IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, NEW YORK TIMES COMPANY

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INDEX

TABLE OF CASES

PAGE

PAGE

CONSTITUTIONAL PROVISIONS AND STATUTES

BOOKS AND TREATISES

MISCELLANEOUS

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals for the Second Circuit sitting *en banc* is reproduced in Appendix A to the Petition for Certiorari. The Opinion of the United States District Court for the Southern District of New York is reproduced in Appendix B to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals *en banc* was entered on June 22, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1). *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, a court may restrain a newspaper from publishing articles relating to public affairs.

2. Whether, consistent with the First and Fifth Amendments, the Court of Appeals may properly remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where publication of the articles was not prohibited by any statute and where the basis for remand was the submission to the Court of Appeals of assertions of fact not before the District Court.

3. Whether, consistent with the First Amendment and the principle of separation of powers, the Court of Appeals may adopt a standard which permits the Executive to obtain injunctive relief against publication by a newspaper of articles relating to public affairs, in the absence of any statute enacted by Congress.

4. Whether a remand by the Court of Appeals to the District Court in a case in which the United States seeks to restrain publication by a newspaper of articles relating to public affairs, in which the Court of Appeals instructs the District Court to enjoin publication of items which "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined" is unconstitutionally vague and impossible of application by a court of law.

5. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District

Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs in circumstances in which the United States at its request had been provided an *in camera* hearing to enable it to fully and frankly set forth its evidence, and at which hearing it had wholly failed to set forth evidence demonstrating any need for an injunction and where remanding the case would substantially delay publication of the news articles.

6. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where two District Courts had held, and a Court of Appeals held, that no irreparable harm would be suffered by the United States if such articles were published and that there was no reasonable certainty that the United States would succeed on the merits.

7. Whether, consistent with the First Amendment, a newspaper may be restrained from publishing articles relating to public affairs for a period of time of as much as eighteen days pending judicial hearing and determination whether the newspaper may publish the articles.

8. Whether, consistent with the First Amendment, a court may issue a temporary restraining order against the publication by a newspaper of articles relating to public affairs in the absence of a showing by the applicant that it was reasonably certain that the applicant would prevail on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, FIRST AMENDMENT:

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

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 to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, TITLE 18 § 793(e)

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United

States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

UNITED STATES CODE, TITLE 28

Federal Rules of Civil Procedure 52(a). *Findings by the Court*

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

On June 13, 1971, the New York *Times* commenced publication of a series of articles based upon two highly significant historical documents. One is a 7,000 page 1968 Pentagon study relating to Vietman entitled "History of U. S. Decision-Making Process on Vietnam Policy"; the other is a summary of a 1965 Defense Department study relating to the Tonkin Gulf incident. Together, they constitute a massive history of how the United States went to war in Indochina. The study was commissioned by Secretary of Defense McNamara in 1967 and completed in 1968. Its analysis is historical. Portions of it relate as far back as 40 years. None of it relates to a time period subsequent to early 1968.

On June 14 and June 15, 1971 two of the articles appeared in the *Times*. On June 15, 1971, the United States instituted in the District Court for the Southern District of New York an action to obtain an order enjoining the dissemination, disclosure or divulgence of the material in the possession of the *Times*, which was to be the basis of the continuation of the series of articles. The complaint prayed for the entry of orders, preliminarily and permanently, (1) restraining the *Times* from publishing the articles which the *Times* intended to publish relating to the origins of the United States involvement in Indochina during the period 1945-1968, and (2) directing the *Times* to deliver to the Government the documents upon which the articles were to be based. The *Times* and twenty-two officials and newsmen of the *Times* were named as defendants.

Simultaneously with the filing of the complaint, the Government applied for a temporary restraining order providing the relief prayed for in the complaint pending the issuance of a preliminary injunction. The application was accompanied by two affidavits. One described the demand

made by the Government to the *Times* to cease publishing the articles in question and to "return" the documents in question. The other by Mr. Fred Buzhardt, the General Counsel of the Defense Department stated that "[p]ublication of the said excerpts [from the Vietnam history] has prejudiced the defense interests of the United States and publication of additional excerpts or material from the aforesaid study would further prejudice the defense interest of the United States." (Buzhardt Aff. ¶ 2) The affidavit did not state how the defense interests of the United States had been or would be prejudiced, why the affiant believed the defense interests had been prejudiced or what qualifications the affiant had to speak with authority with respect to the defense interests.

On this basis and without more, the District Court on June 15, 1971, over the opposition of the *Times,* entered a temporary restraining order to expire at 1 P.M. on Saturday, June 19, and made the Government's motion for a preliminary injunction returnable on Friday, June 18.

On Friday, June 18 (the return day of the Government's motion for a preliminary injunction and at the opening of the hearing thereon), the Washington *Post* commenced publishing articles allegedly based upon the Pentagon study. Numerous newspapers, including the New York *Post,* reported accounts of these articles and even published them as did the national news wire services. Since the information and documents which the *Times* had been restrained from publishing had become publicly available, the *Times* moved at once to vacate the temporary restraining order and to dismiss the Government's action for mootness. The *Times* contended that, by virtue of the public disclosure of these documents in other newspapers, the hardship imposed on the *Times* by virtue of an unique prior restraint, and the corresponding limitation placed

solely upon its readers, the Government no longer possessed an arguably legitimate interest in either enjoining publication or in compelling delivery of the documents. The District Court reserved decision on petitioner's motion and proceeded to hear argument on the Government's motion for a preliminary injunction. Thereafter, a full evidentiary hearing was conducted. Based upon the Government's insistence that considerations of national security would not permit it to elicit testimony in a public courtroom, Judge Gurfein conducted a portion of this hearing *in camera.*

The Government offered the testimony of five witnesses in an effort to prove that further publication by the *Times* would work such irreparable harm to vital national security interests as could justify imposing a prior restraint upon the press. The Government introduced certain documentary evidence including copies of the two Pentagon studies involved. The witnesses were subjected to cross-examination in open court and *in camera.* At the conclusion of the hearing—which began at 10:00 A.M. Friday, June 18, and concluded at approximately 10:30 P.M. that evening—Judge Gurfein reserved decision on the motion for a preliminary injunction.

On Saturday, June 19, the District Court issued a 16-page Memorandum and Order denying the Government's motion for a preliminary injunction. The opinion reads in part:

> "For I am constrained to find as a fact that the *in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified, did not convince this Court that the publication of these historical documents would seriously breach the national security. It is true, of course, that any

> breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us. But to sustain a preliminary injunction the Government would have to establish not only irreparable injury, but also the probability of success in the litigation itself. It is true that the Court has not been able to read through the many volumes of documents in the history of Vietnam, but it did give the Government an opportunity to pinpoint what it believed to be vital breaches of our national security of sufficient impact to contravert the right of a free press. Without revealing the content of the testimony, suffice it to say that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would vitally affect the security of the Nation. In the light of such a finding the inquiry must end." (Memorandum and Order, pp. 12-13).

Aside from denying the Government's motion for a preliminary injunction, the District Court declined to enjoin the *Times* during the pendency of a Government appeal to the Court of Appeals, but did continue the restraint on publication "until such time during the day as the Government may seek a stay from a judge of the Court of Appeals for the Second Circuit." Later that afternoon, the Government filed a notice of appeal and applied to Circuit Judge Irving R. Kaufman for a further injunction pending appeal. This was denied, but Judge Kaufman did extend the restraint until noontime on Monday, June 21, to give the Government time to renew its application before a regular three judge panel of the Court of Appeals.

On June 21, 1971 the Government renewed its application before a panel composed of Circuit Judges Friendly,

Smith and Hayes. At that time the United States Attorney submitted a "Special Appendix" referring to, discussing and characterizing documents contained in the 47 volume history of the Vietnam War and containing broad conclusory statements, often phrased in present tense and containing data entirely outside the record before the Court, alleging *inter alia,* that national security would suffer if the documents were made public. The "Special Appendix" was prepared from affidavits apparently submitted by the United States in the Washington *Post* litigation.*

At the hearing on June 21, 1971, the Court of Appeals announced that the appeal by the United States from the opinion of Judge Gurfein would be heard by the Court sitting *en banc* on June 22, at 2:00 P.M. and continued the restraint on publication until the conclusion of the argument. On June 22, 1971, counsel to the *Times* moved to strike portions of the "Special Appendix." Oral argument was heard in the litigation on June 22.

On June 23, 1971, the Court of Appeals, by a 5-3 decision, ordered that the case:

> "be remanded to the District Court for further *in camera* proceedings to determine, on or before July 3, 1971, whether disclosure of any of those items specified in the Special Appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being

*While the United States contended in the District Court that the "Special Appendix" was based upon affidavits of individuals in Government, it now characterizes the "Special Appendix", as "affidavits submitted by high government officials. . . ." (Memorandum for United States Re Vacatur Application, p. 3).

> enjoined, and to act accordingly, subject to the condition that the stay heretofore issued by this court, shall continue in effect until June 25, 1971, at which time it shall be vacated except as to those items which have been specified in the Special Appendix as so supplemented and shall continue in effect as to such items until disposition by the District Court."

The effect of the decision of the Court was to affirm the decision of Judge Gurfein as to all arguments previously made before him by the Government, but to remand it to him for consideration of the new contentions put forth by the Government on June 21, 1971 in the "Special Appendix" and such new contentions as it might decide upon through June 25, 1971.

Judges Kaufman, Feinberg and Oakes dissented and stated that they "would vacate the stay and affirm the judgment of the Court below."

On June 24, 1971, the *Times* filed in this Court its petition for certiorari, motions for expedited consideration thereof and leave to file on typewritten papers and an application to Mr. Justice Harlan for vacatur of the stay provisions contained in the order of the Court of Appeals and for a stay of that Court's mandate.

