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The National Security Exception to the Doctrine of Prior Restraint

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THE NATIONAL SECURITY EXCEPTION TO THE DOCTRINE OF PRIOR RESTRAINT

On June 13, 1971, *The New York Times* began publishing a series of articles based upon a secret government document that had come into its possession. The secret document dealt with the decision-making process involved in the escalation of the Vietnam War. Shortly thereafter *The Washington Post* published articles based upon the same document. In the wake of these articles the federal government demanded an injunction against any further publication based on the secret document by the two newspapers and thereby sought to impose a prior restraint upon the press for the first time in the nation's history [1]

The Government contended that the documents and the information in the possession of the *Times* and the *Post* involved a serious breach of the security of the United States and that further publication would cause the nation irreparable harm.[2] As a defense to the injunction, the newspapers relied upon the first amendment prohibition of prior restraints on the press.[3]

Historical Perspective

Although the Government has never before taken such action in the courts, the struggle between the free press and the government's responsibility for national security is an old one. In 1777, General George Washington complained about press leaks which might be harmful to the Continental Army [4] During the Civil War General Burnside seized and suppressed an edition of the *Chicago Times*, alleging that the *Times* was publishing material which was secret and that such activity was dangerous to the public safety [5] Confederate generals frequently used the Yankee press to discover enemy troop movements, and President Lincoln felt compelled to issue a sweeping order providing for the court martial of correspondents whose reports were found to be of aid to the enemy [6]

1. United States v. New York Times, 91 S. Ct. 2140 (1971); United States v. Washington Post, 91 S. Ct. 2140 (1971).
2. *Id.*
3. *Id.*
4. Greider, *The Press as Adversary*, Washington Post, June 27, 1971, at B1, col. 3.
5. 55 Cong. Rec. 2005 (1917) (remarks by Senator Ashurst); J. Pollard, The Presidents and the Press 377-78 (1947).
6. Greider, *supra* note 4, at B4, col. 3.

Similar problems occurred during World War II. President Roosevelt found it necessary to order an investigation of the *Chicago Tribune* and the *Washington Times-Herald* after both papers had published the Government's secret war mobilization plans only three days before the attack on Pearl Harbor.[7] In 1942, the *Chicago Tribune* was accused of leaking the fact that the United States had broken the Japanese naval code.[8]

Recently, the *St. Louis Post-Dispatch* reported that the United States had issued a peace feeler to Hanoi prompting other news media to ask for confirmation of the report. When nothing developed from the proposal, there was criticism that the premature publication might have harmed secret negotiations.[9]

The unprecedented attempt by the Government to impose prior restraints on the *New York Times* and the *Washington Post* coupled with the history of conflict between the press and national security raises serious questions as to the scope of the first amendment free press guaranty Under what conditions did the doctrine of prior restraint develop? What did the drafters of the Constitution intend by the first amendment press clause? Under what circumstances if any may exceptions be made to the prohibition of prior restraints? Under what authority may the Government assert a right to impose prior restraints on the press? What facts must be shown by the Government in order to justify the imposition of a prior restraint?

Evolution of the Doctrine

In England printing first developed under the sponsorship of the Crown and was therefore subject to Crown control. The sweeping scope of the system of prior restraint at that time is illustrated by the Licensing Act of 1662.[10] The law has been summarized in the following manner:

> Not only were seditious and heretical books and pamphlets prohibited, but no person was allowed to print any material unless it was first entered with the Stationers' Company, a government monopoly, and duly licensed by the appropriate state or clerical functionary Further, no book was to be imported without a

7. *Id.* at B1, col. 3. *See* J. Tebbel, An American Dynasty 159 (1st ed. 1947).
8. Greider, *supra* note 4, at B4, col. 4.
9. M. Stein, Freedom of the Press 107-08 (1966).
10. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 650 (1955).

