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The Pentagon Papers Case and the Path Not Taken: A Personal Memoir on the First Amendment and the Separation of Powers

Joel Gora

THE PENTAGON PAPERS CASE AND THE PATH NOT TAKEN: A PERSONAL MEMOIR ON THE FIRST AMENDMENT AND THE SEPARATION OF POWERS

*Joel M. Gora**

New York Times Co. v. United States, 403 U.S. 713; 91 S. Ct. 2410; 29 L. Ed. 2d 1822 (1971).

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study entitled *History of U.S. Decision-Making Process on Vietnam Policy.*

In view of the imperatives of the First Amendment, we find, contrary to the conclusion of the courts below, that the Executive Branch lacks the inherent power to seek an injunction to "protect the government's interests" in a case such as this. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Cases cited by the government, such as *In re Debs*, 158 U.S. 564 (1895) and *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967) did not involve First Amendment rights and are therefore distinguishable. If courts are ever to grant injunctions in the First Amendment area, Congress should first delineate precisely the range of the designated authority. In the absence of such a statute, the government should have no inherent power to seek an injunction here.

The judgment of the United States Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court.

So Ordered.

That, of course, is not the per curiam decision in the real Pentagon Papers case. The text and page citations are fictitious, but the theme is adapted from the brief filed by the American Civil

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Liberties Union ("ACLU") before the Second Circuit in the actual case. It embodies the separation of powers arguments which were advanced from the very first moment that the Government commenced its unprecedented federal court action to enjoin continued publication of the Pentagon Papers. Then, as now, the primary attention has focused on the Pentagon Papers case as a First Amendment Thriller, pitting the government against the press, the First Amendment against national security, and President Nixon against his Enemies. But the other themes—the separation of powers themes sounded from day one in the whirlwind litigation—were no less significant in the grand drama of constitutional democracy. Ultimately, the separation of powers themes might have been as influential in protecting that democracy as were the free press themes. As one scholar has suggested,

> the only holding to be found in *New York Times* may be that the doctrine of the separation of powers denies the Executive the constitutional power to take action on its own authority, if that action is one which would be of doubtful constitutionality if it had been authorized by Congress.[1]

If this is true, that would be a far different legacy than the case has left.

INTRODUCTION: AT THE INTERSECTION OF HISTORY AND MEMORY

Professor David Rudenstine's wonderful book[2] about the Pentagon Papers case is an extraordinary exegesis of a critical chapter in the history of the First Amendment and in the relationship between the press and the President. As a courtroom thriller, it is a page-turning account of the high drama that took place during those turbulent days in May and June more than a quarter of a century ago. As a psychological profile, it is a compelling and gripping glimpse into the motives and methods of the key players on both sides of the controversy. As a story about constitutional law, it is mostly about the First Amendment and the doctrine of prior restraint. But the case was also about an older, more pervasive, and constituent theme of constitutional law: the key doctrines of separation of powers. That is the part of the case that I will discuss, because that is the part of the case I worked on.

For me, reading the book had one singular effect: it put me at the crossroads of history and memory. As a young ACLU staff

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[1] Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 44 (1971).

[2] DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED (1996).

lawyer, I was an eyewitness to many of the events described so compellingly in the book, and a participant in some of them. As I read Professor Rudenstine's descriptions of the unfolding daily events and viewed them from a third person perspective, I often could recall those same events from my own first person perspective. And frequently while reading the book, I had the disconcerting sense of not being able to tell where history ended and memory began.

I remember the first frantic hours after the news shot through the left/liberal legal community, that the Government had filed suit and was seeking a restraining order against continued publication of the *New York Times*' series on the Vietnam War. From off the shelves in the rather threadbare, carpetless offices of the ACLU in lower Manhattan, the ACLU lawyers pulled a copy of the *United States Code Annotated* containing the sections on espionage and censorship, and quickly rifled the pages trying to find what possible statutory authority the Government might have had for its action—a question that would pervade the case from that moment on. We also found the dusty volume of *Supreme Court Reporter, Lawyer's Edition*, which contains the *Near* case,[3] to study and remind ourselves about the rarely employed doctrine of prior restraint, and the Court's prophetic hypothetical about a possible judicial restraint on reporting the sailing dates of transport ships or the location of troops.

I remember crowding into the crammed courtroom at the United States Courthouse in Foley Square—Room 506, the Motions Part—and thinking that every lawyer from the liberal community was packed into that room. I remember ACLU Legal Director, Mel Wulf insisting that Yale Law School Professor Alexander Bickel's initial court arguments were not adequately protective of First Amendment interests. I remember, on a sultry early summer evening, going to Professor Norman Dorsen's office at New York University School of Law to deliver a draft of my section of the ACLU's Supreme Court amicus curiae brief for him to incorporate into the final submission that he was writing and editing. I also remember reading the transcript of the oral argument in the Supreme Court and sensing how the Court would rule. And then the news flash and headlines a few short days later: "INJUNCTIONS LIFTED; PRESS WINS; FIRST AMENDMENT PREVAILS."

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[3] Near v. Minnesota, 283 U.S. 697 (1931).

My small personal part in this great constitutional drama was a modest one. I was one junior lawyer among several who contributed to the ACLU brief, which was only one of the half-dozen amicus curiae briefs filed in the case. Naturally, like all supporting players, I thought my part in the drama was more important than it seemed. And perhaps it was.