On June 25, 1971 this Court granted the petition for certiorari, stayed the mandate of the Court of Appeals pending further order of the Court and directed the United States to serve the "Special Appendix" referred to and any additional items "as the United States may have specified with particularity" by 5 P.M. on June 25, 1971.

The Evidence Before the District Court

The Government Witnesses*

Four witnesses were heard in public session before Judge Gurfein, all called by the United States. Three of these witnesses testified that they were competent to discuss the effect of publication of the documents in possession of the New York *Times* on national security interests. The fourth, George MacClain, merely testified to the nature of the United States classification system.**

The most that can be said of the testimony of the three witnesses, Mr. Dennis James Doolin, Admiral Francis J. Blouin and Mr. William B. Macomber, in public is that insofar as it was relevant to the Government's case, it was so generalized and lacking in specificity that it could not conceivably be a basis for a prior restraint on free speech.

Mr. Doolin, Deputy Secretary of Defense for International Security Affairs, testified that his familiarity with the Vietnam volumes dated back only to November 1969 when he reviewed the study to propose a recommended response to Secretary of Defense Laird to a request of Senator Fulbright for the study (Tr. 56); and that he was not a part of the task force that prepared the Vietnam volumes

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*A separate statement sets forth in detail our view as to the lack of substance of the *in camera* testimony presented by the Government, as well as our comments with respect to the later submitted "Special Appendix" and additional materials proferred by the Government.

**Mr. MacClain, Director of the Security Classification, Management Division, in the Office of the Assistant Secretary of Defense and Administration, testified only as to the general scheme of classification of secret documents. He was not familiar with any of the specific documents involved in this case and was thus not qualified to testify as to the propriety of their classification or their supposed relationship to the defense interests of the United States. He was not even able to testify as to which security group the Vietnam volumes were placed in.

in 1967-1968 (Tr. 55). Mr. Doolin also testified that he had been involved with the Vietnam volumes frequently since November 1969 as a result of further and continuing requests of Senator Fulbright. With respect to the Tonkin Gulf report, Mr. Doolin testified that he first saw it after the commencement of the series of New York *Times* articles (Tr. 87).

Mr. Doolin indicated that he was qualified to testify as to whether or not public disclosure of the materials contained in the Vietnam study "would compromise the present or future military or defense plans, intelligence operations [or] jeopardize international relations of the United States." (Tr. 88-89). He did not do so in public.

Mr. Doolin also demonstrated the inability to testify to the interrelationship betweeen the classifications "top secret", "secret" and "confidential" and the groups 1 through 4 established by Executive Order, the latter referring to the automatic declassification system of documents. Except to say that some of the documents contained in the Vietnam volumes were either group 1 or group 4, Mr. Doolin was unable to state whether any of the documents were in groups 2 or 3 (Tr. 75).

On cross-examination, Mr. Doolin discussed the study he prepared in 1969 with respect to the desirability of continued secrecy of the volumes at that time for use by Secretary Laird in responding to the request of Senator Fulbright. In conjunction with this testimony, Mr. Doolin stated that as of the time of his 1969 recommendation to keep the volumes secret, he probably read 7 or 8 of the volumes in the Vietnam study and had surveyed the others (Tr. 132).

The public testimony of Admiral Francis J. Blouin, Deputy Chief of Naval Operations for Plans and Policy was no more specific than that of Mr. Doolin in demon-

strating any significant security interest to be preserved by preventing publication of the Vietnam volumes. With regard to the Tonkin Gulf study, Admiral Blouin testified that he believed that its publication "would compromise the present or future military or defense plans of intelligence operations of the United States." (Tr. 103). According to Admiral Blouin, a summary in the Tonkin Gulf report "gets into very intimate details on the command organization of the United States, and I feel that to go any further in describing that or the forces involved and how they are generated is very definitely damaging to the best interests of the United States." (Tr. 103).

With regard to the Vietnam volumes, Admiral Blouin testified that he had "little better than 24 hours" to get acquainted with the 47-volume Vietnam study (Tr. 104), but that he felt "quite well-informed now as to the content." (Tr. 104). Despite his obviously limited familiarity with the documents, Admiral Blouin concluded that "it would be a disaster to publish all of these other documents, let alone the ones that have already been published." (Tr. 104). Admiral Blouin further testified that he could detect things "already published by the *Times* that the ordinary layman would not detect, but I think as a matter of fact any intelligence organization will derive a great deal of benefit from the articles that have already been published, and there is even more juicy material in the other volumes." (Tr. 105).

However, Admiral Blouin did not specify or point to any item in the Vietnam study or the Tonkin Gulf report which would compromise the security of the United States or, for that matter, refer to any single document published in the New York *Times* to date which would do so.

Thus, in its entirety, the public testimony of Admiral Blouin amounted to no more than an assertion, without

explanation, that in his view neither the Vietnam study nor the Tonkin Gulf report should be published.

The last substantive witness called by the Government was Mr. Macomber, Deputy Undersecretary of State for Administration in the Department of State. Mr. Macomber testified that he had found excerpts of State Department classified documents published verbatim in the New York *Times* articles (Tr. 107). He further testified that publication of the Vietnam study would be "harmful diplomatically" because it would make private communication difficult with foreign nations (Tr. 112). Mr. Macomber testified that disclosure of the material contained in the Vietnam study would have an adverse impact on current diplomatic matters or treaty discussions (Tr. 113). However, in public session Mr. Macomber did not refer to any specific material (Tr. 113).

On cross-examination, Mr. Macomber acknowledged that he had become familiar with the Vietnam study only after its publication in the New York *Times* (Tr. 114). Mr. Macomber agreed that documents involving communications between nations are in fact published at later dates (Tr. 116), although he asserted that it was State Department policy to obtain the agreement of the nation involved before any public disclosure of documents. When questioned about the publishing of basic documents pertaining to American foreign policy, Mr. Macomber testified that the State Department had a regular program of reviewing such documents, but that they were presently up to documents dating only to the year 1946 (Tr. 117).

In the public testimony of the Government witnesses, there was a total absence of a single specific piece of evidence indicating that publication of the Vietnam volumes could damage the national security interests of the United States in any particular area. None of the three witnesses for the

United States referred to a single document in his open testimony, nor a single instance of prejudicing such defense interests. None, in his open testimony, suggested that the *Times* had published shipping dates, future military maneuvers, plans, weapon systems data, or the like. The most that can be said of the public testimony—and it may well be more than the testimony warrants—is that the witnesses attempted to lay a foundation for an effort in the *in camera* proceedings to show on a specific basis that there was in fact a genuine threat to national security posed by the publication of the historical documents contained in the Vietnam volumes.

EVIDENCE SUBMITTED BY THE TIMES

The *Times* submitted the affidavits of 16 persons.

Max Frankel, the Washington Bureau Chief and Washington Correspondent of the New York *Times* attested to the practice of officials in Government regarding disclosure of "secrets" to the press. Mr. Frankel's affidavit is replete with instances of Government officials, from the President and Secretary of State down to lower ranking officials "leaking" "classified" information to himself, with the knowledge that this information would be published in news stories appearing in the New York *Times*. Mr. Frankel, in his affidavit, also notes the abuse of "classification" of information in instances where the imposition of secrecy is motivated not by national security interests, but by political or bureaucratic convenience. In addition Mr. Frankel cites many instances of former high Government officials who revealed, in their memoirs matters not then officially "declassified". Mr. Frankel's belief, and the belief of other persons at the *Times* referred to in the affidavit, was that the two studies here involved constituted an historical record of

importance to the readers of the *Times* and to scholars, and it is this motivation, Mr. Frankel observes, that led to the decision to publish the articles of June 13, 14 and 15. These articles, and the articles contemplated by the *Times* have, in Mr. Frankel's view, no bearing on future military or diplomatic plans of the United States or any foreign nation.

The affidavits of Mr. Neil Sheehan, Mr. Hedrick Smith, Mr. Tad Szulc, Mr. Robert Smith, Mr. Walter Rugaber and Mr. John W. Finney (hereinafter referred to collectively as "Reporters' Affidavits") attest to the fact that each affiant is a reporter employed by the New York *Times* engaged in writing articles on military, national or international affairs and that each affiant has in the course of writing such articles used information, received from Government sources, which the Reporter knew or had reason to believe or suspect was classified. The Reporters' Affidavits also attest to the fact that it is not uncommon for Government personnel to make available to Reporters classified information. To a number of such Reporters' Affidavits are appended articles written by the affiant which incorporate information obtained from Government sources which the Reporter understood to be classified. In many instances the articles clearly indicate either expressly or implicitly that the information originated with a confidential or restricted source. Many of the Reporters' Affidavits aver that the affiant has never received any complaint from Government officials or agencies because of the use of such classified or restricted information.

The New York *Times* has also submitted affidavits from Theodore C. Sorensen, Francis T. P. Plimpton and Adrian Fisher. Each of these affiants was, for a considerable period of time, a high official within the Executive Branch of the United States Government and each has had continual exposure to classified documents. Each has

read and is familiar with the material printed in the New York *Times* on June 13, 14 and 15, 1971. These affiants attest to the fact that the material contained in these articles and the excerpts do not contain information which could result in injury to the national security of the United States. Messrs. Sorensen and Plimpton further aver that, as a result of their familiarity with the classification procedure they know that classifications "top secret" and "secret" can no longer be justifiably applied to material of the sort the *Times* has printed.

The *Times* has also submitted affidavits of James MacGregor Burns, Eric F. Goldman and Barbara W. Tuchman, each of whom is a well-known historian of great repute. Each of these affiants attested to the importance to historians of the type of material published by the New York *Times,* and to the essentially historical nature of that material. Professor Burns, in addition, from past experience in Government service (particularly in Army Intelligence and as a military historian) avers that Governments, both United States and foreign, tend to take an excessively self-protective and parochial view of the "security problem"; this results in a failure to make frank and early disclosure of historical events and thus reduces the ability of the public and governments to learn from mistakes of the past.

