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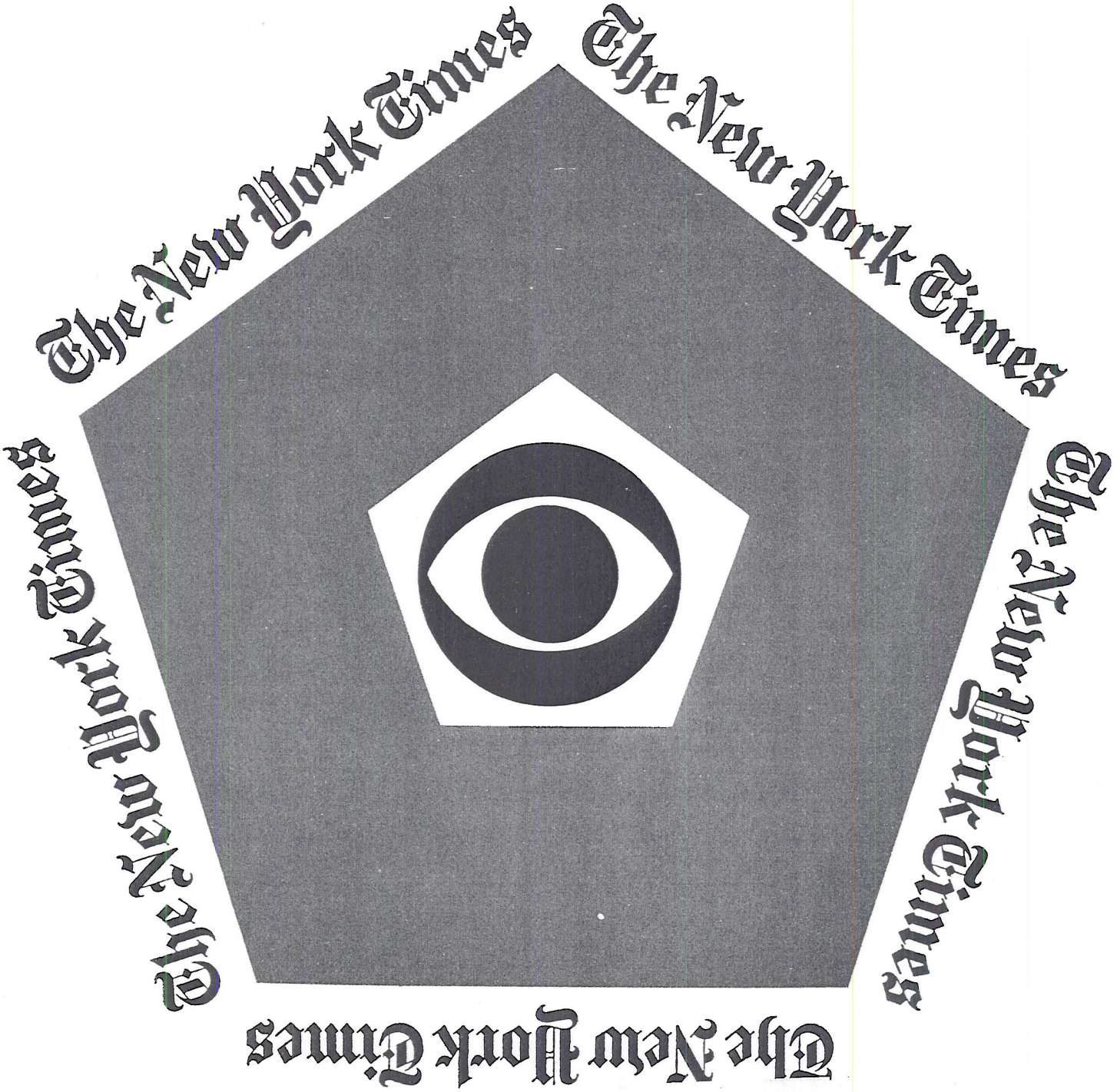

