

Censorship Prior to Publication

New York Times v. United States, 1971

***** **Background of the Case** *****

During the turbulent years when the United States was engaged in the Vietnam War, protests against the war increased as the United States’s role escalated.

One opponent of the Vietnam War , Daniel Ellsberg, a former Defense Department official, secured lengthy classified documents related to the war, including a “History of United States Decision-Making Process of Viet Nam [sic] Policy” and another document relating to the Gulf of Tonkin incident, which the government used to justify expanding its role in the war. These documents came to be known as the “Pentagon Papers.” The government maintained that making the Pentagon Papers public might impose grave danger to the security of the United States.

Ellsberg turned the documents over to the *New York Times*, which planned to begin publishing them on July 13, 1971. The federal government sought to block publication and secured a temporary order from the Supreme Court which barred publication until the Court could hear and decide the case. The case was heard on June 26, 1971. On June 30, the Court lifted the stay and allowed the paper to go to press.

Constitutional Issue *****

The First Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, guarantees the freedoms of speech and the press. The question in this case was whether the government could prevent the publication of materials on the grounds that the national security was endangered.

As had happened before, the right to criticize the government in wartime became an issue. The Supreme Court had to decide whether the government had the right to prevent publication of material that the government regarded as harmful.

***** **The Supreme Court’s Decision** *****

The Court ruled in favor of the *Times*, maintaining that the government had not met the “heavy burden of justification” for a prior restraint. The decision was issued only four days after the Court heard oral arguments. The justice writing the decision is not identified. All nine justices wrote opinions; 6 justices concurred with the Court’s ruling, while 3 dissented.

In his concurring opinion, Justice Hugo L. Black wrote that the Court should not even have heard oral arguments in the case, and the government’s injunction should have been automatically denied. “In my view, it is unfortunate that some of my Brethren are willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.” To Black, by the First Amendment, “the press was protected so that it could bare the secrets of government and inform the people.” In his view, the newspapers that

published these papers “should be commended.” In his concurring opinion, Justice William O. Douglas agreed with Black that prior restraints were never permissible.

Justice William J. Brennan also concurred, finding it noteworthy that “never before has the United States sought to enjoin a newspaper from publishing information in its possession.” For him “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 [troop] transport already at sea can support even the issuance of an interim restraining order.” Justice Thurgood Marshall also agreed that restraint of publication was improper. Marshall emphasized the absence of statutory authorization for governmental action to enjoin a newspaper (but if there had been such a statute, its constitutionality could have been challenged).

Justice Potter Stuart agreed that sometimes secrecy in government is necessary, but it is entirely up to the executive branch to protect its secrets. He was convinced that the executive branch was correct with some of the documents involved in the case, but he could not say that “disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”

***** **Dissenting Opinion** *****

Chief Justice Warren E. Burger dissented, rejecting the view that the First Amendment grants “absolute” privileges to the press. He wished for adequate time in which to consider the competing claims of press and government. Justice Harry A. Blackmun also complained that there had been no time for the Court to arrive at a reasoned judgment. He expressed concern that the publication of the Pentagon Papers might lead to battlefield casualties and diplomatic difficulties.



Questions *****

DIRECTIONS: Answer the following questions on a separate sheet of paper.

1. Why do you think each justice felt compelled to write a separate opinion?
2. Why did the case advance so rapidly through the appeals system?
3. Why is this case considered one of the most important in the Supreme Court’s history?
4. What was the basis of Justice Black’s opinion?
5. If you had been a justice of the Supreme Court considering this case, how would you have voted? Give reasons for your answer.

The President and Executive Privilege

United States v. Nixon, 1974

***** **Background of the Case** *****

During President Nixon's 1972 re-election campaign, several men were caught breaking into the Democratic National Committee's headquarters in the Watergate apartment and office complex in Washington, D. C. It turned out that the burglars were associated with the president's campaign. A nationwide political and public outcry mushroomed into what became known as the Watergate scandal.

The United States Department of Justice appointed a special prosecutor to carry out an independent investigation of the scandal. From the investigation, trials of various White House staff members, investigative newspaper reports, and televised Senate Select committee investigative hearings, a shocked nation learned that the White House was involved in planning and covering up the burglary.

When it was revealed that the president had taped many conversations in the White House Oval Office, both the Senate investigating committee and the special prosecutor attempted to secure the tapes. The president refused to release them, claiming separation of powers and executive privilege, the right of the president to keep his conversations confidential. The special prosecutor subpoenaed the tapes, and a federal judge ordered President Nixon to release them. Nixon refused and instead turned to the Supreme Court for a judgment on executive privilege.

Constitutional Issue *****

The question for the Court to decide was whether the president could refuse to surrender the tapes and other information to a federal court for possible use against those charged in connection with the Watergate break-in.

***** **The Supreme Court's Decision** *****

The Court agreed unanimously that the president had to turn over the tapes. Chief Justice Warren E. Burger wrote for the Court. President Nixon had argued that the courts had no jurisdiction over what he claimed was a dispute between the president and his subordinate, the special prosecutor. The Court responded that it was competent to decide the case, just as it had decided similar controversies between officers and branches of the government in the past. In addition, because the material was wanted for a normal federal criminal trial, the matter fell directly under the Court's jurisdiction through the judicial powers spelled out in Article III of the Constitution.

The president had also claimed that executive privilege shielded him from a subpoena for two reasons. First, it was necessary to protect the confidentiality of high-level presidential communications. Second, the principle of separation of powers protects the president through the independence of the executive branch.

The Court found this argument insufficient, depending merely on a broad and undifferentiated claim of public interest that such conversations remain confidential. It might have been different, the chief justice wrote, if this had been a claim to protect “military, diplomatic or sensitive national security secrets. . . .”

Chief Justice Burger further reasoned that the claim based on the separation of powers would work to impair the balance of those powers. He wrote: “To read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in the confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of a ‘workable government’ and gravely impair the role of the courts under Article III.”

Against the president’s claim of executive privilege stood the Sixth Amendment rights of the accused to subpoena evidence and the Fifth Amendment guarantees against being deprived of liberty without due process of law. The Court weighed these claims and concluded, “without access to specific facts a criminal prosecution may be totally frustrated. The President’s broad interest in confidentiality . . . will not be vitiated by disclosure of a limited number of preliminary conversations shown to have some bearing on the pending criminal cases.” In short, the Court concluded, the president’s claim “cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.”

Finally, the Court ordered certain safeguards on the handling of the tapes while in the possession of the district court. These safeguards included that they be examined by the judge in private; that only relevant material would be used; and that confidentiality would be preserved as far as possible and that the material would be safely returned.

When Nixon still hesitated to turn the tapes over to the Senate committee, the House recommended that the president be impeached. Nixon then released the tapes, which revealed his role in the cover-up, and four days later he resigned the presidency, the first president in the history of the U.S. to do so.



Questions ★★★

DIRECTIONS: Answer the following questions on a separate sheet of paper.

1. What reasons did the president give for justifying his claim of executive privilege?
2. Did the Court hold that there are no circumstances under which executive privilege might be asserted? Explain.
3. Do you agree or disagree with the Court’s decision that a president must reveal material that he has recorded for his own use if it is needed as evidence in a criminal trial? Explain.
4. In what way did the Court’s decision lead President Nixon to resign?
5. A constitutional scholar has written that the most important contribution of the *Nixon* case is “in its reaffirmation that even the highest officer of government is not beyond the reach of the law and the courts.” Explain in your own words what this means and how this conclusion relates to the idea of a democratic government.