My part focused on the separation of powers argument, or as one commentator put it, "the least discussed aspect of a much heralded opinion."[4] Professor Rudenstine reports that this was an important argument that raised the question of "whether the executive branch of the federal government was authorized to seek a prior restraint against the *Times* absent a statute authorizing such action."[5] As Rudenstine goes on to note:

> This question involved several subsidiary ones: the scope of Congress's authority to control the executive branch's initiation of lawsuits; the power of the judiciary to grant relief absent specific congressional authorization; and the power of the executive branch to act unilaterally in limited circumstances so as to protect the national security. No Supreme Court decision conclusively answered these questions, and a handful of lower court decisions had disagreed in deciding related but different issues.[6]

Indeed, that was the major emphasis of Professor Bickel's submission during the initial court arguments in the case, when he maintained, in Rudenstine's words, that

> any plausible conception of the separation of powers doctrine barred the government from suing the *Times* because of inherent power . . . . [T]he suit could go forward only if Congress had passed a statute authorizing it, and it clearly had not done that . . . . [T]he government had cited no particular part of the espionage laws that could form a reasonable basis for its lawsuit and . . . no other statute had been invoked.[7]

Finally, "Bickel conceded that the First Amendment permitted prior restraints in limited circumstances, but argued that the material published by the *Times* was well outside the scope of such circumstances."[8] Consequently, the injunction requested by the Nixon administration was a "classic case of censorship."[9]

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[4] Note, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566, 1566 (1972).

[5] RUDENSTINE, *supra* note 2, at 371 n.24.

[6] *Id.*

[7] *Id.* at 106.

[8] *Id.*

[9] *Id.*

It was separation of powers arguments like Bickel's that drew sharp criticism from many First Amendment advocates.[10] Professor Rudenstine characterizes Bickel's presentation to the district court on this point as "befuddled" in suggesting that the Government might bring suit for an injunction if the situation were grave enough, in enabling the district judge to claim that "the *Times* had conceded that the executive branch had inherent power under the Constitution to 'restrain serious breaches vitally affecting the interests of the Nation' . . . ."[11]

Rudenstine repeats a similar criticism in other portions of his book. He faults the *New York Times*' Second Circuit brief for emphasizing the separation of powers arguments at the expense of the First Amendment claims, contending that "the brief dramatically shortchanged the important and complicated First Amendment issues in favor of those concerning separation of powers."[12] The same criticism was leveled at the Supreme Court brief as well.[13]

Was it a serious strategic error to place those kinds of process-oriented, separation of powers arguments on a par with, or indeed, to give them precedence over the substantive First Amendment arguments? Those separation of powers arguments clearly had weight and were advanced in the principal ACLU and Emergency Civil Liberties Committee's amicus curiae briefs filed in the proceedings. Indeed, a significant portion of the ACLU brief in the Supreme Court addressed the contentions that the district courts were without authority to consider the injunctive requests, and that nothing in the relevant espionage statutes remedied that deficiency. Professor Bickel, of course won his case, and the amici curiae shared that victory as well. But the ground of decision was summary, succinct, and based on the prior restraint doctrine.

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10 Rudenstine describes ACLU Legal Director Mel Wulf's attitude as follows:

> Wulf was . . . concerned by Bickel's conservative conception of the judicial function. Bickel was a strong proponent of judicial self-restraint, and he tended to favor technical legal doctrines that permitted courts to dispose of cases without ruling on the substantive issues in dispute. Wulf feared that Bickel would emphasize the argument he used on Tuesday—that the government could not sue the *Times* because Congress had not passed a law authorizing it to do so. A legal victory based on this argument might simply invite Congress to pass such a law. Wulf, for his part, wanted to seize the opportunity to gain a decision that would protect the broadest possible right of the press to publish and restrict the government's power to censor.

Id. at 111.

11 *Id.* at 171.

12 *Id.* at 224-26.

13 *See id.* at 280-82.

Could it, or should it, have been based on separation of powers concepts instead of, or in addition to, the reasoning employed? And had it been, might our constitutional landscape in the quarter century since have looked different?

It is to these tantalizing questions that I will now turn.

I. THE SEPARATION OF POWERS AND THE PENTAGON PAPERS

The separation of powers arguments raised by the *New York Times* and the various amicus curiae briefs had a number of strands: (1) that the President had no inherent authority to seek injunctive relief against a newspaper for a claimed national security breach; (2) that Congress had not given the President the explicit right to do so; (3) that the courts had no subject matter authority to consider such a request; and (4) that the courts could not utilize the injunctive remedy to deal with the national security breach.[14] At the core of the cluster of claims was the concept that the primary and plenary substantive power belonged to Congress, that the President's substantive powers were limited, and that the President could neither usurp significant powers from Congress nor impose serious obligations on the judiciary in his attempt to deal with the national security breach. Thus, the very commencement of the lawsuit was both an affront to legislative primacy and an imposition on judicial restraint and independence. In response, the Government contended that equitable principles empowered courts to grant executive injunctive relief to guard against serious threats to the national interest; that the authority to consider and apply such civil, equitable remedies could be implied from the extensive criminal statutes Congress had enacted to guard national security information; and that, underlying all this, the President had inherent power under the Constitution to take steps deemed essential to protect the national security.

The linchpin of the argument in this case turned on the great separation of powers battle of two decades earlier: the Steel Seizure case, *Youngstown Sheet and Tube Co. v. Sawyer*,[15] and the question of inherent presidential power. In *Youngstown*, the Court's decision, written by Justice Hugo L. Black with barely a precedent cited, took a hard-line, forceful, no nonsense, categorical approach to limit claims of inherent presidential power. Where

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[14] It is noteworthy that throughout the parallel litigation against the *Washington Post*, its counsel declined to emphasize such separation of powers themes, preferring instead to rest their primary reliance upon First Amendment contentions. *See id.* at 201, 279.

