

Transcript #108  
Air Date: November 6, 1984

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*Media and Society Seminars*

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A PROGRAM OF  
THE GRADUATE SCHOOL OF JOURNALISM  
COLUMBIA UNIVERSITY

Transcripts: 204 Journalism, Columbia University, New York, N.Y. 10027

THE  
**CONSTITUTION**  
THAT DELICATE BALANCE

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**National Security Versus  
Freedom of the Press**

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**The Constitution: That Delicate Balance** is a production of *Media and Society Seminars*, a program of the Columbia University Graduate School of Journalism, produced in association with WNET/Thirteen (New York) and WTTW (Chicago). Major funding was provided by The Annenberg/CPB Project, a project of the Corporation for Public Broadcasting and The Annenberg School of Communications to provide opportunities for higher education, with additional support from the Times Mirror Company.

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## National Security versus Freedom of the Press

**FRED W. FRIENDLY, Columbia School of Journalism:** From the birthplace of the Constitution . . . "National Security versus Freedom of the Press."

**LYLE DENNISTON, Supreme Court Reporter, The Baltimore Sun:** It's been my experience after a lot of years in Washington that lying increases the closer you get to the top.

**BENNO SCHMIDT, Dean, Columbia Law School:** To what extent does the role of the press in our society enter into your thinking about what's possible?

**JAMES R. SCHLESINGER, Former Director, CIA:** Quite heavily. At the present time, leaks have become routine and it's virtually impossible to conduct a covert operation.

**HOWARD SIMONS, Managing Editor, The Washington Post:** That I think it's his job. Jim Schlesinger's job, to keep secrets. That's his job. My job is to find 'em.

**DAN RATHER, Managing Editor, CBS Evening News:** My responsibility is to obey the law, or, if I choose not to obey the law, to be prepared to meet the consequences of that. And I take that very seriously. As a professional my job is to publish and be damned.

**Judge FRANK J. MCGARR, U.S. District Court, Northern District of Illinois:** The First Amendment is a law that says absolutely nothing about breaking and entering or about publishing matters that affect national security.

**Hon. POTTER STEWART, Justice (retired), U.S. Supreme Court:** There is no such thing as being a little bit unconstitutional. It's like being a little bit pregnant. It's impossible.



**Mr. FRIENDLY:** I'm Fred Friendly, here in the Assembly Room at Independence Hall in Philadelphia where our nation's Writ of Independence was conceived and where the Constitution of the United States was framed and signed. The collision between the government's view of the national interest and the press's claims under the First Amendment was the subject of a seminar held in Congress Hall just a few dozen feet from where we're sitting, and the objective was not to change minds or basic principles, but to explore the perceptions and stereotypes that the media and government may have about each other. Justice Potter Stewart participated in the seminar and is here with us to provide additional analysis.

As prologue, Justice Stewart, a question about the framers of the Constitution. Here in this historic room they drafted what George Washington called "something little short of a miracle." Yet less than two years after the original Constitution was ratified, the first Congress meeting in New York drafted the most revolutionary update in history, the first ten amendments to that Constitution, our Bill of Rights. Justice Stewart, why was it necessary to amend that Constitution so soon after it was ratified?

**Justice STEWART:** Well, because they, I think, understood the danger of tyranny by the majority and, as we all know, the Bill of Rights by their very nature protect minorities against majorities and against the tyranny of the majority. And it was Thomas Jefferson's view, and I think eventually shared by a great many people, that any constitution creating a government had to contain a bill of rights, limitations upon what that government could do to the people.

**Mr. FRIENDLY:** Yet that Bill of Rights has endured to this day and is more at the heart of our constitutional confrontations than almost anything.

**Justice STEWART:** Well, I think today it's of more importance perhaps than ever before.

**Mr. FRIENDLY:** Why?

### PARTICIPANTS

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|---|--|
| <b>Floyd Abrams,</b> Attorney, Cahill Gordon & Reindel  | <b>Jack Nelson,</b> Washington Bureau Chief, Los Angeles Times   |
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| <b>Harry T. Edwards,</b> Judge, U.S. Court of Appeals for the District of Columbia                                | <b>Potter Stewart,</b> Justice (retired), U.S. Supreme Court   |
| <b>Max Frankel,</b> Editorial Page Editor, The New York Times   | <b>William Webster,</b> Director, Federal Bureau of Investigation  |
| <b>Orrin Hatch,</b> U.S. Senator, Utah  |  |
| <b>Brit Hume,</b> Correspondent, ABC News   |  |
| <b>Hans A. Linde,</b> Justice, Oregon Supreme Court   |  |
| <b>Frank J. McGarr,</b> Chief Judge, U.S. District Court for the Northern District of Illinois                    |  |

### CASE STUDY

Frieda C. Dobbs, a reporter working for the Washington bureau of the *Nirvana News*, receives a call from Basil Bogart, a source from whom she has received reliable information in the past.

Bogart meets with Dobbs, giving her extensive secret notes that were taken at a meeting of the National Security Council. The notes outline United States policy concerning Sierra Madre, a country hostile to American interests, located in a geopolitically sensitive region. The notes indicate that:

1. The CIA will provide training and arms for anti-Sierra Madran forces.
2. The CIA intends to destabilize the government of Sierra Madre and other neighboring countries that are evolving anti-American policy.
3. Military advisors will be dispatched to other remaining pro-American, but unstable, countries in that region.
4. The United States has contingency plans for the use of military forces, including detailed strategy for a possible invasion of Sierra Madre.
5. Several intelligence sources have infiltrated the Sierra Madran government.

**Justice STEWART:** Well, because at the inception of our country and for a hundred years, or a hundred and fifty years, it was possible for a dissident, an unpopular person, to leave Philadelphia, to leave the East, to go over the mountains to the West. Daniel Boone and others. Now our country is filled up and we have to rely on the Bill of Rights to protect the unpopular, the eccentric, the dissident in our society.

**Mr. FRIENDLY:** Justice Stewart, let's move now to Congress Hall, where our seminar took place and where our moderator, Dean Benno Schmidt of the Columbia Law School, will in a hypothetical case put the distinguished participants to the task of testing and re-examining their positions on national security versus the First Amendment.

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**Dean SCHMIDT:** Stage I: The covert action plan. Mr. Schlesinger, may I ask you to assume that you are the head of the CIA and that you have concluded that it is in the best interests of the United States to take steps against the increasingly hostile government of Sierra Madre, a country in a sensitive, strategically important part of the world. I ask you to assume that you believe it would be in our best interest to train a force of exiled Sierra Madrans for possible military action against their government. And that secondly we should step up a program of covert assistance to opposition forces in Sierra Madre. To what extent do you concern yourself with my right as a member of the public to know what my government is doing about Sierra Madre?

