

1971

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Peter D. Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 Case W. Res. L. Rev. 3 (1971)

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Down Memory Lane: The Case of the Pentagon Papers

Peter D. Junger

The case of the Pentagon Papers has been accused of "greatness" and appears initially to be an important interpretation of the first amendment. The author contends, however, that the major issue in the case concerns the doctrine of separation powers. He argues that the limited holding of the case is completely foretold by the steel seizure case of the 1950's, and he suggests that the protection it affords from unauthorized action by the Executive may be more fundamental to our liberties than the first amendment protection of the press.

"We live under a government of men and newspapers."¹

I

IT IS A THING OF MEMORIES, the case. Not necessarily real memories; they could just as well be ersatz recollections of some penny-dreadful smoked out of the collective unconscious of sixty years ago. It is not really our sort of case, or not predomi-

nately, and it hardly belongs in these pages. It is another sort, the case of the Pentagon Papers.

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The decision of the Supreme Court in *New York Times Co. v. United States*² is surplusage, an epilogue inserted in the saga solely for verisimilitude, or to

give it a medicinal touch of redeeming social interest.³ At least that was my first impression although, of course, it alludes to many half-forgotten things of perhaps more substance than *The Four Just Men* or *The Purloined Letter*. Undoubtedly because of this

¹ Ascribed to Wendell Phillips by Zechariah Chafee, Jr. See Z. CHAFEE, STATE HOUSE VERSUS PENTHOUSE: LEGAL PROBLEMS OF THE RHODE ISLAND RACETRACK ROW 10 (1937).

² 403 U.S. 713 (1971).

³ Cf. N. SHEEHAN *et al.*, THE PENTAGON PAPERS (1971), where the full text of the opinions in *New York Times* is inserted as Appendix 2. Appendix 1 is a collection of editorials from the *New York Times*. Poor old Ralph Ginzburg would never have been sent up for violating the federal obscenity statute had he used props like that. See *Ginzburg v. United States*, 383 U.S. 463 (1966). Mr. Ginzburg's latest effort to reduce his sentence was recently refused by the Court of Appeals for the Third Circuit and the Supreme Court denied certiorari on June 21, 1971 while the case of the Pentagon Papers was climbing its way through the courts. See *United States v. Ginzburg*, 436 F.2d 1386 (3d Cir.), *cert. denied*, 403 U.S. 931 (1971).

allusiveness, as well as the hysterical publicity which the press applies to its own affairs, one can foresee a plethora of articles dissecting the implications of the case.

But let me, by way of prologue, make one thing clear. Mr. Justice Harlan, in dissent, prefaced his opinion with these words of Mr. Justice Holmes: "Great cases like hard cases make bad law."⁴ I trust that it is not presumptuous for me to point out a fact of which, I am sure, Mr. Justice Harlan was well aware and in which he found much consolation: the case of the Pentagon Papers is not, in any lawyer's sense, a great case and it did not make any law at all, good or bad. The Republic has stood for 180 years since the adoption of the first amendment without a judicial determination of the power of the Federal Government to impose prior restraints upon newspapers, and with luck it will still stand in 2151 without such a determination. Some precedents are unnecessary, however much writers in law reviews may yearn for them.

As Mr. Justice Frankfurter once observed:

So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle — preferably forever — a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: "At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eye. Like King Henry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start."⁵

Justice Frankfurter immediately went on to say:

The path of duty for this Court, it bears repetition, lies in the opposite direction. Due regard for the implications of the distri-

⁴ 403 U.S. at 752 (quoting from Holmes' dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904)). The passage quoted by Mr. Justice Harlan continues:

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. 403 U.S. at 752-53.

Is it significant that Mr. Justice Holmes' dissent argued that the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1964), did not, *and constitutionally could not*, forbid the acquisition by Northern Securities Company, a creature of J. J. Hill and J. P. Morgan, of all the stock of the Northern Pacific Railway Company and the Great Northern Railway Company, two competing railroads? Is it bad law to say that Section 7 of the Clayton Act, 15 U.S.C. § 18 (1964) is constitutional?

⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593, 594 (1952) (Frankfurter, J., concurring), *citing* THE ECONOMIST, May 10, 1952, at 370.

bution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. It has also led to a "series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."⁶

One cannot help wonder why it should be necessary or desirable to give a definitive answer to a difficult constitutional question which has arisen only once in 180 years. If one were to decide that the Federal Government may, in a particular case, use the injunctive powers of the courts to impose "prior restraints" on the press, one would be showing a certain insensitivity to the history that gives both content and value to our Constitution.⁷ And to decide that prior restraints can never be invoked against the press would require a certain bravery, if not bravado.⁸

Since speech may presumably be discouraged by threat of criminal sanctions, it is hard to see what harm can result from the vague threat that prior restraints against publication may be available in extreme cases. Do we want a decision that will assure our masters that there are occasions when they may suppress the press? And, on the other hand, is it really bad to let a publisher stew a bit as to whether, if he really thinks his pen can torpedo the ship of state, he just might be enjoined?⁹

If the question is whether injunctions against the press are permissible, it is clear that the case of the Pentagon Papers can supply no precedent. As Mr. Justice White declared:

⁶ *Id.* at 595, citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring).

⁷ See *Near v. Minnesota*, 283 U.S. 697, 713-19 (1931). But cf. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 9-30 (1948).

⁸ Mr. Justice Black undeniably had the courage of his convictions. Consider his opinion in *New York Times* where he states: "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." 403 U.S. at 714, 715. Mr. Justice Douglas joined in Mr. Justice Black's concurring opinion and Mr. Justice Brennan, in his own concurrence, came close to this absolute interdiction on prior restraints when he concluded, "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." *Id.* at 724, 726-27.

⁹ The threat of criminal prosecutions might make an injunction downright attractive to some publishers. As to the risk of criminal prosecutions, see notes 53-61 *infra* & accompanying text. One of the more peculiar benefits of the injunction action from the viewpoint of the newspapers is that once the injunction is denied on the facts, it becomes hard to obtain a criminal conviction. Solicitor General Griswold addressed this point in his arguments before the Court in the *New York Times* case. 2 *THE NEW YORK TIMES COMPANY v. UNITED STATES*, A DOCUMENTARY HISTORY 1222 (Arno Press 1971) [hereinafter cited as HISTORY].

If the United States were to have judgment . . . our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials.¹⁰

Added to Justice White's comments is the fact that a large portion of the materials sought to be enjoined had already been published, thus making moot many of the factual questions. Moreover, there was a real threat that other newspapers not joined in the injunction actions would obtain access to and publish the remaining papers,¹¹ thus making any injunction in the case "a useless thing."¹² It thus seems clear that one cannot gather from the facts of the case any suggestion as to the quantum of evidence that would be sufficient to support a prior restraint against publication. We know that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."¹³ And we also know that the unknown and unknowable facts considered by the Court did not overcome this presumption.¹⁴ Be that as it may, a knowledge of the consequences of unknowable causes cannot be the basis for any future predictions, and certainly cannot be the basis for any "law."

But maybe I am running ahead of myself. *Causes celebres* tend to be ephemeral things, and you may already have forgotten exactly

¹⁰ 403 U.S. at 732-33. There may be a paradox lurking in the Court's keeping secret the record of a case which held that classified materials may be published without fear of prior restraints. But several of the Justices, including Mr. Justice White, hoped that the "responsible press" would not choose to publish the more sensitive material. One may also speculate that the Solicitor General felt compelled to reveal additional "secret" information to the Court in its efforts to explain why the publication of the Pentagon Papers would be harmful. A court probably has the right to seal a file at the request of a litigant, even if the information in the file is available elsewhere. Furthermore, if the Court had allowed the material to be published as part of its reports, it would certainly have made a shambles of any criminal proceedings which may be brought against those who released the papers. In any event, it is not possible to find any procedure to compel the Court to declassify its record of the Pentagon Papers since the Freedom of Information Act, 5 U.S.C. § 552 (1970), applies only to "agencies" and "agency . . . does not include . . . the Courts of the United States." 5 U.S.C. § 551 (1970).

¹¹ See note 33 *infra* & accompanying text.

¹² See 403 U.S. at 744 (Marshall, J., concurring).

¹³ 403 U.S. at 714, quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

¹⁴ 403 U.S. at 714.

what the flurry was about. I shall submit to you that the importance of the case of the Pentagon Papers lies primarily in the memories, the recollection of eternal dubieties that it invokes. But perhaps I should refresh your recollection of the case itself.

We, like the victims of an ancient Chinese curse, have the fortune to live in an interesting period of history. Not the least interesting aspect of our time is our seemingly unlimited and apparently unintended, if not downright absentminded, military involvement, *sub* and *supra* *rosa* in Indochina. I am not trying to remind you of this; it is too immediate and too actual to be remembered. Indeed, at times it seems too actual even to be perceived. But that background to our lives was also the background against which on Sunday, 13 June 1971, The New York Times published excerpts from "what has since become known as the Pentagon Papers — a massive top-secret history of the United States role in Indochina."¹⁵

The papers themselves were a history commissioned in 1967 by the then Secretary of Defense, Robert S. McNamara.¹⁶ It is not at all clear that this history contained any information that had not already been revealed somewhere, but the official genesis of the work made it an excuse for many public cries of "culpa nostra" and "I told you so." It was not the sort of thing that could increase our confidence in the Executive's handling of our foreign affairs or increase our enthusiasm for an extremely unpopular war. Although it is doubtful that the papers contained any information (as opposed to analyses) which was unknown to Hanoi,¹⁷ they did contain matters that could, upon their publication, be considered embarrassing both to our responsible officials and to the representatives of friendly governments. For example, it was revealed that J. Blair Seaborn, the Canadian member of the International Control Commission, was serving, with the cooperation of the Canadian Embassy in Washington, as our messenger to North Vietnam during the period of the Tonkin Gulf incident.¹⁸

¹⁵ N. SHEEHAN, *supra* note 3, at ix.

¹⁶ *Id.*

¹⁷ Of course, the sealing of the record makes it impossible to know what portions of the papers have not been published or what arguments were presented to show that harm would result from revelation of the papers' contents. See note 10 *supra* & accompanying text.

¹⁸ N. SHEEHAN, *supra* note 3, at 256, 289-91. I have left the example to which this Note is appended unchanged although, since writing it, I have read that the information relating to Mr. Seaborn had been leaked to the press, despite its secret classification and the embarrassment of Her Majesty's Canadian Government, by President Johnson on June 17, 1965. See Shackford, *Reports & Comments*, THE ATLANTIC MONTHLY, Sept. 1971, at 19-20. It seems clear that the primary damage done to the

Following the Sunday installment, the Times was able to publish two more installments of its version of the papers on June 14th and 15th. During this rather short period of three days the executive branch determined to seek an injunction in the District Court for the Southern District of New York forbidding the further publication of the papers by the Times.¹⁹ On June 15, Judge Murray Gurfein, a new Nixon appointee performing one of his first judicial acts, issued a temporary restraining order against the Times.²⁰ On June 19, after undertaking a task that must have been comparable, both in labor and boredom, to cleaning the Augean stables without labor saving devices, Judge Gurfein denied the request for a preliminary injunction²¹ and declared, "no cogent reasons were advanced as to why these documents except in the general framework of embarrassment . . . would vitally affect the security of the Nation."²² The second circuit, however, reasserted the stay pending a hearing by the court²³ and, on 23 June 1971 after an *en banc* hearing, remanded the matter to Judge Gurfein for a further determination of the effect that the publication of specified portions of the papers would have upon the national security.²⁴

In the meantime, on June 18, the Washington Post got into the act and began publication of its own series of excerpts from the Pentagon Papers. On that evening the Justice Department unsuccessfully sought to persuade Justice Gerhard A. Gesell to issue a temporary restraining order preventing further publication of the papers by the Post.²⁵ Later that day a three judge panel of the Court of Appeals for the District of Columbia reversed Judge Gesell's ruling, granted a temporary restraining order, and remanded the case.²⁶ On June 21, Judge Gesell denied a preliminary injunc-

executive branch (or the country) by the publication of the Pentagon Papers consisted of reminding the American public of matters which they once knew or could, without undue mental strain, have figured out for themselves.

¹⁹ 1 HISTORY x.

²⁰ *Id.* at 23-29.

²¹ ___ F. Supp. ___ (S.D.N.Y. 1971); 2 HISTORY 654-69.

²² ___ F. Supp. at __, 2 HISTORY 666. On June 16, 1971, the United States Attorney for the Southern District of New York applied for an order requiring the New York Times to produce its copy of the Pentagon Papers for copying and inspection, but this application was denied by Judge Gurfein on July 17. 1 HISTORY 256-91. No appeal was taken from the denial of this motion.

²³ ___ F. Supp. at ___; 2 HISTORY 675-77.

²⁴ ___ F.2d ___ (2d Cir. 1971); 2 HISTORY 973-74.

²⁵ 1 HISTORY xi.

²⁶ 446 F.2d 1322; 2 HISTORY 645-46.

tion and the Justice Department again appealed his ruling.²⁷ After granting a stay pending argument before the court,²⁸ the court of appeals, sitting *en banc*, affirmed the district court's decision that no preliminary injunction should be granted.²⁹

This set the scene for applications for certiorari by the Times in its own case and the Justice Department in the Washington Post case. Both applications were granted on June 25 with argument scheduled for Saturday, June 26.³⁰ The Court continued the stays against both papers.³¹

By this time the Boston Globe had begun publishing a portion of the Pentagon Papers and had been enjoined by the district court in Boston at the request of the Justice Department.³² Other newspapers had also published what purported to be extracts from the papers, but Solicitor General Griswold assured the Court that, except for the material published by the three papers then under restraint, "there has not been published anything else which is not covered by material already published in this series or elsewhere."³³

This short sketch of the precipitous ascent of the two injunction cases to the Supreme Court hardly explains why Justice Harlan should have accused them of the sin of greatness,³⁴ nor does it explain the almost petulant distaste which some of the Justices expressed for the matter before them.³⁵ What is missing is the feeling, perhaps nurtured by both a press and a bar concerned only with immediate news and controversies, that the case of the Pentagon Papers is a skirmish in one of the nastiest and perhaps most dangerous political rows ever to convulse our body politic. We hear repeatedly that the American people are more divided than they have been for a hundred years, and usually this malaise is blamed on the war. We hear threats that any disengagement from the war without at least the appearance of success will induce a violent repercussion of reaction and witch hunting more disastrous to our society

²⁷ ___ F. Supp. ___ (D.D.C. 1971); 2 HISTORY 883-84.

²⁸ *Id.*

²⁹ 446 F.2d 1327 (D.C. Cir. 1971); 2 HISTORY 977.

³⁰ *New York Times Co. v. United States*, 403 U.S. 942 (1971) (*mem.*).

³¹ *Id.*

³² 2 HISTORY 968.

³³ 39 U.S.L.W. 3561 (U.S. June 29, 1971). However, the Solicitor General admitted that it was possible that other newspapers had access to the documents. *Id.* at 3563.

³⁴ See note 7 *supra* & accompanying text.

³⁵ See, e.g., the dissenting opinion of Chief Justice Burger. 403 U.S. at 748, 750-51.

than the unwanted war itself. The morale of our army is supposed to be at its lowest ebb, the economy is in a bad way, Congress and the President are repeatedly at loggerheads. Amidst this disquietude the Pentagon Papers would seem to be another faggot tossed into the public's burning discontent.

But the Justices had a right to be uncomfortable. They have, after all, as an institution, succeeded brilliantly in avoiding the slightest responsibility for the Indochina war; in fact they have been able to ignore its very existence.³⁶ Furthermore, during this century the courts have had little reason to be happy with their record when constitutional rights have conflicted with the alleged interests of national security. Then suddenly the Court was plunged into a battle between the executive branch and the press — a battle in which the brickbats thrown could do some serious damage. That is a rather different risk from the occupational hazard so stoically accepted by the Justices of being pelted by the beanbags of academic commentators.³⁷

It is also clear from this background why the executive branch feared the publication of the papers. Those who conduct the war have always felt that one of their greatest obstacles was public opinion in the United States, and during the last few years the press, particularly the "Eastern Establishment Press," has stirred up the public and the Congress to the point where those who administer the war must at times feel that it is impossible either to fish or cut bait. This inability of the executive to take the steps that it, from time to time, feels to be necessary naturally and perhaps correctly strikes it as a threat to the national security. Certainly the Papers represent a threat to the powers of the executive branch as an institution.³⁸

Against this background the Supreme Court delivered its decision on June 30, 1971. The decision itself was *per curiam*, short

³⁶ See, e.g., the denial of certiorari in *Mora v. McNamara*, 389 U.S. 934 (1967) and the denial of the motion to file a bill of complaint in *Massachusetts v. Laird*, 400 U.S. 886 (1971). The latter case, if the Court had accepted jurisdiction, would have involved the question "whether the Executive can authorize . . . [a war in Indochina] without congressional authorization." *Id.* at 893 (Douglas, J., dissenting).

³⁷ See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970). But cf. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

³⁸ See, e.g., the various proposals to limit the executive branch in its conduct of the war which have received serious consideration in Congress, including the "Mansfield Amendment" to H.R. 6531, 92d Cong., 1st Sess. (1971) passed by the Senate on June 22, 1971 (later rejected by the House), which proposed the withdrawal of all troops from Indochina within 9 months. See 117 CONG. REC. 9717-18 (daily ed. June 22, 1971).

and unrevealing enough to be relegated to a footnote.³⁹ But each of the Justices filed a separate opinion amidst a web of cross-concurrences and there is, though one must dig for it, much material raising many questions in those separate opinions.

The circumstances surrounding the case and the questions discussed in the ten opinions filed by the Justices remind one, as I suggested at the beginning, of many different things. And each memory could perhaps justify a separate comment. Perhaps the most compelling memories are those which are not "legal." It is impossible to think of the case of the Pentagon Papers without recalling at least vaguely the entire history of the last few years. The papers themselves are the stuff of history (particularly so if history is composed of footnotes) and they will be cited at length and for years to come in the journals devoted to Clio. Ever since Herodotus at least, historical writing has tended to ask as its first question, "How did it all begin?" And it was that question, after all, which inspired Secretary McNamara to commission this history of our Indochina war.

