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IV. PROTECTION OF THE PRESS FROM PRIOR RESTRAINT AND HARASSMENT UNDER LIBEL LAWS

STANLEY GODOFSKY*

We all know that the media occupies a unique and vital role in the functioning of our democratic society. In a very real sense, they are the ombudsmen of our system. Throughout the history of the republic, our newspapers and, more recently, other media have played a vital role in exposing governmental incompetence, venality and corruption, of which the latest dramatic example is Watergate. What is perhaps not fully realized is the fact that our founding fathers recognized the unique role which our press was destined to play. James Madison, one of the leading spirits in the formulation of the first amendment, had this to say:

In every state, probably, in the union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . .¹

Perhaps you can write James Madison off as revolutionary. After all, he was. But recognition of the role of the media in our society extends across the entire political spectrum. It has been observed that

the newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.²

Those words were written not by Mr. Justice Black, or Mr. Justice Douglas, or Mr. Justice Brennan. They were written by none other than Mr. Justice Sutherland in the year 1936.

And yet, despite this general recognition of the unique function which our constitution assigns to the press, virtually nothing was done until about ten years ago to provide a legal framework which would protect the press from the harassment of libel suits in carrying out its role.

If this were 1963 and I were asked to summarize the law of libel as it stood in the United States, I would have told you that the

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1. *Quoted in* *Near v. Minnesota*, 283 U.S. 697, 718 (1931).

2. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

Supreme Court said not once, but six or seven times, that libel fell outside the protection of the first amendment.³ Thus, there was no federal constitutional protection afforded the media in dealing with libel suits. There was some limited protection available under state law for fair comment, so long as the defendant could prove that the *facts* printed were true, as well as the usual qualified privileges available for reports of judicial, legislative and executive proceedings. Some states also afforded qualified protection where the libel related to public officials. But in general, any statement which subjected a person to ridicule and contempt could be the subject of a libel suit, irrespective of the plaintiff's status as a public official or a public figure, or the importance of the matter being discussed.

The plaintiff in such a case did not have to prove negligence or any other dereliction; liability was absolute. It was not a defense to show that the defendant was merely repeating a charge that had been made by someone else. The plaintiff did not even have to show that the libelous utterance was false. The falsity of the statement was presumed. For the most part, truth was a defense, but it had to be pleaded and proven by the defendant. Even this defense was taken away in some jurisdictions if malice, meaning ill will or spite, could be established.

It had even been held that a state could enact a group libel law which would impose criminal penalties on those who libeled groups which the legislature wanted to protect.⁴ This was a perfectly understandable ruling from a humanitarian point of view when applied to minority groups such as blacks, but one which could certainly be used at a later date to punish the media for printing material deemed offensive to the majority. In fact, the case which started the revolution in the modern law of libel grew out of just such a situation.

It seems like ancient history, but it was only twenty years ago that the Supreme Court decided *Brown v. Board of Education*.⁵ Following that decision, there was a campaign of massive resistance to public school integration in the South. At the same time, blacks throughout the South began to assert themselves in ways which had been unheard of since Reconstruction. New leaders began to emerge among the black community. The most prominent of these was Martin Luther King, Jr. By the late 1950's, we were in the midst of a massive racial confrontation. There were attempts to suppress the NAACP; threats to close down the public schools; bus desegregation controversies in Montgomery and Birmingham; the issuance of court injunctions; the redistricting of Tuskegee; and many other events, all of which received extensive coverage in the news media.

3. *E.g.*, *Konigsberg v. State Bar*, 366 U.S. 36, 49-50 (1961); *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961); *Roth v. United States*, 354 U.S. 476 (1957).

4. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

5. 347 U.S. 483 (1954).

Somewhere along the line, a number of public officials in Alabama decided that one way to deal with this highly visible and highly unfavorable coverage was to invoke the libel laws. Seven libel suits were commenced in Alabama against the *New York Times* on the basis of a single article written by Harrison Salisbury. At least five members of Alabama officialdom filed libel suits against CBS.