**Mr. SCHLESINGER:** Very little.

**Dean SCHMIDT:** Why?

**Mr. SCHLESINGER:** Well, there is a question about what you mean by "right." We certainly aren't going to publicize what it is that we plan to do.

**Dean SCHMIDT:** Now why is that?

**Mr. SCHLESINGER:** For a variety of reasons. Certain issues are issues that should not be discussed in public.

**Dean SCHMIDT:** So if you think on balance the national interest is served by secrecy you're going to try to see to it that the press doesn't hear about it. Mr. Rather is not going to know — if you can help it.

**Mr. SCHLESINGER:** We're certainly not going to advertise—

**Dean SCHMIDT:** Judge Bell, how weighty in your view should be the public interest in knowledge about what its government is doing?

**Judge BELL:** Well, it would have to be given great weight but it has to a real public interest.

**Dean SCHMIDT:** Justice Stewart, not a question of law but a reaction about citizens' interest and knowledge at this point.

**Justice STEWART:** Well, a couple of comments, Mr. Schmidt. First of all, I'm glad that you've now amended reference to the public's right to know to some public interest, with which I agree. But I think, at the beginning, both you as interrogator and those you questioned assumed the hypothesis that there is a freedom to learn and a freedom to hear, but I wonder where that right, asserted right, comes from. I know it's a ringing phrase that's very popular with the journalistic profession.

**Dean SCHMIDT:** And the First Amendment with its guarantees of freedom of speech and freedom of the press?

**Justice STEWART:** The First Amendment, as I pointed out before, provides only that Congress shall make no law abridging the freedom of the press. It says nothing about a right to know. And at the most that's a derivative freedom and liberty. It's not a right, it's not even a right on the part of the press. It's a freedom, it's a protection.

**Dean SCHMIDT:** So the government is not burdened by any sense of legal obligation—

**Justice STEWART:** Well, of course that—

**Dean SCHMIDT:** —constitutional obligation of the First Amendment.

**Justice STEWART:** —or right. Or right. I think—

**Dean SCHMIDT:** Or my right to know.

**Justice STEWART:** I think the word "right" is loosely bandied about by a lot of intelligent people and including—

**Dean SCHMIDT:** And it's a very woolly mouthful.

**Justice STEWART:** —including some of my former colleagues.

**Dean SCHMIDT:** Having dispensed with this romanticism about the public's right to know—

**Justice STEWART:** I don't think it is romantic. I think it leads to fuzzy and sloppy thinking.

**Dean SCHMIDT:** All right. Stage II: The leak. Mr. Schlesinger, as you contemplate what the CIA, what our government ought to do about Sierra Madre, and you run over the options, to what extent does the role of the press in our society enter into your thinking about what's possible?

**Mr. SCHLESINGER:** Quite heavily. At the present time leaks have become routine and it is virtually impossible to conduct a covert operation.

**Dean SCHMIDT:** Now, why should that be? Now may I just—

**Mr. SCHLESINGER:** Why should that be? Because—

**Dean SCHMIDT:** Yeah, let's posit that—

**Mr. SCHLESINGER:** Because there has been a breakdown in discipline within the executive branch primarily—

**Dean SCHMIDT:** Why?

**Mr. SCHLESINGER:** And more generally within the society at large.

**Dean SCHMIDT:** So it's not the press's fault. It's the executive branch's fault.

**Mr. SCHLESINGER:** I think that it depends on the circumstances. You have boards of officials going to press, handing them documents one after the other. It seems under those circumstances it's rather hard to blame the press.

**Dean SCHMIDT:** Surely not in the CIA?

**Mr. SCHLESINGER:** Our documentation spreads out all over the government.

**Dean SCHMIDT:** Mr. Schlesinger, would you give us a sense what you think the reasons are for this loss of discipline?

**Mr. SCHLESINGER:** I think it is a change in public attitude. I think that a decade or more ago the American public assumed that the United States was number one, that its writ around the world was a wise writ, and that when it chose to intervene it would do so wisely. The public trusted its public officials and therefore did not become involved, did not wish to become involved. And people in the executive branch tended to be disciplined. They are no longer so.

**Dean SCHMIDT:** Give me a sense of what—

**Mr. SCHLESINGER:** Let me not confine that to the executive branch, by the way. There are some problems on the Hill too.

**Dean SCHMIDT:** Judge Bell, what do you think about what ought government do to try to stanch up a sense of discipline that Mr. Schlesinger was talking about?

**Judge BELL:** I recognize that people have motives for leaking. The press is so smart today that they usually recognize motives.

**Dean SCHMIDT:** You mentioned this question of motives for leaks. Mr. Schlesinger, what motives?

**Mr. SCHLESINGER:** Disagreement with policy is the principal motive at the present time.

**Dean SCHMIDT:** That means you can't embark on any plan that depends for its success on secrecy unless everybody in the government who knows about it agrees with you. I mean you've got — this is a form of unanimous consent.

**Mr. SCHLESINGER:** That is basically correct today and that is why the number of covert,

serious covert operations that can be conducted has gone down to the minimal level.

**Dean SCHMIDT:** Now, Mr. Hume, let's suppose you are the beneficiary of one of these leaks that we've heard are fairly numerous. Now I call you up and say, look Brit, I have an extremely interesting story to tell you about Sierra Madre. You know what the Secretary of State has been saying about no external interference in this area of the world, let's live and let live? Well, it ain't so. We're in there now, we're going in more in a big way. And I've got the papers to prove it. Now what do you say? I call you up. Public telephone in a bar.

**BRIT HUME, Correspondent, ABC News:** I want to see the papers and moreover, no matter how authentic they may appear, they would require verification from another source before any decision could be made about what to do with them.

**Dean SCHMIDT:** So your first concern is, am I telling you the truth?

**Mr. HUME:** Precisely.

**Dean SCHMIDT:** So you'd try to find out why I'm leaking this to you?

**Mr. HUME:** No. No.

**Dean SCHMIDT:** You don't want to find that out?

**Mr. HUME:** Not really. I never have been, and I'm not now particularly interested in the motives of leakers.

**Dean SCHMIDT:** Brit, the reason I'm leaking this to you is that that son of a gun, the Secretary of State, passed me over for the job I should have gotten.