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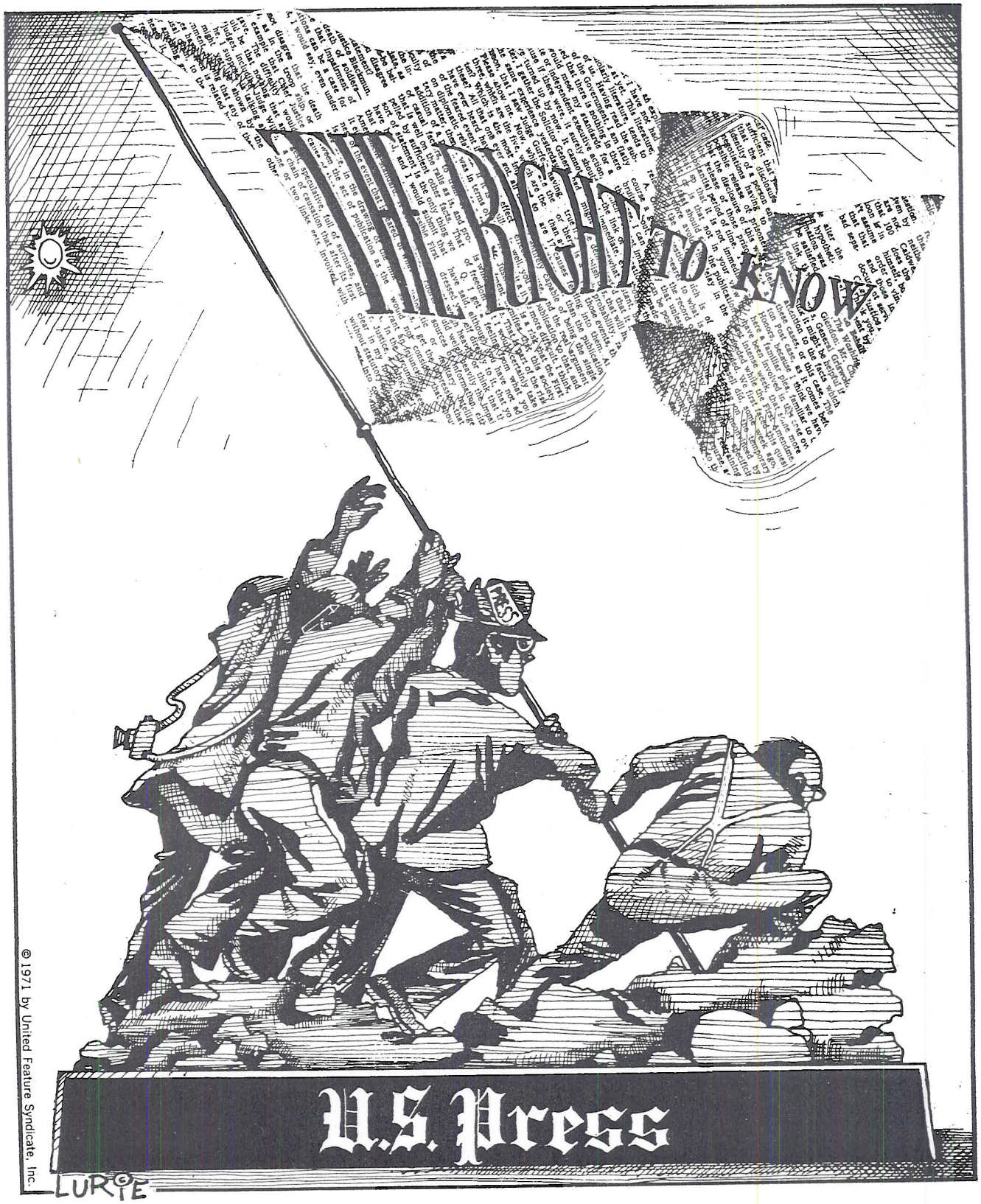

(Ranan Lurie's cartoon is reprinted with permission of United Feature Syndicate.)

