PRESENTATION OF THE *NEW YORK TIMES COMPANY V. UNITED STATES* ORAL ARGUMENT

Editor's Note

In 1971, the United States Supreme Court refused to permit the Government's attempt to suppress publication of the famous "Pentagon Papers." In the wake of domestic turmoil surrounding the Vietnam War, the American public demanded answers to unexplained governmental actions. Upholding the intent of the First Amendment, Justice Douglas wrote "[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."

Nearly thirty years later, the United States Government is again involved in international conflicts, thereby sparking debate over political motivation, inappropriate intervention, and the truthful intent of the Executive Branch's employment of the military. The following is a reproduction of the oral arguments presented to the Supreme Court in *New York Times Company v. United States*. This transcript is presented solely for its scholarly and historical value. These arguments should offer insight as to the importance of the First Amendment's role in keeping the American public informed and restraining the Government's unfettered power in foreign policy.

The Seton Hall Constitutional Law Journal would like to thank the United States Supreme Court Library for aiding in the procurement of the transcript.

NEW YORK TIMES COMPANY, *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.* and UNITED STATES OF AMERICA, *Petitioner,* v THE WASHINGTON POST COMPANY, *et al., Respondents.*	No. 1873 No. 1885

Washington, D.C.
Saturday, June 26, 1971

The above—entitles matter came for oral argument at 11:00 o'clock a.m.

BEFORE:

WARREN E. BURGER, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*
HARRY A. BLACKMUN, *Associate Justice*

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., *Solicitor General of the United States, Department of Justice, Washington, D.C. 20530*

ALEXANDER M. BICKEL, ESQ., *80 Pine Street, New York, New York 10005, on behalf of Petitioner New York Times.*

WILLIAM R. GLENDON, ESQ., *1730 K Street, N.W., Washington, D.C., on behalf of Respondent Washington Post.*

PROCEEDINGS:

MR. CHIEF JUSTICE BURGER: We will hear arguments in Nos. 1873 and 1885, *The New York Times* against *The Washington Post Company.*

Mr. Solicitor General, the Government's motion to conduct part of the oral arguments involving security matters *in camera* as has been done in the Distinct Courts in New York and in Washington and in the Court of Appeals in the Second Circuit and the District of Columbia, is denied by the Court.

Mr. Justice Harlan, Mr. Justice Blackmun, and I would grant a limited *in camera* argument, as has been done in all the hearing in these cases until now. Under the order granting the writ yesterday counsel may, if they wish, submit arguments in writing under seal in lieu of the *in camera* oral argument.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ., ON BEHALF OF THE PETITIONER

MR. GRISWOLD: Mr. Chief Justice, may I say in respect to the announcement just made that all three parties have filed a closed brief, as well as the open brief. And, in addition, I have filed—just within minutes—two statements, one prepared by the State Department and one prepared by the Department of Defense, giving more detail about some of the items which are discussed in my closed brief. And I believe that those will all be before the Court.

THE COURT: Are you suggesting that these matters last filed are security matters? Or that they merely supplement and explain—

MR. GRISWOLD: The only ones that are—

THE COURT: things that are security matters?

MR. GRISWOLD: —security matters that I have filed are all marked "Top Secret."

THE COURT: I see. Thank you very much. I just wanted to be sure as to these last documents.

MR. GRISWOLD: The items filed by The Post and The Times, I do not believe are marked "Top Secret," but they are marked "*In Camera*" in the caption of the items. I repeat, all three have also filed regular briefs, except not printed. Only the American Civil Liberties Union seemed to have the resources to produce the printed brief for this occasion.

I am told that the law students of today are indignantly opposed to final examinations because they say that no lawyer ever has to work under such pressure that he has to get things out in three or four hours. I can only say that I think it's perhaps fortunate that Mr. Glendon and Mr. Bickel and I went to law school under an earlier dispensation.

It is important, I think, to get this case in perspective. The case, of course, raises important and difficult problems about the constitutional right of free speech and of the free press, and we've heard much about that from the press in the last two weeks. But it also raises important questions of the equally fundamental and important right of the Government to function.

Great emphasis has been put on the First Amendment and rightly so. But there is also involved here a fundamental question of separation of powers in the sense of the power and authority which the Constitution allocates to the President, as the Chief Executive and as Commander-in-Chief of the Army and Navy. And, involved in that, there is also the question of the integrity of the institution of the Presidency: whether that institution—one of the three great powers under the separation of powers—can function effectively.

The problem lies on a wide spectrum and, like all questions of constitutional law, it involves the resolution of competing principles. In the first place, it seems to me that it will be helpful to make some preliminary observations. If we start out with the assumption that never—under any circumstances—can the press be enjoined from publication, of course we come out with the conclusion that there can be no injunction here. But, I suggest, not as necessarily conclusive in this case, that there is no such constitutional rule, and never has been such a constitutional rule.

We have, for example, the copyright laws. And my son was in Toronto earlier this week, and he sent me copies of the Globe and Mail of Toronto, ten series

of story the Pentagon's trying to kill, each one headed "Copyright New York Times Service." I have no objection to that, but these stories which have been published have been copyrighted by The New York Times—and, I believe, by The Washington Post—and I have no doubt that—perhaps in other cases because these have already attracted much attention—The New York Times and The Washington Post would seek to enforce their copyright. I suppose it is very likely that, in one form or another, they have obtained royalties because of their copyright on this matter.

But let us also consider other fields of the law. There is a well-known branch of the law that goes under the heading of "Literary Property." In the Court of Appeals I gave the example of a manuscript written by Ernest Hemingway. Let's assume it's while he's still living. It's unpublished, perhaps incomplete and subject to revision. In some way the press gets hold of it. Perhaps it's stolen. Perhaps it's bought from a secretary, through breach of fiduciary responsibility, or perhaps it's found on the sidewalk. And if The New York Times sought to print that, I have no doubt that Mr. Hemingway—or, now his heirs, next of kin—could obtain from the courts an injunction against the press for printing it. Only this morning I see in the paper that a New York publisher is bringing a suit against Newsday—a New York newspaper—because Newsday has violated what the New York publisher considers to be its copyright in the forthcoming *Memoirs of President Johnson.*

And then finally—or not "finally,"—but, next we have a whole series of law, a traditional branch of equity, involving participation in a breach of trust. And there cannot be the slightest doubt, it seems to me, that no matter what the motive—no matter what the justification—that both The New York Times and The Washington Post are here consciously, intentionally, participating in a breach of trust. They know that this material is not theirs. They do not own it. I am not talking about the pieces of paper which they may have acquired. I'm talking about the literary property—the concatenation of words which is protected by the law of literary property. And again I say, I don't regard this as controlling or conclusive in this case. I'm simply trying to advance the proposition that there are many factors and many facets here, and that there is no constitutional rule that there can never be prior restraint on the press, or on free speech.

Now in our main brief in this case we have—which, I may say, was largely prepared by my associate, Mr. Friedman, last evening and last night—we have cited one case which comes very close to being an injunction by this Court against publications in the press. And that is, the *Associated Press* case in, I believe, 215 United States. The Associated Press is a cooperative of newspapers. And there, the Associated Press sought and obtained an injunction against the

dissemination of news of its competitor, United—or International Press, in that case, not United—by its competitor International. And that was granted on copyright and related grounds.

But we have other areas in the law where this Court has approved, against specific First Amendment claims, injunctions in advance forbidding speech. One area of this is the labor law field, where as recently as 395 U.S., in *Sinclair* against *National Labor Relations Board*, the Court unanimously affirmed the judgment of the Court of Appeals enforcing the Board's order, which included a provision requiring Sinclair to cease and desist from threatening the employees with the possible closing of the plant, or the transfer of the weaving production with the attendant loss of employment, or with any other economic reprisals if they were to select the above-named, or any other labor organization.

In 393 U.S., a case involving the Federal Trade Commission, *The Federal Trade Commission* against the—against *Texaco, Inc.*, involving orders with respect to TBA—Tires, Batteries, and Accessories. The Court approved the order of the Federal Trade Commission which restrained Texaco from using, or attempting to use, any device such as but not limited to dealer discussions. They were ordered not to speak to dealers about this subject, and the First Amendment was specifically referred to in the brief for the respondent, and was not mentioned in this Court's opinion.

THE COURT: Mr. Solicitor General, of course there's *The Times Film* case as well, and there are no doubt others. I didn't understand, however, that your brother counsel on the other side really questioned any of this. I thought, that at least for purposes of this case, they conceded that an injunction would be not violative of the First Amendment. Or, to put it this way, that despite the First Amendment, and injunction would be permissible in this case if the disclosure of this material would in fact pose a grave and immediate danger to the security of the United States. That is, that for purposes of this case they've conceded that. But they have said that, in fact, the disclosure of this material would not pose any such grave and immediate danger.

MR. GRISWOLD: Mr. Justice, if they—

THE COURT: At least that is my understanding of the issue.

MR. GRISWOLD: —have conceded it, I am glad to proceed on that basis.

THE COURT: No. I'm not conceding it for them, but that had been my un-

derstanding of what the issue is. They'll make it clear, of course, to us.

MR. GRISWOLD: I may say that their briefs were served in me within the last 15 minutes, which are—or the last hour—which was entirely in accordance with this Court's order, but I have not seen their briefs. I do not know what is in their briefs.

THE COURT: In other words, I had thought in my analysis—and I haven't had the benefit of much more time than you've had—that this, basically, came down to a fact case; that the issues here are factual issues.

MR. GRISWOLD: And that, Mr. Justice, is extremely difficult to discuss—

THE COURT: —to argue here, in this open courtroom, I understand.

MR. GRISWOLD: —in open court, and we have endeavored to—

THE COURT: I was going to say—qualifying that—except as to the scope of judicial review of the Executive determination, which I thought you presented.

THE COURT: And as to what the standard is, Mr. Solicitor General.

MR. GRISWOLD: Mr. Justice White, it was the latter point for which I was seeking to get this, because our contention, particularly with respect to *The Washington Post* case, is that the wrong standard has been used.

Now with respect to the actual factual situations, the only thing that I can do is point to the closed brief with I have filed, in which there are ten specific items referred to. Now when I say "specific items," I must be—I must make myself clear. Some of those are collective. There are—I have brought here, perhaps you can't see them—the 47 volumes that are supposed to be the background of this. They are included in the record of the Second Circuit Court of Appeals which has been filed with the Court.

Let me say, when we move onto this next item, that it was inevitable that I delegate the question of preparing the supplemental statement which was covered by this Court's order yesterday—this Court, as did the Second Circuit, referred to the materials specified in the special appendix in the Second Circuit, and to such additional items might be included on a supplemental statement filed at 5:00 p.m. yesterday—I had nothing to do with preparing that supplemental

statement. I had able and conscientious associates who did work on it. However, when I had a chance to see it last evening, particularly after the State Department called me at 8:00 or 9:00 o'clock at night and said they had four additional items—and I said that the Court's deadline was 5:00 p.m., and that I could not add any additional items—I then examined it.

