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Free Speech and the Prior Restraint Doctrine: The *Pentagon Papers* Case

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The 1960s was one of the finest moments for free speech in America. It was a decade in which citizens vigorously exercised their right to criticize government officials, and in which the Supreme Court, under the leadership of Chief Justice Warren, protected the dissidents. The decade started with civil rights protests, the sit-ins, demonstrations, and parades of those demanding racial equality. By the late 1960s the dissent largely focused on America's involvement in the Vietnam War.

The antiwar movement started with fringe groups but soon it embraced larger and larger sectors of the public, particularly as it became increasingly apparent that neither victory nor peace was at hand and that the United States was the primary combatant, not just a force supporting the South Vietnamese government. In time the antiwar movement had an important effect on mainline politics. Arguably it was responsible for Lyndon Johnson's decision in 1968 not to seek re-election, the defeat of the Democratic candidate for President, Hubert Humphrey, and also for the emergence of the candidacies of Eugene McCarthy and George McGovern, outspoken critics of the war.

During the same period the tactics of the antiwar movement changed, from activity that was modeled after Martin Luther King's nonviolent civil rights protests to "confrontation politics"—mass gatherings that often took a disruptive and violent turn—as evidenced by the march on the Pentagon in 1967 and the demonstrations at the Democratic Convention in Chicago in 1968. The military draft was also attacked. Draft cards were burnt, resistance to the draft was urged, the offices of the Selective Service System were invaded, and the armed services were often prevented from recruiting on college campuses. Private companies

that supplied material to the war effort were the target of protest activities, often of a brazen and vituperative character.

These tactics tested the limits of political tolerance. The free speech tradition in America has never been a libertarian one. The intellectual challenge in First Amendment litigation has been to draw a line between protected and unprotected speech. The Supreme Court always sought to accommodate the countervalues, such as the need to maintain public order. As the tactics of the antiwar movement became more disruptive, the countervalues pressed more heavily. The line that the Warren Court had drawn—a largely protective line, reflecting a commitment to a public debate that was "uninhibited, robust, and wide-open" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270 [1964])—seemed increasingly unable to protect the speech in question.

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On June 13, 1971, antiwar protest took a new turn and posed a new challenge to the free speech tradition: *The New York Times*, the most distinguished and respected of American newspapers, began publishing parts of the Pentagon Papers. The Papers, officially entitled *History of United States Decision-Making Process on Vietnam Policy*, was a voluminous history of the United States' role in Indochina. The Secretary of Defense commissioned the study in 1967 and it took more than a year to complete. The authors had access to official government documents and communications, including some which were classified as top-secret; the Papers consisted both of a narrative (of about 3,000 pages) and a compilation of official documents (of about 4,000 pages). The Pentagon Papers was itself classified top-secret.

The appearance of the Papers in *The New York Times* immediately caused a national stir and a reaction by Washington. The very next day, June 14, after the appearance of the second installment, the Attorney General of the United States sent the following telegram to the *Times*:

Arthur Ochs Sulzberger
President and Publisher
New York, New York

I have been advised by the Secretary of Defense that the material published in *The New York Times* on June 13, 14,

1971 captioned "Key Texts From Pentagon's Vietnam Study" contains information relating to the national defense of the United States and bears a top secret classification.

As such, publication of this information is directly prohibited by the provisions of the Espionage Law, Title 18, United States Code, Section 793.

Moreover, further publication of information of this character will cause irreparable injury to the defense interests of the United States.

Accordingly, I respectfully request that you publish no further information of this character and advise me that you have made arrangements for the return of these documents to the Department of Defense.

John N. Mitchell
Attorney General

What motivated this demand?

This has remained a puzzling question, in large part because the Pentagon Papers was a historical document, covering the period from World War II until 1968. History can of course be embarrassing to an administration, but it is hard to see how *this* history—which stopped in 1968 and dealt mainly with the American military escalation during the Democratic presidencies of John Kennedy and Lyndon Johnson—could have been embarrassing to *this* administration, the Republican administration of Richard Nixon, which started in 1969. Conceivably the publication of the Papers might have interfered with the peace talks that were then in progress; publication could have, so it was said, strengthened the antiwar movement and thereby encouraged the Viet Cong or North Vietnam to be more intransigent. Or perhaps some of the documents, even though dated before 1968, might have revealed secrets about current military strategy or technology. But these explanations seem now, as they did then, farfetched. As Justice Brennan emphasized, at no time in the entire course of the litigation that was to unfold did the Attorney General make concrete his claim that publication would jeopardize "the defense interests of the United States." "The entire thrust of the Government's claim throughout these cases," the justice said, "has been that publication of the material . . . 'could,' or 'might,' or 'may' prejudice the

national interest in various ways" (*New York Times Co.* v. *United States*, 403 U.S. 713, 725 [1971]).

