In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1885

UNITED STATES OF AMERICA, PETITIONER

v.

THE WASHINGTON POST COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district courts and of the court of appeals are not reported.

JURISDICTION

The judgment of the court of appeals in No. 1873 was entered on June 23, 1971, and the petition for a writ of certiorari was filed on June 24, 1971. The judgment of the court of appeals in No. 1885 was entered on June 23, 1971, that court denied the government's petition for rehearing on June 24, 1971, and the petition for a writ of certiorari was filed on the same date. Both petitions for writs of certiorari were granted on June 25, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the First Amendment bars an injunction sought by the United States to prevent a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of * * * the press * * *.

STATEMENT

These two cases grow out of two suits brought by the United States to enjoin the New York Times and the Washington Post from publishing any portion of the following documents: (1) a 47-volume study en-

titled "History of United States Decision-Making Process on Vietnam Policy", prepared in 1967-1968 at the direction of the Secretary of Defense, and (2) a single volume or document entitled "The Command and Control Study of the Tonkin Gulf Incident Done by the Defense Department's Weapons System Evaluation Group in 1965." All of this material is classified as "Top Secret-Sensitive," "Top Secret" or "Secret". As the cases come to this Court, however, the government is asking for a much narrower injunction: it now seeks to bar only the publication of a relatively small number of documents whose disclosure would pose a "grave and immediate danger to the security of the United States" (see *infra*, pp. 7-9).

1. *The New York Times case.* On June 13, 14, and 15 the Times published extensive articles dealing with the involvement of the United States in Vietnam; the articles admittedly were based upon the top secret and secret material whose further publication the United States is seeking to stop. The Times also indicated that it plans to publish further articles in the series, based upon the same sources. The Times declined a request by the Attorney General of the United States to cease further publication and to return the documents to the government. On June 15, 1971, the United States instituted the present suit seeking (1) an injunction against further dissemination or publication of the classified material and (2) an order requiring the defendants to return the material to the government. The government sought a temporary restraining order and a preliminary injunction, pending the final determination of the case.

On June 15, 1971, after a hearing, the district court (Judge Gurfein) entered a temporary restraining order, effective until 1 P.M. on June 19, 1971, or further order of the court. An extensive hearing was held on June 18, 1971, at which the court heard testimony by high-ranking government officials with respect to the injury to the national security and foreign relations of the United States that further dissemination or publication of the material would cause; some of the testimony was given *in camera*. The court also received affidavits from former government officials, publishers, lawyers, historians, and the chief of the Washington Bureau of the Times, submitted by the defendants, which contended that the material was improperly classified and concluding that its dissemination or publication would not have the adverse impact upon the national security or foreign relations that the government stated.

On June 19, 1971, the district court denied the government's request for a preliminary injunction. Later that day a judge of the court of appeals extended the temporary restraining order until noon on June 21, 1971, in order to give a panel of that court the opportunity to consider the government's application for a stay pending appeal. On June 21, 1971 the court of appeals continued the stay pending an *en banc* hearing on June 22, 1971. Following such hearing, the court entered the following order on June 23, 1971:

> Upon consideration by the court in banc, it is ordered that the case be remanded to the District Court for further *in camera* proceedings to determine, on or before July 3, 1971, whether dis-

> closure 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 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.

2. *The Washington Post case.* On June 18, 1971, the Washington Post published the first of a series of articles also dealing with United States' involvement in Vietnam. These articles similarly were based upon the Defense Department studies. At about 5:00 p.m. on that day the United States filed a similar suit against the Washington Post and certain of its officers seeking to enjoin further dissemination or publication of those studies, and a return of the documents. After hearing, the district court (Judge Gesell) denied a temporary restraining order, but early in the morning of June 19, 1971, the Court of Appeals for the District of Columbia Circuit reversed and granted a stay. Pursuant to that court's order, the district court held a hearing on the government's application for a preliminary injunction on June 21, 1971. After an extensive hearing, at which the court heard testimony *in camera* by high-ranking government officials with

respect to the injury to the national security and foreign relations of the United States that further dissemination or publication of the material would cause, the court denied a preliminary injunction.