Here is a copy, and I find it much too broad. In particular it has, at the end, a statement, "In view of the uncertainties as to the precise documents in defendants' custody"—and I say that has been an extreme difficulty in this matter. We don't know now—never have known—what the papers have.

THE COURT: I thought The New York Times was required to, and did, give you a list of what they had.

MR. GRISWOLD: They prepared an inventory. But from it is not possible to tell whether they are the same papers that we have. Part of the problem here is that a great mass of this material is not included in the 47 volumes. It is background material, earlier drafts, of some papers which are materially different from what is included in the 47 volumes. And, as a result, we cannot tell from the inventory what is included. For example, one of the items already published which has caused a certain amount of controversy, publicly and internationally, is a telegram to the Canadian Government. That is not in the 47 volumes, and is not referred to in the 47 volumes. Where they got it, how they got it, what it is, I do not know.

But, in this supplemental memorandum, it is stated under my signature that, "The petitioner specifies, in addition to the foregoing, any information relating to the following:"—and then there are listed 13 items. And, frankly, I regard that as much too broad. And therefore I am saying here that we rely, with respect to this factual question, on only the items specified in the supplemental appendix filed in the Second Circuit, and on such additional items as are covered in my closed brief in this case.

THE COURT: Do those—

MR. GRISWOLD: Those "additional items"—

THE COURT: Mr. Solicitor General, does your closed brief cover all of the items on the special appendix, and any that you think should be added to it?

MR. GRISWOLD: No, Mr. Justice. It does not refer to all of them. What I

tried to do in my closed brief was I spent all yesterday afternoon in constant, successive conversation, with the individuals from the State Department, the Defense Department, the National Security Agency. And I said, "Look, tell me what are the worst. Tell me what are the things that really make trouble." And they told me—and I made longhand notes of what they told me—and from that I prepared the closed brief.

THE COURT: Well, Mr. Solicitor General, if we disagreed with you on those that you have covered, the remainder of the items needn't be looked at?

MR. GRISWOLD: Mr. Justice, I think that the odds are strong that that is an accurate statement. I must say that I have not examined every one of the remainder of the items.

THE COURT: Are you making an argument that even if those ten that you've covered don't move is very far, that nevertheless the cumulative impact of all the others might tip the scale?

MR. GLENDON: I think that's the proper test, Your Honor, yes. That's the test we tried the case under, and I think the implications of the words may require some development, and I'm sure there will be arguments as to exactly what those words mean, but that's the test we tried to—we tried the case on.

THE COURT: And then would you repeat the word, so that I'll have them in mind?

MR. GLENDON: "So prejudice." "So prejudice the defense interests of the United States, or result in such irreparable injury to the United States, as would justify restraining of publication."

THE COURT: Then, that would not cover the simple death say, of 100 or 200 young men?

MR. GLENDON: Well, Your Honor, that's a hard case put, obviously, I'm trying—I think we all have to measure this case in the light of what we have before us, and what we know we have before us.

THE COURT: Well, we have a lot of things under seal that I, for one, haven't seen. I've seen some of it, but I haven't seen all of it.

MR. GLENDON: I'm going to address myself to those, Your Honor. And

I'm going to pint out, as best I can within the limits here, and as did other courts—and the Government has not yet brought anything like that case to Your Honors; nothing like it—what we have heard, Your Honor, is much more in the nature of conjecture and surmise.

THE COURT: Can anyone "know" in any certain sense the consequences of disclosure of sources of information? For example, the upsetting of negotiations if that were, hypothetically, true in Paris, or possible negotiations that we don't know anything about for the release of war prisoners—that sort of thing?

How does a Government meet the burden of proof in the sense that Judge Gesell laid it down? That doesn't bring any battleships to the outer limits of New York Harbor, or set off any missiles, but would you say that it's not a very grave matter?

MR. GLENDON: Your Honor, I think if we are to place possibilities or conjecture against suspension or abridgement of the First Amendment, the answer is obvious. The fact, the possibility, the conjecture of the hypothesis, that diplomatic negotiations would be made more difficult or embarrassing, does not justify—and this is what we have in this case and I think that's all we have—does not justify suspending the First Amendment. Yet, this was what's happened here. Conjecture can be piled upon surmise. Judge Gurfein used the word up in New York, and I'm sure used it respectfully but he said when there is a security breach, people get "the jitters." And I think maybe the Government ahs a case of the jitters here, but that, I submit, does not warrant the stopping of the press on this matter, in the absence of a showing.

I would like to turn to that, because this matter—as I don't have to say—does not come undeveloped before Your Honors. Two fine District Court Judges, two find Courts of Appeals have considered this, and in each I think it's fair to say, even in the New York case, the Government did not meet its burden. And, so it says to us, but one more time—just one more time—and this is where I was a moment ago, when I said that Judge Robb and Judge Robinson agreed to give them a chance.

Now we had a hearing in the District of Columbia, and I'd like to, if I may, comment upon what the Government said—aid it said it twice—about that hearing. Because representation and I know it's a sincere representation by General Griswold—but, on the representation, that "if we're given some more time, maybe we can find something." But here's what the Government says in its brief, and it said it again yesterday. They said, in New York, the Government was not able to present to the Court all of the evidence relating to the impact of

the disclosure of this material upon foreign relations and national defense what it was able to present to the District Court in *The Washington Post* case.

We had, and the Government was accorded, the fullest hearing that it wanted. We started at the unusual hour of 8:00 o'clock in the morning. The Government's case proceeded throughout the luncheon hour. We cross-examined as we felt was necessary. The court had plenty of time to consider the matter. He delivered, I think you would agree, whether you agree with his result, a finely reasoned opinion. So, there was no rush and no pressure. Then the matter went up to the Court of Appeals, and there the Court of Appeals had a session of some three hours the next day. And I might say too, and I think this is perhaps important, there's been no restriction on the Government's latitude, because they did have these *in camera* hearings which, frankly, were very difficult from out pint of view to deal with. But they did have them, and they had an *in camera* hearing in the Court of Appeals.

So, to say now that we need more time, I think, does not measure up to the other side of the equation which you're being asked to do. And that is, to restrain two newspapers, while others ore publishing, from giving their readers the new. And it is. Of course, with their readers that we feel—and I think properly—that the rights are involved, too, their right to know. And I'm talking about currency and immediacy. There is now involved in this country—the country's engaged in an intense national debate. Things are happening this week on that score. This lawsuit—these lawsuits, undoubtedly, precipitated the Executive to turn over these documents to the Congress.

Now, Senator Fulbright, as I'm sure you're all aware, has been trying for some two years, I understand, to get these documents and I think classification is important here in your consideration of these cases because these documents were classified "Top Secret." Now they were classified "Top Secret" because some unknown individual—who was not presented to the Court; whose subjective judgment couldn't be explored, despite the District Judge asking that he be brought in, and perhaps there was a good reason, we don't know—decided that they were "Top Secret." They were all "Top Secret" because one was "Top[Secret." There had been no review—no review—of these documents, except for one individual who said that he had been reviewing them for some two years for sensitivity, and the sensitivity arose form Senator Fulbright's frequent request to get these documents so the Congress could make the laws, and perhaps the public could be informed.

THE COURT: Does the record show how long The Post has had these documents in its possession?

MR. GLENDON: How long it has had them in its possession? It does not show, Your Honor.

THE COURT: Does it show, if you know, how long The New York Times had the documents in their possession, before The Post got them?

MR. GLENDON: The record in our case does not show that, Your Honor. But I have read, and perhaps these gentlemen—Mr. Bickel, can answer better than I. I understood they had them in their possession for some months.

THE COURT: I got the information, somewhere, three to four months.

MR. GLENDON: A month or two, yes. It is not in the record, but that's my best answer to that.

Now, after this proceeding was brought, and again I think it is part of the significance of this proceeding, and during the course of it, although starting out at the point that these documents were "Top Secret" and none could be disclosed, the Government has offered to review them. And, perhaps some of them, they say, will be declassified. Which, I suppose, is some sort of an admission that the original classification, and the original attitude towards them, was wrong.

THE COURT: Of course, it could be that something classified in 1965 properly, would be no longer subject to classification—or even 1969 or 1970—isn't that true?

MR. GLENDON: That is correct, Your Honor. And furthermore, some of these documents were classified, and go back of course to 1945. The documents are that ancient. The document itself is entitled "The History." It's called a history, and from what I've seen of it, that's what it is.

Now, the court in our case had before it, and Your Honors will see the evidence of which I'm aware, there apparently has been—there has been, today, additional references made to the documents, but it's a fact and I think it's a significant fact, that the Judge there asked the extravagant claims were made, and I say this respectfully, but this has been a case of broad claims, and narrow proof. Substantial claims have been made, and if you accept them, they would be worried, but we're talking here bout proof, and—

THE COURT: Well, was there an order at any time to produce all the docu-

ments in the possession of either of the newspapers, for examination?

MR. GLENDON: The Government—there was not, Your Honor.

THE COURT: Was there a request for such an order?

MR. GLENDON: The Government made such a request, and because of the concern that the newspaper has, as to protection of its source, the documents we were advised would indicate the source.

THE COURT: Do you mean the court—

MR. GLENDON: The documents that we had would indicate the source.

THE COURT: Who denied that request? The District Judge?

MR. GLENDON: Yes, and here's how he resolved the matter—

THE COURT: He let that override the Federal Rules of Civil Procedure, on discovery?

THE COURT: Mr. Solicitor General, one detail in that connection. Is there anything in the record, or any intimation anywhere, that the possession by the other newspapers is attributable to The New York Times, or to The Washington Post?

MR. GRISWOLD: No, Mr. Justice. We don't know what they have or how they got it. Nor do we—and that is equally true with The New York Times and The Washington Post.

THE COURT: Have either of these newspapers denied it?

MR. GRISWOLD:I don't know. I don't believe that has been an issue in The Washington Post case. And was there anything like that in the—

MR. SEYMORE: No, there was not.

MR. GRISWOLD: Mr. Seymour advises me there was nothing like that in the *New York Times* case.

THE COURT: Mr. Solicitor General, in terms of equity on an injunction, however, to the extent anything has been published and has already been revealed, the United States is not seeking an injunction for—against the further publication of that particular item?

MR. GRISWOLD: No, Mr. Justice. I think that, at that point, we would agree that it becomes—it becomes futile. It is a useless—

THE COURT: Well would that mean, Mr. Solicitor General, that if the Government were to prevail here, and that at some time some document within the scope of the injunction that the Government got, was published in some other newspaper, that then either The Times or The Post could run in and get, to that extent, the injunction modified?

MR. GRISWOLD: Well I would think so, Mr. Justice.

THE COURT: But that's the only thing they could do? Is that it?

MR. GRISWOLD: I would think so, yes. I may say that it was stated in both lower courts—in New York by Mr. Seymour and here by me—that the President last January directed a complete review of classification of all materials. The several Secretaries of State, Defense, and the Chairman of the Joint Chiefs of Staff, authorized us then to say that they are prepared to appoint immediately a joint task force to conduct an exhaustive declassification study of the 47 volumes; that they will conduct the study on an expedited basis; and will complete it within any reasonable time that the Court may choose. They suggest a minimum of 45 days. And, upon completion of the study, the Government will withdraw its objection to the publication of any documents which it has found no longer relevant to the national security.