I suspect that the Attorney General was less concerned with the publication of this particular study, the Pentagon Papers, and more concerned with the challenge to the *structure of authority*—more specifically, the integrity of the classification system itself and the capacity of the administration to protect that system. That is why the administration was concerned not just with the *Times*, but also with Daniel Ellsberg. He worked on the compilation of the Papers and was the one who defied the security classification and made the Papers available to the *Times*. The threat of the Pentagon Papers—of Daniel Ellsberg taking the study and giving it to the *Times*, and the decision of the *Times* to publish it—was a general threat to authority, to the very power of the executive to maintain a measure of secrecy in the name of national defense.

The *Times* refused to comply with the Attorney General's demand to cease publication. In a public statement the *Times* claimed that it was "in the interest of the people of the country to be informed of the material contained in this series of articles." In effect, the *Times* was saying that it was prepared to run the risk of the prosecution under the Espionage Act that was threatened in the telegram. On the other hand, with respect to the Attorney General's threat to obtain an injunction against future publication, a threat made more explicit after the telegram was sent but intimated in the sentence in the telegram that speaks about "irreparable injury," the *Times* said that it would resist the application for an injunction, but that it nevertheless would "abide by the final decision of the court." In other words, the *Times* was prepared to run the risk of a criminal prosecution under the Espionage Act but not the risk of a contempt proceeding that might be brought for disobeying the injunction.

In the face of this divided response, and after the appearance of a third installment, the Attorney General sought an injunction against the *Times*. The Attorney General was successful in the lower federal courts, and though the *Times* appealed the decision, it ceased publication as promised. That decision to cease publication did not, however, preserve the secrecy of the Papers. While the Attorney General was litigating in New York, the Papers began to appear elsewhere. Various congressmen obtained copies and Senator Mike Gravel began reading the Pentagon Papers into the

Congressional Record. The *Washington Post* also obtained a copy and began publication. The Attorney General then commenced a suit against the *Washington Post.* The lower federal courts in Washington assessed the Attorney General's claim differently than those in New York had and denied the injunction. The Attorney General sought Supreme Court review of the Washington decision, while the *Times* sought review of the New York one.

There was considerable pressure on the Supreme Court for a prompt decision. The *Times* argued it was important for the people to have access to the Papers immediately and that it should be allowed to resume publication. The Attorney General was equally interested in a prompt resolution, for as each day passed, there was an increasing danger that his claim—at least as narrowly focused on the Pentagon Papers—would become moot: there would be no secrecy left to protect. Even after the appeals were docketed, the Papers started appearing in newspapers around the country, in the *Boston Globe,* then in the *St. Louis Post-Dispatch,* then in the *Los Angeles Times*. The Court was also interested in a speedy disposition—it was about to recess for the summer.

The Court expedited its consideration of the case. It issued stays to maintain the status quo in the Washington and New York cases; it kept all the parties to tight briefing schedules; it even held a Saturday session for oral argument—all of which heightened the public attention on the case. Then on June 30, 1971, a little more than two weeks after the Papers first appeared in the press and the Attorney General brought suit, the Supreme Court announced its decision. Free speech won, but in a most curious way.

For one thing, the Court spoke in many voices. Each of the justices wrote a separate opinion, though some joined the opinions of others. Three of the justices—Justice Harlan, Justice Blackmun, and the Chief Justice, Warren Burger—dissented. They thought the Attorney General was entitled to the injunction. The other six justices disagreed, but they in turn disagreed among themselves. They disagreed on the grounds for believing the injunction against the *Times* was invalid. Justice Marshall invoked the concept of separation of powers: the executive should be confined to the remedies provided by Congress, those of the traditional criminal law; the Courts were not free to "make law," as he believed would be entailed in issuing an injunction not specifically authorized by statute. The other five justices voting

against the injunction analyzed the case in free speech terms, but even they were divided. One group—consisting of Justices Black and Douglas—expressed libertarian themes: freedom of speech is an absolute which tolerates no form of government censorship, whether it be in the form of an injunction or otherwise, whether it be in the name of national defense or less exalted purposes. The three other justices who also analyzed the case in free speech terms—Justices Brennan, Stewart, and White—fastened on the instrument of censorship sought: an injunction. They saw the injunction as a prior restraint and read the First Amendment as an especially stringent prohibition against prior restraints.

