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The Book in Retrospect

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THE BOOK IN RETROSPECT

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The Day the Presses Stopped[1] generated substantial discussion about the press and its role in publishing national security information. Four particular themes prominent during the litigation frequently have engaged my attention since my book was published. I thought these themes would be appropriate subjects for this brief Article.

THE MEANING OF THE PHRASE "NATIONAL SECURITY"

Although most reviewers[2] of my book were persuaded that the Pentagon Papers did contain information that could have injured national security if disclosed, a handful of prominent *New York Times* officials were not. Anthony Lewis wrote that he found my book "fascinating," but disagreed with my view "that there were genuine reasons for concern about national security."[3] R.W. Apple wrote that "[f]ew if any of the main players in the drama" share my view that "some of the papers (though not the ones printed) could indeed have compromised national security."[4] In a letter to the *Cardozo Law Review* declining an invitation to participate in this symposium, Tom Wicker, the former *Times* columnist, stated that the claim that "the Government began the case for understandable national security reasons and presented a plau-

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1 DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED (1996).

2 *See, e.g.*, Joseph D. Becker, *Docudrama*, 66 AM. SCHOLAR 294 (1997); Timothy Cook, *Talking About the News*, WASH. POST, Aug. 4, 1996, Book World, at 4; Henry Goldman, *Pentagon Papers Case Is Revisited*, PHILA. INQUIRER, June 16, 1996, at Q1; Matt Nesvisky, *Nixon Was Not Amused*, JERUSALEM POST LITERARY SUPP., July 25, 1996, at 1; Thomas Oliphant, *Fit to Print*, BOSTON GLOBE, July 14, 1996, at B33; David Pannick, Q.C., *Critical Lesson of the Pentagon Papers*, TIMES (London), Aug. 13, 1996, at 37; Robert D. Sack, *The Lawyer's Bookshelf*, N.Y. L.J., July 26, 1996, at 2; Bill Wallace, *The Pentagon Paper Chase*, S.F. SUN. EXAMINER & CHRON., July 7, 1996, at 6; Steve Weinberg, *The Pentagon Papers Problem*, N.Y. NEWSDAY, June 23, 1996, at C28; Book Review, KIRKUS REVIEWS, Apr. 15, 1996, at 585; Book Review, PUBLISHERS WKLY., Apr. 29, 1996, at 57.

3 Anthony Lewis, *'Bare the Secrets'*, N.Y. TIMES, June 7, 1996, at A31.

4 R.W. Apple, Jr., *Lessons from the Pentagon Papers*, N.Y. TIMES, June 23, 1996, at E5.

sible set of reasons and evidence in support of its extraordinary request for injunctive relief . . . contradicts everything I knew about the case at the time and everything I have learned about it since."[5] In a Sunday *Times* review, Adam Clymer, who was a reporter for the *Baltimore Sun* during the Pentagon Papers litigation and the assistant Washington editor of the *Times* when he wrote the review, stated that my most "striking conclusion—that there were real threats to the nation in the papers—is debatable."[6]

It is unclear to me why these *Times* officials differ so sharply with the view I offered in my book. Because none of them explained their position, it is unlikely that these differences will ever be satisfactorily explicated. However, it is possible that a telephone conversation I had with A.M. Rosenthal may shed important light on them.

Mr. Rosenthal, the *New York Times* columnist and former managing editor of the *Times*, telephoned me in June 1996. He did so after a seminar marking the twenty-fifth anniversary of the Pentagon Papers case, sponsored by the *Times* for *Times* personnel, had concluded. He told me that Whitney North Seymour, Jr., the former United States Attorney who represented the Government before United States District Judge Murray Gurfein during the evidentiary hearing for a preliminary injunction in June 1971, participated in the conference. As Mr. Rosenthal described a scene, Mr. Seymour waved my book in the air during the seminar and repeated to the audience to "read this book, read this book."

Mr. Rosenthal wanted to know exactly where in my text I defined the national security information that I contended was contained in the Pentagon Papers study. As I gave him the page numbers,[7] he repeatedly interrupted me: "No, tell where in the text I can read it. Tell me the page. Just give me the page number." After some minutes of this back-and-forth, I asked Mr. Rosenthal this question:

> If you do not think that intelligence activities that aide in securing information about opposing military movements, the names of C.I.A. agents engaged in covert activities, diplomatic efforts to end the war and secure the release of the POWs, and recently discarded war plans deserve the label "national secu-

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[5] Letter from Thomas G. Wicker to Mia B. Warren, Editor-in-Chief, *Cardozo Law Review* 1 (Feb. 28, 1996) (on file with author).