Five officials and former officials brought suit against the *New York Times* and four of Martin Luther King's lieutenants on the basis of a full-page advertisement which had been run in the *New York Times*. The ad had been sponsored by some of the most prominent persons in America, including Eleanor Roosevelt, Norman Thomas and a raft of entertainment personalities. One of the cases arising out of the ad was *New York Times v. Sullivan*.⁶

The ad in question was an appeal for funds for three purposes: (1) to help embattled black students, (2) to assist in their struggle for the right to vote, and (3) to help Martin Luther King defend himself against charges of perjury in connection with the filing of his Alabama state income tax returns. The charge against King was a serious criminal charge and carried a maximum penalty of ten years in jail. This was not Martin Luther King's first brush with the law in Alabama. In 1956, he was indicted and convicted of violating an Alabama criminal boycott statute because of his activities involving desegregation of the Montgomery Bus Lines. Again in 1956, he was arrested for speeding and, in 1958, for loitering.

Commissioner Sullivan filed his complaint 21 days after the publication of the advertisement in question. At the time he filed, he had been police commissioner for some seven months. The ad, without identifying or naming any particular individual, or focusing on any particular time, referred to incidents which had occurred in Montgomery, Orangeburg, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charleston and Tallahassee.

Commissioner Sullivan took umbrage at only two paragraphs in the ad. He admitted at the trial that not all of the statements, even in those two paragraphs, could reasonably be read as relating to him, and the Supreme Court specifically found⁷ that none of the statements related to him.

Nevertheless, the jury awarded him \$500,000 in damages. It found not only against the *New York Times* which had published the advertisement in question, but also against King's lieutenants who were listed as sponsors of the ad.

In the Supreme Court it would have been quite sufficient for the Court to have thrown the case out on the ground that the advertisement could not reasonably be read as relating to Commissioner Sulli-

6. 376 U.S. 254 (1964).

7. *Id.* at 288.

van. But the Court, apparently convinced by the background of the case that the libel laws could be used as instruments of oppression, went further. The Court superimposed on the state libel laws a constitutional first and fourteenth amendment rule which provided, in substance, that an elected public official could not recover damages in a libel suit without establishing that the defendant had published a false and defamatory statement with what the Court called actual malice. The Court defined actual malice to mean either that the defendant knew the statement was false when he published it, or the defendant published the statement with reckless disregard of its truth or falsity.

The Supreme Court soon made it clear that by reckless disregard, it meant publication with a high degree of awareness of probable falsity. So, for public officials, at least, the rule was established that a plaintiff could not recover unless he could show not only that the statement complained of was false, but also that the defendant knew it was false, or published it with a high degree of awareness that it was probably false.

The *New York Times* doctrine was soon expanded to cover candidates for public office and public figures generally.⁸ It was further expanded to cover criminal as well as civil libel cases,⁹ and cases arising out of violations of so-called rights of privacy.¹⁰

The courts also began to hold that a plaintiff within the ambit of the *New York Times v. Sullivan* rule was required to prove falsity, not by a preponderance of the evidence, the normal rule in civil cases, but by evidence of convincing clarity.¹¹

A number of courts concluded that the public policy behind the first amendment protection turned, not so much on the identity of the individual who claimed to be defamed, but upon the importance of the issue under discussion. These courts logically extended the ambit of the *New York Times* rule to all matters of public importance and to individuals, however private or lowly their station in life, who, intentionally or otherwise, found themselves embroiled in a public controversy.

The courts also recognized that in the hurly-burly of meeting deadlines, and sometimes even with all the time in the world, mistakes would inevitably occur and that the failure to afford a judicial remedy for such mistakes was part of the price which a victim would inevitably have to pay if the press were to be left free from the constant threat of libel judgments.

8. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

9. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

10. *Time v. Hill*, 385 U.S. 374 (1967).

11. See *Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (1970) (Bell, J. concurring), cert. denied, 409 U.S. 875 (1972). *New York Times* itself seems to require such a standard on the issue of actual malice.

The courts even went so far as to hold that a failure to investigate before publishing could not be considered evidence of actual malice,¹² and that a denial of wrongdoing by the plaintiff before a story was published was not sufficient to establish "actual malice."¹³ Thus a defendant who failed to conduct an investigation or declined to credit a plaintiff's denial could be held responsible only if he actually entertained serious doubts about the truth of the defamatory statement at the time it was published.

The courts have also recognized that the expense of defending a libel suit, even if ultimately successful, could inhibit a free press. For this reason, unlike the normal civil case, summary judgments and interlocutory appeals are favored in cases involving a *New York Times v. Sullivan* issue. It is even arguable that states have a constitutional duty to make such summary procedures available, even though they are not normally available under the state's procedural rules.¹⁴

Yet almost from the very beginning there were those on the Supreme Court and elsewhere who were concerned with a competing consideration. A libel suit, after all, is a recognized method for the vindication of one's reputation. By way of historical aside, it is interesting to recall that the libel laws were developed, in part, because they are a more civilized, and less dangerous, way of vindicating one's honor than duels.¹⁵

While punitive and even general damages are not necessarily needed for purposes of vindication, most of us would recognize that there are instances where a person falsely accused of misconduct can suffer real damage, which cannot always be measured in dollars. We must also recognize that even among the most prominent, a denial of wrongdoing rarely catches up completely with the original charge.

Those who believe with Mr. Justice Black and Mr. Justice Douglas, that the first amendment precludes the application of libel laws to the media, would argue that these considerations must give way to the clear and unambiguous command of the first amendment. Others would argue that a deliberate liar ought not to be protected from the payment of damages by the first or any other amendment and, beyond that, a private individual who is unwillingly dragged into the middle of something—even something in which the public has an interest—is

12. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

13. *New York Times v. Connor*, 365 F.2d 567 (5th Cir. 1966).

14. At this point Mr. Godofsky suggested that newspapers seriously consider obtaining low-deductible liability insurance covering legal expenses. Panelist Dan Paul, a prominent Miami attorney who represented the *Miami Herald* in the *Tornillo* case, took issue with Mr. Godofsky's suggestion. It was Mr. Paul's position that having an insurance company as co-defendant would be disadvantageous to the newspaper. He expressed concern that plaintiff's counsel could point out to a jury that newspapers regularly make mistakes and that is why the insurance company sits with the defendant: to pay for those mistakes. Mr. Paul's suggestion was for newspapers to establish some type of self-insurance plan, involving a pooling of resources and risks.

15. *See Garrison v. Louisiana*, 397 U.S. 64 (1964).

entitled to an opportunity to vindicate his good name, particularly if the news media has been careless.

The issue of whether the "actual malice" rule of *New York Times v. Sullivan* would apply to all individuals who unwillingly find themselves involved in a matter which is newsworthy was presented to the Supreme Court in *Rosenbloom v. Metromedia*.¹⁶ A plurality there held that it did; but the impact of that decision was to be shortlived.

