

Near v. Minnesota

283 U.S. 697

Supreme Court of the United States

June 1, 1931

NEAR v. MINNESOTA EX REL. OLSON, COUNTY ATTORNEY. No. 91. Argued January 30, 1931. Decided June 1, 1931. APPEAL FROM THE SUPREME COURT OF MINNESOTA. *Mr. Weymouth Kirkland*, with whom *Messrs. Thomas E. Latimer, Howard Ellis, and Edward C. Caldwell* were on the brief, for appellant. *Messrs. James E. Markham*, Assistant Attorney General of Minnesota, and *Arthur L. Markve*, Assistant County Attorney of Hennepin County, with whom *Messrs. Henry N. Benson, Attorney General, John F. Bonner, Assistant Attorney General, Ed. J. Goff, County Attorney, and William C. Larson, Assistant County Attorney*, were on the brief, for appellee.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925[^] provides for the abatement, as a public nuisance, of a “malicious, scandalous and defamatory newspaper, magazine or other periodical.” Section one of the Act is as follows:

“Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away.

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

“Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

“In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action.”

Section two provides that whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or upon like failure to

refusal of the latter, any citizen of the county, may maintain an action in the district court of the county in the name of the State to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank 'J. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank 'J. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations

against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September 24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, "any future editions of said The Saturday Press" and "any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457; 219 N.W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested, without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The District Court made findings of fact, which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles," concerning the individuals named. The court further found that the defendants through these publications "did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper," and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The judgment perpetually enjoined the defendants "from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law," and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40; 228 N. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment and that the lower court had not been asked to modify it. The court added that it saw no reason “for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,” that the allegations of the complaint had been found to be true, and, though this was an equitable action, defendants had not indicated a desire “to conduct their business in the usual and legitimate manner.”

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U.S. 652, 666; *Whitney v. California*, 274 U.S. 357, 362, 373; *Fiske v. Kansas*, 274 U.S. 380, 382; *Stromberg v. California*, ante, p. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases*, 116 U.S. 307, 331; *Northern Pacific Ry. Co. v. North Dakota*, 236 U.S. 585, 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*, 157 U.S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros. v. Banton*, 273 U.S. 418; *Ribnik v. McBride*, 277 U.S. 350; *Adkins v. Children's Hospital*, 261 U.S. 525, 560, 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*, supra; *Stromberg v. California*, supra. Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee

contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions it is enough to say that in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson v. Mayor*, 92 U.S. 259, 268; *Bailey v. Alabama*, 219 U.S. 219, 244; *United States v. Reynolds*, 235 U.S. 133, 148, 149; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 362; *Mountain Timber Co. v. Washington*, 243 U.S. 219, 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends. It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the

protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare.”

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in “efficient repression or suppression of the evils of scandal.” Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be “malicious, scandalous and defamatory,” and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court’s ruling. In the present instance the judgment

restrained the defendants from “publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.” The law gives no definition except that covered by the words “scandalous and defamatory,” and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants “from operating a newspaper in harmony with the public welfare to which all must yield,” and said that the defendants had not indicated “any desire to conduct their business in the usual and legitimate manner,” the manifest inference is that, at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be “usual and legitimate” and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press.⁴ The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.” 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, “the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.” Report on the Virginia Resolutions, Madison’s Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U.S. 454, 462: “In the first place, the main purpose of such constitutional provisions is ‘to prevent all such *previous restraints* upon

publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ubi sup.*; 4 Bl. Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "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." 2 Cooley, *Const. Lim.*, 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado*, *supra*; *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 419.[^] In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.[^] On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U.S.

418, 439.” *Schenck v. United States*, *supra*. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts: “Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse.” In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the “five great rights” it was said: “The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subject, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.” Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:

“In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had ‘Sedition Acts,’ forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or

pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the

multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado*, *supra*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct."[^] There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 89 N.J. Eq. 387, 388; 105 Atl. 72: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this

consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

Confessedly, the Federal Constitution prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech or press against state action. *Barron v. Baltimore*, 7 Pet. 243, 250. *Fox v. Ohio*, 5 How. 410, 434. *Smith v. Maryland*, 18 How. 71, 76. *Withers v. Buckley*, 20 How. 84, 89-91. Up to that time the right was safeguarded solely by the constitutions and laws of the States and, it may be added, they operated adequately to protect it. This Court was not called on until 1925 to decide whether the "liberty" protected by the Fourteenth Amendment includes the right of free speech and press. That question has been finally answered in the affirmative. Cf. *Patterson v. Colorado*, 205 U.S. 454, 462. *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 538, 543. See *Gitlow v. New York*, 268 U.S. 652. *Fiske v. Kansas*, 274 U.S. 380. *Stromberg v. California*, ante, p. 359.

