

## COMMENTARY

THE RIGHT TO KNOW AND THE DUTY TO WITHHOLD:  
THE CASE OF THE PENTAGON PAPERS*Louis Henkin* †

## I

“Great cases like hard cases,” perhaps, still “make bad law,”<sup>1</sup> but in the Supreme Court of the United States they often make almost no law at all. The Court divides sharply and even splinters; a majority is obtained for the judgment only on the narrowest grounds, and the result is explained and justified only in a most cryptic opinion. Individual Justices, more expansive in explaining their concurrence, justify it on grounds that do not commend themselves to their brethren and that would hardly govern any other case. And that which makes the case great or hard renders unlikely that another case will soon arise to invoke the Court’s “precedent.”

By any criteria, the case of the Pentagon Papers<sup>2</sup> must be deemed great or hard, or at least dramatic; surely, it represents “some accident of immediate overwhelming interest which appeals to the feelings and”—some will add—“distorts the judgment.”<sup>3</sup> Six Justices concurred in the judgment, and at least five of them<sup>4</sup> joined a brief per curiam opinion. Each of the concurring Justices wrote separately, two pairs joining each other’s opinion. Each of the three dissenting Justices wrote, and all of them joined in one of the dissents. Some things said by one or more Justices on one side commended themselves to one or more on the other.

The majority justified its judgment in one brief paragraph:

“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U.S. 697 (1931). The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”

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<sup>1</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting), quoted in *New York Times Co. v. United States*, 403 U.S. 713, 752 (Harlan, J., dissenting), 759 (Blackmun, J., dissenting) (1971).

<sup>2</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>3</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

<sup>4</sup> Although only Justices Stewart and White expressly said so. *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971).

*Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.<sup>5</sup>

We know, then, that for a majority of the Court the lower courts properly denied an injunction in this case. One is entitled to infer also that, for the majority, the courts must decide in every such case whether or not the "heavy burden" has been met; if it has, an injunction could and should issue, the first amendment notwithstanding. We are not told, however, why the public interests asserted by the United States were deemed insufficient. Nor are we given general guidance: What kinds of public interests will be protected against Press publication? Do different public interests have the same or different weight? Do the interests of the Press also weigh differently in different cases? How are weights of interests to be determined? What kinds of evidence would meet the Government's burden?

Some intimations of the views of particular Justices can be gleaned from the proliferation of concurring opinions, in the light of their concurrence in the delphic per curiam. Justices Black and Douglas, though they joined the Court's opinion, might not approve judicial restraint of the Press, at least prior restraint, in any circumstances.<sup>6</sup> Justice Brennan might approve an injunction, even a temporary one, only upon proof that "publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."<sup>7</sup> Justice Marshall, and perhaps Justices Stewart and White, refused the injunction in part because Congress had not authorized it, indeed because Congress "has specifically declined to prohibit" publication like that in issue;<sup>8</sup> together with the dissenting Justices, then, they might have formed a majority to approve an injunction authorized by statute, in a like case or even in a case in which the interests jeopardized by publication were less weighty. Justices White and Stewart (as well as Marshall and the dissenters) would apparently find in the first amendment far less resistance to prosecution after publication than to "prior restraint" of publication by injunction; the former might even be possible in a case in which the governmental interests asserted were not very weighty.

Students of the Court, of course, hesitate to build doctrine with what the Court did not do or say, even with the implications of its

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<sup>5</sup> *Id.* at 714.

<sup>6</sup> *Id.* at 715, 722-23.

<sup>7</sup> *Id.* at 726-27.

<sup>8</sup> *Id.* at 742.

reasoning for cases not before it. We may have a few more bricks, or straws, before long, if persons who have been charged with crime for making the Pentagon Papers available to the Press are convicted,<sup>9</sup> and if their convictions are reviewed by the Supreme Court. But another case like last summer's—whether hard or easy, great or small—is not likely to arise soon, and before that case is enshrined—and forgotten—it seems useful to penetrate the rhetoric and dispel the confusion it has engendered, and to plead the fundamental issue.