More to our concerns, the case touches themes that appear throughout much of our legal history and that of other countries. *New York Times Co. v. United States* is not the first occasion in which a government has sought to suppress the publication of news. Do you remember the Spiegel affair? That case involved the publication, by Der Spiegel, of the "top secret" information that NATO had graded the West German *Bundeswehr* as "conditionally ready

³⁹ *New York Times Co. v. United States*, 403 U.S. 714 (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." [403 U.S. 942-43 (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 imposition of such a restraint." *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.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with the directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

for defense." In other words, since that nondescript label is the lowest grade which NATO can give an army, the Spiegel had reported that the German Army had flunked its examinations cold. Shortly after the article was published, the West German political police, acting on orders of the West German Minister of Defense, descended in a *Nacht und Nebel Action* upon the offices of the *Spiegel*, arrested its editors and seized its files, charging that the publication of classified information constituted a type of treason.⁴⁰ Although the end result of the Spiegel affair was the discharge of the Minister of Defense⁴¹ and a probable increase in the Spiegel's circulation, there would seem to be a constructive, and consoling, comparison to be drawn between the Spiegel affair and that of the Pentagon Papers.

Before one decides that the attempt by the Nixon administration to censure the New York Times and the Washington Post bodes ill for the Republic, one might do well to recall how such matters have been handled in other lands or at other times. In retrospect the administration may appear naive in dreaming that the courts would assist it in restraining an unfriendly and embarrassing press; but surely there is much consolation to be found in the circumspect manner in which the present Executive sought to impose the restraints.⁴² Though there have been few cases involving "prior restraints" in our legal history, we should remember that the history of free speech in our country has not always been a happy one. We remember Peter Zenger, of course, but how many of us remember Robert Goldstein, sent up the river during the First World War for exhibiting a movie entitled "The Spirit of '76"? Mr. Goldstein was convicted of a violation of the Espionage Act of 1917⁴³ because scenes in the motion picture included the depiction of atrocities committed by British soldiers during our revolution and those in turn were found likely "to arouse antagonism, hatred, and enmity between the American people . . . [and] the people of Great Britain . . . at a time when . . . the government of Great Britain . . . was

⁴⁰ New York Times, Oct. 28, 1962, at 3, col. 1.

⁴¹ New York Times, Oct. 28, 1962, at 6, col. 2.

⁴² Cf. *In re Debs*, 158 U.S. 564, 583 (1895). The Court stated: [I]t is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong . . . and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals . . . *Id.*

⁴³ Ch. 30, §§ 1-6, 40 Stat. 217, 218-19 (1917), as amended 18 U.S.C. §§ 792-99 (1964).

an ally of the United States"⁴⁴ I hope that others remember, and that in time the shadowy opinions in *New York Times* will generate a comparative study of that case and the *Spiegel* affair, and will give birth to a study of free speech in the United States, bringing down to date Professor Chafee's invaluable work of that name.⁴⁵ It is a good excuse for taking stock of the present status of our liberties.

Still, primarily because freedom of the press is such an integral part of our concept of government, it is not a subject well-suited for that detailed analysis which separates our tradition of legal writing from *belles lettres* or moral tracts. We all know where we stand when it comes to the first amendment, so we need do little more than take down a collection of quotations and choose some apposite passage from, say, Thomas Jefferson and let it go at that. For example: "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."⁴⁶ Or, if you prefer: "The man who never looks into a newspaper is better informed than he who reads them, inasmuch as he who knows nothing is nearer the truth than he whose mind is filled with falsehoods and errors."⁴⁷

II

Beyond the important and exciting questions of free speech and freedom of the press, subjects which the press itself understand-

⁴⁴ *Goldstein v. United States*, 258 F. 908, 909 (9th Cir. 1919); *see also* *United States v. Motion Picture Film "The Spirit of '76,"* 252 F. 946 (S.D. Cal. 1917). Once one starts remembering, the process of free association goes on and on; do you remember Sir Lawrence Olivier's motion picture production of *Henry V*, depicting, during World War II, the slaughter by the French knights of unarmed civilians in the English camp?

⁴⁵ Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1948). I do not enjoy sounding Pollyannish, but, when the case of the Pentagon Papers compelled me to Chafee's book, I received the strong impression that the recent history of the suppression of *political* speech in the United States indicates a remarkable improvement in the attitudes of both the courts and those whom one might expect to set themselves up as censors. Perhaps, because our Indochina war lacks popular support and prosecution of those who oppose it is difficult, due to their respectability, the very unpopularity of the war compels our Government to allow speech which would, in the memory of many now living, have been cruelly suppressed on the ground that it might cause disaffection from governmental policies that were extremely popular. Today, excluding *New York Times*, the major legal problems of free speech appear to be in the non-political areas of advertising and pornography. *See, e.g.,* S. Krislov, *From Ginzburg to Ginsberg: The Unburied Children's Hour in Obscenity Litigation* 1968 S. CT. REV. 153; Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

⁴⁶ Letter from Thomas Jefferson to Colonel Edward Carrington, Jan. 16, 1787.

⁴⁷ Thomas Jefferson, *Writings* XI.

ably considered of paramount importance⁴⁸ in those long ago days when the Pentagon Papers were still news, are the more technical legal questions evoked by *New York Times*. In his dissenting opinion, Justice Harlan compiled a little list of questions which "should have been faced."⁴⁹ This list is enough to keep the mills of the law reviews grinding for a year or more. Some of the questions are, of course, connected with the issue of freedom of the press; others, however, particularly the first and sixth, are not likely to arouse popular passions. In fact, there is something cryptic about Justice Harlan's first question, "whether the Attorney General is authorized to bring these suits in the name of the United States."⁵⁰ A reasonable initial reaction would be to ask, in whose name should the suit be brought if not the United States? The sixth question also is curt enough to be puzzling; if the papers were "purloined"

⁴⁸ See, e.g., the self-congratulatory editorial of the *New York Times* for July 1, 1971, reproduced in N. SHEEHAN, *supra* note 3, at 648-49.

⁴⁹ Justice Harlan suggested that:

[S]ome or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. . . . This question involves as well the construction and validity of a singularly opaque statute — the Espionage Act, 18 U.S.C. § 793 (e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. . . .

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. . . .

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of —

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated. 403 U.S. at 753-55 (cases omitted).

⁵⁰ *Id.* at 753. For a discussion of this question see notes 102-05 *infra* & accompanying text.

and "feloniously acquired," how is it possible that the courts refused to order restoration to their rightful owner?⁵¹

There are other nice questions brought to mind by the opinions in *New York Times*. One example is the question concerning the authority for and history of the entire security classification system which, strangely enough, does not appear to rest on any clear congressional authority.⁵² Another question is the old problem of whether a court of equity can enjoin the commission of crime.⁵³ At least two of the Justices in the majority seemed to feel that criminal proceedings could properly be commenced on the basis of the publication which the court refused to enjoin.⁵⁴

One question leading inevitably to another, there is the pecu-

⁵¹ Since the issues which I feel compelled to discuss are not those raised by Mr. Justice Harlan's sixth question, I will leave it to others. However, it is probably relevant that the Justice Department did not press its demand for the return of the Papers. See note 26, *supra*. Furthermore, the Pentagon Papers were not subject to copyright. See 17 U.S.C. § 8 (1964). In a similar case, where a newspaper columnist copied documents of a private organization, an injunction against the columnist was denied on first amendment grounds. See *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C. Cir. 1968) (Burger, J.).

⁵² The basic authority for the classification of official information is Exec. Order No. 10501, 3 C.F.R. 979 (1953), as amended, 3 C.F.R. 292 (1971). The order purports to rest upon "the authority vested in . . . [the President] by the Constitution and statutes." *Id.* There is no general statutory authority for such classification although 50 U.S.C. § 783 (1964) (which relates only to Government offices and employees) and 18 U.S.C. § 797 (1964) (which relates only to codes, cyphers and "communications intelligence" in general) both make criminal the communication of classified material under certain limited circumstances which hardly seem applicable to the facts in *New York Times*.

⁵³ See 403 U.S. at 744 (Marshall, J.).

⁵⁴ Mr. Justice Stewart declared:

Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. 403 U.S. at 730.

Mr. Justice White declared: "That the government mistakenly chose to proceed by injunction does not mean it would be unsuccessful proceeding another way." 403 U.S. at 733. He continued:

[Congress] has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. 403 U.S. at 740.

Cf. The Chief Justice, dissenting: "I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents of information relating to the national defense." 403 U.S. at 752. Mr. Justice Blackmun, dissenting: "I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion." 403 U.S. at 759.

liarily unanalysed problem of why the first amendment should be applied with much more vigor to *prior* restraints on publication than to other restraints, perhaps more effective and destructive. I cannot help but feel that the editors and publishers of the New York Times and the Washington Post would, in most cases, prefer an injunction to a jail sentence — after all, jails are dark, unpleasant sort of places. The Court's *per curiam* opinion was quite right when it quoted the statement: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."⁵⁵ But why should this presumption not be equally heavy when the restraint is the threat of criminal prosecution? *Bantam Books, Inc. v. Sullivan*,⁵⁶ the source of the quotation in the *per curiam* opinion, was a case in which the informal threat of criminal prosecution made by a state agency having no authority to issue censorship orders was held to be a prior restraint and therefore a violation of the first amendment. But *Bantam Books* implies that there would be nothing wrong with the criminal prosecution itself. The extra constitutional burden placed on prior restraints apparently stems from Blackstone's remark that "[t]he liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."⁵⁷ This definition, which is not beyond criticism, was seized upon by the Court in *Near v. Minnesota*⁵⁸ to distinguish the many cases in which the Court had approved criminal convictions for the offense of unpopular speech⁵⁹ from the case before it (which involved an action for an injunction to abate, under state law, an allegedly "malicious, scandalous and defamatory newspaper").⁶⁰ But in *Near* Chief Justice Hughes was careful to emphasize that Blackstone's comment can be, and had been, criticized "chiefly because . . . [the] immunity [from previous restraint] cannot be deemed to exhaust the conception of liberty guaranteed by state and federal constitu-

⁵⁵ 403 U.S. at 714, *citing* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) and *Near v. Minnesota*, 283 U.S. 697 (1931).

⁵⁶ 372 U.S. 58, 70 (1963).

⁵⁷ *See* IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151 (1807) (emphasis in original).

⁵⁸ 283 U.S. 697, 713-14 (1931).

⁵⁹ *See, e.g.,* *Gitlow v. New York*, 268 U.S. 652 (1925); *see also* the cases cited by counsel for the State of Minnesota in *Near v. Minnesota*, 283 U.S. at 699-70 and Z. CHAFEE, FREE SPEECH IN THE UNITED STATES *passim* (1948). *Near v. Minnesota* is not the first case to adopt Blackstone's definition of freedom of the press. *See, e.g.,* *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

⁶⁰ 283 U.S. at 703.

tions."⁶¹ As Professor Chafee once pointed out: "A death penalty for writing about socialism would be as effective suppression as a censorship."⁶² And the Supreme Court said in *Bantam Books* that: "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ."⁶³ It is possible that the scarcity of prior restraint cases can, in part, be explained by the effectiveness of criminal restraints on expression. And this in turn suggests another reason why the decision in *New York Times* can be said to decide nothing: under our present laws speech is more effectively restrained by criminal sanctions than by prior censorship.

One is reminded of still another problem not mentioned, at least directly, in Mr. Justice Harlan's list. If the press may be restrained either by injunctions or criminal sanctions, what standard is there to determine when such restraints are constitutionally permissible. The need for analysis of this problem is made strikingly clear in a comment by Professor Chafee: "One of the strongest reasons for the waywardness of trial judges during the war was their inability to get guidance from precedents. There was practically no satisfactory judicial discussion before 1917 about the meaning of the free speech clauses."⁶⁴ This problem of standards was

⁶¹ *Id.* at 714-15, citing 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927):

[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions [inasmuch as] . . . the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.

For a more recent criticism of the Blackstonian definition of free speech (as well as other suggested definitions), see Z. CHAFEE, FREE SPEECH IN THE UNITED STATES, 9-15 (1948); see also Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 938 (1919).

⁶² Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 10 (1948).

⁶³ 372 U.S. 58, 68 (1963). In *Bantam Books* the "informal" practice of a state agency circularizing to bookstores a list of objectionable, *i.e.*, allegedly obscene, publications and reminding them of the agency's duty to recommend prosecution of purveyors of obscenity was held by Mr. Justice Brennan to be an unconstitutional prior restraint of expression. Query whether, under *Bantam Books*, the opinions of those Justices who stated that criminal proceedings *might* be brought against the newspapers (see note 54 *supra*) are themselves unconstitutional prior restraints?

Unfortunately for lovers of paradoxes, the answer to that last query is probably "no." As Mr. Justice Harlan stated in his dissent to *Bantam Books*: "It could not well be suggested, as I think the Court concedes, that a prosecutor's announcement that he intended to enforce strictly the obscenity laws or that he would proceed against a particular publication unless withdrawn from circulation amounted to an unconstitutional restraint upon freedom of expression . . ." *Id.* at 81.

⁶⁴ Z. CHAFEE, FREE SPEECH IN THE UNITED STATES, 14-15 (1948).

the basis for Justice Blackmun's dissenting opinion in *New York Times*:

What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be.⁶⁵

I am afraid that the list of such questions could be endless. One could write an article cataloguing the various questions raised by the opinions in *New York Times*, but that article would be much longer than this. And each person who attempted such an article would almost certainly come up with a different list. Certainly everyone will see different pictures in *New York Times*, and if *Shelley v. Kraemer*⁶⁶ is properly called the "Finnegan's Wake of Constitutional Law," *New York Times Co. v. United States* may well be its Rohrschach blot.

III

Perhaps it is because I was trying to understand *Youngstown Sheet & Tube Co. v. Sawyer*⁶⁷ at the time when the comet of the Pentagon Papers rose in the sky (I was concerned with the question of who in the Government has the authority to authorize an exercise of the power of eminent domain) that the strongest memory recalled to my mind when I first read the opinions in *New York Times* was *Youngstown*. "Memory" is not quite the right word; I suffered from an acute sense of *deja vu*. The haste with which the opinions in *New York Times* were produced led inevitably to a certain obscurity of expression, but each cryptic sentence in *New York Times* evoked entire paragraphs from the opinions in *Youngstown*. It was almost as if the Supreme Court had set out, like some poet in the Arabian Nights, to extemporize the same song twice using completely different words and meters. The oneness of the cases is so strong for me that I am writing under a compulsion, even though I am well aware that I may only be attempting to elucidate the self-evident. The foregoing explanation of my biases should be kept in mind when you read my arguments.

I know that I am not alone in believing that *Youngstown* is important to an understanding of the issues before the Court in *New*

⁶⁵ 403 U.S. at 761.

⁶⁶ 334 U.S. 1 (1948).

⁶⁷ 343 U.S. 579 (1952).

York Times. If *Near v. Minnesota*⁶⁸ is the most cited case in the various opinions in *New York Times*, *Youngstown* is in second place. More to the point, Professor Bickel, counsel for the *New York Times*, argued before the Supreme Court that the case of the Pentagon Papers was as much a "separation of powers" case as a "First Amendment" case.⁶⁹ And, of course, *Youngstown* is the separation of powers case.

Despite the fact that the *per curiam* opinion in *New York Times* in no way refers to *Youngstown* or the doctrine of separation of powers, I do not see how the case can be understood without reference to these matters. Although perhaps only Mr. Justice Marshall actually accepted Professor Bickel's argument (and only Mr. Justice Harlan used a similar argument in dissent), it appears to me that the only principle accepted by a majority of the Court was that the Executive lacked the inherent power to impose, without legislative authority, prior restraints upon the press so as to prevent the publication of news which allegedly would have adverse effects upon our war in Southeast Asia. And this principle seems to follow *a fortiori* from the holding of *Youngstown* that the executive branch lacked the inherent power to seize the nation's steel mills in order to prevent a strike which allegedly would have adverse effects upon the conduct of our war in Korea. *A fortiori*, because in *Youngstown* it seems clear that Congress could have sanctioned the seizure, whereas in *New York Times* there is the "heavy presumption" against the constitutional validity of even a congressionally authorized prior restraint on expression. A brief review of the opinions in *New York Times* will, I believe, establish that only the *Youngstown* rationale secured the adherence of a majority of the Court.

Mr. Justice Black, of course, based his opinion almost entirely on the proposition that the first amendment absolutely forbids any injunction against the publication of news. But, although he did not cite *Youngstown*, he did say:

[The Government] makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to make a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. . . . To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment

⁶⁸ 283 U.S. 697 (1931).

⁶⁹ 2 HISTORY 1224.

and destroy the fundamental liberty and security of the very people the Government hopes to make "secure."⁷⁰

In view of this language, and the rather persuasive fact that it was Justice Black who wrote for the Court in *Youngstown*, it seems fair to conclude that he subscribes to two separate principles: (1) that the first amendment absolutely forbids injunctions against the publication of news; and (2) in any event, the executive branch has no inherent power to seek or obtain an injunction.

Mr. Justice Douglas concurred in Justice Black's opinion and also filed his own concurrence. Although his opinion opens with the claim that "the First amendment . . . leaves, in my view, no room for governmental restraint on the press";⁷¹ it proceeds immediately to the proposition "there is . . . no statute barring the publication by the press of the material which the Times and the Post seek to use."⁷² After a rather cursory demonstration of that negative proposition,⁷³ Justice Douglas went on to say: "[A]ny power that the Government possesses must come from its 'inherent power.'"⁷⁴ He then quoted from *Hirabayashi v. United States*:⁷⁵ "[T]he power to wage war is 'the power to wage war successfully,'"⁷⁶ but added that: "[T]he war power stems from a declaration of war. The Constitu-

⁷⁰ 403 U.S. at 718-19.

⁷¹ *Id.* at 720.

⁷² *Id.*

⁷³ See notes 209-13 *infra* & accompanying text.

⁷⁴ 403 U.S. at 722.