Justice Brennan wrote: "Thus, only governmental allegation and 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 can support even the issuance of an interim restraining order" (403 U.S. at 726-27). Justice Stewart formulated his position in similar terms: a prior restraint would be tolerated only when it will result "in direct, immediate, and irreparable damage to [the] Nation or its people" (at 730). Justice Stewart also implied that a lesser standard would be applied to so-called subsequent restraints, for example, the criminal prosecution the Attorney General was in fact threatening under the Espionage Act. Justice White, the third of the justices who invoked the prior restraint doctrine, was quite explicit on this point (though he, unlike Brennan and Stewart, was strikingly nonexplicit about how stringent a standard was to be applied to prior restraints): "Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government chose to proceed by injunction does not mean that it could not successfully proceed in another way" (at 733).

The Court spoke in all these voices, in nine separate opinions, but those of Brennan, Stewart, and White—who used the language of prior restraint—predominated. There was a tenth opinion, labeled "Per Curiam." Traditionally that label is saved for inconsequential cases, where there is no division among the justices and where the point decided is so trivial as not to justify an extended discussion. In this instance, the Per Curiam was used to locate a common point, to create a peg upon which the nine opinions and

the judgment of the Court—invalidating the injunction—could be hung. The Per Curiam opinion was strikingly sparse. It merely described the procedural posture of the cases before the Court, announced the result (setting aside the injunction), and justified that result with a very brief collection of quotes from some previous cases. The quotes made out the following syllogism: (1) injunctions are prior restraints; (2) prior restraints require an especially stringent justification; (3) the Attorney General failed to meet that special burden of justification; (4) therefore, the injunction against the publication of the Pentagon Papers cannot stand.

Clearly the syllogism represented—in skeletal form—the position of Justices Brennan, Stewart, and White. Black and Douglas, the libertarians, subscribed to the conclusion (Step #4). They would go *at least* as far as indicated in the first three premises (Douglas's opinion, which Black joined, says so explicitly); it is just that they would apply the same standard to subsequent restraints. And there is reason to believe that even the dissenters subscribed to the first two premises, those honoring the prior restraint doctrine; by this account, they disagreed only on the third premise, regarding the application of the doctrine in this case. The first two premises were amply supported by precedents, some new, some old, and a couple of years later, Chief Justice Burger, one of the dissenters, wrote of the *Pentagon Papers Case:* "Every member of the Court, tacitly or explicitly, accepted the . . . condemnation of prior restraints as presumptively unconstitutional."[1]

* * *

The Supreme Court decision was warmly received by the press and by the academic community. In an editorial the next day the *Times* characterized the Court's decision as "historic," "a ringing victory for freedom under law"; the *Times* said that "the nation's highest tribunal strongly reaffirmed the guarantee of the people's right to know." This is of course an exaggeration. As far as the

[1]*Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 396 (1973) (dissenting opinion). The pressure for a prompt decision on the *Pentagon Papers Case* required independent writing, without the usual circulation and consultation among the justices. That process often results in revisions, which bring out the common elements and sharpen the points of disagreement.

Pentagon Papers itself was involved, the Supreme Court's decision made little difference—by the time the Supreme Court acted, the Papers was in fact widely disseminated. The Papers had already entered the public domain. (This was acknowledged in Justice White's opinion.) And, as to the more general questions posed by the case, demarcating the bounds of free speech and the need for secrecy in national defense matters, the Supreme Court made virtually no contribution.

The subservience of the executive to the Constitution as construed by the Supreme Court was already a well established proposition. It was never doubted in this case. Indeed the Attorney General implicitly honored the proposition in turning to the courts to supply the instrument of censorship, the injunction. The *Pentagon Papers Case* merely illustrated this tradition of judicial supremacy. Similarly, even the most common basis of decision, the prior restraint doctrine, was not new to the *Pentagon Papers Case*, nor was it given a new meaning. Just weeks before it had been used to invalidate an injunction against the continuation of protest activity—picketing and pamphleteering—aimed at a real estate agent accused of "blockbusting" (*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 [1971]). At best the *Pentagon Papers Case* reaffirmed the prior restraint doctrine in a different context and in a highly visible fashion. Even so, it remains to be seen what contribution that doctrine makes to free speech.