FREE AT LAST, AT LEAST

By JACK C. LANDAU

"Maybe the newspapers will show a little more restraint in the future."

— U.S. Solicitor Gen. Erwin N. Griswold

LAST JUNE 30th, at 2:30 P.M., Chief Justice Warren E. Burger looked up at the crowded Supreme Court chamber and delivered the Court's opinion in the cases of The New York Times Co. v. the United States, and the United States v. The Washington Post Co. By a vote of 6-to-3, the Supreme Court dissolved restraining orders against the *Times* and the *Post* which had prohibited them from further publication of the "Top Secret" 7,000-page, 47-volume "History of U.S. Decision Making Process on Vietnam Policy."

The *Times* and the *Post* immediately announced that their partially stilled presses would roll again. The Boston *Globe* flashed the decision to an assistant editor waiting inside the vault of The First National Bank of Boston where the documents had been stored by agreement with a Boston Federal Court.

The decision was, as both the *Times* and the *Post* reported in their news stories, a "historic" victory. In the 182 years of this republic, no President (and President Nixon had personally approved the law suits) had possessed the political audacity or constitutional temerity to ask the courts to silence a newspaper; nor had any federal court, at the request of the government or any other person, issued a prepublication censorship ban against an established news publication.

For the time being, that great First Amendment tradition had been reaffirmed, although, under the circumstances, somewhat tenuously.

The decision was greeted with "complete joy and delight" by Arthur Ochs Sulzburger, the publisher of the *Times* which ran an accompanying editorial claiming a "ringing victory for freedom under law."

Mrs. Katharine Graham, the publisher of the *Post*, was considerably more restrained — "We are terribly gratified by the result" — as was the *Post's* accompanying editorial entitled "Free — At Last" which pointed out: "There is not much comfort, let alone clear cut law, to be found in yesterday's outcome."

Within the next week, as the emotional heat of victory receded into the cool light of reason, more and more publications, such as *Newsweek* and *The Wall Street Journal*, were saying — quite correctly — that the *Times/Post* ruling was narrow, limited and vague. Far from making the press "stronger" than before — as the *Times'* lawyer, Alexander Bickel, claimed — the traditional interpretation of freedom of the press was probably weakened by the whole affair.

After all, the Nixon Administration had succeeded with action in an endeavor which no previous government had even dared to suggest. It had silenced four of the most respected newspapers in the nation: The *Times* for 15 days, the *Post* for 11 days, the *Globe* for 8 days and the St. Louis *Post Dispatch* for 4 days. It had used the threat of a law suit to induce the *Christian Science Monitor* to voluntarily censor itself. And, despite the firmest constitutional traditions against prepublication censorship, it had convinced a majority of five judges of the influential U.S. Court of Appeals in New York City and three Supreme Court justices that the bans should be extended even longer.

The Decision:

Balanced against this unprecedented series of government victories, the Supreme Court issued the following "historic" four-sentence ruling:

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"(1) Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.

"(2) The government 'thus carries a heavy burden of showing justification for the enforcement of such a restraint.'

"(3) The District Court for the Southern District of New York in The New York *Times* case and the District Court . . . and the Court of Appeals for the District of Columbia Circuit in The Washington *Post* case held that the government had not met that burden.

"(4) We agree."

That's all. There is none of the famed Supreme Court rhetoric upholding "the most treasured traditions of a free society," nor any stinging condemnations of government censorship.

More importantly, in terms of legal precedent, there is no disapproval of the original restraining order against the *Times* issued on June 15th; no criticism of the extensive in-chambers secret hearings from which the public and the press were excluded; no constitutional standard for what the "burden" of proof should have been for the government; no discussion of the facts upon which the government based its case — and thus no guidelines for editors, judges and lawyers who may be faced with similar problems in the future.

In short, the opinion says only that the government failed to carry its (undefined) "burden" of proof that the (undefined) national security would be (undefined) endangered on the specific facts in this case: facts which are forever sealed in secret briefs and secret transcripts of closed hearings in judges' chambers.