[15] 343 U.S. 579 (1952).

a President, flying in the teeth of congressional action and intent, took action to intrude upon private interests in a manner that presumptively infringed constitutional rights, the Court held that the President lacked the inherent power to do so, even though he claimed to be advancing national defense imperatives. To Justice Black, the issue was straightforward:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.[16]

As to the Constitution itself, the Court quickly concluded that no express constitutional language afforded President Harry Truman the authority to "seize" the nation's steel mills to sustain defense production during the Korean War. More significantly, the Court was equally vehement in rejecting the claim that such an authority could be implied from any of the President's relevant enumerated powers. It was left to the concurring opinions to discuss and distinguish cases such as *In re Debs*,[17] which purported to give the United States the right to seek injunctive relief in the absence of express statutory grants of judicial competence, and *United States v. Curtiss-Wright Export Corp.*,[18] which purported to uphold the President's exercise of "inherent powers" in the foreign affairs setting.

With *Youngstown* on the books in such an uncompromising fashion, it would be understandable to consider its analytic framework to be at least as relevant as the *Near* decision in resolving the issues in the *Times* case. This is true even considering the explosion of First Amendment protections that occurred in the decades between *Near* and the Pentagon Papers case.[19]

And so, from the very outset of the litigation, the separation of powers themes were present, although perhaps not quite as predominantly or pre-emptively as Professor Rudenstine would suggest. Thus, in its initial memorandum of law to the district court, the *New York Times* led off with its First Amendment arguments. Then, pointing to the Government's concession at the initial

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16 *Youngstown*, 343 U.S. at 585.

17 158 U.S. 564 (1895).

18 299 U.S. 304 (1936).

19 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1965); Mills v. Alabama, 384 U.S. 214 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

hearing that no nonstatutory or inherent authority exists or can be claimed for the injunctive relief sought, the *Times*' brief demonstrated the lack of statutory authorization for the Government to pursue its unprecedented injunctive action.[20] Similarly, almost half of the ACLU memorandum filed with the district court the day before was addressed to the same cluster of arguments.[21]

The argument for lack of statutory authority inevitably leads to the question of whether the presence of statutory authority was necessary, and whether it would make a difference in light of the overarching First Amendment issue. And that was precisely how District Judge Gurfein framed the question: "If it is a constitutional inhibition, why does Congress under Article 1 have more powers than the President under Article 2 in the field of foreign relations?"[22] This latter question, which would also bedevil Professor Bickel in the appellate courts, went unanswered by the district court. Instead, the court assumed that the *New York Times* had conceded that, if the threat to national security were grave enough, a statute might not be necessary and inherent presidential power to seek an injunction might be recognized.

As a result, the district court sidestepped these questions. First, the district court concluded that the Government could come into court and seek injunctive relief, even absent explicit statutory jurisdictional authority, in order to protect against breaches of security. Second, it concluded that none of the statutes invoked proscribed publication of the documents in question. Third, it had to decide whether the Executive could seek injunctive relief of this kind absent statutory authorization to make such a claim or seek

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20 Memorandum of Defendant New York Times in Opposition to Issuance of Preliminary Injunction, United States v. New York Times Co., No. 71 Civ. 2662 (S.D.N.Y. June 17, 1971), *reprinted in* 1 THE NEW YORK TIMES COMPANY V. UNITED STATES: A DOCUMENTARY HISTORY 329, 342 (1971) [hereinafter DOCUMENTARY HISTORY].

21 Indeed, in seeking to intervene in the proceedings on the ground that the public interest required citizen participation, Professor Norman Dorsen, as ACLU General Counsel, not only stressed the First Amendment themes, but also urged the Court to follow the example of the district judge 21 years earlier in the Steel Seizure suit:

> I suggest that the Court should resist the experts and I suggest that the resistance of the experts in this case is not very far different from what another single District Judge did 21 years ago, in the District of Columbia, when he put himself as a barrier between the Government and people during another wartime era when the Government was attempting to seize the steel mills, and claimed it was an emergency, when the Government claimed it knew the facts and the people did not know the facts, but Judge Pine said, "You are wrong, sirs," and refused to let the Government interfere with the property rights of the steel companies.

Transcript of Hearing or Preliminary Injunction Before Judge Gurfein, WASH. POST, June 18, 1971, at A1, *reprinted in id.* at 447, 611-12.

22 *Id.* at 626.

such relief. Pointing to the supposed concession that the Government could seek injunctive relief to prevent a sufficiently grave threat to the national security (a concession later clarified and disavowed on appeal), and agreeing with the validity of that approach, the district court nonetheless concluded that the Government's evidentiary showing fell short of establishing a grave threat to national security.