THE COURT: Mr. Solicitor General, is the United States pressing separately your request, or your cause of action, for the return of the materials, wholly aside from an injunction against publication?

MR. GRISWOLD: It is not involved in this case in this Court at this time.

THE COURT: It is not?

MR. GRISWOLD: No.

THE COURT: No, but is the Government pressing? Is the Government try-

ing to get these materials back from the Times, or The Post?

MR. GRISWOLD: Well I can certainly say the Government would like to get them back.

THE COURT: That wasn't my question. My question is, is the Government attempting to get them back?

MR. GRISWOLD: The Government is not, at this time, seeking an order for their return.

THE COURT: Well, I thought that was part of your lawsuit? Part of your request for relief in—

MR. GRISWOLD: I believe it was. But we did not appeal with respect to that, nor is it covered in our petition for certiorari. Is that not right?

MR. SEYMOUR: That's correct.

THE COURT: Mr. Solicitor General, on this 45-day study, does that depend on how we rule in this case, or is the Government going to do it anyhow?

MR. GRISWOLD: Oh, Mr. Justice, I will urge the Government to do it anyhow.

THE COURT: Well are they?

MR. GRISWOLD: Of course—of course, if this Court does not allow any injunction it will be futile, because the material will be published, and there won't be any particular—it will be entirely post mortem to say, "Oh, well, it was all right anyhow."

THE COURT: Well, suppose the Court decides the other way? Will the study be made?

MR. GRISWOLD: The study—the study is going to be made—uh—I will—I will do my best to see that the study is made. And I believe I have the full support of the entire Administration, with respect to that.

THE COURT: Well, wouldn't it be important without this case?

MR. GRISWOLD: I'm sorry, Mr. Justice?

THE COURT: Wouldn't this be important, without this case? That the Court—that the Government has the right to find out what's available to be published?

MR. GRISWOLD: Yes, Mr. Justice, except that it's a—

THE COURT: Is that not part of their job?

MR. GRISWOLD: —it's a massive operation. There isn't the slightest doubt in my mind that there has been—has been, as long as I can remember, which is quite a while—massive over classification of material. And there has been much too slow review to provide declassification. And the Government is tin the process of taking steps to try to find a way to work that problem out.

THE COURT: But, if this Court would, by chance, rule against you, then the Government would surely do it, wouldn't it?

MR. GRISWOLD: If the Court should rule against us here, then it seems to me that it becomes moot with respect to these items. They can be published. And, whether we classify them, or declassify them, is an academic question.

THE COURT: Well, the Court will have then done the job for you. Is that not so?

MR. GRISWOLD: Yes, the—

THE COURT: If we declassify them—

MR. GRISWOLD: —the Court will, in effect, have declassified the materials.

THE COURT: Well, I don't' understand that, Mr. Solicitor General. I had thought the standard that you were operating under here, in terms of prior restraint, wasn't necessarily equivalent to the standard that might be operative in a criminal proceeding. And whether or not a newspaper may be enjoined from publishing classified information, doesn't necessarily determine some criminal proceeding.

MR. GRISWOLD: Well you're certainly right, Mr. Justice, if I may say so in terms of an examination question. I find it exceedingly difficult to think that any jury would convict, or that an appellate court would affirm a conviction of a criminal offense, for the publication of materials which this Court had said could be published; simply as a practical matter, whether it was a crime or not, "Why, these are the same materials that were involved in *The New York Times* case ; all we did was publish them," and I find it difficult to think that such a case should be prosecuted, or could effectively be prosecuted.

THE COURT: But, the standard, concededly, is not the same.

MR. GRISWOLD: It's not the same issue. And I repeat, I think it would technically be a crime if the materials remained classified.

Now, I would like to get on—

THE COURT: Mr. Solicitor General, just before you do, this brings me back to my original question of a few moments ago as to what the real basic issue in this case is. As I understand it, you're not claiming that you're entitled to an injunction simply, or solely, because this is "classified" material?

MR. GRISWOLD: No.

THE COURT: Nor do I understand it that you're claiming—

MR. GRISWOLD: Nor because we own it.

THE COURT: Just to let me finish, please?

—that you're entitled to an injunction because it was "stolen" from you, that it's your property. You're claiming, rather and basically that whether or not it's classified, or however it's classified, and however it was acquired by these newspapers, the disclosure—the public disclosure—of this material would pose a grave and immediate danger to the security of the United States of America, period.

MR. GRISWOLD: Yes, Mr. Justice.

THE COURT: Now, isn't that correct?

MR. GRISWOLD: Yes, Mr. Justice.

THE COURT: So, declassification *vel non* doesn't have much to do with the basic issue, does it?

MR. GRISWOLD: I agree with you, except that it's part of the setting. If this material had never been classified, I think we would have a considerably greater difficulty in coming in and saying—well, for example, suppose the material had been included in a public speech made by the President of the united States.

THE COURT: Well, then it would be in the public domain already. That's something else.

MR. GRISWOLD: All right. But we come in and say, "You can't print this because it will gravely affect the security of the United States." I think we would plainly be out.

THE COURT: And have a very shakey case on the facts. And that's—

MR. GRISWOLD: Or, suppose it had been—

[Laughter]

THE COURT: And this, therefore, is a fact case, isn't it? Until we can decide this case, we have to look at the facts, the evidence, in this case that's been submitted under seal.

MR. GRISWOLD: In large part, yes, Mr. Justice. But I'm still trying to get some help from the background, and the setting which, I repeat, it is not irrelevant that the concatenation of words here is the property of the United States; that this has been classified under Executive orders approved by Congress; and that it obviously has been improperly acquired.

THE COURT: Well, that may have a great deal to do, as to whether, on the question of whether or not somebody is guilty of a criminal offense, but I submit it has very little to do with the basic First Amendment issue before this Court in this case.

MR. GRISWOLD: All right, Mr. Justice. I repeat, unless we can show that

this will have "grave" and—I think I would like to amend it. I know the Court's order has said "immediate," but I think it really ought to be "irreparable" harm to the security of the United States.

THE COURT: I would think, with all due respect to my colleague, that the question of the scope of judicial review of an Executive classification.

MR. GRISWOLD: Well I think, Mr. Justice, that is true. But I also think the heart of our case is that the publication of materials specified in my closed brief will, as I have tried to argue there, materially affect the security of the United States. It will affect lives. It will affect the process of termination of war, or recovering prisoners of war, is something which has an "immediate" effect on the security of the United States. I say that it has such an effect on the security of the United States that it ought to be the basis of an injunction in this case.

Now, I would like to get to the question of the standard which was used by the District Judge in this case. I think it is relevant to point out that on page 267 of the closed—of the transcript in the District Court before Judge Gesell, he said: "The Court further finds that publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process"—not in the past—"now in process, or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world. This is not so much because of anything in the documents themselves, but rather results from the fact that it will appear to foreign governments that this Government is unable to prevent publication of actual government communications when a leak such as the present one occurs."

Now, thus the Judge rejected as a standard in this matter the whole question of the ability of the Department of State—and that means the President, to whom the foreign relations are conferred by the Constitution—to conduct "delicate negotiations now in process, or contemplated for the future." And I suggest to the Court that it is perfectly obvious that the conduct of delicate negotiations now in process, or contemplated for the future has an impact on the security of the United States.

Now the standard which the judge did apply is one which, with the benefit of 20-20 hind-sight, I would have written differently. Executive Order 10,501 provides the basis for security classification, issued by President Eisenhower in 1953 after a comprehensive study by a commission on these matters.

The definition of "Top Secret" in Section 1(a) of Executive Order 10,501 is:

"Top Secret shall be authorized by appropriate authority only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material that the defense aspect of which is paramount and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation, such as"—now this was not intended to be all-inclusive. It is illustrative—"such as, leading to a definite break in diplomatic relations affecting the defense of the United States; an armed attack against the United States or its allies; a war or the compromise of military or defense plans, or intelligence operations; or scientific or technological developments vital to the national defense."

And, what Judge Gesell has—he had—Judge Gesell has used that as the standard. He made no reference whatever to the succeeding classification which is "Secret," and there's also a classification which is "Confidential." But, Judge Gesell has used, as the basis of his decision—I suggest this was fundamental error; that there is no proof—this is on page 269 of the transcript of the hearing before Judge Gesell: "There is no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans"—and in my closed brief I contend that he was wrong on that—"a compromise of intelligence operations"—and in my closed brief I contend that he was plainly wrong on that—"or a compromise of scientific and technological materials."

And if the standard is that we cannot prevent the publication of improperly acquired material unless we can show in substance and effect—because that is what he really meant—that there will be a break in diplomatic relations, or that there will be an armed attack on the United States, I suggest that the standard which Judge Gesell used is far too narrow.

Now perhaps it lies in between. My own thought would be that in the present parlous state of the world, considering negotiations in the Middle East, considering the SALT talks now going on—and it is, perhaps, not inappropriate to remember that "SALT" is Strategic Arms Limitations Talks—the consequences of which obviously have, in all likelihood, not the prevention of a nuclear attack tomorrow, maybe not next week, but only by success in this kind of negotiations can we have any hope that our children and our children's children and our children's children will have a world to live in.

I suggest that when it is found by the District Court that the publication of the documents, in the large, may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process, or contemplated for the

future, that that should be enough, by itself, to warrant restraint on the publication of the now quite narrowly selected group of materials covered in the special appendix, and dealt with in some detail in my closed brief, and the related papers which have been filed with the Court this morning.

THE COURT: Could I ask you a question before you sit down? I had understood from your papers and the brief you file this morning, that the only specific relief at this stage—at this juncture in the proceeding—you're asking for is that the Court of Appeals' decision in *The Times* case should be affirmed. Namely, that the further hearings before the District Court ordered by the Court of Appeals should go forward to a conclusion. And, as regards *The Washington Post* case, that you are asking only that the proceedings there be conformed to the proceedings in the Court of Appeals in the Second Circuit. And, therefore, the broader questions that you've been talking about are not before the Court at the moment.

MR. GRISWOLD: No, Mr. Justice. I think I can't agree with that.

It is our position that Judge Gesell used the wrong standard, as I have just said. And it is our view that the judgment of the Second Circuit should be affirmed, and the case remanded to Judge Gurfein for further hearing under a proper standard, which I hope this Court will develop and announce, and that the decision of the Court of Appeals be reversed and the case remanded to Judge Gesell for further hearing in the application of the proper standard, which this Court has decided. Because it is our view, as I have endeavored to contend, that in rational terms, in the modern world, the standard that Judge Gesell applied is just too narrow. And, as I have said, that the standard should be "great and irreparable harm to the security of the United States."

In the whole diplomatic area the things don't happen at 8:15 tomorrow morning. It may be weeks, or months. People tell me that already channels of communication on which great hope had been placed have dried up. I haven't the slightest doubt, myself, that the material which has already been published, and the publication of the other materials, affects American lives, and is a thoroughly serious matter. And I think that to say that it can only be enjoined if there will be a war tomorrow morning, when there's a war now going on, is much too narrow.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Bickel?

