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WHAT'S FIT TO PRINT:

Tragedy of 'The Times'

By Melvin L. Wulf

The attempt of the Nixon administration to prohibit the publication of the Viet Nam papers was the first direct act of political censorship by the federal government since the founding of the nation. If it had succeeded, the government would have taken a giant step toward the permanent erosion of the First Amendment. The episode was a great event in American history in general and in constitutional history in particular. That the Nixon administration would try to pull it off confirmed the most pessimistic assessment about the administration's attitude toward civil liberties. That the courts refused to permit it says something about the independence of the judiciary and about the extent to which the ideas embodied in the First Amendment have taken root in the law. I only wish it could be said with more confidence.

In terms of the final outcome of the whole dramatic event one's first impulse is to compose a stirring mass in praise of the American judicial system. But closer examination of the ultimate decision in the Supreme Court leads to the conclusion that a small motet might be more appropriate. For the fact is that we—the public—won the case by only a little more than the skin of our collective teeth and we have no firm assurance that in some future case this Supreme Court would not tolerate the suppression of similar documents under other conditions. One must come to this conclusion, even if reluctantly, by merely counting noses on the Court as they are exposed in the nine opinions which each of the Justices separately wrote in *The New York Times* case.

Absolutist

Only Justice Black said unequivocally that prior restraints on the press are constitutionally impermissible at all times and under all circumstances. He said, "The Government's power to censor the press was abolished [by the First Amendment] so that the press would remain forever free to censure the government." Remarking upon the government's claim that the courts had the power of censorship even in the absence of any congressional statute, Justice Black said, "To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure'."

Justice Douglas was a bit more equivocal. Although he opened his opinion by stating that the First Amendment "leaves . . . no room for governmental restraint on the press," he examined in detail the statutes which the government claimed gave it the power to censor publication of the Viet Nam papers. He concluded, of course, that the asserted statutory basis was totally inapplicable, at least in peacetime, but suggested that there might be other factors to be considered in time of declared war.

Justice Brennan generally took the same position as Douglas, but he made his indecision rather more explicit. He asserted that there should have been no temporary or permanent injunctions issued at any time during the litigation because the Government's claims, at best, asserted that "publication of the material . . . 'could' or 'might' or 'may' prejudice the national interest in various ways."

