

Media-Prior Restraint

The Supreme Court case of *Near v. Minnesota* (1931) established that the government cannot stop material from being published in advance, even if the publication might be punishable after publication. Prior restraint, as this attempt is called, is unconstitutional in almost all circumstances. The case of *New York Times Co. v. United States* (1971) concerned the government's attempt at prior restraint on national security grounds. *The Pentagon Papers* is a 7000-page Department of Defense report that was classified top-secret. The report detailed United States involvement in Vietnam from 1945 to 1971. It revealed that the United States had been planning to go to war even when President Lyndon Johnson was saying otherwise, that there was no plan to end the war, and other information. No one without top-secret clearance knew of the report until Department of Defense worker Daniel Ellsberg leaked the document to the *New York Times*, which began publishing excerpts in June of 1971. President Richard Nixon, along with Attorney General John Mitchell, citing national security grounds, were successful in getting an injunction to prevent the *New York Times* from printing any more of the document. The *Times* appealed the injunction that had been issued, and within two weeks the case was before the Supreme Court. Before the Court was the question of how to balance the First Amendment's protection of a free press with claims of threats to national security. In a 6-3 decision, the Court held that the prior restraint was unconstitutional.

RIGHTS AND RESPONSIBILITIES

Directions: *Imagine you are a reporter who has learned from a reliable source the following pieces of information. The information is classified—it is secret from the public and even from many in government. Weigh your constitutional rights as a journalist against your responsibilities as a citizen. What are the arguments in favor of publishing the information? What are the arguments against? Does the government have the constitutional power to prevent the publication of this information?*

1. A military official gives you information about future movements of troops.
2. A photographer gives you pictures of soldiers' flag-draped coffins being returned to the U.S.
3. An agent of the Central Intelligence Agency (CIA) gives you a secret document with intelligence that lists a local shopping mall as a potential terrorist target.
4. A military official gives you the location of a secret CIA facility in your town.
5. Your source in the FBI explains to you in detail the reasons that the terror-alert level has been raised to orange.
6. You receive a letter from a soldier telling you his unit is severely lacking in basic supplies.
7. An airport security supervisor tells you that the new security screeners are not receiving adequate training, and that several security breaches occur every day.
8. You receive a packet from a local university student with instructions for making an atomic bomb.
9. An FBI agent offers to give you a list of the flights that air marshals routinely fly.
10. You learn from a source in the state government that a local pharmacy is manufacturing Ricin for a defense contractor.
11. A county official in Seattle offers to show you the city's terror response plan.
12. You learn the identity of an undercover CIA agent.
13. During the course of an investigative report, you learn that a prominent Marine Colonel is wearing medals on her uniform that she did not earn.
14. The administrator of a veteran's hospital invites wounded American soldiers to talk to you on camera about their experiences.
15. While embedded with troops overseas, you witness prisoners being abused by American soldiers.

NATIONAL SECURITY ARGUMENTS

Directions: The following statements reflect points of view about the right of the press to publish information that might compromise national security. Read each statement, and write "PRO" if the statement reflects a point of view in favor of the right of the press to publish the information. Write "CON" if the statement reflects a point of view against that freedom of the press.

- _____ 1 The First Amendment was not intended to make it impossible for the executive to function or to protect the security of the United States.
- _____ 2 The authority of the executive department to protect the nation against publication of information whose disclosure would endanger the national security stems from...the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.
- _____ 3 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.
- _____ 4 Words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent.
- _____ 5 It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.
- _____ 6 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.

THE PENTAGON PAPERS DECISION

I believe that every moment's continuance of the **injunctions** against these newspapers amounts to a **flagrant**, indefensible, and continuing violation of the First Amendment...Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for 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. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to **curtail** freedom of religion, press, assembly, and speech. In response to an overwhelming public **clamor**, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to **abridge**. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great **bulwarks** of liberty, shall be **inviolable**." The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. 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, able men that they were, 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. In my view, far from deserving condemnation for their courageous reporting, the *New York Times*, the *Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam War, the newspapers nobly did precisely that which the Founders hoped and trusted they would do...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.” No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time. 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, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged...

—Justice Hugo Black