The Burger Court Opinion Writing Database

New York Times Co. v. United States

403 U.S. 713 (1971)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1971

Re: New York Times Case

MEMORANDUM TO THE CONFERENCE:

In light of the size of the petition submitted by the New York Times I suggest we gather at 3:15 to consider our next step. We may have something on the Washington Post by that time.

Regards,

WED

1723+1873

WJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 29, 1971

Re: No. 1873 - New York Times v. U. S.
No. 1885 - U. S. v. Washington Post

MEMORANDUM TO THE CONFERENCE:

The printing presses have been rolling and everyone seems to be very nearly ready.

I suggest that a rigid "time table" is not feasible but that we

(1) hold ourselves available for a Conference Wednesday at 11:00 a.m., and

(2) consider an open Court session for announcement in the afternoon

Regards,

WEB

To: Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: The Chief Justice

Circulated: JUN 30 1971

Recirculated: _____

No. 1873 - New York Times Company v. United States

No. 1885 - United States v. The Washington Post Company et al.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the Constitutional limitations on prior restraint against expression, that from the time of Near v. Minnesota, 283 U.S. 697(1931) until recently in Organization for a Better Austin v. Keefe, _____ U.S. _____(1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make this case a simple one. In this case, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances -- a view I respect, but reject -- can find such a case as this to be simple or easy.

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

1873	New York Times Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1885	United States, Petitioner, *v.* The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 30, 1971]

MR. CHIEF JUSTICE BURGER, dissenting.

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This case is not simple for another and more immediate reason. We do not know the facts of the case. No Dis-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

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1st DRAFT

SUPREME COURT OF THE UNITEI

Nos. 1873 AND 1885.—OCTOBER TERM

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[June —, 1971]

MR. JUSTICE BLACK, concurring.

I adhere to the view that the Governn against the Washington Post should have bee and that the injunction against the New Y should have been vacated without oral argun thermore, after oral arguments, I agree comp we must affirm the judgment of the Court of the District of Columbia and reverse the ju the Court of Appeals for the Second Circu reasons stated by my Brothers DOUGLAS and In my view it is unfortunate that some of m are apparently willing to hold that the pul news may sometimes be enjoined. Such a hol make a shambles of the First Amendment.

Our Government was launched in 1789 witl tion of the Constitution. The Bill of Rights the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

When the cases were first presented to this Court, I believe that every moment's continuance of the injunctions against these newspapers amounts to a wanton, flagrant, indefensible, and continuing violation of the First Amendment.

Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Black, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 2 - 1971

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Nos. 1873 AND 1885.—OCTOBER TERM, 1970

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[June —, 1971]

MR. JUSTICE BLACK, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a wanton, flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral arguments, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including

WD

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Black, J.

Circulated: _____

Recirculated: JUN 30 1971

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

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[June 30, 1971]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

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Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
United States, Petitioner, v. The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
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[June —, 1971]

MR. JUSTICE DOUGLAS.

It should be noted at the ouset that the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." That leaves, in my view, no room for congressional restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the Times and Post seek to use. 18 U. S. C. § 793 (e) provides that "whoever having unauthorized possession of, access to, or control over any document, writing . . . relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, wilfully communicates . . . the same to any person not entitled to receive it . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792–799. In three of those eight

WD

file Cir 6-29

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

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1873	
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1885	

[June —, 1971]

MR. JUSTICE DOUGLAS with whom MR. JUSTICE BLACK concurs.

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[1] See *Beauharnais* v. *Illinois*, 343 U. S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth* v. *United States*, 354 U. S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates* v. *United States*, 354 U. S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times* v. *Sullivan*, 376 U. S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

WB

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

Circulated:

Recirculated: 6/29/71

1873	New York Times Company, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[June —, 1971]

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[1] See *Beauharnais* v. *Illinois*, 343 U. S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth* v. *United States*, 354 U. S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates* v. *United States*, 354 U. S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times* v. *Sullivan*, 376 U. S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

June 24, 1971

MEMORANDUM TO THE CONFERENCE

Re: New York Times Case

Dear Brethren:

Counsel for the New York Times have filed with the Clerk a petition for certiorari with a request for accelerated consideration of such petition, and also an application to me, as Circuit Justice, for a stay of the mandate of the Court of Appeals pending disposition of the petition for certiorari. Nine copies of the petition have been filed with the Clerk and will be distributed to the Conference. Counsel are also submitting shortly nine copies of the application to me, which will also be circulated to the Conference. The Government has advised the Clerk that its response to both the petition for certiorari and the application for a stay will be filed here about 1:30.

I am suggesting to the Chief Justice that a special Conference be called this afternoon to consider both of these matters.

Sincerely,

J.M.H.

CC: The Clerk

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
United States, Petitioner, v. The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
1885	

[June —, 1971]

MR. JUSTICE HARLAN, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400 (1904):

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in its haste to bring these lawsuits to an end.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration, and its application for interim relief were filed in this Court on June 24 at about 11 a. m. The

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 4, 7

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

5th DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

Circulated:

Recirculated: JUN 29 1971

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
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[June —, 1971]

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5,7

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

Recirculated: JUN 30 1971

New York Times Company, Petitioner, v. United States.	1873	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
United States, Petitioner, v. The Washington Post Company et al.	1885	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 30, 1971]

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6-28-71

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

Recirculated: _____

New York Times Company, Petitioner, v. United States. (1873)	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
United States, Petitioner, v. The Washington Post Company et al. (1885)	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 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 Viet Nam Policy." — U. S. — (1971).

