

## **New York Times Co. vs. U.S. (1971)**

**Argued:** June 26, 1971

**Decided:** June 30, 1971

### **Background**

The United States' involvement in the Vietnam War became increasingly controversial and unpopular among Americans as the conflict persisted over a decade.

Since security and secrecy were important to the U.S.'s aims in the war, the government enforced laws to punish spying or breaches of national security. The Espionage Act, which was enacted at the beginning of World War I, made it a crime for anyone to obtain information relating to America's national defense with the intent to use it (or reason to believe it will be used) to the injury of the U.S. or to the advantage of a foreign nation. Additionally, anyone who willfully received such information without reporting it to the appropriate government agent was also at risk for criminal prosecution. The law was used to punish traditional spying and sabotage, but it was also used sometimes to prosecute people for speaking out against wars or other government actions.

This case is about when laws intended to protect American security interests come into conflict with the First Amendment's freedom of the press. How much power does the government have to prevent the media from publishing sensitive information?

### **Facts**

Daniel Ellsberg, a former military analyst, was disillusioned with the U.S.'s continued role in the Vietnam War. He felt so strongly that the U.S. should not be in Vietnam that in 1971, he illegally copied over 7,000 pages of classified reports kept at the RAND Corporation, a research institution where he worked. These pages would come to be known as the "Pentagon Papers." Some of these documents were leaked to major publications, such as The New York Times and The Washington Post. These documents contained intimate details about the decision-making plans behind the U.S.'s intervention in the Vietnam conflict, as well as details that revealed contradictions between President Lyndon Johnson's motivations in Southeast Asia and his public remarks.

Neil Sheehan, the New York Times reporter who received the lead from Ellsberg, knew he had the story of the year, but the paper ran the risk of violating the Espionage Act if they published the papers. After printing two stories about the Pentagon Papers, President Nixon directed his attorney general to order the Times to stop, claiming the publications would cause "irreparable injury to the defense interests of the United States." The Times refused and the U.S. government sued the newspaper for violating the Espionage Act.

A federal judge issued a restraining order to stop further publication until trial. However, during that time, the Washington Post also printed portions of Ellsberg's papers. The government asked a federal court to stop the Post from publishing future stories about the papers, citing again the

Espionage Act. Both newspapers argued that the First Amendment protected their right to publish. Two different federal courts heard the Times and Post cases. Both newspapers won at the trial court, and the government appealed. The Court of Appeals for the D.C. Circuit ruled for the Washington Post, while the Court of Appeals for the Second Circuit ruled for the government (against the New York Times). The U.S. Supreme Court agreed to hear both cases, combining them and holding oral argument just one day after the justices agreed to take the cases.

### **Issue**

Did the government's efforts to prevent two newspapers from publishing classified information given to them by a government leaker violate the First Amendment protection of freedom of the press?

### **Constitutional Amendments and Supreme Court Precedents**

- **First Amendment to the U.S. Constitution**

“Congress shall make no law...abridging the freedom of speech, or of the press”

- ***Near v. Minnesota (1931)***

J.M. Near published *The Saturday Press* in Minneapolis, Minnesota; the paper was widely viewed as anti-Semitic, anti-labor, and anti-Catholic. Minnesota's “public nuisance” law prohibited the publication of scandalous, defamatory, or malicious newspapers. Near was sued under this law by someone the paper had frequently targeted. In a 5–4 decision, the U.S. Supreme Court decided that the state's statute was an infringement of the First Amendment. The Court held that, except in rare cases, censorship is unconstitutional. This case made the freedom of press protection applicable to the states, through the 14th Amendment, and emphasized that prior restraint (preventing the publication of something in advance) is almost always unconstitutional.

- ***Dennis v. United States (1951)***

The Supreme Court upheld the Smith Act, which made it a criminal offense for a person or group to advocate the violent overthrow of the government or to be a member of any group that supports such advocacy. This case involved members of the American Communist Party, which petitioned for socialist reforms. The Court said speech from a person or group so grave it poses a vital threat to the security of the nation is not protected under the First Amendment.

### **Arguments for *The New York Times* (petitioner)**

- In the First Amendment, the Framers gave the press the protection it must have to fulfill its essential role in our democracy. People must have access to uncensored information in order

to make decisions and choose leaders. The press was created to serve the governed, not the government.

- Congress has not made laws that abridge the freedom of the press in the name of national security and presidential power. The courts should not take it upon themselves to make law that would do so simply because the executive branch requests it.
- The newspaper did not publish the information in order to hurt the U.S. Instead, it published the information to help the country, by informing citizens about their government’s actions on an important public issue.
- Secrecy in government is fundamentally anti-democratic, perpetuating government misdeeds or errors. Open, robust debate of public issues is vital to our national health. Publishing materials that reveal misjudgments, miscalculations, or mistakes made by government officials is exactly why we want a free press to have unrestrained publishing authority.