ORAL ARGUMENT OF ALEXANDER M. BICKEL, ESQ. ON BEHALF OF PETITIONER NEW YORK TIMES

MR. BICKEL: Mr. Chief Justice, may it please the Court:

We began publishing on June 13th. We published on the 14th and the 15th with no move from the Government until the evening of the 14th, despite what is now said to be the "gravest kind of danger," which, one would have supposed, would have been more obvious than it turned out to be.

THE COURT: Well, Mr. Bickel, aren't you going to allow some time for somebody to really see what this means, before they act and have pleadings drawn and get lawyers into the courts?

MR. BICKEL: Mr. Chief Justice, I plan to return briefly to this point. I point out now only that, as was evident to us at the hearings when we cross-examined some of the Government witnesses, that high ranking people in the Government quite evidently read these things on Sunday morning—the following day—and no great alarm sounded. I mean to return to the significance of this point, as I see it, and I mention it now, by the way, only in the process of reciting the chronology.

We were then enjoined, under prior restraint, on the 15th. And we have been under injunction ever since. This is the eleventh day, I guess, under the order of the Court of Appeals for the Second Circuit. We would remain under injunction, presumably, until the 3rd of July, with the distinct possibility of more time added after that if appellate proceedings are required.

Now a word, simply, on what was had before the hearing that was held before Judge Gurfein. It took place on Friday last, I believe. It started first thing in the morning, with open hearings. We went *in camera* as Mr. Seymour said, for something upward of four hours. I don't know the exact time. The record will clearly show that the Judge's sole purpose *in camera*—and his continuously expressed intent—was to provoke from the Government witnesses something specific, to achieve from them the degree of guidance that he felt he needed in order to penetrate this enormous record. It is our judgment, and it was his, that he got very little. Perhaps, almost nothing.

The point, however,, that I wish to leave with you, is that at no time in the course of these hearings did the Government object to their—what is now called, the speed, or "rapidity" of them. At no point was more time asked for. Of course, we all labored as I think is only proper under the knowledge that a great newspaper was being restrained from publishing, and that expedition was desirable, but there is no evidence that I know of that Judge Gurfein "rushed" the proceedings, or would have rushed them if the Government had asked for more time. I think the Government gave Judge Gurfein all it had.

Now, the Government based its complaint against us, framed in very general terms, on a statute; first one section of it, finally Section 793(e) of the statute. We have a substantial portion of our brief that is still devoted to arguing that that statute is inapplicable. Judge Gurfein so held it to be. And I take it that the order of the Court of Appeals of the Second Circuit is at least open to the interpretation that that holding of Judge Gurfein is, if not affirmed, at any rate accepted.

If I may, at this time, take up Justice Stewart's question to the Solicitor General referring to our position, we concede—we have all along in this case conceded—for purposes of the argument, that the prohibition against prior restraint like so much else in the Constitution, is not an absolute. But beyond that, Mr. Justice, our position is a little more complicated that that; nor do we really think that the case, even with the statute out of it, is a simple, or indeed presents a simple question of fact. Rather, our position is two-fold.

First, on principles as we view them with the separation of powers which we believe deny the existence of inherent Presidential authority on which an injunction can be based, first on those. And, secondly, on First amendment principles which are interconnected on both, and which involve the question of a standard before one reaches the facts—a standard on which we differ greatly from the Solicitor General. On both these grounds we believe that the only proper resolution of the case is a dismissal of the complaint.

THE COURT: What was the first ground?

MR. BICKEL: The first ground, which I'm about to enter upon, is a question of the separation of powers, with the statute of this case.

As I conceive it, Mr. Justice, the only basis on which the injunction can issue is a theory which, I take it, the Solicitor General holds of an inherent Presidential power. Now an inherent Presidential power—

THE COURT: Based upon—

MR. BICKEL: —his constitutional—

THE COURT: —the power of the Executive in the area of international relationships, and the area of the defense of the Nation?

MR. BICKEL: I so assume.

THE COURT: Under the Constitution of the United States?

MR. BICKEL: I so assume; the reason for that being that "a court has to find its law somewhere" as Holmes would have said I suppose, that some legislative will must be present from which the Court draws the law that it then applies, and that legislative will has to be the President's, if there is no statute.

Now I don't, for a moment, argue that the President doesn't have full inherent power to establish a system of classification; that he doesn't have the fullest inherent power to administer that system and its procedures within the Executive branch. He has him means of guarding security at the source. In some measure, he's aided by the criminal sanction, but in any event he has full inherent power. And the scope of judicial review, of the exercise of that power will presumably vary with the case in which it comes up. But I'm prepared to concede the decision in the *Epstein* case, for example, which I think is cited in both briefs, that under the Freedom of Information Act the scope of review is limited—limited to examining whether it's arbitrary; nor do I argue that the President doesn't have standing in the sense in which *Baker* and *Carr* distinguishes between standing and justiciability—standing to come into court—which is, I think, the burden of most of the cases that the Government cites.

The question that I do argue is whether there is inherent Presidential power to make substantive law. Not for the internal management of the Government, but outgoing, outlooking, substantive law which can form the basis for a judicially issued injunction imposing a prior restraint on speech. The decisive issue that ties in this point—and our ultimate First Amendment point—is, of course, the exception carved out by Chief Justice Hughes in *Near v. Minnesota*, for that narrow area in which he accepted that a prior restraint on speech might be applied.

This is an exception that is made to a rule more solidly entrenched in the First Amendment than any other aspects of it; a rule that is deeply part of the formative experience out of which the First Amendment came. The rule against prior

restraint, based on the experience that prior restraints fall on speech with a special brutality, and finality, and procedural ease all their own which distinguishes them from other regulations of speech—if a criminal statute "chills" speech, a prior restraint "freezes" it—it's within that well-established doctrine that the exception arises.

Now, as Chief Justice Hughes formulated it, it referred to, or actually said: "We would all assume that a prior restraint might be possible to prevent actual obstruction of the recruiting service"—this is the Chief Justice's language—"or the publication of sailing dates of transports, or the number and location of troops." I suppose that under present law the "recruiting service" part of that exception is problematic, but on the "sailing dates of ships" and the "location of troops," there is a very specific statute. It is 18 U.S.C. 794 which hasn't been cited against us, which is inapplicable, which is why it hasn't been cited against us, because that's not what we report. That isn't in our papers.

Now, that being the case there is no applicable statute under which we are covered, and the question arises, as a matter of inherent Presidential authority. What kind—what kind of feared event would give rise to an independent power on the part of the President? It's the question, in a sense, that was saved in *Hirabayashi v. United States*—the first of the Japanese exclusion cases—and it's a question which, in its own context of course, *Youngstown Sheet and Tube Company v. Sawyer* answered in the negative.

Now, my suggestion would be that whatever—whatever that case—the extremity, that absolute utter extremity in which action for the public's safety is required, whatever that case may be, in which under this Constitution, under its rules of separation of powers, the President has independent, inherent authority to act domestically against citizens—let alone to impose a prior restraint—whatever that case may be, it cannot be this case.

Whatever the case may be, it surely is of a magnitude and of an obviousness that would leap to the eye, and that is why in part, Mr. Chief Justice, I mentioned at the beginning the period of time that has passed. I would suppose, stretching our imagination and trying to envisage that case, that the one characteristic of it, indeed suggested by the examples that Chief Justice Hughes recited—suggested by the phrase that the Second Circuit used, which is probably why the Solicitor General resists the word "immediate"—the single characteristic that we can surely immediately see of such an imagined event, would be that it is obvious that the public safety is in issue; that time is of the essence.

I submit that that cannot be this case. It cannot be that it has taken, that it has

to take the Government which has been reviewing these documents for many months—not just in connection with this case, but in reply to an inquiry made by Senator Fulbright, as the record of our hearings in New York shows—it cannot be that a Government consisting, after all, of more than just the three witnesses, five witnesses we heard in New York or the ones that were heard here, over this length of time has an unfamiliarity with these documents, as substantial as they might be, which is so great that when news of their publication comes up nobody in the Government knows that somewhere in those documents is one which presents a mortal danger to the security of the United States. And I would submit, secondly, that while error is always possible, Judge Gurfein, and the Court of Appeals for the Second Circuit which affirmed him on the record that he had before him, and Judge Gesell in the Court of Appeals here, that all those judges can't have been that wrong.

THE COURT: Well, Professor Bickel—

MR. BICKEL: Yes, sir?

THE COURT: This isn't your case, but reading from Judge Wilke's dissent—

MR. BICKEL: Yes, sir?

THE COURT: "When I say 'harm', I mean the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate as honest brokers between would-be belligerents," I take it you disagree fundamentally with that statement?

MR. BICKEL: Not entirely, Mr. Justice Blackmum. For example, the "death of soldiers." I would disagree that "impairment of diplomatic relations" can be a case for a prior restraint, I would say, even under a statute.

I would not disagree with the "death of soldiers," as in the "troop-ship" or as in the example Chief Justice Hughes gave. The difficulty I would have would be that nothing that any of these judges, including Judge Wilke—because I suppose he's talking about what might yet be shown by the Government—nothing that any of these judges have seen is related by a direct causal chain to the death of soldiers or anything grave of that sort.

I have heard it, and everything I have read—what characterizes every instance in which the Government tries to make its case factually is a chain of cau-

sation whose links are surmise and speculation, all going toward some distant link, itself not of the gravity that I would suggest is—

THE COURT: Well, you know these records better than I do, but then—

MR. BICKEL: We've all been—

THE COURT: —going back to Judge Wilke, he says, "But, on careful detailed study of the affidavits in evidence, I find a number of examples of documents which, if in the possession of *The Post*"—and I repeat, this is The Post case—"and if published, would clearly result in great harm to the Nation." Now I repeat my question, you therefore, disagree fundamentally with what he seems to say?

MR. BICKEL: Well, I beg your pardon, Mr. Justice. I am not as familiar as I should be with *The Washington Post* case. I had thought that Judge Wilke talked about—dissented on the ground that he would like more evidence to come in. If—if he found—if this is a statement about the evidence that he heard, or that was heard before Judge Gesell, then, depending on what the standard is that he has in mind—I would think that that language doesn't quite communicate to me what the standard is, and I doubt that it's the narrower standard that I would contend for—depending on the standard that he has in mind, he's either wrong about his standard, or seven judges disagreed with him. But I'm sorry, I'm not sufficiently familiar with *The Washington Post* case.

THE COURT: Well, Professor, your standard that you are contending for is "grave and immediate," or not? Is that too general for you, or—

MR. BICKEL: The standard that I would contend for—and the difficulties of words are simply enormous. One has to bring—

THE COURT: Surely.

MR. BICKEL: —into one's mind an image of something, some event, and try to describe it—the standard I would contend for would have two points to it.