In June of 1974, the Supreme Court decided *Gertz v. Robert Welch Inc.*,¹⁷ which, at first blush, appears to be a turning back. But closer examination is warranted. Gertz was a lawyer of some prominence in Chicago who found himself the subject of an attack by a magazine published for the John Birch Society. The nub of the libel was an accusation that Gertz was a "communist-fronter" and that he had participated in a "frameup" of a policeman as part of a large communist conspiracy. The Supreme Court held that the *New York Times* doctrine did not apply to Gertz, whom the Court held to be neither a public official nor a public figure. The Court did hold, however, that the old rule of absolute liability could not constitutionally be applied because the accusation against Gertz arose out of a matter of public interest. The Court further held that the State of Illinois, under whose law the action had been brought, could develop any standard of liability in such a situation other than absolute liability. It also held that, in a case such as this, a plaintiff could not collect punitive damages or general damages without a showing of actual malice in the *New York Times v. Sullivan* sense. The Court did say that such a plaintiff could collect for what it called "actual injury," but the opinion also made it clear that actual injury is not limited to actual out-of-pocket losses. It is pretty hard to see how the Supreme Court's "actual injury" differs materially from the old concept of "general damages." Perhaps the difference lies in the fact that damages are no longer presumed, but must be proven. Just what this means in the case of damages which are not out-of-pocket damages, the Supreme Court gingerly left for lower courts to develop.

The *Gertz* case raises a number of fascinating questions. The Court said, for example, that the *New York Times* rule applied not only to an individual who achieves such pervasive fame that he becomes a public figure for all purposes, but also to a person who voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues. I can see that in the next few years many cases will turn on the question of whether a private individual is a public figure for all or some purposes; but I am not at all certain what tests are going to be used to determine at what point a private individual becomes a public figure; or how the

16. 403 U.S. 29 (1971).

17. 418 U.S. 323 (1974), noted in 29 U. MIAMI L. REV. 367 (1975).

new rule differs significantly from the old rule that one who voluntarily injects himself into the vortex of a public controversy, or is involved in a matter of public importance, falls within the ambit of *New York Times v. Sullivan*.

Perhaps the most intriguing questions of all involve absolute liability; as I indicated earlier, the almost universal rule in libel prior to *New York Times* was absolute liability—liability without fault. In *New York Times*, the Supreme Court superimposed on this rule a constitutional limitation which could readily be applied as a limitation on state law with respect to those cases falling within its parameters. But what do you do in *Gertz* type cases? The Supreme Court says the old rule of absolute liability is unconstitutional and that the states are free to adopt any other rule. Does this mean that substantially all state libel laws are now unconstitutional and can only be cured by acts of the legislature? Can a court preserve the constitutionality of state libel laws by developing some judge-made limitations, and, if so, what limitation? Will it be the *New York Times* standard? Will it be some lesser standard? Can it be done retroactively? And what about those states which have codified their laws, so that the libel law now in force is purely statutory? And what about the Virgin Islands where the law is legislatively declared to be that enunciated by the Restatement promulgated by the American Law Institute? Since we have a case currently pending in the Virgin Islands which raises this very issue, I do not think it appropriate to say any more about that situation, but it certainly is intriguing.

One response to all of this, of course, has been the suggestion that states adopt so-called "right of reply" statutes similar to those adopted many years ago in Florida. The Florida statute, of course, was held unconstitutional just recently in the *Tornillo*¹⁸ case. *Tornillo* will be the subject of a discussion this afternoon by Henry Geller¹⁹ and I do not want to preempt any of his material. Here, it is enough to say that the Supreme Court held that the first amendment prohibits the government from telling the newspapers, at least, what they must publish.

Which brings us to the other side of the coin, can the government tell the media what *not* to publish? In what circumstances, if any, can the government engage in censorship, or, to use a fancier description, impose "prior restraints" upon publication.

Five years ago I would have told you that in 1931, the Supreme Court, in a case called *Near v. Minnesota*,²⁰ held unconstitutional a state statute which authorized the issuance of injunctions against persons who engaged in the business of regularly publishing a defamatory newspaper. Chief Justice Hughes said that the principal purpose of the first amendment was to prevent prior restraints, thereby giving con-

18. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

19. *See* section V.

20. 283 U.S. 697 (1931).

stitutional dimensions to the old English rule that equity will not enjoin a libel. I would also have told you that an exception had been made in the case of motion pictures. The Supreme Court held in 1961 that censorship was permissible because of the unique nature of the medium.²¹ But even there, the Court was creating so many procedural and substantive safeguards that, as a practical matter, censorship of motion pictures would soon be a thing of the past. Since that time, of course, we have had problems with motion picture classification, which presents constitutional problems beyond the ambit of this discussion.