### **Arguments for the U.S. Government (respondent)**

- During times of war, the executive branch must be given broad authority to restrict publication of sensitive information that could harm U.S. national security.
- The judicial branch and the executive branch are co-equal branches of government. The courts should refrain from passing judgment on the executive branch’s assessment of national security and foreign affairs. Our system of government rests on the concept of separation of powers, and the Constitution assigns decisions about foreign affairs to the political departments of the government—the executive and legislative branches.
- The newspapers knew the Pentagon Papers contained sensitive information that was obtained illegally. Both media outlets could certainly anticipate that the government would object to publication. It would have been reasonable to give the government an opportunity to review the entire collection and determine whether agreement could be reached on which sections of the papers could be published.
- One of the basic duties of every citizen is to report to police the discovery or possession of stolen property or secret government documents. This duty applies to everyone equally—from regular citizens, to high officials, and certainly also to The New York Times and The Washington Post.

### **Decision**

Only four days after hearing oral arguments, the Supreme Court ruled, 6–3, for the newspapers. The Court issued a short majority opinion not publicly attributed to any particular justice—called a *per curiam* (or “by the Court”) opinion—and each of the six justices in the majority (Justices Black, Douglas, Stewart, White, Brennan, and Marshall) wrote a separate concurring opinion. Chief Justice

Burger and Justices Harlan and Blackmun each filed a dissenting opinion. It is one of the few modern cases in which each of the nine Justices wrote an opinion.

### ***Per Curiam***

The Court reaffirmed its longstanding rule that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” “The Government thus carries a heavy burden of showing justification for the imposition of such a restraint.” The *per curiam* opinion concluded, without analysis, that that “the Government had not met that burden” in these cases.

### **Concurrences**

Justice Black, in an opinion joined by Justice Douglas, expressed the view that a court can **never** enjoin the publication of news consistent with the First Amendment. In his view, the First Amendment’s freedom of the press is absolute, and “the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.” This freedom is part of the basic constitutional structure: when creating the federal government, “the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy,” in which “[t]he press was to serve the governed, not the governors.” When the First Amendment says that Congress shall pass “no law” abridging freedom of the press, it means “no law,” not “some laws.” And the government cannot evade this absolute command by invoking national security concerns: “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”

Justice Douglas, joined by Justice Black, wrote that the executive branch does not have any “inherent power” to protect “national security” sufficient to overcome the heavy presumption against the constitutionality of a prior restraint on publication.

Justice Brennan concurred to emphasize that the cases represented the first time in American history that the government sought to enjoin a newspaper from publishing information in its possession, and that none of the lower courts ever should ever have ruled for the government. Justice Brennan recognized that there is only “a single, extremely narrow” exception to the prior restraint doctrine, involving an imminent threat in a time of war, and that exception did not apply here.

Justice Stewart, joined by Justice White, recognized the government’s interest in “confidentiality and secrecy,” but emphasized that it is primarily the executive branch’s obligation to protect its own secrets. Because “I cannot say that the disclosure of any of [the documents] will surely result in direct, immediate, and irreparable damage to our Nation or its people,” prohibiting publication would violate the First Amendment.

Justice White, joined by Justice Stewart, emphasized that “I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.” He noted that the government had tools to punish leakers and drew a fundamental distinction between such permissible punishment and an injunction against the

publication of the information by the press. He suggested that the government might even be able to charge the newspapers with a crime for having published the information but held that this possibility did not justify a prior restraint on the publication.

Justice Marshall concluded that no statute authorized the executive or judicial branch to enjoin the publication of information on national security grounds, and that neither branch had the “inherent power” to issue such an injunction. Congress’ authorization of criminal punishment for certain disclosures is not tantamount to authorization to enjoin such disclosures.

### **Dissents**

In his dissent, Chief Justice Burger complained that the Court had rushed its decision in the cases (it accepted, heard, and decided them in less than a week), and that the justices (and the lower court judges) “do not know the facts.” And, he argued, the facts are critical because “the First Amendment right itself is not absolute.” Given his lack of knowledge of the facts, he declared that he was “not prepared to reach the merits” of the cases, and characterized the Court’s rushed decision as “a parody of the legal process.”

Justice John Harlan, joined by Chief Justice Burger and Justice Blackmun, also complained that “the Court has been almost irresponsibly feverish in dealing with these cases,” and the justices had not had time to consider many of the “difficult questions of fact, of law, and of judgment.” He did, however, reach the merits, and concluded that the judiciary did not have the right to second-guess the executive branch on matters of national security beyond (1) satisfying itself that “the subject matter of the dispute does lie within the proper compass of the President’s foreign relations power,” and (2) insisting that “the determination that disclosure of the subject matter would irreparably harm the national security be made by the head of the Executive Department concerned.”

Justice Blackmun emphasized that “[t]he First Amendment ... is only one part of an entire Constitution,” and that “Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs, and places in that branch the responsibility for the Nation’s safety.” In his view, “[e]ach provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions.” He, therefore, would have sent the case back to the lower courts for a further review of the documents and assessment of the national security implications of publishing them.