

JUN 19 1971

NYTimes

Silence Coerced By Law?

By ANTHONY LEWIS

"Those who won our independence believed... that the greatest menace to freedom is an inert people, that public discussion is a political duty and that this should be a fundamental principle of the American Government... They eschewed silence coerced by law."

—MR. JUSTICE BRANDEIS.

LONDON, June 18—The press is no more perfect than any other institution. Newspapers can be vulgar or silly or craven; they can cry "freedom of the press" when nothing is at stake but their desire to sensationalize for a profit.

But one need not romanticize the press to understand that the Constitu-

AT HOME ABROAD

tion and history of the United States have given it a special function. That function is the real issue in the case of *"The United States v. The New York Times."*

The American system of government places ultimate faith in the judgment of the public and its elected representatives. The President is not meant to rule; the Framers hedged his great power about, in their conception, with legislative restraints. The Constitution commits even the gravest of foreign policy judgments, a declaration of war, to the popular assembly, Congress.

The assumption underlying that democratic faith is that Congress, and behind it the public, will have the information on which to base informed judgments. But unlike Parliament, Congress cannot directly question the head of the executive. Its ability to get the facts from his departmental subordinates is also limited; when they resist or evade, there is seldom any effective way to compel responsive answers. And the President's personal assistants are generally immune from questioning altogether—even when, as now, one is the principle adviser on a vital national policy.

It is in this informing role that history has cast the press in American democracy. And not only history but the Constitution: the First Amendment's protection of speech and press extends to literary and artistic matters, but its prime purpose was to safeguard freedom of political discussion.

It is no accident, therefore, that great issues in the United States are often framed in the press, when in Britain the forum would be Parliament. The responsibility given by the First Amendment is not always met, but sometimes the press does play the essential part in making possible informed consideration of some large question—a nomination to the Supreme Court, say, or the value of a supersonic transport.

All that is in the background of *"The United States v. The New York Times."* The immediate context makes the issues even more compelling, for it demonstrates how Presidential behavior has strained beyond belief the assumption of Congressional access to information essential for decision on issues of war and peace.

In 1964, President Johnson suddenly asked Congress for a resolution allowing him to take "all necessary measures" against the Communists in Vietnam. He did so on the basis of an alleged attack on American Navy vessels. He told members of Congress that passage of the resolution would prevent enlargement of the war.

We now know that the entire Presidential argument was a tangled web of deceit. The circumstances of the American vessels' presence in the area were concealed, and the fact of any attack was at best doubtful. Far from preventing enlargement of the war, Mr. Johnson had ordered plans to enlarge it and was looking for an occasion to get the necessary authority. Thereafter, he carried the resolution in his pocket and treated it as a declaration of war.

The process, then, came to this: Congress voted what amounted to a declaration of war without being aware it was doing so, without the barest facts and, worse, on the basis

"... the First Amendment's protection of speech and press extends to literary and artistic matters, but its prime purpose was to safeguard freedom of political discussion."

of blatant lies as to the situation in Vietnam and the intentions of the President. So much for the exercise of a grave constitutional responsibility.

And now, the United States Government tells us that, seven years later, it can prevent publication of the truth about how our country slid into a self-destructive war. If that view of the Constitution is right, then there is no effective check on the power of the President.

For what is involved here is not military secrets — "the number and location of troops," in the example given by the Supreme Court of an exception to the rule against censorship. What is involved is national policy, which the Constitution commits to public discussion.

The theory of free debate in a democracy, Holmes said, "is an experiment, as all life is an experiment." But it is ours.