One would be—and let me also say that I would differentiate between a standard applicable to the President action on his own—the President acting in the case that was saved in *Hirabayashi*, for example—and the prior restraint being imposed pursuant to a well-drawn statute, which defines the standard in the case. I would demand less of the statute than I would demand of the President—but,

the standard in general that I would have in mind, would at one end have a grave event, such as danger to the Nation, some of the things described in the description of the "Top Secret" classification in the Executive Order the Solicitor General read off, which would, I think, fit that end of the standard.

At the other end would be the fact of publication, and I would demand—and this would be my second element—that the chain, the link, between the fact of publication and the feared danger—the feared event—be direct and immediate, and visible.

THE COURT: I take it then, that you could easily concede that there may be documents in these 47 volumes which would satisfy the definition of "Top Secret" in the Executive Order and, nevertheless, not satisfy your standards?

MR. BICKEL: That would be chiefly for the reason that, as notorious, classifications are imposed—

THE COURT: No, my question—let's concede for the moment that there are some documents—

MR. BICKEL: Which are properly?

THE COURT: —that are properly classified "Top Secret." You would say that that does not necessarily mean that your standard is satisfied?

MR. BICKEL: That's correct, Mr. Justice. I would say that—

THE COURT: Well, I think—I haven't read anything in any of your documents, or in any of these cases, where the newspapers suggest for a moment that these is "no document" in these 47 volumes which satisfies properly the definition of "Top Secret."

MR. BICKEL: That there's no document? Well, no, I don't know about that.

THE COURT: Well, you don't deny that do you?

MR. BICKEL: I have no knowledge. I've never been near the documents, Mr. Justice.

THE COURT: Well, I know. But your position must be, then, that even if

there is a document or so, none of them satisfies your standard?

MR. BICKEL: I would say that today; if asked that question on the day we appeared on—the day I appeared before Judge Gurfein on the temporary restraining order, my answer would have been: " I expect not," "I trust the people at The Times," "I'm fairly certain not."

By now, Mr. Justice, after all this time, having read the submissions of the Government—although I was hit with another one this morning; not a separate submission, but an extrication of earlier ones, that I haven't had a chance to glance at yet; this literature, like some scholarly literature, tends to get ahead of us—having read the submissions of the Government, I am flatly persuaded that there's nothing in there. Because if there—nothing that would meet my standard in there for a statute or for independent Executive action—because if there were it surely should have turned up by now.

It cannot be that after—I gather the Solicitor General had the same experience yesterday afternoon that I saw Judge Gurfein having: Please, show me, now which are the three? Which are the five? Which are the ten? Which are the most important of these? All that one ever got, or all that I've ever heard, have been statements of the "feared event," in terms of effect on diplomatic relations. If it's a military matter, why then in terms of addition of a possible cause to a train of causal factors, to a train of events that's well on the rails as is, and propelled by sufficient other factors. That sort of statement is the only thing we've heard; and I would submit that that does not meet any possible First Amendment standard.

It doesn't meet it either in the statement of the seriousness of the event that's feared, or what is more important and more obvious in this case, in the drawing of the link between the act of publication as the cause of that event and the event that is feared. That link is always, I suggest, speculative, full of surmises, and a chain of causations that after its first one or two kinks gets involved with other causes operating in the same area. So that what finally causes the ultimate event becomes impossible in saying which the effective cause was. And the standard that I would propose under the First Amendment would not be satisfied by such showing.

THE COURT: And your standard is that it has to be an extremely grave event to the Nation; and it has to be directly, proximately caused by the publication?

MR. BICKEL: That's exactly correct.

THE COURT: And I gather, then, that your basic argument with the statutory—or the regulatory—definition of "Top Secret" is the word "could" because that definition says unauthorized disclosure which "could" result in blah, blah, blah?

MR. BICKEL: Yes. I was addressing myself only to the defense aspects of it.

THE COURT: And you would insist that it would probably result—

MR. BICKEL: I would insist on that, certainly, for purposes of any action in the President's power, which is the case before us.

THE COURT: Now, Mr. Bickel, it's understandably and inevitably true that in a case like this, particularly when so many of the facts are under seal, it's necessary to speak in abstract terms.

MR. BICKEL: Yes, sir.

THE COURT: But let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of 100 young men whose only offense had been that they were 19 years old, and had low draft numbers. What should we do?

MR. BICKEL: Mr. Justice, I wish there were a statute that covered it.

THE COURT: Well there isn't, we agree—or you submit—so I'm asking in this case, what should we do?

MR. BICKEL: I'm addressing a case which I am as confident as I can be of anything, Your Honor will not find that when you get back to your chambers. It's a hard case. I think it would make bad separation of powers law, but it's almost impossible to resist the inclination not to let that information be published, of course.

THE COURT: As you know—as I'm sure you do know—the concern that this Court has, term after term, with people who've been convicted and sentenced to death—convicted of extremely serious crimes—you know that the—in

capital cases—I'm posing a case where the disclosure of something in these files would result in the death of people who were guilty of nothing.

MR. BICKEL: You're posing me a case, of course, Mr. Justice, in which that element of my attempted definition which refers to a chain of causation—

THE COURT: I suppose in a great big global picture that is no—this is not a national threat.

MR. BICKEL: No, Sir.

THE COURT: There are at least 25 Americans killed in Vietnam every week, these days.

MR. BICKEL: No, sir, but I meant it's a case in which the chain of causation between the act of publication and the feared event—the death of these 100 young men—is obvious, direct, immediate—

THE COURT: That's what I'm assuming in my hypothetical case.

MR. BICKEL: I would only say, as to that, that it is a case in which, in the absence of the statute, I suppose

THE COURT: You would say the Constitution requires that it be published, and that these men die?

MR. BICKLE: No. No. I'm afraid I'd have—I'm afraid my inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment, in a case of that sort. I would wish that Congress took a look to the seldom-used, and not-in-very-good-shape Espionage Acts and clean them up some, so that we could have statutes that are clearly applicable within vagueness rules and whatnot, so that we don't have to rely on Presidential powers. But the burden of the question is: Do I assume that the event has to be of a cosmic nature?

THE COURT: That is the question.

MR. BICKLE: Well, no, sir. The examples given by Chief Justice Hughes himself are not. A "troop ship" is in a sense that 100 men. Or, the "location of the platoon" is in a sense that 100 men. I don't assume that. I have—I do honestly think that that hard a case would make a very bad separation of powers law.

THE COURT: Professor Bickle, let me alter the illustration a little bit, the hypothetical. Suppose the information was sufficient that judges could be satisfied that the disclosure of a link—the identity of a person engaged in delicate negotiations having to do with the possible release of prisoners of war—that the disclosure of this, would delay the release of those prisoners for a substantial period of time? Now this I am posing so that it is not "immediate." Is that, or is that not your view, a matter that should stop the publication, and therefore avoid the delay in the release of prisoners?

MR. BICKLE: Mr. Chief Justice, on that question—which is, of course, a good deal nearer to what's bruited about anyway in the record of this case—I can only say that unless, which I can't imagine can be possible, the link of causation is made "direct and immediate"—even though the event might be somewhat distant—but, unless it can be demonstrated that it is really true, that if you published this that would happen, or there is a "high probability," rather then "as is typical of those events"—that there are 17 causes feeding into them, three of those, any one of those other than publications is entirely capable of being the single, effective cause—then the real argument is: "Well, you add publication to that, and it makes it a little more difficult." I think, Mr. Chief Justice, that that is a risk that the First Amendment signifies that this society is willing to take. That is part of the risk of freedom that I would certainly take.

THE COURT: I get a feeling from what you have said—although you haven't addressed yourself directly to it—that you do not weigh heavily, or think the courts should weigh heavily, the impairment of sources of information, either diplomatic or military intelligence sources?

MR. BICKLE: Mr. Chief—

THE COURT: Now—

MR. BICKLE: I am sorry.

THE COURT: I get the impression that you wouldn't consider that enough to warrant an injunction.

MR. BICKLE: In the circumstances of this case, Mr. Chief Justice, I think it—I'm perfectly clear in my mind that the President, without statutory authority—no statutory basis—goes into court and asks for an injunction, on that basis, that if *Youngstown Sheet and Tube Company v. Sawyer* means anything, he does not get it.

THE COURT: Well then, now let me—

MR. BICKLE: Now, whether under a statute, we don't face it in this case and I really don't know. I'd have to face that if I saw it—if I saw the statute—if I saw how definite it was.

THE COURT: Why would the statute make a difference? Because the First Amendment provides that "Congress shall make no law abridging freedom of the press"?

MR. BICKLE: Well—

THE COURT: And you can read that to mean Congress may make "some laws" abridging freedom of the press?

MR. BICKLE: No, sir—only in that I have conceded, for purposes of this argument, that some limitations, some impairment of the absoluteness of that prohibition, is possible. And I argue that whatever that may be—whatever that may be—it is surely at its very least when the President acts without statutory authority, because that inserts into it, as well as separation of powers—

THE COURT: That's a very strange argument for The Times to be making, that the Congress can make all this illegal by passing laws.

MR. BICKLE: Well, I really didn't argue that, Mr. Justice. At least I hope not.

THE COURT: Well, that was the strong impression you left in my mind.

MR. BICKLE: Well, I replied to the Chief Justice on a case that arose without a statute and tried to distinguish—because it's critical to the purposes of this case to distinguish between authority which is here claimed, of the President to act independently without a statute, and the possibly greater authority of the whole Government through the machinery of legislation, to act in similar premises of which I concede nothing that I don't have to, Mr. Justice.

THE COURT: Professor Bickle, I have one question that's prompted by this exchange. Generally speaking there are, as I understand it, no statutes granting immunity to newspaper reporters from disclosing their sources, but—

MR. BICKLE: There are some.

THE COURT: —there is a firm claim made by the newspapers, by reporters, and there have been a number of cases on that. If I read the briefs and accounts of those other cases, in California and several other places, the claim of the newspaper is that the First Amendment protects them from revealing their source—even to a grand jury—in the investigation of criminal matters because, otherwise, the newspapers sources would dry up. Now that's generally the thesis of the press, is it not?

MR. BICKLE: Well, there are some cases that are on this Court's docket, as you know, Mr. Chief Justice, for next fall. One of them which I'm most familiar is the *Caldwell* case from California, in which there was a refusal to reveal sources upheld by the Court of Appeals for the Ninth Circuit even to the point of not requiring as appearance before the grand jury, but the claim is very substantially qualified. That is to say, *Caldwell* holds—one doesn't know how far that might be taken and perhaps some of the other cases will require the argument to take it somewhat further—but *Caldwell*, on its own, holds that in circumstances where the Government, as indeed Attorney General Mitchell's regulations themselves provided—which were issued after the *Caldwell* case started—in cases where the Government hasn't shown a clear necessity for the evidence, hasn't shown that it hasn't been able to get it elsewhere, hasn't shown that it is central—inescapably central—to the proof of whatever crime it is that the grand jury is investigating, that in those circumstances where the claim of confidential communications is made by the reporter there is a sufficient First Amendment interest to protect that claim—on the theory that if confidential sources dry up, and the theory runs they would dry up if there was no protection of confidentiality—there would be a diminished flow of news.

THE COURT: Yes, but the argument then is that the newspapers, newspaper reporters, claim for themselves a right which this argument now would deny to the Government.

