Prior Restraint: Freedom of the Press v. National Security

By Dawn Zuroff

A prior restraint is a court order banning publication of unpublished material. Clearly, this power needs to be squared with the fundamental right to a free press as guaranteed by the First Amendment to the United States Constitution. The extent to which exceptions to this First Amendment freedom can be justified has always been a matter of dispute.

Perhaps the most commonly accepted justification for the use of prior restraints is that they protect national security. National security is a vague concept which changes in meaning and connotation through time. In *New York Times* v. *the US Government*, 403 US 713 (1971), the government attempted to prove that the security of the nation would have been threatened by furtherpublication of the PentagonPapers, the compilation of US involvement in Indochina from 1945-1968. Thus, the government claimed that a prior restraint on publication was justified in order for US national security to be safeguarded. The press, on the other hand, claimed that national security was not threatened by the publication of a series of articles based on the Pentagon Papers. The press' right to be free of governmental interference was at the pinnacle of importance, while the government's claim to national security was not substantial enough to abridge such fundamental rights.

The press checks the internal workings of the government, which is essential to a free and democratic country. To others, however, it may merely act as a conduit of governmental propaganda and an omnipresent nuisance. Even Daniel Ellsberg, the man that initially exposed the Pentagon Papers, criticized the press for not being critical enough of the government. Referring to the press coverage of the war in the Persian Gulf, Ellsberg described the press as having been "the cheering section for the war in the gulf. The press usually relies upon handouts; it is not adversarial to the government." (Personal interview 2/21/91) "The pooling of reporters is the epitome of the censorship mentality," he said. In a pooled system, the army or government officials selectively report information only to a select group of press reporters.

The mere threat of prior restraints may cause an extra amount of precaution on the part of the press. To some, there may be certain cases where such restraints are indeed necessary. Are prior restraintseverconstitutionallyjustified? Are they even necessary, or are newspapers responsible enough to impose their own internal restraints on publication? Where should the power lie? In the hands of the Judiciary? The Executive? Or the people? The Executive Branch has constitutional power to determine what is vital and essential to the security of the nation. However, "any system of prior restraints of expression bears a heavy presumption against its constitutional validity, and the government carries heavy burden of showing justification for imposition of such a restraint." *(New York Times* v. *US,* 403 US 713 [1971], at 2141).

The Original Intent of the Framers of **the** Constitution

The First Amendment was written: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press..." (US Constitution) According to Justice Douglas, in the Supreme Court decision in the Pentagon Papers case: "The dominant purpose of the First Amendment was to prohibit widespread practice of governmental suppression of embarrassinginformation." (403 US, at 2144) The Framers recognized journalism as a restless, cantankerous force. (Graham 5) At that time, the press was wildly partisan and often inaccurate. (Graham 5) Even though Jefferson once wrote that nothing printed in a newspaper can be believed, he nonetheless supported the notion that: "The basis of our government being the opinion of the people, the very first object should be to keep that right [of freedom of the press]." (Graham 5)

In *Near v. Minnesota,* 283 US 697 [1931], Justice Hughes quoted James Madison: 'The great and essential rights of the people are secured against... executive am bition... .by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." (Report on the

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Virginia Resolutions, Madison's Works, vol. IV, p.543 in 283 US 697, at 626)

Under the autocratic systems of government of the sixteenth and seventeenth centuries, criticism of authority was a crime and was punished as sedition. (Siebert 267) After the US Constitution was ratified, though, similar actions were instituted. The Alien and Sedition Acts of 1798 were four laws enacted by the Federalist-controlled US Congress, designed to destroy Thomas Jefferson's Republican party. Most controversial was the Sedition Act, which was devised to silence Republican criticism of the Federalists. It's broad proscription of spoken or written criticism of the

government, the Congress, and the President virtually nullified the First Amendment freedoms of speech and the press. (Harris vol. I) The significance of the Alien and Sedition Acts is that they took place when the struggle for freedom was directed against a government that thought that they had an inherent right to censor the press in order to prevent dissension. The European nations had lived for many centuries with the concept of a government as "divinely right." So, "wrong thinking" was suppressed and authorities were acting properly when they curtailed the publication of material which embarrassed them. (Graham 41)