The district court found (Transcript, p. 267) that "publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world," and that the government had "demonstrated the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted" (Transcript, p. 269). The court held (Transcript, p. 271), however, that the government had not shown "an immediate grave threat to the national security" that "would justify prior restraint on publication", a conclusion apparently based on the fact that the government had presented "no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials" (Transcript, p. 269). The court ruled (Transcript, 271) that "the First Amendment in this case prohibits a prior restraint on publication" since "there is not here a showing of an immediate grave threat to the national security which in close and narrowly-defined circumstances would justify prior restraint on pub-

lication." On June 23, 1971, the court of appeals affirmed and the following day denied the government's petition for rehearing, which requested the court to modify its order to bring it into conformity with the order of the Second Circuit in the *New York Times* case.[1]

ARGUMENT

I. The First Amendment Does Not Bar A Court From Enjoining the Publication by A Newspaper of Articles That Pose A Grave and Immediate Danger to the Security of the United States.

A. *The First Amendment does not provide an absolute bar to any prior restraint upon the publication by a newspaper of particular material.*

1. The issue before the Court, although of great importance, is narrow. There is no question here of any blanket attempt by the government to enjoin the publication of a newspaper, or any attempt to impose a generalized prohibition upon the publication of broad categories of material. The only issue is whether, in a suit by the United States, the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a "grave and immediate danger to the security of the United States."

In the *Times* case, the Court of Appeals for the Second Circuit affirmed the district court's denial of

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[1] On June 22, 1971, the Boston Globe published the initial article in a similar series also based upon the Defense Department material. Early in the afternoon of that day the United States filed suit to enjoin further publication by that newspaper, and the district court granted a stay.

a preliminary injunction, except with respect to a limited group of documents: "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." (On June 25, 1971, the United States informed the Post and the Times of the additional items it was specifying.) As to those documents, the court continued the preliminary injunction, but remanded the case for the district court to determine, in further *in camera* proceedings, whether any of those specified items met the standard of "grave and immediate danger" to the national security. The government has not sought review of the portion of the judgment of the court of appeals that otherwise affirmed the denial of the preliminary injunction.

In the *Post* case, the government similarly has not challenged the court of appeals' affirmance of the district court's denial of the preliminary injunction, except insofar as that court declined to impose the same condition as the Second Circuit had imposed in the *Times* case. In other words, the government is urging only that the Post should be prohibited from publishing those materials within the categories specified by the court of appeals in the *Times* case that pose a "grave and immediate danger" to national security.

The answer to this narrow question does not depend upon the fact that all of the material whose publication the government is seeking to prevent is classified either "top secret" or "secret", that all of it was obtained illegally from the government and that both the Times and the Post hold such material

without any authorization from the government. For whatever the classification this material has, and however the newspaper may have come into possession of it, we submit that the First Amendment does not preclude an injunction preventing the newspaper from publishing it.

The standard adopted by the Second Circuit is that of "grave and immediate" danger to national security. Since the effect of particular action upon diplomatic relations may be extremely severe in the long run even though its immediate impact is not clear or great, we believe that, insofar as this standard involves the conduct of foreign affairs, the word "immediate" should be construed to mean "irreparable." Indeed, in the delicate area of foreign relations frequently it is impossible to show that something would pose an "immediate" danger to national security, even though the long-run effect upon such security would be grave and irreparable.

2. The only case in which this Court has considered whether the First Amendment bars an injunction against the publication of a periodical was *Near* v. *Minnesota*, 283 U.S. 697. The Court there struck down, as violating the prohibition in the First Amendment against a law abridging the freedom of the press, made applicable to the states by the Fourteenth Amendment, an injunction granted by a state court against the publication of an anti-Semitic periodical, under a Minnesota statute permitting the suppression of newspapers or periodicals as public nuisances. Although the Court held that this statute, sanctioning the "suppression of the offending newspaper or pe-

riodical" (p. 711), was unconstitutional as a "previous restraint" upon publication, the Court recognized (p. 716) that under the First Amendment "the protection even as to previous restraint is not absolutely unlimited. * * * No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." These examples were merely illustrative and obviously there are other items of information so vital to the security of the United States that their publication may be enjoined. The exception to the prohibition upon prior restraint recognized in *Near* v. *Minnesota* surely covers material whose publication would pose a "grave and immediate danger to the security of the United States."