MR. BICKLE: Mr. Chief Justice, I know there is an appearance of unfairness or unevenness about it, but I think the answer that a report would make—and an answer that I find wholly persuasive—is that neither this case, nor in a case like *Caldwell*, does the New York Times or does a reporter claim something for himself, but rather that the claim is made in order to vindicate the First Amendment and those interests which the great document serves. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. Mr. Glendon?

ORAL ARGUMENT OF WILLIAM R. GLENDON, ESQ., ON BEHALF OF RESPONDANT

MR. GLENDON: Mr. Chief Justice, Your Honors, General Griswold, Mr. Bickle:

I think it might be helpful if I address my attention to the facts which lie behind these cases—or, this case, *The Washington Post* case—as it comes before Your Honors, because I think we have heard here a familiar plea—familiar to us who have been involved in this case over this last intense week—that some more time is needed while the First Amendment is suspended.

We first faced this question, or Judge Gesell did, some weeks ago. And, after a hearing on the temporary restraining order, unconvinced by the generality and lack of specificity, he denied the temporary restraining order. The Government, as of course was its right, promptly went up to the Court of Appeals. And, in an extraordinary late session—everything's been late, I might say, in this case; late hours, anyways—the Court of Appeals, 2 to 1, Judge Robb and Judge Robinson, granted a temporary restraining order to the Government to give them some time. And, thus, for the second time in two weeks, and the second time in 200 years, the United States succeeded in obtaining prior restraint against the press.

Now, the Court of Appeals stated in its order that it would send back—send it to the District Court—and the District Court would try it to determine whether the granting of an injunction with the publication of material would so prejudice the defense interests of the United States, or result in such irreparable injury to the United States, as to justify the extraordinary relief that was asked: to wit, a prior restraint.

THE COURT: Before you proceed, Mr. Glendon—

MR. GLENDON: Yes, sir?

THE COURT: —do you agree that that is the proper test?

MR. GLENDON: I think that's the proper test, Your Honor, yes. That's the test we tried the case under, and I think the implications of the words may require some development, and I'm sure there will be arguments as to exactly what

those words mean, but that's the test we tried to—we tried the case on.

THE COURT: And then would you repeat the word, so that I'll have them in mind?

MR. GLENDON: "So prejudice." "So prejudice the defense interests of the United States, or result in such irreparable injury to the United States, as would justify restraining of publication."

THE COURT: Then, that would not cover the simple death say, of 100 or 200 young men?

MR. GLENDON: Well, Your Honor, that's a hard case put, obviously, I'm trying—I think we all have to measure this case in the light of what we have before us, and what we know we have before us.

THE COURT: Well, we have a lot of things under seal that I, for one, haven't seen. I've seen some of it, but I haven't seen all of it.

MR. GLENDON: I'm going to address myself to those, Your Honor. And I'm going to pint out, as best I can within the limits here, and as did other courts—and the Government has not yet brought anything like that case to Your Honors; nothing like it—what we have heard, Your Honor, is much more in the nature of conjecture and surmise.

THE COURT: Can anyone "know" in any certain sense the consequences of disclosure of sources of information? For example, the upsetting of negotiations if that were, hypothetically, true in Paris, or possible negotiations that we don't know anything about for the release of war prisoners—that sort of thing?

How does a Government meet the burden of proof in the sense that Judge Gesell laid it down? That doesn't bring any battleships to the outer limits of New York Harbor, or set off any missiles, but would you say that it's not a very grave matter?

MR. GLENDON: Your Honor, I think if we are to place possibilities or conjecture against suspension or abridgement of the First Amendment, the answer is obvious. The fact, the possibility, the conjecture of the hypothesis, that diplomatic negotiations would be made more difficult or embarrassing, does not justify—and this is what we have in this case and I think that's all we have—does not justify suspending the First Amendment. Yet, this was what's happened here. Conjecture can be piled upon surmise. Judge Gurfein used the

here. Conjecture can be piled upon surmise. Judge Gurfein used the word up in New York, and I'm sure used it respectfully but he said when there is a security breach, people get "the jitters." And I think maybe the Government ahs a case of the jitters here, but that, I submit, does not warrant the stopping of the press on this matter, in the absence of a showing.

I would like to turn to that, because this matter—as I don't have to say—does not come undeveloped before Your Honors. Two fine District Court Judges, two find Courts of Appeals have considered this, and in each I think it's fair to say, even in the New York case, the Government did not meet its burden. And, so it says to us, but one more time—just one more time—and this is where I was a moment ago, when I said that Judge Robb and Judge Robinson agreed to give them a chance.

Now we had a hearing in the District of Columbia, and I'd like to, if I may, comment upon what the Government said—aid it said it twice—about that hearing. Because representation and I know it's a sincere representation by General Griswold—but, on the representation, that "if we're given some more time, maybe we can find something." But here's what the Government says in its brief, and it said it again yesterday. They said, in New York, the Government was not able to present to the Court all of the evidence relating to the impact of the disclosure of this material upon foreign relations and national defense what it was able to present to the District Court in *The Washington Post* case.

We had, and the Government was accorded, the fullest hearing that it wanted. We started at the unusual hour of 8:00 o'clock in the morning. The Government's case proceeded throughout the luncheon hour. We cross-examined as we felt was necessary. The court had plenty of time to consider the matter. He delivered, I think you would agree, whether you agree with his result, a finely reasoned opinion. So, there was no rush and no pressure. Then the matter went up to the Court of Appeals, and there the Court of Appeals had a session of some three hours the next day. And I might say too, and I think this is perhaps important, there's been no restriction on the Government's latitude, because they did have these *in camera* hearings which, frankly, were very difficult from out pint of view to deal with. But they did have them, and they had an *in camera* hearing in the Court of Appeals.

So, to say now that we need more time, I think, does not measure up to the other side of the equation which you're being asked to do. And that is, to restrain two newspapers, while others ore publishing, from giving their readers the new. And it is. Of course, with their readers that we feel—and I think properly—that the rights are involved, too, their right to know. And I'm talking

about currency and immediacy. There is now involved in this country—the country's engaged in an intense national debate. Things are happening this week on that score. This lawsuit—these lawsuits, undoubtedly, precipitated the Executive to turn over these documents to the Congress.

Now, Senator Fulbright, as I'm sure you're all aware, has been trying for some two years, I understand, to get these documents and I think classification is important here in your consideration of these cases because these documents were classified "Top Secret." Now they were classified "Top Secret" because some unknown individual—who was not presented to the Court; whose subjective judgment couldn't be explored, despite the District Judge asking that he be brought in, and perhaps there was a good reason, we don't know—decided that they were "Top Secret." They were all "Top Secret" because one was "Top[Secret." There had been no review—no review—of these documents, except for one individual who said that he had been reviewing them for some two years for sensitivity, and the sensitivity arose form Senator Fulbright's frequent request to get these documents so the Congress could make the laws, and perhaps the public could be informed.

THE COURT: Does the record show how long The Post has had these documents in its possession?

MR. GLENDON: How long it has had them in its possession? It does not show, Your Honor.

THE COURT: Does it show, if you know, how long The New York Times had the documents in their possession, before The Post got them?

MR. GLENDON: The record in our case does not show that, Your Honor. But I have read, and perhaps these gentlemen—Mr. Bickel, can answer better than I. I understood they had them in their possession for some months.

THE COURT: I got the information, somewhere, three to four months.

MR. GLENDON: A month or two, yes. It is not in the record, but that's my best answer to that.

Now, after this proceeding was brought, and again I think it is part of the significance of this proceeding, and during the course of it, although starting out at the point that these documents were "Top Secret" and none could be disclosed, the Government has offered to review them. And, perhaps some of them, they

say, will be declassified. Which, I suppose, is some sort of an admission that the original classification, and the original attitude towards them, was wrong.

THE COURT: Of course, it could be that something classified in 1965 properly, would be no longer subject to classification—or even 1969 or 1970—isn't that true?

MR. GLENDON: That is correct, Your Honor. And furthermore, some of these documents were classified, and go back of course to 1945. The documents are that ancient. The document itself is entitled "The History." It's called a history, and from what I've seen of it, that's what it is.

Now, the court in our case had before it, and Your Honors will see the evidence of which I'm aware, there apparently has been—there has been, today, additional references made to the documents, but it's a fact and I think it's a significant fact, that the Judge there asked the extravagant claims were made, and I say this respectfully, but this has been a case of broad claims, and narrow proof. Substantial claims have been made, and if you accept them, they would be worried, but we're talking here bout proof, and—

THE COURT: Well, was there an order at any time to produce all the documents in the possession of either of the newspapers, for examination?

MR. GLENDON: The Government—there was not, Your Honor.

THE COURT: Was there a request for such an order?

MR. GLENDON: The Government made such a request, and because of the concern that the newspaper has, as to protection of its source, the documents we were advised would indicate the source.

THE COURT: Do you mean the court—

MR. GLENDON: The documents that we had would indicate the source.

THE COURT: Who denied that request? The District Judge?

MR. GLENDON: Yes, and here's how he resolved the matter—

THE COURT: He let that override the Federal Rules of Civil Procedure, on

discovery?

MR. GLENDON: Here's how he resolved the matter—and I think he did it very fairly, Your Honor. He said, "If you're not willing to produce the documents,"—we do not have all the documents, but—"If you will not produce all the documents because of your claim of First Amendment source protection, then I will assume you have all the documents and, therefore, the Government can show me any document—show me any document—and I will accept that as being in your possession, for the purposes of this case." And I think it was a very—under the circumstances—a very fair way to do it. I, no more than any other lawyer, like to be in that position, but I have to respect my client's assertion, which is substantial and I think a valid assertion, that a newspaper is entitled to protect its source. And, so that's the way it was, Your Honor.

THE COURT: Now, Mr. Glendon, I recall an ancient doctrine of equity, about people who come into equity having certain burdens on them. Doesn't it strike you as rather extraordinary that in a case which largely centers on the protection of sources, the newspapers are making—are refusing to reveal documents, on the grounds that they must refuse in order to protect "their" sources.

MR. GLENDON: Your Honor, I don't understand that that is the issue here.

THE COURT: Well, it is an issue. It's in this case. This is an equity proceeding, and there are certain standards about people coming into equity—coming in with clean hands, is one of them, and is prepared to do equity.

MR. GLENDON: Well, we did not come into equity. The Government came into equity. But I don't—

THE COURT: You were brought in.

MR. GLENDON: We were brought in, kicking and screaming, I guess is the answer.

[General laughter]

THE COURT: You are now in the position of making demands on the First Amendment—

MR. GLENDON: That's right.

THE COURT: —and you say the newspaper has a right to protect its

sources, but the Government does not?

MR. GLENDON: I see no conflict, Your Honor. I see no conflict at all. We're in the position of asking that there not be a prior restraint, in violation of the Constitution, imposed on us; and, that equity should not do that. We are also in the position of saying that under the first Amendment we are entitled to protect our sources. And I find—frankly, I just don't find any conflict here, Your Honor.

