4. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970).

5. L. LEVY, LEGACY OF SUPPRESSION 10 (1960).

6. Id. 11.

7. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1948).

8. See Near v. Minnesota, 283 U.S. 697, 716 (1931) for a listing of exceptions (*dictum*).

9. Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 35 (1947).

CHAPTER II

COURT AND THE FIRST AMENDMENT

The Supreme Court has failed to develop a comprehensive, coherent theory of the First Amendment. The major doctrines it has used are set forth below. Most of these doctrines have never commanded a majority of the Court. The basic difficulty facing the Court is reconciliation of which types of speech are protected by the First Amendment. It is extremely doubtful that the Court will ever rule that every word uttered or printed has absolute immunity from governmental interference. Some limited censorship, whether by the government or as self-censorship, is thought to be necessary. Formulating a legal doctrine that draws a neat line between allowed and disallowed expression has proved to be a formidable task. Too many of these First Amendment doctrine applications appear to be mere rationalizations of preformed conclusions.¹

Absolutist

Philosophically, the position of the "absolutist" is sound, although somewhat trivial. This test states that the phrase "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." means just that. The amendment is not qualified and therefore its application cannot be qualified. The roots of this philosophical approach are ancient, but for this study the absolutist views of Alexander Meiklejohn and Justice Black are most pertinent. Neither of these men advocate the literal view outlined above, although their views approximate this literalness more than those of

anyone else.

The controlling factor in Meiklejohn's analysis is the concept of self-government. The First Amendment, taken as a whole, protects "the 'political freedom' which the Constitution establishes as the basis of any arrangement by which men may govern themselves, rather than submit to despotic control by others."² With respect to "political belief, political discussion, political advocacy, political planning our citizens are sovereign."³ While Congress may limit the non-political affairs of citizens, it has no authority whatsoever to limit their political freedom.

Justice Black's position is similar.⁴ The more a form of expression relates to public affairs the more protection he is willing to provide. If the expression is definitely within the field of public policy then it has absolute protection. For Justice Black the controlling factor is the Constitution. The Founding Fathers formed a balance between the three branches of government and the people, and documented this balance in the Constitution. To him, this balance was not meant to be reformulated; it is to be maintained.

As a working legal doctrine the absolutist doctrine has abundant flaws as well as many assets. The major asset is the sense of attitude it embodies. The person who prefers to look at the First Amendment guarantees as absolutes will see them as more broadly defined and enforce them with more resolution. The major difficulties come when these absolutes are defined. Legal definitions of the words "abridge," "freedom of speech," "freedom of the press," and even "law" are slippery and lack the precision necessary for adjudication. The artificial distinction between public and private affairs used by Meiklejohn and Black is even more elusive. Hence, the absolutist doctrine is essentially undeveloped. If the doctrine should ever command a majority

of the Court, then its supporters will be compelled to face the responsibility of formulating its scope with precision.

Preferred Position

A footnote to a Supreme Court opinion hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the Carolene footnote did not purport to announce any new constitutional doctrine. Justice Stone's famous footnote, which says in part:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.⁵

This became the basis of what is now called the "preferred position" doctrine.

Usually when the Court is called upon to decide the constitutionality of a statute or an administrative action, the constitutionality is assumed until it is shown beyond a reasonable doubt to be unconstitutional. The burden of proof is on the party claiming unconstitutionality. The preferred position shifts this burden of proof in First Amendment cases, i.e., statutes which on their face abridge the freedom of speech or press are assumed to be unconstitutional unless the state can show an overriding compelling interest to maintain the statute.

During the 1940's the preferred position doctrine was used by a majority of the Court in many freedom of expression cases. The substance of the doctrine is still used today but the Justices decline to refer to its use by name.

Clear and Present Danger Test

The Supreme Court first turned its attention to formulating a First

Amendment doctrine in 1919. This doctrine has been called the "clear and present danger" test. As originally enunciated by Justice Holmes in Schenck v. United States⁶ the test was: "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."⁷

This formula was designed to test the constitutionality of the application of a statute, rather than the constitutionality of the statute itself. It is a measure of the damage that the contested expression is likely to cause. The damage itself does not need to occur.

In the course of its development the clear and present danger test was expanded to include other factors. Thus, such elements as the nature and gravity of the evil sought to be prevented, the alternatives open to the government, and the value of the expression in relation to the harm feared were taken into account. These factors, however, make the clear and present danger test indistinguishable from the ad hoc balancing test, discussed later, and make it subject to the same infirmities.

The present status of the clear and present danger test is in doubt. It was abandoned by the Supreme Court in the Dennis case in 1951, but has emerged again in a number of freedom of expression cases during the Warren Court era.

Bad Tendency Test

In the 1920's, a majority of the Supreme Court accepted the "bad tendency" test. According to this doctrine expression which had a tendency, or which the legislature could reasonably believe had a tendency, to lead to substantial evil could be prohibited. The Court in Gitlow v. New York⁸

stated the doctrine broadly: "That a State in the exercise of its police power may punish those who abuse this freedom [of expression] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."⁹ With reference to the particular issue before it--speech thought to endanger the public peace and safety--the Court held that the legislature was entitled to "extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration."¹⁰

This test put almost no limitation on legislative judgments and consequently offered virtually no protection to freedom of expression. In any conflict between free expression and other social interests the latter objectives are preferred.

Ad Hoc Balancing Test

The dominant doctrine used by the Supreme Court is the "ad hoc balancing" test. Using this formula the Court must in each case balance the individual and social interest in free expression against the social interest sought by the regulation which restricts expression. In theory, neither interest is preferred, but in practice legislative judgment is given excessive deference. The factual determinations involved are not only difficult and time consuming, they also rely heavily on legislative sources. Thomas Emerson best describes the difficulties of the ad hoc balancing test this way:

The test gives no real meaning to the First Amendment . . . it amounts to no more than a statement that the legislature may restrict expression whenever it finds it reasonable to do so, and that the courts will not restrain the legislature unless that judgment is itself unreasonable. The same degree of protection could be obtained under the due process clause, without the First Amendment.¹¹

Prior Restraint Ban

A doctrine that has particular significance in free press cases is the ban on prior restraints. The distinction is usually made between prior restraint and subsequent punishment, between prohibiting publication in advance and attempting to punish the publisher after the fact. Censorship is the classic form of prior restraint. Prior restraint was apparently the principal evil the Founding Fathers had in mind in writing the First Amendment.

Prior restraint is particularly damaging to freedom of expression. First, the public never finds out what it has been missing. Criminal trials subsequent to publication at least make the public aware of what kinds of expression the government is trying to suppress, and allows those who have heard the speaker or read the writer before his arrest to judge for themselves whether the government is justified in suppressing it. Second, censorship allows the government to manipulate the people by letting through those facts and ideas favorable to itself and suppressing that which is unfavorable. The ramifications of this point are too clear to need detailing.

Other Doctrines

The above discussion does not by any means exhaust the judicial yardsticks used by the Supreme Court to reconcile liberty with authority in First Amendment cases, nor does it represent variations on the doctrines discussed above. For example, the Court has often used the least means test. Some government regulations are designed to achieve valid goals such as clean streets or peace and quiet, but also incidentally infringe upon speech. The Court sometimes strikes down such regulations because it feels that the government might have adopted some means of achieving its end which entailed less infringement upon expression. The Court has also used the vagueness

doctrine in freedom of expression cases. Even if the government is sometimes entitled to place some limitations on expression, those limitations must be precisely and narrowly drawn so that they cannot be used to limit any more expression than is absolutely necessary to the government's purpose.

Understanding how the Supreme Court arrives at a decision is just as important as the ruling itself. Knowledge of the doctrine used in a freedom of expression case cannot predict the ruling, but it can explain it and define new boundaries or reaffirm existing boundaries of free expression. Any study of First Amendment cases would be meaningless without an understanding of these judicial doctrines.

FOOTNOTES

1. Most of the discussion of First Amendment doctrines is based on T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 48-58 (1966).
2. A. MEIKLEJOHN, POLITICAL FREEDOM 96 (1960).
3. Id. 107.
4. This very brief summary of Justice Black's position was based on C. Black, Jr., "Mr. Justice Black, the Supreme Court and the Bill of Rights," Harper's Magazine, February, 1961, at 63, and Reich, "Mr. Justice Black and the Living Constitution," 76 HARV. L. REV. 673 (1963).
5. United States v. Carolene Products, Co., 304 U.S. 144, 152n.4 (1938).
6. Schenck v. United States, 249 U.S. 47 (1919).
7. 249 U.S. at 52.
8. Gitlow v. New York, 268 U.S. 652 (1925).
9. 268 U.S. at 667.
10. 268 U.S. at 669.
11. T. EMERSON, supra note 1, at 55; variations of this test have been referred to as the "reasonableness" doctrine.