Harry Kalven, the preeminent First Amendment scholar of that period, warmly praised the case and the doctrine. In the 1971 Foreword to the *Harvard Law Review* he wrote: "What the Court appears to have decided in *Times* is that everything, or virtually everything, is entitled to be published at least once." This view can, of course, be faulted on its value premise, that at least "virtually everything"—including a document bearing a "secret" or "top-secret" classification—is entitled to be published "at least once." One publication of a classified document is all that matters; nothing short of the libertarian position—rejected by the majority of the Court and by Kalven—would support such a devastating blow to the classification system. But even putting that issue to one side, Professor Kalven's assessment of the significance of the case can be faulted on more technical, less normative grounds: the prior restraint doctrine provides for less adequate protection than Kalven would have us believe. It does not provide

that "virtually everything" is entitled to be published "at least once."

The prior restraint doctrine is essentially a comparative doctrine—it says that prior restraints are to be judged more stringently than subsequent restraints, but it does not make an absolute statement, and it does not say how stringent that higher standard is to be. Some of the justices, notably Justices Stewart and Brennan, contemplated that on an absolute scale the standard for prior restraints was to be stringent indeed—similar to the near libertarian position that Black and Douglas would have applied to all constraints on publication. They required for injunctions against speech a threat as "direct," "immediate," and "irreparable" as that imperiling a troop movement at sea (the well-known example used in *Near* v. *Minnesota*, 283 U.S. 697, 716 [1931]). That standard would protect "virtually everything" (at least from prior restraints). But that standard is not written into the Per Curiam, the decision of the Court. The sparse Per Curiam is silent on that issue—it speaks in purely comparative terms.

The Chief Justice subsequently expressed the view that in the *Pentagon Papers Case* all the justices embraced the prior restraint doctrine, and he also said that doctrine made all prior restraints "presumptively unconstitutional." But he did not say how strong a presumption that is or what it takes to rebut the presumption. The Chief Justice himself, plus two other justices, could not have regarded it a very strong presumption: they voted in favor of the injunction. This impression as to the weakness of the presumption was confirmed in a still later decision, *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976). There Chief Justice Burger, writing for a majority, invoked the prior restraint doctrine and the legacy of the *Pentagon Papers Case* and yet treated the discounted "clear and present danger" standard as the prior restraint standard. Under that test the question is whether "the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[2] Given the "gravity" of the so-called "evil" invariably claimed in national security matters, that standard, which allows gravity to augment improbability,

[2]The test is from *United States* v. *Dennis*, 183 F.2d 201, 212 (2nd Cir. 1950), aff'd, 341 U.S. 494 (1951). It is quoted and adopted in *Nebraska Press* at 427 U.S. 562.

protects a great deal less than "everything" (even from prior restraints). Indeed that standard is one of the most notorious and least protective in the history of the First Amendment, even in the domain of subsequent restraints. It made possible the conviction of the Communist leaders in the McCarthy era. That is no doubt why Justices Brennan and Stewart so strongly disassociated themselves from the Chief Justice's opinion in *Nebraska Press* though they agreed with the result.[3]

Chief Justice Burger was, it will be acknowledged, one of the dissenters in the *Pentagon Papers Case*, but his *Nebraska Press* gloss on the *Pentagon Papers Case* cannot on that ground be easily dismissed. Justice White, one of the five who joined the *Pentagon Papers Case* Per Curiam, also joined the Chief Justice's opinion in *Nebraska Press* (though not without some hesitation—he also found it necessary to write a short separate opinion). In the *Pentagon Papers Case* Justice White was explicit that prior restraints were held to a higher standard than subsequent restraints. He was also explicit that the higher standard was not met, but, it will be recalled, he did not tell us how high—on any absolute scale—the prior restraint standard was. It was Justice White's irresoluteness on this issue, I suspect, that accounts for the gap in the Per Curiam opinion: his vote—the fifth—was needed to