The decision cited only three prior cases, of which the most famous is the 1931 ruling in Near v. Minnesota. The Near case stands for a dual proposition: that "liberty of the press . . . has meant, principally, although not exclusively, immunity from previous restraints or censorship"; and also that the First Amendment protection "is not absolutely unlimited" because it may be infringed upon "if the security of the community" is threatened — exactly what the government claimed and the *Times/Post* challenged, which is how the whole case started in the first place. Thus, even the Supreme Court case citations are a circular enigma.

Concurring and Dissenting Opinions:

Any further aid and comfort which the press may obtain from the *Times/Post* case comes from the six majority concurring opinions.

Two justices, Hugo L. Black and William O. Douglas, restated their "absolutist" position that the First Amendment bars prepublication censorship under all circumstances.

Two justices, William J. Brennan Jr. and Thurgood Marshall, said that the government had not presented sufficient evidence on June 15th to justify even the initial ban against the *Times*.

Two justices, Byron White and Potter Stewart, the so-called "swing vote" justices, said that the total evidence presented by the government in four previous hearings (two District Courts and two Courts of Appeals) showed that the information was of "substantial damage to public interests" but did not pose a "grave and immediate" danger to the national security.

The three dissenting justices were more consistent. They complained that the "feverish" pace of the litigation deprived the Supreme Court of sufficient time to carefully weigh the issues. They would have sent the cases back for further hearings in the lower courts. They were Chief Justice Burger and Justices John M. Harlan and Harry C. Blackmun.

Perhaps a more helpful way to understand the diverse opinions in the case is to synthesize the nine separate opinions by issues:

- Did the government present enough evidence on June 15th to justify the initial ban against the *Times*? yes, 4-to-4 (1 unsure).
- Did the government present enough evidence after hearings in the District Courts and Courts of Appeals to justify a long-term ban against the *Times* and the *Post*? no, 6-to-3.
- Could Congress pass legislation giving the courts the power to censor newspapers, at least temporarily, under circumstances similar to the *Times/Post* case? yes, 6-to-2 (1 unsure).
- Could the Court, in the *Times/Post* case, permamently ban the Pentagon Papers if the government had presented enough evidence to show a "grave," "immediate," and "direct" threat to the national security? yes, 7-to-2.

Effects of the Times/Post case:

It is fairly safe to assume that there will be no duplication of the *Times/Post* case in the near future, with 7,000 pages of classified documents falling into the hands of the press.

But that improbability hardly means that the *Times/Post* decision will have no practical effect on the press in the future.

THE AUTHOR

Jack C. Landau, 37, a graduate of Harvard College and the New York University Law School, worked for the the New York bureau of the Associated Press, the Washington Star *and the Washington* Post *before joining the Newhouse National News Service, Washington, D.C. in* 1966 *as Supreme Court correspondent. For a year and a half he served as director of public information for the Department of Justice then rejoined Newhouse in October* 1970. *He received the Sigma Delta Chi Distinguished Service Award for Washington correspondence in* 1967 *for a seven-part series for Newhouse entitled "G.I. Justice — A Second-Class System." The American Bar Association gave him its Silver Gavel Award the same year for "outstanding reporting of the Supreme Court of the United States." He was a Nieman Fellow at Harvard University in* 1967-68.

First: Both the *Times* and the *Post* in their editorials called for improved procedures within the Executive branch to assure – to some greater degree – that the "top secret" stamp is not placed willy-nilly on millions of unimportant documents from SALT talk outlines to the National Security Council luncheon menu.

This may mean that the press will have access to more government information. But there is also a danger. A "secret" classification is within the sole discretion of the Pentagon, State Department and other executive agencies. It is a self-serving declaration by the Executive branch that publication of the document will endanger the national security, a declaration that the *Times* and *Post* contested and rebutted.

The government, even under improved procedures, should be forced to prove in court on a document-by-document basis that the information is so damaging as to justify censorship. No editor should delegate to the Executive branch what he may and may not print without at least an adversary hearing in a court.