PART II
GOVERNMENT AND PRESS

The Pentagon Papers decision relied heavily on Supreme Court precedents and cannot be fully understood without first understanding how the Supreme Court has handled previous cases involving comparable issues in the area of First Amendment liberty of the press. This section of the study discusses the Supreme Court's First Amendment rulings in three areas: (1) libel, (2) contempt of court, and (3) prior restraint by injunction. Each area presents examples of governmental attempts to suppress criticism of public policy or officials. The first two areas--libel and contempt--are forms of subsequent punishment for the abuse of the right to publish, but they also contain elements of prior restraint. Severe subsequent punishments, selectively and regularly applied, have what is called a "chilling effect" on freedom of expression. Publishers need only to observe these prosecutions to form a clear impression of the types of publications that the government does not tolerate. Only the very bold publishers will ignore these governmental warnings. The last area--prior restraint by injunction--is, of course, a form of pure censorship. This kind of official action contains potential elements of subsequent punishment since a publisher is at liberty to ignore an injunction but will do so under heavy penalties--an indication that, in both legal ramifications and practical effects, the distinction between governmental regulation in the form of subsequent punishment or prior restraint is barely perceptible.

CHAPTER III

LIBEL AND THE FIRST AMENDMENT

Generally speaking, the law of libel seeks to protect various individual interests against injury resulting from false and defamatory communication. Until recently it was assumed that the law of libel simply constituted an exception to the law of the First Amendment. But now it is fully recognized that the problem cannot be resolved that easily. It remains one of the most complex and troublesome in the whole field of First Amendment doctrine.¹

A brief glance at the historical development of libel law will help to clarify why it is so complex today.

Historical Development

The law of libel has its roots in civil and criminal forms of action that were designed primarily to protect the government against criticism or to prevent breach of peace by persons resorting to self-help in defense of their honor.² In eighteenth century libel cases, the law did not regard truth as a defense. On the contrary, the theory of the law was, the greater the truth, the greater the scandal against the government. Judges in libel cases reserved exclusively to themselves, as a matter of law, decision of the crucial question whether the defendant's remarks were libelous.³ Andrew Hamilton challenged this theory in the case and trial of John Peter Zenger, printer of the New York Weekly Journal, in 1735. The defense of Zenger presented by Hamilton was the first to popularize the idea that truth should be admitted as a defense against the charge of criminal libel.⁴ From the time

of the Zenger defense until the response to the Sedition Act, there were no innovations in libertarian theory on freedom of the press.⁵ The prevailing thought was expressed by Blackstone:

The 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.⁶

The first change in libel law resulted from the Croswell⁷ case. Alexander Hamilton, a supporter of the Sedition Act and of prosecutions for criminal libel, believed that the law of libel should be governed by the principles of the Zenger case, in order to protect the legitimate freedom of the press. In 1804 New York indicted Harry Croswell, a Federalist editor, for the common law crime of seditious libel against President Jefferson. Croswell's crime was his publishing of the accusation that Jefferson had paid to have Washington denounced as a traitor and Adams as an incendiary. Chief Justice Morgan Lewis, a Jeffersonian, refused Croswell the opportunity of introducing evidence to prove the truth of his statements. In instructing the jury, Lewis told the jurors that their only duty was to determine whether the defendant had in fact published the statements as charged; that they must leave to the court, as a matter of law, the determination of the statement's libelous character. On the appeal of Croswell's conviction, before the highest court of the state, Alexander Hamilton played the role of Andrew Hamilton, eloquently championing the cause of freedom of the press. That freedom, he said, "consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals." The court divided evenly, two against two, but

in the following year, 1805, the state legislature enacted a bill allowing the jury to decide the criminality of an alleged libel and permitting truth as a defense, if published "with good motives and for justifiable ends." It is this standard that has prevailed in the United States.⁸

The Court and Libel: Early Cases

Limitations were increasingly imposed on action for libel, reflecting the change in function served by the libel law as it moved from protection of social to protection of individual interests. The restrictions likewise reflected the recognition that the system of freedom of expression demanded greater space for controversy than the original libel law technically allowed. But these factors were seldom explicitly articulated as problems of reconciling the law of libel with the law of the First Amendment.⁹ The statement of Justice Murphy in Chaplinsky v. New Hampshire¹⁰ expressed the accepted view that the libel laws were simply not affected by the First Amendment:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment (as it incorporated the First Amendment), it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹¹

In the 1952 case of Beauharnais v. Illinois¹² the Supreme Court upheld an Illinois group libel law, recalling the language in Chaplinsky. The statute before the court made it unlawful for any person to sell or exhibit any publication which "portrays depravity, criminality, unchastity, or lack

of virtue of a class of citizens, of any race, color, creed or religion, [which exposes such citizens] to contempt, derision, or obloquy or which is productive of breach of the peace or riots." Beauharnais was convicted of violating the statute for distributing a leaflet in Chicago that called upon the Mayor and City Council "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro"; calling to "one million self-respecting white people to unite"; and warning that if "the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the Negro, surely will."¹³ The Supreme Court affirmed by a vote of five to four. Justice Frankfurter, speaking for the majority, treated the statute as "a form of criminal libel law," and accepted the dictum in Chaplinsky that libels were outside the protection of the First Amendment. The "precise question" before the court, he said, was whether the due process clause of the Fourteenth Amendment prevented a state from punishing libels "directed at designated collectivities and flagrantly disseminated." He ruled that the statute did not violate the Fourteenth Amendment and that the Illinois legislature had a reasonable basis for passing the statute in the interests of "the peace and well-being of the State."

The major premise of Beauharnais--that libel laws are not within the coverage of the First Amendment--was overruled by New York Times v. Sullivan¹⁴ in 1964. A minor premise--that criminal libel laws are outside the First Amendment--was expressly repudiated a few months later in Garrison v. Louisiana.¹⁵ Hence little remains of the doctrinal structure of Beauharnais. Nevertheless, the problem of group libel laws still exists. They continue on the statute books of several states and are occasionally invoked.¹⁶

The Court and Libel: Recent Developments

New York Times v. Sullivan

In the Sullivan case the Supreme Court was forced to face the problem squarely. In that case, and in decisions immediately following, the Court at last undertook to bring the law of libel into harmony with the First Amendment. The case involved an advertisement, in which certain errors of fact appeared, placed in the New York Times by civil rights advocates. Sullivan, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by the advertisement. The advertisement included statements about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement. Sullivan claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages. For the purpose of compensatory damages malice was presumed, so that such damages could be awarded if the statements were found to have been published by the Times and to have related to Sullivan. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice and would not justify an award of punitive damages. He refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for Sullivan should differentiate between compensatory and punitive damages. The jury found for Sullivan and the State Supreme Court affirmed.

Justice Brennan disposed of earlier opinions that had placed the libel laws outside the First Amendment. None of those statements, he said, "sustained the use of libel laws to impose sanctions upon expression critical of

the official conduct of public officials." He went on more broadly: "[Libel] can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."¹⁷ Applying the First Amendment to the libel area, Justice Brennan concluded: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on governmental and public officials." The advertisement involved was "an expression of grievance and protest on one of the major issues of our time," and "would seem clearly to qualify for the constitutional protection." The issue resolved itself then into the question of whether the communication "forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."¹⁸ Justice Brennan held that neither factual error nor injury to official reputation, nor the combination of both, afforded "warrant for repressing speech which would otherwise be free."¹⁹ On the issue of falsity, he rested his conclusion on two grounds. The first was that "erroneous statement is inevitable in free debate and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"²⁰ The second ground was that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions--and to do so on pain of libel judgments virtually unlimited in amount--leads to 'self-censorship.'"²¹ Justice Brennan stated the rule of libel law that would satisfy the demand of the First Amendment:

The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that

is, with knowledge that it was false or with reckless disregard of whether it was false or not.²²

Three members of the Court concurred but thought that the majority had not gone far enough. Justice Black, joined by Justice Douglas, took the position that an "unconditional right to say what one pleases about public affairs is . . . the minimum guarantee of the First Amendment." He felt that malice is "an elusive abstract concept, hard to prove and hard to disprove"; that it "provides at best an evanescent protection."²³ Justice Goldberg, with Justice Douglas agreeing, felt that the First Amendment afforded "to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses." The right to speak out about "public officials and affairs should not depend upon a probing by the jury of the motivation of the citizen or press."²⁴

Garrison v. Louisiana

The Garrison case involved criminal rather than civil libel. Garrison, the District Attorney in New Orleans, had issued a statement at a press conference charging that the large backlog of pending criminal cases was due to the inefficiency, laziness and excessive vacations of the judges, and that, by refusing to authorize disbursements for investigation of vice, the judges had hampered his efforts to enforce the vice laws. "This raises interesting questions about the racketeer influences on our vacation-minded judges," he added. Garrison was prosecuted and convicted under the Louisiana criminal libel law.²⁵ The Supreme Court's opinion reversing the conviction was again written by Justice Brennan. Like New York Times, the case involved criticism of public officials for official conduct. In this situation, Justice Brennan ruled, criminal libel laws serve the same interests as civil libel laws and

for the same reasons must conform to the rule of actual malice. Justice Brennan then went on to explain why the line should be drawn at actual malice rather than at full immunity. "Calculated falsehood," he said, is "no essential part of any exposition of ideas"²⁶ and hence should enjoy no constitutional protection.