**Mr. HUME:** I don't really care about that.

**Dean SCHMIDT:** And I'll bring that hypocrite down.

**Mr. HUME:** I don't really care about that.

**Dean SCHMIDT:** The only concern about motive is if it interferes with your verifications.

**Mr. HUME:** Precisely. Precisely.

**Dean SCHMIDT:** But no matter how seemingly corrupt my motive is in leaking—

**Mr. HUME:** Well, well, I mean if you're talking about—

**Dean SCHMIDT:** How about if I stole it—

**Mr. HUME:** If you're talking about the commission of a crime.

**Dean SCHMIDT:** Well, I wasn't going to ask about that.

**Mr. HUME:** Well, when I was—

**Dean SCHMIDT:** Suppose I say where did you get that. "Well, I swiped it off Mr. Schlesinger's desk."

**Mr. HUME:** And— well, I don't want to receive the stolen goods.

**Dean SCHMIDT:** Why not?

**Mr. HUME:** But I would still be interested in the information.

**Dean SCHMIDT:** They're true. They're true.

**Mr. HUME:** I'd take a Xerox, frankly.

**Dean SCHMIDT:** Why would you take— why not— why not take it?

**Mr. HUME:** Well, for the simple reason that I don't think that journalists can fulfill a mission in responsibility professionally if they are involved directly, or even indirectly, in crimes.

**Dean SCHMIDT:** Mr. Abrams, if he is a purely passive recipient of this paper from me, I just give it to him. He didn't know I stole it; I don't tell him that I've stolen it; he doesn't ask. Has he got any legal problem if he just takes that document, do you think?

**FLOYD ABRAMS, Attorney, Cahill Gordon & Reindel:** If I were advising Mr. Hume I would tell him that the chances are so slight, the chances of prosecution so slight, of conviction so much slighter still, that it really should not be a fact which weighed upon his decision about the receipt of the document.

**Mr. HUME:** Mind you, Professor Schmidt, that it is *not* the question of prosecution that concerns me. It is the question of what might be called answering the questions raised thereafter. If indeed—

**Dean SCHMIDT:** By whom? Whose questions?

**Mr. HUME:** By, well, there would no doubt be enormous fallout from the publication or broadcast of such information. There would be criticism advanced from many quarters of the journalists involved. And if the case could be made, not so much in court but in the court of public opinion, if you will, that the journalists involved had participated in a crime in order to do this, it seems to me that that would complicate the question of the journalist's credibility and would—and would perhaps change the focus of the issue. That really is what I'm talking about.

**Dean SCHMIDT:** Mr. Nelson, do you agree with that?

**JACK NELSON, Washington Bureau Chief, Los Angeles Times:** No.

**Dean SCHMIDT:** It doesn't matter if it's stolen, as long as it's true. It doesn't affect your credibility to be a trafficker in stolen pieces of paper. Does it?

**Mr. NELSON:** No.

**Dean SCHMIDT:** You worry about that at all on an ethical level?

**Mr. NELSON:** Oh, I might—I might be—I might be a little bit concerned. I might rather somebody give it to me who hadn't stolen it. I might rather he be someone with a good motive. But in the end it wouldn't make any difference.

**Dean SCHMIDT:** Why not?

**Mr. NELSON:** Well, because I'd get the information and the information is important and I think despite what Mr. Justice Potter Stewart said, I think the people do have a right to know. And I like it that we use the phrase "right to know" because I think the people are entitled to know it. I think in this particular case you've outlined it looks like a classic case of the CIA being a rogue elephant. I mean, you know, they're going to war without declaring war, they're training—

**Dean SCHMIDT:** Just stick with the stolen document.

**Mr. NELSON:** No, but that's all right, that's—

**Dean SCHMIDT:** Mr. Justice, I noticed we've reintroduced the concept of rights here when the issue is the journalist's right or immunity perhaps from usual rules of legal responsibility if they're in the situation of being receivers of what is, after all, I guess, stolen property.

**Justice STEWART:** Well, if something's stolen, it's stolen, whether it be a diamond ring or a document. And if somebody is guilty of knowingly receiving stolen goods, he's guilty, whether he receives a stolen diamond ring or a stolen document. That's just self-evident, it seems to me.

**Dean SCHMIDT:** Mr. Rather, if I give you a copy of the National Security Council minutes on Sierra Madre—and let me just raise the ante a little bit. It has stamped on the front of it "top secret."

**Mr. RATHER:** A long checklist of things would go through my mind beginning with, is this a so-called offensive leak of the things that Mr. Schlesinger and others have not mentioned? Among them this: Is the United States government trying to use me to send a signal to the government of whatever this little country is, that if they don't straighten up they're gonna have big trouble from Uncle Sam?

**Dean SCHMIDT:** Why should it matter if the motive is to use you to send a signal? That's what we're all doing, aren't we, all we leakers and sources, for all kinds of reasons, good, virtuous, corrupt?

**Mr. RATHER:** Well, it's certainly true that there are all kinds of motives.

**Dean SCHMIDT:** Is the point that only if the government tries to manipulate you by using your scapbox to get out a message, then you worry about that?

**Mr. RATHER:** No, no, I say it becomes a question with me, speaking for myself, what the motive is. It's not the number one question in my mind. The first question in my mind is, is this information true? The second question in my mind is, is this information newsworthy? And if those two things are true there is a high probability that I'm going to use this story.

**Dean SCHMIDT:** Mr. Denniston, are you with Mr. Rather on that?

**Mr. DENNISTON:** Absolutely not.

breaking and entering or about publishing matters that affect national security. There is no hope or help in the First Amendment, or protection in the First Amendment, for most of the media attitudes I've heard.

**Dean SCHMIDT:** Then let me— let me throw Mr. Denniston on the mercy of the court.

**Judge McGARR:** All right. He's in trouble.

**Dean SCHMIDT:** He makes no— now he makes— he makes no appeal to any legal right. He says, "Judge, I knew it was against the law to go into Mr. Schlesinger's office and take that document, but this is very important stuff for the people of the United States to know."

**Mr. DENNISTON:** I wouldn't say that.

**Dean SCHMIDT:** Well, bear with me. Come on, I'll be your lawyer. I think we'll keep you quiet in this — I think you need representation. This is very important stuff for the people to know. Indeed, the government is misleading the people about its policies in Sierra Madre. It's true that I took it, I am prepared to pay at least some penalty, but surely in the sentencing you're not going to treat me like some jewel thief, or some fence, are you?

**Judge McGARR:** Well, I'd say, "Mr. Denniston, Mr. Schlesinger was the one who was appointed the public official to decide that, not you." And now that we've disposed of that plea in mitigation, let's talk about the sentence.

**Dean SCHMIDT:** Does the fact that—

**Mr. SCHLESINGER:** Worse than a jewel thief.

**Dean SCHMIDT:** Does the fact that he is courageously serving the public interest in knowledge about government, does that cut no ice at all?

