

By DEAN ACHESON

WASHINGTON—More than a century ago Alexis de Tocqueville told us: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

Here the question, both political and ethical—whether a newspaper may properly receive and publish papers illegally taken from the Government—merges into the question whether judges must let the would-be publisher get away with publishing by virtue of the freedom-of-the-press provision of the First Amendment. In this case the ethical question disappeared and the political question became hopelessly simplified into whether publication would give aid and comfort to some enemy. The Solicitor General agreed that his case required him to show that publication of the Pentagon Papers would result in an immediate grave threat to the security of the United States of America.

Justice Stewart: "However it was acquired, and however it was classified?"

The Solicitor General: "Yes, Mr. Justice, but I think the fact that it was obviously acquired improperly is not irrelevant in the consideration of that question. I repeat, obviously acquired improperly."

But he never discussed how that fact was relevant or what conclusions should be drawn from it.

The Chief Justice, however, in his dissenting opinion did so:

"To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret Government documents. That duty, I had thought—perhaps naively—was to report forthwith to responsible public officers. This duty rests on taxi drivers, justices and The New York Times. The course followed by The Times, whether so calculated or not, removed any possibility of orderly litigation of the issues."

Later, counsel for The Washington Post was asked by Justice Stewart: "Mr. Glenden, wouldn't you be making the same argument if your client had stolen the papers?"

Mr. Glenden: "I don't think the source of how we obtained them features in this case."

But the ethical issue, or its ghost, continued to haunt The Times. Exorcism by incantation was tried. Thus Mr. Neil Sheehan:

"This history is public property, not the property of Lyndon Johnson or Robert McNamara or the Bundy brothers or any other public figure involved in the Vietnam war. The story belongs to the people. They paid for it with their lives and treasure. As far as I am concerned, they own it and have the right to know of its contents."

Oratory aside, the Pentagon Papers belong to the United States of America as clearly as does the battleship Missouri or the White House silver. To jump from the assertion that the papers do not belong to any public figure to the conclusion that they do belong to all the two hundred million inhabitants of the United States violates Mr. Johnson's advice to Boswell not "to think foolishly."

The issue between the newspapers and the Government became narrowed by the frenetic conduct of the case to the nature, degree, and immediacy of the danger threatened to the security of the United States and how directly it would follow from the publication. The newspapers insisted that it must be such danger as the breaking of diplomatic relations, war, sinking of ships, attack on military units, or disclosure of war plans and weapons. The Government would have included a wider range of dislocation of diplomatic ne-

gotiations relating to security. Both are practically impossible for the Government to prove or judges to apply with proper regard to the complexity of the problems involved. Two of the six majority judges believed that the public interest would be harmed by publication and that there might be room for a statute to provide some relief.

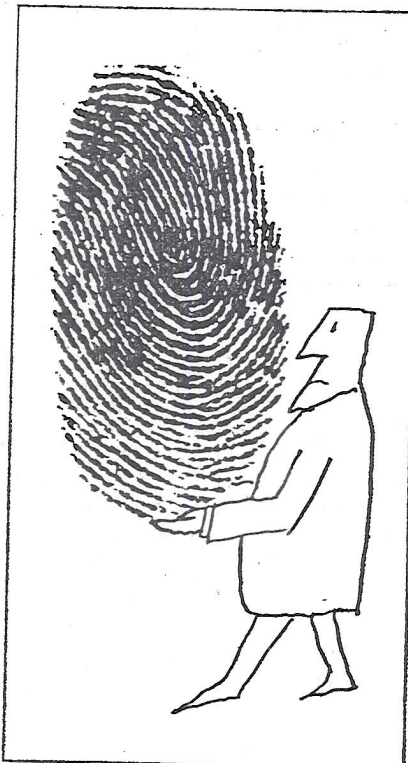
Here is a supreme example of the problems we pose for ourselves by turning every political question—and some ethical questions—into judicial questions. In my lifetime it has been done with the question of monopolistic practices, labor relations, control of alcoholic beverages, race discrimination, control of pornography, determination of election districts, qualifications for voters. All of these questions are too complicated for judicial solution under the formal procedures of courts and the guidance of sibilant phrases such as "contracts and combinations in restraint of trade," "liberty of contract," "equal protection of the laws," "interstate commerce," and so on. Nearly all of these judicial experiments have failed and driven us through painful experience to use—as we should have done in the first place—all the devices of government and the means of social control outside of government.

So it is with freedom of the press. Judges cannot spin from that phrase a solution of the situation resulting from the purloining of the Pentagon Papers. We need a severe Official Secrets Act to prevent irresponsible or corrupt transfer of secret papers from the Government to publishers, a commission of the quality of the Royal Commission recently created in Britain under the chairmanship of Lord Franks, to determine how this present disclosure came about and what laws and procedures we need to prevent its repetition and for the faster declassification and release of most papers.

Finally, the creation of a self-governing body for the press, as in Britain, might be very helpful, headed by a universally respected public figure, past the age of ambition, to stimulate more ethical professional relations with the Government and self-restraint in publishing material ethically undesirable.

In short, what is needed now is more than prohibitions, punishments, or Pulitzer Prizes. Far-reaching improvement of public health in the relations between press and Government is called for.

Dean Acheson was Secretary of State in the Truman Administration.



Saul Steinberg