[3]Both the result in *Nebraska Press* and the method of analysis, in effect creating a strong presumption against gag orders, tend to impeach the laxity of the verbal formula, the use of the discounted "clear and present danger" test as the prior restraint standard. On the other hand, the fears of Justices Brennan and Stewart are not unfounded: (a) A verbal formula often develops an independent life of its own, apart from its application to a set of facts in a particular case. In the First Amendment area the methods of Cardozo do not predominate. (b) The justices might have feared that the verbal formula would not be likely to produce as congenial results in domains such as national security, where the "evil" is so "grave" and the alternative means of control not as obvious as in a trial. (c) The verbal formula might have been seen by Brennan and Stewart as having disturbing implications for the subsequent restraint standard. If the discounted "clear and present danger" standard is the standard for prior restraints, and that is supposed to be the higher standard, one could only wonder—or fear—what the standard might be for subsequent restraints—might it be the rationality standard of the World War I cases, which hold that censorship would be justified if the criminal statute bears some reasonable relationship to the perceived threat to legitimate state interests?

achieve majority status for the Per Curiam.[4]

Professor Kalven's assessment of the contribution of *Pentagon Papers Case* can thus be faulted on the ground that it incorrectly assumes a high absolute standard for prior restraints. That assumption is not securely rooted in the Court's opinion, the Per Curiam, and it is in fact contradicted by subsequent cases, specifically *Nebraska Press*. Kalven's assessment can also be faulted on a second ground, namely, that the Court gives an excessively formalistic definition to the category of prior restraints. The Court includes injunction but excludes criminal statutes, allowing the latter to be treated as subsequent restraints and to be judged by lesser standard. In doing this, the Court ignored the structural similarity between injunctions and criminal statutes.[5]

In order to see the structural similarity, a distinction must be drawn between two distinct phases of the injunctive process, issuance and enforcement. In its issuance phase, the injunction resembles a criminal statute: it establishes a standard of conduct and threatens to punish those who disobey. It controls through deterrence. An injunction is often classified as a prior restraint because it can be issued before publication. That only means that the injunction controls—deters—before the event to be avoided—here publication—actually occurs. But that is equally true of the criminal statute. It restrains before publication, it deters future conduct. The criminal prosecution takes place after the event, after publication, but that phase of the criminal process should be compared to the enforcement phase of the injunctive process (the contempt proceeding): sanctions are imposed on those who violate the standard of conduct. Contempt and criminal prosecution are retrospective; an injunction and a criminal statute are both preventive.

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[4]The Per Curiam oddly does not cite *Near* v. *Minnesota*, the most venerable of all prior restraint precedents. This omission also might be due to Justice White's irresoluteness, for a citation to *Near* v. *Minnesota* might be understood as adopting the troop-movement standard long associated with that case. White joined Stewart's opinion in the *Pentagon Papers Case*, but not in *Nebraska Press*.

[5]The structural similarity between injunctions and criminal statutes is explored more fully in my book, *The Civil Rights Injunction* (Indiana University Press, 1978). For a similar perspective, see Barnett, "The Puzzle of Prior Restraint," 29 *Stanford Law Review* 539 (1977).

In the *Pentagon Papers Case* the Supreme Court was confronted with an injunction, not a criminal statute. But by choosing to rely on the prior restraint doctrine—one that introduces a double standard, a greater one for prior restraints and a lesser one for subsequent restraints—and by taking a formalistic view of what constitutes a prior restraint—injunctions, not criminal statutes—the Court left the criminal statute unencumbered. The criminal statute—in this instance, the Espionage Act—was left fully in effect, free to deter access and publication. The classification system was left protected by a legal instrument as powerful as the injunction, and thus it cannot be said the *Pentagon Papers Case* established that "virtually everything" is entitled to be published "at least once."

There are, of course, differences between injunctions and criminal statutes, even viewing both as preventive instruments. For example, the injunction is likely to be more specific in terms of the act prohibited and the persons addressed; the judge has the power to initiate the criminal contempt proceeding; there is no jury in criminal contempt if the punishment turns out to be a petty one (e.g., less than six months imprisonment); the range of defenses to an injunction may be more limited. These differences, Professor Kalven suggested, render the injunction a more potent or more dangerous instrument of censorship than the statute, and thus the injunction is properly the subject of a more stringent First Amendment standard. I do not agree.[6]