**Judge McGARR:** Well, first, in the instance of Mr. Denniston I'm not sure he's doing that. He's the only man in the discussion so far who has been honest enough to use the word "commercial." He said he was in the business of gathering and distributing news. And I take that at face value. But he is no better judge of the public interest than those persons who have determined that this should be a covert operation. So I don't accept that he is protecting the public interest.

**Dean SCHMIDT:** Let's go turn the clock back a little to Mr. Hume, and I walk into his office and I put the document on his desk. I stole it. He didn't put me up to it. He didn't pay me for it. But I stole it. Should the First Amendment play any role in determining the outcome of his liability?

**Judge ROBERT H. BORK, U.S. Court of Appeals, D.C. Circuit:** I think it has to. If you're just talking about his liability for looking at a stolen document, you mean?

**Dean SCHMIDT:** Yeah, sure. Maybe even he prints it or he holds it up in front of the television cameras on the nightly news.

**Judge BORK:** It has to.

**Dean SCHMIDT:** It has to? How? I mean, how would it factor in? You mean sort of a justification defense?

**Judge BORK:** We have no very coherent theory of what the First Amendment means in these areas. For example, if you caught somebody under current law stealing documents related to national security and you caught him in the building, you could wrestle him to the ground and take the documents away from him. Apparently once he gets across the property line, it's like he could spike the ball, he's scored. You can't get the documents back. This is—

**Dean SCHMIDT:** The First Amendment is sort of like a trespass.

**Judge BORK:** Well, it has that aspect. The Pentagon Papers case was that sort of case, in a sense. Those were the papers which could have been held by the government, could have been— anybody trying to remove them could have been stopped. Once they were out of the building and in the hands of the press a different set of First Amendment considerations comes into play.

**Dean SCHMIDT:** Justice Stewart, you think the First Amendment ought to play a role in Mr. Hume's liability?

**Justice STEWART:** I agree with Bill Webster that the question of whether a criminal

**Dean SCHMIDT:** Even this top secret stamp and so on. No. What —

**Mr. DENNISTON:** I don't mind being used at all, if I can get a story out of it.

**Dean SCHMIDT:** Used by someone who's committed a crime?

**Mr. DENNISTON:** Exactly. Exactly.

**Dean SCHMIDT:** Or used by someone who is breaching his oath of office referred to, breaching his trust?

**Mr. DENNISTON:** Professor Schmidt, as a journalist I have only one responsibility and that is to get a story and print it.

**Dean SCHMIDT:** Would you steal it yourself?

**Mr. DENNISTON:** I would.

**Dean SCHMIDT:** Right off Mr. Schlesinger's desk.

**Mr. DENNISTON:** Exactly. And hopefully without his knowing it.

**Dean SCHMIDT:** Would you hold a gun to his head? I mean, surely there must — are there any limits to the extent to which you are justified in your single-minded motivation?

**Mr. DENNISTON:** Mayhem might well be ruled out but I'm not even sure of that.

**Dean SCHMIDT:** But breaking and entering?

**Mr. DENNISTON:** Breaking and entering is benign.

**Dean SCHMIDT:** No problem.

**Mr. DENNISTON:** No problem whatever.

**Dean SCHMIDT:** Now seriously, really?

**Mr. DENNISTON:** No, I'm quite serious now. First of all, the question is—

**Dean SCHMIDT:** How can you possibly justify that?

**Mr. DENNISTON:** No, it isn't a question of justification in terms of the law. It's a question of justifying it in terms of the commercial sale of information to interested customers. That's my only business. That's the only thing I do in life, is to sell information, hopefully for a profit.

**Dean SCHMIDT:** Now wait a minute.

**Mr. SCHLESINGER:** I guess the CIA is no longer the rogue elephant here.

**Dean SCHMIDT:** Mr. Webster, let's take Mr. Denniston's position seriously. Now why isn't he right? After all, the First Amendment functionally, at least, depends on the capacity of the press to get information about what the government's doing. Now why shouldn't his right to publish this newsworthy information encompass some right to go get it?

**Judge WILLIAM WEBSTER, Director, FBI:** Well, I think there's a great, vast difference between the right to publish what you know and the means by which you acquire that information.

**Dean SCHMIDT:** Is there any protection at all for him? Can he get any help from the First Amendment at all?

**Judge WEBSTER:** In terms of the legitimacy of his activity, I think not.

**Dean SCHMIDT:** Judge McGarr.

**Judge McGARR:** There is no help in the First Amendment for breaking and entering. I'm amazed that the question would be asked. I'm amazed and appalled at most of the comments I heard this morning from the newsmen. I'm actually shocked to hear somebody say, "I wouldn't touch the stolen document, I'll just let him read it to me." Or to hear somebody else argue, you know, "The national security is no great problem, it's news and I have the right and duty to publish it." Or, "I'd break the law in furtherance of my commercial duty to publish them." That's what a fence does. He breaks the law in furtherance of his pursuit of his commercial goal. There has been no respect for the law, for the legal problem implied here, by anyone who has spoken for the media here today, and I'm really amazed by it.

**Dean SCHMIDT:** Well, but — the First Amendment is law.

**Judge McGARR:** The First Amendment is a law that says absolutely nothing about

offense has been committed is quite a different question from whether this or that or the other publication is protected by the First Amendment. And it's my view, as I say, that even though information was acquired as a result of criminal activity, that's a separate issue from the protection that the acquirer has to publish, print, or broadcast that information.

**Dean SCHMIDT:** And does this—

**Justice STEWART:** But just because you have a right to do something doesn't mean it's right to do it.

**Dean SCHMIDT:** Well, I understand that. But does the acquirer get any little helpful ruboff, a little glow or something from the First Amendment?

**Justice STEWART:** Not so far as the commission of the criminal offense goes.

**Dean SCHMIDT:** Just like he was trying to steal a diamond.

**Justice STEWART:** That would be my view.

**Dean SCHMIDT:** Information no more protected—

**Justice STEWART:** That would be my view.

**Dean SCHMIDT:** In the acquisition stage.

**Justice STEWART:** That would be my view.

**Dean SCHMIDT:** Mr. Abrams, a last comment on this point before we—

**Mr. ABRAMS:** I think it is different, whether we have a breaking and entering situation on the one hand or Mr. Hume paying someone to go steal a document on that same hand, both of which, it seems to me, are clearly criminal, whether a reporter does it or anyone else does it. But quite a different situation if a journalist in the course of what I think is fair to call ordinary newsgathering learns information from someone who is unauthorized to give it to him. It seems to me that in that type situation there is a very, at least a very strong First Amendment argument which could be mounted against the imposition of criminal liability.