> license; no person was permitted to sell books without a license; all printing presses had to be registered with the Stationers' Company; the number of master printers was limited to twenty, and these were to be licensed and to furnish bond; and sweeping powers to search for suspect printed matter in houses and shops, except the houses of peers, were granted.[11]

The struggle for the freedom of the press was directed primarily at the power of the licensor, and it was against this power that writers such as John Milton directed their attacks.[12] When the licensing law expired in 1695, the House of Commons refused extension and it was never revived.[13]

The disappearance of the prior restraints imposed by the licensing system did not completely free the press. The criminal courts extended the law of treason and seditious libel so as constantly to harass printers and publishers by imposing subsequent punishments.[14] Nonetheless, prior restraints were abolished, and by the eighteenth century the right of the press to be free from the power of the censor assumed the status of common law Sir William Blackstone explained the law as follows:

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freemen [sic] has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity [15]

11. *Id.*

12. Lovell v. Griffin, 303 U.S. 444, 451 (1938). *See* Emerson, *supra* note 10, at 656-60 for a discussion of some of the arguments against any system of censorship. Emerson concludes that, "[t]he form and dynamics of such systems tend strongly toward overcontrol—towards an excess of order and an insufficiency of liberty" *Id.* at 670.

13. Emerson, *supra* note 10, at 651; F SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776 260-63 (1952).

14. L. LEVY, LEGACY OF SUPPRESSION 9-13 (1960); SIEBERT, *supra* note 13, at 264-75. Subsequent punishments are those penalties imposed *after* publication of certain material as opposed to prior restraints which prevent any publication whatsoever. The latter is commonly called censorship.

15. 4 W BLACKSTONE, COMMENTARIES 151-52 (St. G. Tucker ed. 1953).

Thus, the common law definition of freedom of press meant an absence of censorship in advance of publication. Such was the state of the common law in 1791 when the first amendment was drafted, adopted by Congress, and ratified by the states.

The Meaning of the Press Guaranty

It is apparent that the first amendment was designed to prohibit the establishment of any system of prior restraints similar to those previously known in England.[16] It has been generally, if not universally, recognized that the chief purpose of the guaranty was to prevent previous restraints on publication.[17] The prohibition of prior restraints, however, was not the sole purpose of the free press guaranty.[18] James Madison, the drafter of the first amendment, emphasized that the press should not only be free from licensing and censorship, but also from the imposition of subsequent punishments.[19]

It was not until the passage of the Sedition Act of 1798[20] that a national awareness of the central meaning of the first amendment was created.[21] The manifest purpose of the act was the protection of the Government from damaging criticism,[22] yet a critical press was one of the primary objectives of the founding fathers in drafting the first amendment. Jefferson believed the press had the right to criticize, even unjustly, the conduct of public officials.[23] In Madison's words, "[t]he right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right."[24] The Continental Congress in its letters emphasized that a free,

16. Emerson, *supra* note 10, at 652.

17. *E.g.*, Near v. Minnesota, 283 U.S. 697, 713 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

18. Z. Chafee, Free Speech in the United States 10-23 (1954). *See also* Times Film Corp. v. Chicago, 365 U.S. 43, 54 (1963); Grosjean v. American Press Co., 297 U.S. 233, 248 (1936); Near v. Minnesota, 283 U.S. 697, 715 (1931).

19. L. Levy, *supra* note 14, at 274-75.

20. Ch. 74, § 2, 1 Stat. 596-97 (1798). The statute made it a crime, punishable by a fine and five years in prison,

> if any person shall write, print, utter or publish any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress or the President with intent to defame or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.

21. L. Levy, *supra* note 14, at 258-60.

22. 55 Cong. Rec. 2011 (1917) (remarks by Senator Ashurst).

23. *See* L. Levy, Freedom of the Press from Zenger to Jefferson 355 (1966).

24. *See* Parks, *The Open Government Principle: Applying the Right to Know Under*

critical press would inure to the benefit of all, reasoning that "oppressive officers are ashamed or intimidated, into more honorable and just modes of conducting affairs." [25] The Sedition Act was subsequently condemned as unconstitutional by Jefferson and Madison, fines levied against violators were repaid by Congress and Jefferson, when President, pardoned those who had been convicted.[26]

The idea of an antagonistic and adversary press constantly exposing the activities of government and informing the people was a primary consideration in the adoption of the free press guaranty, as well as the prohibition of prior restraints. As Mr. Justice Black has stated:

> 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 unrestricted 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.[27]

Exceptions

Except for occasional dicta, the Supreme Court did not invoke the doctrine of prior restraint until 1931 in the case of *Near v. Minnesota*.[28] Therein, Mr. Chief Justice Hughes reaffirmed the central meaning of the first amendment press guaranty·

> [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in the great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the

the Constitution, 26 Geo. Wash. L. Rev. 1, 9 (1957), *quoting from* 6 Writings of James Madison 398 (1906).

25. Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

26. New York Times v. Sullivan, 376 U.S. 254, 274-76 (1964).

27. United States v. New York Times, 91 S. Ct. 2140, 2143 (1971).

28. 283 U.S. 697 (1931) (found Minnesota statute which allowed prior restraint of publications to be violative of first amendment); Emerson, *supra* note 10, at 652.

> press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.[29]

The Chief Justice further stated, however, that even the principle of immunity from prior restraints is not absolute, emphasizing that certain "exceptional cases" [30] might exist wherein the Government would be justified in imposing prior restraints on the press. These included "actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops." [31] Prior to the Government's action against the *New York Times* and the *Washington Post*,[32] the Hughes dicta in *Near v. Minnesota*[33] was the sole constitutional authority directly relating to the problem of exceptions to the doctrine of prior restraint in cases involving conflict between the free press and national security Yet the examples cited by Hughes fell far short of providing an effective standard for determining the types of publications which might be denied immunity from prior restraints.

In *United States v New York Times*[34] and *United States v. Washington Post*,[35] the Government's power to censor information allegedly endangering the national security was brought directly into focus. The Government based its power to impose prior restraints on the press upon the constitutional power of the President over the conduct of foreign affairs and on the Espionage Act of 1917 [36]

The Court found, however, that the Espionage Act did not apply to the press.[37] This conclusion was based in part upon a review of the legislative history of the act, which revealed that in 1917 Congress eliminated from the proposed bill a provision that would have given the President broad powers in time of war to prohibit publication of information threatening the national defense.[38] Congressional objections to

29. 283 U.S. at 719-20.

30. *Id.* at 715-16. *See* Times Film Corp. v. Chicago, 365 U.S. 43, 47-49 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957); Roth v. United States, 354 U.S. 476, 483 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

31. 283 U.S. at 715-16.

32. United States v. New York Times, 91 S. Ct. 2140 (1971); United States v. Washington Post, 91 S. Ct. 2140 (1971).

33. 283 U.S. 697 (1931).

34. 91 S. Ct. 2140 (1971)

35. *Id.*

36. *Id.*

37. *Id. See* concurring opinions of Black, J. and Marshall, J.

38. 55 CONG. REC. 2166 (1917). The provision read:

> During any national emergency resulting from a war to which the U.S. is

the proposed clause were based on the fear that such a provision would allow the imposition of prior restraints.[39] In addition, the Court found that a 1950 amendment to the Espionage Act requires that the act be construed so as not to infringe upon the freedom of the press.[40] Finally, the Court found that usual methods of statutory interpretation lead to the conclusion that the act did not apply to the press.[41]

Since the President lacks statutory authority to impose prior restraints on the press when a publication threatens the national security, his authority must stem from the inherent powers of his office. It has long been accepted that responsibility for the conduct of foreign relations is an area committed to the sole discretion of the executive and should not be subject to judicial review.[42] Every government, by its very existence, has the power to apply to the courts for assistance in providing for the security and welfare of its people,[43] and it has been recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."[44]

Despite the President's primacy in the area of foreign relations, it is the Judiciary and not the Executive which has the duty independently to determine whether the granting of an injunction sought by the Executive would abridge constitutional protections.[45] The President is

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a party or from threat of such war, the President may, by proclamation, prohibit the publishing or communication 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

55 CONG. REC. 1763 (1917).

39. *See* 55 CONG. REC. 2004-11 (1917) (remarks by Senator Ashurst); 55 CONG. REC. 2165 (1917) (remarks by Senator Reed); 55 CONG. REC. 2003 (1917) (remarks by Senator Vardaman)

40. Ch. 1024, § 1, 64 Stat. 987 (1950).

41. The pertinent provision merely mentions "communicates" and not "publication," whereas other sections of the statute distinguish between publishing and communication. *See* concurring opinion of Douglas, J. in United States v. New York Times, 91 S. Ct. 2140, 2145 (1971).