⁷⁵ 320 U.S. 81, 93 (1943). The *Hirabayashi* case was one of the first "Japanese exclusion cases." Mr. *Hirabayashi* was convicted of violating a federal statute which authorized the imposition, during a declared war, of curfews applying only to American citizens of Japanese descent. Presumably all that Justice Douglas meant by his citation of *Hirabayashi* (a case in which he concurred, stating that if *Hirabayashi* had obeyed the curfew he could have obtained a hearing "in some appropriate proceeding," 320 U.S. at 108) was that even that outrageous case would not support the Government's arguments. *Hirabayashi* rested on both the express congressional authorization and the existence of the state of *declared* war. However, if the citation is taken as an approval of *Hirabayashi*, and one remembers that there was on the books until recently a federal statute authorizing detention camps, 50 U.S.C. § 811-826 (1964), repealed by Pub. L. No. 92-128, 85 Stat. 347, one might well worry a little. The only moral seems to be that *Youngstown* and *New York Times* are not really important precedents. Normally one can find congressional authorization for any evil which the Executive Branch may wish to perpetrate. I am not claiming that price and wage controls are evil. But one might consider the fact that the present price freeze and the proposed "Phase II" price controls are authorized by the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, *as amended* Pub. L. No. 92-15, § 3, 85 Stat. 38 (1971), which provides almost no standards limiting the President's power to "make laws" under its authority. Query whether such a sweeping delegation to the Executive of complete control of the nation's economy is constitutionally permissible under the separation of powers doctrine. *Cf. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁷⁶ 403 U.S. at 722.

tion by Article I, § 8, gives Congress, not the President, power '[t]o declare War.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have."⁷⁷ The remainder of Justice Douglas' opinion is devoted to an explanation of rationales behind the first amendment. But it seems fair, especially when one notes that Justice Douglas concurred in *Youngstown*,⁷⁸ to count his vote the same as Justice Black's. So far our score is two votes for the absolute prohibition of the first amendment and two votes for the lack of "inherent power" in the President.

Mr. Justice Brennan's opinion is concerned only with the first amendment. He admitted that the precedents indicate that in time of war, in an extremely narrow class of cases, there may be prior restraints placed upon the press. He argued, however, that if there is such an exception to the absolutes of the first amendment neither the proof nor the allegations in *New York Times* placed that case within the exception.⁷⁹ If there is any reference at all in Justice Brennan's opinion to the separation of powers problem, it must be latent in the following sentence: "In no event may mere conclusions be sufficient: for if the *Executive Branch* seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary."⁸⁰ This can be read, if it appertains to our problem at all, in two diametrically opposed ways: (1) if the executive branch had shown facts falling within the exception, then it might have been entitled to the injunction, or (2) (perhaps a less likely reading) the "basis upon which the aid is sought" must, among other things, contain a showing of legislative authority if the injunction is to be issued. Be that as it may, the cumulative score is now: first amendment absolute, three; lack of inherent power, two.

The concurring opinions of Justices Stewart and White⁸¹ must be considered the "swing" votes, because in concurring with the majority they joined with Justices Black, Douglas, Brennan and

⁷⁷ *Id.* See also note 75 *supra*.

⁷⁸ See Mr. Justice Douglas' concurring opinion in *Youngstown*, 343 U.S. at 629 (1952), where he stated that: "We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution." *Id.* at 633. Cf. *Massachusetts v. Laird*, 400 U.S. 886, 893 (1971) (Douglas, J., dissenting).

⁷⁹ 403 U.S. at 725-26.

⁸⁰ *Id.* at 727 (emphasis added).

⁸¹ *Id.* at 727, 730.

Marshall, who, in the original decision on the application for certiorari, had voted to simply vacate the stays without a hearing.⁸² Furthermore, although concurring in the result, Justices Stewart and White (at least in Justice White's opinion) clearly disavowed any absolute effect to the first amendment.

Mr. Justice Stewart's opinion causes me some difficulties: perhaps I should just pass over it and accept his concurrence with Justice White as the explanation for his vote with the majority. He said nothing from which one could infer that he considered the first amendment to be an absolute prohibition on prior restraints. And, although his opinion is primarily concerned with the inherent power of the presidency, difficulty arises because the opinion appears to be more concerned with practical advice and admonitions to the executive branch, than with the reasons for the result in *New York Times*. In other words, Justice Stewart appears to have relied on Justice White to explain his vote. Notwithstanding this inadequacy, Justice Stewart's opinion is either the most interesting of the opinions filed by the majority Justices or it is the most obscure. I am sure that the Justice knows what he meant, but the opinion clearly shows the effect of the haste with which it was written. Not that it fails to say what it was intended to say, but rather, being riddled with ambiguity, it can be read as saying a great deal more.

Mr. Justice Stewart began:

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the missile age.⁸³

He then pointed out that in the absence of those "governmental checks and balances" which are normally present, the "only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry

⁸² *New York Times Co. v. United States*, 403 U.S. 942 (1971) (mem.); *United States v. Washington Post Co.*, 403 U.S. 943 (1971) (mem.).

⁸³ 403 U.S. at 727 (footnotes omitted). Mr. Justice Stewart qualifies the quoted material with the following footnote:

The President's power to make treaties and to appoint ambassadors is of course limited by the requirement of Art. II, § 2, 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. *Id.* at 727 n.1.

. . . ."⁸⁴ Thus, Justice Stewart sees a "dilemma," with one horn being the near absolute power of the President with respect to national defense and foreign affairs and the other horn being the greater need in these areas for the freedom of the press that is assured by the first amendment. At first glance Justice Stewart appears to have avoided the dilemma by washing his hands of it:

The responsibility must be where the power is. . . . [T]he Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is the constitutional duty of the Executive — as a matter of sovereign prerogative and not as a matter of law as the courts know law — through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.⁸⁵

Up to this point Justice Stewart seems to be advocating that the Judiciary simply keep its hands clean of whatever dirty work the Executive may choose to do. One can read in his language the suggestion that the only thing wrong with the Executive's action was that it invoked the aid of the courts, and that the Executive should have simply seized the offending editions or shut down the newspapers at gunpoint. This interpretation appears plausible in light of Justice Stewart's later statement that he was convinced that some of the documents "should not, in the national interest, be published."⁸⁶

Though I do not (and I hope that no one does) read Justice Stewart's opinion in this manner, there is precedent for such a "let's keep our skirts clean" argument. Consider, for example, Justice Jackson's famous dissent in *Korematsu v. United States*,⁸⁷ in which he warned of the Court's inability to restrain the acts of the military, should it ever fall into the hands of irresponsible and unscrupulous leaders, and then concluded: "I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution."⁸⁸ More recent

⁸⁴ 403 U.S. at 728.

⁸⁵ *Id.* at 728-30.

⁸⁶ *Id.* at 730.

⁸⁷ 323 U.S. 214, 242 (1944).

⁸⁸ *Id.* at 248. The parallel between Jackson's dissent in *Korematsu* and Stewart's concurrence in *New York Times* is quite close. In *Korematsu*, Mr. Justice Jackson would not have interfered with the Executive's action in shipping Mr. Korematsu to a concentration camp, but would have refused to sustain his conviction for failing to report for detention. Mr. Justice Stewart's opinion can be read as saying that he would

precedents can perhaps be found in the Court's silent refusals to consider the legality of the War in Vietnam at the insistence of either a draftee or a state appearing as *parens patriae* for its soldiers.⁸⁹

There is, however, reason to believe that Justice Stewart did not intend his opinion to be read in this fashion. It is hard to believe that he would overrule *Youngstown* and refuse to enjoin an officer of the executive branch who seized or censured the defendant newspapers *vi et armis*. A cautious reading of the entire opinion suggests that Justice Stewart was merely telling the Executive to keep its own house in order and giving it some extremely practical advice: "[W]hen everything is classified, then nothing is classified . . . [T]he hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained."⁹⁰

Because Justice Stewart concurred in Justice White's opinion, his vote can best be understood by undertaking an analysis of that opinion.⁹¹ So let us leave our tally unchanged until that opinion is considered. The least that one can say is that Justice Stewart's opinion does not rest on any idea of an absolute prohibition by the first amendment.⁹²

Mr. Justice White was less ambiguous. He began his opinion with the following summary of his conclusions:

not interfere with the Executive's enforcement of its own regulations against disclosure of classified material, but that he would refuse an injunction restraining the publication of that material.

⁸⁹ See note 36, *supra*.

⁹⁰ 403 U.S. at 729.

⁹¹ Even if one reads Mr. Justice Stewart as saying only that the courts will not assist the executive branch in imposing a legislatively unauthorized prior restraint, it does not take much wrenching to fit that conclusion into the "lack of inherent power" category. It just means that the Executive lacks the power, the "standing" if you will, to obtain an injunction. This point is discussed *infra* in section VIII.

⁹² Of course, one could argue that the first amendment absolute was treated as applying to the courts, but as being unenforceable against the Executive. Mr. Justice Stewart did say: "I cannot say that disclosure of any of [the documents] . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us." 403 U.S. at 730. This does sound something like Mr. Justice Brennan's modified absolutism. Even if that were so, the opinion would still rest on the lack of power in the Executive to get the courts to issue an injunction. See note 91 *supra*. If Mr. Justice Stewart's opinion espouses a modified first amendment absolutism, he would presumably apply the same standard to congressional legislation: "[I]f Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to determine the constitutionality of such a law . . ." *Id.* As I read the opinion, Mr. Justice Stewart does not reach the question whether Congress could pass a law authorizing the injunction. The lack of congressional authorization plus the strictures of the first amendment form the two coequal pillars on which his opinion rests.

I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. . . . I am confident that . . . disclosure [of these documents will do substantial damage to public interests. N]evertheless . . . the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication . . . *at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.*⁹³

Going further to the point he said:

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.⁹⁴

It is clear that the main support for Justice White's opinion is the lack of inherent authority in the Executive. Of course he goes on to discuss the first amendment and the standard which should be applied in granting injunctions against the press, but this discussion is used to demonstrate the fact that the denial of the injunction will not greatly compound the harm already done by publication of part of the Pentagon Papers.⁹⁵

The major portion of Justice White's opinion is dedicated to an analysis of the legislative history of the Espionage Act of 1917 and a summary of the criminal provisions which might apply to publication of the papers.⁹⁶ The chief thrust of this portion of the opinion is that "Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. It has not, however, authorized the injunctive remedy against threatened publication."⁹⁷ This is the first of the opinions to be based clearly and solely on the lack of inherent power in the Executive.⁹⁸ And, since Justice Stewart concurred in it, one can only conclude that he too

⁹³ 403 U.S. at 731 (emphasis added).

⁹⁴ *Id.* at 732.

⁹⁵ *Id.* at 732-33.

⁹⁶ Mr. Justice White's conclusion with respect to the criminal possibilities of the case is: "I would have no difficulty in sustaining convictions . . . on facts that would not justify the intervention of equity and the imposition of a prior restraint." *Id.* at 737. See notes 52-61 *supra*, and notes 214-17 *infra* & accompanying text.

⁹⁷ 403 U.S. at 740 (citations omitted).

⁹⁸ The discussion of the first amendment in Mr. Justice White's opinion does not weaken this conclusion. If one admits that the executive branch may have some inherent authority, then the existence of a constitutional prohibition is extremely relevant in determining the extent of that authority. See discussion in section VI *infra*.

must have felt that the Executive (or the Executive and the courts together) lacked the inherent authority to impose prior restraints on the publication of the Pentagon Papers. Thus, our cumulative tally is: first amendment absolutes, three; lack of inherent power, four.

Mr. Justice Marshall is the only remaining Justice concurring in the decision of the Court. His opinion addresses itself solely to the problem of separation of powers. His only reference to the first amendment was to deny that it raises "the ultimate issue in these cases."⁹⁹ For our immediate purposes, his opinion can be classified on the basis of the following passage:

It would . . . be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President shall execute laws, and courts interpret laws. [citing *Youngstown*]. It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress.¹⁰⁰

Now it stands three for the first amendment, and five for inherent power concepts.

I have considered the opinions of the majority Justices at some length to demonstrate that a creditable case can be made that *New York Times* is, like *Youngstown*, a decision that turns primarily on the separation of powers doctrine rather than any of the enumerated Constitutional limitations on governmental powers. *New York Times*, if I am correct, is concerned only with the powers of the executive branch of the Government, not with the powers of the Government as a whole.

Since the analysis of the rationales underlying the votes of the various Justices in favor of the newspapers establishes, or fails to establish, my point, it is not necessary to consider the dissenting opinions of the Chief Justice and Justice Blackmun at any length. They do not clarify the points made by the majority, but merely suggest that the Justices needed more time to think about the case.¹⁰¹ But,

⁹⁹ 403 U.S. at 741.

¹⁰⁰ *Id.* at 742.

¹⁰¹ See the dissenting opinions of Mr. Chief Justice Burger, 403 U.S. at 748, 749,

since Justice Harlan's opinion, in which the Chief Justice and Justice Blackmun concurred, does appear to address itself to the merits, and to do so on the ground that the Executive does have the inherent power to cause the courts to issue an injunction against publication of the Pentagon Papers, it is appropriate to touch on that opinion here. In my desire to avoid confusing my argument, I have already treated a major point of Mr. Justice Harlan's in a rather unfair fashion.

You will recall that the first question on Justice Harlan's list of problems is "[w]hether the Attorney General is authorized to bring these suits in the name of the United States."¹⁰² He then suggested that we compare *In re Debs*¹⁰³ with *Youngstown*.¹⁰⁴ Obviously this question does not turn on in whose name the action should be brought, although I suggested earlier that it could be read in that fashion. The question, rather, is whether the Executive had the power, without any specific congressional sanction, to seek and obtain the injunction against the publication of the Pentagon Papers. Where Justice Harlan differs from Justices Black, Douglas, Stewart, White and Marshall is that he apparently finds that the Executive does have that power. I say "apparently" because he claims that: "Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form"¹⁰⁵

Mr. Justice Harlan finds the power to obtain the injunction in the Executive's power to conduct the nation's foreign affairs. He would hold that the Executive has the right to the injunction if "the subject matter of the dispute does lie within the proper compass of the President's foreign relations power,"¹⁰⁶ and would remand the case to the district courts for the determination of this question. This conclusion by Justice Harlan seems, perhaps because something got lost in the telescoping, to raise but not answer an extremely important question: by what test can one locate the "proper compass of the President's foreign relations power"? It would seem that one could not merely decide that any action having a major influence on

Mr. Justice Harlan, 403 U.S. at 752, 753, and Mr. Justice Blackmun, 403 U.S. at 759, 760.

¹⁰² *Id.* at 753; see note 49 *supra*.

¹⁰³ 158 U.S. 564 (1895).

¹⁰⁴ 343 U.S. 579 (1952).

¹⁰⁵ 403 U.S. at 755.

¹⁰⁶ *Id.* at 757. Mr. Justice Harlan would also require that the determination of the necessity for secrecy be made by a cabinet officer.

foreign affairs is within the compass, otherwise the President could simply line the editors of the *New York Times* up against a wall and shoot them. Obviously the nature of the action must also be considered. Shooting citizens without trial within the territorial limits of the United States, however much it might benefit our foreign relations, is, I hope, not within anyone's concept of the President's foreign relations power. Can the censorship of the domestic press be within that power? That is a question of law which, if Justice Harlan's view had prevailed, the Supreme Court would have been compelled to face. The answer, I submit, would have had to be "no," unless the Court were willing to overrule *Youngstown*.

It is significant that all of the authorities cited by Justice Harlan in support of the President's power in foreign relations deal with (1) the Executive's privilege to refuse to disclose to either Congress or the courts information relating to foreign affairs or the national defense;¹⁰⁷ (2) relations with foreign powers which have no direct effect upon domestic interests,¹⁰⁸ or (3) matters which, to the extent they affect domestic interests, do so with the authorization of Congress.¹⁰⁹

Another question raised but not answered by Justice Harlan's opinion is whether, even if the executive branch has the power to do whatever it desires in matters affecting foreign relations, the courts constitutionally may add their authority to the Executive's "lawless" (in the sense of being unrestrained by any judicial review) actions.¹¹⁰

IV

To establish that *New York Times* turns in large part on the question of the inherent power of the executive branch does not,

¹⁰⁷ 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 194-95 (1899) (statement by President Washington); *United States v. Reynolds*, 345 U.S. 1 (1953).

¹⁰⁸ 10 ANNALS OF CONG. 613 (1800) (statement by John Marshall on the floor of the House of Representatives).

¹⁰⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (conviction of offense created by Joint Resolution of Congress was proper despite arguments that the Joint Resolution was an unconstitutional delegation of authority by Congress to the President). The authorities collected in *Curtiss-Wright* at 319 are all separately cited by Mr. Justice Harlan except for 8 S. REP. COMM. ON FOREIGN RELATIONS 24 (1816), which concerns only "foreign negotiations" conducted by the President. Cf. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (an order of the President made under the authority of section 801 of the *Civil Aeronautics Act* was not subject to judicial review).

¹¹⁰ As to this point, see the discussion of Mr. Justice Stewart's concurrence (and Mr. Justice Jackson's dissent in *Korematsu*), at notes 86-88 *supra* & accompanying text.

of course, explain why I feel that the two cases are essentially (as well as accidentally) identical. So I will list what I see as the similarities, important and unimportant, between the two cases.

A. "Greatness". If Justices Harlan and Blackmun accused *New York Times* of being great, and therefore a maker of bad law, one commentator at least described *Youngstown* as "the legal battle of the century."¹¹¹

B. "Too many cooks". In *New York Times* there were ten opinions; one per curiam, six concurring, and three dissenting. *Youngstown* is not quite so extreme in this regard, there were only seven and one-half opinions; the opinion of the court by Mr. Justice Black, five and one-half concurring opinions,¹¹² and one opinion by the three dissenters. This multivoiced method makes it difficult to extract a holding or *ratio decidendi* from either case. Compare my convoluted nose-counting in section III above with Professor Corwin's attempts to find a holding in *Youngstown* in his book on the office and powers of the President.¹¹³

C. "The Rush to Judgment." I have already described *New York Times'* ascent through the courts, and need now only to outline *Youngstown's*.¹¹⁴ On April 8, 1952, President Truman ordered the seizure of the nation's steel plants. On April 9, the steel companies applied for a temporary injunction against the seizure. The application was denied on the same date. Also on April 9, the steel companies applied to the federal district court in Washington, D.C. for a permanent injunction, and between April 10 and April 24 the companies made various applications for preliminary injunctions. On April 24 and 25 there were hearings in the district court on the preliminary injunction applications. On April 29, the United States District Court for the District of Columbia granted a preliminary injunction against the seizure. On the morning of April 30, the Government applied for and was denied a stay pending appeal. On the afternoon of that day the appeal from the preliminary injunction was heard by the court of appeals sitting *en banc*. On the same day the court of appeals entered a stay of the injunction pending ap-

¹¹¹ Banks. *Steel, Sawyer, and the Executive Power*, 14 U. PITT. L. REV. 467 (1953); of course Mr. Banks was counsel for Jones & Laughlin Steel Corporation in the *Youngstown* case.

¹¹² Mr. Justice Frankfurter wrote both an opinion starting at 343 U.S. at 593 and a fragment at 589.

¹¹³ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, 155-57 (4th ed. 1957).