The *Times* has also submitted the affidavit of Arthur Ochs Sulzberger, President of the New York Times Company and publisher of The New York *Times.* Mr. Sulzberger avers that the decision to publish the material in question was made with the conviction that it was in the interest of the people of the United States that they be informed, and that it was the fundamental responsibility of the press to make such information available.

The *Times* has also submitted the affidavit of Sanford Cobb, President of the Association of American Publishers,

Inc. Mr. Cobb avers that the board of directors of the Association of American Publishers, Inc. adopted unanimously a resolution commending The New York *Times* for publishing the documents concerning the history of the United States involvement in Vietnam. The resolutions of the Board of Directors of the Association of American Publishers, Inc. also asserts that "the freedom to publish without prior restraint is of vital importance."

Finally, the *Times* has submitted the affidavit of Colbert Augustus McKnight, President of the American Society of Newspaper Editors ("ASNE"), with a membership of more than 700 directing editors of leading American daily newspapers. Mr. McKnight avers, on behalf of the Board of Directors of ASNE, that any order imposing a prior restraint upon publication "destroys a basic constitutional right of the people under a democratic government."

The Decision of the District Court

After reviewing all the testimony presented in the Court, both in public session and in the over four-hour long *in camera* session proposed by the Government, Judge Gurfein rejected each of the critical allegations of the Government addressed in the motion for a temporary injunction. The United States, the Court held, had failed to present enough evidence even to pose a "sharp clash" between supposed needs of security and the First Amendment. "[N]o cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned could vitally affect the security of the Nation."

The Court, as a finding of fact, held that the 47 volume history of Vietnam policy prepared in 1968 and the 1965 document relating to the Tonkin Gulf incident were prepared as historical documents by a group of historians.

The Court, in construing 18 U. S. C. § 793(e), upon which the United States then relied in seeking injunctive relief, closely examined the legislative history and setting of that section within the statutory scheme of the "Espionage and Censorship" Chapter 37 of Title 18 U. S. C. Judge Gurfein analyzed 18 U. S. C. §§ 792-799 as covering both "simple espionage" and publication of information. The Court concluded that 18 U. S. C. § 793(e) does not use the term "publishes", whereas other sections of Chapter 37 of Title 18 do employ that word. After a careful analysis of 18 U. S. C. §§ 792-799, Judge Gurfein concluded that § 793(e) "is truly an espionage section", and did not prohibit publication. Sections of the Chapter which do cover publication are plainly inapplicable on their face. Further, the Court held that the *Times* published its articles "in good faith", and with no intention to cause "injury to the United States or the advantage of any foreign nation." As a matter of law the Court concluded that 18 U. S. C. § 793(e) could not apply to the *Times* in this case.

After a thorough analysis of the legislative history of the Espionage Act of 1917 (uncontradicted by any contrary submission to the Court on behalf of the United States), the Court determined that Congress deliberately refused to include any form of precensorship in the Espionage Act.

As a finding of fact, the Court after the *in camera* proceedings*, held that the United States had not persuaded it that the publication "of these historical documents" could seriously compromise national security. Judge Gurfein noted that "no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned would vitally affect the security of the Nation".

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*Which were held, as Judge Gurfein noted, to provide the United States an opportunity to present its case forcefully and without restraint and to allow the United States to pinpoint specific breaches of national security.

The Court then concluded that even if § 793 could be applied to the *Times* in these circumstances, there was "no reasonable likelihood" of success by the Government because there was no basis for concluding that the *Times* willfully believed the material published "could be used to the injury of the United States or to the advantage of any foreign nation."

As for the Government's contention that the executive could invoke its inherent power to protect national security, the Court relied on its factual determination that the "historical documents" could not seriously breach national security.

> "[U]pon the facts adduced in this case there is no sharp clash such as might have appeared between the vital security interest of the Nation and the compelling Constitutional doctrine against prior restraint. If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach, we must learn to live with it. The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the Government at political suppression. There has been no attempt to stifle criticism. Yet the last analysis, it is not merely the opinion of the editorial writer, or of the columnist which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions." (Opinion, p. 15)

The Decision of the Court of Appeals

The Court of Appeals, by a 5-3 vote, remanded the case to Judge Gurfein for further *in camera* proceedings to determine on or before July 3, 1971, whether disclosure of items specified in the Special Appendix or "any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined . . ."*. Judge Kaufman, Feinberg and Oakes dissented and would have affirmed the decision below.

SUMMARY OF ARGUMENT

As of the date of argument of this appeal, the New York *Times* has been restrained by the United States for a total of 11 days from publishing articles in a series relating to the history of the Vietnam War. The order of the Court of Appeals for the Second Circuit from which this appeal is taken effectively bars further publication of such articles by the *Times* until July 3, 1971 and, with appeals in the offing, probably far beyond that date. Against the background of a First Amendment which, in the words of this Court, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the

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*The formulation by the Court of Appeals is, at one and the same time, circular and vague. It is difficult to divine under what circumstances Judge Gurfein is being told he may enjoin the *Times* when the test he is told to apply is whether the itemized list of the Government "poses such grave and immediate danger to the security of the United States *as to warrant their publication being enjoined.*" (Emphasis added.) As a statute, such a formulation would plainly be unconstitutional for vagueness as well as for its First Amendment connotations. We submit it is no less so because it is a judicial decree.

public, [and] that a free press is a condition of a free society", *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945) this appeal is taken.

Prior restraints on publication are peculiarly disfavored by the First Amendment. Whatever difficult conceptual issues may yet be presented with respect to the First Amendment, the bar on prior restraints is at the core of the theory of the Amendment. As such, the Government bears an extremely heavy burden to demonstrate that the prior restraint sought in this case could possibly be justified.

In *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931) this Court, in *dictum,* left open the possibility that the prohibition against prior restraints against publications might not be absolute. To the extent it is not absolute, the prohibition must at least presumptively be imposed pursuant to a legislative mandate. In this action, no legislation can be pointed to by the Government permitting the restriction sought to be perpetuated on the *Times.*

Nor, in this case, is there any inherent executive authority pursuant to which the restraint on the *Times* could be justified. Whatever the circumstances, if any, in which said authority could be found present, it would arise only when publication could be held to lead directly and almost unavoidably to a disasterous event for the country. The probabilities must be very high, near certainty, and the chain of causation between publication and the feared event must be direct. In this case, it is inconceivable the Government could meet such a test.

The process of this litigation itself has become a form of censorship. From the granting of an original temporary restraining order based on a conclusionary affidavit of an individual without personal knowledge of the facts, through a series of stays granted so as not to "moot" the issue, the *Times* has been barred from printing its stories for almost

two weeks. The procedure followed—including *in camera* hearings—has inevitably led to a deprivation of both First and Fifth Amendments rights.

ARGUMENT

I.

ANY ATTEMPT TO IMPOSE A PRIOR RESTRAINT ON PUBLICATION PLACES ON THE GOVERNMENT THE HEAVY BURDEN OF REBUTTING THE PRESUMPTION AGAINST PRIOR RESTRAINTS, WHICH IS SO WELL ESTABLISHED AS THE LAW OF THE FIRST AMENDMENT AS TO HAVE BEEN RARELY CHALLENGED IN THE HISTORY OF THE NATION.

This case lies, as is obvious, at the core of First Amendment concern, namely, the interest in "uninhibited, robust and wide-open" debate with respect to public affairs. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). This Court said just the other day, in *Rosenbloom* v. *Metromedia, Inc.,* 91 S. Ct. 1811 (1971), quoting from *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 39 U. S. L. W. at 4698.

This is as good a statement as any of the public interest the New York *Times* seeks to vindicate in this case.

The United States attempts, moreover, to impose on a newspaper the kind of prior restraint which holds an especially disfavored position under the First Amendment. It need not be contended, and we do not contend, that the

First Amendment always carries all before it, regardless of countervailing considerations. But "[a]ny claim which seeks prior restraint on publication bears a heavy burden." *Liberty Lobby, Inc.* v. *Pearson,* 390 F. 2d 489, 490 (D. C. Cir. 1968) (Burger, J.)* See also *Organization For a Better Austin* v. *Keefe,* 91 S. Ct. 1575 (1971). "[F]reedom of expression [is] the rule." *Burstyn* v. *Wilson,* 343 U. S. 495, 503 (1952). And this Court observed in *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175 (1968):

> "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement." 393 U. S. at 180-81.

In *Near* v. *Minnesota,* 283 U. S. 697, 713-14 (1931), the Court noted that Blackstone's radical aversion to prior restraints, and the repression in Stuart England and under George I, constitute the immediate formative background of the First Amendment. The Amendment does forbid more than simply the imposition of prior restraints. In short, wrote the late Professor Chaffee, "the framers of the

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*In *Liberty Lobby,* plaintiffs sought a preliminary injunction against two syndicated newspaper columnists to prohibit "dissemination or publication" of letters and documents copied and removed from plaintiff's files. The District Court dismissed, and the Court of Appeals affirmed, per Judge (now Chief Justice) Burger, who also remarked that "a free, open society elects to take calculated risks to keep expression uninhibited." 390 F. 2d at 491.

First Amendment sought to preserve the fruits of the old victory abolishing the censorship, and to achieve a new victory abolishing seditious prosecutions."* A certain primacy has nonetheless continued to attach to the prohibition against prior restraints in the First Amendment scheme of values.

Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted, they cause irremediable loss, a loss in the immediacy, the impact of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt. The violater of a statute punishing speech criminally knows that he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint therefore stops more speech, more effectively. A criminal statute chills. The prior restraint freezes.