## II

Both before the courts and in the Press there was much talk of “the right of the people to know” what government was up to. That phrase might have appealed to the authors of the Declaration of Independence and even to Constitutional Fathers whose political theory and rhetoric asserted that sovereignty was in “the people” and that government governed with the consent of the governed.<sup>10</sup> But the Constitution, of course, expressed no such right, if only because the Eighteenth Century Framers were committed to minimal, “watch dog” government, and saw rights as “retained by the people” to be safeguarded against infringement by government;<sup>11</sup> they did not declare obligations by the government to the people or declare rights of the people that government was obliged affirmatively to effectuate. A “right of the people to know” may indeed have been a principal rationale for the freedom of the Press, but, in the law at least, the people’s right to know was derivative, the obverse of the right of the Press to publish, and coextensive with it.

The Press apart, however, any right of the people to know was not considered violated if government maintained secrecy in some matters; it was assumed, no doubt, that the people agreed it should not know what could not be told it without damage to the public interest. From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted “such parts as may in their judgment require secrecy.”<sup>12</sup> The occasional need for secrecy underlay some of the dis-

<sup>9</sup> See *New York Times*, Dec. 31, 1971, at 1, cols. 5-7; *id.*, June 29, 1971, at 1, col. 5.

<sup>10</sup> *E.g.*, VA. CONST., BILL OF RIGHTS §§ 1-3 (1776), in F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3812 (1909) (with unimportant changes in punctuation and wording, now VA. CONST., art. 1, §§ 1-3 (1971)).

<sup>11</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST., amend. IX (1791). When arguing for adoption of the bill of rights, James Madison said, “[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act . . . .” 1 ANNALS OF CONG. 437 (1789).

<sup>12</sup> U.S. CONST., art. I, § 5.

positions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress,<sup>13</sup> and a part in making treaties to the less numerous Senate rather than to the House.<sup>14</sup> Presidents from Washington to Nixon have asserted "executive privilege" to withhold information from Congress.<sup>15</sup> And Congresses and congressional committees have recognized the "right," the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was "not incompatible with the public interest."<sup>16</sup> Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal penalties.<sup>17</sup> The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities.<sup>18</sup> For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of the government is probably the conference of the Justices of the Supreme Court.

The reasons for confidentiality in government are various. Military secrecy in time of war is the example usually cited, but that, and

<sup>13</sup> See THE FEDERALIST No. 70 (A. Hamilton).

<sup>14</sup> See THE FEDERALIST No. 64 (J. Jay), No. 75 (A. Hamilton). Compare United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936).

<sup>15</sup> See, e.g., 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 194 (1897), cited in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-21 (1936). Many instances of presidential refusal are collected in 40 OP. ATT'Y GEN. 45 (1949). See also Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 GEO. WASH. L. REV. 623 (1961). See generally, Bishop, *The Executive's Right of Privacy*, 66 YALE L.J. 477 (1957).

<sup>16</sup> See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1936); 40 CONG. REC. 1418 (1906) (remarks of Senator Spooner). While congressional committees have often resisted the President's claim of privilege, some of them have recognized it in principle. See, e.g., S. REP. No. 1761, 86th Cong., 2d Sess. 22 (1960).

<sup>17</sup> Compare 18 U.S.C. § 793 (1970), with *id.* § 797, and *id.* § 798.

<sup>18</sup> E.g., *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *United States v. Reynolds*, 345 U.S. 1 (1953); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See also *Totten v. United States*, 92 U.S. 105 (1876).

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Attorney General claimed the right to refuse to divulge to the courts something relating to his official transactions while he was acting as Secretary of State. The Court said: "There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that anything was communicated to him in confidence he was not bound to disclose it." *Id.* at 143-45.