The record shows—and I think this is important in Your Honors' consideration, too. We are, as I said, talking about allegedly "Top Secret" documents—and the record shows that these nomers of "Secret" and "Top Secret" are honored, perhaps in the breach in Washington and the way it has perhaps to do business—but it is certainly true that there is massive overclassification of documents in Washington. We have, in the record, instances where one Government official or another has quite clearly indicated that, while everything on his desk may be classified in one fashion or another, in fact perhaps 1 percent or 2 percent or 5 percent of it really is classified, and I think that's a realistic fact of life here.

We also—we also have, clearly, in the record that the Government and the press, who have some mutual—perhaps "antagonism" isn't quite the word—but they are naturally in opposite corners. The press is trying to get as much news as it can. The Government, particularly where it may be embarrassing or where it may be overly concerned, or may feel it's embarrassing or may, in Judge Gurfein's words, "have the jitters," is trying to prevent that, sometimes. On other occasions, the Government engages itself in leaks, because some official will feel that in the public interest it's well for the public to know, and that overrides any particular judgment about security or classification. And the record, Your Honors will find, is replete with instances where leaks of "Confidential," "Secret," and "Top Secret" material have been given to the press, or the press has found them out and published them and, of course, nothing has happened.

Now I think that that's significant, because here this is the sort of thing we feel we're talking about, as far as the classification itself is concerned, and you will remember that the documents that we're talking about are a mixed bag. They have—

THE COURT: Mr. Glendon, wouldn't you be making the same argument if your client had stolen these papers?

MR. GLENDON: I don't think the source—I don't think how we acquired

them, Your Honor, features in this case.

THE COURT: Well, then, it wouldn't make any difference. The leak aspect has no relevance to the case, either, then.

MR. GLENDON: I think it's relevant, as background, because this is not—this is the way the—

THE COURT: Well, then it would be relevant if you stole them.

MR. GLENDON: I think so.

THE COURT: And you'd be making the same argument if your client sent an agent into the Government and stole these papers, an then the Government attempted to restrain your publication of them.

MR. GLENDON: I just don't think that the—I don't that the manner in which

THE COURT: Well, then, one is as relevant as the other.

MR. GLENDON: Fine.

THE COURT: Well, it isn't customary for the Government to leak 47 volumes at a time, is it?

MR. GLENDON: Well, Your Honor, I think if you'll examine the—that's certainly true. It's certainly not customary. The size here is different. But I think that you will find, Your Honor, in the affidavits that we have attached and exhibits that we have attached to our affidavits, indicating "Secret" stories or allegedly "Secret" stories based on "Secret" information, that there's probably more "Secret" information there than you'll find in these documents, if you examine them.

I started to—

THE COURT: What basis did it have, on this case?

MR. GLENDON: I think it's simply a matter of background, Your Honor, and atmosphere, to show that this is not an untoward, or unknown situation. And,

when we hear about how our foreign allies, or our foreign friends will be shocked or appalled, or anything else, it simply is not so. This has happened. This happens. This is one of the facts of life.

I tried to—I started to aver to the District Judge telling the Government to show him, which is what he was supposed to do—that's what the Court of Appeals sent it back for—and he requested to be shown these documents, these "Top Secret" documents. They were in the courtroom, and the Government was invited, and has been invited, to show: "Let's look at what we are talking about, instead of dealing just with abstractions and conjectures." Now, this was on the so-called secret transcript, and I'm not going to aver to it other than to say that the one document that the Government produced, in response to this invitation, was to set forth certain options with reference to war—and I won't go any further than that—which any high school boy would have no difficulty in either putting together himself, or readily understanding. All of them are on the public press. Now, this is the sort of proof we've been faced with, and this is the will of the wisp that we've been chasing.

THE COURT: Well, Mr. Glendon, then I come back to you with the same inquiry I made of Professor Bickel: At least it was close enough to persuade one judge of the Court of Appeals to disagree with what you've just said.

MR. GLENDON: Well, Your Honor, that is true. I'd like to aver to the fact that the other members of the Court of Appeals felt constrained, after they read that particular dissent, to just yesterday issue an amendment to their opinion in which they reiterated that they disagreed with Judge McKennon—Judge Wilke—which to me, was some indication of the strength and depth of their feeling—but, Your Honor is right. There is a—Judge Wilkie—felt, and I say to Your Honor, respectfully, that that is not based on the record—there is nothing in the record that I know of, and I think I know the record as far as has been disclosed to me and there's, perhaps, some new material this morning that's not, but as far as the record that's been disclosed to me, there is absolutely nothing to justify that statement and, as I say, the Court of Appeals felt strong enough about it to issue another statement—to issue an amendment, in which they specifically said they disagreed.

THE COURT: This, then, really is—the issues in this case really are factual issues, aren't they?

MR. GLENDON: Well—

THE COURT: I mean, as I understand it—and his was my understanding initially and I haven't heard anything, really, to—

MR. GLENDON: Largely—largely this—

THE COURT: —modify my understanding.

You agree that an injunction would issue, despite the First Amendment, if it were shown—proved by the Government, that there was something here the disclosure of which would directly cause a grave, irreparable, and immediate danger to the country. You agree that an injunction could issue. You just simply say they've shown nothing of the kind, isn't that right?

MR. GLENDON: I—they have shown nothing of that kind, or by any other measurable standard, that I understand could possibly be involved in this case whether you take the "Top Secret"—

THE COURT: So, it's a matter of fact.

MR GLENDON: —take the "Top Secret" definitions, or anything else. Yeah, but there is something behind this, too, which I think, perhaps is a legal issue. And that is, the scope of the review here.

THE COURT: Scope of review of what?

MR. GLENDON: Scope of review of the findings of the District Court.

THE COURT: Of fact. Findings of fact, under Rule 52(a), isn't it?

MR. GLENDON: That's right, so—

THE COURT: So, these are factual issues.

MR. GLENDON: Yeah. And there is one legal question, perhaps I'll come to later, and that is the futility of an injunction here. But I—

THE COURT: Well, Mr. Glendon, I take it you do assert that there is not a single document in the 47 volumes which is entitled to a "Top Secret" classification, as defined in the Executive Order?

MR. GLENDON: No, sir. I assert this, Your Honor, and I'm involved in a—

THE COURT: You said, as tested by "Top Secret" standards, or any others, that there's been no showing—

MR. GLENDON: —any other standard, I'm talking about, I don't—I think that the standard is reasonably clear here, whether you use words such as "gravely prejudicial to the United States," or "irreparably injure the defense of the United States," whatever the standard may be.

THE COURT: Well, assume the standard as made more specific by the tests of the "top Secret" classification—

MR. GLENDON: Yes.

THE COURT: —standard, you would say it has not been satisfied?

MR. GLENDON: Clearly.

THE COURT: By any document?

MR. GLENDON: By anything the Government has brought forward.

THE COURT: By any document in these Papers on the specified list?

MR. GLENDON: Well, Your Honor, the Government came into court. They suspended the First Amendment. They stopped us from printing and they said they were going to prove this, and this is an injunction proceeding. Now, it may be that the Government would feel that the courts should become the Defense Department's security officer, and they should—that the Court should delve into this pile of paper—47 volumes—and, on its own, from time to time whenever they're so moved—the Government is so moved—that they should, the courts should look for them.

I say, Your Honor, our system, as I understand it, when you bring a case you're supposed to prove it; and, when you come in claiming "irreparable injury," particularly in this area of the First Amendment, you have a very, very heavy burden.

THE COURT: Do you agree that Judge Gesell applied the "Top Secret"

definitions as his guide?

MR. GLENDON: Yes, I think that would appear from his opinion.

THE COURT: That is, the way he measured the case?

MR. GLENDON: He looked at it that way from his opinion, yes, Your Honor, as far as I can determine from—

THE COURT: Would you accept that standard?

MR. GLENDON: Yes, I think that that fits in clearly to what we're talking about, under the doctrine of *Near* v. *Minnesota*, yes, sir.

THE COURT: If the trial judge used a clearly erroneous standard, then the case is simply not controlled by facts, is it?

MR. GLENDON: Your Honor, I'm sorry?

THE COURT: If a trial judge, in these circumstances, used a standard to judge the facts and the standard was clearly erroneous, then this is not just a fact case, is it?

MR. GLENDON: Well, I think that the clearly, as I understand it, the clearly erroneous rule would apply to the facts—what facts he found—and that point, You Honor—

THE COURT: But, if he used the wrong standard then it ceases to be just a fact case?

MR. GLENDON: Well, I feel he used the right standard. Your Honors will determine that here, an I think, as far as the law is concerned, that that is, substantially, the standard—whether you can, perhaps, use alternative words—but the thing is, I think, immediacy and currency; current injury to the United States, as this Court has—and so substantial that it justifies what's been done here.

I mean, it isn't just that the United States has been injured. Judge Gesell made a point, which I think is a very good one, that I think perhaps the Government may forget, that the interests of the United States are the people's interest. And, you're weighing here—and this is why, I suppose, we're here—but what

you're weighing here, is an abridgement of the First Amendment, the peoples' right to know. And, that may be an abstraction, but it's one that's kept this country and made it great for some 200 years and you're being asked to approve something that the Government has never done before.

We were told by the Attorney General, to stop publishing this news. We didn't obey that order, and we were brought into court, and we ended up being enjoined. And I do think—I do think, that when you come to that balance, in the face of the proof—in the face of the proof that exists here—that the decision is quite clear, that the First Amendment must survive because they haven't made out a case.

THE COURT: Do you think that Judge Gurfein and Judge Gesell used the same standard of review?

MR. GLENDON: I think essentially they did, Justice Harlan.

THE COURT: They didn't, as a matter of review, did they? They considered a matter of original finding?

MR. GLENDON: No, they weren't reviewing. They were making an original determination. It wasn't—Your Honor, the circumstances, and the proof before them, there was not the kind of injury, the irreparable injury—

THE COURT: Well, it was a *de novo* hearing on whether or not the publication would—

MR. GLENDON: Sure, it was a *de novo* hearing.

THE COURT: It wasn't reviewing any classification by the Executive Department, was it? They didn't consider that that's what they were doing?

MR. GLENDON: No. That featured in the evidence, Your Honor, as to how the classification got put on there, because that, of course, is the bedrock of their case.

THE COURT: That is basically irrelevant, isn't it?

MR. GLENDON: No, because the Government says—and you must listen, they say—it's "Top Secret," and that's it.

THE COURT: No, I haven't heard the Solicitor General say that here today, at all.

MR. GLENDON: Well, that's my understanding of their whole—

THE COURT: I asked him that question, and he said there were those in the Government who would like to make that argument, but he was not pressing it.

MR. GLENDON: Well, it's the argument we've heard along that—and you know, you see that having classified "Top Secret," they move from there to show no proof.

THE COURT: No, no. The Government has not, in this Court, made the argument that simply because it's "Top Secret," they're entitled to an injunction. They have not made that argument.

MR. GLENDON: I was trying to say, that having classified the documents "Top Secret," that's the premise of their case. They have not yet come into this Court and proven their "Top Secret," and yet they say we can't publish them, because they are "Top Secret."