"But the First Amendment," said Brennan, "tolerates absolutely no prior ju-

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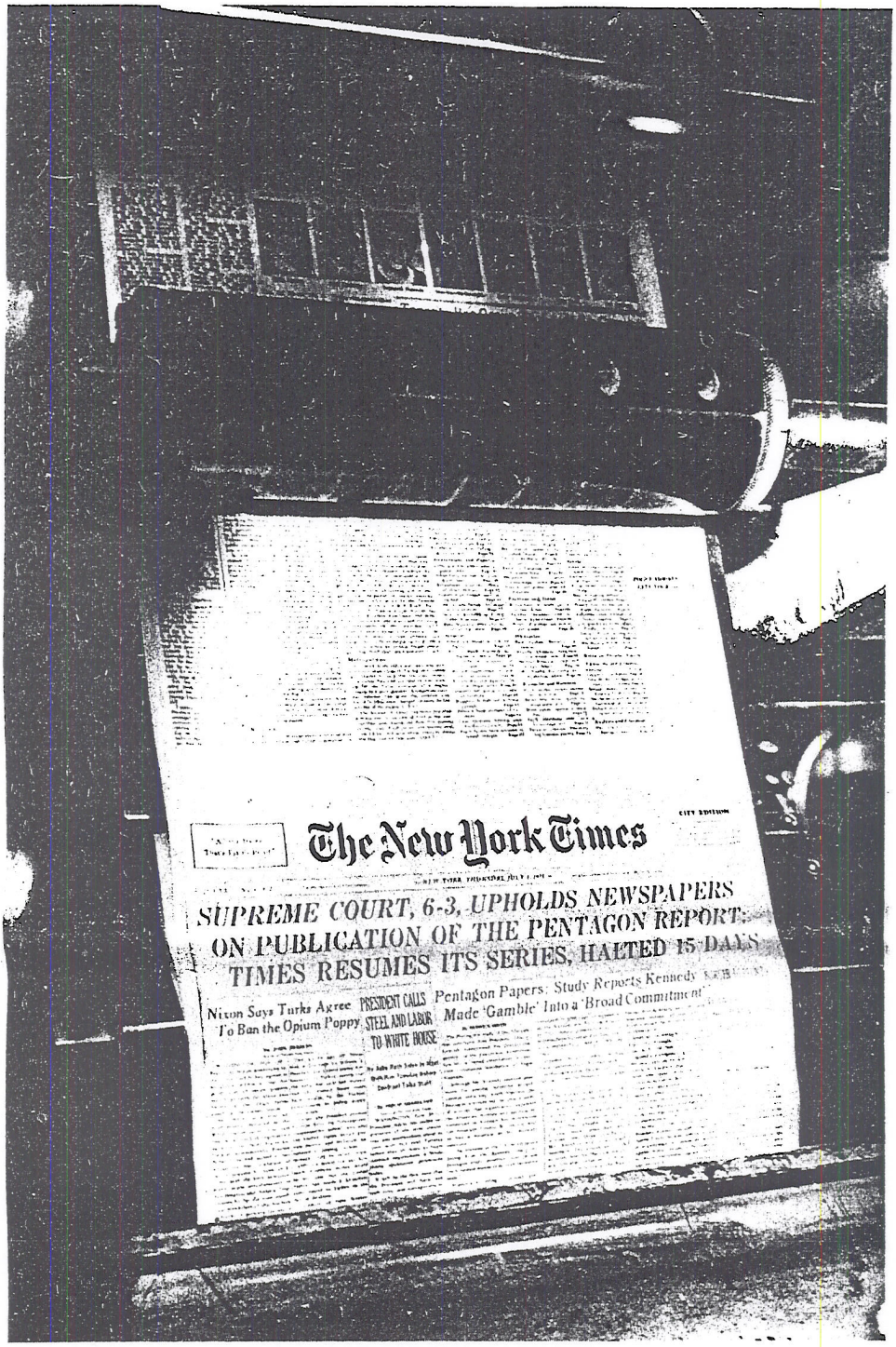

Newsweek Photo by Bernard Gotfryd

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dicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." Then, casting about for examples of such "untoward consequences," he referred to sailing dates of transports, and the number and location of troops when "the Nation is at war," and to "information that would set in motion a nuclear holocaust." His conclusion, finally, was that "only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."

No Statute

Justice Marshall managed to write an opinion in which he referred only once to the First Amendment, and then only for the purpose of rejecting the idea that it was "the ultimate issue in this case." Marshall preferred to decide the case on the ground that "Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here . . . When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress." There is no hint in the opinion of what Justice Marshall would have felt about the constitutionality of such a statute had it been passed.

The votes that swung the balance against suppression were cast by Justices Stewart and White.

Stewart acknowledged that a free press "most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people." But on the other hand, "it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense requires both confidentiality and secrecy."

Stewart made it clear, however, that he thinks there is too much secrecy practiced: ". . . the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained." Alluding to the absence of any Congressional statute authorizing "civil proceedings in this field" and clearly stating that he would not consider such a statute to necessarily bear a presumption of unconstitutionality; and noting his agreement with the government's claim that publication of some of the Viet Nam papers would not serve the national interest, he nonetheless concluded that he could not "say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."

Heavy Burden

Justice White got to the point in the opening paragraph of his opinion. First, he denied that the First Amendment would in every case prohibit an injunction against publication of "government plans or operations"; second, he thought publication of the Viet Nam papers would "do substantial damage to public interests"; lastly, he concluded that the "United States has not satisfied the very heavy burden which it must meet to warrant an injunction . . . at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these." Referring, however, to the availability of criminal statutes (from which, he warned, *The New York Times* and *The Washington Post* would not be immune should they continue publication), White seemed hardly to discourage prosecution by noting: that "the government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way."