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as to compel a finding that they are false. The articles themselves show malice. The following articles appear in the last edition published, dated November 19, 1927:

"FACTS NOT THEORIES.

"'I am a bosom friend of Mr. Olson,' snorted a gentleman of Yiddish blood, 'and I want to protest against your article,' and blah, blah, blah, ad infinitum, and nauseam.

“I am not taking orders from men of Barnett faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis.

“It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have ‘pulled’ practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett’s ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett’s place of ‘business’ that the ‘13 dollar Jew’ found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that for five hundred dollars they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand – had bought and paid for him.

“It is Jewish men and women – pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today.

“Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW.

“Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a ‘bosom friend’ of Mr. Olson.

“I find in the mail at least twice per week, letters from gentlemen of Jewish faith who advise me against ‘launching an attack on the Jewish people.’ These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:

“When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting business men; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity, that I refuse to back up a single step from that ‘issue’ – if they choose to make it so.

“If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call ‘Jews’ they can easily do so BY THEMSELVES CLEANING HOUSE.

“I’m not out to cleanse Israel of the filth that clings to Israel’s skirts. I’m out to ‘hew to the line, let the chips fly where they may.’

"I simply state a fact when I say that ninety per cent. of the crimes committed against society in this city are committed by Jew gangsters.

"It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:

"It is Jew, Jew, Jew, as long as one cares to comb over the records.

"I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

"Either Mr. Guilford or myself stand ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews want to battle.

"Both of us have some mighty loyal friends among the Jewish people but not one of them comes whining to ask that we 'lay off' criticism of Jewish gangsters and none of them who comes carping to us of their 'bosom friendship' for any public official now under our journalistic guns."

"GIL'S [Guilford's] CHATTERBOX.

"I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead and won a bed for myself in St. Barnabas Hospital for six weeks. . . .

"Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis' law enforcement league or the K.K.K. hammers the eagle's beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem.

"All of which has nothing to do with the present whereabouts of Big Mose Barnett. Methinks he headed the local delegation to the new Palestine-for-Jews-only. He went ahead of the boys so he could do a little fixing with the Yiddish chief of police and get his twenty-five per cent. of the gambling rake-off. Boys will be boys and 'ganefs' will be ganefs."

"GRAND JURIES AND DITTO.

“There are grand juries, and there are grand juries. The last one was a real grand jury. It acted. The present one is like the scion who is labelled ‘Junior.’ That means not so good. There are a few mighty good folks on it – there are some who smell bad. One petty peanut politician whose graft was almost pitiful in its size when he was a public official, has already shot his mouth off in several places. He is establishing his alibi in advance for what he intends to keep from taking place.

“But George, we won’t bother you. [Meaning a grand juror.] We are aware that the gambling syndicate was waiting for your body to convene before the big crap game opened again. The Yids had your dimensions, apparently, and we always go by the judgment of a dog in appraising people.

“We will call for a special grand jury and a special prosecutor within a short time, as soon as half of the staff can navigate to advantage, and then we’ll show you what a real grand jury can do. Up to the present we have been merely tapping on the window. Very soon we shall start smashing glass.”

The defendant here has to standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to the inquiry whether, having regard to the points properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law. This Court should not reverse the judgment below upon the ground that in some other case the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment. *Castillo v. McConnico*, 168 U.S. 674, 680. *Williams v. Mississippi*, 170 U.S. 213, 225. *Yazoo & Miss. R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544-546.

This record requires the Court to consider the statute as applied to the business of publishing articles that are in fact malicious, scandalous and defamatory.

The statute provides that any person who “shall be engaged in the business of regularly or customarily producing, publishing or circulating” a newspaper, magazine or other periodical that is (a) “obscene, lewd and lascivious” or (b) “malicious, scandalous and defamatory” is guilty of a nuisance and may be enjoined as provided in the Act. It will be observed that the qualifying words are used conjunctively. In actions brought under (b) “there shall be available the defense that the truth was published with good motives and for justifiable ends.”