3. A form of prior restraint of specifically delimited categories of communication has also long been utilized in cease-and-desist orders issued by regulatory agencies, and enforced by the courts, in remedying violations of federal regulatory statutes. For example, in *Federal Trade Commission* v. *Texaco, Inc.*, 393 U.S. 223, this Court upheld the Commission's determination that sales-commission arrangements between an oil company and a tire manufacturer constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, and ordered enforcement of the Commission's order which, *inter alia*, restrained Texaco from "[u]sing or attempting to use any * * * device, such as, but not limited to, * * * dealer discussions * * *, to sponsor, recommend, urge, induce, or otherwise

promote the sale of TBA products by any distributor or marketer of such products other than The Texas Company to or through any wholesaler or retailer of The Texas Company petroleum products * * *." *Federal Trade Commission* v. *Texaco, Inc.*, No. 24, O.T. 1968, I App. 231. Respondents' contentions in this Court in *Texaco* based upon the First Amendment (Resp. Br. 29-31) were not discussed in the Court's opinion.

Similarly, in *Sinclair Co.* v. *National Labor Relations Board*, 395 U.S. 575, this Court upheld, against "petitioner Sinclair's First Amendment challenge" (395 U.S. at 616), the Board's setting aside of a representation election because of the coercive nature of the employer's communications to its employees during the election campaign. The Court unanimously affirmed the court of appeals' judgment enforcing the Board's order, including a provision requiring Sinclair to cease and desist from "[t]hreatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative." *Sinclair Co.* v. *National Labor Relations Board*, No. 585, O.T. 1968, App. 199.

In its opinion in *Sinclair*, the Court specifically recognized that an employer's free speech rights are subject to the limited restrictions necessary to protect "the equal rights of the employees to associate freely * * *" (395 U.S. at 617). We submit that a carefully limited restriction on the right of newspapers to pub-

lish secret government documents is similarly warranted in order not to impede, by the threat that they might impair the very security of the Nation, communications of the greatest importance between the President and his advisers or between our government and other governments. Within the confines of the First Amendment, newspapers are, of course, subject to the same legal remedies as are other persons and business organizations. Indeed, this Court held in *International News Service* v. *Associated Press*, 248 U.S. 215, that, in appropriate circumstances, a news organization can, and should, be enjoined from disseminating or publishing particular materials.

4. Another, and very common, example of the use of prior restraints on publication by the courts is in enforcing statutory copyrights and—of particular relevance here—the common law right of literary property.

At common law, the author of a literary product has a protected property right in the unpublished work. The common law right guarantees the author the exclusive use of the product before publication. "He has the sole and exclusive right to perform, dramatize, or copy the production until he permits a general publication, as well as the exclusive right of first general publication." Copyright and Literary Property, 18 Am. Jur. 2d Sec. 9, pp. 311-312. See *id.*, Secs. 6-16, Spring, *Risks and Rights in Publishing* 75-80; Copyright and Literary Property, 18 C.J.S. Secs. 4-16. The right continues to exist in the United States independently of comprehensive copyright statutes. See *Wheaton* v. *Peters*, 8 Peters (33 U.S.) 591;

Caliga v. *Inter Ocean Newspaper Co.*, 215 U.S. 182; *Ferris* v. *Frohman*, 223 U.S. 424; *Mazer* v. *Stein*, 347 U.S. 201. See also *Chamberlain* v. *Feldman*, 300 N.Y. 135.

Almost any intellectual production that had been put in tangible form was protected at common law. The nature of the right to literary property in large measure dictated the remedies invoked by the courts for its protection. Only equitable relief could fully protect the author's privilege of first publication. To protect his rights, courts if necessary would prohibit all unauthorized uses, including publishing or printing. Compare *Belford* v. *Scribner*, 144 U.S. 488; Copyright and Literary Property, 18 Am. Jur. 2d Secs. 124-126; Copyright and Literary Property, 18 C.J.S. Secs. 16c, 120-124. Cf. *Folsom* v. *March*, 9 Fed. Cas. 342 (C.C. Mass.), where the court stated that "a court of equity will prevent the [unauthorized] publication [of copyrighted papers] by an injunction." *Id.* at 346. The courts in this country have continued through the subsequent years to provide injunctive relief against publications infringing statutory copyrights. See 18 C.J.S. Secs. 128-132; 18 Am. Jur. Secs. 131-134.