¹¹⁴ For the history of *Youngstown* from which this summary was extracted see A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958).

plication for certiorari. On May 2, both the Government and the steel companies petitioned for certiorari from the decision of the district court. On May 3, the Supreme Court granted the petition for certiorari and entered another stay conditioned on the preservation of the status quo. Argument before the Supreme Court was held on May 12-13. On June 2, 1952 the Supreme Court rendered its decision affirming the District Court.

This progression of *Youngstown* through the courts, though practically testudinarian in comparison with *New York Times*, was remarkably swift. There is no finality requirement before the Supreme Court can exercise its certiorari jurisdiction — neither of the two decisions appealed from in *New York Times* was final in the technical sense — but for the Supreme Court to completely bypass the court of appeals, as it did in *Youngstown*, to review a decision of a district court denying interlocutory relief is unusual enough to be noteworthy.

D. "Press v. President." In *New York Times*, the press, understandably enough, was almost unanimously opposed to the Executive's attempts to censure some of its members. Even before the Pentagon Papers appeared, there had been many an exchange of insults between the Executive (represented primarily by the Vice President) and the "Eastern Establishment Press." In fact, and maybe this has some bearing on the genesis of the case of the Pentagon Papers, President Nixon, long before his election, clearly considered the press unsympathetic. Among the multitude of memories evoked by the case of the Pentagon Papers is the echo of a voice from afar saying: "You're not going to have Dick Nixon to kick around anymore." And if you listen carefully you may hear other voices:

[T]here have been few instances in history where the press was more sensational or partisan. . . . What was more disturbing was what amounted to editorial intervention by the press of America in a case pending before the Supreme Court of the United States. News stories and editorials . . . inflaming public opinion were pre-judging and deciding the case at the very time the Court itself was hearing arguments for both sides.¹¹⁵

That is not President Nixon speaking about *New York Times*: that is President Truman reminiscing about the steel seizure case.

E. "Underlying Constitutional Restraints." In *New York Times* the action of the Executive arguably was forbidden by the first

¹¹⁵ 2 HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 475 (1956).

amendment provision: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." In *Youngstown*, the Executive's action was arguably forbidden by the fifth amendment provision: "nor shall private property be taken for public use without just compensation." Admittedly the fifth amendment element was as obscured in *Youngstown* as the first amendment was highlighted in *New York Times*. In fact the basic fifth amendment question in *Youngstown* was passed over so quickly in the Court's opinion that I suspect that many who have noticed the other parallels between *New York Times* and *Youngstown* will have missed this critical similarity.

F. "The Problem of Inherent Executive Power." Whether the Executive had the inherent power to seize the nation's steel plants to prevent a strike was the determinative question (and the question which was determined) in *Youngstown*. I have argued that the determinative question in *New York Times* was whether the Executive had the inherent power to censor the press.

G. "Undeclared War." *Youngstown* arose during the Korean "war"; *New York Times* arose during the Vietnam "war." Neither of these wars was declared by Congress and in both cases the Executive argued that the war made its actions necessary. In *Youngstown* the steel plants were seized to prevent a strike that supposedly would have had catastrophic effects on the war effort; in *New York Times* the executive branch justified the censorship upon the ground that publication of the papers would have adverse effects on the conduct of the war, as well as on our relations with other countries.

There is, however, one major procedural distinction between *Youngstown* and *New York Times*. In *Youngstown* the Executive acted on its own initiative in seizing the steel mills and it was the steel companies who sought an injunction against the Executive's action. In *New York Times* it was the Executive who sought an injunction against the papers' action. So, despite all the parallels that I have noted, the cases are not on all fours. *New York Times* is *Youngstown* turned upside down. Whether this reversal of parties was, or should have been, relevant is a nice question which leads to interesting speculations. For instance, could the Executive have accomplished its purpose in *Youngstown* if it had sought an injunction against the steel companies? Could it have accomplished its purpose in *New York Times* if it had "seized" the offending newspapers or the offending documents? Obviously any comparison of

the two cases must consider the fact that each case is the converse of the other.

V

There are two threshold problems common to both cases which I feel should be mentioned before the major issues are compared. The first question is: what purpose is served when the Court speaks with nine (or seven and a half) distinct voices? One can speculate that the Court has, over the years since *Ashwander v. Tennessee Valley Authority*,¹¹⁶ developed a new rule for avoiding constitutional adjudications — that is, to decide constitutional questions on multiple grounds, none of which are subscribed to by a majority of the court.¹¹⁷ Whether it is a desirable technique might well be the subject of some of the other musings inspired by the Pentagon Papers. Whether it is good or bad that the Court delivers itself on such multifoliate decisions, it might be hazarded that the ongoing academic demand for “principled decisions” and “neutral principles”¹¹⁸ may tempt the Justices to supply a number of such decisions and principles in a single case, particularly in those cases in which the Court as a unit can only agree upon a Delphic utterance or a stamp of its foot.¹¹⁹ I am willing to hazard the tentative impression that, when the separate opinions are well-done, the consolation of knowing that the Justices are doing their jobs in a conscientious, restrained and workmanlike manner outweighs any sense of insecurity which may arise from the implied admission that the Justices, like the rest of us, can see no more than shadows flickering on the wall. On the other hand, I doubt whether anyone will argue that any of the opinions in *New York Times* (except perhaps the *per curiam* and that of Justice Black) are finished work. Certainly no one has the right to expect more than a few notes jotted down toward a well-worked opinion when the time between argument and judgment is only four days. Certainly Justice

¹¹⁶ 297 U.S. 288 (1936). See note 6 *supra* & accompanying text.

¹¹⁷ For the extreme example of the Court reaching a decision in which no grounds were satisfactory to a majority of its members, see *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); see also note 137 *infra*.

¹¹⁸ See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); A. BICKEL, *supra* note 37. But cf. Wright, *supra* note 37.

¹¹⁹ Cf. A. BICKEL, *supra* note 37, at 58, where the author states that: “There are other, more numerous instances of the failure of process, but not necessarily of individual justice. Among those, the most readily identifiable are cases in which the Court stamps its foot, as it were, and refuses to enter into argument on a, or the, decisive issue.” Professor Bickel, *qua* Professor (if not as to the winning advocate in *New York Times*), could hardly have failed to apply this language to the decision in *New York Times* if there were no more to it than the *per curiam* opinion.

Harlan could have justly claimed that great cases make bad, or at least unenlightening, opinions.

In *Youngstown*, however, where the Court allowed itself a bit more time, the opinions are generally finely wrought and two, those of Justices Frankfurter and Jackson, might well be considered masterpieces of the judicial art. There is also an apologia written by Mr. Justice Frankfurter for the numerous opinions filed in that case: "Even though . . . differences in attitude toward . . . [the principle of the separation of powers] may be merely differences in emphasis and nuance, they can hardly be reflected by a single opinion for the Court. Individual expression of views, in reaching a common result, is therefore important."¹²⁰ But this explanation, though it may justify the many opinions in *Youngstown* where the nuances were carefully preserved, cannot easily be stretched to justify *New York Times* where the opinions are too opaque to reflect much of anything. Any criticism of the clarity of the opinions in *New York Times* may be explained away by the rush in which they were prepared. But that just leads us to the next question: why the rush?

In *New York Times* all three dissenters complained of the lack of time available to them to prepare their opinions and formulate their views. If they had prevailed they would not have approved a permanent injunction but would have remanded the cases to the district courts.¹²¹ In *Youngstown*, Justices Burton and Frankfurter voted to deny certiorari on the ground that the Court should not have bypassed the court of appeals. They declared: "The constitutional issue which is the subject of this appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it."¹²²

In *New York Times*, the four Justices (Black, Douglas, Brennan and Marshall) who voted against the grant of certiorari did so, not because they wished to gain more time for consideration, but rather because they wished to bypass the necessity for a decision by the Supreme Court. They wanted not only to deny certiorari but, at the same time, to grant the motion to vacate the order of the Second Circuit Court of Appeals which had remanded the New

¹²⁰ 343 U.S. at 589.

¹²¹ To be precise the dissenters would have remanded the *Washington Post's* case to the district court and would have affirmed the decision of the Second Circuit which remanded the *New York Times's* case to the district court.

¹²² 343 U.S. 937, 938 (memorandum opinion by Mr. Justice Burton).

York Times' case to the district court and also to vacate all of the restraints against both the Times and the Washington Post.¹²³

Why all the rush? In *New York Times* it certainly reduced the quality of the opinions. And it is always possible, as Justices Burton and Frankfurter argued in opposition to the granting of certiorari in *Youngstown*,¹²⁴ that the consideration of that case by the court of appeals would have improved the ultimate judicial production. There is, of course, an explanation in the fact that both cases involved preliminary equitable relief, and that cases involving preliminary injunctions and temporary restraining orders do receive expedited treatment in the courts.¹²⁵ But that does not explain the extraordinary expedition of *Youngstown* and *New York Times*.

Perhaps the rush is explicable in terms of the cases' "greatness" — the fact that they received massive attention in the press and appeared initially to involve questions of major national importance. In *Youngstown* it was the Attorney General who had the major reason to press for an immediate decision. The steel companies had won in the district court and the stay of the district court's order granted by the court of appeals expired on the day that certiorari was granted. The Supreme Court entered its own stay, but it was one that left the steel companies sitting in the catbird seat.¹²⁶ In

¹²³ The result of this maneuver, if it had prevailed, would have been in effect a final judgment against the Government. Technically, since the two decisions before the court on the application for certiorari involved only temporary restraining orders, the actions for permanent injunctions could still have been tried by the district courts, but, by leaving the newspapers unrestrained prior to trial, the dissenters would have insured the publication of the papers and rendered the entire controversy moot.

¹²⁴ See note 122 *supra*.

¹²⁵ For example, under 28 U.S.C. § 1291 (1964), there generally can be no appeal from a decision of a district court unless it is final. However, 28 U.S.C. § 1292(a)(1) (1964) is the major exception to this rule and provides for appeals from: "Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ."

¹²⁶ The Executive branch desperately wanted to avoid a steel strike, but it sympathized with the union's demands for higher wages. Therefore instead of invoking the mandatory "cooling-off" period of the Taft-Hartley Act, 29 U.S.C. §§ 141-87 (1964), the Executive Branch seized the steel plants, presumably with the intent of raising the wages of the steelworkers although the motive may also have been in part dictated by *United States v. United Mine workers*, 330 U.S. 258 (1947), which established that once the government seized the plant it would be entitled to an injunction against the strike. The stay of the district court's order, entered by the Supreme Court at the time it granted the Solicitor General's application for certiorari, contained an order that the government "take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies . . . and the bargaining representatives of the employees." 343 U.S. 938. This meant that until the Court reached its decision the steel companies were safe from either a strike or a raise in wages.

New York Times, it is not so clear who had the most to gain from expedition. As long as a restraint was in force against both papers it would seem that the Executive, who had been taken by surprise by the initial publication of the Pentagon Papers, had little to lose by delay. And once the Supreme Court had stayed both papers, the newspapers clearly had more to gain from a quick decision than the Executive did.

Since there is no sign that the haste in *Youngstown* made waste of the Justice's opinions, it does not seem unreasonable that the Supreme Court should have reached its decision with considerable rapidity. One could justify the bypassing of the court of appeals on the theory that a separation of powers case was without precedent; only the Supreme Court could resolve the problems in that case and no court except the Supreme Court could, with any authority, pass judgment on the propriety of the actions of the President and the Secretary of Commerce.

In contrast to *Youngstown*, the haste with which the opinions in *New York Times* were delivered did have a deleterious effect on the Court's work product, and in some ways that haste is difficult to justify. If a majority of the Justices had felt that the first amendment absolutely forbids any prior restraints, then their task would have been easy. Mr. Justice Black could have written a short opinion for the majority and merely let it go at that.¹²⁷ But Mr. Justice Brennan, who is not quite an absolutist, carefully explained why he and Justices Black and Douglas felt compelled to have the Court announce its decision and dissolve the restraints as soon as possible:

The error which has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. . . . [E]very restraint issued in this case, whatever its form, has violated the First Amendment — and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly.¹²⁸

That argument would be fine if the question before the Court were an easy one. Perhaps it is valid even if the case were one in which it was difficult to determine whether or not the first amendment forbids the prior restraint. Logically, but perhaps not realistically, if the ultimate decision is that the first amendment forbids any injunc-

¹²⁷ The effect of the Court's haste upon the quality of its opinions does not extend to the opinion of Mr. Justice Black. One knows where he stands and, whether or not one agrees with his opinions, there is nothing ambiguous, confusing or inconsistent in them.

¹²⁸ 403 U.S. at 725-27.

tion on the facts involved in the case, then that is true *ab initio*.¹²⁹ But two of the majority Justices (Stewart and White) did not appear to consider the case easy, did not join in the original vote to deny certiorari and dissolve the restraints, and did not appear to rest their opinions on first amendment grounds. And Justice Marshall (although he voted to deny certiorari) based his decision solely on the separation of powers doctrine. One would think that these three Justices were under no compulsion to deprive both themselves and their dissenting colleagues of the opportunity to marshal their arguments in a more orderly and satisfactory manner.

Even if Congress has not passed a law authorizing an injunction against the publication of classified secrets, it has authorized the courts to use "all writs" to preserve their jurisdiction,¹³⁰ and that includes injunctions.¹³¹ Of course, if a Justice had felt that *New York Times* should be decided on the basis of the separation of powers doctrine, so as to avoid considering first amendment problems, then he might feel that reliance on the "all writs" statute would defeat his purpose. There could, after all, be a serious question as to the constitutionality of using that statute to grant an injunction against publication by a newspaper. Perhaps this explains Justice Marshall's position, but I cannot think of any reason why Justices Stewart and White would have felt compelled to rush to a decision. They would presumably allow restraints in some cases and they clearly felt that there was some merit to the Executive's claim of damage to the national interest. In those circumstances, why did they not take all the time that they needed and leave the interim restraints in effect? Or did they perhaps feel that the answer was so clear that there was no need for more time? I am afraid that such speculation could go on forever.

VI

It is, of course, accepted dogma that constitutional issues are to be avoided if possible. In *Youngstown*, Justice Frankfurter gives

¹²⁹ Perhaps this argument can be avoided by saying that, even though — on the facts in *New York Times* — the Executive (or Congress) could not restrain the press, the interim restraints granted by the courts were justified, not by the danger to the national security, but by the necessity of preserving the status quo to preserve the Court's jurisdiction. That is, a non-absolutist like Mr. Justice Brennan might have admitted that one of the rare excuses for a prior restraint on publication is the necessity of preserving the courts' jurisdiction in hard cases. Cf. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

¹³⁰ 28 U.S.C. § 1651 (1964).

¹³¹ 9 J. MOORE, FEDERAL PRACTICE §110.26, at 278-79 n. 22 (2d ed. 1970).

us an extended apology for deciding the constitutional issue, pointing out that: "It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them."¹³²

But if constitutional issues are to be avoided, it is also true that some are to be avoided more vigorously than others. There is no compelling reason for a court to use one of the dodges described by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*¹³³ in order to deliberately avoid a constitutional decision in a case where the answer to a relevant constitutional question is perfectly clear. In *New York Times* for example, Justices Black and Douglas could see no difficulties in applying the first amendment to the facts of that case. To them it was clear beyond any doubt that that amendment forbade granting an injunction against the publication of the Pentagon Papers and it would have been inexcusable for them, believing as they did, to dodge the issue.

In *New York Times* there were two constitutional questions. One was whether the Government as a whole could restrain the publication of the papers despite the first amendment. Assuming an affirmative answer to that question, the next query was whether the Executive has the power to impose such restraints without congressional authorization. If the answer to either question is negative, the restraint was constitutionally impermissible.¹³⁴ Since the Court refused to permit the restraint, it might seem that there could be no other basis for the Court's decision except a negative answer to one or both of the questions posed.

There is, however, one other possibility. A majority Justice could have decided, with respect to each of the constitutional questions, that the answers were very hard to find and most likely in the negative. Then, without a definitive answer to either, he could have concluded that two probable no's, when added together, justified a denial of the restraint. I know that such an approach to an important constitutional case might seem rather slap-dash to many

¹³² 343 U.S. at 595.

¹³³ 297 U.S. 288, 341, 346 (1936); see note 6 *supra*.

¹³⁴ Of course, the first question can be divided into two: On the one hand, does the first amendment absolutely forbid such restraints? And, on the other, does the first amendment forbid such restraints on the record before the Court in *New York Times*? A negative answer to either of these questions produces, of course, a negative answer to the composite question given in the text.

people, but it seems to me to be a reasonable way of balancing the various considerations before the Court. Any action that comes close to infringing upon several constitutional prohibitions can reasonably be considered wrong.

In *New York Times* the rather speculative damage which might be suffered by the "national interest" was weighed against both the first amendment and the doctrine of separation of powers. That damage was not enough to tip the scales in favor of an injunction against the newspapers, even though a particular Justice, or the majority of the Justices, might not have felt that either constitutional consideration standing by itself was determinative of the case. This, in fact, may be the position of Mr. Justice White who said: "I nevertheless agree that the United States has not satisfied the very heavy burden which it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these."¹³⁵ If this still seems an improperly sloppy approach to hard constitutional cases, one could, if he so desires, formulate a rule or "neutral principle" that leads to the same result: *The doctrine of the separation of powers denies the Executive the constitutional power to take action on his own authority if that action is one which would be of doubtful constitutionality had it been authorized by Congress.*

I believe the above rule is the only principle that can be derived from *Youngstown* and *New York Times*. I am not sure that any Justice in either of those cases consciously subscribed to it, but it does describe the result reached by the majority in both cases. A decision of the Court after all, once one adds and subtracts the opinions of the various Justices, may ultimately rest on a synthesis which in its entirety is not present in any single opinion. Moreover, I think that the rule has a certain predictive value.¹³⁶

If one accepts the rule as I have formulated it, the task of resolving cases like *New York Times*, where there is both a separation of powers problem and some other constitutional questions,¹³⁷

¹³⁵ 403 U.S. at 731.

¹³⁶ If it does not, then it is wrong. Like so many rules it has an undefined element. However, it is no harder to determine that a particular act is of "doubtful constitutionality" than it is to determine that an act is "negligent." Like pornography, we know it when we see it, though we are inclined to differ on what we see.