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

In *Near v. Minnesota,* 283 US 697 (1931), a state statute provided for injunctions against any "malicious, scandalous, and defamatory newspaper," and a state judge had enjoined a scandal sheet from publishing anything scandalous in the future. The Minnesota statute did not require advance approval of all publications, but came into play only after a publication had been found scandalous, and then only to prevent further and similar publications. Nevertheless, a majority of the Justices concluded that to enjoin future editions under such vague standards would, in effect, put the newspaper under judicial censorship. Chief Justice Hughes made clear, though, that the First Amendment's bar against prior restraints was not absolute. There areclearly circumstances in which prior restraints would be justified. For example, "no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."(283 US at 626)

In the Pentagon Papers case, unlike *Near* , the government sought to enjoin only readily identifiable material, not unidentified similar publications in the future. Also, the Pentagon Papers case did not deal with an overly broad statute, but rather with the specific claim of national security. In that sense, then, it was surely the first case of its kind.

The Exposition

The *New York Times* published two articles based on a 47 volume study, "The History of U.S. Decision-Making Process on Vietnam Policy." These documents, compiled from Defense Department files, were to be known as "The Pentagon Papers." The study itself was classified Top Secret. There had been no authorization by government officials for its release to the press. Many of the individual documents, consisting of memoranda produced by high officials in the early sixties, were quoted directly by the newspapers without paraphrasing. (Graham 37) After reading the published articles, the US Attorney General, John Mitchell, sent a telegram to the r/mesrequestingafreezeon future publication of information from the study. In it, he advised that the key texts of the Pentagon Papers contained:

> ***information relating to the national defense of the U.S. and bears a top secret classification. Publication... is directly prohibited by certain provisions of the Espionage Law.... further publication of information will cause irreparable injury to the defense of the U.S.... and such information could be used to the advantage of a foreign nation and... such knowledge and belief did willfully communicate, deliver and transmit said information by the publication thereof, to persons not entitled to receive such information, (see Espionage Act, no.24; 65th Congress [Title I in Udell])***

In 1917 and 1918, towards the end of World War I, Congress passed the Espionage Acts, which limited the freedom of public discussion while the nation was at war. The purpose of the statutes was to suppress certain hazardous information in times of crisis. The Espionage Act was intended to punish those who were involved with obtaining information injurious to the US or advantageous to other nations.

The *Times* refused to halt publication of the Pentagon Papers, and then published the third of its series on June 15th. The Government then moved before U.S. District Court Judge Gurfein for a temporary restraining order, which Gurfein granted. The *Times* gave the District Court and the Justice Department a list of descriptive headings for the portions of the Pentagon Papers in the *Times'* possession. Subsequently, *The Washington Post* printed parts of the Pentagon Papers, as well. However, in this case, Judge Gesell of the DC District Court, did not grant the Government's motion for a temporary restraining order. The Government then appealed to the Court of Appeals for the DC Circuit which granted the Government a temporary restraining order and remanded the case back to Judge Gesell.

In less than a week, because of the urgency of the case, the Supreme Court heard oral arguments. By a 6-3 vote, the Court dissolved the injunctions by lower courts, permitting the newspapers to resume publication. The Justices were divided even more deeply than the six to three vote indicated, and each member voiced his own views in a separate opinion. The Court majority concluded that the government did not have the right to prevent the publication of the specific documents in question.

The Case Against Prior Restraints

Justice Hugo Black, who was ardently opposed to the use of prior restraints in virtually every case, argued that censorship of the Pentagon Papers was clearly not constitutional. He claimed that, "both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without

censorship, injunctions, or prior restraints."(403 US at 2142) Only in this way would the press readily be able to criticize the government's wrongdoings.

Whereas JusticeBlack argued againstprior restraints more absolutely and universally, Justice Potter Stewart included a specific set of circumstances under which prior restraints could be constitutionally justified. He pointed out that with the governmental structure created by the Constitution, "the Executive is endowed with enormous power in the two related areas of national defense and international relations." (403 US, at 2148) Thus, the press serves as a check on the Executive Branch's decision-making apparatus in the areas of national defense and international affairs.

Justice William Brennan defined a narrow case in which prior restraints would be justified: only when the nation "is at war." *(Schenck* v. *United States,* 249 US 47, at 52 [1919]) Strategic military information, like troop locations, must be protected by prior restraints when the publication of such material might cause irreparable injury.

