LATE RETURNS:

Another Look at 'The Times'

By Nat Hentoff

On the day of the Supreme Court's 6-3 decision allowing the publication of the Pentagon Papers to go forward, *Times'* publisher Arthur Ochs Sulzberger proclaimed his reaction to the decision as "one of complete joy and delight."

For some of the rest of us, as Mel Wulf explains elsewhere in this issue, the joy was decidedly muted. In my own case, the more I re-examine that day's decisions (the use of the plural is important) and their implications, I am more apprehensive than joyful.

It cannot be over-emphasized that, as Tom Braden wrote in the July 6 *Washington Post:* "... the line-up on the court is really six to two against absolute right to free expression. (Mr. Justice Marshall did not confront the issue, choosing instead to argue that the power of the executive branch did not extend to injunction.)"

For this journalist, the key lines in all the decisions that day were from Justice Black's (with Justice Douglas joining): "... it is unfortunate that some of my brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."

Qualifications

Only Black and Douglas affirmed the First Amendment rights of the press without qualification. In addition, I.F. Stone emphasizes, "five of the nine Justices encouraged the government to believe that they would give it wide latitude if it sought to punish editors for publishing official secrets *after* they did so instead of trying to enjoin them in advance."

Only two Justices are *unqualifiedly against prior restraint. At least five are willing* – some quite eager – to punish after publication in certain instances.

It is no wonder that Solicitor General Erwin N. Griswold was heard to say as he left the Court that day: "Maybe the newspapers will show a little more restraint in the future."

The Times, it should be noted, was quite satisfied with the verdict because *The Times* has, in my view, a markedly limited understanding of the First Amendment. In a lead editorial (July 1), *The Times* revealed how content it is with so small a victory in so large an issue: "The Supreme Court did not hold that the First Amendment gave an absolute right to publish anything under all circumstances. Nor did *The Times* seek that right. What *The Times* sought, and what the Court upheld, was the right to publish these particular documents at this particular time without prior Governmental restraint."

Strange Argument

Accordingly, in Professor Alexander Bickel, *The Times* did indeed have a lawyer reflecting its own priorities – if not the Constitution's, as some of us read it.

From the June 26 oral arguments –

Justice Douglas: "Why would the statute make a difference, because the First Amendment provides that Congress shall make no law abridging freedom of the press. Do you read that to mean that Congress could make some laws abridging freedom of the press?"

Mr. Bickel: "No, sir. Only in that I have conceded, for purposes of this argument, that some limitations, some impairment of the absoluteness of that prohibition is possible, and I argue that, whatever that may be, it is surely at its very least when the President acts without statutory authority because that inserts into it, as well–"

Justice Douglas: "That is a very strange argument for *The Times* to be making. The Congress can make all this illegal by passing laws."

Were I the publisher of *The Times,* I would have engaged Professor Thomas Emerson. In any case, what happened, in I. F. Stone's terms, is that "no one took the First Amendment as his client."

Other Briefs

No one in the front lines, that is. There were two other sets of arguments – unfortunately paid scant notice by the press – that did concern themselves with the fundamental First Amendment issues. One was that of 27 members of Congress as *amici curiae*, filed by Representative Robert Eckhardt of Texas and Professor Thomas Emerson. The other was the *amicus curiae* brief of the American Civil Liberties Union. I have not yet had access to the full brief filed for the Congressmen. I have read the probing ACLU analysis; but even the ACLU, I believe, yields too much. As Aryeh Neier distills the essence of the ACLU's argument: ". . . even if the test of danger[to the nation] is met, no information may ever be suppressed if it 'is of value in permitting citizens to render an informed judgment on public issues'."

This is far better than Bickel's formulations, but we are all much safer standing with Justice Douglas's view (expressed in his decision) that there is "no room for governmental restraint on the press."

No room means no room. And I wish the ACLU had said that – without proposing tests.

A further element of this case, and its far from completely joyful resolution, is the fact that for the first time in a case of this kind, the government was allowed to present a considerable amount of its evidence in secret. Since only two Justices came out flatly against prior restraint under any circumstance, I see no reason why the Government cannot use this *in camera* procedure again at another time when it has – from its viewpoint – a "stronger" case.

Plaintiff Controls

Consider, therefore, the precedent that has already been set. I quote from the Eckhardt-Emerson brief: "Only the defendants and their counsel were permitted to attend the *in camera* session. More than that, *no one was allowed to be present unless he was first given security clearance by the government.* Hence the plaintiff in the case was able to dictate what individual defendants, and what counsel, were entitled to participate in determination of the issue. Such procedure can hardly be recommended in a democratic society." (Emphasis mine: N.H.)

In the aftermath of this case, there will, I expect, be more Daniel Ellsbergs and Neil Sheehans. I am not as certain that there will be a significantly greater number of courageous publishers. And if the Attorney General, encouraged by some of the Justices of the Court, does bring criminal charges against certain reporters and newspapers, we may even have fewer publishers of courage next time than we had this time around.

So it was hardly as famous a victory as may have at first appeared. There will be additional basic battles for the First Amendment rights of the press. I am reliably informed, incidentally, that if Neil Sheehan is charged criminally by the Government, he will hire his own attorney rather than counsel selected by *The Times.*

Mr. Sheehan, as he has often demonstrated, is a most intelligent man.

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