[6] Adam Clymer, *Classified*, N.Y. TIMES, Apr. 13, 1997, at 15.

[7] *See generally* RUDENSTINE, *supra* note 1. The most important pages are pages 326-29, which offer a summary conclusion. Pages 84-87, 195-201, 218-24, and 267-72 review the information in more detail.

rity," then how do you define national security information? Mr. Rosenthal did not hesitate: "National security information is limited to troop movements during wartime."

I told Mr. Rosenthal that I thought his definition of the phrase national security information—troop movements during war time—was extremely narrow and that I doubted most readers of the *Times* would define the term so narrowly. I also told him that I thought there were important distinctions between the generally accepted meaning of the term national security and the evidentiary burden the Government had to satisfy to obtain a prior restraint to protect the nation's security.[8]

Mr. Rosenthal's narrow definition of the phrase national security gave the *Times* a significant practical benefit for it permitted the *Times* to state—as it did throughout the litigation—that the top secret Pentagon study was merely an historical document containing no information injurious to national security.[9] Thus, the *Times* reassured its readers throughout the litigation that it was not in any way tampering with the national security and it asserted in the courts that there was no basis for the Government's claims that its planned multi-part series threatened national security.

This uncomplicated posture was in sharp contrast to the more complex position I developed in my book and which may be boiled down to the following points:

> • [T]he Pentagon Papers did contain information that could have inflicted some injury—at least to a degree that makes the concerns of national security officials understandable—if disclosed, which it was not;[10]
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> • [T]he information in question likely formed a small percentage of the overall study. Outside of the four negotiating volumes, the potentially damaging information seems to have composed no more than five percent, or less than 350 pages of the complete study;[11]
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> • There is no evidence that the newspapers' publication of the Pentagon Papers, followed by the three [book versions of the study published] during the summer and fall of 1971, harmed the U.S. military, defense, intelligence, or international affairs

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8 In the per curiam opinion in the Pentagon Papers case, the Supreme Court noted that the Government had a "heavy burden." *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

9 *See* RUDENSTINE, *supra* note 1, at 48 n.1.

10 *Id.* at 9.

11 *Id.* at 329.

interests;[12]

- I strongly approve[d] of the Supreme Court decision [denying the Government the preliminary injunction it sought].[13]

If the *Times* had concluded that the Pentagon Papers contained some information potentially injurious to national security, its public posture, at least before its readers,[14] would have been compromised. If the *Times* had made this concession, it would have been forced to maintain that: (1) it was capable of identifying what information within the classified study was threatening to current national security interests; (2) it was capable of assessing how injurious to national security further disclosure of this information would be; (3) it had concluded that further disclosure of this information would not injure national security to a degree to warrant suppressing it; and (4) the public should trust the *Times* to make these decisions. This would have been a much more complex position for the *Times* to explain to its readers than the one it asserted, and it might have caused some readers to question why a newspaper should be entrusted with such responsibilities, or worse, to assail it for arrogating to itself responsibilities that belonged to the government. There is a powerful and persuasive response to such a challenge—the alternative of giving greater power to the government and the courts to censor the press poses a greater threat to a democratic order[15]—but such a response invites a debate over subtle judgments, and the press's power may be better served by avoiding such debate.

From a different perspective, the position taken by the *Times* officials is deeply ironic. The more the *Times* asserts that the Pentagon Papers were merely historical in nature, the less meaningful its victory before the Supreme Court. If the classified study contained no information implicating national security, as the *Times* officials contend, the *Times* decision to publish the information took no special courage, the Government's legal claims were totally frivolous, and the High Court's decision rejecting the request for a prior restraint was all but a forgone conclusion.

The *Times*' position makes its landmark victory almost meaningless. That is an ironic and extraordinary perspective for

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12 *Id.* at 327.

13 *Id.* at 8.

14 Mr. Rosenthal was greatly concerned about the reaction of the *Times* readers to the Pentagon series and the Government allegations that the series jeopardized national security.