B. *A court may enjoin a newspaper from publishing material whose disclosure poses a grave and immediate danger to national security.*

The authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of

foreign affairs and his authority as Commander-in-Chief. Of course, if, as we shall argue, the government is entitled to such an injunction, there is no question that "the United States may sue to protect its interests." *Wyandotte Co.* v. *United States*, 389 U.S. 191, 201.

1. *The President's power to conduct foreign affairs.* It has long and repeatedly been recognized that the President is constitutionally empowered to act with broad freedom and secrecy in the conduct of our relations with foreign powers. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; *Chicago & Southern Air Lines, Inc.* v. *Waterman Corporation*, 333 U.S. 103; *United States* v. *Belmont*, 301 U.S. 324, 328; *United States* v. *Pink*, 315 U.S. 203, 229; *Oetjen* v. *Central Leather Company*, 246 U.S. 297, 302.

In *Curtiss-Wright, supra*, the Court explicitly held that there is a fundamental difference between the conduct of domestic and external affairs. It explained (299 U.S. at 319):

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613.

The Court also pointed out that Congress had reached the same conclusion (*Curtiss-Wright, supra,* at 319):

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how and upon what subjects negotiation may be urged with the greatest prospect of success . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." United States Senate, Reports, Committee on Foreign Relations, Volume 8, page 24.

This Court reaffirmed and further elaborated the *Curtiss-Wright* doctrine in *Chicago & Southern Air Lines, Inc.* v. *Waterman Corp., supra,* 333 U.S. at 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy.

> They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

These are not merely hortatory phrases without practical significance. For example, it would have been potentially disastrous had the sensitive, high-level negotiations involved in the "Cuban Missile Crisis" been conducted with the fear that what transpired in the utmost confidence—and necessarily so—might have been ultimately "published to the world." *Chicago & Southern Air Lines, Inc.* v. *Waterman, supra*, 333 U.S. at 111. On a less monumental level it is hardly an overstatement to suggest that the chance of success of the Nuclear Test Ban Treaty negotiations, or perhaps more immediately pertinent, the SALT negotiations, would have been, or would be, substantially diminished if the parties involved had feared that the necessary give-and-take of their informal conversations would at some future—and perhaps imminent—date be subject to close examination and scrutiny through general dissemination. It is self-evident, we submit, that the existence of such a possibility could not but impede the free flow of ideas and render positions rigid and immovable in any sensitive international negotiation.

In the subtle and difficult world of diplomacy, things often are said in confidence that will prove so embarrassing if disclosed that the mere threat of dis-

closure is enough to leave them unsaid. Sensitive negotiations often are carried on through people who, if they knew their identity might be disclosed, would be unwilling to participate. Neutral nations may play a role in involved negotiations that they would eschew if the fact of their participation were known. All of these activities are essential elements of the conduct of foreign affairs, which involve far more than direct face-to-face negotiations or the exchange of diplomatic notes. The publication of material relating to confidential discussions and negotiations between this country and both friendly and unfriendly powers would have the gravest consequences because it could dry up vital sources of information and thwart, if not sometimes destroy, meaningful communication.

2. *The President's Authority as Commander-in-Chief.* Under Article 2, § 2, cl. 1 of the Constitution, the President, as Commander-in-Chief of the armed forces of the United States, has not only the duty of conducting military operations, but also the duty of protecting "the members of the armed forces from injury, and from the dangers which attend the rise, prosecution, and progress of war." *Hirabayashi* v. *United States*, 320 U.S. 81, 93; see also *Prize Cases*, 2 Black 635. The latter responsibility includes the duty to preserve military secrets whose disclosure might threaten the safety of United States troops engaged in combat. For example, the President is empowered to prevent the disclosure by newspaper or otherwise of troop movements, secret military bases, or technical information vital to the production of

arms. Thus, during World War II, the President, "at his discretion, established rules and regulations for the censorship of communications by mail, cable, radio, or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country." Smith and Cotter, *Powers of the President During Crises*, p. 84. See Act of December 18, 1941, Section 303, 55 Stat. 838.

