The Wall of Secrecy Remains

. . . Has anyone gone to jail for freedom of the press lately?

By J. EDWARD GERALD

THE PENTAGON PAPERS case makes clear that when the First Amendment was adopted in 1791 the President and the Congress kept high a security wall around the activities of the departments of defense and foreign affairs. It was built of the same legal materials used by the Tudor and Stuart kings and, instead of being weakened by the spirit of the American Revolution, was reinforced by appeals from the new government for patriotic support.

Did the Supreme Court decision in the New York *Times* and Washington *Post* case on June 30 penetrate the wall? No, the six-man majority did all it could, but it will take political action, not only legal action, to change secrecy habits 200 years old.

The nine members of the Court wrote separate opinions. The true import of their decision becomes clearer when the opinions of the justices are sorted out, some of the positions noted, and a head count made on each position.

1. "The First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by the cases." — Justices Black, Douglas, and Brennan. (The language used here is found in the opinion by Brennan.)

2. The Chief Executive has the responsibility and the power to protect the confidentiality of communication in international relations and national defense. "But I cannot say that disclosure of any of [these documents] will surely result in direct, immediate, and irreparable damage. . . ." "I would have no difficulty in sustaining convictions under [the criminal code] on facts that would not justify . . . prior restraint. It is a criminal act to communicate, without authorization, a document 'relating to the national defense' defined by the statutes, or willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it." . . . Such information "is obviously not limited to that threatening 'grave and irreparable' injury to the United States." — Justices White, Stewart, Burger, Blackmun. (It would seem from the opinions that Justice Harlan might move to this group on the same facts if criminal prosecution were to be reviewed.)

3. At least in this case, the Court lacks the power to enjoin because the government asks the Court, by this decision, to make law which would justify the requested injunction. — Justice Marshall. (Justice Marshall, in limiting his opinion narrowly to this case, gave no clue as to his probable position on criminal prosecution based on the same facts.)

4. "I would continue the restraints on publication . . . long enough to act responsibly [on] matters of such national importance as those involved here. . . . 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 . . . and the judiciary may not properly . . . redetermine for itself the probable impact of disclosure on the national security." . . . The scope of review must be exceedingly narrow. — Justices Harlan, Burger, Blackmun.

5. "What is needed here is a weighing upon properly developed standards [the clear and present danger test is prominently mentioned but not adopted] 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 conceded that there are situations where restraint is in order and it is constitutional." — Justice Blackmun.

Summary

No injunctions permitted by the First Amendment — 3 votes

The question of injunction to one side, prosecution appears appropriate under statutes or when the President identifies publication of a particular paper as dangerous to the country — 4 votes

THE AUTHOR

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Government asks the Court to make the law in this case and then to enforce it; that request cannot be granted — 1 vote

Prosecution appears on narrow grounds to be appropriate; we have been rushed so much in this case that the injunction should have been used to give the court time to study and to adjudicate — 1 vote

The press, as a result of the case, faces a question of future strategy in attacks against the "wall of restraint" which surrounds the Executive Branch and the Congress.

The campaigns of SDX, the American Society of Newspaper Editors and others led by Harold L. Cross, Russell Wiggins, Herbert Brucker, V. M. Newton, Clark Mollenhoff, Congressman John E. Moss, and others, obviously have not been able to make significant inroads into the classification habits of the Executive Branch. The best way, and the way most likely to obtain lasting results, is through political action, sending to Washington members of Congress who believe in openness and in government by the people.

But if the press wishes it can proceed on a case-by-case basis until new and more liberal definitions are established by the courts. Chief Justice Burger, in his courteous rebuke to the New York *Times* and, by inference, to the press as a whole, suggested that the *Times* should have informed the government it had the papers and then negotiated for their declassification.