THE COURT: I haven't heard that argument made.

THE COURT: May I say, that as I understand the argument by both of the lawyers for the New York Times, it seems to me that they have pursued it—have argued it on the premises that the First Amendment freedom of speech can be abridged by Congress, if it desires to do so.

MR. GLENDON: I did not make that argument, Your Honor.

THE COURT: I understood you to. I did not understand you to make any other argument, or your colleague.

MR. GLENDON: No, I did not.

THE COURT: You talk about standards. I'm not talking about standards. The First Amendment says that "Congress shall make no law abridging freedom of the press." I understand you to say that Congress can make a law—

MR. GLENDON: No, Your Honor, I did not say that.

THE COURT: You did not say it?

MR. GLENDON: Never. I do not say it, no, sir. I say we stand—

THE COURT: Well, I misunderstood—

MR. GLENDON: —I'm sorry, Your Honor, if I had—

THE COURT: I had misunderstood both of you.

MR. GLENDON: No, sir. I say we stand squarely and exclusively on the First Amendment.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Glendon.

Mr. Solicitor General, you have about 12 minutes, or thereabouts, left.

REBUTTAL ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

I should like to make it plain that we are not at all concerned with past events in this case. We are not interested in protecting anybody. That should be obvious enough simply from the date of the materials which are involved. We are concerned with the present and future impact of the publication of some of this material. And, when I say "future," I don't mean in the 21st Century, because in this area events of great consequence to the United States happen over periods of six months, a year, perhaps two, or three years. But, what we are concerned with, is the impact on the present and the reasonably near future of the publication of these events—of these materials.

Now, it is perfectly true that prior restraint cases with respect to the press are rare, or conceivably nonexistent. I'm not ready to concede that they're nonexistent, but I can't point to one now. I haven't had time to make a really thorough research. I did pint out that there are prior restraint cases as recently as last term with respect to freedom of speech, which is in the First Amendment in exactly the same terms as the freedom of the press. And there is the *Associated Press* case which comes about as closest to being a prior restraint on the press case as

you can get, without perhaps being technically a prior restraint case.

And the reason, of course, that there are not prior restraint cases, with respect to the press, is that ordinarily you don't find out about it until it's been published. Reference has been made to the fact that, "Oh well, there're leaks all the time." There are a great many leaks, but I would point out that there're leaks all the time." There are a great many leaks, but I would point out that there's also a very widespread respect of the security classification system, and its potentiality on the security of the United States. Senator Fulbright did not publish this material. He sent it to the Secretary of Defense, or requested from the Secretary of Defense what use he could make of it, and I have seen on the television other members of Congress who said that they had some of the material, but felt it not appropriate to use it because it was classified "Top Secret."

THE COURT: Mr. Solicitor General, what particularly worries me at this point, is I assume that if there are not studies now being made, in the future there will be studies made about Cambodia, Laos, you name it. And, if you prevail in this case, then in any instance that anybody comes by any of those studies, a temporary restraining order will automatically issue. Am I correct?

MR. GRISWOLD: It's hard for me to answer the question, in such broad terms. I think that if properly classified materials are improperly acquired, and that it can be shown that they do have an immediate, or current impact, on the security of the united States that there ought to be an injunction. Now I think it is relevant, at this point—

THE COURT: Well, wouldn't we, then, be—the Federal Courts—be the censorship board?

MR. GRISWOLD: Uh, that's—

THE COURT: As to whether this does—

MR. GRISWOLD: That's a pejorative way to put it, Mr. Justice. I don't know what the alternative is.

THE COURT: The First Amendment might be.

[General laughter]

MR. GRISWOLD: Yes, Mr. Justice, and we are, of course, fully supporting

the First Amendment.

[Laughter]

MR. GRISWOLD: We do not claim, or suggest, any exception to the First Amendment. And we do not agree with Mr. Glendon, when he says that we set aside the First Amendment, or that Judge Gesell or the two Courts of Appeals in this case, have set aside the First Amendment by issuing the injunction which they have.

The problem in this case is the construction of the First Amendment. Now, Mr. Justice Black, your construction of that is well unknown, and I certainly respect it. You say that "no law" means "no law," and that should be obvious.

THE COURT: I rather thought that.

MR. GRISWOLD: And 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 that is true.

As Chief Justice Marshall said so long ago, it is a Constitution we are interpreting. And all we ask for here is the construction of the constitution, in the light of the fact that it is part of the Constitution, and that there are other parts of the Constitution which grant powers and responsibilities to the Executive; and, that the First Amendment was not intended to make it impossible for the Executive to function,, or to protect the security of the United States.

Now, it's been suggested that the Government moved very slowly in this matter. That The Times started publishing on Sunday—well, actually it was on Monday, which is pretty fast, as the Government operates, in terms of the consultations that have to be made, the policy decisions that have to be made—on Monday, the Attorney General sent a telegram to The New York Times and asked them to stop and to return the documents. The New York Times refused, and on Tuesday the United States started this suit.

It's suggested that there'd been full hearings—everything's been carefully and thoroughly considered—but, there's clear evidence of haste in both records. And this is apparent from the times which have been stated. I would like to point out that even now, at this point, the hearing is on the ques4tion of whether a preliminary injunction should be granted. They were not intended to be full plenary trials, but merely sufficient to show the probability of possible success.

There simply was not time to prepare a comprehensive listing, or a comprehensive array, or expert witnesses. The Government relied on the fact that the District Judge would examine the study. And he, on the record, concededly refused to do so. This was at the heart of the decision of the Court of Appeals for the Second Circuit in its decision to remand for a full week of hearings on the merits.

THE COURT: I'm not sure I understand what you just said. The Court of Appeals relied on the assumption that the District Judge would examine the evidence, and that the District Judge refused to do so? Or failed to do so?

MR. GRISWOLD: No. That there had not been a full hearing with respect to this.

THE COURT: Now, which case are we talking bout now?

MR.GRISWOLD: I'm talking about *The New York Times* case, in the Second Circuit, and the Second Circuit sent it back to the Judge for a hearing which—

THE COURT: Well, as I understand it, there was no claim that Judge Gurfein didn't—didn't consider everything that was then before him, but that new matter was brought to the attention of the Court of Appeals for the Second Circuit.

MR. GRISWOLD: Well, on the contrary, Mr. Justice. The full 476 volumes were offered to Judge Gurfein—

THE COURT: Well, I know—

MR. GRISWOLD: —and he refuse to examine them.

THE COURT: Well he did not. He didn't "refuse" to. He failed to. He didn't have time to.

MR. GRISWOLD: No, Mr. Justice. He said he "wouldn't" examine them.

THE COURT: He said he didn't have time to, but he did ask the Government to bring forward their worst, and that's—

MR. GRISWOLD: No. I think that really came at a later stage in that—

THE COURT: —and that new matter was brought to the attention of the Second Circuit Court of Appeals.

MR. GRISWOLD: It was brought to the attention of the Second Circuit Court of Appeals, and they sent it back not for an instant rehearing, but for one limited—properly so. Everything about this case has been frantic. That seems to me to be most unfortunate, and I would like to point out that the New York—

THE COURT: Well, the reason is, of course, as you well know, Mr. Solicitor General, that unless the constitutional law as it now exists is changed, a prior restraint of publication by a newspaper is presumptively unconstitutional.

MR. GRISWOLD: It is a very serious matter. There is no doubt about it. And so is the security of the United States a very serious matter. And we have two important constitutional objectives here which have to be weighed and balanced, and made as harmonious as they can be.

But it is well known that The Times had this material for three months. It's only after The Times had an opportunity to digest it—and it took them three months to digest it—that it suddenly becomes necessary to be frantic about it. It wasn't so terribly important to get it out and get it to the public while The Times was working over it. But after that, now The Times finds it extremely difficult to accept an opportunity for the courts to have an adequate chance, first to resolve the extremely difficult question of the proper construction of the First Amendment in this situation. And I concede that it's an extremely difficult question. And if the proper construction is the one which Mr. Justice Black has taken for a long time and is well known, of course there's nothing more to be said; but our contention is that it is not the proper construction—

THE COURT: And your brother counsels on the other side don't disagree with you, Mr. Solicitor General. They don't take Mr. Justice Black's position—at least for purposes of argument—in this case.

MR. GRISWOLD: Very reluctantly they were pushed into conceding that there might be some cases where there could be those suggested in—

THE COURT: Mr. Glendon said that he thought Judge Gesell's standard was the correct one. Mr. Bickell said that he was making no claim that there's an absolute prohibition of a prior restraint.

MR. GRISWOLD: Well, frankly, I don't' think it's much of a limitation to say that it can be enjoined if it will result in a break of diplomatic relations, or a war tomorrow, and as I have already said, we think the standard used by Judge Gesell is wrong.

THE COURT: Do you think they differed from the standards of Judge Gurfein?

MR. GRISWOLD: Well, I think—I'm sorry, Mr. Justice.

THE COURT: I say, do you think that the standards that Judge Gesell used were different form those which Judge Gurfein used?

MR. GRISWOLD: I'm not sure what standard Judge Gurfein used. Judge Gesell—because much of this material, Judge Gurfein did not have specifically called to his attention—the standard which Judge Gesell used is to say that unless it comes within that illustrative language in the definition of "Top Secret," that it does not meet the requirement. And I contend that that is wrong.

I believe, and have sought to show in the closed brief which is filed here, that there are materials in—there are items in this material which will affect the problem of the termination of the war in Vietnam., which will affect the negotiations such as the SALT talks, which affect the security of the United States vitally over a long period, and will affect the problem of return of prisoners of war. And I suggest that, however it is formulated, the standard ought to be one which will make it possible to prevent the publication of materials which will have those consequences.

THE COURT: I sill am not clear as to the basis for your view that the case should be—the District of Columbia case should be remanded. I got it originally, from your papers, that you thought it should be remanded in order to have the fuller hearing that the Court of Appeals—or it had been lacking before Judge Gurfein. And, this morning, you said that you thought it should be remanded because the standard used by Judge Gesell was erroneous.

MR. GRISWOLD: Essentially, in the Court of Appeals, there has been a hearing, though it lasted only one long day. However, our basic claim there would be that it ought to be remanded for hearing. And I would be content to have it for hearing on this record, but for determination on the right standard. In the Second Circuit case, from Judge Gurfein, there has not yet been the kind of

hearing that we think there ought to be. We think there ought to be such a hearing, and that Judge Gurfein should have the benefit of this Court's views as to what the proper standard is in coming to his conclusion as a result of that hearing.

THE COURT: I understand, also, that you do claim that there are materials in this record which do satisfy the categories "Top Secret"?

MR. GRISWOLD: Yes, Mr. Justice. I do not think that that is essential, but I think there are some.

THE COURT: I know, but if Judge Gesell used those standards—the "Top Secret" standard—for judgment, he was wrong in saying that none of the material—

MR. GRISWOLD: Yes, Mr. Justice, because there is reference in there, among other things, to communications. And I think that that is established in this record.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General. The case is submitted.

[Whereupon, at 1:13 o'clock p.m., the case was submitted.]