The classified material that was submitted to the district court in the *Post* case and that the government intends to submit to the district court on the remand in the *Times* case—significant portions of which are discussed in our sealed brief filed in this Court—demonstrates that publication of the Defense Department studies would pose a serious danger to the armed forces. Of course, it cannot be said with absolute certainty that this result would follow from publication. But the government need not show that such disastrous consequences are inevitable; it is enough that there be a real likelihood of the event. In the present cases high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch's conclusion, reflected in the top secret classification of the documents and in the *in camera* evidence, that disclosure would pose the threat of serious injury to the national security.

The question whether the disclosure of military secrets would be so harmful as to merit prior restraint involves difficult and complex judgments which do not lend themselves to judicial resolution. This Court

recognized in *United States* v. *Reynolds*, 345 U.S. 1, that the President is uniquely qualified to determine whether the disclosure of "military and state secrets" would result in danger to the national security. Though the Court was not required in *Reynolds* to hold that the President's authority in this area is never subject to judicial review, the Court recognized that the national security may require the judiciary to play a very limited role in determining whether a particular occasion appropriately invokes the presidential power to prevent disclosure. Indeed, as Hamilton noted in discussing the power of Congress and the Executive to conduct military affairs:

> The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence. [*The Federalist*, No. XXIII, p. 147.][2]

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[2] This Court has also recognized, by analogy, that the power of the Commander-in-Chief to determine that an attack on American citizens or property has occurred, requiring the use of repellant force, is an exclusive power subject to review by neither of the co-equal branches.

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself. [*Martin* v. *Mott*, 12 Wheat. 19, 29-30.]

While, of course, the judiciary's duty to enforce the guarantees of the First Amendment cannot be abdicated, we submit that instances in which disclosure of particular state secrets would endanger troops in combat or otherwise imminently imperil the national security are among the "special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment," even from prior restraint. *Carroll* v. *Princess Anne*, 393 U.S. 175, 180.

Obviously, in circumstances like those here, the only effective means of protecting the nation against the improper disclosure of military secrets is to enjoin their impending publication. To limit the President's power in this regard solely to punishment of those who disclose secret information would render the power meaningless: the harm sought to be prevented would have been irreparably accomplished.

* * * *

Congress has recognized the authority of the President to protect the secrecy of information relating to foreign relations and national defense. The first exemption to the Freedom of Information Act, which generally provides for making public information in the hands of the government, specifically excepts from the statute's disclosure provisions "matters that are —(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. (Supp. V) 552(b)(1).

II. The United States Is Entitled to an Injunction Against Publication by the New York Times and the Washington Post of Material Whose Disclosure Would Pose A Grave and Immediate Danger to National Security.

A. *The Court of Appeals for the Second Circuit properly remanded the* Times *case to the district court to conduct an* in camera *hearing on whether designated material poses such a danger.*

When the *New York Times* case was originally heard by the district court, the government, because of the short time it had to prepare for that hearing, was not able to present to the court all of the evidence relating to the impact of disclosure of this material upon foreign relations and national defense that it was able to present to the district court in the *Washington Post* case. It was on the basis of this limited evidence in the "*in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified," that the district court concluded that it had not been convincingly shown that "the publication of these historical documents would seriously breach the national security," and that "no cogent reasons were advanced as to why these documents except in the general framework of embarassment previously mentioned, would vitally affect the security of the Nation." When the case reached the court of appeals, however, the government filed additional material relating to the effect of disclosure upon the national security. It was presumably the submission of this additional material that led the court of appeals to remand to the district court for a further hearing on whether disclosure of the specific items designated by that court

would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined." As we have already argued, the First Amendment does not bar an injunction against publication of material of that character.

The court of appeals directed the district court to render its decision on remand by July 3, 1971, which is one week from the date on which the Times is free to resume publication of these articles as a result of the court of appeals' affirmance of the other portions of the district court's order denying a preliminary injunction. The court of appeals did not abuse its discretion in giving the district court another opportunity to consider this important matter in the light of the additional evidence that the government had developed. The short additional period during which the Times remains under an injunction as to the designated documents represents a reasonable accommodation of, on the one hand, protecting the nation against the publication of material whose disclosure would threaten the national security and, on the other hand, the interest of the Times in publishing relevant information at the earliest possible date.

