" 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' "—The COURT

"In seeking injunctions against these newspapers ... the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment ..."—Justice BLACK

"The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information."—Justice DOUGLAS

"[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture. ..."—Justice BRENNAN

"The responsibility must be where the power is."—Justice STEWART

"I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations."—Justice WHITE

"The issue is whether this Court or the Congress has the power to make law."—Justice MARSHALL

"An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation. ..."—Chief Justice BURGER

"I consider that the Court has been almost irresponsibly feverish in dealing with these cases."—Justice HARLAN

"The First Amendment, after all, is only one part of an entire Constitution."—Justice BLACKMUN

The Pentagon Papers Case (New York Times v. United States)

403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

In 1971, the *New York Times* and the *Washington Post* obtained copies of a classified study stolen from the Department of Defense, *History of U.S. Decision–Making Process on Viet Nam Policy,* popularly called *The Pentagon Papers.* After some delay, the newspapers began publishing the documents. The Department of Justice sought injunctions from federal district courts in New York and the District of Columbia against further publication. Both courts refused the requests, but the Court of Appeals for the Second Circuit sent the case back to the district court in New York for further hearings and granted a temporary injunction. In Washington, the Court of Appeals for the District of Columbia sustained the refusal. Both sides

petitioned for expedited review. The Supreme Court agreed but issued an order restraining publication until after its decision on the merits. Four days after oral argument, the Court announced its judgment.

PER CURIAM. ...

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan (1963); see also Near v. Minnesota (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree. ...

Mr. Justice **BLACK**, with whom Mr. Justice **DOUGLAS** joins, concurring. ...

... [F]or the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. ... The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment ... wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law ... abridging the freedom ... of the press. ..." Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. ...

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and

emphatically stated:

> Now, Mr. Justice [Black], your construction of ... [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that "no law" does not mean "no law," and I would seek to persuade the Court that that is true. ... [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and ... the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.

And the Government argues in its brief that in spite of the First Amendment, "[t]he 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." ...

... To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure." ...

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. ... The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment ... sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. ...

Mr. Justice **DOUGLAS**, with whom Mr. Justice **BLACK** joins, concurring. ...

It should be noted at the outset that the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." That leaves, in my view, no room for governmental restraint on the press. There is, moreover, no statute barring the publication by the press of the material which the *Times* and the *Post* seek to use. ... So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See Hirabayashi v. United States [1943]. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have. These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. ...

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security. Near v. Minnesota [1931] repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. ... A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress. Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. New York Times Co. v. Sullivan [1964]. ...

Mr. Justice **BRENNAN,** concurring. ...

... The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," Schenck v. United States (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. ...

Mr. Justice **STEWART**, with whom Mr. Justice **WHITE** joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

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

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

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

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. ...

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

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

Mr. Justice **WHITE,** with whom Mr. Justice **STEWART** joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases. ...

... That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way. ... I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the

material now in its possession. ...

Mr. Justice **MARSHALL**, concurring.

... The issue is whether this Court or the Congress has the power to make law. ... The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. ...

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. ...

... Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube Co.* ...

Mr. Chief Justice **BURGER**, dissenting.

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

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act? I suggest we are in this posture because these cases have been conducted in unseemly haste. ... The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the *Times* proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the *Times* asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course,

the First Amendment right itself is not an absolute. ...[1] An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the *Times*, by its own choice, deferred publication.

It is not disputed that the *Times* has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the *Times*, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated *instanter*. ...

The consequences of all this melancholy series of events is that we literally do not know what we are acting on. ...

Mr. Justice **HARLAN**, with whom The Chief Justice [**BURGER**] and Mr. Justice **BLACKMUN** join, dissenting. ...

... With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases. ...

... It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests. In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." ... From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. ...

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive

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[1]... [T]he *Times* has copyrighted its material and there were strong intimations in the oral argument that the *Times* contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically this would afford it a protection, analogous to prior restraint, against all others—a protection the *Times* denies the Government of the United States. [Footnote by Chief Justice Burger.]

determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." ... Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. ...

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

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. ... Pending further hearings in each case conducted under the appropriate ground rules, I would continue the restraints on publication. ...

Mr. Justice **BLACKMUN**, dissenting.

The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the *Times* itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. ...