The Government's desire for secrecy may be subject to some limitations, however, when it is invoked in court. In *Reynolds*, a civil suit against the United States arising from the death of three civilians in the crash of a military plane, the Court said that in the circumstances the Government's privilege against production of the accident report had been properly invoked. The majority intimated, however, that if it appeared necessary the trial judge could inspect the documents to determine whether they were privileged. In *Jencks v. United States*, 353 U.S. 657 (1957), the Court required the Government to make witness reports available to the accused or drop the prosecution. Cf. *Alderman v. United States*, 394 U.S. 165 (1969); *Giordano v. United States*, 394 U.S. 310 (1969).

defense security in time of peace, do not begin to explain all the information that government has regularly withheld. Diplomatic communications are commonly restricted. Wilson's "open covenants openly arrived at" was a notorious if innocent joke, a precept he violated as soon as he had pronounced it. No one has questioned the need to prevent premature disclosure of new policy—say, impending economic acts that might affect prices, rates, or values—where "leaks" might bring chaos, or unfair advantage to those who learn early. Confidentiality and privilege are recognized as essential to many working relationships, and many believe that government would become impossible if all communications between officials might readily become public knowledge.<sup>19</sup> And does even an official, perhaps, have a right of "privacy," or a right to have his role fully and accurately, not selectively or erroneously, known?

Government has protected its "right to withhold" by various devices—by selection of trustworthy personnel, by rules, practices, and mores of non-divulging, by avoidance of written communication or other recording, by classifications and restricted distributions, by codes and ciphers, by locks and guards. Such measures to prevent disclosure have also been supplemented by criminal statutes to deter it: laws against espionage have existed longer than the Constitution; some disclosures are expressly forbidden;<sup>20</sup> some publications, involving unauthorized disposition of government documents, might be punishable under general statutes protecting government property.<sup>21</sup> In some circumstances disclosure could bring contempt proceedings by Congress or by the courts. Unauthorized disclosure by officials might bring suspension or removal.<sup>22</sup>

In principle as in practice, then, the "right of the people to know" what Government does has always been reduced by "the right—or duty, or responsibility—of the Government to withhold" in the public interest. But governmental secrecy has usually been seen as at best a necessary evil, and the necessity for that evil has not been accepted by all at all times in all cases. The standards for determining the need to withhold are less than exact, and reasonable men differ widely as to them and as to their application in particular cases. Without any doubt, moreover, Government frequently withholds more and for longer than it has to. Officials, of course, tend to resolve doubts in favor of non-disclosure. Some concealment is improperly motivated—to cover up mistakes, to promote private or partisan interests, even to deceive another branch or

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<sup>19</sup> Compare the exceptions in the Freedom of Information Act, 5 U.S.C. § 552(b) (1970), for "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." There are exceptions also for trade secrets and commercial information, personnel, medical, and similar files, and other matters.

<sup>20</sup> 18 U.S.C. §§ 793, 794 (1970).

<sup>21</sup> See *id.* § 641.

<sup>22</sup> 5 U.S.C. §§ 7501, 7532 (1970).

department of government, or the electorate. Congress has tried to deal with such abuse, for example, in the Freedom of Information Act,<sup>23</sup> but such statutes do not begin to reach the problem of "over-concealment" by mammoth, complex government. It may be because "over-concealment" is rampant that Congress seems to have aimed criminal penalties to enforce classification essentially—perhaps exclusively—at purposeful disclosure "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation."<sup>24</sup>

Still, in the past at least, few have seen constitutional issues in governmental concealment. A government official, surely, has no constitutional "right" to divulge what he learns in office if those in authority prescribe secrecy. A citizen who happens upon a classified document or information also cannot insist on a right to divulge what the law forbids him to. Few have believed, moreover, that a governmental classification was not valid unless it was shown to be "necessary," that, constitutionally, a defendant could not be punished for unauthorized disclosure unless the Government showed that the public interest required concealment in the particular case. Rather, it has been assumed, a court would hold that the judgment of the political branches that withholding was required was within their constitutional authority to make and not for the courts to review.<sup>25</sup>

### III

Nothing in the *Pentagon Papers Case* contradicts these assumptions for the generality of cases; nothing in it suggests other limitations on the authority of the Government to withhold information or of Congress to provide punishment for, or injunction against, divulgence. The question raised by *Pentagon Papers* was whether publication by the Press is different.

Even as to the Press, it should be clear, it has not been claimed that the Government was constitutionally obliged to tell the Press everything, or anything. Nor is it widely claimed, apparently, that Congress could not constitutionally provide criminal penalties or injunction against unauthorized disclosure to a newspaper by an indi-

<sup>23</sup> *Id.* § 552. That section does not apply to matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and to a host of other matters. *Id.* § 552(b).