¹³⁷ The rule, as I have formulated it, does not apply to every case which presents two constitutional problems. If, for example, Congress had authorized the confiscation of a newspaper which publishes classified information, there would be both a first amendment problem and a fifth amendment "taking" or "deprivation of property"

becomes relatively simple. The more difficult is the underlying constitutional question, the clearer is the answer that the Executive lacks the constitutional power to do the questionable act. This ability of the suggested rule to turn two difficult questions into one relatively easy one is certainly a great advantage. But the ease of applying the rule is perhaps not a sufficient argument for its adaption. After all, we could find easier rules of decision, such as decreeing that in all cases argued on Monday the plaintiff loses.

But I repeat once again that some constitutional questions are more to be avoided than others. As pointed out above, *New York Times* involved two constitutional questions that *could* have been decided: (1) the first amendment question; and (2) the separation of powers question (whether or not influenced by the difficulty of the first amendment question). Those who are made uncomfortable by the power of the Supreme Court, nine unelected men, to settle all constitutional questions in our country and to settle, rightly or wrongly, most of our important political questions, must take comfort in the Court's policy of avoiding such questions when possible. It is to the great credit of the Court that throughout its history its members have feared their own power. But even the strongest opponents of "judicial review" have recognized that in some areas the power of the Court to overturn decisions made in other

problem. One might be influenced in deciding one question by the existence of the other, but I cannot see how they can be strung together to form a single rule. Only where one of the constitutional questions is a separation of powers problem (or some other "internal" constitutional problem, as defined below, *see* note 144 *infra* & accompanying text), can the difficulty of the other constitutional question have a direct logical bearing on its resolution.

Of course, one can derive a statistical rule that will explain how the court may reach its decision when there are two difficult constitutional questions in one case, even though the rule cannot describe how any particular justice reached (or will reach) his result. Take our hypothetical confiscation case involving both first and fifth amendment problems. If three justices hold that the confiscation violates neither the first nor fifth amendments, three hold that it violates the first but not the fifth, and three hold that it violates the fifth but not the first, then the Court will hold that the confiscation is unconstitutional, but it will do so for no reason that is acceptable to a majority of its members. *Cf.* *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). Such decisions have a rather unsatisfactory quality. On the other hand, the rule which I have extracted from *New York Times* and *Yongstoun* is one that can be accepted by all the Justices who would hold the actions of the Executive in these cases unconstitutional. For example, those in *New York Times* who felt that the first amendment clearly forbids the government (including Congress) from enjoining the publication would agree, *a fortiori*, that the Executive lacks the power to obtain the injunction on its own authority. It is for this reason that I am convinced, even if my earlier nose count is wrong, that *New York Times* should be considered as a separation of powers case, rather than one of those unfortunate decisions in which no proposition commands a clear majority.

organs of our exceedingly complex government is necessary, and indeed preferable to any alternative process.¹³⁸

Perhaps the most trenchant critic of the Court's power to override decisions made by other governmental authorities is the late Judge Learned Hand. In his 1958 Oliver Wendell Holmes' lectures at Harvard, Judge Hand argued:

[W]hen the Constitution emerged from the Convention in September, 1787, the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court, and *a fortiori* of the lower courts, were to be authoritative upon the Executive and the Legislature. Each of the three "Departments" was an agency of a sovereign, the "People of the United States." Each was responsible to that sovereign, but not to one another; indeed, their "separation" was still regarded as a condition of free government

On the other hand it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another "Department," even of the courts. The courts were undoubtedly the best "Department" in which to vest such a power. . . . It was not a lawless act to impart into the Constitution such a grant of power.¹³⁹

But Judge Hand then went on to say: "On the other hand it was absolutely essential to confine the power to the need that invoked it: that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers."¹⁴⁰ I can think of no question which more clearly falls within the jurisdiction which Judge Hand felt that the courts must have — the jurisdiction to act as arbiter between the various "Departments" of the sovereign — than the questions of the inherent power of the presidency that were raised in *New York Times* and *Youngstown*.¹⁴¹

Judge Hand summarized his position as follows: "The authority of the courts to annul statutes (and *a fortiori*, acts of the Execu-

¹³⁸ Perhaps the most succinct statement of this position is the title of a book by Professor Alexander Bickel, *The Least Dangerous Branch*. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

¹³⁹ L. HAND, *THE BILL OF RIGHTS 27-29* (1958).

¹⁴⁰ *Id.* at 29-30.

¹⁴¹ Another example of such a question was the one upon which *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), turned: Does the Supreme Court have the power to issue a writ of mandamus, as authorized by Congress, in an original action brought before it when the proceeding does not fall within the Court's original jurisdiction as defined by the Constitution? In *Marbury* the Court was adjudicating the limits of its own jurisdiction; it did not decide that all other "departments" of the Government or other courts lacked the power to issue a mandamus (or similar order).

tive) may, and indeed must, be inferred. . . . However, this power should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised."¹⁴² If I read this passage correctly in the context of Judge Hand's lectures, I would tend to believe that the first amendment question in *New York Times*, at least as it was handled by most of the Justices, was exactly the sort of question that Judge Hand felt should not be reviewed. Mr. Justice Harlan's conclusion in dissent that the only question that could be reviewed was whether the act fell within the President's "foreign relations" power was, on the other hand, a position which would be acceptable to Judge Hand. And perhaps Judge Hand would have had no objection to the contention made by Justices Black and Douglas that any prior restraint on publication imposed by the Government is outside the power of the Government. Even so, he might have felt that their decision, while within their jurisdiction, was incorrect. But to decide whether the censorship involved in *New York Times* was an abuse of a power which the Government (or the Executive) rightfully had is exactly the type of judicial action which Judge Hand condemned.

Conceding that there are cases where the courts must review how a constitutional power was exercised, it is still the course of wisdom to avoid the necessity of such review wherever possible. Given the choice between deciding whether the Executive has a power or deciding whether its action is an abuse of a lawful power, the first decision is the desirable one. In *New York Times*, if one concludes that the Executive lacks the power to impose a prior restraint, then one can avoid the entire problem of determining whether the prior restraint constitutes an abuse of power limited by the first amendment.

There is another extremely practical reason for adopting this approach of considering the separation of powers question first. If, in *New York Times*, the Court determined that the restraint on publication violated the first amendment, then the only way that the "sovereign" could impose such a restraint would be by the extremely cumbersome route of constitutional amendment. Now it is a brave, and perhaps dangerous, thing for a court to completely deny a power to any governmental authority whatsoever. If, on the other hand, the decision in *New York Times* merely holds that the executive "department" does not have the power to impose the

¹⁴² L. HAND, *supra* note 139, at 66.

prior restraint, then the question of whether the legislative department has that power is not foreclosed. Such a decision, though based on the Constitution, does not deny a power to Government as a whole.¹⁴³

For convenience, we can divide constitutional limitations upon governmental power into two categories: (1) those which limit the powers only of a single governmental "department" so that it cannot encroach upon the power of another "department"; and (2) those which limit the powers of all departments acting alone or together. The former I would describe as "internal," the latter as "external."

It is characteristic of internal limitations that they fall both within Judge Hand's category of cases in which judicial arbitration is necessary and the category of cases in which the enforcement of the limitation does not necessarily deprive the "sovereign" of the asserted power. It seems obvious to me that the Court, if it had a choice, should decide a constitutional question involving internal limitations whenever that decision will avoid the necessity of deciding a constitutional question involving external limitations.¹⁴⁴

Internal limitations, as I have defined them, are not restricted to areas of potential conflict between the various departments of the federal government. The question of whether a state government or the federal government has power over a certain matter clearly is the same type of problem. Thus, Professor Bickel has recently noted in his Holmes lectures that Mr. Justice Frankfurter, one of the strongest advocates of judicial restraint, "set apart, as fittingly exercised by judges, the Commerce Clause jurisdiction, in which judgments denying the power to the states are subject to Congressional revision."¹⁴⁵ And this similarity between cases involving the inherent powers of the Presidency and those involving the powers of the states to regulate interstate commerce was not unnoticed by

¹⁴³ I am not, of course, saying that the first amendment does not forbid prior restraints on facts such as those in *New York Times*; I am saying that if that case was decided on the separation of powers issue, then the first amendment question remains open.

¹⁴⁴ I have been arguing as if the only vice involved in deciding questions concerning external limitations is that the decision may limit the power of the government to act. I suppose that this was Judge Hand's view. To a Jeffersonian — or a sentimental anarchist like myself — an even greater vice may be that the decision allows the Government to act. But perhaps we can all agree that, since we cannot agree, we should keep our options open as long as possible.

¹⁴⁵ A. Bickel, *supra* note 37, at 30.

the commentators who wrote under the inspiration of *Youngstown*.¹⁴⁶

Not only would it seem preferable that, in a case such as *New York Times*, the court decide the question of the internal constitutional limitation before deciding the external question, but it also seems logical that the Court should decide the internal question in such a way that it becomes unnecessary to resolve the external one. I am suggesting that the Court in *New York Times* should have decided that the Executive lacked the inherent power to obtain the injunction against publication, so as to avoid deciding the question of whether a law passed by Congress authorizing such an injunction would be constitutional. And, since the various opinions in *New York Times* do not compel us to extract any particular *ratio decidendi* for that case, I believe that we should conclude that the Court did just that.

Support for this approach can be found by referring to the normal rules for avoiding constitutional questions set forth by Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*.¹⁴⁷ I call particular attention to the rule that: "The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."¹⁴⁸ Of further support is the rule that: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."¹⁴⁹

If it is agreed that external constitutional questions are more to be avoided than internal ones, one should be justified in proposing the following corollaries to the two rules quoted above. As a corollary to the first rule: the Court will not pass upon an external constitutional question, although properly presented by the record, if there is also present an internal constitutional question the determination of which will dispose of the case. The corollary to the second rule is more complex and also more questionable: when the

¹⁴⁶ See, e.g., Kauper, *The Steel Seizure Case: Congress the President and the Supreme Court*, 51 MICH. L. REV. 141 n.2 (1952). Cf. *id.* at 155 n.36 & accompanying text where Professor Kauper suggests that judicial review of presidential acts is similar to a judicial review of an assertion of legislative jurisdiction by a state.

¹⁴⁷ 297 U.S. 288, 341, 346-48 (1936).

¹⁴⁸ *Id.* at 347.

¹⁴⁹ *Id.* at 348, quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

validity of an act by one governmental "department" is drawn into question as to its external constitutionality, the Court should, or at least may, first ascertain whether a construction of the Constitution is fairly possible by which an internal question could be substituted for the external one.

I see nothing wrong with the second corollary as a logical proposition, and it would seem to be a neutral and principled rule of decision. Still, with the exception of *Youngstown* and *New York Times* I know of no history that would either support or undermine its logic. Of course, the Court does not apply the rules of avoidance laid down by Justice Brandeis when the constitutional question is an easy one, nor when the Court believes that the time has come to decide it. Even if my proposed corollaries have never been consciously applied in the past, if they describe what happened in *Youngstown* and *New York Times* they may be useful in analyzing future cases (if there be any)¹⁵⁰ in which a separation of powers problem is present. It is the second corollary that supports and legitimates my conclusion that the only holding to be found in *New York Times* may be that the doctrine of the separation of powers denies the Executive the constitutional power to take action on its own authority, if that action is one which would be of doubtful constitutionality if it had been authorized by Congress.

Although the reader may agree that my reading of *New York Times* is a possible one, it is quite likely that he does not see any substantial external constitutional question that could have been answered in *Youngstown*. I agree that the Court may not have been concerned with avoiding any external constitutional issue, and indeed it may have wanted to reach the separation of powers question so as to put the executive branch on notice that it is not the beneficiary of unlimited power. It is quite possible the Court may have felt, with good cause, that the Executive was simply getting too big for its britches.¹⁵¹ The fact remains, however, that there

¹⁵⁰ The *Youngstown* and *New York Times* cases stand by themselves, all alone. "[T]he very important problem of executive power, unaided by legislative scaffolding, to deal with important non-military problems of domestic concern, particularly those assuming the proportions of an internal emergency, had never squarely presented itself until the Court was confronted with President Truman's seizure of the steel mills in *Youngstown* . . ." Kauper, *supra* note 146, at 142.

¹⁵¹ A tactical error was made by the Government's counsel in the district court, and that error may have pervaded the entire subsequent proceedings. During the argument before Judge Pine in the district court, the following colloquy took place between the court (C) and the Assistant Attorney General (AG).

C: [I]s it not . . . your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?

was another constitutional issue which would have had to be faced in *Youngstown* had the Court not held that the President lacked power to seize the nation's steel mills. The President's seizure order made no provision for any compensation to the steel companies.¹⁵² If there were no way in which the companies could obtain compensation, then it would appear that the seizure was in violation of the fifth amendment's external limitation on uncompensated takings.¹⁵³ The only Justices who touched on this point were Black and Douglas,¹⁵⁴ and Justice Black, who wrote for the Court, did not discuss the issue of compensation as a constitutional one. Rather, he dealt only with the Government's argument that an injunction should not issue since an adequate remedy existed at law in the form of a suit for compensation in the Court of Claims. He made the statement:

Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged

AG: That is true, Your Honor, with respect to legislative powers.

C: But it is not true, you say, as to the Executive?

AG: No. Section 1, of Article II of the Constitution reposes . . . all of the executive power in the Chief Executive.

. . .

C: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution . . . limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

AG: That is the way we read Article II of the Constitution.

The above exchange is quoted in A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE 63-64* (1958).

This claim of unlimited executive power made headlines, *id.* at 65-67, and, though it was quickly withdrawn, *id.* at 68, it may well have influenced a normally placid Supreme Court to the point where it chose to assert its power, protect that of Congress, and limit that of the Executive.

¹⁵² See Exec. Order No. 10,340, 3 C.F.R. 861 (1952).

¹⁵³ It has also been suggested that there was a question as to whether the taking was for a "public use." See Banks, *supra* note 107, at 481. Even though *Youngstown* was decided before *Berman v. Parker*, 348 U.S. 26 (1954), the Court in *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1946), had already indicated that there is no separate "public use" requirement in federal constitutional law. Furthermore the opinions in *Youngstown* are replete with cases where industries were seized with congressional authority. There is nothing to suggest that the Supreme Court would have had difficulty in finding a "public use" if Congress had authorized the seizure. Cf. Mr. Justice Douglas' concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 629.

¹⁵⁴ Judge Pine in the District Court had said: "The records show that monetary recovery would be inadequate; but aside from that, the seizure being unauthorized by law, there could be no recovery under an implied contract [*quoting* *Hooe v. United States*, 218 U.S. 322 (1910)], and there can be none under the Federal Tort Claims Act." 103 F. Supp. 569, 577. Judge Pine, like Mr. Justice Black after him, did not treat this as an answer to a constitutional question, but rather as the answer to the claim that there was an adequate remedy at law.

to have been¹⁵⁵ [*citing, inter alia*, *Larson v. Domestic & Foreign Corp.*¹⁵⁶ as contrary authority].

If, however, no compensation were available for the seizure, clearly the fifth amendment would be violated, so clearly that there would be no reason for Justice Black, or anyone else, to stress the fact. The reference to *Larson* makes this quite clear. There the Court had declared: "Where the action against which the specific relief is sought is a taking . . . of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."¹⁵⁷ In *Youngstown* Secretary Sawyer was claiming that the steel companies could get compensation, while the steel companies, who wanted their plants back, were claiming that it was unavailable. Everyone appeared to be in agreement that without compensation the seizure would fail. But the fifth amendment issue was not passed over in total silence. Justice Douglas expressly raised it: "The command of the Fifth Amendment is that no 'private property be taken for public use, without just compensation.' That constitutional requirement has an important bearing on the present case."¹⁵⁸ He then went on to argue that only Congress has the authority to raise revenues, capping his argument with the conclusion: "The branch of the Government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected."¹⁵⁹

Mr. Justice Douglas' contorted attempts to establish that compensation was not available so as to void the seizure as a violation of the fifth amendment, and Justice Black's mild conclusion that "[p]rior cases . . . have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials . . ." ¹⁶⁰ appear at first glance to be the weakest link of the reasoning in *Youngstown*. Justice Black's conclusion appears to be an almost deliberate effort to make sure that the Court reached the constitutional issues.¹⁶¹ And Justice Douglas apparently de-

¹⁵⁵ 343 U.S. at 585.

¹⁵⁶ 337 U.S. 682 (1949).

¹⁵⁷ *Id.* at 697, n. 18.

¹⁵⁸ 343 U.S. at 631.

¹⁵⁹ *Id.* at 631-32 (footnote omitted).

¹⁶⁰ *Id.* at 585.

¹⁶¹ Perhaps that is one of the reasons why the Court held that the remedies at law were inadequate, despite Mr. Justice Brandeis' rules of avoidance; it is quite clear that the Court at times feels obliged to decide important constitutional questions. Mr. Justice Brandeis was not speaking for the Court in *Ashwander*, after all. As one com-

cided the internal constitutional question, as to which branch of the Government can exercise the eminent domain power, solely in order to hold the seizure invalid under the fifth amendment.

The refusal of the Court to decide *Youngstown* on the non-constitutional basis that there was an adequate remedy at law may seem to indicate a strong desire on the part of the Court to strike down the Executive's action, even though that embarrassing exercise of judicial power could have been avoided. Professor Corwin has claimed: "*Youngstown* will probably go down in history as an outstanding example of the *sic volo, sic jubeo* frame of mind into which the Court is occasionally maneuvered by the public context of the case before it."¹⁶² Certainly Justice Black's claim, that the company's right to compensation in the Court of Claims was doubtful, is itself subject to doubt. Since the Supreme Court held, in *United States v. Causby*,¹⁶³ that there is a cause of action under the Tucker Act¹⁶⁴ for just compensation in the Court of Claims whenever property is taken by the government, the courts have not, except for Justice Black's opinion in *Youngstown*, worried whether a taking was authorized when the owner of property taken has sued for compensation under the fifth amendment.¹⁶⁵ Thus, it would seem at first glance that the Court in *Youngstown* could have avoided the fifth amendment problem by construing the Tucker Act in a manner which would have assured compensation to the steel companies; that is, the Court could have held that lack of authorization was not a defense to a claim arising under the Constitution for just compensation brought in the Court of Claims.¹⁶⁶ Such a holding would have vitiated Justice Douglas' argument as well as remov-

mentator said of *Youngstown*: "One can only imagine what criticism would have been made against the Court had it refused to decide the constitutional question which had been heralded in the press as the greatest in generations." Lea, *The Steel Case: Presidential Seizure of Private Industry*, 47 NW. U.L. REV. 289, 293 (1952). Could one conclude that "great cases induce unnecessary constitutional decisions"?

