

*New York Times v. United States*

**MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.**

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co. v. United States*, [193 U. S. 197](#), [193 U. S. 400-401](#) (1904): "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their [Page 403 U. S. 753](#) real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. *Compare* [Page 403 U. S. 754](#)

*In re Debs*, [158 U. S. 564](#) (1895), with *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U. S. 579](#) (1952). This question involves as well the construction and validity of a singularly opaque statute -- the Espionage Act, 18 U.S.C. § 793(e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. *See* *Near v. Minnesota*, [283 U. S. 697](#), [283 U. S. 716](#) (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that, regardless of the contents of the documents, harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession, and that the newspapers received them with knowledge that they had been feloniously acquired. *Cf. Liberty Lobby, Inc. v. Pearson*, 129 U.S.App.D.C. 74, 390 F.2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of --

a. The strong First Amendment policy against prior restraints on publication; [Page 403 U. S. 755](#)

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,\* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues -- as important as any that have arisen during my time on the Court -- should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though, in different circumstances, I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that, because of the time elements the Government had not been given an adequate opportunity to present its case [Page 403 U. S. 756](#) to the District Court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation, the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand -- a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the *Times* litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

10 Annals of Cong. 613 (1800). From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See *United States v. Curtiss-Wright Corp.*, [299 U. S. 304](#), [299 U. S. 319-321](#) (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; [Page 403 U. S. 757](#) and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers."

1 J. Richardson, Messages and Papers of the Presidents 194-195 (1896).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." *Cf. United States v. Reynolds*, [345 U. S. 1](#), [345 U. S. 8](#) (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned -- here, the Secretary of State or the Secretary of Defense -- after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See *id.* at [345 U. S. 8](#) and n. 20; *Duncan v. Cammell, Laird Co.*, [1942] A.C. 624, 638 (House of Lords).

But, in my judgment, the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions [Page 403 U. S. 758](#) are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

*Chicago & Southern Air Lines v. Waterman Steamship Corp.*, [333 U. S. 103](#), [333 U. S. 111](#) (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground, and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And, for the reasons stated above, I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the [Page 403 U. S. 759](#) restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

\* The hearing in the *Post* case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p.m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18, and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting en banc, on June 22. Each court rendered its decision on the following afternoon.