<sup>24</sup> 18 U.S.C. § 794 (1970). Virtually the same language is employed in *id.* § 793. *Id.* § 798(a) seems to cast a wider net although how one parses some of the clauses will doubtless be sharply debated in court. The statute would punish "Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . . ." Subsection (b) defines "classified information" as information designated for limited or restricted dissemination or distribution "for reasons of national security." Compare 50 U.S.C. § 783(b),(d) (1970) (on the disclosure of classified information by a Government employee).

<sup>25</sup> See note 18 *supra*.

vidual, official or citizen, though that would doubtless deter "leaks" to the Press in general, and effectively deprive it of the information or document.

Apparently, then, one approaches serious constitutional issues only when one attempts to enforce governmental secrecy directly against the Press itself. The first amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," and there has been common disposition to apply the amendment to the Executive and the courts as well.<sup>26</sup> But the import of the first amendment is as uncertain and undefined in regard to the freedom of the Press as to the other rights and freedoms that it protects, and, indeed, the courts have had far fewer occasions to define the freedom of the Press than, say, freedom of speech.

Doubtless, the amendment sought to protect the freedom of the Press to report and to criticize the actions of government. In publishing the Pentagon Papers the Press asserted something more—the right to publish documents prepared by, belonging to, and emanating from the Executive Branch that, in the exercise of constitutional responsibility, the Executive sought to withhold. One can argue that the traditional freedom of the Press is not in issue, and that the Press is not free to publish confidential government documents with impunity, even less, say, than it could publish private documents in violation of a copyright, or disclose protected trade secrets, or invade individual privacy. But Government has a monopoly of masses of important information and it could effectively curtail the freedom of the Press to report and criticize by withholding that information, or distort the function of the Press by selective "hand out."

Neither the Court's per curiam nor any of the individual opinions tells us whether it was relevant or material, and whether it made the Government's burden any lighter, that the papers were, or derived from, government documents. We are not told whether and how much it would matter were it determined that they were obtained without the Government's consent, that they were taken or copied in violation of some governmental "title" or right. We know only that even as to the particular documents, so classified, so obtained, so about-to-be-published, the Government in this case and in these circumstances did not meet its burden to the satisfaction of the courts.

The Press, then, the Court has told us, is different. At least when Congress has not spoken, Press publication even of government documents cannot be enjoined unless the courts "balance" in favor of the government, and the balances are weighted heavily on the side of freedom. For some Justices, perhaps, even criminal penalties would not be

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<sup>26</sup> *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 143-44 (Black, J., concurring), 199 (Reed, J., dissenting) (1951); *Watkins v. United States*, 354 U.S. 178, 188 (1957); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). See also *Beauharnais v. Illinois*, 343 U.S. 250, 386 (Douglas, J., dissenting) (1952); *Reid v. Covert*, 354 U.S. 1, 17 (1957).

available, surely if the Government had little to put in its balance. For some, on the other hand, criminal penalties might be imposed, and even injunctions might issue, if Congress authorized them, perhaps with little regard to the weight of the governmental interest at stake.

#### IV

Friends of liberty are warmly disposed to any decision that favors freedom against authority, even against representative government. The student of the Constitution requires something more, a workable accommodation of competing values properly achieved and reasonably justified. Perhaps the *Pentagon Papers Case* was rightly decided; perhaps the Court was wise to read the Constitution as requiring wide berth to anything that looks like censorship, even filtered through the courts; perhaps the Court was uneasy with subtle distinctions founded on the source and the character of documents and information. But it has not drawn acceptable lines. The distinction between prior injunction and subsequent punishment is hallowed by history, but its application, at least here, would seem less than persuasive: while a criminal penalty more readily permits "civil disobedience," or reliance on the jury to acquit, stiff penalties will deter—and deny the right to know—almost as effectively as any injunction.