15 This point is developed further in my book. *See* RUDENSTINE, *supra* note 1, at 354-56.

the *Times* to advance, and as my book details, that perspective is at odds with events at the *Times* during the weeks prior to the *Times* commencing publication of its Pentagon Papers series and during the litigation.[16]

MR. ROSENTHAL AND MR. BRADLEE'S POWER

It is a basic tenet of our polity that the press performs critical functions within our democratic order that are protected by the First Amendment.[17] The Pentagon Papers case not only reaffirms this tenet, but it concretely illustrates the scope of the press's power and some of the rarely articulated assumptions underlying it.

Because the Government had the burden of proving that further press disclosures of the top secret history would irreparably harm national security,[18] the meaning of the Supreme Court's decision denying the Government a preliminary injunction could be construed quite narrowly: The evidence offered by the Government in support of its claim for a preliminary injunction fell short of what was required. In reaching its decision, it could also be fairly assumed that the High Court did not reach any conclusion whatsoever concerning three important other considerations: (1) whether the Pentagon Papers contained any information which would seriously harm national security if disclosed; (2) whether Daniel Ellsberg made available to the *New York Times* and *The Washington Post* any other classified documents containing information that would seriously harm national security if disclosed; and (3) whether either one or both of the two newspapers would publish information which would seriously harm national security. Again, for emphasis, all the Court concluded, and all it needed to conclude since the Government had the burden of proof, was that the evidence presented by the Government—the specific page references and supporting testimony—fell short of what the law required.

Once the Court made its judgment public, Mr. Rosenthal at the *Times* and Mr. Bradlee at the *Post* were free to publish whatever they wished. Although this was indeed the understanding at the time, what it specifically meant in this case was that the *Times* and the *Post* were free to publish whatever top secret information

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16 *See id.* at 48-65.

17 *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

18 *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

was contained within the Pentagon study they wished, even if the information were injurious to national security. Of course, although the members of the Court's majority most assuredly did not think that either newspaper would publish information seriously harmful to security, the Court's ruling did not foreclose the possibility that the newspapers might publish such information.

Moreover, none of the Justices could be certain that the Government lawyers had identified for the Court all of the information within the Pentagon Papers study that might seriously harm national security. Indeed, it was entirely plausible that the Government lawyers had failed to bring to the Court's attention all of the information seriously implicating national security. This was true for two reasons. The first concerned the classified material in question. The Government did not know exactly what information Daniel Ellsberg had made available to the press.[19] Officials certainly knew that Ellsberg had made substantial portions of the Pentagon study available, but they did not know what other documents Ellsberg had made available. They believed that Ellsberg had made other documents available because the *Times* had published documents as part of its Pentagon series that defense experts were unable to identify.[20] In addition, the Pentagon study itself was 7000 pages in length and contained about 2.5 million words. Since it was prepared during the Johnson Administration, only one Pentagon official in the Nixon Administration seems to have been familiar with the contents of the classified history.[21] Thus, the security officials who were trying to identify sensitive security information faced a substantial challenge because of the massive amount of material involved.

The second factor was the speed of the litigation. The Government secured a restraining order against the *Times* on June 15, an evidentiary hearing was held on June 18, and District Judge Gurfein denied the Government a preliminary injunction on June 19; the Second Circuit heard oral argument on June 22 and it rendered a decision on June 23; the Supreme Court granted the *Times* a writ of certiorari on June 25, held oral argument the next day, and rendered a decision four days later. The Government's litigation against the *Post* was even more compressed since the Government did not file suit against the *Post* until the evening of June 18, three days after it filed suit against the *Times*. As a result of

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19 *See* RUDENSTINE, *supra* note 1, at 84.

20 *See id.*

21 *See id.* at 148.

the frenetic pace, it is most unlikely that the Government's lawyers ever felt confident that they had brought to the Court's attention all the information that was potentially harmful to national security.[22]

Once the Supreme Court's decision in the Pentagon Papers case is understood to encompass these possibilities, it is difficult to avoid asking whether the Justices were measuredly influenced, as they considered the case, by the fact that the defendants were the *Times* and the *Post*. Or, to make the same point with different emphasis, would the Court have reached the same result if the newspaper were a minor fringe publication?