Editors' Notes

(1) **Query**: Did Black's *textual approach* force him to contradict himself? In other cases, he would have limited constitutional rights to those explicitly listed in the constitutional document; see espec. his dis. op. in Griswold v. Connecticut (1965; reprinted above p. 147). But what right does the First Amendment explicitly establish against either judicial or executive interference with freedom of the press? That amendment says "Congress shall make no law," not "Government shall not interfere with. ..." Did Black extract himself from this contradiction by employing (an)other approach(es) to constitutional interpretation in conjunction with *textualism*? If so, how well did he succeed?

(2) **Query:** Recall Dworkin's distinction between "concepts" and "conceptions" in constitutional interpretation. ("Taking Rights Seriously," reprinted above, p. 249.) Reread the text of the First Amendment. To the extent Dworkin's distinction is valid, can Black legitimately claim to be a literalist?

(3) **Query:** Douglas also used a *textual approach* in *Pentagon Papers*; but, as a constitutionalist, he demanded that government put its finger on a clause in the document authorizing interference with freedom of the press. If we assume *arguendo* that Douglas's mixture of approaches was more congruent with constitutionalism than Black's, was it more congruent with democratic theory than Black's?

(4) **Query:** Which justice(s) followed a *structural approach* in *Pentagon Papers*? Is there evidence in the opinions themselves that any of the justices used a *prudential approach*?

(5) **Query:** As always, the question of WHO interprets was bubbling beneath the surface of this case. How did each of the justices explicitly or implicitly resolve that issue?

(6) **Query:** Compare the various opinions here as they relate to divisions of power within the national government with those in the Steel Seizure Case (1952; reprinted above, p. 443) and INS v. Chadha (1983; reprinted above, p. 485). Did any opinion have the sophistication of Jackson's concurring opinion in *Steel Seizure*?

(7) Unlike most nations, the United States has no "Official Secrets Act." Thus, when the Department of Justice indicted Daniel Ellsberg for passing the *Pentagon Papers* to the press, it had to charge him in very general terms. The prosecution foundered when it became known that, under orders from Nixon's White House, the government had engaged in assorted crimes, including breaking into the office of Ellsberg's psychiatrist to try to obtain information that might embarrass him. No criminal action was ever brought against the newspapers.

(8) Less than a month after the Court's decision in *Pentagon Papers*, the version printed in the *Times* was published as a paperback book, *The Pentagon Papers* (New York: Bantam Books, 1971), under the supervision of James L. Greenfield, based on investigative reporting by Neil Sheehan. It contained much embarrassing information about the way in which presidents from Eisenhower to Johnson had bungled American relations with and in IndoChina, but no great military secrets escaped.

(9) For analyses of the Court's ruling and its various opinions, see: Louis Henkin, "The Right to Know and the Duty to Withhold," 120 *U.Pa.L.Rev.* 271 (1971); C. Herman Pritchett, *Constitutional Civil Liberties* (Englewood Cliffs, NJ: Prentice–Hall, 1984), ch. 4; David M. O'Brien, *The Public's Right to Know* (New York: Praeger, 1981), pp. 155–165; Martin Shapiro, *The Pentagon Papers and the Courts* (San Francisco: Chandler, 1972); Sanford J. Ungar, *The Papers and the Papers* (New York: Dutton, 1972). For a consideration of the constitutionality of the Vietnam War, see John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993).

(10) In Haig v. Agee (1981), the Court, speaking through Chief Justice Burger, upheld

revocation of the passport of James Agee, a former CIA agent who had announced that he was launching a "campaign" to "fight the United States CIA wherever it is operating" and "to expose CIA officers and agents and take the measures necessary to drive them out of the countries where they are operating." Burger acknowledged that the revocation "rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel." But the Chief Justice observed, quoting *Near*, that "[l]ong ago ... this Court recognized that '[n]o 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.' " He concluded: "The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law."

(11) In 1978 Frank W. Snepp, III, a former CIA agent, published *Decent Interval* (New York: Random House), a critical analysis of earlier American policy in Vietnam. He had not submitted the manuscript to the Agency for review as his contract of employment had required. On the other hand, the government conceded that the book contained no classified information that had not already been published elsewhere. Six justices, without hearing oral argument or having briefs on the merits, treated the case solely as a matter of breach of contract and ordered Snepp to give the government all royalties the book earned. Snepp v. United States (1980). Stevens, joined by Brennan and Marshall, dissented.

(12) CIA v. Sims (1985) held that Congress had given the CIA very broad exemption from the obligation to disclose information under the Freedom of Information Act.