

It has been a struggle for the better part of a century between the United States government and the American people; what is the appropriate balance of keeping classified information out of the public's hands and our right to know information about those who govern us? This struggle reached its tipping point in 1971 when the federal government and *The New York Times* went to the Supreme Court to settle a case known as the "Pentagon Papers" case. Information regarding the Vietnam War was leaked to the *Times* and *The Washington Post* that President Richard Nixon deemed to be an issue of national security and publication of a story on the Pentagon Papers would jeopardize the safety of the United States. But President Nixon was wrong. In a 6-3 ruling, the Supreme Court would lay out a clear precedent that allowed publication of information regarding U.S. involvement abroad that the government desperately tried to forbid making public. *New York Times Co. v. United States* (1971) has been the appropriate standard for prior restraint because it implements a test of "grave and irreparable danger" that champions our democratic ideals and furthers the necessity for a robust press.

Like much of American law, precedent of prior restraint originated from British Common law, and can be defined as government prohibiting publication or suppresses particular material (*New York Times Co. v. United States*, 1971). It was implied through the First Amendment that prior restraints were unlawful when the Bill of Rights were adopted in 1791. It wasn't until 1931 when the Supreme Court ruled on a landmark case that would set a clearer precedent for when the government can and cannot intervene in the suppression of speech. In *Near v. Minnesota* (1931), the Court ruled in favor of lifting an injunction on a tabloid newspaper editor who attempted to publish negative articles about certain racial and ethnic groups. Chief Justice Hughes, who wrote the majority opinion, acknowledged the absence of a clear precedent and

established grounds allowing the government to intervene on certain instances. The instances included “actual obstruction to [military] recruiting service...location of troops...obscene publications...incitements to acts of violence and the overthrow by force of orderly government” (*Near v. Minnesota*, 1931). Additionally, Hughes cited the Court’s ruling several years earlier in *Schenck v. United States* (1919) where in times of war and a need for increased national security, utterances of sedition were not permitted because it was a “clear and present danger” to national security (*Schenck v. United States*, 1919). Justice Oliver Wendell Holmes deemed distribution of Socialist Party leaflets violated the Espionage Act, passed in 1917, and expanded the powers of the federal government to suppress speech. This precedent would later become important in the Pentagon Papers case, nearly 50 years later. Chief Justice Hughes acknowledged the Court’s ruling in *Schenck* and allowed for the precedent to stand because it was not a time of war. So after 1931, several instances of prior restraint were deemed acceptable by tests established in *Near* and *Schenck*.

Then, in 1964 the Supreme Court gave more latitude to political speech with its landmark decision in *New York Times v. Sullivan*. What is important in *Times* in context of the history of prior restraints is the Court’s acknowledgment of the idea the press needs to be “uninhibited, robust, and wide-open” (*New York Times v. Sullivan*, 1964). Many legal scholars, including David Partlett and Russell Weaver, argue prior restraints would diminish a robust press, and would create a “chilling effect,” which was denounced in *Times*. Partlett & Weaver go on to conclude common law has been favorable to news organizations to further a robust press in the United States (Partlett & Weaver, 2006). The pattern emerging in the mid 20th century was

giving more latitude to individuals and limiting injunctions on publications that were critical of the government – ultimately leading to a robust press and transparent government.

In 1971 the United States was involved in a polarizing war in Vietnam, which brought criticism to the government, in particular the Nixon Administration. Much of the involvement in Vietnam was classified until June, 1971 when several thousand pages of classified documents regarding the war were leaked to *The New York Times* and *The Washington Post*. The documents, which dated from the 1940s to 1968 (*New York Times Co. v. United States*, 1971) were a part of a study done by the government to evaluate its position in Vietnam and abroad. When the *Times* went to publish stories regarding, what is now known as the “Pentagon Papers,” the Nixon Administration used an injunction to block the publication. Citing the documents as a violation of the Espionage Act of 1917, 18 U.S.C 793 (e), the *Times* could not publish what the government deemed to be a threat to national security (*New York Times Co. v. United States*, 1971). The case was quickly moved to the Supreme Court where the two sides sparred over the publications of such sensitive documents. Solicitor General Erwin Griswold argued the Executive Branch superseded the First Amendment and his order was to protect national security (*New York Times Co. v. United States*, 1971). The *Times*’ legal team, headed by Alexander Bickel, and the famous First Amendment advocate/lawyer, Floyd Abrams, argued the government could not use a prior restraint in this case because the First Amendment must be “left free to publish the news, whatever the source” (*New York Times Co. v. United States*, 1971). Ultimately the Court decided in a per curium decision the injunction should be lifted because the government failed to prove that publication of the stories would threaten national security. The Court additionally created a test requiring proof that “grave and irreparable danger” would

happen in result of publication. The Court sided with the Bickel and Abrams doctrine that “security also lies in the value of our free institutions” (Abrams, 2005, p. 31), which was deemed as a triumph for the First Amendment. Abrams, who would go on to represent many more clients such as Senator Mitch McConnell in the *Citizens United v. FCC* case, argued in his book *Speaking Freely, Trials of the First Amendment* (2005) the decision “stiffened the spines of all journalists” and eliminated a government chilling effect (Abrams, 2005, p. 53). Overall, as Abrams adamantly notes, the *Times* and the press triumphed in the Court’s decision.