It is for reasons such as these, as Mr. Justice Harlan observed in *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 149 (1967), that this Court has "rejected all manner of prior restraints on publication [citing *Near* v. *Minnesota*], despite strong arguments that if the material was unprotected the time of suppression was immaterial." See also *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963).

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*CHAFEE, FREE SPEECH IN THE UNITED STATES 22 (5th Printing 1954).

II.

SUCH NARROW EXCEPTIONS TO THE RULE AGAINST PRIOR RESTRAINTS, IF ANY, AS MAY BE ADMITTED TO EXIST ARISE, FOR THE MOST PART, IN CONNECTION WITH THE REDRESS OF INDIVIDUAL OR PRIVATE WRONGS. IF THERE IS AN EXCEPTION PERMITTING IMPOSITION OF PRIOR RESTRAINTS BY GOVERNMENT ON POLITICAL SPEECH, IT IS SUBJECT TO THE FURTHER PRESUMPTION THAT IT MUST BE IMPOSED PURSUANT TO A CLEAR LEGISLATIVE MANDATE, NOT AT THE BEHEST OF THE EXECUTIVE EXERCISING SUPPOSED INHERENT POWERS.

A passage in Chief Justice Hughes' opinion in *Near* v. *Minnesota, supra,* 283 U. S. at 716 concedes that the prohibition against prior restraints need not be viewed as altogether absolute, and goes on to say that Government "might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Without entering a discussion of the hypothetical concerning obstruction of the recruiting service, which may well be considered problematic in light of later decisions*, it would seem evident that if there is any exception to the prohibition against prior restraints outside the area of private rights, its definition must run along the strict and narrowly drawn lines of Chief Justice Hughes' military hypotheticals.

The area of private rights is different, and no analogies can properly be drawn from it to a case such as the present one. No such analogies were drawn in *Near* v. *Minnesota.* The statute before him, said Chief Justice Hughes, "is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected." (283

*See *e.g., Brandenburg* v. *Ohio,* 395 U. S. 444 (1969).

U. S. at 709) Remedies for libel have, of course, not remained "unaffected" to this day, see *e.g., Rosenbloom* v. *Metromedia, Inc., supra,* but the point of the remark is that no conclusions are to be drawn for a case such as the present one, any more than they were drawn for purposes of *Near* v. *Minnesota* itself, from the possibility that one or another form of injunctive relief might be available in a suit between private parties concerning, let us say, literary property.

There can be no copyright in any publication of the United States Government or of any reprint of it, 17 U. S. C. § 8*, and it seems clear that there is no common law copyright in Government publications either. See *Banks* v. *Manchester,* 128 U. S. 244, 252 (1888); Studies on Copyright, No. 33, p. 169 (I. A. Fisher Mem. Ed. 1963). Individual claims to literary property and to privacy do not in any event themselves easily prevail or commonly achieve protection by injunction. See *e.g., Estate of Hemingway* v. *Random House, Inc.,* 23 N. Y. 2d 341, 296 N. Y. S. 2d 771 (1968); for decision denying preliminary injunction see 49 Misc. 2d 726, 268 N. Y. S. 2d 531 (Sup. Ct. N. Y. Co.), *aff'd,* 25 App. Div. 2d 719, 269 N. Y. S. 2d 366 (1st Dep't 1966). Such claims prevail all the less in the area of the public interest in discussion of political affairs. See *Liberty Lobby, Inc.* v. *Pearson, supra; Cf. Pearson* v. *Dodd,* 410 F. 2d 701 (D. C. Cir.), *cert. denied,* 395 U. S. 947 (1969).

Putting the area of private rights aside as irrelevant even for purposes of the drawing of distant analogics, we return to the narrow exception admitted by Chief Justice Hughes in *Near* v. *Minnesota.* If a prior restraint is to be

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*"No copyright shall subsist in the original text of any work which is in the public domain . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof [except in publications authorizd by Title 39 U. S. C. § 405—referring to postage stamp printings]."

imposed within that exception, we contend, it must at least presumptively be imposed pursuant to a legislative mandate. In substantiating this contention, it is important first to make clear what is not involved in this case, and what our contention is not intended to cover. Thus the question does not arise in this case, and we do not contend, that the President, as Chief Executive and Commander-in-Chief, lacks inherent authority to establish security classifications for Government documents and to set forth procedures binding on all officers and employees of the Executive Branch, and on the military services, for the handling, dissemination and disposition of classified documents. Nor is the President without means of enforcing, within the Executive Branch and in the armed services, the procedures he has laid down. He can discipline, he can discharge, and he can repossess Government property.* These enforcement powers may not be unlimited, but we may safely assume they are ample. Yet neither the power to establish security classifications, nor the power to enforce procedures relating to them within the Executive Branch and the armed services, nor again the power to repossess Government property—none of these is in question in this case.

Again, it may well be that in other circumstances, and even as it arises under Section 3 of the Administrative Procedure Act, 5 U. S. C. § 552, the question of the validity of a classification affixed to a document under Executive Order 10501, 3 C. F. R. 280 (1970) is reviewable only to the extent necessary to determine whether the classification is "clearly arbitrary and unsupportable." *Epstein* v. *Resor,* 296 F. Supp. 214, 217 (N. D. Cal. 1969), *aff'd,* 421 F. 2d 930 (9th Cir.), *cert. denied,* 398 U. S. 965 (1970). Yet in justifying this minimal measure of judicial review

*See, *e.g., Dubin* v. *United States,* 289 F. 2d 651 (Ct. Cl. 1961). Nothing that the New York *Times* holds is alleged to be Government property.

Pages 30 and 31 temporarily unavailable

to say the source of the authority to act, is not a statute, it must be the inherent power of the President under Article II of the Constitution.

The Government maintains that it has standing to come into its own courts to protect its functional interests under *In Re Debs,* 158 U. S. 564 (1895), and cases following it on this point. The Government does indeed have standing to come into a Federal Court to protect its functional interest in the integrity of an established rule of law, whether it is established by statute or by the Constitution. The theory of *In Re Debs, supra,* was that the conduct the Court enjoined was unlawful under the Commerce Clause of the Constitution, and perhaps under the Sherman Act. In more recent years also the Government has entered its own courts to vindicate established constitutional* and statutory** rights.

But the Government's standing to come into court to vindicate existing statutory rights is a wholly separate matter from the issue of inherent executive authority, without the aid of legislation, to formulate and establish substantive rules of law, and obtain the process of a court in order to enforce them against private individuals. This is the basic distinction between standing and justiciability taken in *Baker* v. *Carr,* 369 U. S. 186 (1962). The cases supporting the proposition that the Government can sue do not establish the proposition that the executive has inherent power to make the substantive law under which he proposes to win his suit, or that the courts do. Here we encounter a fundamental principle of the separation of

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**United States* v. *Brand Jewelers, Inc.,* 318 F. Supp. 1293 (S. D. N. Y. 1970); *United States* v. *Brittain,* 319 F. Supp. 1058 (N. D. Ala. 1970); *United States* v. *City of Jackson,* 318 F. 2d 1 (5th Cir. 1963).

***United States* v. *Republic Steel Corp.,* 362 U. S. 482 (1960); *United States* v. *Jalas,* 409 F. 2d 358 (7th Cir. 1969); *United States* v. *Arlington County,* 326 F. 2d 929 (4th Cir. 1964).

powers, which teaches that there is no such inherent executive authority. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952); *Kent* v. *Dulles,* 357 U. S. 116 (1958); *United States* v. *United States District Court,* 39 U.S.L.W. 2574 (6th Cir. April 8, 1971), *cert. granted,* 39 U.S.L.W. 3556 (June 11, 1971) (No. 1687); *United States* v. *Hilliard,* 39 U.S.L.W. 2679 (C. D. Cal. May 4, 1971). *Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* the great steel seizure case of 1952, surely came up under circumstances of a very substantially grave emergency, and *Kent* v. *Dulles, supra,* dealt with a subject matter rather near to ours, namely foreign affairs.

III.

ON THE FACTS OF THIS CASE, THE GOVERNMENT CANNOT PREVAIL WITHOUT A STATUTORY BASIS. NONE EXISTS.

Since we have concluded that the Government's generalized claim to inherent Presidential authority as the source of an injunction in this case cannot stand, we maintain that on the facts, as found by Judge Gurfein in the District Court in our case, and on a fuller record by two courts in the Washington *Post* case, the Government's complaint must be dismissed without further inquiry, unless some statutory basis can be found for it. Our contention would be that no statute could constitutionally result in the issuance of an injunction in this case, but without conceding that point, the argument in this section is that no statutory basis for the action exists.

We have surveyed all statutory provisions which might, by their terms, prohibit the dissemination (to use the broadest term) of sensitive government information. The

only statutory provision which is not, on its face, conclusively inapplicable in this case is 18 U. S. C. § 793(e).*

Although it briefly attempted to rest on 18 U. S. C. § 793(d), the Government, having abandoned that false reliance, has cited us to no statute other than 18 U. S. C. § 793(e). There is a faint contention that the Freedom of Information Act, 5 U. S. C. § 552, has some relevance to

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*Congress has enacted other statutory provisions to prohibit and punish the dissemination of information, the disclosure of which it thought sufficiently imperilled national security to warrant that result. These include 42 U. S. C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U. S. C. § 2162 authorizes the Atomic Energy Commission to classify certain information. 42 U. S. C. § 2274, subsection (a) provides penalties for a person who "communicates, transmits, or discloses . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation." Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation. . . ." Other sections of Title 42 of the U. S. C. dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. 42 U. S. C. §§ 2276, 2277. Title 50 U. S. C. Appendix § 781 (part of the National Defense Act of 1941, as amended, 55 Stat. 236) prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and indeed Congress in the National Defense Act conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U. S. C. App. § 1152. 50 U. S. C. § 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person whom that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any communist organization.

the case in that it offered a way to the New York *Times* to seek the declassification of the documents in question in this case, and then to acquire access to them. This contention must rest on the theory that the Freedom of Information Act was intended to provide—for the press as well as for private individuals—an exclusive avenue toward obtaining government information. Such a theory is palpably erroneous. Nothing is clearer about the Freedom of Information Act than that it was meant to open further avenues to obtaining information from the government, not to foreclose any existing ones. If, therefore, the New York *Times* was entitled under the Constitution and laws to publish the documents published in this case, obtained as they were, then the other, slower and more laborious route perhaps opened up by the Freedom of Information Act is irrelevant. If, on the other hand, consistently with the Constitution of the United States, it was unlawful for the New York *Times* to obtain and publish the documents in question in this case, then the Freedom of Information Act is equally irrelevant; it could not have helped.