If this were 1969 instead of 1974 I would also have told you about an attempt which had been made in the middle 1960's, in New York, to enjoin the distribution of a picture called "John Goldfarb Please Come Home" on the ground that the privacy of Notre Dame University and its president, Father Theodore Hesburgh, had been invaded.²² But I would also have told you that the *Goldfarb* litigation had foundered within a matter of months because of an interpretation of New York law which was based essentially on first amendment considerations.

But all this would have been five years ago. Today any discussion of prior restraints must deal extensively with the so-called *Pentagon Papers* litigation, which occurred in June of 1971, and its implications for the future.²³

There were, as you may recall, two cases, one against the *New York Times* and the other against the *Washington Post*. I was deeply involved in the *Post* case and will concentrate my personal comments on it. You may recall that on June 13, 1971, the *New York Times* began publication of a series of articles based upon a forty-seven volume history of United States foreign policy in Vietnam. This study covered the period from 1945 to March 1968, and was therefore more than three years old at the time of litigation.

As we were told, these forty-seven volumes had been classified "top secret—sensitive." We were later to learn that there was, in fact, no such official classification. The highest level of classification was top secret and it was applicable only to documents which were so secret that unauthorized disclosure could lead to exceptionally grave damage to the nation, such as a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of information vital to the national defense.

Well, it turned out that *much* of this material consisted of clip-

21. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

22. *University of Notre Dame v. Twentieth Century Fox Film Corp.*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832, *aff'g*, 22 App. Div. 2d 452, 256 N.Y.S.2d 301 (1965).

23. *New York Times v. U.S.*, 403 U.S. 713 (1971).

pings from newspapers such as the *New York Times*, texts of various presidential addresses and other similar information. It also developed that *much* of the information was already in the public domain.

I remember scanning the first article or two in the *New York Times*, when I had no idea that I would ever have a professional interest in any of this. To me it looked like history. To be sure, it appeared to portray our government as something less than candid with the American people. But nothing in what I read, suggested that the publication of the material was likely to cause anything more than embarrassment, and that mostly to President Nixon's political opponents. The government, however, took a different view.

The Justice Department filed suit two days after the initial publication and, for the first time in the 182-year history of the Republic, asked a court to stop the presses. On Friday, June 18, the *Washington Post* began publication of a series based on some of the same documents. This time the government moved more quickly. By nightfall it had filed a suit against the *Washington Post* in the District of Columbia. By this time, it was obvious to everyone, except possibly to the government, that its actions had created a grave constitutional confrontation. The courts reacted with lightning speed, although interim restraints by court order throughout the litigation effectively barred publication. In exactly eight days the *New York Times* case arrived in the United States Supreme Court, having been through the district court and the Court of Appeals for the Second Circuit. The *Washington Post* case moved even more quickly. It arrived in the Supreme Court less than a week after it had been filed, having gone through an application for a temporary restraining order, an appeal to the Court of Appeals for the District of Columbia Circuit; the granting of a restraining order in the middle of the night by a hastily convened panel of the court of appeals; a remand for the taking of testimony on the government's application for preliminary injunction; an appeal from the denial of the application after hearing; an affirmance of the denial by the court of appeals and a denial of a motion for reargument in the court of appeals.

We learned on the afternoon of Friday, June 25, 1971, that the two cases would be heard in the Supreme Court the following morning, June 26, at 11 A.M. and we were directed to file our brief on the merits by 9 A.M. The brief that was filed on behalf of the *Washington Post* was written between approximately 3:30 P.M. on Friday, June 25 and 5 A.M., June 26. It was reproduced, served and filed between 5 and 9 A.M.