Rosenblatt v. Baer

In Rosenblatt v. Baer²⁷ the Supreme Court began to explore the question of how far the First Amendment protection extended into public officialdom. A newspaper columnist had criticized the operation of a state recreation center and ski resort of which Baer had been supervisor. Baer brought suit for libel, alleging the column had imputed mismanagement and peculation to him. The Court reversed a judgment for Baer. Justice Brennan, this time writing for only three members of the Court (he previously had written for five), put the decision on two grounds. First, he saw error in the failure to require the jury to find that Rosenblatt's statement had specifically referred to Baer rather than merely to a group of officials of which Baer was one. Second, Justice Brennan found that Baer was a "public official" under the New York Times doctrine and that the trial court erred in not applying the actual malice rule. Justice Douglas concurred but thought that the question should be "whether a public issue, not a public official, is involved."²⁸

The disagreement foreshadowed in Rosenblatt came to full flower in the 1967 decisions in Curtis Publishing Co. v. Butts²⁹ and Associated Press v. Walker.³⁰ The first case, a diversity libel action brought in a Georgia federal court, stemmed from an article published in petitioner's Saturday Evening Post which accused respondent, then athletic director of the University of Georgia, of conspiring to "fix" a football game between his university

and the University of Alabama by giving information to the coach of the Alabama team. The second case, a libel action brought in a Texas state court, arose out of a distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi when a riot erupted because of federal efforts to enforce a court decree ordering the enrollment of James Meredith as a student in the University. The dispatch stated, among other things, that Walker, a retired general, had taken command of the violent crowd on campus and personally led a charge against federal marshalls. The Supreme Court unanimously reversed the Walker case, but affirmed the Butts case by a vote of five to four.

Justice Harlan, joined by Justices Clark, Stewart and Fortas, took the position that the New York Times rule of actual malice should not be extended to "public figures" who were not "public officials." Actions for libel brought by "public officials" were analogous to seditious libel and hence had to be allowed with "extreme caution." The rule in "public figures" cases should be that damages could be obtained "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." These Justices concluded that their standard was satisfied in the Butts case but not in the Walker case. Hence they voted to affirm in Butts and reverse in Walker.³¹

Chief Justice Warren voted to apply the New York Times standard of actual malice to "public figures" as well as "public officials." In his view, "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy." He concluded the standard had not been met in the Walker case but that it had been in the Butts case.³²

Justices Brennan and White agreed with Chief Justice Warren that the rule of actual malice should apply to the public figures involved in the two cases, and agreed with him that this required reversal in the Walker case. They also agreed that the evidence would support the verdict for Butts under the doctrine of actual malice. But they voted to reverse in Butts because the trial judge's charge to the jury did not conform to that standard.

Justices Black and Douglas held to their view that libel laws should not be used to limit discussion of public issues. Their vote was to reverse in both cases.

The following year, in Pickering v. Board of Education,³³ the court made clear that the First Amendment extended a substantial measure of protection to government employees. An Illinois public high school teacher, dismissed for writing a letter to a local newspaper which was critical of the school board's handling of financing, successfully invoked the Times standard. The Pickering case in substance took the view that expression unconnected with the job should be accorded the usual protection of the First Amendment.

Time, Inc. v. Hill

The "public figure" application of the New York Times doctrine was extended in Time, Inc. v. Hill.³⁴ The Hill family was held hostage in its home by three escaped convicts, but no violence occurred and all members of the family were ultimately released unharmed. A play, The Desperate Hours, subsequently appeared, depicting a hostage incident involving considerable violence. A Life magazine article portrayed it as a reenactment of the incident which the Hill family had experienced more than two years earlier and used as illustrations photographs of scenes staged in the former Hill home. This article was the subject of Hill's action. The suit was brought under a New York statute

that allowed damages for publication of "the name, portrait or picture of any living person without having first obtained the written consent of such person" for advertising or trade purposes. The New York courts construed the statute as not applying to "factual reporting of newsworthy persons and events" but allowing a right of action for material and substantial falsification or "fictionalization." The Supreme Court reversed and sent the case back for a new trial. There were five opinions. Justice Brennan, writing also for Justices Stewart and White, held that the New York statute could be applied to allow redress for false reports on matters of public interest only if there was proof of actual malice in the New York Times sense; that the evidence in the case could be construed either as showing innocent or mere negligent mistake, or as showing actual malice; and that the instructions to the jury did not make clear that actual malice was required. Justices Black and Douglas concurred in the decision, in order to make up a majority agreement to a single disposition of the case, but expressed the view that, as in libel cases, the First Amendment prohibited any restriction on communication relating to matters in the public domain. Justice Harlan dissented on the ground that the proper standard of liability should be merely negligent rather than knowing or reckless misstatement. Justice Fortas, joined by Chief Justice Warren and Justice Clark, agreed with the Brennan opinion as to the principles to be applied but thought there was no reason for a new trial since the instructions and evidence met the required standard of actual malice.

The Supreme Court's attempt to harmonize the law of libel and the law of the First Amendment has thus produced some measure of agreement. The position that libel laws are simply outside the First Amendment no longer prevails; it is agreed that such laws do raise issues under that provision. It is also

agreed that, so far as libel laws operate to limit criticism of public officials and thereby function as seditious libel laws, they must conform at least to the rule of actual malice. Beyond this there are serious differences of opinion within the Court.

FOOTNOTES

1. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 517 (1970).
2. Id. 518.
3. FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON xxv (L. Levy ed. 1966).
4. Id. xxvii.
5. Id. xxviii.
6. Quote reprinted in T. EMERSON, supra note 1, at 504.
7. See People v. Croswell, 3 Johnson's (N.Y.) Cases 336 (1804) as cited in L. LEVY, supra note 3, at lxxviii.
8. L. LEVY, supra note 3, at lxxviii.
9. T. EMERSON, supra note 1, at 519.
10. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
11. 315 U.S. at 517-72, emphasis added.
12. Beauharnais v. Illinois, 343 U.S. 250 (1952).
13. 343 U.S. at 255-56.
14. New York Times v. Sullivan, 376 U.S. 254 (1964).
15. Garrison v. Louisiana, 379 U.S. 64 (1964).
16. T. EMERSON, supra note 1, at 396.
17. 376 U.S. at 268, 269.
18. 376 U.S. at 270, 271.
19. 376 U.S. at 272.
20. 376 U.S. at 275.
21. 376 U.S. at 279.
22. 376 U.S. at 279-80.
23. 376 U.S. at 297, 293.
24. 376 U.S. at 298.

25. Garrison v. Louisiana, 379 U.S. 64 (1964).
26. 379 U.S. at 75.
27. Rosenblatt v. Baer, 383 U.S. 75 (1966).
28. 383 U.S. at 85.
29. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
30. Associated Press v. Walker, 388 U.S. 130 (1967).
31. 388 U.S. at 153, 155.
32. 388 U.S. at 163.
33. Pickering v. Board of Education, 391 U.S. 563 (1968).
34. Time, Inc. v. Hill, 385 U.S. 374 (1967).

CHAPTER IV

CONTEMPT AND THE FIRST AMENDMENT

Communications aimed directly at the court or its manner of operation may create concern on the ground that they may be thought to bring the court into disrepute in the community, to undermine its prestige, or in similar ways to impair its effective functioning. In this respect the impact of the communication is not very different from that of any hostile utterance addressed to the legislative or executive branch of government.