18 U. S. C. § 793(e), the only statute whose possible application in this case so much as needs to be discussed, must be approached, of course, in light of the special requirements of clarity and precision which obtain when First Amendment rights are in play. *United States* v. *Rumely,* 345 U. S. 41 (1953); *Watkins* v. *United States,* 354 U. S. 178 (1957); *Kent* v. *Dulles,* 357 U. S. 116 (1958); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Gojack* v. *United States,* 384 U. S. 702 (1966). "The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law." *Masses Publishing Co.* v. *Patten,*

244 Fed. 535, 543 (S. D. N. Y.) (L. Hand, J.), *rev'd on other grounds,* 246 Fed. 24 (2d Cir. 1917).*

18 U. S. C. § 793(e) reads as follows:

> "(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

Judge Gurfein in dismissing the Government's prayer in the District Court in this case, held 18 U. S. C. § 793(e) inapplicable. He relied, in part, on the notable absence of the word "publish." "A careful reading of the section," wrote Judge Gurfein, "would indicate that this is truly an espionage section where what is prohibited is the secret or

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*18 U. S. C. § 793(e), moreover, is a criminal statute. Its construction in this extraordinary civil action can hardly be different from the construction which would be given it if it were used to achieve its prime end, namely, imposition of the criminal sanction. Criminal statutes also receive close and narrow readings. *United States* v. *Sullivan,* 332 U. S. 689 (1948); *Winters* v. *New York,* 333 U. S. 507 (1948); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Connally* v. *General Construction Co.,* 269 U. S. 385 (1926).

clandestine communication to a person not entitled to receive it. . . ."

Naturally enough, we have not found, and the Government has not cited, any case beyond a single civil action* —not a prosecution or in any way an action initiated by the Government—in which § 793 or its companion sections of the Espionage Act have been applied to anything but an ordinary espionage situation.**

The scheme of the Espionage Act as a whole and its legislative history both confirm Judge Gurfein's determination that publishing was not meant to be covered by Section 793(e).*** The striking fact is, as Judge Gurfein pointed

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**Dubin* v. *United States,* 289 F. 2d 651 (Ct. Cl. 1961) (a civil action brought by a private citizen to recover the fair market value of radar equipment purchased as "surplus" which the Government reclaimed under an assertion that said devices were "classified" and mistakenly sold for surplus).

**See *Gorin* v. *United States,* 312 U. S. 19 (1941); *Boeckenhaupt* v. *U. S.,* 392 F. 2d 24 (4th Cir. 1967), *cert. denied,* 393 U. S. 896 (1968); *U. S.* v. *Rosenberg,* 195 F. 2d 583 (2d Cir.), *cert. denied,* 344 U. S. 838 (1952) (Stay by Douglas, J. vacated, 346 U. S. 273 (1953)); *U. S.* v. *Drummond, supra,* and *U. S.* v. *Butenko,* 384 F. 2d 554 (3d Cir. 1967), vacated *sub. nom. Alderman* v. *U. S.,* 394 U. S. 165 (1969).

***This is not to say that, as 18 U. S. C. § 1717 assumes, it is not possible for a newspaper to violate other subsections of Section 793 in the same fashion as an individual or an entity of any sort is capable of violating Section 793. Thus presumably if a newspaper violates subsection (b) of Section 793 by taking or copying a photograph or a map, or an appliance, or indeed a document connected with the national defense, for the purpose of obtaining information about it and with intent or reason to believe that the information is to be used to the injury of the United States, it can then become a publication under 18 U. S. C. § 1717 which is in violation of Section 793, and is therefore nonmailable. Or a newspaper could with similar effect violate subsection (c) of Section 793. But the consequences would only be that it becomes nonmailable. 18 U. S. C. § 1717 is drawn from Title 12 of the original Espionage Act of 1917. As we shall see, *infra,* Congress at that time explicitly rejected a proposal for censorship of newspapers on the ground that it would be unconstitutional. Congress at the time believed, however, that it could consistently with the First Amendment exclude newspapers from the mails, and that was what Congress did. Section 1717 and its legislative history further confirm the inapplicability of 18 U. S. C. § 793(e) as a source of authority to censor.

out, that when Congress wanted to proscribe the act of publishing as well as communicating, delivering or transmitting, it knew how to do so and insisted on dong it with precision. Thus, when Congress dealt in Section 794 with the highly dangerous act of revealing to the enemy, in wartime, information on troop movements and dispositions, on ships, aircraft and war materials, on operations, plans, fortifications and other [which would be construed to mean similar] information relating to public defense, Congress spoke of whoever, in time of war, "collects, records, *publishes,* or communicates." (Italics supplied) Again, when in Section 797 Congress dealt with special military and naval installations so dominated by the President, Congress spoke of "whoever reproduces, *publishes,* sells, or gives away any photograph, sketch, picture," etc. (Italics supplied) Finally, when in Section 798 Congress defined and listed, and then punished the disclosure of, four categories of classified information, having to do with codes and cryptography, it spoke of whoever "knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or *publishes* . . . ." (Italics supplied)*

In the scheme of the Espionage Act, the terms communicating, furnishing, making available, transmitting and, on the rare occasions when it appears, publishng, are used with care. When Congress wished to cover the latter, it named it. And under a Constitution that includes a First Amendment, which in turn places the act of publishing to the people in a specially protected category, it is natural for a legislative body to make nice distinctions between words

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*As Judge Gurfein stated:

"The government does not contend, nor do the facts indicate, that the publication of the documents in question would disclose the type of classified information specifically prohibited by the Congress [in 18 U. S. C. § 798]."

(*e.g.* communicate, transmit) aptly characterizing the ordinary espionage transaction, and the term which describes the activities of those who issue to the public its daily newspapers, its books, and, by extension, its radio and TV broadcasts. And it is doubly natural, given the First Amendment, for Congress to have used the word "publish" sparingly, and only when it thought it crucial. All this the legislative history noted by Judge Gurfein amply demonstrates.

In the extended debates in the first session of the 65th Congress in 1917 on the predecessor espionage act to present Sections 793 and 794 of Title 18 U. S. C., both the House Bill (H. R. 291), which ultimately was enacted as Sections 31, 32, 34 and 36 of Title 50 U. S. C.,* and the parallel (but more broadly drawn) Senate Bill (S. 2), contained provisions empowering the President in time of war or threat of war to directly prohibit by proclamation the publication of information relating to national defense which might be useful to the enemy. The provision in H. R. 291 was as follows:

> "SEC. 4. During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: *Provided,* That nothing in this section shall be construed to limit or restrict any discussion, comment,

*Act of June 15, 1917, ch. 30, Title I §§ 1, 2, 4, 6, 40 Stat. 217, 218, 219.

> or criticism of the acts or policies of the Government or its representatives or the publication of the same." 55 Cong. Rec. 1763 (1917).

Since war had already been declared on Germany, Congress was under great pressure to grant whatever emergency powers the executive requested. Yet Congress resisted the censorship proposal. Senator Ashurst of Arizona, among others, spoke at length, and with present relevance, on the question of censorship, even if his more general First Amendment views have a somewhat quaint sound to our ears:

> "Mr. ASHURST. Mr. President, I have submitted an amendment to Chapter II of the pending bill because I am unable to support that chapter in its present form. I am opposed to a censorship of the press as we have come to know that expression, and I oppose it on two grounds—upon the ground of public policy and upon the ground of constitutionality. I shall discuss the present chapter, reviewing both aspects of the same as they present themselves to me; that is, from the standpoint of public policy and from the standpoint of its constitutionality . . . .
>
> "What does 'freedom of the press' mean? It is amazing to note the amount of loose talk—not in the Senate, but throughout the country and in the newspapers themselves—as to what is 'freedom of the press' as used in the Constitution of the United States. The average citizen of this Republic, the ordinary publisher in our country who is not a lawyer, thinks that 'freedom of the press' means the right to publish his sentiments just as he pleases. In a large sense, that may be true; but in a legalistic

> sense, and from a constitutional standpoint, that is not entirely accurate. 'Freedom of the press' means simply, solely, and only the right to be free from a precensorship, the right to be free from the restraints of a censor. In other words, under the Constitution as amended by amendment No. 1, 'freedom of the press' means nothing except that the citizen is guaranteed that he may publish whatever he sees fit and not be subjected to pains and penalties because he did not consult the censor before doing so. The citizen is left to publish just what he pleases, and must take his chances before a court of his country as to whether or not he has published anything libelous or anything that may bring any human being to disrepute or ridicule, or whether he has published anything of a treasonable or obscene nature. I undertake to say upon the floor of the Senate that any sort of censorship which even the necessities of war may apparently cast upon us would not be in keeping with the Constitution of the United States." 55 Cong. Rec. 2004 (1917).