**Dean SCHMIDT:** Mr. Frankel.

**Mr. FRANKEL:** With all due respect to the legal argument here, isn't the secrecy or not complicated enough? I don't understand where this property business comes from. I mean, unless Schlesinger is going to write his memoirs with this piece of paper and he wants to protect the future copyright of the secret, whose property are we talking about? Why are we injecting jewels and all the other aspects of ownership and economic value into a discussion that's hard enough?

**Mr. HUME:** It's government information really, isn't it?

**Mr. FRANKEL:** Well, government information is also public information is also American information. What's it got to do with jewels?

**Dean SCHMIDT:** Well, let's move to the publication stage. It's Stage III in our little scenario now. Mr. Rather, you have managed to overcome your trepidation at receiving this obviously stolen document from your source that has "top secret" stamped all over it. What happens next?

**Mr. RATHER:** If we'd established it was true we'd probably run it.

**Dean SCHMIDT:** How do you establish that it's true?

**Mr. RATHER:** I'd ask the person who gave this information to me: "How is the best way you think that I can verify this independently, keeping in mind that I'm going to have to have some other verification?" That this person's word is not good enough for me. The document itself, in and of itself, is not good enough for me. I've got to have some other sources.

**Dean SCHMIDT:** I see.

**Mr. RATHER:** And also—

**Dean SCHMIDT:** So, in other words, do I know another dissident from the policy, or another personal vendetta, I just—

**Mr. RATHER:** That would be very handy, yes, if he knew another person such as that.

**Dean SCHMIDT:** But why? That person could be just as suspect. I mean, it's part of the little conspiracy, isn't it? Why—

**Mr. RATHER:** But it's helpful in my deciding, our deciding, whether we're going to run this story or not, whether we've heard it from one person, or two people or half a dozen.

**Dean SCHMIDT:** Why don't you just call up Mr. Schlesinger?

**Mr. RATHER:** I might do that. Underscore the word *might*.

**Dean SCHMIDT:** Why? Why is there any doubt about it?

**Mr. RATHER:** Well, I might not want Mr. Schlesinger to know in the beginning that I knew anything about this story. Might not. Eventually I probably would call Mr. Schlesinger or someone who had the right to speak for him.

**Dean SCHMIDT:** Before you ran it?

**Mr. RATHER:** Before I ran it.

**Dean SCHMIDT:** Why don't you want him to know about it?

**Mr. RATHER:** In the early stages?

**Dean SCHMIDT:** Yeah.

**Mr. RATHER:** Because he might shut off avenues for me to determine whether this story is true or not. It's not unheard of to turn every valve in the CIA and the government saying, "Rather is on to this story, shut him down." As a matter of fact, I would consider that part of his responsibility if he knew that I was on to the story.

**Mr. SCHLESINGER:** Protect sources and methods, right.

**Dean SCHMIDT:** Mr. Denniston, how about you, how would you go about figuring out whether this document is fourteen carat or is a fraud?

**Mr. DENNISTON:** Well, let's first of all operate on the assumption that you stated earlier, which is that this is a source previously known to be reliable. For me that's enough.

**Dean SCHMIDT:** You mean if I told you what's playing down at the local movie theatre yesterday I can all of a sudden give you a covert action plan on Sierra Madre and you'll swallow it?

**Mr. DENNISTON:** Well, if you have an on-going relationship between a reporter and a source there are a number of things that that yields. If you have that kind of an on-going relationship every time the source comes to you with new information and there is no easily or immediately verifiable means available to you, you go with it.

**Dean SCHMIDT:** You could call Schlesinger.

**Mr. DENNISTON:** Oh, I would call Schlesinger after I had the story ready to go to be sure that the story got on the streets before the injunction was issued.

**Dean SCHMIDT:** Now wait a minute. I don't understand why you're reluctant to call him. Suppose you've gone through this process of verification that Mr. Rather described.

**Mr. DENNISTON:** Well, first of all, the chances are that—I would expect that Mr. Schlesinger would probably ultimately lie to me about it anyway. He would tell me that the information was not true. He would try somehow, perhaps by invention or fabrication, to persuade me not to run it. So it's a useless call, unless you want to just put in the story. "The Director of CIA said the information was flawed or faulty." That doesn't seem to me to add much to the weight of the story which you're already satisfied is true.

**Dean SCHMIDT:** I'm the leaker. You're ready to all but irrefutably presume that what I give you is true. But you're ready likewise to make the opposite assumption about him.

**Mr. DENNISTON:** Well, it's been my experience after a lot of years in Washington that lying increases the closer you get to the top.

**Dean SCHMIDT:** And yet we—yeah, but we've heard about—we've heard about all of the really crummy motivations that I, as a leaker, could have. Those are motivations that motivate lying as well as leaking.

**Mr. DENNISTON:** But that doesn't have anything to do with whether the information is true or false. I have never met a leaker who was pure in heart, and I don't ever expect to meet—

**Dean SCHMIDT:** So let him lie to you a little bit. Why are you worried about what—I mean, why not call him up before he—before you put it on the streets? What are you worried

about?

**Mr. DENNISTON:** Except for cosmetic purposes to add his name to the story I don't know why, so I won't even feel obliged to do so.

**Dean SCHMIDT:** Mr. Nelson, do you talk to him before you run this story? Or are you with Mr. Denniston? Is it a second page item?

**Mr. NELSON:** Oh, I'm not with Mr. Denniston on anything, I don't think. I mean—I mean I think he's playing devil's advocate. I don't think he's even—I don't think he'd break and enter anyplace, or I hope he wouldn't.

**Dean SCHMIDT:** Is it because he—it's part of the director's reaction is part of the story. Is this just a newsworthy judgment?

**Mr. NELSON:** That is—

**Dean SCHMIDT:** Or is there some other responsibility in a case like this just to inform him that one of his secrets is about to be blown?

**Mr. NELSON:** Well, no. I don't think you necessarily need to inform him about that, except I think you need to get his reaction to it. If he wants to deny it—

**Dean SCHMIDT:** Okay. Let's get his reaction. Call him up. What do you say?

**Mr. NELSON:** Well, I say—

**Dean SCHMIDT:** You know him. "Hi, Mr. Director."

**Mr. NELSON:** I've got these notes from a meeting. I've got a source who tells me that the CIA is up to training people to go into Sierra Madre and so forth, and I just wondered do you have any comment on it? I have it from more than one source and we're going to publish it in the morning.

**Mr. SCHLESINGER:** Am I responding only to Jack Nelson or in general?

**Dean SCHMIDT:** Respond to him.

**Mr. SCHLESINGER:** It depends on the reporter's reputation in the first instance. If he's what has been called an investigatory journalist I figure he doesn't have very much. He's heard something somewhere and he's off on a fishing expedition. Any further information that I give is simply going to be used to pad up the story.

