

New York Times v. United States

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression that, from the time of *Near v. Minnesota*, [283 U. S. 697](#) (1931), until recently in *Organization for a Better Austin v. Keefe*, [402 U. S. 415](#) (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances -- a view I respect, but reject -- can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed, and I need not restate them. The prompt [Page 403 U. S. 749](#) setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases, and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably, such exceptions may be lurking in these cases and, would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is

unwarranted in light of the long period the Times, by its own choice, deferred publication.
[\[Footnote 6/1\]](#) [Page 403 U. S. 750](#)

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper, and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time, and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instantaneously.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not, in fact, jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach -- one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press -- the newspapers and Government might well have narrowed [Page 403 U. S. 751](#) the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary. To me, it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought -- perhaps naively -- was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issue. If the action of the judges up to now has been correct, that result is sheer happenstance. [\[Footnote 6/2\]](#)

Our grant of the writ of certiorari before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly, they pointed out that they had been working literally "around the clock," and simply were unable to review the documents that give rise to these cases and [Page 403 U. S. 752](#) were not familiar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN, but I am not prepared to reach the merits.
[\[Footnote 6/3\]](#)

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the *status quo* in the *Post* case. I would direct that the District Court, on remand, give priority to the *Times* case to the exclusion of all other business of that court, but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes, but, when judges are pressured, as in these cases, the result is a parody of the judicial function.

[\[Footnote 6/1\]](#)

As noted elsewhere, the *Times* conducted its analysis of the 47 volumes of Government documents over a period of several months, and did so with a degree of security that a government might envy. Such security was essential, of course, to protect the enterprise from others. Meanwhile, the *Times* has copyrighted its material, and there were strong intimations in the oral argument that the *Times* contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically, this would afford it a protection, analogous to prior restraint, against all others -- a protection the *Times* denies the Government of the United States.

[\[Footnote 6/2\]](#)

Interestingly, the *Times* explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants! The *Times* thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

[\[Footnote 6/3\]](#)

With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.