The Argument In Favor of Prior Restraints

In Justice Marshall's opinion, the government argued that "in addition to the inherent power to protect itself, the President's power to conduct foreign affairs and his position as Commander-in-Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country." (403 US, at 2155)

Former members of the Johnson and Kennedy Administration claimed that the exposure of the Pentagon Papers would cause national harm because the papers were based only on partial access to government war policy documents. (Ungar 113) In fact, during the reign of the Nixon administration, at the time of the Pentagon case controversy, Kissinger was on a top secret mission negotiating with North Vietnamese officials in Paris on his way back from a secret visit to Peking. There was a fear in the White House among conservatives that unless the White House took a firm stand infavoroftightrestrictionsonthepress.adangerousprecedent could be established; reporters might feel encouraged, even obligated, to delve deeper into government affairs for more secret documents on American foreign policy, which could weaken law and order. (Ungar 114)

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Additionally, during the time of the delicate talks with the Chinese government during the Nixon years, there was concern that the Chinese government, a very secretive regime, might have felt that there was relatively little secrecy in the US, and would then have felt hesitant to discuss anything thatcouldpotentially harm their country's reputation or any deals that they would make with the Nixon Administration. (Ungar 114)

District Court Judge Gurfein justified his issuance of the temporary restraining order to the *Times,* by claiming that "any harm that may result from not publishing during the pendancy... is far outweighed by the irreparable harm that could be done to the interests of the US government if the government should prevail." *(US v. New York Times,* 71 Civ. 2662)

Chief Justice Warren Burger argued that, due to the haste in which the case moved from the District Court to the Supreme Court (less than two weeks after the initial publication), no District Judge, Court of Appeals Judge, nor any member of the Supreme Court knew all of the facts (403 US, at 2158) It was impossible to read the 7000 pages in a fortnight's span. Justice Burger made reference to the apparent hypocrisies underlying the case. The *Times* held the documents for three to four months prior to publication. He questioned why the government was criticized for holding the documents, while the press, acting similarly, was not even questioned. However, Burger's assessment does not acknowledge that the press' responsibilities to the public are not the same as the government's. Although it also has an enormous responsibility as the purveyor of information to the public, the press may print at its own discretion. In the Pentagon case, the newspapers chose not to print, initially, until they were sure of the usefulness and accuracy of its content and sources. The press certainly wants to stay away from accusations of libel and the like. Thus, Burger's claim that the press was just as guilty as the government for withholding information is unsubstantiated.

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United States v. Progressive, Inc. (1979)

A few years after the Pentagon case, another controversial case came to the forefront of the still burning issue of freedom of the press versus national security. In this case, the Progressive magazine sought to publish an article entitled, *The H-Bomb Secret; How We Got It, Why We're Telling It.* The purpose of the article was to inform the public about nuclear weapons, specifically to show how easy it was to construct a nuclear bomb, obtain information about the construction, as well as the dangers associated with nuclear energy. The United States government thought that the dissemination of all of the information presented in a synthesized manner would cause immediate and irreparable harm to the United States. Specific concepts never before correlated could allow certain nations to bypass certain steps

in the construction of nuclear weaponry, thus enabling them to design a hydrogen weapon sooner.

The government proceeded to file for an injunction to haltpublicationof the article. The basis forthegovemment's claim was that the Atomic Energy Act "prohibits anyone

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from communicating, transmitting or disclosing any restricted data to any person 'with reason to believe that such data will be utilized to injure the United States or to secure an advantage to any foreign nation.'" (467 F. Supp. at 991) The term "restricted data" refers to "all data concerning: 1) design, manufacture, or utilization of atomic weapons; 2) the production of special nuclear material; or 3) the use of special nuclear material in the production of energy...." (467 F. Supp. at 994) Clearly, time is an extremely important factor when dealing with hostile nations and the potential destructive power that they might acquire. 'This time factor becomes critical when considering mass annihilation weaponry — witness the failure of Hitler to get his V-1 and V-2 bombs operational quickly enough to materially affect the outcome of World War II." (467 F. Supp. at 994)

The defendants claimed that the information in the article was easy to obtain. Although they acknowledged that freedom of the press is not an absolute right, they asserted that, in this case, the article "[did] not rise to the level of immediate, direct, and irreparable harm which could justify incursion into First Amendment freedoms." (467 F. Supp. at 991)

The outcome was that the government had sufficiently proven that a prior restraint was justified because this case fit into the narrow arena where potential for irreparable harm to the nation's security was sufficient enough to warrant infringement upon the magazine's First Amendment rights. It was also acknowledged that the *Progressive* case was different than the Pentagon Papers case in several important ways: First of all, that case contained historical data and, secondly, there were no substantial reasons given by the government, aside from the possible embarrassment of policy-makers, to believe that national security would have been in jeopardy had the series of *New York Times* articles been printed. Most importantly, in the *Progressive* case, the government was able to cite a specific statute that applied directly and unambiguously to the material in question.