First, the purported differences between injunctions and criminal statutes might not exist in fact. Although injunctions often have a specificity not found in criminal statutes, in this instance the Espionage Act was rendered more specific by the very explicit and concrete threat contained in the Attorney General's telegram. Prosecutorial threats are not at all unusual in cases of this type. Second, some of the alleged differentiating attributes of the injunction may well enhance First Amendment values and thus injunctions should not be disfavored. Specificity may be a case in point, for it curtails or eliminates the chilling effect that comes from vague or overbroad statutes. So might the fact that prosecutorial

[6]These and other differences between injunctions and criminal statutes, and their relevance for the prior restraint doctrine, are discussed in more detail on pp. 69-74 of *The Civil Rights Injunction*.

discretion in criminal contempt is vested in a judge rather than a political officer, the Attorney General, who is more sensitive to the pressures of the majority—pressures the First Amendment is often thought to guard against. Third, some of the so-called strengths of the injunction as a deterrent instrument are offset by other factors. The specificity of the injunction and the absence of the jury might, for instance, enhance the likelihood of a punishment being imposed for violating an injunction, as opposed to violating a statute; on the other hand, the anticipated penalty for violating an injunction is usually petty, especially compared to that likely to be imposed for violating a criminal statute—in this instance, a $10,000 fine and ten years in prison. The deterrent effect of a legal instrument is a product of *both* the certainty *and* the severity of the anticipated sanction.

In this particular case, the *Times* was not prepared to run the risk of contempt though it was prepared to run the risk of prosecution under the Espionage Act: recall the *Times*'s divided response to the Attorney General's telegram. But that response cannot be used in calculating the general utility of the prior restraint doctrine. The response was peculiar to the *Times;* it cannot be generally assumed of those prepared to engage in radical criticism of government policies. In fact it was never satisfactorily explained by the *Times,* and in a public address later that fall the General Counsel of the *Times* said that the promise to obey the injunction was ill-conceived.[7] In later cases the *Times* reserved to itself the right to decide whether it would obey an injunction directed against publication.

Professor Kalven, in one final attempt to locate the accomplishment of the *Pentagon Papers Case,* suggested that the divided response of the *Times*—whatever its basis—might have given the prior restraint doctrine a special attractiveness in the context of that particular case, for that doctrine might be seen as preserving "the chance for civil disobedience." But surely by the time the Supreme Court rendered its decision, that opportunity had already been exercised. Daniel Ellsberg had obtained possession of the Papers, he made them available to the *Times,* and though the

[7]See Note 9 and the text following for possible explanations for a response that otherwise remains inexplicable.

Times was prepared to abide by the outcome of the litigation, others were not. By the time the Court decided, the Papers were in fact in the public domain. The true issue in the case was neither the civil disobedience of Ellsberg or the *Times,* nor the availability of the Papers itself. That was all past. The true issue was the general *structure of authority,* the integrity of the classification system, and the Supreme Court left that structure very much intact.

In the months following the Court's decision, the Attorney General made real his threat to use the Espionage Act. Grand juries were convened. As it turned out, no indictments were returned against the *Times,* its officers, or any reporters. We will never know the reasons for that negative decision. Some might attribute it to the Supreme Court's decision in the *Pentagon Papers Case,* not the formal terms of decision, but the simple result, which might have made it politically difficult for the administration to prosecute the *Times* for having published the Papers. The popular mind might well read the Supreme Court as having "allowed" the *Times* to publish the Papers. We will never know whether that conjecture is right. What we do know, however, is that Daniel Ellsberg was indicted and fully prosecuted under the Espionage Act. That prosecution was ultimately dismissed, but the Supreme Court's decision in the *Pentagon Papers Case* was not responsible for that result. It was due to wholly collateral circumstances—overreaching by the government in the conduct of its prosecution (e.g., breaking into Ellsberg's psychiatrist's office to obtain evidence; offering the directorship of the FBI to the trial judge), which, to give our story one further twist, was to figure in the impeachment proceedings brought against Richard Nixon in 1974.

In sum, the *Pentagon Papers Case* was a victory for free speech, true, but in my judgment it was not a "ringing victory," not at all a "strong reaffirmation" of "the people's right to know." The case found the Court pressed for time, and in a period of transition—the Chief Justiceship had already passed from Earl Warren to Warren Burger, and the process of replacing the other justices of the Warren Court had begun. The Warren Court had significantly enlarged the domain of freedom of speech in America. It was the legacy of that Court that increased the breathing space for First Amendment freedoms and that helped give the *Times,* Daniel Ellsberg, and the antiwar movement the courage, and maybe even the impetus, to do what they did. The *Pentagon Papers Case*

expressed that legacy. It did that by result, by denying the Attorney General's request, not by invoking the prior restraint doctrine.

