



Serving the Governed, Not the Governors

Floyd Abrams, counsel for the *New York Times* in *United States v. New York Times* (1971), with Kathleen Sullivan and a bust of Learned Hand, just prior to a program on the 100th anniversary of *Masses Publishing v. Patten*, co-sponsored by NYSBA's Committee on Media Law.

President's Message

BY SHARON STERN GERSTMAN

I finally got around to seeing “The Post,” the Oscar-nominated movie about Katherine Graham’s decision to publish the Pentagon Papers in the *Washington Post*. Her decision, played against the background of her business decisions to have a public offering of stock and to turn the *Post* into a national newspaper, appropriately demonstrates the tension between the responsibility of the press and making a profit. It also does an excellent job of handling the delicacy of friendships between high-ranking leaders and publishers and editors.

It is interesting that Daniel Ellsberg delivered the 4,000 Xeroxed pages to the *New York Times*, and then when the *Times* was under a preliminary injunction sought by President Nixon, to the *Washington Post* and several other newspapers. As well as can be discerned, at no time did Daniel Ellsberg seek publication from television, even though most Americans got their news from television in 1971.

Similarly, Edward Snowden leaked the NSA material he hacked to journalists at the *Guardian* and the *Washington Post*, and one documentary filmmaker, not to electronic media outlets, though both the *Guardian* and the *Post* have online personas.

While print newspapers are literally fighting for their lives, it is significant to note that these two famous “leakers” trusted journalists at print newspapers to sift through thousands of pages and items to protect the privacy and safety of American citizens. While there have been scandals at print media (e.g., Jayson Blair at the *Times*) as well as on network television (e.g., Brian Williams’ fabricated story, Dan Rather’s rush to air a story), television and other electronic sources of news seem less reliable, and more easily manipulated. The leakers may also have been

influenced by the tendency of electronic media to whittle down material to sound bites, or even 288 characters.

Of particular interest, with respect to the Pentagon Papers, was that the challenge was led by President Nixon. The Papers implicated the Kennedy and Johnson administrations, and it is reported that Nixon’s first inclination was to let them be published so that the blame for the Vietnam War would be focused on them. However, President Nixon understood that the release of classified information, regardless of who it helped or hurt, was a danger to his or any other presidency, and he put the full force of the federal government behind the prevention of its publication. He recognized that foreign powers would not entrust the United States with their intelligence if there was a significant harm in the public airing of such classified information. This importance was apparently dismissed by President Trump in his permission to release the “Nunes Memorandum,” which included confidential information provided by British intelligence.

The 6-3 decision of the U.S. Supreme Court, which heard and decided the case within a few days, upheld the refusal of the D.C. District and Circuit Courts to issue any injunction, and reversed the decision of the Second Circuit, which had issued the injunction to the *New York Times*. The per curiam decision reflected the lack of time to develop an opinion that would satisfy the individual justices’ view on why prior restraint based upon national security was improper in this case. The three justices dissenting (Chief Justice Burger, Justice Blackmun and Justice Harlan) were of the view that there was insufficient time for the government to gauge the effect on national security, and that the court should not act so hastily. Justice Marshall’s opinion to allow publication was based on the overbreadth of “national security,” as a limit on

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First Amendment rights. Justices Brennan and Douglas based their opinions on the failure of the government to meet one of the three recognized exceptions to the First Amendment. Justice Hugo, a First Amendment absolutist, recounted the history and purpose of the First Amendment. His opinion, quoted in the film, makes the case for the necessity of a free press:

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.

Justices Stewart and White recognized the power of the Executive to protect national security. Justice White determined that the government did not fit a congressionally authorized prior restraint. Justice Stewart did a masterful job of weighing two great principles:

The need of secrecy and confidentiality in the administration of foreign affairs and the need for a check and balance on the power of the executive. In deciding in favor of publication, he stated:

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

As technology changes how we receive information and the print media, which were so vital in informing us of the truth of the Vietnam War, become a rarity, we must hope that the resulting form will continue to be “alert, aware and free” to provide an “informed and critical public opinion,” or the values of our democratic government will be unprotected.

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