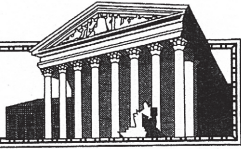


Supreme Court Case Study 45



Censorship Prior to Publication

New York Times v. United States, 1971

***** Background of the Case *****

During the turbulent years when the United States was engaged in the Vietnam War, protests against the war increased as the United States's role escalated.

One opponent of the Vietnam War, Daniel Ellsberg, a former Defense Department official, secured lengthy classified documents related to the war, including a "History of United States Decision-Making Process of Viet Nam [sic] Policy" and another document relating to the Gulf of Tonkin incident, which the government used to justify expanding its role in the war. These documents came to be known as the "Pentagon Papers." The government maintained that making the Pentagon Papers public might impose grave danger to the security of the United States.

Ellsberg turned the documents over to the *New York Times*, which planned to begin publishing them on July 13, 1971. The federal government sought to block publication and secured a temporary order from the Supreme Court, which barred publication until the Court could hear and decide the case. The case was heard on June 26, 1971. On June 30, the Court lifted the stay and allowed the paper to go to press.

Constitutional Issue *****

The First Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, guarantees the freedoms of speech and the press. The question in this case was whether the government could prevent the publication of materials on the grounds that the national security was endangered.

As had happened before, the right to criticize the government in wartime became an issue. The Supreme Court had to decide whether the government had the right to prevent publication of material that the government regarded as harmful.

***** The Supreme Court's Decision *****

The Court ruled in favor of the *Times*, maintaining that the government had not met the "heavy burden of justification" for a prior restraint. The decision was issued only four days after the Court heard oral arguments. The justice writing the decision is not identified. All nine justices wrote opinions; 6 justices concurred with the Court's ruling, while 3 dissented.

In his concurring opinion, Justice Hugo L. Black wrote that the Court should not even have heard oral arguments in the case, and the government's injunction should have been automatically denied. "In my view, it is unfortunate that some of my Brethren are willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment." To Black, by the First Amendment, "the press was protected so that it could bare the secrets of government and inform the people." In his view, the newspapers that

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published these papers "should be commended." In his concurring opinion, Justice William O. Douglas agreed with Black that prior restraints were never permissible.

Justice William J. Brennan also concurred, finding it noteworthy that "never before has the United States sought to enjoin a newspaper from publishing information in its possession." For him "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 [troop] transport already at sea can support even the issuance of an interim restraining order." Justice Thurgood Marshall also agreed that restraint of publication was improper. Marshall emphasized the absence of statutory authorization for governmental action to enjoin a newspaper (but if there had been such a statute, its constitutionality could have been challenged).

Justice Potter Stuart agreed that sometimes secrecy in government is necessary, but it is entirely up to the executive branch to protect its secrets. He was convinced that the executive branch was correct with some of the documents involved in the case, but 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."

***** Dissenting Opinion *****

Chief Justice Warren E. Burger dissented, rejecting the view that the First Amendment grants "absolute" privileges to the press. He wished for adequate time in which to consider the competing claims of press and government. Justice Harry A. Blackmun also complained that there had been no time for the Court to arrive at a reasoned judgment. He expressed concern that the publication of the Pentagon Papers might lead to battlefield casualties and diplomatic difficulties.



Questions *****

DIRECTIONS: Answer the following questions on a separate sheet of paper.

1. Why do you think each justice felt compelled to write a separate opinion?
2. Why did the case advance so rapidly through the appeals system?
3. Why is this case considered one of the most important in the Supreme Court's history?
4. What was the basis of Justice Black's opinion?
5. If you had been a justice of the Supreme Court considering this case, how would you have voted? Give reasons for your answer.

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