On the basis of those six votes, based upon a variety of reasons, including at best only three predictable votes against prior restraints in *most* cases, and two votes based on a judgment that publication of these documents as a factual matter did not promise the grave but undefined harm that would justify suppression, the restraints against *The Times* and *The Post* were lifted.

Melvin L. Wulf, as ACLU legal director, has engineered many of the First Amendment landmarks of the past decade.

Dissenters

Of the three dissenters, the Chief Justice wanted the cases sent back to the district courts for more thorough review of the government's claim that publication would endanger the national security.

Justice Harlan, who thought "the Court has been almost irresponsibly feverish in dealing with these cases," would have ruled against the newspapers on the ground that the Court exhausts its constitutional duty and must enjoin publication once it is satisfied that the "subject matter of the dispute does lie within the proper compass of the President's foreign relation power," and

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." That, said Harlan, is the extent of the Court's "duty to protect the values of the First Amendment against political pressures."

Justice Blackmun, also, thought the cases had been decided too hastily and would have sent them back for presentation of more evidence. Blackmun capped off his opinion by lecturing the two newspapers about "their ultimate responsibilities to the United States of America" and threatened to hold them responsible for the death of soldiers, the prolongation of the war, and delay in freeing American prisoners should they dare continue publication—as if there had never been a single casualty before *The Times* decided to publish the documents.

Easy Case

The disappointment in all these opinions is that several of the Justices apparently had a tough struggle with their consciences and principles just to reach the right result in this case, an easy one, and went out of their way to assure us that where the "national security" was similarly at stake in future cases, they could well come to a different conclusion. They even mentioned that they were sure to treat any criminal prosecutions which might arise from publication of the Viet Nam papers differently from the government's efforts to secure an injunction.

I would be more confident about the strength of judicial hostility to prior restraints upon the press if a majority of the Justices had simply and directly condemned in this case the government's efforts to suppress the publication of documents which, by no stretch of the imagination, threatened any *bona fide* "security" interest and in fact served the press's historic function by revealing the moral and ideological bankruptcy of the men who were principally responsible for waging an illegal war and for causing the death of hundreds of thousands of innocent victims —both American and Vietnamese. The only conceivable justification for keeping the documents secret would be to protect those men from being judged. But men who occupy high office must endure the judgment of the people they serve, at least in a democracy, and any agency of government which interferes with that process is itself guilty of corrupting democratic principles.

The exaggerated deference to the power of the Executive Branch which runs through several of the opinions is probably the most discouraging side of this case. Harlan, Burger and Blackmun asked to be trampled underfoot by rampant executive power; Stewart and White might do some fancy broken-field running before allowing themselves to be violated, but in the end they would prefer to acquiesce. That is a majority of five, and should a case come down the pike which is not as open and shut as this one, we should prepare ourselves to endure defeat.

Frankfurter

There is, of course, a very respectable—too respectable—body of legal philosophy which would grant only a very narrow scope of power to the Judicial Branch of government when it runs up against an assertion of power by the executive or legislative branches. Felix Frankfurter, while on the Supreme Court, was the greatest modern practitioner of that philosophy. In a long series of opinions he carved out a jurisprudence which preached judicial self-restraint.

Much of the controversy generated during the tenure of Earl Warren as Chief Justice was precisely over the extent to which the Court should defer or not to legislative and executive judgments. During the last several years of the Warren Court, the so-called judicial activists, led by the Chief Justice, were in ascendency. It was President Nixon's explicit campaign promise, which he unfortunately kept, to change the direction of the Court by replacing the activists with passivists.

There is now a strong nucleus of Justices who practice the self-restraint which Nixon preaches. Harlan, the intellectual leader of the group, is Frankfurter's philosophical heir, and is joined consistently by Burger and Blackmun. Stewart and White come and go depending on the issue. Douglas, Brennan and Marshall compose the liberal triumverate. Black, who cannot be faulted when the First Amendment in a pure speech context is involved, has lost a considerable amount of his judicial liberalism over the past half-dozen years.

The leading academic advocate of judicial self-restraint is Yale Law Professor Alexander Bickel, former law clerk to and protégé of Felix Frankfurter. In books, law reviews and popular journals, Bickel has carried forward the Frankfurter philosophy of judicial restraint. One of his best known law review articles on the Supreme Court is entitled "The Passive Virtues."