¹⁶² Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 64 (1953). Professor Corwin's criticism of the steel case was not directed primarily to the remedial question because he felt that the President had the authority to seize the steel plants. What can be better described by the words "*sic volo, sic jubeo*" than the Executive's position in *Youngstown* or *New York Times*.

¹⁶³ 328 U.S. 256 (1946). For a critique of the Court's handling of the remedial issue in *Youngstown*, see Freund, *The Supreme Court, 1951 Term Forward: The Year of the Steel Case*, 66 HARV. L. REV. 89, 91-94 (1952); cf. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1203-12 (1953).

¹⁶⁴ 24 Stat. 505 (1887).

¹⁶⁵ See D. SCHWARTZ & S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* 181 (1970).

¹⁶⁶ Cf. *Malone v. Bowdoin*, 369 U.S. 643, 647 n.8 (1962).

ing the doubt raised by Justice Black. Even if Congress had not authorized the taking it could have been found that the payment of compensation had been authorized.¹⁶⁷ Furthermore, it would seem that application of the rule of jurisprudence which I have earlier proposed would have led the Court to decide the internal question of the Executive's power in favor of the Executive. If that were the case the taking would, *ex hypothesi*, have been "authorized" and compensation would have been available. These suggested solutions, however, would not have avoided the external constitutional question raised by the fifth amendment, they would merely have postponed it.

The Court in *Youngstown* reasoned not only that the right to compensation in the Court of Claims was "doubtful," but also that "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement."¹⁶⁸ Justice Frankfurter, the only Justice besides Justice Black who discussed the availability of equitable relief, also stressed this point.¹⁶⁹ The difficulty in measuring damages not only goes to the question of the availability of equitable relief, but also raises an extremely difficult external constitutional question. If compensation were available in the Court of Claims, it could only be on the basis that it was a claim founded on the constitutional right to just compensation. It is a fact not often considered that every eminent domain proceeding raises a constitutional issue, and usually a difficult one.¹⁷⁰ Fortunately, normal rules for calculating "just compensation" have been formulated over the years, even though their application to specific factual situations may be exceedingly difficult.¹⁷¹

¹⁶⁷ It has been claimed that the Supreme Court had, prior to *Youngstown*, in the case of *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), approved the Court of Claims action in awarding compensation for the taking of coal mines that were seized by the Executive without congressional authorization. Corwin, *supra* note 162, at 60. That is not very conclusive, however, since the authority for the taking in *Pewee* was never questioned. Furthermore the seizure in *Pewee* occurred during a declared war; in *Youngstown* the Court might well have treated a congressional declaration of war as an authorization for the seizure. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593, 612-13 (1952) (Frankfurter, J., Concurring).

¹⁶⁸ 343 U.S. at 585.

¹⁶⁹ *Id.* at 595-96.

¹⁷⁰ Occasionally Congress may provide for compensation in a case where compensation is not constitutionally required or may provide more compensation than the constitutional minimum. See, e.g., the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894. But even in such cases a court might have to determine that the compensation was not required or that "just compensation" was less than the amount provided by Congress.

¹⁷¹ The best general description of the rules adopted by the Supreme Court to de-

The statements made by Justices Black and Frankfurter to the effect that the steel companies' damages could not be accurately calculated would not, of course, defeat a condemnation authorized by Congress. Condemnees normally do not recover all their losses as "just compensation" since "not all losses suffered by the owner are compensable under the Fifth Amendment."¹⁷² Thus it might seem that, though the unascertainability of the damages to the steel companies would justify equitable relief, it would not have raised any serious constitutional problems if the Court had determined that the seizure was a proper exercise of the federal government's long established and unquestioned power of eminent domain.¹⁷³

But the taking in *Youngstown* was not an ordinary taking of a definite interest in property: rather, it was a seizure of going concerns for an indefinite period of time. Two cases decided prior to *Youngstown* suggest some of the difficulties which would have been involved in determining the "just compensation" which the Constitution would have required if the taking were upheld. In *United States v. Westinghouse Electric & Mfg. Co.*¹⁷⁴ the government had condemned, for an indefinite period, land subject to a lease. The Court, in an opinion by Justice Frankfurter, did not even attempt to calculate the total compensation due to the lessee, choosing instead to delay the ascertainment of just compensation until the period of the taking was established, and to provide for rental payments to the lessee (who remained liable to the lessor) in the interim. Actually the facts in *Westinghouse* were more complicated than I indicated in the preceding sentence, but probably were no more confusing than those that could be expected to arise in a trial of the just compensation issues in the steel seizure case. The primary fear of the steel companies was that during the period of federal control the government would compel them to enter into new collective bargaining agreements with the unions. If the government returned the plants to private ownership burdened by those contracts, what would the constitutionally required compensation

termine the amount of the constitutionally mandated "just compensation" is set out in *United States v. Miller*, 317 U.S. 369, 373-77 (1943).

¹⁷² *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 281 (1943). It has been argued that, since the property owner does not receive all his losses under the "just compensation" requirement, if the taking is constitutionally unauthorized (e.g., is not for a public use) then the due process clause of the fifth amendment would be violated because the owner would be "deprived" of "property" without due process of law. See, e.g., *Banks*, *supra* note 111, at 481.

¹⁷³ See, e.g., *Kohl v. United States*, 91 U.S. (1875).

¹⁷⁴ 339 U.S. 261 (1950).

for the damages resulting from the contracts be? And if the plants were still in the Government's hands when the just compensation issue was tried, how could one even begin to guess at the damages? But the particularly interesting feature of *Westinghouse* is a question raised by Mr. Justice Jackson in dissent: "[W]hether Congress ever authorized a type of expropriation that can not be rationally compensated."¹⁷⁵ One can see the temptation that the *Youngstown* Court might have felt to avoid the external constitutional question, of calculating the incalculable just compensation, by denying that the Executive had the authority to raise the question.

The other case was *United States v. Pewee Coal Co.*,¹⁷⁶ the only case in the Supreme Court which gives a hint as to the just compensation required in a seizure case. But, though *Pewee* was a seizure case, it reached the Supreme Court in a peculiarly limited fashion. The only question before the Court was whether the coal company was entitled to receive compensation for losses which were incurred as a result of the Government's increasing wages during its period of control.¹⁷⁷ In a decision written by Justice Black, the Court held that the company was entitled to receive those damages. Perhaps it is significant that the properties were already operating at a loss when the Government seized them to prevent a strike, but it is difficult to see how that fact could be controlling. If the Executive had prevailed in *Youngstown*, and if the "just compensation" turned out to be the amount of any wage increases paid on government orders (as was the case in *Pewee*), then the Government's victory would have been pyrrhic and the steel companies would have laughed all the way to the bank.¹⁷⁸ I really doubt if that was

¹⁷⁵ 339 U.S. at 268, 270

¹⁷⁶ 341 U.S. 114 (1951).

¹⁷⁷ In *Pewee* the government argued that no compensation was payable, because there was no "taking," 341 U.S. at 117 n.4, the exact opposite of its position in *Youngstown*. The Pewee Coal Company's property was seized in 1943 when there was a declared war but no statutory authorization for such a seizure. *Id.* at 115. See also the concurring opinion of Mr. Justice Franfurter in the *Youngstown* case. 343 U.S. at 593, 612-13, 622. No claim was made in *Pewee* that the taking was not authorized.

¹⁷⁸ Exec. Order No. 9,340, 3 C.F.R. 1276 (1943), which was the authority for the seizure in *Pewee*, had no provision relating to the disposition of profits and losses. The Pewee Coal Company claimed in the Court of Claims that it was entitled to all of the losses it suffered during the period its property was in government control, but only the losses resulting from the government's wage increase was allowed by the Court of Claims and the company did not appeal. The Executive order authorizing the seizure in *Youngstown*, see note 152 *supra*, specifically provided that "Except so far as the Secretary of Commerce may otherwise direct . . . there may be made, in due course, payments of dividends on stock . . ." There was no other provision in any way relating to the disposition of profits (or losses) accrued during the period when the steel mills were in the control of the Secretary of Commerce.

what President Truman had intended. I also doubt that the Court would have reached such an easy and expensive resolution of the just compensation question that was concealed in *Youngstown*.

The following passages appear in Justice Reed's concurring opinion in *Pewee*.

[T]he use of the temporary taking has spawned a host of difficult problems . . . especially in the fixing of just compensation. . . . [I]n the temporary taking of operating properties . . . market value is too uncertain a measure to have any practical significance. The rental value for a fully functioning railroad for an uncertain period is an unknowable quantity. . . . The most reasonable solution is to award compensation to the owner as determined by a court under all the circumstances of the particular case. . . . Whatever the nature of the "taking," the test should be the constitutional requirement of "just compensation." However, there is no inflexible requirement that the same incidents must be used in each application of the test.¹⁷⁹

This is less a description of how one determines just compensation in a seizure case than it is a prescription for chaos.¹⁸⁰ When one considers Justice Frankfurter's assertion that the consequences of the steel seizure "cannot be translated into dollars and cents"¹⁸¹ in the light of the remarks I have quoted from Justices Jackson and Reed, it is hard to avoid the conclusion that any decision in *Youngstown* which allowed "just compensation" to the steel companies would have opened up a can of worms. The external constitutional question inherent in the fifth amendment's "just compensation" clause, which was waiting in the wings in *Youngstown*, would appear

¹⁷⁹ 341 U.S. at 119-21 (cases omitted).

¹⁸⁰ In fairness to Mr. Justice Reed he did develop a rule applicable to the factual situation in *Pewee*: "[T]he Government's supervision of a losing business for a temporary emergency ought not to place upon the Government the burden of the losses incurred during that supervision unless the losses were incurred by governmental acts . . ." 341 U.S. at 121. But would Mr. Justice Reed have accepted the logical corollary that the government does not get the profits of a winning business (unless the profits came from governmental acts)? And if he does how could he justify denying any losses which would result from governmental acts? Perhaps in a case like *Youngstown* he would have deducted any losses due to the hypothetical strike (which was averted by the seizure) from the losses resulting from governmentally mandated wage increases? But how on earth could one calculate that?

Of course, the ultimate rule to be applied in seizure cases might turn out to be some sort of "we get the profits, you reap the losses" approach. Such "heads we win, tails you lose" rules are not totally unknown in "just compensation" cases. Compare *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) with *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926). Cf. *United States v. Rands*, 389 U.S. 121 (1967). But it might be well for the courts to avoid, whenever possible, cases which are likely to lure them into such "unjust compensation" rules.

¹⁸¹ 343 U.S. at 596.

to be at least as difficult,¹⁸² if not as melodramatic, as the separation of powers question which occupied the stage.

Despite my demonstration that there was an external constitutional question in *Youngstown*, I am not suggesting that the Court was consciously influenced by that fact in reaching its decision. But I do not see how one can read the opinions in *New York Times* without concluding that the first amendment problem played a major role in the process by which the majority concluded that publication of the Pentagon Papers could not be enjoined. And, if one searches *Youngstown* for the narrowest holding derivable from that case, I believe that the existence of the fifth amendment problem might be determinative.

Thus, in the end, *New York Times* appears to do nothing except establish that *Youngstown* is alive and fairly well. But the stress placed in *New York Times* on the external constitutional limitation of the first amendment may actually have served to weaken the holding in *Youngstown*. An opponent of unrestrained executive power would presumably have been happier if the first amendment had never been mentioned in *New York Times*. Among the majority Justices, only Justice Marshall seemed to be willing to decide the separation of powers question without being pushed into it by the first amendment problems. Nevertheless, the decision in *New York Times* goes a small way to restore Congress to its rightful power and, I hope, to remind Congress of its responsibilities. *Youngstown* can no longer be considered a sport never to be repeated.

A scholar to whom *Youngstown* was anathema concluded:

[T]he lesson of the case is that, just as nature abhors a vacuum, so does an age of emergency. Let Congress see to it, then, that no such vacuum occurs. The best escape from presidential autocracy in the age we inhabit is not, in short, judicial review, which can supply only a vacuum, but timely legislation.¹⁸³

The same lesson can be drawn from *New York Times*, even though the vacuum revealed by that case may well be mandated by the first amendment. The absence of any comprehensive and rational legislative provision for the safeguarding and classification of infor-

¹⁸² See the discussion of the just compensation issue in Lea, *The Steel Case: Presidential Seizure of Private Industry*, 47 NW. U.L. REV. 289, 304-10 (1952). Mr. Lea concluded: "The *Pewee* Case is ample proof that it is hard enough to determine the measure of compensation where the only governmental interference is the ordering of a wage increase. When the government interferes to a greater extent, the problem becomes insoluble." *Id.* at 309.

¹⁸³ E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 157 (4th ed. 1957).

mation affecting the nation's security was the proximate cause of the affair of the Pentagon Papers. If only that small portion of the Pentagon Papers which actually might have affected the national security had been classified, it is improbable that any party to the affair would have felt compelled to reveal it to the public. The case of the Pentagon Papers is a clear call to Congress to supply some ground rules for the file clerks rustling through their tunnels beneath the corridors of power. Mr. Justice Stewart has supplied some sensible suggestions: "[W]hen everything is classified, then nothing is classified [T]he hallmark of a truly effective . . . security system would be the maximum possible disclosure . . ." ¹⁸⁴

Now Congress, if it is wise, can take the hint. And while they are at it, they might also take a look at that "singularly opaque statute" ¹⁸⁵ which is sometimes called "the Espionage Act." ¹⁸⁶

VII

I have contended that one cannot understand *New York Times* without understanding *Youngstown*, and that the two cases have the same holding and the same *ratio decidendi*, however obscure and limited they may be. But a judicial decision is more than a holding and a *ratio decidendi*. It is, if well expressed, a peculiar hodge-podge of circumstances, ideas and attitudes, style and substance. A case which holds little denotes little, but may, because of the opinions expressed in its resolution, have connotations that far transcend the issue that was decided. *New York Times* does not seem to be such a decision. Its hasty conclusions suggest little except that the Justices failed to communicate either with each other or with us, their audience. But *Youngstown* is another, and far more satisfactory, matter.

Both decisions were decided by courts that no longer exist. Of the Justices who decided *Youngstown* some twenty years ago, only Justice Douglas is still on the bench. Justices Black and Harlan both spoke to us from the bench for the last time in *New York Times*. One could have wished them a happier departure. Mr. Justice Black perhaps was content with his last opinion since it was consistent with his thought throughout the years. It is fitting that he should have departed upholding the absolutes of the first amendment and chiding those who would depart from the simple verities

¹⁸⁴ 403 U.S. at 729 (Stewart, J., concurring).

¹⁸⁵ See *id.* at 754 (Harlan, J., dissenting).

¹⁸⁶ 18 U.S.C. § 793(e) (1964).

he found in the Constitution. But it seems almost cruel that Mr. Justice Harlan should have been compelled by the "feverish" rush of a "great case" to forego the opinion which he wished to write, and leave us as his parting words a cryptic opinion in "telescoped form" about issues he felt were "as important as any that have arisen during my time on the Court . . ."¹⁸⁷ But though men go, the Court remains, and what past benches have said and done still influences, and at times controls, the decisions which are yet to come. For this reason it is proper to remind ourselves of what was thought and said in *Youngstown*. If *New York Times* is, as I believe, *Youngstown* writ small, and if the issues which were involved, if not decided, in both cases are, as they appear to be, the same, then the connotations and the nuances of *Youngstown* are still important — not only for their own sake but also because they give flesh and order to the scattered bones which the Court threw us in *New York Times*.

Mr. Justice Black delivered the Court's opinion in *Youngstown*. He quickly dismissed the Government's argument that equitable relief was not available¹⁸⁸ and stated the basic principle of the case: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."¹⁸⁹ The

¹⁸⁷ 403 U.S. at 755.

¹⁸⁸ 343 U.S. at 585.

¹⁸⁹ *Id.* There is no provision in the Constitution decreeing that the various "Departments" of the government shall be separate, but each "Department" has only such power as may be granted to it by the Constitution. "[T]he Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they are not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." *Myers v. United States*, 272 U.S. 52, 116 (1926) (Taft, C.J.) (holding that the President has the power to remove, without the consent of the Senate, an officer appointed with the advice and consent of the Senate). In *Myers*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was construed as holding only that the Supreme Court did not have the jurisdiction to issue a writ for mandamus. Chief Justice Marshall's conclusion that *Marbury* had been improperly denied his commission was said to be mere *obiter dictum*; this is an interesting example of how the resolution of a separation of powers question can avoid the necessity of deciding another constitutional question. However, both questions in *Marbury* included separation of powers issues, so that case is not an example of my rule that "internal" questions should be decided in a manner that avoids "external" questions. Also consider the following statement:

The Constitution, in distributing the powers of government, creates three distinct and separate departments. . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, . . . namely, to preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933) (cases omitted).

principle that I see in *New York Times* is very similar: the Executive's power to obtain an injunction must stem either from an act of Congress or from the Constitution.¹⁹⁰ Justice Black then quickly found (as did several Justices in *New York Times*)¹⁹¹ that there was no statute authorizing the Executive's action and concluded that "If the President had the authority to issue the order he did, it must be found in some provision of the Constitution."¹⁹² And Justice Black could find no such provision, either in the President's power as Commander in Chief¹⁹³ or in the constitutional grant of executive power. He declared:

[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The President's order does not direct that a congressional policy be executed in a manner proscribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President.¹⁹⁴

Ultimately he concludes with a passage that could have been written by no other Justice:

The founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.¹⁹⁵

Justice Black's thought echoes through Justice Marshall's opinion in *New York Times*:

The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. . . . [citing *Youngstown*]. It did not provide for government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress. . . . [C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.¹⁹⁶

Mr. Justice Frankfurter joined in the Court's opinion in *Youngstown*¹⁹⁷ and also filed a separate opinion. He began with a justi-

¹⁹⁰ If you prefer, this can be restated as a principle relating to judicial power: The Courts' power to grant an injunction must stem either from an act of Congress or from the Constitution.

¹⁹¹ Mr. Justice Black, 403 U.S. at 718; Mr. Justice Douglas, *id.* at 720; Mr. Justice White, *id.* at 732. See notes 209-217 *infra* & accompanying text.

¹⁹² 343 U.S. at 587.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 587-88.

¹⁹⁵ *Id.* at 589.

¹⁹⁶ 403 U.S. at 742-43.