The confusion about the concession was unfortunate because the clear answer to the district court's question, the answer compelled by the Steel Seizure case, is no; without explicit or fairly implied statutory authority, the President cannot conscript the courts to impose national security-based constraints on a newspaper.[23] That was the answer that portions of the *Times*' appellate brief attempted to make. Professor Rudenstine states that in its brief, "the *Times* conceded that the government could sue the press for a prior restraint absent congressional authorizations in 'extraordinary situations of extreme urgency,'"[24] a disabling concession he asserted, rendered worse by the *Times*' failure to define what it meant by extraordinary situations. My reading of that portion of the brief revealed a somewhat different argument: To the extent that there might be occasions for inherent presidential power to act in extreme urgency or national emergency, such situations were not before the court where the issue concerned an effort to prevent a breach of national security by publication of information. In the latter situation, there could never be inherent presidential authority; rather, the President could act only with congressional authorization. Subsequently, in the oral argument Professor Bickel seemed to retreat a bit and concede that the President did have inherent authority to seek injunctive relief against disclosures of national security information in extreme cir-

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[23] The *Times* brief to the Second Circuit, in describing the ruling of the district court, addressed the concession as follows:

> The court observed in its opinion that it was "conceded" by the Times that there is constitutional power to restrain serious security breaches vitally affecting the interests of the Nation. The Times' position, as expressed orally and in the briefs, was that while there was no inherent Presidential power to enjoin even serious security breaches absent some specific statutory authority therefor, sufficiently grave security breaches which were violative of law might, under particularly grave conditions, be enjoined. It is The Times' position that so long as the Government could not show a violation of a statute, it could not prevail even if it could show a "serious security breach."

Memorandum of Defendant New York Times Company in Opposition to Motion for Injunction Pending Appeal, United States v. New York Times Co., No. 71-1697 (2d Cir. June 21, 1971), *reprinted in* 2 *id.* at 745, 763-64.

[24] RUDENSTINE, *supra* note 2, at 225.

cumstances, although he quickly observed that this was far from such a case.[25] Maybe the better answer would have been no. Perhaps Professor Bickel should have stuck to his guns and insisted that, under both separation of powers and First Amendment imperatives, the President could not seek to restrain the publication of information, period: "No, your honor, see the Steel Seizure case."

The Second Circuit portion of the proceeding ended with the proverbial whimper. The majority, in an unsigned per curiam order, ruled that the matter be remanded to the district court to determine whether disclosure of specified items "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."[26]

The argument, based on a lack of congressional authorization for the Government's seeking injunctive relief, fared slightly better in the *Washington Post* proceedings then in those involving the *New York Times*. The district court, which uncompromisingly refused to grant any injunctive relief, premised its decision at least in part on the lack of congressional authorization to do so.[27] In an initial ruling reversing that determination, two circuit judges framed the separation of powers argument in the reverse fashion, ruling that the President could come to court unless Congress had withheld that authority and that the criminal statutes punishing the dissemination of classified information, although stating that censorship would not be permitted, did not foreclose relief. There the court stated: "But it is hardly clear that Congress thereby meant to foreclose all possible resort to injunctive relief to protect such in-

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[25] In response to a question about whether the court's decision should turn solely on whether the material is injurious to the national defense, Professor Bickel replied:

> I think it turns on that to some extent.... We conceded below for purposes of argument on the basis of the facts of this case that certainly one can conceive of extreme circumstances.
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> I would refer to the case cited in here, the *Hirabayashi* case, the Japanese exclusion case. There are extreme circumstances of grave mortal danger in which, under the Constitution, there might be authority in the Executive to act in his inherent power.
>
> It is conceivable that in such circumstances a Court would say the President can come in, and maybe the troopship movement is such an example. Judge Gurfein could simply not have been that wrong on these facts.

Transcript of Argument Before Court of Appeals Sitting *En Banc*, United States v. New York Times Co., No. 71-1617 (2d Cir. June 22, 1971), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 20, at 885, 927.

[26] United States v. New York Times Co., 444 F.2d 544, 544 (2d Cir. 1971).

[27] *See Gesell Ruling on Post*, N.Y. TIMES, June 19, 1971, at 10 (reprinting the text of District Judge Gerhard A. Gesell's decision in *United States v. Washington Post Co.*, No. 71 Civ. 1235 (D.C. Cir. June 19, 1971)); *see also* RUDENSTINE, *supra* note 2, at 188-89.

formation in such exceptional circumstances as would justify prior restraints under *Near*."[28] But from that point on in the case, as Professor Rudenstine reports, the *Post*, unlike the *Times*, minimized the separation of powers arguments. The *Post* lawyers, like the *Times* lawyers, conceded that sometimes the First Amendment might permit a prior restraint,

> [b]ut unlike the *Times*, the *Post* lawyers focused solely on the right of the press to publish free of government censorship. They did not argue, as the *Times* had, that the government was barred from seeking a prior restraint because Congress had not passed a statute authorizing such legal action.[29]

Judge Gesell denied an injunction on the ground that the government had not shown that publication would cause "'a definite' break in diplomatic relations, an armed attack on the United States or an ally, a war, or a compromise of military or defense plans, intelligence operations, or scientific and technical materials,"[30] and the District of Columbia Circuit upheld that determination on the same ground without reference to the separation of powers issue.[31]

II. THE PENTAGON PAPERS IN THE SUPREME COURT

So the case was poised for the Supreme Court, where separation of powers arguments would continue to be pressed by the *Times*, although perhaps not with the same priority as before. Indeed, the very first issue raised by the *New York Times* was the purely constitutional question of "whether, consistent with the First Amendment, a court may restrain a newspaper from publishing articles, relating to public affairs."[32] Questions of the President's power to act in the absence of a congressional statute were stated subsequently. These issues were emphasized in the brief, although not with the single-mindedness that Professor Rudenstine's description would suggest. For even the portions of the brief attempting to show the need for, and absence of, statutory authority were interlaced with First Amendment cases showing why rigorous insistence on carefully crafted and narrowly drawn statutory authority had First Amendment roots.