Congress in 1831 limited the power of the United States judges to punish summarily by a statute, which has been slightly amended to read as follows:

The said courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice . . .

Most state courts have long refused to treat this legislation as drawing a geographical line. They have construed "so near thereto" in a causal sense as meaning "in close relationship thereto," and then allowed closeness to include almost any tendency to obstruct the administration of justice. The Act of Congress was interpreted in the same way by the Supreme Court, until it swung to the opposite extreme in 1941. This older attitude is shown in the 1918 case of Toledo Newspaper Company v. United States.² Chief Justice White construed the 1831 statute as merely declaratory of the inherent power of the federal courts to punish summarily for contempt which does no more than express a limitation imposed by the Constitution. The newspaper publications

were held contemptuous because there was a reasonable tendency that the publications would evoke public suspicion of the judge's integrity or fairness and bring him into public odium, and that a particular decision would be met by public resistance. The only physical nearness to the court was that the judge was a daily reader of the publication. Justice Holmes dissented, with the concurrence of Justice Brandeis, saying, among other things, that "misbehavior means something more than adverse comment or disrespect."³

Toledo Newspaper Company v. United States was expressly overruled in Nye v. United States⁴ in 1941. The Court ruled that the words "so near thereto" are to be construed as having a geographical, rather than causal, connotation.⁵ This case did not involve the press, but later in the year the Supreme Court applied the Nye decision in a case which did involve the press.

Bridges v. California⁶ involved contempt citations by two California courts for statements made by the Los Angeles Times and by labor leader Harry Bridges in connection with pending judicial proceedings. The Supreme Court held five to four that both contempt citations violated the First Amendment.

Justice Black, writing for the majority, accepted as the controlling principle the clear and present danger test, although he did not consider that test "to mark the furthestmost constitutional boundaries of protected expression."⁷ Applying the doctrine he began by emphasizing "how much, as a practical matter, [the judgments below] would affect liberty of expression." He then went on to define more precisely the interest of the State, noting that the "substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." The "disrespect" aspect of the case Justice Black disposed of summarily:

The assumption that disrespect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.⁸

The other evil feared, "disorderly and unfair administration," Justice Black thought "is more plausibly associated with restricting publications which touch upon pending litigation." Upon analysis of the particular utterances involved, however, he concluded that the "degree of likelihood" of unfair administration of justice was not "sufficient to justify summary punishment."⁹

Justice Frankfurter, with whom Chief Justice Stone and Justices Roberts and Byrnes agreed, vigorously dissented. He accepted, in form, the clear and present danger test, but interpreted it as meaning no more than the "reasonable tendency" test which the State court had applied. He agreed, also, on the "disrespect" issue, but he believed the State had the power "to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal."¹⁰

In the following case, Pennekamp v. Florida,¹¹ the Supreme Court was unanimous in striking down the contempt citation. A Florida newspaper had published two editorials and a cartoon strongly attacking the local court and its judges for delays, undue technicalities, and general softness in dealing with criminal cases. Actions taken in specific cases were criticized, including one situation in which indictments had been dismissed on technical grounds and the defendants reindicted. Justice Reed, writing for all but one member of the Court, accepted the clear and present danger test, but treated it as the equivalent of a general balancing test. He considered the issue to be

only whether the publication constituted a "threat to the impartial and orderly administration of justice," and concluded that the danger of this revealed by the record "has not the clearness and immediacy necessary to close the door of permissible public comment."¹² Justice Frankfurter concurred, saying that the issue was not whether the publication operated "to bring the courts of a State into disrepute and generally to impair their efficiency" but that the "decisive consideration is whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect."¹³

The Court again split in the next case, Craig v. Harney.¹⁴ A newspaper article gave an inaccurate and unfair report of a trial, and an editorial attacked the decision vigorously, calling it "arbitrary action," and a "travesty of justice." Justice Douglas, writing for the majority, adopted the clear and present danger test. He held that the article did not present "any imminent or serious threat to a judge of reasonable fortitude." As to the editorial--"we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give a fair consideration to the motion for rehearing."¹⁵ Justices Frankfurter and Jackson dissented, noting the powerful influence of the articles and criticizing the majority's assumption that judges were relatively immune to the effects of hostile publicity.¹⁶

Fifteen years later, in 1962 the Supreme Court returned to the problem in Wood v. Georgia.¹⁷ Three judges of a county court made public a charge to a grand jury in which they gave it special instructions to investigate "bloc voting" by Negroes in prior elections, charges of purchasing votes, and other "practices which, while not technically in violation of law, are yet so immoral or corrupt as to be destructive of the purposes of our system of

elections." The charge was issued in the midst of a primary election campaign. Wood, the incumbent candidate for county sheriff, issued a statement denouncing the grand jury investigation. His conviction for contempt was reversed by the Supreme Court in a six to two decision. Chief Justice Warren relied upon the Bridges, Pennekamp and Craig cases as requiring application of the clear and present danger test. There was no proof in the record that the publication had had any actual effect upon the grand jury and the Chief Justice concluded that no showing had been made of "a substantive evil actually designed to impede the course of justice." He plainly considered the context of the controversy to be more a political than a judicial one.¹⁸ Justice Harlan joined by Justice Clark dissented. His view was summarized in a concluding sentence: "I do not understand how it can be denied that a grand jury, reading in the course of this investigation the sheriff's statement that the judges who instructed the grand jury to undertake it were racial bigots making discriminatory use of the laws for purposes of political repression, and that the charges themselves were incredibly false, might well be influenced in his deliberations."¹⁹

Perhaps the chief conclusion that emerges from this series of cases is that from 1941 on the Supreme Court has never upheld a contempt citation for expression critical of a court or its operations. The court seems clearly determined to extend a high degree of protection to discussion of the administration of justice.

FOOTNOTES

1. 28 U.S.C. §385.
2. Toledo Newspaper Company v. United States, 247 U.S. 402 (1918).
3. 247 U.S. at 423.
4. Nye v. United States, 313 U.S. 33 (1941).
5. 313 U.S. at 48.
6. Bridges v. California, 314 U.S. 252 (1941).
7. 314 U.S. at 263.
8. 314 U.S. at 270-71.
9. 314 U.S. at 271.
10. 314 U.S. at 291.
11. Pennekamp v. Florida, 328 U.S. 331 (1946).
12. 328 U.S. at 336, 350.
13. 328 U.S. at 368-69.
14. Craig v. Harney, 331 U.S. 367 (1947).
15. 331 U.S. at 375, 378.
16. 331 U.S. at 390, 396.
17. Wood v. Georgia, 370 U.S. 375 (1962).
18. 370 U.S. at 389.
19. 370 U.S. at 402.

CHAPTER V

PRIOR RESTRAINT BY INJUNCTION

The two preceding chapters dealt with forms of subsequent punishment for publications. This chapter deals with prior restraint in advance of publication--pure censorship of the press--and, in particular, prior restraint by injunction. When the First Amendment was adopted in 1791 it was clearly meant to outlaw any system of prior restraint similar to the English licensing system. No one ever challenged the basic prohibition against prior restraint, and it was not until 1931 that the Supreme Court undertook to clarify the broad concept and reduce it to a working principle of constitutional law.

Near v. Minnesota

Near v. Minnesota¹ involved the so-called Minnesota Gag Law, an experiment in control of the press that had aroused the concern of the newspaper world. The statute provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical "is guilty of a nuisance"; and that suit could be brought by the State "to enjoin perpetually the persons committing or maintaining any such nuisance." Such a suit had been commenced against the publishers of a weekly Minneapolis newspaper which had printed a series of articles that "charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." No allegation was made that the publication

was obscene. The State court perpetually enjoined the publishers from issuing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The Supreme Court in a five to four decision reversed.

Chief Justice Hughes, writing for the majority, held the statute invalid as a prior restraint. He stated that the principle of "immunity from previous restraint" is subject to limitation "only in exceptional cases," and laid down the basic rule:

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.²

The Court left in considerable confusion the question of what exceptions, if any, should be permitted to the prior restraint doctrine. Chief Justice Hughes' opinion asserted, and this was only dicta, that the doctrine would not be applicable in "exceptional cases." He gave as examples certain obstructions to the conduct of war, obscenity, and incitement to violence. But the reasons for making these exceptions were unclear--some of them do not involve expression--and the whole matter remained obscure.