Second: pursuant to the suggestions of three justices, there may be a congressional law authorizing the federal courts to issue short restraining orders any time a rubber-stamped "secret" document is to be published.

This would pose the same type of constitutional problems as the *Times/Post* case, except the press would be fighting the legislative rather than the executive branch.

One proponent for this type of law was Mr. Bickel who told the Supreme Court, during the oral arguments: "I would wish that Congress took a look at the . . . Espionage Acts and cleaned them up so that we could have statutes that are clearly applicable . . ."

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

There is a strong tradition in constitutional law, strongly championed by the late Felix Frankfurter, that Congress has somewhat more power to temporarily limit individual rights than the President alone.

In the *Times/Post* case, the President was asserting his "inherent power" under the Constitution to protect the national security, separate and apart from congressional authorization to seek a censorship ban (an authorization, by the way, which Congress specifically rejected when it passed the Espionage Acts).

Third: The government may indict New York *Times* reporter Neil Sheehan and those reporters on seven other newspapers who might have conspired to illegally obtain the government documents. Any such prosecutions, like the indictment against Dr. Daniel Ellsberg, would probably be brought under a section of the Espionage Act which makes it a crime to conspire to "willfully communicate" documents "relating to the national defense" if the documents are obtained from a person having "unauthorized possession."

Executives of the *Times* and *Post* have said privately that their reporters did not participate in any unauthorized removals of the documents. Furthermore, there is a major constitutional case – now pending before the Supreme Court – on whether it is a violation of the First Amendment to force a reporter to disclose his sources. In addition, one section of the Act appears to say that the document has to be communicated with intent "to believe (it) could be used to the injury of the United States or to the advantage of any foreign nation."

Under any circumstances, it will be difficult to prove that the *Times* and the *Post* published the articles to injure the nation. As the *Times*' bureau chief, Max Frankel, said on the NBC News broadcast: "The fact is, that nobody, not in the government and not in the press, can play God and is omniscient enough to know what the consequences of truth are . . ."

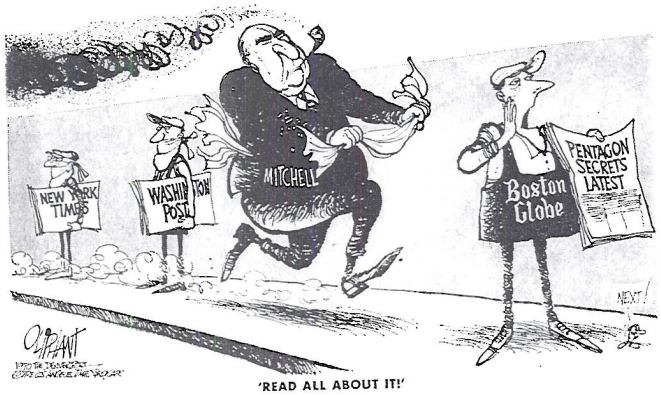
In the *Times/Post* opinion, five justices pointed to the criminal laws as alternatives to censorship. Even with such an invitation, one fact seems clear: the criminal cases against the reporters would be such close ques-

> "And what other government officials in what other day – perhaps men of less good will than those currently holding positions of trust – will seek to impair the people's right to know what their government is doing – and for what reasons?"
>
> –RICHARD P. KLEEMAN
> *SDX National Chairman*
> *Freedom of Information*

—Herblock, in The Washington Post

'Follow That Car—And That One—And That One—'

—copyright 1971 by Herblock in the Washington Post



'READ ALL ABOUT IT!'

(Patrick Oliphant cartoon, Denver Post)

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tions legally that a decision to indict would be a purely discretionary political determination by the Attorney General.

Fourth: It is entirely probable that a newspaper may obtain a limited amount of secret information, such as the SALT talks strategy, and that government would again attempt to ban publication.