**Mr. NELSON:** Then you are going to do as Lyle Denniston said — lie about it.

**Mr. SCHLESINGER:** Oh no. I didn't say that I wasn't going to give him any additional information. Now that's if he's an investigatory journalist. Now if he is a journalist, by contrast, with some sense of responsibility I may appeal to his patriotism. If Mr. Denniston comes in and I'm familiar with his political philosophy I appeal to his editor right off.

**Dean SCHMIDT:** Let's just—I'm interested in just playing this one for a moment nice and slow, the way it happens in real life.

**Mr. SCHLESINGER:** I think I'm as interested in what he's got as he's interested in what I've got.

**Dean SCHMIDT:** Do you show him the minutes, Mr. Simons?

**Mr. SIMONS:** No.

**Dean SCHMIDT:** Why not?

**Mr. SIMONS:** I don't show him documents of any kind. Don't let him even know I have 'em.

**Dean SCHMIDT:** Why not? He'd probably show you documents once in a while.

**Mr. SIMONS:** Well, that's fine. That's his job.

**Dean SCHMIDT:** Why don't you tell him what you have?

**Mr. SIMONS:** Oh, I tell him what we're going to run but I don't show him anything and I don't tell him we have notes, documents, or pieces of paper.

**Mr. SCHLESINGER:** And he usually gives me an hour before the presses run.

**Mr. SIMONS:** That's right. That's all he deserves.

**Dean SCHMIDT:** So you've got to be a fast talker, huh? Why—two questions. Why won't

you just show him the minutes?

**Mr. SIMONS:** Because I regard the minutes as something that I have.

**Dean SCHMIDT:** Oh now it's your property?

**Mr. SIMONS:** That's right. It might also indicate to him who gave me the documents. It might have handwriting on there; it might have an indication of who it went to; it might even be encoded in a code I don't understand.

**Dean SCHMIDT:** I see.

**Mr. SIMONS:** So I'm protecting a source.

**Dean SCHMIDT:** You're protecting your source too.

**Mr. SIMONS:** Absolutely. I don't trust him, but the fundamental difference, and where I agree with Lyle theoretically, although maybe not practically, is that I think it's his job, Jim Schlesinger's job, to keep secrets. That's his job. My job is to find 'em.

**Dean SCHMIDT:** Let me change the circumstances just a bit. Okay, we're not talking about Sierra Madre, we're talking about another country in that general area. That country has been in the hands of an extremely repressive, almost pathologically repressive right wing military dictatorship for almost two decades. And you learn that the CIA has been encouraging some young officers in the military of this country to throw these bums out, and put in a decent government, and it's about to happen. Mr. Nelson, do you go with that story, or not?

**Mr. NELSON:** Well, I would—I would report it. It would be up to the editor and publisher whether they would run it. I'd report it.

**Dean SCHMIDT:** I see. It's just not your job as a reporter.

**Mr. NELSON:** That's right. That's right.

**Dean SCHMIDT:** Mr. Simons? If you were his editor—

**Mr. SIMONS:** The impulse is to publish, so then we have to talk ourselves out of it for the national interest, if we think there is a national interest or a national security *[inaudible]*

**Dean SCHMIDT:** But you certainly listen to Mr. Schlesinger—

**Mr. SIMONS:** Yes.

**Dean SCHMIDT:** On a national interest question.

**Mr. SIMONS:** Yes. And we don't listen to your proposition. We're convinced this would be a good thing. Because we're not in the business of drawing the moral values of things if we report something good is going to come of it or bad is going to come of it. That's a very dangerous position to put yourself in as an editor.

**Dean SCHMIDT:** Why? Why is it dangerous?

**Mr. SIMONS:** Because then you begin making judgments on publishing stories and displaying them in a way that you think are going to change the world for good or for evil, depending on your own predilection. I think what we do rather is—

**Dean SCHMIDT:** What if it's a very clear case? These are very nasty, nasty fellas down there?

**Mr. SIMONS:** I don't—they may be replaced by very nasty, nasty fellas down there and I don't know that.

**Dean SCHMIDT:** Mr. Carter.

**Mr. CARTER:** To the degree that the press starts trying to think it should think as a government official, to that degree that you start confusing functions, is a day that we are all in trouble, and I think that there is a mentality at work in the press today which sees itself as part of the government. To that degree you're all in trouble, folks.

**Dean SCHMIDT:** But when you look at the probabilities—

**Mr. CARTER:** Journalists have a hard enough time deciding what's actually happening. When they start trying to be prophets they go completely wrong. I mean, they—they cannot play that game. They must not. The government is elected to do that.

**Dean SCHMIDT:** Mr. Buchen, on the basis of your experience in government, in the White

House, what's your guess about whether you could persuade the press to keep quiet about a story that involved a covert program on our part to overthrow or cause a change of government in a repressive right wing dictatorship in some part of the world?

**PHILIP BUCHEN, Counsel to President Ford:** Well, I fortunately went through about two-and-a-half years when I didn't have to try my theory out to see if it would work on Dan Rather, but my theory would be to ask people like Dan and the other media people what their purpose is. And I'd think they'd all agree that their purpose is to inform the public so that the public can make an opinion. Now, if by putting out information of this type, and we assume that to put it out is to kill the effort, you are not putting out information to guide the public, you're acting as government. You're killing your project, you're vetoing an action of government. You're not putting out information to help the public make a decision.

**Dean SCHMIDT:** Senator Hatch, do you agree with that?

**ORRIN HATCH, U.S. Senator, Utah:** Well, to a degree. I think that the press should not become an influencer or manipulator of foreign policy by printing stories in one way versus another, or in a biased manner. I think that they do have an obligation to report facts. If lives are to be lost if we don't at least give some consideration to what the head of the CIA, the director of the CIA, says and we just print it anyway, without any sense of responsibility, then I think that the press has to take some responsibility for the loss of those lives. And I think the press in a very real sense might have to take some responsibility for the loss of foreign policy initiatives that may otherwise take place.

**Dean SCHMIDT:** Mr. Buchen, let's suppose that you're—I'm going to make myself the President and you're my counsel. My director of the CIA has come in and told me that Dan Rather has the story of an initiative that we're undertaking in this country, that we planned for months and months, very careful. Now why can't we use forces of law in this society to make him do the responsible thing, which is to permit the government to make its policy, carry out its initiatives?

**Mr. BUCHEN:** Well, the only possible remedy you'd have would be to go into court for an injunction. How a judge could resolve a conflict between what must be some rationale on the publisher's part from going ahead and the government claim that to go to publish would kill the operation. Whether you could get a judge to comprehend the case in order to stop the press and whether he's willing to use an extreme remedy, certainly extreme in free speech cases, an injunction is very questionable.