On May 4, 1917, Section 4 of Title I of H. R. 291, quoted above, was stricken in the House. *Id.* at 1808. The bill passed without it.

By the Act of May 16, 1918, Congress amended the Espionage Act of 1917 so as to punish (but not restrain) seditious speech. This was the amendment under which *Abrams* v. *United States,* 250 U. S. 616 (1919), of unhappy memory, was in part decided. See also *Pierce* v. *United States,* 252 U. S. 239 (1920); *Schaefer* v. *United States,* 251 U. S. 466 (1920). In 1921, the 1918 amendment was rather resoundingly repealed. 41 Stat. 1359 (1921).

When, in 1953, it enacted the second of the two sections numbered 798 in Title 18, continuing in effect the wartime penalties of Section 794, Congress had before it a report from a Senate committee which analyzed some of the sections we are concerned with. The committee pointed out that the prohibition of Section 794 on gathering or publishing certain information with intent to communicate it to the enemy could be invoked only in time of war. However, the committee pointed out that Section 793 of Title 18 prohibits "*similar acts of gathering or communicating* defense information at any time (in wartime or peacetime), under penalty of a fine . . . or imprisonment . . . or both." S. Rep. No. 409, 83d Cong., 1st Sess. 2-3 (1953). (Italics supplied) The committee thus carefully noted and brought to the attention of Congress the differences between the two sections, and the omission in Section 793 of the act of publishing, although "similar acts of gathering or communicating" were covered. The committee did not suggest that Congress supply this omission, and Congress did not. But nothing could be clearer than that Congress was aware of it, and of its significance. What the committee did suggest, and what Congress did do, was to continue in effect the wartime penalties of Section 794—which does punish publishing.

The omission of the word "publish" in Section 793, and the fact, therefore, that newspapers were not covered by it, continued to be noticed in Congress. In 1957, the Senate had before it S. 2417, introduced on June 27, 1957, by Senator Cotton (for himself and Senator Stennis), expressly to implement certain of the recommendations of the Commission on Government Security for revision, *inter alia,* of the espionage laws. (85th Cong., 1st Sess., 103 Cong. Rec. 10447) The Commission specifically focused on the problem of unauthorized publication of classified information as being not covered by the Espionage Act:

"The Commission found to its dismay that one frustrating aspect of this overall security problem is the frequent unauthorized disclosure without subversive intent of classified information affecting national security. Several instances were noted where information emanating from the Department of Defense, and subsequently determined to have been classified, has found its way through various media into the public domain, when in deference to the interests of national security more restraint should have been exercised before dissemination. Airplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons.

"In many instances the chief culprits responsible for any unauthorized publication of classified material are persons quite removed from Government service and therefore not amenable to applicable criminal statutes or other civil penalties. Congressional inaction in this particualr area can be traced to the genuine fear of imposing undue censorship upon the bulk of information flowing from the various governmental agencies, and which the American people, for the most part, have the right to know. Any statute designed to correct this difficulty must necessarily minimize constitutional objections by maintaining the proper balance between the guarantee of the first amendment, on one hand, and required measures to establish a needed safeguard against any real danger to our national security." (Report of the United States Commission on Government Security 619-20 (1957))

That the Commission's Bill, S. 2418, was intended to extend the applicability of Section 793 to newsmen among others was well-understood. (See 103 Cong. Rec. 10449 (1957).) The bill was, of course, not acted upon, but it demonstrates yet again that until the present action against The New York Times, no one supposed that Congress, despite the First Amendment, and in the teeth of common English usage, had meant to cover the act of publishing by using such words as "communicate, deliver or transmit." The omission of the word "publish" in § 793 was noted.

Judge Gurfein also held that under *Gorin* v. *United States,* 312 U. S. 19 (1941), § 793(e) could be constitutionally applied, if at all, only upon a finding that a violation of it, in addition to being willful, was committed with knowledge that the information involved "could be used to the injury of the United States or to the advantage of any foreign nation."* Otherwise, the operative phrase of the statute "relating to the national defense," would be unconstitutionally vague. It may be that in the present § 793(e), as compared to the slightly different predecessor section involved in *Gorin, supra,* the clause "reason to believe [that it] could be used etc. . ." modifies only the word "information," not the words "any document, writing, code book . . ." *Scienter* could not then be imputed as an element in the phrase "relating to the national defense" so far as it relates to documents and writings which under the Govenment's allegations are in issue in this case. Under either construction, the statute is inapplicable. Without *scienter, Gorin* v. *United States* indicates that it is too vague to be applied.

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*The United States Attorney observed that it was the Government's "assumption that the *Times* acted in complete good faith. . . ." (Tr. 36) That being so, there could be no violation of 18 U. S. C. § 793(e).

If, on the other hand, *scienter* is held to be required, then, as Judge Gurfein held, the Government must fail because it is impossible to find on this record that the New York *Times* had "reason to believe" that the documents "could be used to the injury of the United States or to the advantage of any foreign nation." As our uncontroverted affidavits show, the New York *Times* believed—as Judge Gurfein was later to hold—that it was dealing with historical materials running back several years, all at least three, and some many decades. A reason to surmise injury to the United States or advantage to a foreign nation could be imputed to the New York *Times* on the facts of this record only by accepting the preposterous and plainly unconstitutional construction that any discomfiture caused the Government of the United States by political opposition at home qualifies as an injury to the United States and an advantage to a foreign nation within the meaning of § 793(e).

Quite aside from any requirement of *scienter,* and all the more so if such a requirement is applicable, the concept of documents or information "relating to the national defense" must be restricted to a meaning that can fairly be expected to have been in the minds of, or at least accessible to, persons situated as was the New York *Times* in this case. We believe the concept is unconstitutionally vague if it is read to go beyond both decided cases that have construed it in the past, and the common understanding exhibited in the practices of newspapers and publishers of other materials.

At no time until the Government's motion was filed in the District Court on June 15 has the Government used this section to move criminally or civilly against the publication—not communication or transmittal or delivery, but *publication*—of any materials or information in a newspaper or magazine or book or any other medium addressed

internally within the United States to the American public. This has been the unbroken administrative practice, which we submit is conclusive against the attempted application of Section 793 in this case. *Cf., Poe* v. *Ullman,* 367 U. S. 497 (1961)

There might be some question about the significance of the previously unbroken administrative practice if it were true that no or few recent occasions had arisen, or come to the Government's attention, which presented the need for an application of the statute (if such an application were thought possible), beyond the ordinary espionage situation. But the overwhelming fact, demonstrated by our uncontradicted affidavits (*e.g.,* Frankel affidavit ¶¶ 15, 16, 20)* is that numerous publications similar and even precisely equivalent to the publications made and still contemplated by The New York *Times* have been common in newspapers, magazines and books in the United States for many years.

The unbroken practice on the part of the Government of moving only against what may properly be defined as espionage has prevailed, then, in a context of public discourse in which the supposed offense now charged to the New York *Times* under Section 793(e) was common occurrence in newspapers, magazines and books published to the American people.** This is the context of public discourse in which memoirists who formerly held high government office

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* See also affidavit of Walter Rugaber, ¶ 2 and annexed exhibits; affidavit of Hedrick Smith, ¶ 2 and annexed exhibits; affidavit of John W. Finney, ¶ 2 and annexed exhibits; affidavit of Tad Szulc, ¶ 2 and annexed exhibits; and affidavit of William Beecher, ¶ 2 and annexed exhibits.

** One-time newspaper (but not book) publications are difficult to move against by seeking an injunction. But ours is not the first relevant serial publication. See, for example, the series by David Kraslow and Stuart Loory of the Los Angeles *Times* entitled "The Secret Search For Peace in Vietnam," to this day the most extensive newspaper (and book) account of the diplomacy surrounding the War.

and various journalists and others have published books going over the same ground as the publications of the New York *Times,* and using in part materials included in the documents now in the possesssion of the New York *Times.**

It may be contended that Attorney General Mitchell's telegram to the New York *Times* of June 14th authoritatively defines the phrase "relating to the national defense" for purposes of this case, and cures its vagueness. Among other difficulties with this contention, the decisive one is that it would repose untrammeled discretion in the Attorney General or in the Secretary of Defense or in some other officers of the Government to define the terms of a statute which imposes criminal penalties, and which in this unprecedented instance is being used to impose a prior restraint upon a newspaper. Such a delegation would without doubt be unconstitutional under *Kent* v. *Dulles, supra; United States* v. *Rumely, supra; Watkins* v. *United States,* 354 U. S. 178 (1957); *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957). See also *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935).

There is no warrant for defining the concept, "relating to the national defense," as coterminous with the concept of classified information. Nor would it be possible in this fashion to cure the vagueness of the phrase as applied in this case, since no expectation can be imputed to the defendant that any classified material, no matter what its

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*See Frankel affidavit ¶¶ 27, 28; see, also MATTHEW B. RIDGEWAY, THE KOREAN WAR, pp. 267, 268 (containing texts of letter of instruction to air and naval forces of the United States; THEODORE C. SORENSON, KENNEDY, p. 612 (relating to the "missile gap"), p. 642 (relating to U. S. intervention in Laos), p. 659 (paraphrasing cable relating to overthrow of Diem), p. 712 (relating to Cuban missile crisis); JOHN BARTLOW MARTIN, OVERTAKEN BY EVENTS, p. 757 (revealing the author's sources of information to be private notes and files accumulated while in government service), p. 235 (paraphrasing a "top priority—top secret" cable on communist involvement in Dominican Republic in 1965).

nature, would be considered to relate to the national defense within the meaning of this statute. It is notorious that numerous papers having no proper relation to the national defense, or no longer having any, and in no sense dangerous or injurious to the national security if published, are or remain nevertheless classified, despite the perhaps more restrictive criteria for classification contained in Executive Order No. 10501 3 C. F. R. 280 (1970). The late Professor Chafee wrote:

> "Of course, state secrets are nothing new. Military information was always guarded from the enemy, and bureaucrats have often invoked public safety as a protection from criticism. What is significant is the enormous recent expansion of the subjects which officials are seeking to hide from publication until they give the signal. If persuasion fails to prevent leaks, they are tempted to use threats. The result may be a hush-hush attitude, likely to extend beyond the real public need for silence. . . . A direct consequence of secrecy in the ordinary press may be great activity of the subsidiary press in disseminating the concealed material, and this is more dangerous than frank discussion in the general press. . . . Too often we get as gossip what ought to reach us as regular news." CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, 13-14 (Archon ed. 1965).