From Prior Restraint To Censorship

During the war in the Persian Gulf, many news reporters, journalists, civil rights activists, and others criticized the government for imposing what they felt were harsh restrictions on the coverage of the war. A pooled reporting system was used. The government defended the pooled system for such reasons as: because most of the war was in the air, the journalists could not have been expected to fly in tiny planes that would fit only three people. Plus, it sought to protect the journalists from the dangers involved in a war of this magnitude.

However, many did not see the validity of the government's claim. In fact, there was a law suit filed in the District Court of New York. The plaintiffs were a group of sixteen journalists and small newspapers and magazines whocharged that thePentagon'spost Vietnam presspractices, especially the unprecedented access and censorship restrictions imposed as the Persian Gulf War began, violated the freedom of the press as guaranteed under the First Amendment. The plaintiffs alsocharged that these restrictions were representative of the government's emerging policy of censorship. The press was totally excluded from coverage of the Grenada invasion in 1983. The Defense Department failed to mobilize its press pool in time to cover the Panama invasion in 1989.

After arguments in Federal Court on March 7, 1991, US District Court Judge Leonard Sand dismissed the case on the grounds that the suit was too abstract; there was no reason to think that a similar situation would happen again. In his decision he stated: 'The court can not now determine that some limitation on the number of journalists granted access to the battlefield in the next overseas military operation may not be a reasonable time, place and manner for restrictions to be valid under the First and Fifth Amendments." *(Nation Magazine v. U.S. Department ofDefense,[199l])* In this case, the plaintiffs did not have standing. On February 25,1991, in an article from theAfew *York Times,* a Washington editor pointed out his frustration that, "the Administration want[ed] to use the legitimate theme of security, in some cases, to install a kind of blanket news management that we've never had in this century.... " (Berke)

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had been led by the puppet strings of Saddam; that he was merely using Arnett as a pawn in his maniacal game of war. But Anna Quindlen, on the other hand, defended Arnett by acknowledging the magnitude of Iraqi censorship: Even with censored information, "I think it's better to be there and get part of the story than to leave a major area of the war uncovered. "(Quidlen)

In the Pentagon Papers case, the government did not have a substantial argument other than an ambiguous clause in the Espionage Act that essentially accused Daniel Ellsberg of being a spy. This merely diverted attention away from the most basic issue surrounding the case — freedom of the press. Justice Brennan's assessment of the issue seems to be right: constitutional freedoms are not absolute, but there are few instances in which aprior restraint could be justified. The *Schenck* and *Near* cases provided that only when the nation is at war, is the government justified in preventing publication of potentially injurious information such as "sailing dates of transports or the number and location of troops." *(Near* v. *Minnesota,* 283 US 697, at 716 [1931])

What about the Cold War? The post World War II order has been enveloped by fear, due to the complete and total destructive power of nuclear weapons. *Progressive* took place when the nation was still ensconced by the rhetoric of containment. Unlike the Pentagon case, *Progressive* was about current information, not history. This information, presented in a synthesized manner, could have proved disastrous in the unraveling of future events. An enemy nation on its road to creating nuclear weapons might have gained some vital information never before conceived. (One can only imagine what would have happened had Israel not bombed Iraqi nuclear facilities in the early 1980s. By doing so, Israel set Iraq back roughly ten years on its path to the construction of nuclear weapons.) The prior restraint of Progressive Magazine, for the above reasons, seems to be entirely justified.

Although the point of the Progressive article was to expose the dangers of nuclear weapons and the relative ease with which they could be designed, the US was in a precarious position. Globally, the US was gaining its emergence as a world hegemon. It did not want to scare its own citizens about potential hazards associated with the newfound enormous powers of nuclear weapons.

In this sense, the press is desperately needed to protect citizens from the immorality of governmental actions. But, the Progressive article could have been written with the same fervor, just without certain critical information. The average citizen probably does not need to know every detail about the construction of nuclear weapons, especially if this information would allow certain nations to come closer to certain realizations about nuclear weapons. The Supreme Court, in order to allow the publication of the article (without the dissemination of dangerous material) asked Mr. Morland, the author, and the US government to reach a compromise on what would be fit to print.