Organization for a Better Austin v. Keefe

The next case, Organization for a Better Austin v. Keefe,³ was adjudicated just last year. Petitioner, an organization whose stated purpose is to "stabilize" the racial ratio in the Austin neighborhood of Chicago, contended respondent real estate broker was engaging in "blockbusting" and "panic peddling" activities in the Austin area. It distributed leaflets critical of these real estate practices in Westchester, where respondent resided, some seven miles from the Austin area. Although the State court found that the

leaflets were distributed in a peaceful and orderly manner, it enjoined petitioner from distributing literature "of any kind" anywhere in the city of Westchester." In vacating the injunction Chief Justice Burger observed for the Court that "the Illinois court was apparently of the view that petitioner's purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement." This did not remove the expressions from the reach of the First Amendment. The Chief Justice laid down the following rule: "[Respondent] carries a heavy burden of showing justification for the imposition of [a prior] restraint. He has not met that burden."⁴

FOOTNOTES

1. Near v. Minnesota, 283 U.S. 697 (1931).
2. 283 U.S. at 715-716.
3. Organization for a Better Austin v. Keefe, 403 U.S. 415 (1971).
4. 403 U.S. at 419.

PART III
PENTAGON PAPERS

CHAPTER VI

THE PENTAGON PAPERS CASES

The question of prior restraint was considered again last year in New York Times Co. v. United States¹ and United States v. Washington Post Co.² For the first time in the history of the United States, the Federal Government sought through the courts to prevent publication of material that it maintained would do "irreparable injury" to the national security if spread before the public. The Times held on the contrary that it was in the national interest to publish this information, which was of historic rather than current operational nature.³

On June 13, 1971, the New York Times began publishing material based on a massive Pentagon study of United States involvement in Vietnam. The published material dealt with top secret recommendations and decisions on the United States' military role during the Johnson and Kennedy Administrations and with diplomacy in the Eisenhower Administration. The Department of Justice obtained a temporary restraining order blocking publication after the paper had published three issues. In the meantime, the Washington Post and other newspapers obtained and printed portions of the Pentagon Papers, and the Government successfully moved against them to halt the flow of information. On appeal the Post was given permission to resume full publication, but the Federal Court of Appeals in New York gave the Times permission to resume publication of only those portions deemed by the government not to be detrimental to national security. The question then went immediately to the Supreme Court,

which was about to adjourn for the summer recess.

The Supreme Court heard oral arguments on June 26, 1971, and announced its decision just four days later and fifteen days after the injunction was first ordered against the Times. In a six to three decision, the Justices vacated the injunctions. The order freeing the newspapers to print the documents in full was given in a brief per curiam opinion. Each Justice, then, added a separate opinion.

The Opinion of the Court

The Court justified the ruling in one brief paragraph, citing Near and Keefe as important authority:

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." . . . The Government "thus carries a heavy burden of showing justification for the enforcement of such a restraint." . . . 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.⁴

Put very simply, then, for a majority of the Court the lower courts had properly denied an injunction in this case. By inference, the courts must decide in every case whether or not the "heavy burden" has been met; if it has, an injunction could issue in spite of the First Amendment. The opinion did not close the door on prior restraint completely. Guidance was not given on what kinds of evidence would meet the Government's burden. In particular, the Court did not say why the public interests asserted by the United States were deemed insufficient.

Separate Opinions

Views Commanding a Majority

Views that command a majority can be gleaned from the proliferation of concurring opinions as well as the dissenting opinions, since some of the things said by the Justices on one side commended themselves to one or more of the Justices on the other side.

Every Justice, except Justices Black and Douglas,⁵ reaffirmed the dicta in Near that the demands of national security might, in special circumstances, justify enjoining publication. Justice White, joined by Justice Stewart, refused to say:

[I]n no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.⁶

Justice Brennan observed that "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." Justice Marshall conjectured that "in some situations it may be that . . . there is a basis for the invocation of the equity jurisdiction . . . to prevent publication of material damaging to 'national security,' however that term may be defined."⁷ Each of the dissenting Justices thought the present case might be an exception to the ban on prior restraints. Referring to the exceptions cited in the Near case, Chief Justice Burger warned the Court:

There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures.⁸

While the dissenting Justices were bitterly complaining of the "unseemly haste" with which the cases had been tried, a majority of the Justices regarded the First Amendment itself as a reason for haste. Justice White, joined

by Justice Stewart concurred "because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system."⁹ Justice Black would have vacated the injunctions without oral argument.¹⁰ Justice Douglas maintained that "[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of information."¹¹ Justice Brennan, the only Justice stating that "there has now been ample time for reflection and judgment,"¹² said that "the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases."¹³

The fact that Congress had considered and denied authorization for injunctive relief of the kind requested by the Government in these cases was, in the view of a majority of the Justices, ground for denying the relief.¹⁴ In the words of Justice Marshall: "When Congress specifically declines to make conduct unlawful it is not for the Court to redécide those issues--to overrule Congress."¹⁵ A different majority, three of the concurring Justices¹⁶ and the three dissenting Justices, indicated that they might uphold a statute authorizing injunctive relief. Not much detail was given, but these concurring and dissenting Justices were obviously split on how much weight would be given to Executive claims of danger to national security. None of the Justices, it should be noted, maintained that any existing statute authorized the requested injunctions.¹⁷

Minority Views

Some of the "minority" views are of interest. Not every Justice addressed himself to these issues so whether they are in fact minority views is open to speculation.

On the question of whether the Executive has an inherent power to go

into court to enjoin publication to protect national security, Justices Black¹⁸ and Douglas¹⁹ said absolutely no. Justice White, with the concurrence of Justice Stewart, answered negatively also, but only for the present case.²⁰ Justice Marshall maintained that in the absence of a statute the Court did not have the power and did not address himself directly to the question of Executive power. Justices Stewart, White, and Marshall each maintained that the Times holding was only applicable to injunctive relief.²¹

Justices Black, Douglas, and Brennan each emphasized that all the temporary stays issued in the cases were unconstitutional.²² Justice Brennan warned "that our judgment 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."²³ Diametrically opposed to this view was that of Justice Harlan, joined by the Chief Justice and Justice Blackmun:

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.²⁴

While no one, including the Government, maintained that publication of these documents could be enjoined solely because they were classified, the issue of classification power and secrecy in government was discussed. To Justice Stewart "it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."²⁵ Justice Marshall said "there is no problem concerning the President's power to classify information . . . "²⁶ In a footnote, Chief Justice Burger compared the "inherent power of the Executive to classify"²⁷ with the inherent power of the Court to protect its confidentiality. On the other hand, Justice Douglas maintained

that "[s]ecrecy in government is fundamentally anti-democratic"28 and Justice Black observed that the "guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."²⁹

Proposals for the Constitutional Test

Every Justice, except Justice Marshall, either offered or joined a solution for reconciling prior restraint with the First Amendment. Justice Black would not approve of prior restraint in any circumstances. Justice Douglas might make an exception during a war declared by Congress, but otherwise he would agree with Justice Black.

Harlan Proposal

Justice Harlan³⁰ would in effect abdicate to Executive judgment. He maintained that as a general rule judicial review of Executive action in the field of foreign affairs be "very narrowly restricted." The Court's only functions are to: (1) determine that the subject matter of the dispute does lie within the proper domain of the President's foreign relations power, and (2) insist that determination of the alleged damage be made by the head of the Executive Department concerned, e.g., the Secretary of State, after actual personal consideration by that officer. Harlan then maintained that the judiciary cannot properly redetermine for itself the probable impact of the disclosure of the national security; that the criteria to overrule an executive determination must be exceedingly narrow.

Stewart and Brennan Proposals

Justice Stewart would authorize an injunction upon proof that the publication would "result in direct, immediate, and irreparable damage to our Nation

or its people."³¹ Justice Brennan's solution is similar but more stringent:

Thus only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.³²

Comments

Justice Black's position would give full protection to the press, which he views as indispensable for the citizenry to appraise the conduct of government and, if necessary, to check often unbridled Presidential discretion. Justice Harlan's proposed resolution would effectively delegate the power to restrict public access to information relating to current policies to those who have the greatest interest in maintaining those policies. Justice Stewart's proposal would restrict the cases in which injunctions would be awarded so narrowly as to approach the absolutist position. His standard emphasizes precisely those elements--certainty and directness of causation--which are most insusceptible of proof and would prove extremely difficult for the Government to meet. Adding the standards of "immediacy" and "kindred to imperiling the safety of a transport already at sea" (Brennan solution) would accord substantial protection to expression.³³

As a principle of constitutional law, the ban on prior restraints is not absolute. Injunctive relief has never been granted by the Supreme Court, so all exceptions to the ban are hypothetical. Pure censorship of information relating to public affairs seems to be forbidden, but this remains an assumption as do the proposed exceptions.