What would probably happen would be a total replay of the *Times/Post* litigation with a short restraining order, a secret trial, an appeal and a Supreme Court appeal. The danger here is that the SALT talk story may not be an historical document where a short delay in publication poses no problems to the public's right to know about its government. The whole value of its publication may be lost in a one-week delay.

Another real possibility is that the principles of the *Times/Post* case could encourage restraining orders at the state and local level.

Suppose, for example, that Washington, D.C. has a tense racial situation and the *Post* has a picture of a white policeman brutally beating a pregnant, blind Negro nurse. The city government goes into court and alleges that publication of the picture would cause a riot – a danger to the "security" of the city.

It must be remembered that the grandfather exemption doctrine, authorizing prepublication censorship, is Justice Holmes' famous statement permitting a suspension of free speech if there is a "clear and present danger" to society: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic." And he wasn't talking about a theater attended by SALT talk negotiators. He was describing the general doctrine by which any government – federal, state or local – has a right to protect itself from dire disorder.

In our racial tension example, it seems likely that a judge would at least briefly restrain the *Post* from publishing the picture; just as courts have banned political demonstrations which posed threats to communities.

A Footnote:

Much of the problem in the *Times* portion of the case is that the *Times* seemed to treat the proceedings more like a leisurely scholarly debate at the Yale Law School, where Mr. Bickel teaches, than like an outrageous and illegal gagging of a great newspaper.

By refusing to appeal the original four-day ban on the *Times*, he conceded that the New York court was freezing the "status quo" – when the "status quo" in fact was the unfettered right to publish which would have been maintained by no injunction.

Perhaps, the most remarkable incident in the whole affair took place Friday morning, three days after the ban was imposed, when Mr. Bickel argued that the *Times* was now "irreparably injured" in an intolerable manner – not because of the injunction alone, but because the *Post* had started publishing the documents.

"It seems to us," said Mr. Bickel, "that the radical change in the situation . . . is the readers of the New York *Times* alone in this country are deprived of this story. This is a degree of irreparable damage which varies, is different . . . altogether from the situation that confronted your Honor on Tuesday last when you granted the temporary restraining order."

From this argument, one may deduce that the *Times'* lawyer was claiming that a critical factor in freedom of the press may not be the inherent right of each newspaper to publish, but may depend upon whether the competition can match the story.

It is important to remember that precise situation on June 15th. The government came to court alleging danger to the national security but without a single, solitary fact to back up that statement. There was no allegation that, for example, "Document A – 007 would ruin prisoner exchange negotiations," or that "Document B-007 would disclose the key to a code" – nothing but the conclusory statements of Pentagon and State Department officials about the national security when the State Department had not even found its copy of the study.

And here comes Mr. Bickel armed with the great constitutional tradition against prepublication censorship. He sympathizes with the government's position that it needs several days' time to familiarize itself with the facts in the seven-million word study. Therefore, he does not demand an immediate trial within 24 hours to elicit the facts showing a national security threat; nor appeals when the judge, without any facts, silences the

SCENE IN THE composing room as the New York Times got the word and also got ready to print the Pentagon Papers after the Supreme Court decision was announced.

(New York Times Photo by Edward Hausner)

Times for one, two, three, four days; nor asks the judge to certify immediately the restraining order on appeal (under a special rule which permits injunction appeals when "there is substantial ground for differences of opinion" on the prevailing law; nor claims that the injunction is constitutionally void and advises the *Times* to publish anyway and ultimately risks being held in contempt of court — a risk which was only recently taken by one of the *Times'* own reporters, Earl Caldwell, when he refused to turn over his notes to a federal grand jury in San Francisco; and by CBS President Frank Stanton when he refused to give the House Interstate and Foreign Commerce Committee out-takes of "The Selling of the Pentagon."

Judge Gerhardt Gessell, who only took eight hours in refusing to enjoin the *Post*, emphasized that time was of the essence and that the right to publish was so precious that no one can "measure the effects of even a momentary delay."