"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 enforcement of such a restraint." *Organization for a Better Austin* v. *Keefe,* — U. S. — (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.

Mr. The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Brennan, J.

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Recirculated: _____

SUPREME COURT OF THE UNITED STATES

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1885	

[June —, 1971]

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgment in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to asure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

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1885	

[June —, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, enormous power has been given to the Executive in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative [1] and Judicial [2] branches of Government, has been presssed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple

[1] The President's power to make treaties and to appoint ambassadors is of course limited by the requirement of Article II, § 1, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "provide for the common defence" by raising military forces. And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately ——,—— casualties in various parts of the world.

[2] See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Hirabayashi* v. *United States*, 320 U. S. 81; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304; cf. *Mora* v. *McNamara*, cert. denied 389 U. S. 934.

1-3

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: Stewart, J.

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

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[1] The President's power to make treaties and to appoint ambassadors is of course limited by the requirement of Article II, § 1, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

[2] See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103; *Hirabayashi* v. *United States*, 320 U. S. 81; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304; cf. *Mora* v. *McNamara*, cert. denied 389 U. S. 934.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 29, 1971

Nos. 1873 & 1885
New York Times v. United States

Dear Bill,

I am glad to join the Per Curiam you have circulated in these cases.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 29, 1971

Re: Nos. 1873 & 1885 - New York Times Co. v. U. S.

Dear Bill:

Please join me in your proposed per curiam for these cases. I shall, of course, file a separate concurring opinion.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT From: White, J.

SUPREME COURT OF THE UNITED STATES

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Nos. 1873 AND 1885.—OCTOBER TERM, 1970

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1885	

[June —, 1971]

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Govern-

[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers whom it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e. g.*, *NLRB* v. *Gissell Packing Co.*, 395 U. S. 575, 616–620 (1969). Art. I, § 8 of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100

Minor stylistic changes throughout
pp. 2-4, 6, 8-10

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: White, J.

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

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MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[1] Nor, after examining the materials the Govern-

[1] The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers whom it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969). Art. I, § 8 of the Constitution authorizes Congress to secure the "exclusive right" of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
United States, Petitioner, v. The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
1885	

[June —, 1971]

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in this case is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States." Brief of the Government, at 6. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make laws.

In this case there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Executive Order 10501, to classify documents and information. See, *e. g.*, 18 U. S. C. § 798; 50 U. S. C. § 783. Nor is there any issue here regarding the President's power as Chief Executive and Commander-in-Chief to protect national security by disciplining employees that disclose information and by taking precautions to prevent leaks.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, 1873 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
United States, Petitioner, 1885 *v.* The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1971]

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[1] See n. 3, *infra*.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

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New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
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1885	

[June —, 1971]

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[1] See n. 3, *infra*.

B

STYLISTIC CHANGES THROUGHOUT

4, 6

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun

4th DRAFT

From: Marshall, J.

Circulated:

Recirculated: JUN 30 1971

SUPREME COURT OF THE UNITED STATES

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
United States, Petitioner, v. The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
1885	

[June 30, 1971]

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in this case is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a grave and immediate danger to the security of the United States." Brief of the Government, at 6. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

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[1] See n. 3, *infra*.

WB

WD

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

6/29/71

Nos. 1873 AND 1885.—OCTOBER TERM, 1970

New York Times Company, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
1873	
United States, Petitioner, v. The Washington Post Company et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
1885	

[June —, 1971]

MR. JUSTICE BLACKMUN.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case, observed:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure . . . ." *Northern Securities Co.* v. *United States,* 193 U. S. 197, 400–401 (1904).

June 29, 1971

Re: No. 1873 - New York Times v. U.S.
No. 1885 - U.S. v. Washington Post

Dear John:

Although I am probably filing my own dissent, I would like to be joined in yours.

Sincerely,

H.A.B.

Mr. Justice Harlan

cc: The Conference

IN THE SUPREME COURT OF THE UNITED STATES

No. 1873 -- October Term, 1970.

New York Times Company,
Petitioner,

v.

United States of America,
Respondent.

ORDER

The petition for certiorari is granted and the case is set for oral argument on Saturday, June 26, 1971, at 11:00 o'clock a.m. Briefs and records shall be filed simultaneously, the requirement for printing being waived.

The application of the New York Times Company for stay of mandate of the Court of Appeals for the Second Circuit is granted pending further order of this Court. The Special Appendix referred to in the order of the Court of Appeals, and any additional items as the United States may have specified with particularity, shall be served on the New York Times Company and filed in this Court by 5:00 p.m. today, June 25, 1971. The restraint imposed upon the New York Times by the Court of Appeals for the Second Circuit is continued pending argument and decision in this case.

IN THE SUPREME COURT OF THE UNITED STATES

No. _____ - October Term 1970

United States of America,
Petitioner

v.

The Washington Post Company, et al.,
Respondent

ORDER

Treating the application for stay as a petition for certiorari, the petition is granted and the case is set for oral argument on Saturday, June 26, 1971, at 11:00 a. m.

Briefs and records shall be filed simultaneously, the requirement for printing being waived. Portions of the record or argument relating to matters claimed to affect national security may be filed in sealed form.

Pending argument and decision in this case the restraint imposed by the Court of Appeals on the Washington Post and its officers, is continued but limited to items specified in the special Appendix filed on June 21, 1971, with the United States Court of Appeals for the Second Circuit in a case in that Court captioned The United States v. New York Times Company et al, Docket 71-1616, decided June 23, 1971, and any