FOOTNOTES

1. New York Times Co. v. United States, 403 U.S. 713 (1971).
2. United States v. Washington Post Co., 403 U.S. 713 (1971).
3. The following description of the facts surrounding the Pentagon Papers cases are taken from various sources: periodicals, newspapers, and law review articles.
4. 403 U.S. at 714.
5. Justice Black would not approve of prior restraint in any circumstances; Justice Douglas would be prepared to make some exceptions if there were a war declared by Congress, based on the war power, but would otherwise join Justice Black's view.
6. 403 U.S. at 730.
7. 403 U.S. at 741.
8. 403 U.S. at 750.
9. 403 U.S. at 730.
10. 403 U.S. at 714.
11. 403 U.S. at 723.
12. 403 U.S. at 724.
13. Id.
14. 403 U.S. at 719 (Black, J., concurring); id. at 721-22 (Douglas, J., concurring); id. at 730 (Stewart, J., concurring); id. at 731-32 (White, J., concurring); id. at 741-43 (Marshall, J., concurring).
15. 403 U.S. at 745.
16. Justices Stewart, White, and Marshall.
17. The Government sought to prove that the word "communicates" in section 793 of the Espionage Act, encompassed publishing; see 18 U.S.C. §793 (e) (1950).
18. 403 U.S. at 719.
19. 403 U.S. at 723.
20. 403 U.S. at 732.

21. 403 U.S. at 730 (Stewart, J., concurring); id. at 733-40 (White, J., concurring); id. at 742 (Marshall, J., concurring).

22. 403 U.S. at 715 (Black, J., concurring); id. at 724 (Douglas, J., concurring); id. at 724-25 (Brennan, J., concurring).

23. 403 U.S. at 724-25.

24. 403 U.S. at 758.

25. 403 U.S. at 729.

26. 403 U.S. at 740.

27. 403 U.S. at 751n. 2.

28. 403 U.S. at 723.

29. 403 U.S. at 719.

30. See 403 U.S. at 757.

31. 403 U.S. at 730.

32. 403 U.S. at 726-27.

33. These comments on the proposed constitutional tests are based on the following source: "The Supreme Court, 1970 Term," 85 HARV. L. REV. 3, 199-212 (1971).

CHAPTER VII

SECURITY, CLASSIFICATION, AND FREEDOM OF THE PRESS

Central to the Pentagon Papers controversy is the official policy and practice which constitute the process of classification of governmental documents. Classification is the method by which certain information is withheld from publication upon the determination that its disclosure would be detrimental to the national interest.

The temptation to introduce this system of classification as being in direct opposition to the constitutionally-protected freedom of the press is difficult to resist, but once it is recognized that some degree of governmental immunity from disclosure in matters involving national security is justifiable as a matter of practical politics and constitutional as a matter of law,¹ the correct focus of inquiry becomes that of the proper relationship between national security and freedom of the press, rather than national security versus freedom of the press. The real threat to a free press comes from the abuses of classification--overclassification--which serves neither the purposes of national security nor a free press. Posing the problem in this, the only realistic, fashion is a call to the familiar judicial perspective: A determination of the permissible boundaries of governmental control or regulation of First Amendment liberty.

What follows is a discussion of overclassification--causes and effects, which affects the flow of information from the government to the people through the press.

Classification and the Pentagon Papers

The national security classification system was at the heart of the Pentagon Papers controversy. The "grave and irreparable danger" standard asserted by the Government in the Supreme Court decision corresponds to the "exceptionally grave damage" standard for permissible "top secret" classification, the classification of the Pentagon study. The Court was in effect asked to determine whether the papers were indeed top secret.

All the Pentagon Papers documents have been declassified in the past year.² How long would this information on the Vietnam War have been kept from the public if they had not been disclosed by Daniel Ellsberg?³ More importantly, and this is a matter of value judgment, how long should they have been classified, if at all? Obviously if they had been declassified in a less spectacular way they would not have drawn as much public attention. It can be said that due to their importance to the public they were disclosed in one of the best possible ways to ensure the widest coverage and dissemination.

Executive Order No. 10501

Until it was superceded in June, 1972, Executive Order No. 10501,⁴ issued November 5, 1953, was the entire basis for the classification system which provided for the withholding of certain kinds of information which might be harmful to the security of the United States if revealed. The basic classification system and safeguarding in the order were originally designed for the very narrow field of military information. As defense planning operations became more complex and more government agencies became involved, a uniform system of security procedures was needed. The policy for classifying military information was expanded on September 24, 1951, to cover all activities and information of the executive branch. This policy was embodied in Executive

Order No. 10290,⁵ the first such order for safe-guarding official information. The classification system established by this order led to a more widespread use of classification markings than existed before. In order to reduce the scope of this order, the classification policy was redrafted and republished as Executive Order No. 10501. The preamble began: "Whereas it is essential that the citizens of the United States be informed concerning the activities of their government . . . "⁶ Ironically, the original purpose of Executive Order No. 10501 was to prevent overclassification.⁷

The order authorizes three classification categories for information which requires protection in the interests of national defense. In descending order of importance they are: (1) top secret, (2) secret, and (3) confidential. These designations are to be used to indicate that unauthorized disclosure of the information would, respectively, (1) result in exceptionally grave damage to the nation, (2) result in serious damage to the nation, and (3) be prejudicial to the defense interests of the nation. Only persons designated to have original classification authority may classify documents. The order specifies that "[u]nnecessary classification and over-classification shall be scrupulously avoided."⁸ No penalties for overclassification are provided.

In addition to the classification, the information is categorized into one of four groups to indicate its downgrading and declassification procedure. Groups 1 and 2 are exempted from automatic downgrading and declassification. Group 1 relates to specified information, such as information originating from a foreign government; Group 2 allows the head of an agency or his designees to exempt other sensitive information from the declassification process. Group 3 provides for automatic downgrading at twelve-year intervals until the lowest

classification is reached, but the information is not automatically declassified. Group 4 provides for automatic downgrading at three-year intervals, and automatic declassification twelve years after the date of issuance. It should be noted that the automatic downgrading and declassification procedure was added to the order in September, 1961, and that the automatic declassification provisions are not scheduled to begin until 1975 unless the classifying authority indicated an earlier date.

The classification procedure itself is mainly mechanical and of little interest to this study; however, the portion referring to multiple classifications is pertinent. The rule states that a document shall bear a classification at least as high as that of its highest classified component part. Accordingly, if the forty-seven volume Pentagon study on Vietnam policy contained only a few pages of top secret documents (this is strictly hypothetical) then the entire study would be classified top secret. There is no requirement in the order that all component parts be marked according to their own classification apart from the collection's classification.

Overclassification

It has been estimated by William Florence, a retired civilian security classification policy expert, that "less than one-half of 1 percent of the different documents which bear currently assigned classification markings actually contain information qualifying even for the lowest defense classification [i.e., confidential] under Executive Order 10501."⁹ In other words, "the disclosure of information in at least 99-1/2 percent of those classified documents could not be prejudicial to the defense interests of the nation."¹⁰ Former Justice Arthur Goldberg, U. S. representative to the United Nations, who has had the experience of dealing with classified material at the highest

level of government in international affairs, estimated that 75 percent of the classified documents should never have been classified in the first place, that another 15 percent quickly outlived their need for secrecy, and that only about 10 percent genuinely required restricted access over any significant period of time.¹¹ These figures represent not only the percentage of documents that were misclassified in the first place but also those that should have been declassified because their need for secrecy no longer existed.

There are several reasons for this overclassification. First of all, the classification system itself encourages the tendency to overclassify. There are no penalties for overclassification; the official may receive an admonition but he will not lose his job or otherwise be punished if he overclassifies. On the other hand, the official may be discharged if he underclassifies documents. The burden of proof is to show why a document should not be classified, not vice versa. Another reason that documents remain classified too long is that very few are assigned to Group 4 which provides for automatic declassification. It is interesting to note at this point that the Pentagon Papers were assigned to Group 1 and were therefore exempt from automatic downgrading and declassification. The executive order requires that the heads of departments or agencies originating classified information or material designate persons to be responsible for a continuing review of the classified material on a systematic basis for the purpose of downgrading or declassifying the information. These reviews have obviously been ineffective. A document cannot be reviewed out of context; its relationship with other documents has to be considered. A review board with access to all classified documents and having expert knowledge in national security affairs would be necessary to effectively enforce a review for the purpose of downgrading or declas-

sification. This review board would not be effective, however, unless the burden of proof for classification was shifted. Justification for continued classification would be necessary rather than justification for declassification. The last reason that overclassification has not been abated is that Congress has not taken any effective steps to prevent it. In 1966 Congress passed the Freedom of Information Act¹² to facilitate the flow of information from the government to the people. This Act, however, specifically exempted material classified by an executive order. Secrecy in government is not solely the responsibility of the Executive. Congress could have clarified the ambiguity of Executive Order No. 10501 with a precise statute, clearly marking the boundaries of secrecy and providing severe penalties for stepping outside those boundaries.

