Statement of Hon. Arthur J. Goldberg at congressional hearing, June 23, 1971

Ten days after the New York Times began publishing the Pentagon Papers, William Moorhead’s subcommittee began hearings to determine, in Moorhead’s words, “whether or not the right of the people and the peoples’ representatives in Congress to adequate information is being thwarted and, if so, to recommend legislation for procedural mechanisms to reestablish a proper balance between these shifting constitutional rights.”

The first statement to the subcommittee was made by Arthur Goldberg, who served as a justice on the Supreme Court of the United States from 1962 to 1965, when he resigned to become the U.S. ambassador to the United Nations. Goldberg urged Congress to take a more active role in balancing the executive branch’s need for secrecy and the public’s right to know, reasoning that the latter could not be adequately protected if elected representatives were not full partners in the evaluation and safeguarding of vital information.

In this case, the drama is virtually unprecedented: the most powerful government in the world has taken powerful newspapers into court. And as the world watches with fascination and incredulity, America is forced to confront constitutional and political questions of the utmost gravity in an atmosphere of crisis.

Some of these questions will be resolved by the Supreme Court of the United States. It would not be appropriate to discuss the precise legal issues awaiting judicial resolution and I do not propose to do so. But the broader questions of reconciling the needs of the government and the rights of the citizen to information on the operations of government are appropriate for discussion and resolution, consistent with our Constitution, by this committee, by like committees, and by Congress at large. It is the broader philosophical questions which underpin our constitutional framework, rather than the narrower legal questions, that I should like to discuss this morning.

We are witnessing what some regard as a classic conflict between freedom and responsibility; between order and liberty; between the right of the public and their representatives to know—in the name and spirit of democracy—and the Executive's need to withhold—in the name of security. But, I believe, as I have said before—in a majority opinion of the Supreme Court—that “freedom and viable government are . . . indivisible concepts.” [Case citation omitted.] They can be reconciled—they must be reconciled—if our form of government is to survive as it has done for almost 200 years. . . .

Given this premise, is there an orderly framework in which the rights and needs of the public, the press, Congress and the executive can be rationalized and reconciled? I think there is, on the basis of the following guidelines:

First, in mandating government by the consent of the governed, our constitutional system requires that the people be adequately and honestly informed about the great issues that affect their lives and welfare. If this means the government must, by and large, be conducted in a goldfish bowl, so be it, for in no other way can it retain the consent of the governed. The first amendment was conceived as a basic safeguard of the public’s right to know, as well as the press’ right to publish. Without the first amendment—indeed the whole Bill of Rights—we all know our Constitution would not have been adopted. A firm commitment was made at the time that there would be a Bill of Rights. The language of the first amendment in this connection needs recalling.

“Congress shall make no law . . . abridging the freedom of speech or of the press . . . .” I would hope, as Justice Cardozo has felicitously said, that this “preferred right” on which all other rights rest will be preserved against further erosion. This provision also applies—while directed at the Congress—now by decisions of the Supreme Court, to the States and also to actions of the Executive.

Second, there is no possible justification that I can conceive for denying to Congress the information necessary to the performance of its duties. If the people have a
right to know, their representatives have a need to know. Nothing can contribute more to the weakening of Congress and undue concentration of power in the executive than the latter’s recalcitrance in sharing information with Congress. With adequate information, Congress under our constitutional framework can be the full partner which was envisioned in our separation of powers, in the evolution of policy and the resolution of our foreign and domestic problems—this is what the Founding Fathers perceived. Without it, Congress cannot appropriately perform functions entrusted to it under our Constitution.

Third, as the history of civilization, ancient and modern, teaches, any government, including our own, has more to fear from a captive press than from a zealous press, more to fear from the journalistic apologist for an administration—any administration—than the journalistic antagonist of an administration. By commanding freedom for the press, our Constitution seeks to inspire responsibility by the press. As an essential safeguard, the framers of our Constitution vested in the courts the duty of assuring the constitutional freedom of the press as well as the orderly exercise of the Government.

Mr. Chairman, I regret exceedingly the confrontation which has come between the press and our Government. I am one who believes that we have had too many confrontations lately. In resolving this terrible dilemma, there is surely no easy solution. But there are ways in which all of us may proceed to preserve the vital balance between press, the Congress, the public, and the executive branch of the Government.