Usually, when the government has been able to benefit from the exposition of information, it has informed the public. When the disclosure of embarrassing information is at issue, however, the claim of national security has been continuously abused by the Executive Branch. The country has witnessed this time and again - remember the Watergate scandal and the Nixon tapes case? Thus, it is essential that the press serve as the fourth branch of government, to check the other three branches, especially the Executive Branch. As Justice Stewart pointed out in the Pentagon Papers case, "...the only effective restraint upon executive policy and power...may lie in an... informed and critical public opinion... a press that is alert, aware and free most vitally serves the the basic purposes of the First Amendment." (403 US at 2148)

It is ironic that after the Bay of Pigs invasion failed, even President Kennedy acknowledged that perhaps the *Times* had been too self-restraining. He commented that if the full truth had been told in print, then the invasion might have been canceled, a fiasco avoided and many lives saved.

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(Ungar 102) When overclassification and overly stringent delineations concerning secrecy are used, the public does not have enough information to make an informed decision. Furthermore, overclassification costs the taxpayer an enormous amount of money.

Although the press is annoying and inaccurate at times, it nonetheless tests our country's commitment to the ideal of democracy. As Thomas Jefferson stated, "...if we [had] to choose between a government without newspapers or newspapers without government, I [would] prefer the latter." (Graham 5)

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Dawn Zuroffis a Barnard College senior.

Is the Current Middle East Peace Process a Step Towards War?

By Leron Kornreich

The purpose of the state of Israel is to ensure the strength, growth, and security of the Jewish peoples and to provide a bastion of democracy in a region that is infested with military dictatorships. The proceedings within the peace process in the Middle East must be viewed with these considerations in mind. "Occupied territories" is a misnomer. The West Bank is not a sovereign country and, under international concensus, it never has been. It is, therefore, incorrect to call it occupied because one cannot occupy something that does not rightfully belong to anybody. Rule of the territories is simply disputed. Many of the obstacles towards reaching a compromise arise because of the contradictory aims of Arab and Israeli leadership. Israel's goal is to reach an agreement without compromising its security. The Arab leaders are adamant about attaining the West Bank, the Gaza Strip, and the Golan Heights, which poses a direct threat to Israel's security. The Palestinian Liberation Organization (PLO), the terrorist group responsible for the hijacking of the Achille Lauro in 198S and countless other attacks, declared its goal as "eliminatfing] the Zionist presence in Palestine" in article 15 of the PLO Covenant Against Israel. Opposing views such as these are often close to irreconcilable, making the peace process a long and arduous journey.

Obstacles To Peace

The PLO now claims that their sole objective is to gain a homeland in the West Bank and in the Gaza Strip. However, the PLO was formed in Egypt in 1964, three years before Israel even gained the West Bank. It is, therefore, impossible to conclude that the primary objective of the PLO is only to attain the West Bank, because the conflict began before Israel controlled the West Bank and was over Israel's "right to exist" and not the Palestinian's claimed right to the territories. In fact, it is clearly stated in article eight of their covenant that their objective is "the retrieval of Palestine and its liberation through armed struggle."

If the issue at hand was really land, the Palestinians would have formed a state when given the opportunity was given under the 1948 partition plan. The struggle is over conflicting religious ideologies. The land is only a premise for the conflict. The Arab consensus is that Israel does not have the right to exist because it is a Jewish state. Their hostility towards Israel is rooted in their aversion to any Jewish presence, no matter what its size or location. Former Israeli Ambassador Abba Eban questions the longevity of a peace struck between Israel and the surrounding nations when one of the first steps in the process is gaining recognition of Israel as a country.

> *"Israel's legitimacy is not suspended in midair awaiting acknowledgement...There is certainly no other state, big or small, young or old, that would consider mere recognition of its 'right to exist' a favor, or a negotiable concession."* (Davis 1)

Perspective

Despite the amountofnewscoverage that it recieves, Israel is geographically a small country. When considering security, every inch of land should be a potential buffer against attack. The West Bank added strategic depth to Israel,

> "Occupied territories" is a misnomer.

providing an additional 31 mile buffer between Israel and Jordan at Israel's narrowest point. Without it, there are only nine miles of land between Israel's eastern border and the Meditteranean, making it easy to split Israel in half during an attack. In addition, heavily-populated and industrialized areas of Israel would be exposed. The West Bank's deep valley provides natural protection against attack, making it a barrier against a ground assault from Jordan. Israel' s hesitation