Proposed Solution to Overclassification

Executive Order No. 10501 has now been rescinded and replaced, but before the succeeding order is discussed a proposed solution for the overhaul of the classification system, as presented by Norman Dorsen, general counsel for American Civil Liberties Union, and who argued the Pentagon Papers case before the Supreme Court, will be discussed.¹³ The purpose of presenting this solution is for contrast. This solution goes much farther to protect the people's right to know than the new revision does.

The first step is the elimination of the confidential and secret categories. All documents currently classified as secret or confidential would be declassified automatically within a few months. Declassification of these documents would have the salutary effect of awakening executive officials to the fact that they are improperly classifying information that the public has a right to know. Only the head of a department or agency could prevent the

declassification of a particular document and only for very compelling reasons.

The remaining material would be divided into three categories: first, material which may be protected through criminal sanctions; second, material which may be protected by the government from public disclosure only through the use of administrative sanctions such as discharge from employment; and finally, material which must be made available to the public. The only material that would satisfy the criteria for the first category is material which, if made public, would create an immediate danger to military operations and would be of no value in permitting citizens to render an informed judgment on public issues. The only kinds of material that would fall into this category, then, are the following three: first, present or future tactical military operations, second, blueprints or designs of advanced military equipment, and third, secret codes or material identifying particular secret operatives. The second category would be limited to data on the private lives of particular individuals and information on current diplomatic negotiations, crisis deliberations or covert intelligence operations. There would be no time limit on material concerning the lives of particular individuals, but all other material in this category would have to be made publicly available after a relatively short period--one or two years. The third category includes all material not covered by the other two.

Classification can be made only by the agency head or a departmental officer specifically designated by him to perform this function. All classified material should be presumptively declassified within a relatively brief period of time--perhaps two or three years. At that point, the burden would be on the agency to make a clear and convincing showing that the document should remain classified. An independent tribunal, composed of public members

confirmed by the Senate, should then determine whether the document should remain classified. The ultimate criteria is that no information may be kept secret if it would be of value in permitting the citizens to render an informed judgment on public issues.

Executive Order No. 11652

As indicated above, Executive Order No. 10501 has been rescinded and replaced. In January, 1971, President Nixon initiated a review of the classification system then in effect and on March 8, 1972, he signed Executive Order No. 11652,¹⁴ the result of that review. The new system became effective on June 1, 1972.¹⁵

The present Administration could not ignore the rampant overclassification that occurred under the previous executive order, nor did it ignore the effects of those abuses on the public's right to know. In President Nixon's own words:

The many abuses of the security system can no longer be tolerated. Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and--eventually--incapable of determining their own destinies.¹⁶

These are gallant words from the same Administration that made the first Federal attempt to enjoin publication of material that "properly belongs to the public."

The most important feature of Executive Order No. 11652 is the reversal of the burden of proof. For the first time the burden, and the threat of administrative sanction, is upon those who wish to preserve the secrecy of documents rather than upon those who wish to declassify them. In addition, each agency is to provide a means of identifying the classifying authority

for each document, and each official is to be held personally responsible for the propriety of the classifications attributed to him. Repeated abuse of the process through excessive classification is grounds for administrative action. A continuing monitoring process has been set up under the National Security Council and an Interagency Classification Review Committee.

The number of departments and persons who can originally classify information has been reduced. Under the previous rules, twenty-four departments and agencies outside the Executive Office had broad classification authority, while several others had more restricted powers. Under the new system, only twelve departments and agencies have authority to, in the first instance classify information top secret, and thirteen others have authority to stamp materials secret and confidential.

Unless specifically exempted, all documents classified after May 31, 1972, are to be automatically downgraded and declassified. Top secret information is to be downgraded to secret after two years, to confidential after two more years, and declassified after a total of ten years. Secret information is to be downgraded to confidential after two years and declassified after a total of eight years. Confidential documents are to be declassified after six years. Also, each classified document must be marked to show which portions are classified, at what level, and which portions are unclassified.

Information may be exempted from the automatic process only by an official with top secret classification authority, and that official must specify in which of four specific exemption categories the material falls. The four exempted categories are: (1) classified information furnished in confidence by a foreign government or international organization; (2) classified information covered by statute, or pertaining to cryptography, or disclosing intelli-

gence sources or methods; (3) classified information disclosing a system, plan, installation, project, or specific foreign relations matter the continued protection of which is essential to the national security; and (4) classified information which, if disclosed, would place a person in immediate jeopardy--e.g., physical harm, not personal embarrassment or discomfiture.

Upon request from anyone, including a member of the general public, exempted material is subject to mandatory review by the originating department after ten years from the date of origin. If the material is still classified thirty years after the date of its original classification, it shall then be automatically declassified. Classification may be further extended only if the head of the originating department personally determines in writing that its continued protection is essential to national security or that its disclosure would place a person in immediate jeopardy.

Two additional elements of the new system are notably weak. First, the definitions for top secret, secret, and confidential remain essentially the same except now the classifier has to believe their unauthorized disclosure could reasonably be expected to cause the different degrees of damage rather than to have a remote expectation of such damage. Second, the application of the declassification system to documents classified before June 1, 1972, will not remedy the past abuses of the classification system. The six-to-ten year rule for automatic declassification can only be applied to those documents already subject to a twelve-year declassification under the previous procedures. All others, which are by far the majority, are subject to the rules applying to the exempted categories.

Besides the two weaknesses just mentioned which appear on the face of the order, there are several others. The new order does nothing to break the

inertia of the bureaucrats like Norman Dorsen's suggestion of declassifying all existing secret and confidential materials. Bureaucratic habits die hard and there is sufficient latitude in exemption category (3) for them to carry on with their old practices. The mandatory review upon request from anyone is equally suspect. Just how is anyone to know of the existence of a classified document in the first place so that he can initiate said review? It is claimed that the reduction in classification authority will "sharply reduce the quantity of material which enters the government's classified files."¹⁷ The following is not meant to be a semantics argument. If William Florence is correct in saying that 99-1/2 percent of the currently classified material could be released to the public, then the way to reduce the government's holdings of classified material is to severely reduce the amount of material which was classified according to the rules of Executive Order No. 10501 while simultaneously reducing the amount of newly classified material. To greatly oversimplify, Executive Order No. 11652 has cut the classification authority to approximately half the number of people who previously had such authority. Presumably, the definition of national security will continue to grow in complexity as will the Federal Government, and delegated classification authority will increase to correspond. The new security classification system will reduce the amount of classified material slightly, not "sharply."

Impact and Importance

In today's world, control of the information process is the key to power. "Power to the people," to borrow the current phrase, will not come through Executive Order No. 11652. The changes from the old system to the new are thoughtful and responsible if the primary objective is to maintain governmental secrecy and executive power over the information.

James Madison described the right to know as follows:

Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or tragedy, or perhaps both.¹⁸

The new executive order does not contain the crucial rule included in Norman Dorsen's proposed solution, viz., no information may be kept secret if it would be of value in permitting the citizens to render an informed judgment on public issues. Without this rule the people's right to know is merely being patronized. Those who have been impatient and leery of the constant growth of the executive power that has been a major characteristic of our age will properly look upon this tokenism with scorn. The press, and ultimately the public, will still be dependent on the official "leaks" of information which will probably continue. Those who are accustomed to deferring to new systems, simply because they are new and should be given a chance to work, will continue to abdicate to the Executive, but those who are deeply concerned about the people's right to know will pierce through the rhetoric and see that the new system falls short of its stated goals--far short.

FOOTNOTES

1. See U.S. CONST. art. I, §5; "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; . . .".

2. The four volumes relating to diplomatic negotiations were declassified in June, 1972, according to an NBC news broadcast.