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The prior restraint doctrine received an important modern statement in the 1930s in *Near* v. *Minnesota*. For the next 40 years it maintained a very low profile. In fact during the 15 years of the Warren Court it was virtually invisible. Now it has become a favorite of the Burger Court, as witnessed by the *Pentagon Papers Case*, *Nebraska Press*, and a number of other cases.[8] What accounts for this newly achieved prominence for the prior restraint doctrine? Part of the answer is suggested by the *Pentagon Papers Case* itself and the role the doctrine played in that case.

The prior restraint doctrine is distinguished by its ambivalence. On the one hand, it holds injunctions to a higher standard than criminal statutes, but on the other hand, it does not specify how high that standard is on an absolute scale, nor does it provide protection against other preventive instruments, such as criminal statutes, even though they may be equally effective in deterring speech. From a purely analytic perspective this ambivalence may seem to be a failing, an incoherence, but on another level this ambivalence only increases the appeal of the doctrine to a divided Court drifting to the right. The ambivalent analytic structure of the doctrine enhances its strategic utility.[9] There is something for everyone.

Justices from the right wing of the Court would be comforted by the continued operation of the criminal statute. They would also be able to pay homage to the First Amendment, wrap themselves up in the emotive force attaching to the traditional ban on prior restraints, and then fill the empty vessel of the prior restraint doctrine—the essentially comparative standard—with a content that

[8]See *Pittsburgh Press Co.* v. *Human Relations Commission* and *Organization for a Better Austin* v. *Keefe*.

[9]I suspect that the *Times*'s divided response to the Attorney General's telegram might be profitably analyzed from this perspective, too. The promise to obey the injunction might on this account be seen, not as evidence of the injunction's greater force, but as for a bargaining ploy, a way of inducing the Attorney General not to prosecute the *Times* under the Espionage Act.

could be, on an absolute scale, as restrictive as they wish. As Chief Justice Burger is anxious to remind us, even the dissenters in the *Pentagon Papers Case* subscribed to the prior restraint doctrine.

A justice from the more liberal wing would of course be concerned with the gaps, the silences of the doctrine, and view them as implied concessions to the power of the censor. Such a justice might wish to impose a standard on subsequent restraints that is as high as that on prior restraints; Black and Douglas (no longer on the Court) tried to do that in the *Pentagon Papers Case*, and so did Brennan on other occasions in the heyday of the Warren Court (for example, in constructing his overbreadth doctrine). But once it is recognized, as it must have been in the *Pentagon Papers Case*, that this position is not likely to be adopted by a majority, the liberal justices would have no interest in repudiating the prior restraint doctrine. It may be their only hope. Indeed, a liberal judge—such as Brennan—might even propose prior restraint as a basis of decision, as a compromise candidate, as a way of obtaining the votes from the middle of the Court.

A justice from the middle of the Court—White and maybe even Stewart—is ambivalent. He is committed to free speech, but at the same time, is troubled by the countervalues, the interests threatened by the speech, in this instance the classification system and the needs of national defense. The prior restraint doctrine would not resolve that ambivalence but rather serve it, for the doctrine itself is ambivalent. A decision against censorship predicated on the prior restraint doctrine is an ambivalent decision, a divided or weak rebuff to the censor, denying *only* the injunction without a functional basis for the limitation. The weakness of the rebuff would be attractive to a justice from the middle of the Court for it would express his own view of the merits, and though it would be a source of concern to the liberal, a weak "no" would be seen by him as a lot better than a "yes," a decision approving the censorship.

The prior restraint doctrine thus should not be seen as a full or coherent expression of free speech values, but rather as a strategic device capable of effectuating a compromise, the chief value of which is negative—to block a decision against speech. The *Pentagon Papers Case* might itself not have been a great victory for speech, but the opposite result, a decision legitimating the Attorney General's demand for silence—a chilling and indeed

plausible thought given the closeness of the division—would have been, so the strategist of that compromise must have premised, a devastating blow to First Amendment values. Like the war, that decision had to be stopped, no matter what the terms.