The complaint charges that defendants were engaged in the business of regularly and customarily publishing “malicious, scandalous and defamatory newspapers” known as the Saturday Press, and nine editions dated respectively on each Saturday commencing September 25 and ending November 19, 1927, were made a part of the complaint. These are all that were published.

On appeal from the order of the district court overruling defendants’ demurrer to the complaint the state supreme court said (174 Minn. 457, 461; 219 N.W. 770):

“The constituent elements of the declared nuisance are the customary and regular dissemination by means of a newspaper which finds its way into families, reaching the young as well as the mature, of a selection of scandalous and defamatory articles treated in such a way as to excite attention and interest so as to command circulation. . . . The statute is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends. . . . In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. . . . It was never the intention of the constitution to afford protection to a publication devoted to scandal and defamation. . . . Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous and defamatory printed matter.”

The case was remanded to the district court.

Near’s answer made no allegations to excuse or justify the business or the articles complained of. It formally denied that the publications were malicious, scandalous or defamatory, admitted that they were made as alleged, and attacked the statute as unconstitutional. At the trial the plaintiff introduced evidence unquestionably sufficient to support the complaint. The defendant offered none. The court found the facts as alleged in the complaint and specifically that each edition “was chiefly devoted to malicious, scandalous and defamatory articles” and that the last edition was chiefly devoted to malicious, scandalous and defamatory articles concerning Leach (mayor of Minneapolis), Davis (representative of the law enforcement league of citizens), Brunskill (chief of police), Olson (county attorney), the Jewish race and members of the grand jury then serving in that court; that defendants in and through the several publications “did thereby engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper.”

Defendant Near again appealed to the supreme court. In its opinion (179 Minn. 40; 228 N.W. 326) the court said: “No claim is advanced that the method and character of the operation of the newspaper in question was not a nuisance if the statute is constitutional. It was regularly and customarily devoted largely to malicious, scandalous and defamatory matter. . . . The record presents the same questions, upon which we have already passed.”

Defendant concedes that the editions of the newspaper complained of are “defamatory *per se*.” And he says: “It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. . . . The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance*, though he is subject to responsibility therefor *afterwards*.” The record, when the substance of the articles is regarded, requires

that concession here. And this Court is required to pass on the validity of the state law on that basis.

No question was raised below and there is none here concerning the relevancy or weight of evidence, burden of proof, justification or other matters of defense, the scope of the judgment or proceedings to enforce it or the character of the publications that may be made notwithstanding the injunction.

There is no basis for the suggestion that defendants may not interpose any defense or introduce any evidence that would be open to them in a libel case, or that malice may not be negatived by showing that the publication was made in good faith in belief of its truth, or that at the time and under the circumstances it was justified as a fair comment on public affairs or upon the conduct of public officers in respect of their duties as such. See Mason's Minnesota Statutes, §§ 10112, 10113.

The scope of the judgment is not reviewable here. The opinion of the state supreme court shows that it was not reviewable there, because defendants' assignments of error in that court did not go to the form of the judgment, and because the lower court had not been asked to modify the judgment.

The Act was passed in the exertion of the State's power of police, and this court is by well established rule required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79. *Gitlow v. New York*, *supra*, 668-669. *Corporation Commission v. Lowe*, 281 U.S. 431, 438. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251, 257-258.

The publications themselves disclose the need and propriety of the legislation. They show:

In 1913 one Guilford, originally a defendant in this suit, commenced the publication of a scandal sheet called the Twin City Reporter; in 1916 Near joined him in the enterprise, later bought him out and engaged the services of one Bevans. In 1919 Bevans acquired Near's interest, and has since, alone or with others, continued the publication. Defendants admit that they published some reprehensible articles in the Twin City Reporter, deny that they personally used it for blackmailing purposes, admit that by reason of their connection with the paper their reputation did become tainted and state that Bevans, while so associated with Near, did use the paper for blackmailing purposes. And Near says it was for that reason he sold his interest to Bevans.

In a number of the editions defendants charge that, ever since Near sold his interest to Bevans in 1919, the Twin City Reporter has been used for blackmail, to dominate public gambling and other criminal activities and as well to exert a kind of control over public officers and the government of the city.

The articles in question also state that, when defendants announced their intention to publish the Saturday Press, they were threatened, and that soon after the first publication Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence and was not unprepared to repel it. There is much more of like significance.