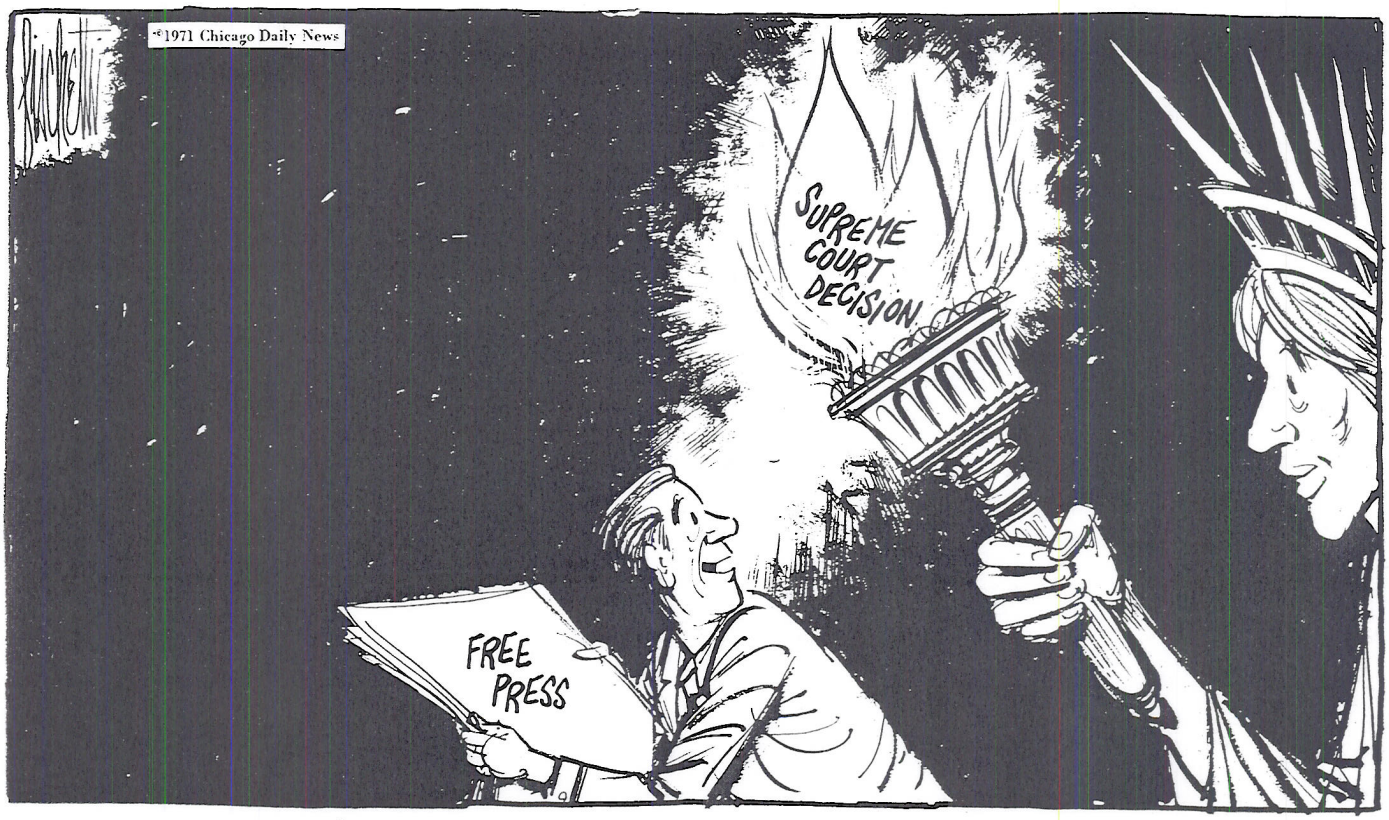
If additional secret papers find their way to the press, editors can again make their own determination of the risk to security and diplomatic protocol and negotiate as Justice Burger suggested. If declassification is refused, judicious publication can proceed, putting on the government the burden of prosecution and leaving the eventual outcome to the great American jury.

The risks in this procedure are considerable, but seem to be a way the press, following the precedent of others protected by the First Amendment, can learn what it may and may not legally publish. At the present time, no one knows. A few key cases, coupled with adequate publicity, might persuade the Congress and the President to reconsider their classification habits.

If, as President Kennedy said, more publicity might have saved him from the Bay of Pigs, more news and less secrecy might have saved Lyndon Johnson and a generation of Americans from frustration and bitterness. The press campaign for reform of the classification system, despite the fact that 218 votes is a majority in the House of Representatives, has been confined to Washington and a few volunteers have done the work — a pitifully small cadre in view of the size of the task.

Freedom of religion, also guaranteed by the First Amendment, has been extended by the martyrdom of Jehovah's Witnesses and of conscientious objectors to military service. The Court usually accepts professions of belief as sincere, and provides legal relief, when an individual is willing to go to jail for them.

The press has been living on the reputation of John Peter Zenger long enough. Has anyone gone to jail for freedom of the press lately? ■



"I WAS JUST ABOUT TO CURSE THE DARKNESS..."

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