**Dean SCHMIDT:** Mr. Skinner, suppose I'm the President and you're the Attorney General. I want to stop this story. I only need about a week. The story can run after a week to get this operation off the ground, so I'm just seeking to buy a little time through the judicial process.

**SAMUEL K. SKINNER, Former U.S. Attorney, Northern District of Illinois:** I think we can — maybe with every break in the world buy a week.

**Dean SCHMIDT:** Now how do you get that issue before the court?

**Mr. SKINNER:** You find out whose paper it is, what lawyer represents him, you say I'm going to see Judge McGarr or Judge Linde, would you meet me in court.

**Dean SCHMIDT:** All right, it's Mr. Abrams, You meet him, Mr. Abrams? If you're representing Mr. Rather on this one?

**Mr. ABRAMS:** Yes, I'd go to court. Yes.

**Mr. SKINNER:** Thank you. Step one.

**Mr. ABRAMS:** I would say that as far as I'm concerned there is no lawsuit, there is nothing in the court, there is no legal proceeding.

**Dean SCHMIDT:** In this early stage you say there is no lawsuit, there is no legal proceeding, does that mean he can run with it?

**Mr. ABRAMS:** Sure enough.

**Dean SCHMIDT:** On tonight's news?

**Mr. ABRAMS:** Absolutely.

**Dean SCHMIDT:** Mr. Rather, would you do that?

**Mr. RATHER:** Absolutely. I'm not going to give it a week's delay and get bogged down

with a bunch of government lawyers. We're going to run it tonight. On the other hand—  
**Dean SCHMIDT:** Isn't that contempt for the judicial process, I don't mean in a technical sense, but in a sense of—I mean, are you just kind of playing "Beat the Clock," aren't you? Here is a legal issue—that the court—

**Mr. RATHER:** Yes, and it's my job to beat that clock.

**Dean SCHMIDT:** It is?

**Mr. RATHER:** Absolutely.

**Mr. SKINNER:** That's what the other side's doing now too, is trying to beat the clock too.

**Mr. ABRAMS:** Here is Mr. Skinner telling you candidly he hasn't even had a case, he knows he's going to lose this case. He has no case at all. He wants a week, not because he's got a good lawsuit but because he has policy reasons which lead him to go to court to try to keep this story from being published.

**Dean SCHMIDT:** I don't think he's got such a bad case.

**Mr. ABRAMS:** And you ask Mr. Rather whether Mr. Rather is acting contemptuously? I think Mr. Skinner is acting contemptuously going to court on a case which he knows has no merit.

**Mr. SKINNER:** Well, I didn't—I don't believe I ever said that I would—had a bad case. I said that, you know, if we started from scratch it's one thing but the precedent's been set that leads me to believe that I won't succeed. I won't succeed. That doesn't mean that there is not going to come a time when in the right case, in a very limited window, we will have the right case. It isn't here yet according to the precedent.

**Dean SCHMIDT:** Mr. Skinner, I think it may not have been the best idea to call Mr. Abrams. I think maybe you should have called Judge Linde first.

**Mr. SKINNER:** Let's try that scenario for a minute—

**Dean SCHMIDT:** I mean you'd call him and say, look, Judge, here we got a very, very serious situation. The President of the United States has instructed me to try to get a prior restraint here, how about an order that will keep the *status quo* under control, maybe just for twenty-four hours. What do you think, Judge?

**Justice HANS A. LINDE, Oregon Supreme Court:** I have to ask you some questions. Is there a law against what they propose to do?

**Dean SCHMIDT:** Probably.

**Justice LINDE:** What is it?

**Mr. SKINNER:** There are certain statutes—

**Justice LINDE:** Well, let me—go ahead—

**Mr. SKINNER:**—that could be applied to this.

**Mr. SCHLESINGER:** A clear violation of the intent of the National Security Act which presupposes the means by which the director of Central Intelligence can protect sources and methods of intelligence operations.

**Justice LINDE:** Yes. Mr. Schlesinger, I'm fully familiar with that but it looks as if you've been unable to do that. What I want to know is, am I enjoining something which would be illegal if, in fact, it were carried out? Or am I making it illegal for the first time? I mean, I'm a judge. I'm going to administer law.

**Dean SCHMIDT:** Judge Edwards, let me get a reaction from you if you were a trial judge.

**Judge HARRY T. EDWARDS, U.S. Court of Appeals, D.C. Circuit:** We do not engage in prior restraint because it's one of the most important rights, freedoms, that we have in this country.

**Dean SCHMIDT:** But the implication of your position is that you won't even preserve the status quo.

**Judge EDWARDS:** It's not our responsibility to judge.

**Dean SCHMIDT:** Long enough to hear Mr. Skinner's arguments and to hear Mr. Schlesinger's testimony.

**Judge EDWARDS:** We're not to make policy. We enforce and apply laws for the Constitution, and you're asking us to make policy. We won't do it.

**Dean SCHMIDT:** Judge Webster, taking you back to your days on the bench, if I could for just a moment. You take these judges who have spoken to be right in their extreme reluctance even to get involved with this question of whether this is a situation where the broadcast of this story might cause such irreparable damage and even loss of life?

**Judge WEBSTER:** I think that generally expresses the view of the judiciary in relation to their role, and I think they're generally right.

**Dean SCHMIDT:** Why, the judiciary is not generally, with respect, tremendously shy about making policy, or at least just keeping things the same for twenty-four hours or a week so they can decide whether to make policy.

**Judge WEBSTER:** You always have the problem whether you can bend the Constitution because of particular exigent circumstances.

**Dean SCHMIDT:** The full weight of the executive branch from the President on down telling you, Judge, that it would be terrible for the national interest for Rather to put this story on the news. Now how far as a judge are you capable of making your independent determination about that?

**Judge WEBSTER:** You're limited. You have to give certain good faith presumptions to the executives charged with the responsibility for carrying out their role. Now—

**Dean SCHMIDT:** Why? The journalist did just the opposite.

**Judge WEBSTER:** Well, theirs—I think theirs is different. They're not compelled to give that presumption.

**Dean SCHMIDT:** Same executive branch people.

**Judge WEBSTER:** I think a judge might want to look at the legitimacy of the undertaking to determine whether there is something about that undertaking, not in terms of whether it's wise or unwise, but whether it offends some other statute or constitutional principle. There is another aspect here. You're doing a certain kind of equity here where you're invoking an injunction. So you're looking at equitable principles. And judges have always been reluctant to undertake to achieve what they cannot achieve. To order to be done what they cannot order. They can order a particular newspaper, a particular radio station not to publish. But they're also either directly or indirectly going to be considering whether or not the leaker isn't going to go to the next place. Is this going to be effective in stopping the activity?