The long criminal career of the Twin City Reporter – if it is in fact as described by defendants – and the arming and shooting arising out of the

publication of the Saturday Press, serve to illustrate the kind of conditions, in respect of the business of publishing malicious, scandalous and defamatory periodicals, by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.

In his work on the Constitution (5th ed.) Justice Story, expounding the First Amendment which declares: "Congress shall make no law abridging the freedom of speech or of the press," said (§ 1880):

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow-citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil, and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassination and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports to more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, *that every man shall be at liberty to publish what is true, with good motives and for justifiable ends*. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form." (Italicizing added.)

The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the *previous restraints* referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152): "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution [of 1688], is to subject all freedom of sentiment to the prejudices of

one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”⁵⁴

Story gives the history alluded to by Blackstone (§ 1882):

“The art of printing soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king’s proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books; and during the Commonwealth (such is human frailty and the love of power even in republics!) they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree of 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force; but it was so strongly resisted by Parliament that it expired in 1694, and has never since been revived.”

It is plain that Blackstone taught that under the common law liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published. And, as above shown, Story defined freedom of the press guaranteed by the First Amendment to mean that “every man shall be at liberty to publish what is true, with good motives and for justifiable ends.” His statement concerned the definite declaration of the First Amendment. It is not suggested that the freedom of press included in the liberty protected by the Fourteenth Amendment, which was adopted after Story’s definition, is greater than that protected against congressional action. And see 2 Cooley’s Constitutional Limitations, 8th ed., p. 886. 2 Kent’s Commentaries (14th ed.) Lect. XXIV, p. 17.

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to do what has been duly adjudged to constitute a nuisance. The controlling words are “All persons guilty of such nuisance may be enjoined, as hereinafter provided. . . . Whenever any such nuisance is committed . . . an action in the name of the State” may be brought “to perpetually enjoin the person or persons committing, conducting or maintaining

any such nuisance, *from further committing, conducting or maintaining any such nuisance*. . . . The court may make its order and judgment permanently enjoining . . . defendants found guilty . . . from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. . . .” There is nothing in the statute[^] purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous restraint* upon the press by licensors as referred to by Blackstone and described in the history of the times to which he alludes.

The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined it is hard to understand why the one resulting from a regular business of malicious defamation may not.

It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.

The judgment should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

The Pentagon Papers Case

403 U.S. 713

Supreme Court of the United States

June 30, 1971

NEW YORK TIMES CO. v. UNITED STATES. No. 1873. Argued June 26, 1971. Decided June 30, 1971. Together with No. 1885, *United States v. Washington Post Co. et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. *Alexander M. Bickel* argued the cause for petitioner in No. 1873. With him on the brief were *William E. Hegarty* and *Lawrence J. McKay*. *Solicitor General Griswold* argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Mardian* and *Daniel M. Friedman*. *William R. Glendon* argued the cause for respondents in No. 1885. With him on the brief were *Roger A. Clark*, *Anthony F. Essaye*, *Leo P. Larkin, Jr.*, and *Stanley Godofsky*. Briefs of *amici curiae* were filed by *Bob Eckhardt* and *Thomas I. Emerson* for Twenty-Seven Members of Congress; by *Norman Dorsen*, *Melvin L. Wulf*, *Burt Neuborne*, *Bruce J. Ennis*, *Osmond K. Fraenkel*, and *Marvin M. Karpatkin* for the American Civil Liberties Union; and by *Victor Rabinowitz* for the National Emergency Civil Liberties Committee. The dissents of MR. JUSTICE HARLAN (with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN joined), MR. JUSTICE BLACKMUN, and MR. CHIEF JUSTICE BURGER are omitted.

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.” *Post*, pp. 942, 943.

“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 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.

So ordered.

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

I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first

presented to this Court. I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

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

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.³ They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; *and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.*"⁴ (Emphasis added.) The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's

³ In introducing the Bill of Rights in the House of Representatives, Madison said: "[B]ut I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights" 1 Annals of Cong. 433. Congressman Goodhue added: "[I]t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.*, at 426.

⁴ The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 1 Annals of Cong. 434.

freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press" Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that is true. . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief."

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt

to rely on any act of Congress. Instead it 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.⁵ 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 and destroy the fundamental liberty and security of the very people the Government hopes to make “secure.” No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word “security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes – great man and great Chief Justice that he was – when the Court held a man could not be punished for attending a meeting run by Communists.