One of the most difficult problems about the case, apart from the pressures of time, was the fact that no one seemed to know the exact basis on which the government was attempting to obtain the injunction; nor could anyone determine what legal standard should be applied in such a situation. The government itself kept changing its theories as the cases proceeded through the courts.

The closest we came to any guidance on the subject was the order filed by the court of appeals on June 19, 1971. That order directed the district court to determine whether publication of material "would so prejudice the defense interests of the United States or result in *such* irreparable injury to the United States as would justify restraining the publication thereof."

The only authority cited for this test was *Near v. Minnesota*.²⁴ In that case, Chief Justice Hughes had said by way of dictum:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.²⁵

I am aware of the fact that members of academia and others have criticized those who briefed and argued this case in the Supreme Court because none of us urged adoption of a rule which would prohibit prior restraints, even in circumstances such as those suggested by Chief Justice Hughes in *Near v. Minnesota*. I don't think I should attempt to explain the position of the *New York Times*, but I would like to tell you something of what went into our own thinking.

In the first place we did not need an absolute ban on prior restraints to win the case. The district court had found, after an evidentiary hearing, that the only danger involved in publication was the embarrassment which the United States would suffer in attempting to explain to foreign governments why the United States government could not censor its press. We did not think that any court in this country would be prepared to support a prior restraint on this basis.

Second, the court of appeals had also found, by a lopsided majority, that the government had failed to meet the *Near* test. This included the two appellate judges who, only a few days earlier, had remanded the case to the district court for a hearing on the preliminary injunction issue.

Third, we knew from the Supreme Court memorandum setting the case for argument that four of the nine justices (Black, Douglas, Brennan and Marshall), would almost certainly hold that there was no basis for continuing the restraint which had been in effect during the pendency of the litigation, and we did not wish to take a position which might conceivably alienate the critical fifth vote we needed to win. After all, unless you accept the position of Justices Black and

24. 283 U.S. 697 (1931).

25. *Id.* at 716.

Douglas, it's pretty hard to argue that papers can publish the sailing dates of troopships and the number and location of troop positions.

Finally, we knew that Justices Black and Douglas had long been advocates of the absolute position with respect to the first amendment. We also knew that these two eminent Justices had never convinced any of their brethren of the correctness of their views. We believed that Justices Black and Douglas would almost certainly continue to urge that view on their brethren in this case. We were of the view that if Justices Black and Douglas were unable, over a period of several decades, to convince their brethren that the first amendment was absolute, we certainly would not be able to devise a series of arguments which would do so between 3:30 P.M. Friday and 5 A.M. Saturday morning.

The case was argued in the Supreme Court on the morning of June 26. The decision was rendered four days later, June 30, 1971.

Believe it or not, in a court having but nine members, we had ten opinions: an unsigned *per curiam* opinion, and separate opinions by each of the nine members of the Court. The final vote was 6 to 3 against the government. The separate concurring and dissenting opinions touch on a wide range of issues. It is perhaps fitting that Mr. Justice Black's opinion in this historic case was to be the last opinion that great jurist rendered. It could well stand as a monument to his life and to his constitutional philosophy. In his opinion, Mr. Justice Black proclaimed in ringing terms the supremacy of the first amendment and the unique role of the press in keeping the government honest. Other opinions deal with various aspects of the Espionage Act, the question of whether even temporary restraints should be granted in similar cases in the future, and complaints about the speed with which the court was forced to render its decision.

The *per curiam* opinion, the only one on which a majority of the Court could agree, stated simply that any system of prior restraints carried with it a heavy presumption against its constitutional validity; that the government thus carried a heavy burden of showing justification for the imposition of such a restraint; and that the government had failed to meet that burden.

But what is that burden? And against what standard is it to be measured? Is it the grave and irreparable injury test suggested by the Court of Appeals for the District of Columbia Circuit? On all this, the *per curiam* opinion is silent.