42. *E.g.*, United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319-20 (1936); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)

43. *In Re* Debs, 158 U.S. 564, 584 (1895)

44. Chicago & Southern Air Lines, Inc. v Waterman Steamship Corp., 333 U.S. 103, 111 (1948)

45. *See* dissenting opinion of Harlan, J. in United States v. New York Times, 91 S. Ct. 2140, 2160-64 (1971); New York Times v Sullivan, 376 U.S. 254, 285 (1964); Edwards v South Carolina, 372 U.S. 229, 235 (1963); Wood v. Georgia, 370 U.S. 375, 386 (1962); Pennakamp v Florida, 328 U.S. 331, 335 (1946); Norris v. Alabama, 294 U.S. 587, 950 (1935).

obligated to act within the limits of his power, but it is for the Court to determine precisely where those limits are to be drawn.[46] Thus, the fact that a publication threatens national security and that the national security traditionally is a matter within the Executive's responsibility, does not prevent the courts from protecting constitutional rights.

Not only are the President's actions in protecting the national security subject to judicial review when they infringe on constitutional protections, but freedom of the press occupies a "preferred position" [47] in the scale of constitutional values, and a prior restraint on expression requires an unusually heavy burden of justification.[48] Concomitantly, there is a strong presumption against the constitutional validity of any prior restraint on expression.

It has been recognized that the mere mention of the magic phrase "national security" should not automatically prevent the press from revealing the conduct of government to the public.[49] The word "security" is a vague generality which courts have not allowed to be used as a means of foreclosing the exercise of fundamental constitutional rights. The security of the nation is said not to lie in the defense of foreign threats alone. Security, according to the broader meaning, also lies in the value of our free institutions, and an obstinate and provocative press is fundamental to the preservation of the greater values of freedom of expression.[50] President Kennedy recognized this when he said:

> Even today there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our own traditions do not survive with it. And there is a very grave danger that an announced need for increased security will be seized on by those anxious to expand its meaning to the very limits of official censorship and concealment [51]

46. United States v. New York Times, 91 S. Ct. 2140, 2163 (1971) (dissenting opinion of Harlan, J.).

47. *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 326 U.S. 516, 529-30 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); Jones v. Opelika, 316 U.S. 584, 608 (1942).

48. United States v. New York Times, 91 S. Ct. 2140, 2141 (1971); Organization for a Better Austin v. Keefe, 91 S. Ct. 1575, 1578 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

49. Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209, 229 (1951).

50. United States v. New York Times, 328 F Supp. 324 (S.D.N.Y. 1971).

51. M. STEIN, *supra* note 9, at 179. *See* A. MEIKLEJOHN, POLITICAL FREEDOM 112 (1960).

SELF-RESTRAINT BY THE PRESS

The press has exercised a good deal of self-imposed censorship, not only regarding World War II and Vietnam,[52] but also in recent "national security" crises. The *New York Times* knew for over a year that the United States was flying high-altitude U-2 missions over the Soviet Union from a base in Pakistan in order to photograph military and missile installations, but the *Times* did not publish this fact until one of the planes was shot down in 1960.[53] The Cuban missile crisis of 1962 was another "secret" about which the *New York Times* had knowledge. On request of President Kennedy, the *Times* withheld news that the Soviet Union had atomic missiles in Cuba until an official government announcement was made.[54] The *Times* in 1960 learned that an invasion force largely financed and trained by the CIA was preparing to invade Cuba. A decision was made by the newspaper "not to mention the CIA's part in the invasion preparations, not to use the date of the invasion, and, on April 15, not to give away in detail the fact that the first air strike on Cuba was carried out from Guatemala." [55] The reasons given for the exclusion of these facts were those of national security, national interest and concern for the lives of the invaders.[56]

After the Bay of Pigs fiasco, President Kennedy criticized the *Times* for premature disclosure of security information.[57] Yet Kennedy later told the publisher of the *New York Times*, "I wish you had run everything on Cuba. I am sorry you didn't tell it at the time." [58] Earlier he had told the managing editor, "If you had printed more about the operation you would have saved us from a colossal mistake." [59] Arthur Schlesinger, Jr., in answering a question about a *New York Times* article which quoted him as saying that he had lied to the *Times* in April 1961 about the landings at the Bay of Pigs, commented:

> If I was reprehensible in misleading the Times by repeating the official cover story, the Times conceivably was just as reprehensible in misleading the American people by suppressing the

52. See M. STEIN, *supra* note 9, at 103.

53. CENSORSHIP IN THE UNITED STATES 134 (G. McClellan ed. 1967).

54. *Id.* at 148.