“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”⁶

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

While I join the opinion of the Court I believe it necessary to express my views more fully.

⁵ Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: “If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.” 1 Annals of Cong. 439.

⁶ *De Jonge v. Oregon*, 299 U. S. 353, 365.

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

There is, moreover, no statute barring the publication by the press of the material which the *Times* and the *Post* seek to use. Title 18 U. S. C. § 793 (e) provides that “[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . 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 . . . the same to any person not entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

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

There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight “publish” is specifically mentioned: § 794 (b) applies to “Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces].”

Section 797 applies to whoever “reproduces, *publishes*, sells, or gives away” photographs of defense installations.

Section 798 relating to cryptography applies to whoever: “communicates, furnishes, transmits, or otherwise makes available . . . *or publishes*” the described material. (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: “During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy.” 55 Cong. Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2167.

Judge Gurfein’s holding in the *Times* case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U. S. C. § 793 states in § 1 (b) that:

“Nothing in this Act 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 and no regulation shall be promulgated hereunder having that effect.” 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its “inherent power.”

The power to wage war is “the power to wage war successfully.” See *Hirabayashi v. United States*, 320 U. S. 81, 93. But the war power stems from a declaration of war. The Constitution by Art. 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.

These disclosures~ may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. As stated by Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697, 719-720:

“While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.”

As we stated only the other day in *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419, “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.”

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. Minnesota, 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, *The System of Freedom of Expression*, c. V (1970); Z. Chafee, *Free Speech in the United States*, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be “uninhibited, robust, and wide-open” debate. *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota*.

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.⁷ Our cases, it is true, have indicated that

⁷ The hearing in the *Post* case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p. m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by

there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U. S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U. S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota*, *supra*, at 713. Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. 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. And therefore, every 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. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

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

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 nuclear missile age. For better or for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of

the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting *en banc*, on June 22. Each court rendered its decision on the following afternoon.

the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.~ If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the 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. But be that as it may, it is clear to me that it 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.

This is not to say that Congress and the courts have no role to play. 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 very 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. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them 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. I join the judgments of the Court.

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

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that 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.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

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. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, 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. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for

suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.~ Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to “filter out the news to the people through some man.” 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper “should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing.” *Id.*, at 2009.~

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797~ makes it a crime to publish certain photographs or drawings of military installations. Section 798,~ also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.~ If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e)~ makes it a criminal act for any unauthorized possessor of a document “relating to the national defense” either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no penalty for

the unauthorized possessor unless demand for the documents was made.~ “The dangers surrounding the unauthorized possession of such items are selfevident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand.” S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin v. United States*, 312 U. S. 19, 28 (1941), the words “national defense” as used in a predecessor of § 793 were held by a unanimous Court to have “a well understood connotation” – a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness” – and to be “sufficiently definite to apprise the public of prohibited activities” and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in *Gorin*, information “connected with the national defense” is obviously not limited to that threatening “grave and irreparable” injury to the United States.^[10]

It is thus clear 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. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585-586 (1952); see also *id.*, at 593-628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It 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 it 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. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, “the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a ‘grave and immediate danger to the security of the United States.’” “ Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President’s power to classify information as “secret” or “top secret.” Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, e. g., 18 U. S. C. § 798; 50 U. S. C. § 783.~ Nor is there any issue here regarding the President’s power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

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. See *In re Debs*, 158 U. S. 564, 584 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103 (1948); *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943); *United States v. Curtiss-Wright Corp.*, 299 U. S. 304 (1936).~ And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

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. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). 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. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship.~ In that chapter, Congress has provided penalties ranging from a \$10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See *Bennett v. Laman*, 277 N. C. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, *Equity* 935-954 (5th ed. 1967); 1 C. Joyce, *Injunctions* §§ 58-60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U. S. C. § 793 (e) that whoever “having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . 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 . . . 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 . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.” Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U. S. C. § 793 (e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793 (e). He found that the words “communicates, delivers, transmits . . .” did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein’s view of the statute is not, however, the only plausible construction that could be given. See my Brother WHITE’S concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues – to overrule Congress. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by

proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

“During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same.” 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that “[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons.” In response to this problem the Commission proposed that “Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified ‘secret’ or ‘top secret,’ knowing, or having reasonable grounds to believe, such information to have been so classified.” Report of Commission on Government Security 619-620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447-10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

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. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.