It may be true, and it does not in any event affect our position in this case, that as was held in *Epstein* v. *Resor,* 296 F. Supp. 214 (N. D. Cal.), *aff'd,* 421 F. 2d 930 (9th Cir. 1969), *cert. denied,* 398 U. S. 965 (1970), no elaborate inquiry into the justification for a classification will be undertaken by a court in response to a suit by a private individual seeking to have the Government declassify mate-

rial so that the plaintiff can obtain it under Section 3 of the Administrative Procedure Act, 5 U. S. C. § 552. That statute by its terms does not apply to materials kept secret in the interest of national defense or foreign policy. The scope of review of the *Epstein* case may, perhaps, be acceptable when the classification comes under attack in a suit by a plaintiff wanting to obtain material from the Government—that is one thing. But there is a vast difference when application to a private person of a criminal statute is attempted, or when as here the Government seeks to impose a prior restraint on publication. Under these conditions, the judicial function in passing on criteria for classification is infinitely more crucial. Yet, of course, even in the *Epstein* case, as we have noted, the Court did not accept without question and without judicial review any classification simply because it was placed on a document in the regular order by a government official. The Court undertook rather to make an independent judicial inquiry at least whether a classification is "clearly arbitrary and unsupportable."

Other cases in addition to *Epstein* conclusively refute any assertion that the question of whether a classification is valid is a political question, and that the act of classification is an exercise of executive discretion not subject to judicial review. To the contrary, as it affects private rights, the act of classifying a document, like other even more serious exercises of executive discretion relating to the internal and external security of the country, is subject to judicial review, even as the ultimate act of declaring martial law is, under our system of government, subject to judicial review.* *Sterling* v. *Constantin,* 287 U. S. 378 (1932);

*A somewhat analogous situation is the assertion by the Government of a privilege not to disclose classified information demanded by a party in a suit to which the Government is also a party. This privilege was honored in narrowly defined circumstances in *United States* v. *Reynolds,* 345 U. S. 1 (1953), partly on the ground that

Duncan v. *Kahanamoku,* 327 U. S. 304, 336, (1946), (Stone, C. J., concurring). In *United States* v. *Drummond,* 354 F. 2d 132 (2d Cir. 1965), *cert. denied,* 384 U. S. 1013 (1966), which affirmed a conviction under the Federal Espionage Act, the court held that the classification of certain documents as "Top Secret" or as "containing information affecting the national security of the United States" was not sufficient for a conviction. Rather, the Second Circuit ruled that the defendant had a "right to a jury determination on the character of the documents," pointing out that the trial court had properly charged the jury that:

> "Whether any given document relates to the national defense of the United States is a question of fact for you to decide. It is not a question of how they were marked." *Id.* at 152

The Government cannot rest, in this action, on any statutory authority.

IV.

EVEN IF AN EXCEPTION TO THE PROHIBITION AGAINST PRIOR RESTRAINTS WERE APPLIED IN THIS CASE, THE REMAND REMAINS IMPROPER BECAUSE THE NATURE OF ANY SUCH EXCEPTION IS SUCH THAT IT COULD NOT FIT THE RECORD IN THIS CASE.

The most evident characteristic of military examples ("sailing dates of transports or the number and location of troops") given by Chief Justice Hughes in *Near* v. *Min-*

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no unavoidable necessity was shown for the privileged information. But the court noted that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U. S. at 9-10. *Cf.,* Proposed Rule of Evidence for the United States Courts and Magistrates Rule 509 "Military and State Secrets," subparagraph (e) 91 S. Ct. 61-64 (April 15, 1971). The Government "informer privilege" is also carefully circumscribed. See *Roviaro* v. *United States,* 353 U. S. 53 (1957).

nesota, supra, and the plain connotations of the phrase, "grave and immediate danger to the security of the United States," used by the Court of Appeals for the Second Circuit in remanding this case to the District Court, indicate if even an exception to the prohibition against prior restraints were to be judicially established, it would arise only when publication could be held to lead directly and almost unavoidably to a disastrous event. The probabilities must be very high, near to certainty, and the chain of causation between the publication and the feared event must be direct. Anything less will risk having the exception swallow up the rule.

We would contend that the test must be more rigorous than that employed in *Dennis* v. *United States,* 341 U. S. 494 (1951)* because of the especially disfavored position of prior restraints in First Amendment doctrine as opposed to regulation by subsequent criminal sanction. Procedural safeguards, including the proof of intent in the *Dennis* case, do not apply where prior restraints are in question. But even if, purely for the sake of argument, we accepted the *Dennis* test, we would still need what is surely essential, namely a direct nexus, supplied by proof of intent or otherwise, between the publication and the feared event supposedly likely to flow from it. We will argue that in the circumstances of this case the Government has in no single instance been able to show any direct nexus, any probable and immediate chain of causation, between the many documents it wishes to suppress and supposed events that might follow upon their publication, and we think that under the *Dennis* test the Government's suit must fail. But for the reasons mentioned we do not accept the *Dennis* test in a

*"In each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." 341 U. S. at 510.

prior restraint case, and return rather to the evident intent of Chief Justice Hughes in the opinion of *Near* v. *Minnesota, supra,* and to the connotations of the Second Circuit's formulation.

The Government is not entitled by prior restraint to avert just any significant evil, discounting its probability by its gravity. Certainly it may not do so without a statutory warrant. If there is an exception to the prohibition against a prior restraint that needs no statute to invoke it, it can exist only in circumstances where a publication will directly and immediately cause, by a probability amounting to a certainty, a grave and disastrous breach in the security of the country.

If we characterize the applicable test correctly, and indeed even if something of the more attenuated test of *Dennis* is read in to modify the test we propose, the exception to the prohibition against prior restraints could not be invoked in the circumstances of this case. For one would suppose that the document or documents which might fall within this extraordinary exception would certainly have leaped to the memory or to the eye of the Government officials who for one or another purpose, and since June 13 for purposes of this case, have been reviewing the volumes of which the New York *Times,* and now also the Washington *Post* among other papers, possess copies.

Mr. Dennis James Doolin, a Deputy Assistant Secretary of Defense, had the documents in his office for approximately six months reviewing them in response to a request from Senator Fulbright for a copy (Tr. 130-31). He then reviewed them again (Tr. 124). Yet on the basis of his testimony in open court and *in camera,* District Judge Gurfein (and later Judge Gesell, before whom Mr. Doolin also testified) held that no document of a sufficiently serious nature to justify imposition of a prior restraint had been

pointed out to him, and this finding was left undisturbed by the Court of Appeals for the Second Circuit *en banc*. Nor, of course, did other Government witnesses succeed in convincing Judge Gurfein or the Court of Appeals for the Second Circuit of the danger in the publication of any given document. By the time testimony was taken before Judge Gurfein on Friday, June 18, three days had passed since the Government commenced this action, and five days since the New York *Times* began publication of the series. It seems to us conclusive against the supposition that a document to which the exception could be applicable is involved in this case, that a reference to it did not surface in Mr. Doolin's mind almost instantly, or at least in response to Judge Gurfein's repeated requests for specificity and particularity.

In the Washington *Post* case, consolidated with this one for purposes of argument, the record made by the Government was ampler. It included, in affidavit form, the very material, or at least closely similar material, to that which the Government came forward with in this case only at the time it reached the Court of Appeals, and which, over our objection, it was allowed to bring to the attention of the Court in the form of a "Special Appendix." This is the material as to which the Court of Appeals would require Judge Gurfein to hold further hearings. District Judge Gesell and the Court of Appeals for the District of Columbia in the Washington *Post* case passed on this or closely similar material. Both of these courts found nothing sufficiently dangerous to the national security to justify issuance of an injunction. Error is, of course, possible. Error may even amount to such abuse of discretion as will result in the reversal by an appellate court of the denial of a preliminary injunction. But we submit that it must be in the nature of any exception to the prohibition against prior restraints that a document to which it can be applied, a document that

can be a direct cause of a grave breach in the national security, would be recognizable almost instantly by any court which had been given the appropriate guidance by the Government. Our submission, in short, is that Judge Gurfein, on the record made before him, and the Court of Appeals for the Second Circuit on that same record, and Judge Gesell on the record made before him, and the Court of Appeals for the District of Columbia on that same record—all these judges could not have been that wrong.

It seems clear to us that the reason why the Government has been unable to convince any court of the existence in this case of a document that would fit an exception to the prohibition against prior restraints is that the formulation of such an exception that the Government has in mind differs from that indicated by the Court of Appeals of the Second Circuit, and certainly differs markedly from that indicated by Chief Justice Hughes in *Near* v. *Minnesota, supra.* The difference lies not only in the gravity of the danger that the Government believes it must show, but in the directness and immediacy of the chain of causation that is required between the publication and the feared danger. This will be made unmistakably evident by an examination of the standards of judgment voiced by Government witnesses who appeared in the hearing before Judge Gurfein. In general remarks and in pointing to the few specific examples which they cited to Judge Gurfein, these witnesses showed that their conception of the dangers justifying imposition of a prior restraint included diplomatic embarrassments, the possibility of internal political difficulties caused to friendly governments, the addition of a causative effect, however minor, to chains of events which are well launched and sufficiently caused by other facts, or the confirmation of knowledge about methods of operation which is either already in the public domain or presumed to be

otherwise available to foreign governments. What is perhaps even more important, Government witnesses in each relevant instance reasoned from publication to feared effect not directly and immediately, but along a lengthy chain of causation whose links invariably included speculation and surmise. On such data, prior restraints on the press cannot conceivably be sustained.