**Dean SCHMIDT:** He found out the leak and he throttled it. So that at least for a week you're not—there is no evidence that your injunction would be ineffective. I think, Mr. Skinner, you may get what you want.

**Mr. SKINNER:** I think we've finally found a judge.

**Mr. ABRAMS:** I would say, Judge Webster, that when we look back on our prior restraint experiences we see that other administration officials in good faith signed similar affidavits, and we found out later on, looking back ten years after the Pentagon Papers case, that whatever else is true about that, I would argue at least, nothing much happened of a bad sort as a result of publication. So that you'd have to be very wary about deferring to Mr. Schlesinger because there will always be a Mr. Schlesinger there to sign the affidavit and to sign it in good faith and to say in good faith, "these very bad things are going to happen." So it seems to me that the window out there, is to leave ourselves in the uncomfortable position, but the necessary one, of leaving it to the judge to be persuaded, and to be very persuaded, so that all the prior restraint tests are met. That in Justice Stewart's language in the Pentagon Papers case, that there will surely be direct and immediate and irreparable harm to the nation or its people. Now that's a test which is almost impossible to meet. I don't know any lawyer who can prove almost anything surely, let alone irreparably.

**Dean SCHMIDT:** Mr. Rather, if Judge Webster or some other district judge in these circumstances, conscientiously doing his job as described, issued a forty-eight hour injunction prohibiting you from publishing this, does that make any difference?

**Mr. RATHER:** It wouldn't to me, but in honesty that wouldn't be my decision to make. I want to say it's my responsibility to be a good citizen—

**Dean SCHMIDT:** Why wouldn't it to you?

**Mr. RATHER:** My responsibility is to obey the law, or, if I choose not to obey the law to be prepared to meet the consequences of that. And I take that very seriously. As a professional my job is to publish and be damned. What I would want to do with this story is run it—

**Dean SCHMIDT:** But Mr. Rather, you above all as a journalist benefit from the rule of law in this society.

**Mr. RATHER:** I do.

**Dean SCHMIDT:** I mean, the reason you have First Amendment rights is because there are judges who will stand up and defend those rights when the executive branch or some other branch of government wants to take them away from you.

**Mr. RATHER:** May I gently point out that the First Amendment right is not my right, is not a journalist's right, it's the right of every citizen in this country. So it's not something special for me or anybody else.

**Dean SCHMIDT:** Mr. Sauter.

**VAN GORDON SAUTER, Executive Vice President, CBS Broadcast Group:** Oh, I obviously have some reservations about our technical capability of originating a broadcast from Leavenworth, Kansas. I would obviously go to our lawyers and say what are the—what are the ramifications of broadcasting that story?

**Dean SCHMIDT:** Mr. Abrams.

**Mr. ABRAMS:** The question is obedience or not, and the legal advice is that you run very grave risks; that the majority view at least seems to be, at least in the federal courts, that if you violate any court order, even if it's unconstitutional, you are still responsible for having violated it and you can still go to jail for having violated it—

**Mr. SAUTER:** I would have grave reservations about defying the order. I think I would say to my attorney that we pay you more than the government pays Skinner. He found Webster. Go find one for us. Let's get this on the air tomorrow night.

**Dean SCHMIDT:** But you—but your position would be to obey the injunction during the pendency of the appeal process.

**Mr. SAUTER:** I don't think that there is any way you can operate in the broadcast business as it's constituted today and violate that. No.

**Dean SCHMIDT:** Justice Stewart, we've seen here a conflict or a contest at least, between the press on the one hand, the government on the other. The government has ways of keeping secrets if it needs to. If it fails, why should the courts be a kind of forum of last resort for the government to turn to?

**Justice STEWART:** Well, the reason that it is a proper function of the judiciary to consider these questions is that the judiciary is sworn to and—to apply the Constitution and the law. And here we have a constitutional provision, the First Amendment of the Constitution, which bears on this problem. And one of the leading cases written under the First and Fourteenth Amendments is the case of *Near* against Minnesota which purportedly *dictum*, to be sure, to create an exception, an exceptional situation—to describe it as an exceptional situation—where prior restraint is permissible. But now if prior restraint is not permissible in this case it doesn't make any difference if it's twenty-four hours, or one hour, or three years—

**Dean SCHMIDT:** Should that window—

**Justice STEWART:** Because there is no such thing as being a little bit unconstitutional. It's

like being a little bit pregnant. It's impossible.

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**Mr. FRIENDLY:** Justice Stewart, there is a backdrop to this hypothetical case that we can't ignore: that 1931 landmark decision called *Near vs. Minnesota* in which Chief Justice Charles Evans Hughes writing for a five-to-four majority ruled that there could be no prior restraints, except in such rare cases as the reporting of troopships sailing in time of war, reporting that might do irreparable damage to the national security. In the 1980s, in a thermodynamic age with instant communications, is that not outdated?

**Justice STEWART:** Those words were written by Chief Justice Hughes in 1931, and I would believe and assume that the exception about which he wrote in those words [which] had relevance then and maybe still do today.

**Mr. FRIENDLY:** And yet you are very wary about Supreme Court justices issuing prior restraints.

**Justice STEWART:** I am indeed, with the— because it seems to me that Chief Justice Hughes was correct in that case in saying that above all else, the First Amendment prevents a previous restraint of publication with that one single, rather narrow exception described in dictum, which had all the relevance in 1931, but perhaps whose specifics do not have relevance today.

**Mr. FRIENDLY:** Except it isn't going to happen next time and some journalists are going to have some very fast decisions to make under lightning pressure.

**Justice STEWART:** Well, I hope they act responsibly and with self-restraint and with good judgment. Because it seems to me that if in violation of the canons of judgment and self-restraint and responsibility a journalist someday published some information that's going to end up in a tremendous catastrophe that, that alone, will trigger a modification of the First Amendment. And that, it seems to me, would be a tragic event in American society. Because the First Amendment, Mr. Friendly, protects not just the press and not only the press, and not simply the press, but it protects us all. It protects American society.

**Mr. FRIENDLY:** So the press is really the surrogate for the people who benefit from the First Amendment?

**Justice STEWART:** That's correct. And it's the people who do benefit.

**Mr. FRIENDLY:** I can't think of a better way to end this first seminar on the delicate balance of the Constitution and the Bill of Rights. Thank you, Justice Stewart. And good night from us here at Independence Hall.

**Justice STEWART:** Thank you, Mr. Friendly.

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