Compare this statement with Mr. Bickel's refusal to be rushed, or as he told the Supreme Court approvingly: "There is no evidence I know of that Judge (Murray) Gurfein rushed the proceedings" by his four-day delay. To which one might inquire: "And why not?"

Stated more dramatically: Suppose the *Times* had printed 1,000 test-run copies of the newspaper including the Pentagon Papers; and then, in conformity with the court order barring publication, had publicly burned these 1,000 copies every night, or had permitted federal marshals to seize the 1,000 copies every night. That is the issue in the original restraining order which does not seem to have made any impact. The public did not appear to understand that this was censorship by gentlemen's agreement. If the *Times* had wanted to be tough and to visually demonstrate to the public that censorship was not a lot of prolix legalisms, it should have symbolically destroyed the paper publicly for that is what the federal court order actually did.

And what would the Nixon Administration have done then with nation-wide headlines reading: "U.S. Seizes and Burns N.Y. Times"?

A *Times* official explained that the newspaper did not appeal for a number of reasons: 1. It thought the government was being "reasonable" in asking for time to discover what was in the 7,000 pages. 2. Judge Gurfein was "hostile" and it did not want to offend him by appealing his ruling. 3. The *Times* thought it might lose in the Court of Appeals on the June 15th restraining order but might win later (in fact, the Court of Appeals ruled against the newspaper).

While these arguments speak for themselves, indicating how aggressive the *Times* wanted to be, Mr. Bickel explained it this way:

"In order to appeal you have to show a truly irreparable injury. A truly irreparable injury might result from a restraining order, for example, against the sale of some stock which, if kept in effect, would destroy the value of the stock. We didn't think we could show this type of injury." (By comparison, the *Post* informed the U.S. District Court in Washington that it would not agree to any sweetheart injunction.)

Justice Brennan, in his opinion, saw the danger of the *Times'* position and warned: "Our judgment in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the government . . .

"The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever."

Unfortunately, only three other justices appeared to agree with him.

The damage that was done when the *Times*, in effect, consented to the four-day ban was soon apparent. The Court of Appeals in Washington issued a three day-stay; Boston a week, St. Louis 10 days.

The *Times* agreed to the ban so that it, the District Court and the government would have the "opportunity" to study the evidence in more detail.

And thus we find Justice Brennan, who handed the press its great victories in the New York *Times* v. Sullivan and Rosenbloom v. Metromedia, being more protective of the right to publish than the *Times'* own lawyer. He said:

"Every restraint issued in this case, whatever its form, has violated the First Amendment — and none the less so because that restraint was justified as necessary to afford the court an opportunity to examine the claim more thoroughly."

So the next time a court enjoins your newspaper for a week or so and you complain, don't be surprised if the judge tells you to calm down. After all, how can your First Amendment rights be damaged by a temporary restraining order when a similar order did not pose an "irreparable injury" to the New York *Times* — that is, not until the *Post* got hold of the story.

And if you want to avoid the whole affair, take the advice of a Boston *Globe* editor who said that the courts will never be able to censor you if you "dump it all at once." Today, that still may be the best answer. ■

SAYS COLUMNIST FLORA LEWIS:

"Why didn't we see during the build-up in Vietnam that it was an open-ended commitment, as no-longer-so-secret records show, and why did we supinely accept official claims that only another 10,000 or another 25,000 troops would be sent? Why did we wait for the underground press to break the stories of the huge stockpile of poison gas and the trail of heroin along CIA-run routes in Laos into the blood-stream of thousands of GI's in Vietnam?

"Why did we wait for Ralph Nader to find out what's wrong with our autos and for the surgeon-general to find out that cigarets can cause lung cancer and for riots to show how people were living in the ghettos?

"These are the kinds of questions the U.S. media are having to face, mostly from the young reporters who are willing to look about them as well as look at public relations-type handouts.

"They haven't been asked enough yet, or persistently enough. And if what Agnew sees in the responses are indeed signs of 'paranoia,' it's from having to acknowledge such a bleak record."