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28 United States v. Washington Post Co., 446 F.2d 1322, 1324 (D.D.C. 1971).

29 RUDENSTINE, *supra* note 2, at 201.

30 *Id.* at 212-13.

31 *See id.* at 247.

32 Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, New York Times Co. v. United States, No. 1873 (June 24, 1971), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 20, at 984, 990.

Moreover, those arguments were in response to the rather extensive submission by the Government, which alternatively sought to show a statutory authority basis for the suit or to justify the absence of a statute by the showing of an inherent authority to protect the national security. Indeed, the Government made rather extravagant claims about how the failure to grant injunctive relief would impose upon the President's constitutional powers as Commander-in-Chief and Head of State. The argument was that since the President had primary responsibility for foreign affairs, national security, and foreign intelligence, the very inquiry into harm to those interests caused by disclosure of classified materials was a political question, and beyond the ken of the courts. With copious quotations from *Curtiss-Wright*[33] and *Chicago & Southern Air Lines, Inc. v. Waterman Corp.*,[34] two vintage cases extolling virtual unrestrained presidential power in foreign affairs, the Government insisted that, despite the First Amendment, the issues were beyond judicial cognizance: "The question whether the disclosure of military secrets would be so harmful as to merit prior restraint involves difficult and complex judgments which do not lend themselves to judicial resolution."[35] Accordingly, the Government argued, the President's judgment is all but conclusive, and the Court's responsibility is to support that judgment with its injunction.

Against such an argument, the more telling response is not that the Court knows better than the President about such matters, which would be an arrogation of judicial power, but that Congress knows better, or just as much as, the President, and therefore the authority to act must emanate from Congress as well, not from the President alone. Perhaps that is why Professor Bickel emphasized such separation of powers questions so extensively, hoping for the Court to answer the substantive constitutional question of whether the disclosures would harm the country with the process-based constitutional answer that this is a determination for Congress to make and that it had not affirmatively and expressly authorized the President to make the decision. That cluster of separation of powers arguments, pressed by both Professor Bickel and various amici curiae briefs, were in direct response to the Government's submission.

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33 299 U.S. 304 (1936).

34 333 U.S. 103 (1948).

35 Brief for the United States, New York Times Co. v. United States, Nos. 1873, 1885 (June 26, 1971), *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 20, at 1161, 1175.

These same themes would recur during oral argument. Solicitor General Griswold began his argument by observing:

> Great emphasis has been placed upon the First Amendment, and rightly so, but there is also involved here a fundamental question of separation of powers in the sense of the power and authority which the Constitution allocates to the President as chief executive and as Commander-in-Chief of the Army and Navy.
>
> Involved in that there is also the question of the integrity of the Presidency, whether that institution, one of the three great powers under the separation of powers, can function effectively.[36]

The silent citation of *Curtiss-Wright* could almost be heard.

Of course, Professor Bickel approached the separation of powers balance and tension from a different perspective. It is Congress, not the President, which has primary control over national security and all other fundamental legislative and constitutional policy matters. Bickel's silent citation of the Steel Seizure case could be heard as well. He argued that since the only possible exception to the ban on prior restraint suggested in *Near*—publishing the sailing dates of transports and the number and location of troops—was covered by a specific federal statute and was not claimed to exit in this case, the issue came down to a claim of raw, inherent executive power. Professor Bickel stated:

> That being the case, there is no applicable statute under which we are covered. The question arises, as a matter of inherent Presidential authority, what kind of feared event would give rise to an independent power on the part of the President? It is a question, in a sense, that was saved in Hiribayashi v. United States, the first of the Japanese exclusion cases. It is a question which, in its own context, of course, Youngstown Sheet and Tube Co. v. Sawyer answered in the negative.
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> My suggestion would be that whatever that case, that extremity, that absolute other extremity in which action for the public safety is required, whatever that case may be in which, under this Constitution, under its rules of separation of powers, when the President has independent, inherent authority to act domestically against citizens, let alone to impose a prior restraint, whatever that case may be, it cannot be this case.[37]

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[36] *Transcript of Oral Argument in Times and Post Cases Before the Supreme Court*, N.Y. TIMES, June 24, 1971, at 24, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 20, at 1218, 1218.

[37] *Id.* at 1224.

Yet, the more Professor Bickel emphasized the greater authority of Congress, the more he opened himself up for Justice Douglas' telling question:

"Why would the statute make a difference, because the First Amendment provides that Congress shall make no law abridging freedom of the press. Do you read that to mean that Congress could make some laws abridging freedom of the press?" To the response that any exception to First Amendment protection is most suspect when the President invokes it without statutory authority, Justice Douglas responded: "That is a very strange argument for The Times to be making. The Congress can make all this illegal by passing laws."[38]

Justice Black, in questioning William Glendon, the lawyer for the *Post*, likewise rejected the separation of powers tack:

> Q. As I understand the argument of both of the lawyers, it seems to me that they have argued it on the premise that the First Amendment, freedom of speech, can be abridged by Congress if it desires to do so.
>
> A. I did not make that argument. . . . I do not say that.
>
> Q. You do not say that?
>
> A. Never. I do not say that. No, sir. I am sorry, Your Honor. I say that we stand squarely and exclusively on the First Amendment.[39]

And, so did the per curiam opinion of the Court.