¹⁹⁷ 343 U.S. at 589.

fication, one could almost say a glorification, of the doctrine of the separation of powers:

For [the Founders of this Nation] the doctrine . . . was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded — too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.¹⁹⁸

This passion, this explanation why *Youngstown* could *only* be decided in the way it was, this interjection of "great" thoughts into a case involving "great" issues is tragically missing from the opinions in *New York Times*. Even if you do not agree that *New York Times* was primarily a separation of powers case, I trust that you will recognize the relevance of Justice Frankfurter's words to that decision. And if you accept his words, as I do, you may feel in your bones that it was correctly decided. It is perhaps possible, even though difficult, to understand *New York Times* on the basis of its own opinions. But one must look elsewhere to feel its necessity.

Then Justice Frankfurter did something else that was not done very well in *New York Times*. He proved the negative proposition on which the decision rested.¹⁹⁹ In both *Youngstown* and *New York Times* (as I read them) a necessary foundation for the holding was the conclusion that Congress had not authorized the action taken by the executive branch. In both cases it was perhaps sufficient to say that the Solicitor General did not rely on any congressional authority, but this is not completely satisfactory. In both cases the Solicitor General did argue that there were applicable statutes which, though they did not expressly authorize the *remedy* used

¹⁹⁸ *Id.* at 593-94. If *New York Times* invokes memories, so did *Youngstown*. Mr. Justice Frankfurter was not alone in recalling the experiences of totalitarian governments that culminated in World War II. See the discussion of Mr. Justice Jackson's opinion, note 248 *infra* & accompanying text.

¹⁹⁹ 343 U.S. at 593. Before arriving at the merits Mr. Justice Frankfurter pointed out that "The Framers . . . did not make the judiciary the overseer of our government. . . . So . . . our first inquiry must be not into the powers of the President, but into the powers of a District Judge to issue a temporary injunction in the circumstances of this case." *Id.* at 594-95.

by the executive branch, did create the right. Both the Defense Production Act²⁰⁰ and the Universal Military Training and Service Act,²⁰¹ which were on the books at the time of *Youngstown*, authorized seizures of property if certain preconditions were met. The Solicitor General therefore argued that the seizure was at least sufficiently authorized by Congress to support an action in the Court of Claims for compensation,²⁰² thus suggesting that equitable relief was not available to the steel companies.²⁰³ In *New York Times* the Department of Justice originally argued that, though Congress may not specifically have provided for an injunction, it had made publication of the Pentagon Papers wrongful by the provisions of the Espionage Act.²⁰⁴ In both cases it was possible that there was some statute lying around authorizing the Executive's action which was unknown even to the Solicitor General. But in *Youngstown*, Justice Frankfurter gave a comprehensive analysis of all seizure statutes since 1916,²⁰⁵ and, by a careful review²⁰⁶ of the legislative history of the Labor Management Relations Act of 1947,²⁰⁷ was able to demonstrate that Congress had deliberately decided not to grant the President the power to seize plants under circumstances such as those which gave rise to the steel seizure. Thus he was able to conclude:

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in as many words. . . . It would be not merely infelicitous draftsmanship but almost offensive *gaucherie* to write such a restriction upon the President's power in terms into a statute rather than to have it au-

²⁰⁰ See 50 U.S.C. §§ 2061-66 (1964), formerly 64 Stat. 798 (1950).

²⁰¹ See 50 U.S.C. §§ 451-62 (1964), formerly 62 Stat. 604 (1948).

²⁰² The Solicitor General cited *Hurley v. Kincaid*, 285 U.S. 95 (1932). There the Court held that an injunction would not stand to prevent a government officer from subjecting plaintiff's land to flooding where the government was authorized to condemn an easement but had not done so on the ground that the remedy was an action for compensation in the Court of Claims.

²⁰³ A scholarly explanation of this aspect of the *Youngstown* case can be found in Kauper, *supra* note 150, at 157-58.

²⁰⁴ 18 U.S.C. § 793 (1964); see 2 THE NEW YORK TIMES COMPANY VS. UNITED STATES: A DOCUMENTARY HISTORY 702, 721-23 (Arno Press 1971) [hereinafter cited as HISTORY]. In the Supreme Court, however, existence of criminal sanctions on publication was not urged as a basis of equity jurisdiction to issue an injunction. See 403 U.S. at 720 (Douglas, J., concurring).

²⁰⁵ 343 U.S. at 597-98, 615-19.

²⁰⁶ *Id.* at 598-602.

²⁰⁷ 29 U.S.C. §§ 141-88 (1964), formerly 61 Stat. 136 (1947).

thoritatively expounded, as it was, by controlling legislative history.²⁰⁸

There is in *New York Times* no comprehensive history of press censorship or of the various statutory provisions concerning the protection of information relating to the national security. There was no time to prepare such a study. And yet, at the very least, a review such as Mr. Justice Frankfurter gave to the history of seizure legislation would have added considerable substance to a decision supported by extremely fragile and fragmented opinions. Here is a gap in the opinions in *New York Times* which will perhaps be filled by commentators in law reviews. Unfortunately, no article however scholarly is likely to have the authority of Justice Frankfurter's study in his concurring opinion in *Youngstown*. Justice Douglas, in *New York Times*, did undertake to show that Congress had expressly declined to grant the authority to either the executive branch or the courts to prevent publication of matters such as the Pentagon Papers. One item of proof was the rejection by Congress of a version of the Espionage Act which would have allowed the President to forbid such publication;²⁰⁹ the other was a provision in the Internal Security Act of 1950: "Nothing in this Act [The Internal Security Act of 1950] shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States" ²¹⁰

The first item, though certainly helpful to Mr. Justice Douglas' argument, lacks the force of Mr. Justice Frankfurter's detailed analysis of the legislative history of the Taft-Hartley Act. This is, however, probably something that could not be helped, since it is improbable that one could show as clear a congressional intent to forbid Executive censorship, as there was to forbid Executive seizures at the time the Taft-Hartley Act was adopted. Justice Douglas was primarily making the rhetorical point that "Congress has been faithful to the command of the First Amendment in this area,"²¹¹ rather than establishing as a major premise of his argument the

²⁰⁸ 343 U.S. at 602-03.

²⁰⁹ 18 U.S.C. § 793(e) (1964).

²¹⁰ Internal Security Act of 1950, § 1(b), 64 Stat. 987. This Act did amend 18 U.S.C. § 793 as claimed by Mr. Justice Douglas, but its two titles are (1) the "Subversive Activities Control Act of 1950" which, among other things, established the Subversive Activities Control Board and forbade passports to "members of Communist organizations" and (2) the "Emergency Detention Act of 1950."

²¹¹ 403 U.S. at 722.

fact that Congress had specifically and deliberately declined to authorize prior restraints on publication in cases such as that of the Pentagon Papers. His fundamental position was clear: even Congress could not have authorized the prior restraint. Furthermore, Justice Douglas' primary argument was that the pertinent provisions of the Espionage Act²¹² did not apply to newspaper publications at all, even in its criminal aspects. The argument was that although the provision forbids "communication," it does not forbid "publication" as do other provisions of the Espionage Act.²¹³

Mr. Justice White, unlike Justice Douglas, would "not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations."²¹⁴ He did attempt in *New York Times* to establish a legislative history of the Espionage Act which would indicate a deliberate decision on the part of Congress to deny the authority to the Executive and the courts to restrain publication.²¹⁵ But he was also trying to establish that the same legislative history indicated that Congress fully intended newspapers to be criminally liable for violations of the Espionage Act.²¹⁶ It seems strange that Justice White did not clearly conclude, as did Justice Frankfurter in *Youngstown*, that Congress had expressly forbidden the Executive's action, rather than merely concluding that though "Congress has addressed itself to the problems . . . , [i]t has not . . . authorized the injunctive remedy against threatened publication."²¹⁷ But since

²¹² 18 U.S.C. § 793(e) (1964) was the only provision of the Espionage Act which the government claimed applied to the actions of the *New York Times*. See note 204 *supra*. The provision reads as follows:

Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information 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, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, translate or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; . . .

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

²¹³ 403 U.S. at 721-23.

²¹⁴ *Id.* at 731 (White, J., concurring) (footnote omitted).

²¹⁵ *Id.* at 733-34.

²¹⁶ *Id.* at 734-37. At least those violations of 18 U.S.C. § 793(e) (1964) which consist of the willful retention, as opposed to communication, of materials relating to the National Defense.

²¹⁷ 403 U.S. at 740 (citations omitted).

Justice White cited Justice Frankfurter's concurring opinion in *Youngstown* as authority for his conclusion that the injunction was not authorized, perhaps he did tacitly accept the theory that a legislative history establishing congressional refusal to authorize an executive action is tantamount to a statute expressly denying the authority. If this is so it bears out my contention that the opinions in *New York Times* cannot be understood without reference to those in *Youngstown*.

Mr. Justice Marshall also reviewed portions of the legislative history of the Espionage Act,²¹⁸ but not with the intent of reaching any conclusion. Rather he used the history to construct a dilemma and then impaled the Solicitor General's arguments upon its horns:

"Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court."²¹⁹

If one accepts the conclusion of Justice Frankfurter in *Youngstown*, and the implication of Justices Douglas and White's opinions in *New York Times*, that Congress had specifically forbidden the Executive from acting in the way it desired, then the minimum holding in both cases approaches nothing at all. Not only would one need to find the Executive performing an act of questionable external²²⁰ constitutionality that was not authorized by Congress, but the act would also have to be an act expressly forbidden by Congress before the precedent of *Youngstown* and *New York Times* would be squarely in point. But, since neither Justice Douglas nor Justice White adverted to this point, perhaps I am not compelled to admit that my subject is of vanishingly small legal significance. And if I have persuaded anyone that the two cases are of little use as precedent, at least I have performed an educational function.

One final aspect of Justice Frankfurter's opinion in *Youngstown* deserves particular mention, if only because it is so lacking in *New York Times*. That is a courteous and respectful deference to the executive branch which was found to have overstepped the limits of its Congressional authority:

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated

²¹⁸ *Id.* at 743-45.

²¹⁹ *Id.* at 747.

²²⁰ See text accompanying notes 132-135 *supra*.

by concern for the Nation's wellbeing, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodations for differences as matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world.²²¹

Now if one of the majority Justices in *New York Times* had had time to supply such a sugar coating, the pill undoubtedly would have been swallowed a little more easily by those who disagreed. And, more importantly, the decision in *New York Times* would have appeared more compelled than self-willed.

Mr. Justice Douglas rested his concurrence²²² in *Youngstown* almost entirely on Article I, Section 1, of the Constitution:²²³ "All legislative powers herein granted shall be vested in a Congress of the United States . . ." He then proceeded to prove to his own satisfaction, and in a manner that cannot be analogized to any aspect of *New York Times*, that the power of eminent domain is a legislative power.²²⁴ The remainder of his opinion, however, supplies a gloss to Justice Marshall's opinion in *New York Times*. After examining the various constitutional grants of power to the President, and finding none of them applicable to the President's actions in *Youngstown*,²²⁵ Justice Douglas concluded: "Article II, Section 3 also provides that the President 'shall take Care that the Laws be faithfully executed.' But . . . the power to execute the laws starts and ends with the laws Congress has enacted."²²⁶ Compare this with Justice Marshall's statement: "The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. It

²²¹ 343 U.S. at 614.

²²² *Id.* at 629.

²²³ *Id.* at 630.

²²⁴ *Id.* at 630-32. Mr. Justice Douglas' argument was that the power to raise revenues was granted to Congress by Article I, Section 8 of the Constitution and that "[t]he branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure . . ." 343 U.S. at 631. Someone without a sense of constitutional history could argue that the language of the first amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .", implies that only Congress is forbidden to abridge that freedom, but such a reading is clearly untenable. On the other hand one could argue that the provision recognizes that any act abridging the freedom of the press is a legislative act (which would be within the sole power of Congress but for the first amendment). This approach might allow one to apply some of Justice Douglas' arguments in *Youngstown* to *New York Times*.

²²⁵ 343 U.S. at 632.

²²⁶ *Id.* at 632-33.

did not provide for government by injunction in which the courts and the Executive Branch can make law without regard to the action of Congress."²²⁷

Now I am sure that someone will rush in and say that the courts and the Executive "make" law all the time and will accuse Justices Douglas and Marshall of naively subscribing to outmoded concepts which were never true. In a sense, of course, in the process of interpreting laws, reconciling them and filling in their gaps, the courts and the Executive do make law. But the formulation used by Justice Douglas neatly avoids the strength of the accusation: "[T]he power to execute the laws [and to interpret them] starts and ends with the laws Congress has enacted."²²⁸ One can be as much of a judicial realist as one pleases, can "make" as much law as one desires in the process of interpreting or executing laws passed by Congress, but, unless one simply wipes the Constitution from the books, a necessary precondition for such law "making" is the existence of a law passed by Congress.²²⁹ I would submit that he is naive who thinks, because both Congress and the courts can be said to "make" law, that Congress and the courts do the same sort of thing. Still, I admit that Justice Marshall's formulation invites such "realistic" criticism, and for that reason I prefer Justice Douglas' version. Once again, it seems to me that in grasping what is happening in *New York Times* one is aided by the opinions in *Youngstown*.

Finally, Justice Douglas, like Justice Frankfurter, carefully sugar-coated the bitter pill that the Court was handing to the President:

Today a kindly President uses the seizure power to effect a wage increase, and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.²³⁰

It might have made *New York Times* more palatable to those who supported the Executive's position if someone had bothered to point out to them that it all depends on whose ox gets gored.

Mr. Justice Jackson analysed the problem in *Youngstown*²³¹ in a manner that sheds considerable light on the issues in *New York*

²²⁷ 403 U.S. at 742 (citing the *Youngstown* case).

²²⁸ 343 U.S. at 633.

²²⁹ Or a law embodied in the Constitution.

²³⁰ 343 U.S. at 633-34.

²³¹ 343 U.S. at 634.

Times. He did not confine himself to the question whether the President or Congress had the power to seize the steel mills. Instead he pointed out that the President has varying powers depending upon the circumstances:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .²³²

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indiffer-

²³² At this point Mr. Justice Jackson inserted a footnote which should be read by those who accepted Mr. Justice Harlan's conclusion in *New York Times* that the President's Foreign Relations Power authorized, and compelled, the granting of an injunction against the newspapers.

It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States v. Curtis-Wright Corp.*, 299 U.S. 304, involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President. Much of the Court's opinion is *dictum*, but the *ratio decidendi* is contained in the following language:

"When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action — or, indeed, whether he shall act at all — may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U.S. 299, 311, 'As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*' (Italics supplied.)" *Id.*, at 321-322.

That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

Other examples of wide definition of presidential powers under statutory authorization are *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, and *Hirabayashi v. United States*, 320 U. S. 81. But see, *Jecker v. Montgomery*, 13 How. 498, 515; *United States v. Western Union Telegraph Co.*, 272 F. 311; *aff'd*, 272 F. 893, *rev'd* on consent of the parties, 260 U.S. 754; *United States Harness Co. v. Graham*, 288 F. 929. 343 U.S. at 635-36 n.2.

ence or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.²³³

Justice Jackson then asked into which category the President's alleged power to seize the steel mills fell.²³⁴ It admittedly was not in the first, and he decided that it was not in the second because "Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure."²³⁵ Finally he concluded "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."²³⁶ It would seem that the same analysis could have been applied with equal force in *New York Times*. No statute authorized the injunction and Congress had "covered" the field by passing many statutes protecting the nation from the dissemination of information relating to the national defense.²³⁷ Therefore, the Court could only uphold the imposition of a prior restraint "by holding that [such restraints] are within the [President's] domain and beyond control by Congress."²³⁸ And that does not sound like a likely holding.

Proceeding in *Youngstown*, Justice Jackson demonstrated to his own satisfaction: (1) that the provision of Article II providing that the "executive Power shall be vested in a President of the United States of America" did not, as the Solicitor General claimed, constitute a grant of unlimited executive power;²³⁹ (2) that the clause "The President shall be Commander in Chief of the Army and Navy of the United States" did not make him Commander in Chief of the country, its industry, and its inhabitants, as opposed to the army and navy;²⁴⁰ and (3) that the clause "he shall take Care that the Laws be faithfully executed" must be matched against the "Due Process" clause of the fifth amendment, so that "[o]ne gives

²³³ 343 U.S. at 635-37.

²³⁴ *Id.* at 638.

²³⁵ *Id.* at 639.

²³⁶ *Id.* at 640.

²³⁷ See 403 U.S. 740, 743-34 n.3 (where Mr. Justice Marshall, in his concurring opinion in *New York Times*, lists many of these statutes).

²³⁸ 343 U.S. at 640.

²³⁹ 343 U.S. at 640-641.

²⁴⁰ *Id.* at 641.

a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther."²⁴¹ Then he proceeded to an examination of the claim that the President has "nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations" and the "plea . . . for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law."²⁴² In his refutation of the claim of inherent powers, and in his earlier examination of the powers of the President as "Commander in Chief," Justice Jackson articulated arguments of a type that are lacking, not only in *New York Times*, but in most judicial opinions. His arguments were of the type that withdraw from the abstract preoccupations of the law and draw their strength instead from that imperfect world in which we live and in which ultimately all values, including our rules of law, must be tested. He addressed himself not to statutes and precedents, not to express constitutional provisions and implied constitutional doctrines, but rather to the considerations that justify and necessitate the Constitutional dogmas which he defended.

I cannot resist quoting Justice Jackson at some length despite (or because) of the fact that he was not greatly concerned with narrow issues involved in *Youngstown* and perhaps in *New York Times*. He was concerned with the "great" issues which permeate both cases. Much of what he wrote in *Youngstown* has a hortatory quality, and what he said is as meaningful today as it was twenty years ago. It is tragic that there was no voice like Justice Jackson's among the fragmented chorus that spoke in *New York Times*. In both cases there were underlying political and constitutional issues that were too great to be decided solely by manipulating legal rules. It was to these issues that he spoke.

In *New York Times* Mr. Justice Douglas said:

The power to wage war is 'the power to wage war successfully.'
But the war power stems from a declaration of war. The Constitution by Article I, §8, gives Congress, not the President, power '[t]o declare war.' Nowhere are presidential wars authorized. We

²⁴¹ 343 U.S. at 646. Mr. Justice Jackson continued: "These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Id.* These words support not only the decision of the Court in *Youngstown*, but also Mr. Justice Marshall's concurring opinion in *New York Times*.