Once these questions are raised, it seems possible, if not likely, that at least some members of the majority thought that the two newspapers were patriotic[23] and loyal to the nation, and that each newspaper had editors and reporters with national security experience who could identify information affecting national security. In short, it is probable that some members of the majority assumed that the *Times* and the *Post* could be trusted not to publish any information seriously harmful to national security. Such speculation gives rise to the implication that, at least in some cases, First Amendment rights may vary depending on the defendant. This conclusion may not be surprising to some, but it certainly is at odds with the conventional assumption that emphasizes the equality of rights.

THE MYTH OF SYMMETRY

During a panel discussion on the Pentagon Papers case in which I participated in June 1996,[24] a federal circuit judge criticized the outcome in the case. He reasoned that if the *Times* or the *Post* had filed a copyright infringement suit against a competitor newspaper that was about to republish one of its news reports, a court would award a prior restraint as long as the evidence supported the allegation. Thus, the judge argued, it was unfair for the Supreme Court to deny the Government similar relief against the newspapers. For this judge, the lack of symmetry between the newspapers and the Government in terms of the ability to obtain a

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22 In his dissenting opinion, Justice Harlan emphasized the frenetic pace of the litigation. *See New York Times Co.*, 403 U.S. at 753 (Harlan, J., dissenting).

23 The patriotism of the *New York Times* was directly challenged by United States District Judge Murray I. Gurfein while he considered whether to grant the Government a temporary restraining order. *See* RUDENSTINE, *supra* note 1, at 106.

24 Panel discussion, Prior Restraint 25 Years After the Pentagon Papers (June 25, 1996) (Association of the Bar of the City of New York).

prior restraint proved that the Supreme Court's decision was incorrect.

During the Pentagon Papers case, Erwin Griswold, the Solicitor General who argued on behalf of the Government in the Supreme Court, made a similar point. He told the Justices that he had "no objection" to the idea that a newspaper could obtain an injunction to protect its property under the law of copyright.[25] In making this point Mr. Griswold was not only suggesting that the First Amendment tolerated prior restraints, but that the Government had a property right in the Pentagon Papers comparable to a newspaper's property right in a news report. But in the face of stiff questioning from Justice Stewart,[26] Mr. Griswold dropped the idea that the Government had a property right in the Pentagon study that entitled it to a prior restraint similar to a newspaper's right to an injunction under the law of copyright.

The Government's relationship to the classified Pentagon study was different from the newspaper's relationship to its news reports. Under the law of copyright, the newspapers have a right to an injunction to protect their property interests in appropriate circumstances.[27] The Government did not sue the *Times* and the *Post* to protect a property interest; the Government sued the newspapers seeking a prior restraint because of alleged national security considerations.[28] In addition, the Government's ability to secure such relief depended solely upon satisfying the evidentiary requirements of the First Amendment.[29] Because the position of the parties differed, there is no basis for the assertion that outcomes should be the same.

OBTAINING INFORMATION VERSUS PUBLISHING IT

American constitutional law draws a sharp distinction between the right of the press to publish information it possesses[30] and the right of the press to obtain information.[31] With limited and well-known exceptions,[32] the press's right to publish is near absolute. In contrast, the press's constitutional[33] and statutory[34] rights

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25 *See* RUDENSTINE, *supra* note 1, at 285.

26 *See id.*

27 *See generally* Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987).

28 *See* RUDENSTINE, *supra* note 1, at 105-06.

29 *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

30 *See, e.g., id.*; Near v. Minnesota, 283 U.S. 254 (1964).

31 *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1478-91 (12th ed. 1991).

32 *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

33 *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett v. De

to obtain information are extremely limited.

In recent years, the attempts of some prominent members of the press to secure information have sparked successful civil claims for damages.[35] Two recent cases involving national broadcasters illustrate this point. In 1992, two ABC News reporters filled out job applications for entry level clerk positions at a Food Lion grocery store.[36] The reporters did not disclose that they were reporters working for ABC News and that they were planning to conduct an investigation of Food Lion using hidden cameras. Food Lion hired both individuals, one as a clerk in the deli department waiting on customers and the other as a meat wrapper working in the meat department. By the time the two reporters resigned from Food Lion, they had recorded about forty hours of videotape, which ABC reduced by editing to ten minutes and aired as part of a twenty-six minute national broadcast. In December 1996, a jury returned a $5.5 million verdict in favor of Food Lion, finding ABC liable for fraud, trespass, and breach of duty of loyalty.[37]