But a close examination of the separate opinions reveals that the separation of powers theme played a much more powerful role in the outcome than that. Even Justices Douglas and Black, the ones most skeptical about those arguments, incorporated those themes into their opinions. Indeed, in a comprehensive study shortly after the decision, one scholar suggested that the Pentagon Papers case cannot be understood except as a separation of powers case:

> Despite the fact that the *per curiam* opinion in *New York Times* in no way refers to *Youngstown* or the doctrine of separation of powers, I do not see how the case can be understood without reference to these matters. Although perhaps only Mr. Justice Marshall actually accepted Professor Bickel's argument (and only Mr. Justice Harlan used a similar argument in dissent), it appears to me that the only principle accepted by a majority of the Court was that the Executive lacked the inher-

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38 *Id.* at 1226.

39 *Id.* at 1231.

> ent power to impose, without legislative authority, prior restraints upon the press so as to prevent the publication of news which allegedly would have adverse effects upon our war in Southeast Asia. And this principle seems to follow *a fortiori* from the holding of *Youngstown* that the executive branch lacked the inherent power to seize the nation's steel mills in order to prevent a strike which allegedly would have adverse effects upon the conduct of our war in Korea. *A fortiori*, because in *Youngstown* it seems clear that Congress could have sanctioned the seizure, whereas in *New York Times* there is the 'heavy presumption' against the constitutional validity of even a congressionally authorized prior restraint on expression.... [O]nly the *Youngstown* rationale secured the adherence of a majority of the Court.[40]

Thus, for example, the opinion of Justice Black, the Court's fiercest First Amendment defender, but also the author of the no less fierce Steel Seizure opinion, was a one-two punch of freedom of the press and separation of powers. After extolling the First Amendment role of the press as the guardian of the people's right to know, Justice Black's opinion went on to condemn, in no less clarion tones, the assertion of inherent executive authority to override that role:

> The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.... To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure."[41]

Likewise, Justice Douglas, who berated Professor Bickel for suggesting that the Court might rule for the press on separation of power grounds, nonetheless invoked those themes in addition to the First Amendment's principles: "There is, moreover, no statute barring the publication by the press of the material which the *Times* and *Post* seek to use."[42] Indeed, the Douglas opinion dwells

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[40] Junger, *supra* note 1, at 19.

[41] New York Times Co. v. United States, 403 U.S. 713, 718-19 (1971) (Black, J., concurring).

[42] *Id.* at 720 (Douglas, J., concurring).

on the statutory analysis and lack of statutory authority in a length comparable to the extensive emphasis in the *New York Times*' brief and notes, as well, the dangers posed by the government's claims of "inherent" presidential power to seek injunctions on grounds of protecting the national interest.[43] It is not surprising that Justices Black and Douglas would employ these separation of powers principles since they were the only Pentagon Papers Justices who were on the Court during the Steel Seizure case.

Justice Brennan's opinion, however, is the primary First Amendment exposition among the concurring opinions, which is not surprising coming from the author of *New York Times Co. v. Sullivan*,[44] the landmark 1964 ruling about the relationship between freedom of the press and democratic government.

The swing votes were Justices Stewart and White, who joined each others' concurring opinions. Justice Stewart's opinion changes direction frequently, and it is difficult to identify a prevailing theme. But one can tease a split-level separation of powers motif from the opinion: under the Constitution, it is the President who has the primary responsibility to take care of national security and safeguard intelligence sources, and the courts basically lack competence to act one way or the other absent specific congressional direction. Certainly, given the imperatives of the First Amendment, they lack independent competence to enjoin the press in all but the most extraordinary situations.[45]

For Justice White, it was the absence of congressional authorization that established the clear and dispositive tie-breaker in an otherwise close First Amendment case. Justice White, not a notoriously vigorous champion of press or speech rights, was only willing to concede that "the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."[46] And again: "At least in the absence of legislation by Congress . . . I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."[47] Finally, and some-

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43 *See id.* at 722.

44 376 U.S. 254 (1964).

45 *See New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring).

46 *Id.* at 731 (White, J., concurring).

47 *Id.* at 732.

what chillingly, Justice White justified his refusal to allow a prior restraint against publication by describing all the statutes providing for criminal punishment for the papers' actions and suggesting that he might very well uphold convictions under such provisions, notwithstanding the First Amendment. He stated: "I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint."[48] Citing the Steel Seizure case, Justice White concluded that Congress had pervasively addressed the issue of protecting national defense information, and still had not authorized injunctive relief against threatened publication. As Professor Peter D. Junger observed: "This is the first of the opinions to be based clearly and solely on lack of inherent power in the Executive."[49]

The final Justice who comprised the majority was the one whose opinion was based solely on separation of powers grounds. Justice Marshall's opinion barely mentioned the First Amendment and focused exclusively on the various separation of powers themes sounded by the *New York Times* and various amici: "I believe the ultimate issue in cases is even more basic [than the First Amendment question,] whether this Court or the Congress has the power to make law."[50] Seriously questioning the power of the President—even in the foreign affairs field—to invoke the equity jurisdiction of courts to protect the national interest in the absence of substantial congressional authorization, Justice Marshall observed: "The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It did not provide for government by injunction in which the courts and the Executive Branch can make law without regard to the action of Congress."[51] Without saying that the President would never have the inherent power to act, or to invoke the equity jurisdiction of courts to prevent publication of matters harmful to national security, Justice Marshall concluded that it would, however, "be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."[52]

Justice Marshall's opinion was the only one which stressed

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48 *Id.* at 737.

49 Junger, *supra* note 1, at 25.

50 *New York Times Co.*, 403 U.S. at 741 (Marshall, J., concurring).