²⁴² 343 U.S. at 646.

need not decide therefore what leveling effect the war power of Congress might have.²⁴³

Compare this exercise in question-begging with the following passage from Justice Jackson's opinion in *Youngstown*:

[T]his loose appellation [of Commander in Chief] is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

That seems to be the logic of an argument tendered at our bar — that the President having, on his own responsibility, sent American troops abroad derives from that act affirmative power to seize the means of producing a supply of steel for them. . . . I cannot foresee all that it might entail if the Court should endorse this argument. Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown,²⁴⁴ can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.²⁴⁵

Or compare this passage:

The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.²⁴⁶

But the best of Justice Jackson's opinion is too long to quote and quite without parallel in *New York Times*. It begins:

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something that the forefathers omitted. They knew what emergencies were, knew the

²⁴³ 403 U.S. at 722 (citations omitted).

²⁴⁴ There is a glorious irony when one reads this sentence under the inspiration of the case of the Pentagon Papers.

²⁴⁵ 343 U.S. 641-642 (footnote omitted). Mr. Justice Jackson went on to say: "I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discontinue argument based on it." *Id.* at 643.

²⁴⁶ *Id.* at 646. In neither of the quoted passages does Justice Jackson cite a statute or a case.

pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.²⁴⁷

Then he went on to discuss the fate of recent governments under constitutions which permitted emergency powers to the Executive, particularly the fate of Germany under the Weimar Constitution which ultimately allowed Hitler to become, quite constitutionally, a dictator.²⁴⁸ With this he contrasted the practical workings of our government of "balanced" powers.²⁴⁹ And in conclusion he said:

The essence of our free Government is "leave to live by no man's leave, underneath the law" — to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.²⁵⁰

Again, even though I may be wrong in my understanding of what was said and done in *New York Times*, and even if the holding in that case is not governed by *Youngstown*, still the opinions of Justice Frankfurter and Justice Jackson in the latter case supply an understanding of what was at stake in *New York Times* — an understanding which was not expressed in any of the rushed opinions filed in that case.

The opinions of Justices Burton and Clark in *Youngstown* need not detain us long. Justice Burton limited his opinion²⁵¹ in a manner that reduces its value as precedent, confining it strictly to the facts before him.

Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situa-

²⁴⁷ *Id.* at 649-50.

²⁴⁸ *Id.* at 650-52.

²⁴⁹ *Id.* at 653-655.

²⁵⁰ *Id.* at 654-55. See *id.* at 655 n.27, where Justice Jackson added: "We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: 'Then I am to be *under* the law — which it is treason to affirm.' Chief Justice Coke replied to his King: 'Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'" . . ."

²⁵¹ 343 U.S. at 655.

tion is not comparable to that of an imminent invasion or threatened attack.²⁵²

If Justices Jackson and Frankfurter tried to meet the "greatness" of the steel seizure case on its own terms, Mr. Justice Burton attempted to exorcize it with a dry incantation in lawyers' prose.

Mr. Justice Clark also filed an opinion²⁵³ concurring only in the result in *Youngstown*, which carefully avoided saying very much:

The limits of presidential power are obscure. . . . I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.²⁵⁴

He found simply that Congress had established procedures to cover the crisis which invoked the seizure in *Youngstown*, and that the President had failed to follow them. His opinion, with minor changes, could have been filed in *New York Times*, though it would entail the finding that Congress had adopted criminal proceedings as the procedures to cover the crisis brought on by the publication of the Pentagon Papers.

The dissent of Chief Justice Vinson,²⁵⁵ with which Justices Reed and Minton joined in *Youngstown*, need not detain us long, if only because it has no parallel in *New York Times*. The Chief Justice's argument consisted primarily of a history of the Korean War,²⁵⁶ a history of the events heading to the seizure of the steel mills,²⁵⁷ and a history of "executive leadership."²⁵⁸ Out of this historical hotch-potch he drew the conclusion, *ex necessitate*, that the President had the authority to seize the mills (one is tempted to say "the dark, infernal mills").

The dissent is, however, in one way relevant to *New York Times*. Written in the middle of a major crisis, its argument that the President's action was necessary and therefore authorized, must have seemed very persuasive. In retrospect, knowing that the nation survived the steel strike with little discomfort and no danger, we may view that argument as almost silly. Similarly, the Pentagon Papers

²⁵² *Id.* at 659.

²⁵³ *Id.* at 660.

²⁵⁴ *Id.* at 361-62.

²⁵⁵ 343 U.S. at 667.

²⁵⁶ *Id.* at 668-72.

²⁵⁷ *Id.* at 672-79.

²⁵⁸ *Id.* at 683-700.

have now been published and the Republic still stands.²⁵⁹ Perhaps we have yet to pay the price for their publication, but that seems doubtful.

The importance of *New York Times* does not lie in the contents of the Pentagon Papers, but in the fact that the Executive tried to stop their publication and was blocked by the courts. The importance of *Youngstown* lay, not in the production of the steel mills, but in the fact that the Executive tried to seize them and was blocked by the courts. Whether *New York Times* pivots on the first amendment or the separation of powers doctrine, at least this one parallel exists between the two cases. That and the fact that the nation in the end had to pay little or nothing for the Court's refusal to surrender the values of the Constitution to the siren song of necessity.²⁶⁰

VIII

Before I can close this overlong analysis of what I happen to have read in (or into) *New York Times*, I must answer one obvious objection to my belief that *New York Times* can and should be read as nothing more, or less, than a reaffirmance of *Youngstown*. I have already mentioned that there is one difference between *Youngstown* and *New York Times*. In *Youngstown* the victims of the Executive's action sought an injunction against the executive branch in the person of Secretary of Commerce Sawyer. In *New York Times* the executive branch in the name of the United States sought an injunction against the newspapers.

At first glance this may not seem much of a problem. Normally the outcome of a lawsuit does not depend on which party happens to be plaintiff.²⁶¹ But there are a few cases which suggest

²⁵⁹ Perhaps the wisest remark engendered by the whole affair of the Pentagon Papers was one made by Professor Bickle before Judge Gurfein in the district court: "The Government's position in this court, your Honor, was that grave danger to the national security would occur if another installment of a story that the Times had were published. Another installment of that story has been published. The republic stands and it stood the first three days." 1 HISTORY at 465.

²⁶⁰ In *New York Times Co. v. United States*, 403 U.S. 713 (1971), even the dissenters did not succumb to the siren's song, they just wanted to listen to her a while longer. See the opinion of the Chief Justice, *id.* at 748, the opinion of Mr. Justice Harlan, *id.* at 752, and the opinion of Mr. Justice Blackmun, *id.* at 759.

²⁶¹ Of course this is not always true. An equitable defense will not always support a cause of action in equity as an amusing exchange during argument before the Supreme Court makes clear:

Chief Justice Burger:

"Mr. Glenden [counsel for the Washington Post], I recall an ancient doctrine of equity about people who come into equity with certain burdens on them. Doesn't it strike you as rather extraordinary that in a case which largely

that the federal courts may have inherent power under their general equity jurisdiction to enter injunctions at the request of the Executive. Justice Marshall recognized this challenge: "The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest [citing *In re Debs*]." ²⁶² And he answered it squarely:

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect 'national security' it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct.²⁶³

In support of this argument Justice Marshall cited *Youngstown!* But once *In re Debs* is brought to mind, one might well think that it is more relevant to *New York Times* than *Youngstown* is. And this might lead one on to believe that *New York Times* was wrongly decided.

In *Debs* the Supreme Court, in a habeas corpus proceeding, upheld the contempt conviction of Eugene Debs and other labor leaders for violating an injunction, issued without any express statutory authority, restraining the defendants from obstructing "the interstate transportation of persons and property, as well as the mails . . ." ²⁶⁴ Justice Harlan seemed to feel that there was a conflict between *Youngstown* and *Debs*.²⁶⁵ And, at first glance, *Debs* does seem to recognize the Court's inherent authority to issue an injunction in the national interest.

centers on protection of sources the newspapers are refusing to reveal documents on the grounds that they must refuse in order to protect their sources?

[A.] Your Honor, I don't understand that that is the issue here.

Chief Justice Burger:

I don't know about the issue. It is in and there are certain standards about this case. This is an equity proceeding, people coming into equity with clean hands, which is one of them, and prepared to do equity.

[A.] We did not come into equity. The government came into equity.

Chief Justice Burger:

You were brought in.

[A.] We were brought in kicking and screaming, I guess.

403 U.S. at 740.

²⁶² 403 U.S. at 741 (citing *In re Debs*, 158 U.S. 564, 584, (1895)).

²⁶³ *Id.* at 742.

²⁶⁴ 158 U.S. at 577.

²⁶⁵ See the first question in Justice Harlan's list of problems which should have been faced. 403 U.S. at 753-55.

There are, however, several answers to any argument based on *In re Debs*. In *New York Times* only Justices Marshall and Harlan mentioned *Debs* and no one suggested that it was controlling. In *Youngstown*, *Debs* was mentioned only by Justice Clark²⁶⁶ and by Chief Justice Vinson in dissent.²⁶⁷ Again it was not treated as controlling. Perhaps the simplest way around the problem *Debs* presents would be merely to point out that it troubled neither Court.

However the clearest proof that *Debs* in no way contradicts *Youngstown* is the fact that in *Debs* the Court expressly relied on the fact that:

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control.²⁶⁸

The Court then cited many cases where the obstruction of a public highway was abated by public authorities and concluded: "Indeed, the obstruction of a highway is a public nuisance, . . . and a public nuisance has always been held subject to abatement at the instance of the government."²⁶⁹

The Court in *Debs* expressly found that the government could have abated the public nuisance, and could have ended the strike by "force on the part of the executive authorities."²⁷⁰ The Court then said:

Granted that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result.²⁷¹

Thus *Debs* first concluded that the Executive was authorized by the mass of legislation relating to interstate commerce, and by the commerce clause of the Constitution, to end the strike by force. And on the basis of that authority it upheld the injunction and the

²⁶⁶ 343 U.S. at 661.

²⁶⁷ *Id.* at 688, 691, 702.

²⁶⁸ 158 U.S. 586.

²⁶⁹ *Id.* at 587 (citations omitted).

²⁷⁰ *Id.* at 582.

²⁷¹ *Id.*

convictions of contempt. To apply *Debs* to *New York Times*, one would first have to find that the Executive could have imposed a prior restraint on the newspapers by force, and it is that which *Youngstown* says the Executive cannot do.

One cannot very well try to apply the *Debs* rationale in *New York Times* and label the newspapers, or their offending articles, "public nuisances," in view of the statement in *Near v. Minnesota*²⁷² that: "[c]haracterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."²⁷³ "Public nuisance" is a fairly well defined concept which clearly includes blocking highways,²⁷⁴ but cannot include publications or, at least, cannot authorize prior restraints against them. The latter point is, in effect, the meaning of Blackstone's statements about the freedom of the press mentioned earlier in this article.²⁷⁵ One should remember that Blackstone was writing about the law which our courts inherited, and not about the first amendment in our Constitution.

I suppose that it could be argued that the grant of the "judicial power" to the federal courts²⁷⁶ which extends "to all Cases, in Law and Equity, arising under this Constitution [and] to Controversies to which the United States shall be a Party . . ." ²⁷⁷ was a grant not only of jurisdiction but of some sort of common law equity power. However, none of the Justices in *New York Times* considered this proposition and it was not argued by the Solicitor General. In any case, the argument has clearly been rejected by the Court, among other places, in Mr. Justice Brandeis' opinion in *Erie R. R. Co. v. Tompkins*.²⁷⁸

Of course, there are cases in which the Supreme Court has exercised its general equity jurisdiction to create a remedy in the United

²⁷² 283 U.S. 697 (1931).

²⁷³ *Id.* at 720.

²⁷⁴ Fairly well defined for the purposes of this paper, actually it is one of the most confused concepts known to the law. See W. PROSSER, *LAW OF TORTS* 571-73 (4th ed. 1971). "A public . . . nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure." *Id.* at 573 (footnotes omitted). See also *Id.* at 583-91.

²⁷⁵ See Note 57 *supra* & accompanying text.

²⁷⁶ U.S. CONST. art. III, § 1.

²⁷⁷ U.S. CONST. art III, § 2.

²⁷⁸ 304 U.S. 64 (1938). "There is no federal general common law." *Id.* at 78. This proposition was based on constitutional grounds, *Id.* at 77-79, although Mr. Justice Brandeis was the compiler and great exponent of rules for avoiding constitutional decisions. See notes 6 & 133 *supra* & accompanying text.

States, or in a private person, when it is found that a statute or the Constitution has created a right for which the Court must create a remedy. *Debs* is such a case, as is *Wyandotte Transportation Co. v. United States*,²⁷⁹ which the Solicitor General cited for the proposition that "the United States may sue to protect its interests."²⁸⁰ But *Debs* found that the interest, the "right" that was being protected, had been created by the commerce clause²⁸¹ and the many statutes relating to interstate commerce. And *Wyandotte* (which also was a common type of public nuisance case involving boats sunk in navigable waters) found that same interest and protected right in Section 15 of the Rivers and Harbors Appropriations Act of 1899.²⁸² In fact the *Wyandotte* Court, *contra* to *Youngstown* and *New York Times*, specifically found that Congress had not intended by the rather peculiar draftsmanship of the Rivers and Harbors Act to exclude injunctive relief as possible remedies for violations of that Act.²⁸³ *Debs* and *Wyandotte* found an implied right to an injunction in the statutes that were before them. The majorities in *Youngstown* and *New York Times*, on the other hand, could find no statutory authority for an injunction. This basic difference in the posture of the two types of cases reconciles them. Thus it seems clear that, even though the executive branch was polite enough to seek an injunction rather than to call out the troops, the question before the Court in *New York Times* was whether the Executive, not the courts, had the right and authority to restrain the newspapers.

But even if one believes that the courts have some inherent

²⁷⁹ 389 U.S. 191 (1967).

²⁸⁰ *Id.* at 201. See also 2 HISTORY 1172.

²⁸¹ U.S. CONST. art. 1, § 8. Unlike other grants of legislative power in the Constitution, the Commerce Clause has been treated since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), as creating substantive rights (since it limits the powers of the states to regulate interstate commerce, it creates corresponding rights in those who are exempted from the regulation), even before any legislation is passed under its authority.

²⁸² 33 U.S.C. § 409 (1964). See also 389 U.S. at 194-97.

²⁸³ 389 U.S. at 200-01. It is interesting to note that Mr. Justice Harlan filed a short concurring opinion in *Wyandotte*, in which he stated:

I have not been unmindful of the view stated by me in dictum in my dissenting opinion in *United States v. Republic Steel Corp.* . . . to the effect that the courts are precluded from supplying relief not expressly found in the Rivers and Harbors Act. Insofar as that dictum might be taken to encompass the present, where, contrary to my view in *Republic Steel*, I do believe that the relief afforded by this Court is fairly to be implied from the statute, candor would compel me to say that the dictum was ill-founded. *Id.* at 211 (emphasis added).

If Mr. Justice Harlan had been given the time to write the opinion which he felt his position in *New York Times* required, it would be interesting to see how he reconciled his apparent willingness to grant an injunction to the government in *New York Times* with his insistence upon statutory authority in *Wyandotte*.

authority which the Executive could invoke, there are good reasons why the Court would not use that authority in a case like *New York Times*. One is, of course, the fact that the Court could avoid the serious constitutional question under the first amendment by denying the injunction.²⁸⁴ Another is the often cited doctrine that equity will not enjoin a crime.²⁸⁵ Moreover, if one assumes that the courts had the inherent authority to grant an injunction in *New York Times*, the best reason why they should not have granted it was formulated by Mr. Justice Frankfurter in *Youngstown*:

'Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interest, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.²⁸⁶

CONCLUSION

Understandably enough, when the Court announced its decision in *New York Times*, there was some confusion as to who had won what. The publisher of the *Times* reacted with "complete joy and delight" and his lawyer, Professor Bickel of Yale, claimed that the ruling put the press in "a stronger position." On the other hand, Solicitor General Griswold, formerly of Harvard, was heard to say: "Maybe the newspapers will show a little more restraint in the future."²⁸⁷

Professor Bickel, though he passed the one test for an advocate and won his case,²⁸⁸ has been lambasted for conceding away too much of the press's immunity under the first amendment,²⁸⁹ and the

²⁸⁴ Cf. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (D.C. Cir. 1967) where the Court of Appeals (per Judge, now Chief Justice, Burger) refused to enjoin the dissemination by Drew Pearson of information purloined from the plaintiff on the ground that "[a]ny claim which seeks prior restraint on publication bears a heavy burden." *Id.* at 490.

²⁸⁵ This point was made by Justice Marshall in *New York Times*. See 403 U.S. at 744.

²⁸⁶ 343 U.S. at 609-10.

²⁸⁷ *N.Y. Times*, July 1, 1971, at 1, col. 2; reprinted in 2 HISTORY at 1291.

²⁸⁸ If Professor Bickel had not raised the separation of powers argument in his brief, 2 HISTORY 1126, and argument, *id.* at 1226-27, and instead had relied solely on the prohibitions of the first amendment, my guess is that the majority of the Court (which is not and never was, fortunately or unfortunately, composed of first amendment absolutists) would have remanded the case to the trial courts to determine an appropriate first amendment standard for injunctions in such cases and to apply that standard to the facts before them.

²⁸⁹ See, e.g., Wulf, *What's Fit to Print: Tragedy of 'The Times'*, CIVIL LIBERTIES, Sept. 1971, at 1.

Court has been criticized for not saying clearly that the first amendment forbids any prior restraints on publication. But the holding in *New York Times* clearly does not reduce the scope of the first amendment, and the newspapers did win their case even if they did not get a binding advisory opinion as to their first amendment rights.²⁰⁰

The issue in *New York Times* was, however, even more important than the freedom of the press. Our constitutional liberties, even those preserved by the first amendment, rest not only on the words of the Constitution, but also upon the men who interpret those words. Our Government is divided into three branches and, though we tend to forget the fact, each branch has the duty, even though the Supreme Court often has the last word, to make sure that no unconstitutional act is taken by the Government. The great vice in *New York Times*, as it was in *Youngstown*, was that the Congress had not passed on the difficult constitutional questions involved in the actions which the Executive desired to take — either that or the Congress had decided, under its constitutional powers, that the action should not be taken.

Though there is little law in *New York Times*, it reaffirms a principle that is greater than any of our liberties because it is a necessary condition for their existence; the principle that, contrary to the cynical quotation with which I have prefaced this article, all of our masters, be they king, president, bureaucrat or judge, are, as we ourselves are: *non sub homine, sed sub Deo et Lege*.²⁰¹

²⁰⁰ I admit that the advice on the criminal law which the newspapers received from Justices Stewart and White, and the homilies that they received from the Chief Justice and Justice Blackmun may have been rather hard for their editors to stomach.

²⁰¹ See note 250 *supra*.