In the subsequent years of *New York Times Co. v. United States* the Court did rule on another case in regards to prior restraint. In *Nebraska Press Association v. Stuart* (1976) the Court denied a gag order on the press when covering a highly publicized murder trial citing the *Times* decision as its premise. Chief Justice Berger wrote “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights” (*Nebraska Press Association v. Stuart*, 1976) ultimately strengthening the Court’s per curiam decision five years earlier. Though it was not an issue of national security, the decision furthered the Court’s intolerance for prior restraints. Secondly, though the case never reached the Supreme Court, in *United States v. The Progressive Inc.* (1979) the Wisconsin Western District Court lifted an injunction that prevented a magazine story to be published on how to create a hydrogen bomb. The United States argued a threat to national security and a violation of Department of Energy guidelines, though all of the information compiled for the story was in the public domain. The argument failed and the case was eventually dropped, striking down yet another prior restraint (*United States v. The Progressive Inc.*, 1979). The 70s was a key decade in the judicial branch for ruling on prior restraints, giving more power to the press.

The legal standard handed down in 1971 in *New York Times Co. v. United States* essentially was the death penalty to prior restraints on the American press. The per curiam decision decided the government did not show enough evidence that national security would be compromised with the publication of a series of reports in the *Times*, thus posing the question: is there ever enough evidence to uphold a prior restraint? In his book *The day the presses stopped*, David Rudenstine argues the Supreme Court left it undefined on what the government had to prove in order for the Court to uphold the injunction (Rudenstine, 1996, p.10). Perhaps it was left undefined because there was no plausible situation in which the government could have proved an injunction was necessary. The test the government had to pass for the injunction to be upheld required the publication to “surely result in direct immediate and irreparable damage to our Nation or its people” (*New York Times Co. v. United States*, 1971) which essentially was the nail in the coffin for prior restraints. Floyd Abrams, writing 40 years after being involved in the case, said the test “is articulated that is so nearly impossible to meet” (Abrams, 2011). If sensitive documents that describe American involvement in Vietnam, classified information from Presidents John F. Kennedy and Lyndon B. Johnson, and internal foreign policy debates (Abrams, 2011) did not meet the standards of Justice Hugo Black and Justice William Douglas’ test, then what would? Despite Solicitor General Griswold’s passionate argument that publication of the Pentagon Papers would “reduce the rate of American troop withdraw from Vietnam...identified top CIA agents and activities...and contained current military plans” (Rudenstine, 1996, p. 9) his claims still failed to pass the strong standards of “grave and irreparable danger.” Griswold’s argument may have caught the attention of some justices, but in

the end his argument fell short of acknowledging national security means our political institutions, as well.

Five years prior to *New York Times Co. v. United States*, a key precedent was handed down that paved the way for the Pentagon Papers injunction to be lifted. Coincidentally, it was the same petitioner, *The New York Times*. In *New York Times v. Sullivan* (1964), Justice Brennan noted the press must be “uninhibited, robust, and wide open” when debating public issues, even if it means “unpleasantly sharp attacks on government and public officials.” This democratic principle is to allow constituencies to follow elected officials and government conduct in the media (Morant, 2003), almost as a “fourth branch of government” working within the checks and balances system. Justice Hugo Black and Justice William Douglas used this doctrine to justify ruling in favor of the *Times* in 1971. The two in concurring opinions wrote, “Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate” (*New York Times Co. v. United States*, 1971). Black and Douglas were right – if the United States wants to be the forefront and image of a democratic society, transparency in government is vital. Having a government that classifies thousands and thousands of documents cannot be held accountable by its constituents, and a media that is subject to a government as its editor cannot claim it is a true democratic system. In a democracy, the people prevail, and restraining information is unhealthy to democracy. The physical safety of Americans is important, but the solicitor general failed to recognize the idea of national security is necessary in our political institutions as well. Judge Murray Gurfein, who decided on the Pentagon Papers case in New York’s Southern District court before it went to the Supreme

Court, famously wrote “The security of the Nation is not at the ramparts alone. Security lies in the value of free institutions” (*United States v. New York Times Company et al.*, 1971). But without the emerging idea of a robust press, established in *New York Times v. Sullivan* (1964), Black and Douglas’ argument would have had a weak base.