51 *Id.* at 742 (citation omitted).

52 *Id.*

separation of powers concepts which serve both as a limit on inherent executive power to act unilaterally without congressional approval, and as a limit on the power of the Executive branch to conscript the courts to help it perform tasks which Congress had precluded. Had Justice Marshall's opinion been the opinion of the Court, so much might have been different.[53]

III. THE LEGACY OF THE PENTAGON PAPERS CASE

One commentator, who argued that the Steel Seizure sensibilities infused much of the Pentagon Papers opinion, nonetheless ironically observed:

> Thus, in the end, *New York Times* appears to do nothing except establish that *Youngstown* is alive and fairly well. But the stress placed in *New York Times* on the external constitutional limitation of the First Amendment may actually have served to weaken the holding in *Youngstown*. An opponent of unrestrained executive power would presumably have been happier if the First Amendment had never been mentioned in *New York Times*.[54]

It sounds like apostasy to wish that a landmark First Amendment case had been something else. The great Pentagon Papers case of course has been treated, by the received and conventional wisdom, as a great First Amendment victory and a separation of powers afterthought. It is inserted in constitutional law casebooks in the First Amendment section, not with the Steel Seizure case. But it is heresy vindicated by the hindsight of history. For, as a First Amendment case, *New York Times*, though it has undoubtedly stayed the hand of many a bureaucrat who would have otherwise gone to court to seek a prior restraint against publication, has not stayed the hand of aggressive Presidents whose aggrandizement of power has been left a clear field by the fact that the Pentagon Papers case is not conceived of as a separation of powers victory, but a free press landmark.[55] And the aggrandizement has

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53 Justice Harlan's dissenting opinion also emphasized separation of power themes, but from the opposite perspective. In his view, given the Executive's primacy on foreign affairs, the President's assertion of harm to the national security threatened by the release of classified information essentially should have concluded the matter. For courts or Congress to intervene in such matters was a violation of the President's prerogatives. *See id.* at 752 (Harlan, J., dissenting). Justice Blackmun's dissenting opinion took a similar tack. *See id.* at 759 (Blackmun, J., dissenting).

54 Junger, *supra* note 1, at 52.

55 The *Times* precedent has been available to help secure important free press victories against the censorship of prior restraint. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

come, more often than not, at the expense of First Amendment rights.

The real irony is that the Pentagon Papers case turned out to be one of the last clear chances to limit presidential power in the foreign affairs sphere. It was the moment to say that the Steel Seizure case should be the rule in all instances of executive action unauthorized by or inconsistent with congressional policy instead of only applying to those actions that affect the "domestic" sphere, with *Curtiss-Wright* supplying the rule favoring "inherent" presidential power on "foreign affairs."[56] One other chance was lost the following spring, when the Court unanimously rejected the Nixon Administration's claim of inherent executive authority to engage in warrantless wiretapping and eavesdropping in cases of domestic security intelligence. Although the Court broadly rejected excessive claims of presidential authority, it expressly saved questions concerning the President's powers over foreign affairs.[57] With the emergence of the Burger and Rehnquist Courts, the separation of powers tilted toward the President and away from Congress. In the twenty-seven years since the Pentagon Papers case, the Presidency has emerged victoriously from almost every clash over the power to make national policy in the domestic or foreign spheres.

Within a year, the Pentagon Papers decision failed either as a First Amendment ruling or a separation of powers limitation on excessive presidential power, to interdict a classic act of administrative censorship. The lower courts were willing to enforce, with-

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[56] *See* Harold Edgar & Benno C. Schmidt Jr., Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 351 (1986); Harold Hongju Koh, *Why The President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988). These Articles suggest that not only did the Pentagon Papers Court fail to ground the decision on the kind of classic separation of powers concepts embodied in Justice Marshall's opinion, but that, given the opinions of Justices Stewart and White, the decision was actually a victory for the primacy of presidential power vis-a-vis Congress in foreign affairs. It was a victory, in other words, of *Curtiss-Wright* over *Youngstown*. As Professor Koh put it:

> When Congress responded to Vietnam . . . by attempting to impose the *Youngstown* vision upon the President by statute, the Court threw its weight toward *Curtiss-Wright*, which has now reemerged as the touchstone of the Court's foreign affairs jurisprudence. This pattern first appeared in 1971, when the Burger Court rejected the Nixon Administration's efforts to enjoin publication of the Pentagon Papers without statutory authorization. Although the votes of the First Amendment absolutists then sitting on the Court sealed a rare presidential defeat, the separate opinions in the Pentagon Papers Case unveiled a strong undercurrent favoring *Curtiss-Wright*'s vision of executive supremacy in foreign affairs.

Koh, *supra*, at 1309.

[57] *See* United States v. United States Dist. Ct., 407 U.S. 297, 308, 322 (1972).

out clear legislative warrant, a "secrecy agreement" whereby CIA personnel were compelled to agree to submit all writings and speeches for prior clearance to the Agency.[58] That same principle was sustained by the Supreme Court a decade later when it upheld the authorization of monetary damages against a former agent who published wholly nonclassified material in violation of the prior submission requirement of the "secrecy agreement."[59] Finally, in *Haig v. Agee*,[60] the Court woodenly upheld the State Department's revocation of the passport of a former CIA agent who traveled throughout Europe condemning the agency and exposing its misdeeds. Eschewing statutory interpretation that would have invalidated the passport action and avoided the First Amendment question, the Court found that revocation of the passport was an inhibition of action rather than speech and thus subject to lesser First Amendment scrutiny, even though the government's action was triggered purely by speech.