In another area where *Near* v. *Minnesota, supra,* recognized the propriety of a prior restraint upon publication—obscenity—recent decisions of this Court have recognized that such a prior restraint is permissible provided there is a prompt judicial determination of obscenity. The Court reaffirmed that principle only this Term. *United States* v. *Thirty-Seven Photographs,* No. 133, this Term, decided May 3, 1971.

To be sure, "obscenity is not within the scope of first amendment protection." *Id.* sl. op. at 13; *United States* v. *Reidel*, No. 534, this Term, decided May 3, 1971. But the basis of the requirement for speed in resolving disputed issues is a recognition that not all books or films seized as "obscene" will prove to be so; even though they constitute protected expression, restraint of their publication for the brief period necessary to decide the issue is countenanced. *Freedman* v. *Maryland*, 380 U.S. 51; *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43. In that context, where the element of social harm is admittedly speculative, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, this Court found a total restraint of 74 days for decision of the issue not constitutionally excessive. In this case, where the government believes it can show that publication of specific documents will bring about grave national harm, interim restraint for a much shorter period even of documents which a court might ultimately conclude do not fit that description is not constitutionally excessive.

B. *The Court of Appeals for the District of Columbia Circuit should have remanded the* Post *case for a further hearing like that ordered by the Second Circuit in the* Times *case.*

As noted in the Statement (*supra*, p. 6), the district court found in the *Post* case that "publication of the documents in the large may interfere with the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world" and that the government

had "demonstrated the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted." The court held, however, that the government had not shown "an immediate grave threat to the national security" that "would justify prior restraint on publication." This ruling apparently reflected the court's conclusion (Transcript 269) that the government had not established that the documents satisfied the standard that Executive Order 10501 specifies for "top secret" classifications—the court stated (*ibid.*) that the government had not shown that "the documents at the present time and in the present context are Top Secret." In the district court's view, the flaw in the government's case was that it had presented

> no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials.

That is not the proper standard for determining whether publication would pose a "grave and immediate danger" to the national security of the United States. Disclosure may pose such a danger even though it may not lead to a definite break in diplomatic relations, an armed attack on the United States or on an ally, a war or any of the other completely catastrophic events that the district court apparently concluded would have to be shown as certain to occur.

As we have discussed above, less calamitous consequences than those required by the district court may cause serious and irreparable damage to the vital interests of the United States in its dealings with foreign nations and in its defense posture. See the material in the government's sealed brief. Moreover, it is impossible to know where such events, once they are set in motion by improper disclosure, may lead. Relatively innocuous adverse consequences today may develop into serious and sometimes virtually insolvable problems in the future.

The determination of the particular classification that is appropriate for national defense purposes and whether and when that classification should be changed are matters of the highest sensitivity and difficulty; they require judgments based on wide knowledge of and familiarity with many interrelated factors. Whether a particular document requires a "top secret" classification, or whether that classification should be removed cannot be decided on the basis of a simple reading of the document. Material that seems relatively innocuous to the casual observer may, to one more familiar with the intricacies and intimate details of the situation, be revealed to have an entirely different significance. The kind of judgment involved in the proper classification of documents relating to the national security is one that courts simply are not equipped to make, and they should not attempt to make their own independent determination whether the particular classification was justified.

In its memorandum in opposition to the petition for certiorari, the *Post* contended that its case involves only the factual question whether the district court's conclusion that disclosure would not pose "an immediate grave threat to the national security" is supported by the record. To the contrary, we submit that that conclusion reflects not just a different evaluation of the evidence by the district court than by the government. The district court's ultimate conclusion, which the court of appeals approved, rests upon an improper standard of what the government is required to show in order to prevent publication of material whose disclosure would pose a grave and immediate danger to the United States.

CONCLUSION

The judgment of the court of appeals in No. 1873 should be affirmed. The judgment of the court of appeals in No. 1885 should be modified to conform it to the judgment of the court of appeals in No. 1873.

Respectfully submitted.

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