Certain things do emerge from the litigation, even though they are not clearly articulated in the opinions. First, it seemed clear that a security classification by the government does not, of itself, permit the government to obtain an injunction against publication. At the outset of the litigation, the government asserted that the courts had no right to second-guess the executive, but that argument was substantially abandoned by the time the case reached the Supreme Court.

Second, it is equally clear that a majority of the Supreme Court

did not attribute controlling significance to the argument that the documents in question may originally have been copied illegally or improperly by the person or persons who turned them over to the *New York Times* and the *Washington Post*.

Third, at least so far as some of the Justices were concerned, the possibility that publication of the material might violate a criminal statute did not justify the issuance of an injunction to preclude its publication.

Fourth, mere embarrassment to the government in the conduct of foreign affairs did not provide a sufficient basis for the granting of an injunction against publication.

Fifth, the government's argument that its right to obtain an injunction was based upon the President's power as commander-in-chief of the armed forces and his responsibility in the conduct of foreign relations, did not persuade a majority of the Court.

But the most significant fact that emerges from this judicial potpourri is the fact that the government, in fact, failed in its attempt to stop the presses, except for a relatively short period of time. This, in itself, was no mean achievement. I think that in the future, the government will think long and hard before it again rushes off to court to seek injunctive relief to prevent publication of political material in the hands of the media.

Finally, I would like to talk about something that pervaded the whole case and which, in my view at least, has very serious implications for freedom, even though it also has its amusing aspects. I am talking about the aura of secrecy with which the government sought to invest the litigation. At an early stage in the *Washington Post* case, for example, the government suggested to the district court that it had evidence which was so secret that even defense counsel could not look at it. The court said that, if defense counsel could not look at it, it did not want to look at it either, and that was the end of that. Also, there was a secret evidentiary hearing in the district court and a secret argument in the court of appeals. During the open hearing in the district court, the government objected to the presence of the defendants during the secret proceedings. Judge Gesell overruled that objection and the Republic did not collapse.

At the opening of the public hearing in the district court, one of those sitting at the counsel table to assist the *Washington Post* was none other than Roswell Gilpatric, who had held extremely sensitive positions in the Defense Department. Counsel for the government briefly objected to Mr. Gilpatric's presence on the ground that he did not have the necessary security clearance. This argument was quickly abandoned.

Thus, in the interests of national security, the government was prepared not only to stop the presses in contravention of the first amendment, but to deny the defendants their right to counsel and

advice and to confront the witnesses against them, in contravention of almost every principle of Anglo-Saxon jurisprudence in which we have been taught to believe, not to mention a series of constitutional protections. But I suppose we should not have been too surprised that the Defense Department did not want to trust defendants and their counsel. It had already been reviewing this forty-seven volume tome for three years to decide whether it was safe to let Senator Fulbright see it. He was only chairman of the Senate Foreign Relations Committee, but the Department decided they could not show the history to him because it was too sensitive.

Finally, to illustrate just how infectious these claims of secrecy can be, I come to a rather bizarre incident that occurred just before the argument of the appeal in the United States Supreme Court. Shortly before 11 A.M., counsel who were to actually argue the appeal were informed by one of the Supreme Court clerks that the Court had voted 6-3 against allowing a government request for a secret argument in the Supreme Court, but that the Court's decision with respect to that motion must itself be kept secret, even from the defendants. A few minutes later the Court convened and, as the first order of business, the Chief Justice announced that the government's motion for an in camera hearing had been denied by a vote of 6 to 3. Even if disclosure of the Pentagon Papers could have led to an atomic war, it is difficult to see why the denial of a government request for an in camera argument should have been kept secret from anyone.

The *Pentagon Papers* litigation is now, happily, concluded, but issuance of prior restraints unfortunately are not. Since the *Pentagon Papers* decision we have begun to see a proliferation of cases in which courts seem to be willing to issue injunctions against publication of material.