In the era between Steel Seizure and Pentagon Papers the Court frequently had invalidated executive action violative of rights on the grounds of lack of proper legislative authorization. These cases were sub-constitutional protections of substantive and process-oriented constitutional rights, for they insisted that the Executive could not take harmful actions that would arguably violate fundamental rights unless the Congress had clearly authorized the action. These rules were applied in areas such as

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[58] *See* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972). In response to the claim of lack of congressional authorization for the executive imposition, the appeals court casually pointed to vague language in post war statutes setting up the Central Intelligence Agency. In the one prior censorship case where there was arguable legislative authority for a prior restraint, a lower court judge granted injunctive relief against publication of a magazine article providing instructions for building a hydrogen bomb. *See* United States v. Progressive Inc., 467 F. Supp. 990 (W.D. Wis. 1979). The judge also indicated that he would have granted an injunction even without a statute, based on the existence of the likelihood of direct, immediate and irreparable injury to our nation and its people. *See id.* at 996. The case might have finally tested the Pentagon Papers question of whether the presence of statutory authority for a prior restraint reconfigures the First Amendment question. But it was mooted out when other copies of the same information began springing up everywhere.

[59] *See* Snepp v. United States, 444 U.S. 507 (1980). In a frighteningly disdainful per curiam opinion, written without even the benefit of oral argument, the majority upheld the secrecy agreement and the imposition of damages on the former agent, with barely a whisper about the First Amendment. More tellingly, although a strong dissent protested the offense to First Amendment rights, "[s]eparation of powers considerations were . . . entirely absent from both the majority and the dissent." Edgar & Schmidt, *supra* note 56, at 375.

[60] 453 U.S. 280 (1981).

security clearance to work in the Defense Department[61] or passports to travel,[62] even though the action affected national security and foreign affairs. A clear separation of powers ruling in the Pentagon Papers case might have carried those principles into contemporary times. But, instead, the Court persistently has retreated from insistence on explicit congressional authorization and deferred to executive power. Two final examples will prove the point. Travel restrictions to Cuba were upheld on the basis of less than clear and convincing congressional authorization, as well as over constitutional objections.[63] Otherwise, property rights of American companies, with claims against Iranian government assets, were compromised in executive arrangements that were similarly without obvious statutory authorization.[64]

In all of these instances, the kind of insistence on clear and strong congressional authorization for presidential action that was the hallmark of the Steel Seizure case, but which could not be mustered as the main basis of the Pentagon Papers case, might have led to the opposite result. Instead, the phenomenon of presidential primacy in foreign affairs, at the expense of legislative prerogative, and, more importantly, individual rights, which are always the bottom line beneficiary of properly separated powers, continues unabated. As Professor Harold Hongju Koh has concluded:

> In short, far from maintaining a rough balance in the congressional-executive tug-of-war, the Court's decisions on the merits of foreign affairs claims have encouraged a steady flow of policymaking power from Congress to the Executive. Through unjustifiably deferential techniques of statutory construction, the courts have read *Curtiss-Wright* and its progeny virtually to supplant *Youngstown*'s constitutional vision. As a result, the courts have become the President's accomplices in an extraordinary process of statutory inversion. It hardly surprises, then, that Oliver North should have cited *Curtiss-Wright* to Congress as the legal basis justifying all of his actions during the Iran-Contra Affair.[65]

Finally, these trends mirror general developments in the balance of power between President and Congress, as mediated by

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61 *See* Greene v. McElroy, 360 U.S. 474 (1959).

62 *See* Kent v. Dulles, 357 U.S. 116 (1958).

63 *See* Regan v. Wald, 468 U.S. 222 (1984).

64 *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

65 Koh, *supra* note 56, at 1313. A number of lower court rulings in cases challenging presidential foreign policy actions similarly have been dismissed on grounds of executive authority to act without, or sometimes even despite, clear legislative mandate. The cases are collected by Koh. *See id.* at 1313-17.

the Court. By invalidating legislative branch arrangements to limit presidential power, cases like the legislative veto ruling[66] and the balanced budget act case[67] were significant victories for the Executive over the Legislature in the struggle over power to make policy. The only time the Court has really sustained incursions into executive power was when Congress had delegated presidential authority to others, but not to itself.[68]

The important thing is not how the particular adjustment of power relations among the three branches is worked out in the specific instance, but rather to recognize that the purpose of the proper separation and balance of power is to protect individual freedom. That is the structural genius of the Constitution.

The first, outer perimeter line of defense of individual liberty is that the respective branches must act within their respective realms and through constitutionally prescribed processes. If they fail to do so, the government's effort to invade the people's rights is met and defeated at that outer line of defense. Only when the government has acted consonant with separation of powers principles, thereby breaking past the outer barriers that protect against intrusion into individual rights, do the great substantive protections of the Constitution—the inner perimeter line of defense protecting the liberties of the people—need to be invoked. Had the Pentagon Papers case been resolved at the outer perimeter, with a clear and convincing Steel Seizure-esque ruling that major government actions such as restraining the press in the name of national security can only be clearly authorized by Congress if they are to proceed at all, its precedential and political power might have been even stronger than it is.

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66 *See* INS v. Chadha, 462 U.S. 919 (1983).

67 *See* Bowsher v. Synar, 478 U.S. 714 (1986).

68 *See* Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent counsel statute against claim that it detracted from President's law enforcement responsibilities).