V.

THE DEFINITION OF ANY EXCEPTION TO THE RULE AGAINST PRIOR RESTRAINTS MUST BE SUCH AS TO ENABLE COURTS TO PERCEIVE ITS APPLICATION EXPEDITIOUSLY, ELSE THE PROCESS OF LITIGATION BECOMES A FORM OF CENSORSHIP.

The history of this case demonstrates that unless an exception, if any, to the rule against prior restraints is defined along the lines we suggested in the previous section, so that the rare occasion for applying the exception will fairly leap to the eye, a form of prior restraint is made available to the Government in the process of litigation, even though the Government may ultimately fail. This kind of prior restraint by litigation itself inflicts unacceptable injury to First Amendment rights.

The Government sought a prior restraint on June 15. Its allegations of irreparable injury to the national interest were general, conclusory, and aside from predicting "irreparable harm" silent on the question of the gravity of the harm. In resisting the request for a temporary restraining order, we were met—as also at every subsequent stage of the litigation when resisting extensions of the restraining order—with the argument that to allow us to publish would be to moot the Government's case, and to foreclose the possibility of an appellate decision that might yet find substance in it.

It will be true in every case that a failure to impose a prior restraint will moot the case of the party seeking it. And it will always be true that if the prior restraint, however temporary, were not imposed, the party seeking it would suffer irreparable injury, namely publication of what he wanted restrained. It is a kind of irreparable injury by hypothesis. It will equally always also be true that the party to be restrained suffers no irreparable injury, in the sense that he can publish or exhibit when the restraint is lifted.

The irreparable injury to the party to be restrained must also be injury by hypothesis—the hypothesis of the value of speech, the benefits gained from its immediacy and free flow, which is embodied in the First Amendment. Thus, in prescribing, in *Freedman* v. *Maryland,* 380 U. S. 51 (1965), a constitutionally acceptable procedure for restraining allegedly obscene matter, the Court said that such a procedure must "assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" restraint. (380 U. S. at 59) A model, said the Court, was to be found in the procedure upheld in *Kingsley Books Inc.* v. *Brown,* 354 U. S. 436 (1957). The New York statute approved in *Kingsley Books* requires a hearing on the issue of obscenity within one day after joinder of issue, and a judicial decision within two days after termination of the hearing. The *Times* has been under restraint for the eleventh day on the date of this expedited argument.

Under the order of the Court of Appeals for the Second Circuit, of which we are now seeking review, the *Times* would remain under restraint until July 3rd, unless the District Judge was somehow able to find his way through dozens upon dozens of items the Government has generated since the first hearing that was had before him. After July 3rd, one would suppose that further appellate procedures would follow while the restraint was continued.

No doubt, the volume of documents involved in this case is exceptional. But the expedited procedures that have brought us to this Court in ten days are also not likely to be the normal fate of every such case, particularly a case brought against a more obscure publication, commanding lesser resources. We submit that procedural delays running to many days and possibly weeks would necessarily inhere in a definition of an exception to the rule against prior restraints which was less strict than the one we have suggested, and which could have application to less than obvious cases.

We maintain that the procedure, adopted over our objection, allowing the Government to enlarge the factual record it had made before Judge Gurfein with an appendix submitted to the Court of Appeals, and to then go back on remand to the trial judge with leave to enlarge the record further—such a procedure, we submit, in itself constitutes a prior restraint in violation of the First Amendment. But we submit further that no procedure likely to consume less than several days, and often perhaps more, is foreseeable unless any exception to the rule against prior restraint is closely defined, so as to apply only to obvious cases. Absent such a strict and narrow definition, prior restraints by judicial process will be an inevitable occurrence, and will run well past the time limit laid down in *Freedman* v. *Maryland, supra.* They may be temporary restraints, as viewed in fields where immediacy is less significant than is true with the press, but it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech. Only in the most extraordinary, gravest and most obvious circumstances can we permit ourselves to do so, for the reason, among others, that only in such circumstances can we expect the restraint resulting from procedure itself to be brief.

VI.

THE COURT OF APPEALS IMPROPERLY REMANDED THE ACTION TO THE DISTRICT COURT.

We turn, in conclusion, to the standard of review which should have been applied to the proceedings before Judge Gurfein by the Court of Appeals.

The relief sought by the United States in this action is injunctive in nature. A preliminary injunction is "an extra-ordinary remedy, and will not be granted except upon a clear showing of probable success *and* possible irreparable injury." *Checker Motors Corporation* v. *Chrysler Corporation,* 405 F. 2d 319 (2d Cir.), *cert. denied,* 394 U. S. 999 (1969). Entirely apart from the overriding First Amendment issues present in the case, the United States must—if it is to be entitled to any chance of success—meet stern tests for the granting of such relief.

Since the legal tests applicable to the obtaining of a preliminary injunction are demanding ones, the courts have naturally indicated that a party appealing from the denial of preliminary injunction must meet still more demanding tests. As expressed in a great variety of cases, in order for an appellate court to reverse the denial of temporary injunctive relief "[a] clear abuse of discretion . . . must be shown. . . ." *Checker Motors Corporation, supra* at 323; *Packard Instrument Co.* v. *Ans, Inc.,* 416 F. 2d 943 (2d Cir. 1969); *Dino deLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.,* 366 F. 2d 373, 374-75 (2d Cir. 1966). The findings of a trial court with respect to a motion for a preliminary injunction may not be set aside "unless clearly erroneous." Fed. R. Civ. P., Rule 52 (a); 5 J. MOORE FED. PRACTICE ¶ 52.07 at 2732 (2d ed. 1970). See, *e.g., Unicorn Management Corp.* v. *Koppers Co.,* 366 F. 2d 199, 203 (2d Cir. 1966) ("On the basis of the findings of fact made by the district court, which we must

accept unless clearly erroneous . . . it was not an abuse of discretion to issue a preliminary injunction in this case."); *Craggett* v. *Board of Education,* 338 F. 2d 941 (6th Cir. 1964) (rule applied to findings of fact supporting denial of preliminary injunction); *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222, 229 (7th Cir. 1961) (denial of temporary injunction); *Gibson Wine Co.* v. *Snyder,* 194 F. 2d 329 (D. C. Cir. 1952).

That the United States did not demonstrate any abuse of discretion by Judge Gurfein in his determination that the United States had not demonstrated "probable success" in the action, is shown by its failure to persuade a single judge who has viewed evidence in this case that it was entitled to succeed. Judge Gurfein was not persuaded on the evidence and argument submitted to him; neither was Judge Gesell. The five judges of eight on the Court of Appeals for the Second Circuit, who voted to remand, affirmed Judge Gurfein on all that was before him; and the two judges who dissented in part in the Court of Appeals for the District of Columbia Circuit in the Washington *Post* case voted to affirm Judge Gesell on all that was before them. Having failed to persuade a single judge of the nineteen before whom this case has thus far been heard of the factual validity of the Government's position as thus far developed, the Government can hardly demonstrate that the decision of Judge Gurfein was clearly erroneous.

Moreover, even assuming the Government could prove all it claims, it can hardly show that Judge Gurfein's decision was clearly erroneous, since the possibility of irreparable injury to the Government is at this point virtually nil. There has already been what the Court of Appeals for the District of Columbia Circuit characterized in the Washington *Post* case as a "leak" of "massive character." Not only in New York and Washington, but in Boston, Chicago,

Los Angeles, St. Louis and elsewhere, lengthy portions of the Vietnam study have been published. An injunction, after all, is supposedly designed to protect the party seeking it against the consequences of certain future events. No such purpose could now be served by any further restraint upon the *Times*.

CONCLUSION

This country's experience with censorship of political speech is happily almost non-existent. Through wars and other turbulence, we have avoided it. Given the choice of risks, we have chosen to risk freedom, as the First Amendment enjoins us to do.

We have not opted for some naïve insistence that all our processes of government take place in the open, or that those charged with heavy responsibilities, executive, legislative or judicial, be denied privacy in their decisional processes. But we have preserved the values of decisional privacy without resorting to censorship. We have met the needs for privacy by safeguarding it at the source, as in the Government's internal procedures for maintaining informational security. In some limited measure, we have used the deterrent force of the criminal sanction to safeguard privacy and security. But we have not censored.

As our affidavits show, press and government have a curious, interlocking, both cooperative and adversary relationship. This has been the case more or less in this country since the extension of manhood suffrage, and the rise of an independent, rather than party-connected, or faction-connected press. It is not a tidy relationship. It is unruly, or to the extent that it operates under rules, these are unwritten and even tacit ones. Unquestionably, every so often it malfunctions from the point of view of one or the other partner to it. The greater power within it lies

with the Government. The press wields the countervailing power conferred upon it by the First Amendment. If there is something near a balance, it is an uneasy one. Any redressing of it at the expense of the press, as this case demonstrates, can come only at the cost of incursions into the First Amendment.

In effect, in this case the Court is asked, without benefit of statute, to redress the balance, to readjust the uneasy arrangement which has, after all, served us well. That which the Government seeks in this case is outside the framework of both law and history.

Except as it inferentially affirms the judgment of the District Court, the judgment of the Court of Appeals should be reversed, and the case remanded with directions to dismiss the complaint.

Respectfully submitted,

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