One of the most compelling arguments Griswold made was, at the time of the trial, the United States was taking troops out Vietnam and the *Times* publication would slow the withdrawing process, thus expanding an unpopular war (Rudenstine, 1996, p. 9). History has shown the Executive Branch has expanded powers during times of war dating all the way back to the Lincoln Administration when the United States was split and involved in a civil war (Whittington & Carpenter, 2003). The Nixon Administration issued the injunction on the *Times* in June, 1971 on the premise of having expanded executive powers (Abrams, 2005, p. 26) and the oath of office he pledged to keep the nation safe. Using *Near v. Minnesota* (1931) and *Schenck v. United States* (1919), Griswold’s argument stood ground. According to *Near*, it is forbidden to disclose “location of troops,” therefore Griswold saw the injunction was legal. However, the Pentagon Papers had reports dating up to 1968 – stopping three years prior to the *Times*’ story. *Schenck* supported the claim that the Nixon Administration had the proper authority to stop the publication acting in the best interest of national security – the U.S. was involved in the Vietnam War and the federal government had the power to suppress speech.

This argument was difficult for the Court to ignore and it essentially had a fundamental decision to make, either side having potential damaging affects – allowing for the injunction to stay and undermining one of the most fundamental rights the Constitution offers, or lift the

injunction and risk a breach in national security, suggested by Griswold. The Court took a risk for the sake of a freer press because the alternative, allowing an expanded Executive Branch to censor the press, would have been a detrimental precedent for a stable and vital democracy (Rudenstine, 1996, p. 355). Many scholars, including Rudenstine, argue democracy requires risk taking, like *New York Times Co. v. United States*, to further the fundamental ideas of a democracy (Rudenstine, 1996, p. 356). But what is more compelling is the Court decided to take a risk in a time of war, where history has sided with an expanded Executive Branch. The Courts, according to Second Circuit Court of Appeals judge James Oakes, took this risk because “even the war powers exercised by the commander-in-chief, however broad they may be, are subject to applicable constitutional limitations” (Oakes, 1982). But it was four years earlier in 1967 when the Supreme Court issued an opinion that countered the doctrine that the Executive Branch had expanded powers during a time of war. In *United States v. Robel* (1967), Chief Justice Warren handed down a powerful decision that addressed the First Amendment and its unique roll in the democratic process during a time of war:

“For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.” (*United States v. Robel*, 1967)

Warren's decision fits nicely in the context of *New York Times Co. v. United States* – it champions the democratic ideals the United States is based, over national defense, the centerpiece of the per curiam decision in *Times*. What possible speech could be so damaging that it is worth undermining the First Amendment of the Constitution?

In subsequent years of *New York Times Co. v. United States*, prior restraint cases stood no chance in courts across the U.S. due to the death sentence issued in 1971. A government chilling affect, once a threat to American journalists, had gone by the wayside. In fact, it had the complete opposite affect. In addition to Floyd Abrams' analysis that all journalists had its "spines stiffened" (Abrams, 2005, p. 53), he argued that has opened many opportunities for the journalism industry to grow. The 1970s shifted the type of journalism that was being printed. Abrams was right – several years later in 1974, the Nixon Administration suffered a major blow with the Watergate Scandal. According to Abrams, the decision in *New York Times Co. v. United States* gave the confidence to the press to report the unlawful activity in the White House (Abrams, 2005, p. 53), which led to the eventual resignation of President Nixon. *New York Times* journalist Harrison Salisbury said the reporting of Watergate would have never happened without the publication of the Pentagon Papers (Abrams, 2005, p. 54). The relationship between the press and the government was beginning to change, and according to judge James Oakes, the change was largely good because of demands made for a more transparent government and less secrecy (Oakes, 1982). Finally, David Rudenstine assessed the publication of the Pentagon Papers changed public opinion on the Vietnam War dramatically, and it became very unpopular very quickly, leading to a full troop withdraw in April, 1975 (Rudenstine, 1996, p. 9). His final conclusion is one that is hard to oppose: publication of the Pentagon Papers "made an

inestimable contribution to a free press and the American democracy” (Rudenstine, 2006, p. 356).

The Supreme Court delicately handled *New York Times Co. v. United States*, examining all of the possible outcomes of its decision, and in the end, they got it right. On June 30, 1991, twenty years to the day of the Pentagon Papers decision, Solicitor General Erwin Griswold had a short op-ed published in *The New York Times* Sunday edition. Griswold bowed down to the Court’s decision writing “In hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers” (Griswold, 1991). Griswold’s op-ed confirmed what the Court thought in 1971 and strengthened the per curium decision of not allowing for the injunction. The legal standard of “grave and irreparable danger” is a powerful precedent that has been true to the democratic process key to a robust press.