55. *Id.* at 144.

56. *Id.*

57. *Id.* at 146.

58. *Id.*

59. *Id.*

> Ted Szulc story from Miami [the story of the Bay of Pigs invasion].[60]

Later Schlesinger wrote, "I have wondered whether, if the press had behaved irresponsibly, it would have spared the country a disaster."[61]

The comments by Kennedy and Schlesinger clearly demonstrate the significance of the press's obligation to inform the public of government activities, and illustrate the deterrent effect of the availability of such information on government conduct. The Bay of Pigs invasion, the U-2 flights and other similar "secret" activities of the Government which have resulted in the loss of lives and a great deal of embarrassment to the United States might well have been avoided if the press had been more diligent in keeping the public informed of the activities of government.

Conclusion

On matters affecting the national interests, the people must be provided with all the pertinent information so that they can reach intelligent, responsible decisions. The first constitutional principle is that a self-governing people must have a thorough knowledge and understanding of the problems of their government in order to participate effectively in their solution. The underlying thesis of self-government is that if a majority of the people are well-informed, their decisions will produce more satisfactory solutions than could be produced by a small band of geniuses.[62] In the absence of strong and effective governmental checks and balances in the areas of national defense and international affairs, the only effective restraint on executive power lies in a well-informed citizenry Without an alert, free, and diligent press there cannot be a well-informed citizenry Only if the government is vigorously and constantly cross-examined and exposed by the press can the public stay informed and thereby control their government.

The difficulty arises in the twilight zone where the publication of military secrets might immediately endanger the national security, whereas the repression of such information would prevent the free operation of the press and deceive the public. President Kennedy, in an address before the Bureau of Advertising of the American Newspaper Publisher's Association, asked the members of the newspaper profession

60. *Id.* at 142.

61. *Id.* at 146.

62. United States v. Associated Press, 52 F Supp. 362, 372 (S.D.N.Y. 1943).

"to re-examine their own responsibilities." [63] The Cold War, according to Kennedy, requires newspapermen to exercise the same restraint they would in actual war. He continued, "Every newspaper now asks itself with respect to every story, 'Is it news?' All I suggest is that you add the question: 'Is it in the interest of national security?' " [64]

No formula can be entirely satisfactory The primary responsibility for safeguarding the national security still rests with the President, but the prohibition of prior restraints is so fundamental to the first amendment that only in the most exceptional of circumstances should they be permitted. The *Near* case speaks of "actual obstruction" to the Government's "recruiting service or the publication of the sailing dates of transports or the number and location of troops." [65] This list was obviously not all-inclusive but was intended to embrace only the most serious and immediate threats to the Government's ability to wage war, imminent death to military personnel, or serious breaches of national security A publication that will merely demonstrate an embarrassing disparity between the public and private words and acts of elected officials falls far short of the seriousness required for a prior restraint. Professor Chafee sums up the problem of defining the boundary line of first amendment freedoms in the following manner:

> We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are more flexible than private property, but we can establish a working principle of classification in this method of balancing and this broad test of *certain* danger.[66] [Emphasis supplied]

In light of the deep roots of the prohibition of prior restraints in both the Constitution and the common law, exceptions should be made only in the most extraordinary of circumstances. As Mr. Justice Brennan has stated:

> [O]nly governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event *kindred to imperiling the safety of a transport already at*

63. CENSORSHIP IN THE UNITED STATES, *supra* note 53, at 145.

64. *Id.*

65. 283 U.S. 697, 715-16 (1931).

66. Z. Chafee, *supra* note 18, at 35.

> *sea* can support even the issuance of an interim restraining order.[67] [Emphasis supplied]

The Supreme Court's denial of an injunction to the Government in the *Times* and *Washington Post* cases was a soundly based decision strongly supported by the central thrust of the first amendment. A prior restraint on the press for reasons of national security should be allowed only where the publication would create immediate, inevitable, direct, and irreparable harm to the United States. The burden of proof on the Government in such situations is extremely difficult to overcome, but the first amendment demands nothing less.

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67. United States v. New York Times, 91 S. Ct. 2140, 2148 (1971).