For example, the courts are increasingly issuing gag-orders against reporters to preclude publication of information which, in the court's view, might prejudice a defendant's right to a fair trial.²⁶ This problem is compounded by the fact that, even if an injunction is later held to be invalid, at least one court has held that it must nevertheless be obeyed, on pain of contempt, until it is vacated.²⁷

As a second example, a former CIA agent was recently enjoined from disclosing classified information in a book which he had written.²⁸ In that particular case, the agent had signed an oath promising not to disclose information about the CIA which he learned in the

26. See, e.g., *Oliver v. Postel*, 37 App. Div. 2d 498, 327 N.Y.S.2d 444, modified, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); *State v. Rose*, 271 So. 2d 483 (Fla. 2d Dist. 1972). See also *Charlottesville Newspapers, Inc., v. Berry*, 206 S.E.2d 267 (Va. 1974) (holding that the trial court's bar of access to pleadings for 21 days following filing was unauthorized by statute).

27. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), cert. denied, 414 U.S. 979 (1973); compare *State v. Sperry*, 79 Wash. 2d 69, 483 P.2d 608 (1971) with *Oliver v. Postel*, 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1972) (dictum).

28. *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

course of his employment. The Court of Appeals for the Fourth Circuit specifically stated that by signing the oath, the agent had not surrendered his first amendment right to free speech and that the court would decline on first amendment grounds to enforce the oath to the extent that it purported to prevent disclosing non-classified information. In the very next sentence, however, the court held that the agent could not disclose classified information obtained in the course of his employment which was not already in the public domain. I will leave it to you to figure out what all this means in terms of first amendment freedoms.

Another instance involves the issuance of an injunction against circulation of a book because the author, who was a psychiatrist, disclosed information which he had received in a professional capacity.²⁹ That case is now on appeal to the Supreme Court and will be heard in the October term.

Late last year, a trial court in Indiana issued an injunction against a television news documentary showing that plaintiff manufactured baby cribs which were flammable. Plaintiff claimed it has been libeled because the actual crib-burning took about ten minutes whereas in the television documentary it took about 40 seconds. That injunction has since been vacated.³⁰

Finally, I would just mention briefly a decision, about a year old, in which the United States Supreme Court, by a 5-4 vote, upheld a Pennsylvania state court decision enjoining the continuation of classified advertisement columns designated "male interest" and "female interest."³¹ The Court acted even though the paper advised its readers that employers were not permitted to discriminate on the basis of sex and that the designation was based only on probable areas of employee interest.

The increasing willingness of courts to grant such injunctions, on whatever theory and for whatever purpose, is disturbing. In each case, of course, there appeared to be some social interest which the injunction would serve. But where do you stop?

Governments can always find or manufacture sound reasons why a particular piece of information should be suppressed. Frankly, I do not like to see courts get into the habit of acting as judicial censors. It would be a sorry day for this country if some American writer were someday to echo these words which Leo Tolstoy once wrote:

You would not believe how, from the very commencement of my activity, that horrible censor question has tor-

29. *Doe v. Roe*, 42 App. Div. 2d 559, 345 N.Y.S.2d 560 (1973), *aff'd* 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1974) (without opinion), *on rehearing* 34 N.Y.2d 562, 310 N.E.2d 539, 354 N.Y.S.2d 941 (1974), *cert. granted*, 417 U.S. 907 (1974), *cert. dismissed as improvidently granted*, 420 U.S. 307 (1975).

30. *American Broadcasting Companies v. Smith Cabinet Mfg. Co.*, 312 N.E.2d 85 (Ind. 1st Dist. 1974).

31. *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376 (1973).

mented me; I wanted to write what I felt; but at the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I abandoned, and went on abandoning, and meanwhile the years passed away.³²

32. *Quoted in* Times Film Corp. v. Chicago, 365 U.S. 43, 66, n.6 (1961) (Warren, C.J., dissenting).