A second case involved a CNN news crew which accompanied federal law enforcement officials in a search of a Montana ranch looking for evidence that the rancher had poisoned eagles preying on his sheep.[38] The CNN crew members were dressed in clothes similar to those worn by the federal agents and they failed to wear any visible tag identifying themselves as CNN reporters. In addition, the federal officials wore wires so that their conversations could be recorded by CNN. Although a district court dismissed the rancher's civil rights action against CNN and the federal officials on the ground that the search warrant gave the federal officials the right to invite CNN to accompany them on the search,[39] a panel of the Ninth Circuit Court of Appeals recently reversed that ruling.[40] It concluded that the federal officials and CNN violated the rancher's rights when the CNN crew participated in and recorded the search.

Pasquale, 443 U.S. 368 (1979); Houchins v. KQED, Inc., 438 U.S. 1 (1978).

34 *See* Freedom of Information Act, 5 U.S.C. § 552 (1994).

35 *See* Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997); Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811 (M.D.N.C. 1995) (motion to dismiss granted in part, dismissed in part, deferred in part), *and motion for summary judgment granted*, 951 F. Supp. 1233 (M.D.N.C. 1996).

36 *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1233 (M.D.N.C. 1996).

37 *See id.*

38 *See* Berger v. Hanlon, No. CV-95-46-BLG-JDS, 1996 WL 376364 (D. Mont. Feb. 26, 1996), *aff'd in part, rev'd in part*, 129 F.3d 505 (9th Cir. 1997).

39 *See id.*

40 *See* Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997).

ABC and CNN are not the first press organs whose efforts to secure information gave rise to possible civil or criminal claims.[41] However, their prominence may suggest that a shift is occurring among the most powerful and influential press organizations regarding what conduct the press may engage in to gain information. If the shift occurs, the press may enhance its ability to obtain information, but it may also unintentionally undermine its near absolute right to publish.

Courts have not explicitly tied the press's right to publish with how the press obtained the information it has published. But that may be true because traditionally the press has not made it a practice to secure information by conduct giving rise to meritorious civil or criminal claims. If, in the future, the press makes it a practice to engage in such conduct, it is possible that courts will fashion civil or criminal remedies that have the effect of suppressing the right of publication.

The possibility that the methods used by the press to obtain information may affect the scope of the press's right to publish is, of course, purely speculative. But it may well turn out to be prophetic speculation. Again, the Pentagon Papers case is instructive. During the litigation, the Government tried to undermine the press's position by emphasizing that Daniel Ellsberg had wrongfully made a photocopy of the papers available to the *Times* and the *Post*, and that the newspapers were not authorized under the relevant federal executive orders establishing the classification system to possess the top secret study.[42] Although the Government did not charge that the newspapers had committed trespass or fraud to obtain the secret study, the newspapers insisted that they had done nothing improper to obtain a copy of the study.[43] The newspapers made no representation as to whether or not their source had acted legally in making the papers available to them; they restricted their statements to their own conduct.

Although the lower courts and the Supreme Court did not inquire into the circumstances surrounding how the newspapers had obtained the classified study during the prior restraint litigation, there is little doubt that the High Court—as did the lower courts—

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41 *See, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972).

42 *See* Transcript of Argument Before Court of Appeals Sitting *En Banc*, United States v. New York Times, No. 71-1617 (2d Cir. June 22, 1971), *reprinted in* 2 THE NEW YORK TIMES COMPANY V. UNITED STATES: A DOCUMENTARY HISTORY 885, 891 (1971) (statement of Whitney North Seymour, Jr.).

43 *See id.* at 923 (statement of Alexander M. Bickel).

assumed that the press had not committed trespass or fraud in obtaining the classified documents. Had the facts supported a different conclusion—that the press had engaged in fraud, trespass, or theft to obtain the documents—it is quite possible that one or two Justices in the majority, most likely Justices White and Stewart, might have reached a different conclusion than the one they did.

In offering this speculation, I well understand that presently—or then—the law of prior restraint does not make it relevant to the outcome whether the press obtained the information in dispute by trespass or fraud. However, I think it possible, if not likely, that that is the case because the press has shown little inclination to commit such acts. If the press makes it a common practice to commit trespass, theft, or fraud to obtain information, rather than such conduct simply resulting in the imposition of criminal or civil penalties, there is a substantial possibility that courts would consider such conduct as a grounds for undercutting the press's right to publish.