3. It has been widely assumed, and even alleged by Ellsberg himself, that Ellsberg was the source of the documents. Some Federal investigators now hint that perhaps he was not the key figure. There is some evidence, they say, "to suggest that Ellsberg may have hesitated before releasing the papers and that someone else with access to his copies, in exasperation at Ellsberg's indecision, may have handed them over to the Times," "The Pentagon Papers: Anniversary," Newsweek, June 26, 1972, p. 29.

4. 18 FED. REG. 7049, as amended by Executive Order No. 10816, May 7, 1959; Executive Order No. 10901, Jan. 9, 1961; Executive Order No. 10964, September 20, 1961; and Executive Order No. 10985, Jan. 12, 1962.

5. FED. REG. [the contents of this executive order are available only in secondary sources].

6. Executive Order No. 10501, supra note 4.

7. The history of Executive Order No. 10501 is taken from the following source: Hearings on U.S. Government Information Policies and Practices Before the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations, 92d Cong., 1st sess., pt. 1, 96-97 (1971) [hereinafter cited as 1971 Hearings].

8. Executive Order No. 10501, supra, note 4.

9. 1971 Hearings, at 97.

10. Id.

11. Id. at 12.

12. Freedom of Information Act, 5 U.S.C. §552 (1966).

13. The entire discussion of the proposed solution is based on 1971 Hearings, pt. 3, 815-17; Norman Dorsen presented an amicus curiae brief to the Supreme Court in behalf of the ACLU in the Pentagon Papers case.

14. 37 FED. REG. 5209.

15. The discussion of Executive Order No. 11652 is taken from the following source: Statement by President Nixon, "President Nixon Establishes New System for Classification and Declassification of National Security Documents," Department of State Bulletin, April 3, 1972, 318-22 [hereinafter cited as Nixon Statement].

16. Nixon Statement, at 518.

17. Id. at 520, emphasis added.

18. Quoted in 1971 Hearings, pt. 3, 832, emphasis added.

PART IV
CONCLUSION

CHAPTER VIII

SUMMARY AND COMMENTARY

Summary

Freedom of the press, being part of the system of freedom of expression, is essential to the process of self-government. Without the facts and opinions supplied by media such as the press, the people cannot participate in the decision-making process and elected officials cannot be effectively held accountable for their actions. Criticism, in a free market of ideas, is inevitable and must be endured to the maximum. Suppression of criticism by governmental officials destroys the very foundation of self-government.

The development of constitutional law regarding the liberty of the press has been consistently in favor of the people's right to know. The Supreme Court's interpretation of the First Amendment now puts a considerable burden on the government to demonstrate why a publication should not be free from prior restraint or subsequent punishment. The Court very seldom abdicates to legislative, and now executive, determinations of which writings will be given First Amendment protection; the "bad tendency" doctrine, which the Court used to defer to legislative judgment in freedom of expression decisions, has been forever buried.

Governmental attempts to suppress hostile writings, which were successful in the early years of the republic, are not likely to succeed today. This has been demonstrated by the discussion of libel, contempt of court, and prior restraint by injunction. A public official cannot recover damages for a libel

relating to his official conduct unless he can prove that the false statements were knowingly made or were made with reckless disregard of whether they were false or not. Judges cannot use their power of contempt to punish expression critical of the court or its operations with impunity. The government carries a very heavy burden of showing justification for the enforcement of prior restraints on expression. Thus, the courts probably will not enjoin publications unless the government can prove that the expression will cause direct, immediate and irreparable damage to the nation or its people.

The controversy resulting from the publication of the Pentagon Papers concerned many issues of prior restraint. The government was denied its request for an injunction, but all avenues of subsequent punishment with their prior restraint aspects were left open. Just the fact that the government sought an injunction against publication will have a chilling effect on the future decisions of publishers when they must determine whether or not to publish information which is vital to public issues, but is nevertheless classified.

The classification system for national security documents is a system of prior restraint. Overclassification and misclassification is rampant and will continue to grow. It is estimated that 99-1/2 percent of the currently classified documents could be released to the public without harm to national security. The current Administration has made a noble effort to halt the tendency towards overclassification, but it has not gone far enough. The interests of national security, as defined by the executive branch through its classification system, do not serve the people's right to know. The rhetoric is there but the means of acquiring the information are not. The Executive, or Congress, needs to transform its stated policy of the people's right to

to withhold any information at all in the interests of national security. Congress has the specific power to maintain secrecy over part of its records and there is precedent to support the extension of this power to both the executive branch and the judicial branch. Next, the Court would have to decide the constitutionality of the procedure used to withhold this information, specifically the classification system formed by Executive Order No. 10501, the classification system in effect when the Pentagon Papers were classified. This order is excessively vague, but on its face its intent is to prevent classification of documents similar to the Pentagon Papers. The Court would not be able to rule on Executive Order No. 10501 itself, since this order has been rescinded, but it can rule on the application of this order to the Pentagon Papers. The Court would be reluctant to decide whether these documents were misclassified or overclassified, since it lacks expertise in the field of foreign relations, but it can decide whether these documents are useful to the public. The question then resolves itself to one of striking a balance between the government's right to withhold and the people's right to know. It is this author's opinion that the preferred position doctrine should be used to resolve this issue. The classification of the Pentagon Papers should be presumed to be unconstitutional. This would immediately put the government in a very difficult position of proof. As was previously mentioned, all of the Pentagon Papers documents have been declassified and would not have been declassified for at least thirty years if they had not been disclosed by Ellsberg. Of course, they were not declassified at the time that Ellsberg transmitted them to the newspapers, and this would be the focus of the government's argument. Using the preferred position doctrine, the government would bear a very heavy burden of proof to establish that the government's right to

withhold outweighed the people's right to know the contents of the Pentagon study on Vietnam policy. If the author were a Supreme Court Justice, her vote would be to uphold the people's right to know in this case. The fact that this information would be of value in permitting the citizens to render an informed judgment on the Vietnam War issue would be conclusive evidence that the interests of national security would be better served by the release of this information notwithstanding the fact that these documents were classified. The release of this information would be protected by the First Amendment.

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THE PENTAGON PAPERS:
A STUDY IN PRIOR RESTRAINT

by

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The controversy surrounding the publication of the Pentagon Papers in 1971 involved a number of important political and legal issues. This study is directed at the legal aspects of this controversy--more specifically, the constitutional issues prompted by the First Amendment. When the First Amendment was adopted in 1791 it was clearly meant to prohibit any system of prior restraint on the freedom of the press. Censorship of the press to protect the security of the nation is possible, although the government's burden of proving grave danger to the nation will be a heavy burden indeed.

The Supreme Court has never ruled that the First Amendment guarantees of freedom of speech and the press are absolute. However, the development of constitutional law in the area of freedom of expression is clearly in the direction of more, not less, protection of free expression, especially when that expression relates to public affairs. Debate on public issues has to be open in order to maintain a system of self-government.

Criticism of the political leadership is inevitable and not always in good taste. Government has tried to suppress this criticism in many ways. Libel actions have been taken to suppress personal criticisms. The courts have used their power of contempt to punish hostile writings aimed directly at the court or its manner of operation. In the name of national security the Federal Government tried to enjoin publications, as it did in the matter of the Pentagon Papers. Most of these actions were not successful. The Supreme Court, in its expositions of the demands of the First Amendment, has recognized the value of a free press as a vital source of public information.

If the press is not free, then it is controlled, and it can be controlled by methods other than libel, contempt of court, or injunction. The government, a major source of information, can and does control the flow of

information by releasing favorable reports and withholding those that are not favorable. It is generally agreed that some amount of secrecy in government is necessary to protect national security. The classification system used by the Executive to protect documents vital to national security has been abused, however. Overclassification and misclassification is rampant. This overclassification serves neither the interests of national security nor the people's right to know what their government is up to. This study is focused on the issue of governmental control of information and its relation to the people's right to know.

The Supreme Court avoided the question of overclassification in the Pentagon Papers case, but it may not be able to do so in the current case of Daniel Ellsberg and Anthony Russo. Freedom of information is the other side of the First Amendment coin's protection of a free press. The precise degree of protection afforded by the doctrine of the right to know, as embodied in the First Amendment, has not yet been fully developed. As the Court proceeds in expanding the protection of free expression necessary to self-government, the issue of overclassification will have to be faced eventually.

This study explores these issues involving the freedom of the press and the right to criticize the government. The focus is on the Pentagon Papers case. The major source materials are the Supreme Court opinions found in the United States Reports, books by legal theorists and legal historians, and law review articles. The main thesis is that the development of constitutional law has been a consistent and conclusive repudiation of the kind of governmental censorship involved in the Pentagon Papers case.