For whatever reason, *The New York Times* selected Bickel as its chief attorney in the Viet Nam papers litigation. It was, I must say, a mistake.

Ground Work

Though the decision-making process of any court, and particularly one with nine members, is an amalgam of many forces, one which is easily identifiable is the manner in which a lawyer presents his case to the court, both in his briefs and on oral argument. I don't mean the lawyer's fluency or literacy, but rather the posture from which he argues his case.

Cases can be argued conservatively, liberally or radically; but one thing is certain—it is a rare court in our adversarial system of justice which will go beyond the claims presented by the lawyer in deciding a case. Though a lawyer cannot confidently predict he will win any given case, he controls to a large extent the grounds upon which the court will decide his claims if they are decided favorably. By emphasizing one ground over another or by conceding the relative unimportance of one or another ground, he influences judges in their selection of the grounds upon which to rest their decision.

That is true in the generality of cases. And it is inevitable where the attorney is eminently respectable. Mr. Bickel is eminently respectable.

Mr. Bickel has committed himself academically to the dual thesis that the Court should generally adopt a passive posture when confronted with executive or legislative action and that it should avoid deciding cases on constitutional grounds as far as possible.

Therefore, when *The Times* gave Mr. Bickel the job of convincing the courts to deny the Executive Branch a ban on publication of "state secrets," it was inviting a conflict between Mr. Bickel, the attorney, and Professor Bickel. It was (if I may hazard a personal comparison) as if Attorney General Mitchell had invited me to represent the government in the case. Had I accepted—a possibility equally remote—how far would my committed views about a free press (to say nothing about my views about activist courts) interfere with my duty as an attorney to my client?

The analogy has its limits (not the least of which is the law of libel), but the fact is that those of us from the ACLU who heard Mr. Bickel argue *The New York Times* case (I heard him in the District Court and the Court of Appeals and read the transcript of argument in the Supreme Court) and who read his briefs, felt dissatisfied with the manner in which he presented the First Amendment arguments.

There were three principal arguments available to *The Times*. One was the First Amendment argument. Second was a statutory argument based upon the dual theory that there was no statutory authority for suppression and that if there were colorable statutory authority, it would not apply to the facts of this case. Third was a separation of powers argument.

Speech Played Down

Mr. Bickel spent practically all his time at oral arguments and in his briefs arguing the separation of powers and statutory points. He addressed the First Amendment issue only in a perfunctory and formalistic way. Time and again during oral argument in the Supreme Court, Bickel made it clear that, in his opinion, there was no absolute constitutional prohibition against prior restraint and that if there were a statute adopted by Congress which authorized suppression of state documents, he would have a much tougher case. That, I must say, is the argument of a law professor defending his published writings, not a lawyer advocating a great constitutional principle regarding a fundamental political freedom.

It's no suprise, then, that the Court decided as it did. If the lawyer for one of the parties confesses that there is no absolute, or even near absolute,* constitutional ban against prior restraint, why should the Justices, or at least a majority of them, go any further? All they had to do, as did Justices Stewart and White, who cast the deciding votes, was adopt Mr. Bickel's position that the Viet Nam papers were of such a nature that they could not be suppressed no matter what standard of prior restraint might be thought constitutional.

The next round in the case of the Viet Nam papers will come in the prosecution of Daniel Ellsberg and anyone else involved in the circulation of the papers who may also be indicted. The ACLU is prepared to provide attorneys to anyone who might be indicted because we believe that criminal prosecution in the circumstances of the case, no less than censorship, is a direct violation of the First Amendment.

*I say "near absolute" because even the ACLU brief in the Supreme Court allowed that three categories of information "could conceivably" be subject to prior restraint: data on present or future tactical military operations, blueprints or designs of advanced military equipment, and secret codes. I'm not sure we didn't give away too much. In self-defense I must add that our proposed standard would also have required that even those three kinds of information could not be suppressed if they would be "of value in permitting citizens to render an informed judgment on public issues."