More important, the upshot of the Court's apparent constitutional doctrine is unsatisfying. For, as regards governmental documents and information, the Constitution is apparently interpreted as ordaining that a branch of government can properly conceal, even from other branches, surely from the public; but the Press is free to try to uncover, and if it succeeds it is free to publish. That kind of trial by battle and cleverness between the three estates and the fourth hardly seems the way best to further the various aims of a democratic society. It does not ensure that what should be concealed will not be uncovered. And, on the other hand, the rare, haphazard, fortuitous, journalistic uncovering will hardly achieve effective public knowledge of all that should be known, for almost all that is concealed (needfully or not) will continue to be effectively withheld. (That some bits of it are sometimes selectively revealed by official "leaks" to chosen journalists only underscores the haphazard quality of what is disclosed.)

Nor does the implication that the courts will be available to adjust the competing interests promise an effective accommodation. The difficulty is not with judicial balancing in principle: that, we have accepted (*pace* Mr. Justice Black), is what the Constitution orders even as regards the "preferred freedoms" of the first amendment.<sup>27</sup> But, one may ask, can courts meaningfully weigh the Government's "need" to

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<sup>27</sup> *E.g.*, *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *United States v. O'Brien*, 391 U.S. 367 (1968). Even for Mr. Justice Black the first amendment was not in fact "absolute." See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

conceal, the Press's "need" to publish, the people's "need" to know? If, on the one hand, the need for military secrecy in time of war seems obvious and paramount; if, on the other hand, as in the *Pentagon Papers Case*, many could not see why the Government should conceal documents several years old relating to an issue that had become of great national moment; who can meaningfully weigh the less obvious, less dramatic consequences of disclosure of any one of millions of documents that are the stuff of governing and of international relations? How does a court weigh the effect on relations with country X, or on international relations generally, of publication of a diplomatic communication to or from another country which the latter does not wish to see public? How does the court weigh the people's "need" to know in any particular case? Such considerations, no doubt, impelled Mr. Justice Harlan to say that the Court should ask only whether the subject matter is within the general area of competence of the Executive Branch and whether the Head of the Department certified that withholding was necessary;<sup>28</sup> beyond that, whether a document or information should be withheld was for political judgment and within the constitutional authority of the Executive to determine. Especially with the direction of the winds of change on the Supreme Court, the Court would doubtless accept the Harlan formula if Congress enacted it, even to support an injunction, surely for criminal penalties. That would largely safeguard the needs of government, but it will only encourage unnecessary secrecy.

But public knowledge will not flourish even if the Court continues to insist that the Constitution requires judicial review of the Government's determination that national interest in concealment outweighs the freedom of the Press to publish. Inevitably the courts will have to legislate gross categories ("diplomatic correspondence," "internal memoranda") and even then virtually rubber stamp (and legitimate) governmental concealment. In the result, there will be few instances of Press uncovering and divulging, few cases in which the Executive will seek to bar or punish publication, few cases in which the Court will in fact reverse the Executive.

Effectively, then, the issue will remain one between Executive and Press. Many will support the claims of government, insisting that the consequences of over-concealment are less grave than those of over-disclosure; that the wisdom and integrity of government must be the ultimate safeguard in this as in other, more important, decisions; that it is "our government," more or less responsible to the people. Others, increasingly distrustful of government, will see in the ever-present threat of uncovering, even by a not-responsible, sometimes irresponsible press, some, and the only, defense against governmental abuse.

There is no happy solution, only the eternal cry and quest for better government. But surely Congress and the President could do more than they have done. The *Pentagon Papers Case* has dramatized issues, ad-

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<sup>28</sup> *New York Times Co. v. United States*, 403 U.S. 713, 757 (1971).

monished bureaucrats, and created an atmosphere receptive to a major effort to increase public and scholarly knowledge even while reinforcing secrecy where it is necessary. There is need for measures to rebuild confidence in government, including confidence in its policies of disclosure and concealment. At least there ought to be provision for automatic declassification of many categories of documents, putting the burden on the bureaucracy to determine and maintain the need for reclassifying. Until Congress and Presidents turn a hard face to unnecessary classification,<sup>29</sup> bureaucrats will not learn the habit of disclosure. The unhappy game of trial by cleverness between Executive and Press with an infrequent journalistic success will do little to support the people's right to know when Government abuses its responsibility to withhold.

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<sup>29</sup> Both the President and the Congress have constitutional authority to regulate disclosure, the President under his Executive power, U.S. CONST., art. II, § 1, Congress under its power to establish additional offices "by law," *id.*, art. II, § 2.