First, we presumably will receive guidance from the Supreme Court on the fundamental constitutional questions at issue.

Second, we should distill the best from among the various thoughtful proposals being advanced by Members of Congress, on the question of reforming our classification procedures. It is my own feeling that here is an area in which Congress should act to define more precisely what documents are properly to be classified, and the duration of any classification. The present system whereby the executive branch itself determines the rules for disclosure of its own documents has proved inadequate for keeping Congress and citizen informed. It would be appropriate, I feel, for Congress to draw upon the various proposals of its Members and others and lay down more specific guidelines.

Third, I believe that our statutes dealing with disclosure of information merit careful revision so that they may better conform to constitutional requirements as defined by the Supreme Court of precision and clarity. In such revision, we must bear in mind again what the Supreme Court has said:

The first and fourteenth amendment rights of free speech and free association are fundamental and highly prized, and “need breathing space to survive.” “Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.” [Case citations omitted.]
Fourth, I can see no conceivable reason why the chairman of the appropriate committees of Congress cannot be furnished copies of executive reports and memoranda essential to the performance of congressional responsibilities under appropriate security arrangements. I am sure that the average constituent, the average member of the public, must be completely puzzled why access to certain such documents is denied to responsible Members of Congress when newspapers seem to have such documents at hand.

Fifth, I think the present impasse makes it imperative that a select committee of Congress conduct a special investigation into the causes and conduct of the war in Vietnam. Regardless of how the various lawsuits turn out, such an investigation is necessary to preserve public trust in the candor and competency of our public officials and, indeed, of our Government itself. This investigation should occur at an appropriate date fixed in the judgment of Congress and should be accompanied by public disclosure of those documents whose classification is no longer merited. I myself haven’t the slightest doubt that such a select committee will carefully screen the documents to preserve necessary confidentiality. That is done in proceedings in Congress all of the time, where the Foreign Affairs Committee, the Armed Services Committee, other committees of Congress holding hearings and at various stages release or not release some material to the press. But I would put that power in the select committee. I also have no doubt that the public today, along with Congress, is entitled to know, subject only to genuine national and diplomatic security considerations, all that occurred leading to the momentous decisions of this tragic war. In fact, I see no escaping from this at the present time in light of what has occurred in recent days.

Statement of Richard P. Kleeman at congressional hearing, June 25, 1971

Reporter Richard Kleeman, who chaired the Freedom of Information Committee of Sigma Delta Chi, a professional journalists’ organization, argued that prior restraints on publication constituted unwarranted government censorship. Kleeman stressed that while members of the press could not perform their function effectively without disclosing sensitive information, the vast majority of journalists handled such material carefully and responsibly, and were thus qualified to exercise independent judgment, free from government supervision.


I would like to comment on a recent claim that freedom of the press and freedom of information have become partisan issues: as the current chairman of a committee that—under many chairmen before me—has been at least as critical of Democratic
as of Republican administrations on these issues, I find that view, now or at any time in the past, unwarranted. . . .

[O]n the question of the Government’s right to restrain publication in advance: our society would agree with the Hughes decision in Near v. Minnesota in 1931 that such prior restraint “is of the essence of censorship,” and we reject the idea of Government censorship in all but the most limited of wartime, battlefield situations.

On the other hand, I do not believe there are many—if any—reporters, editors or broadcasters who are not sensitive to the occasional need for restraint—preferably by mutual agreement—imposed by the exigencies of national security. This concept also was dealt with in the 1931 Hughes opinion when it said that:

No one would question but that a government might prevent actual obstruction to its recruitment service or the publication of the sailing dates of transports or the number and location of troops.

I think you would have to take those as merely examples of a class of information, rather than limiting it to those specifics. What I think the responsible reporter or editor would say is that the judgment of the effect of what he might write or publish in a security-sensitive area is but one of many judgments they are constantly called upon to make in gathering, editing, and publishing the news. What they do not want is a government—or a court—standing beside them saying, “Print this—don’t print that.”

The present situation is not by any means the first time—nor will it be the last—that highly classified documents have come into the possession of aggressive, enterprising newsmen. Perhaps half—maybe more—of what a good reporter writes consists of material that someone, in or out of government, would prefer not to see reported. Sometimes reporters having security-sensitive information elect to publish it—I would say most often they do—on some few occasions, they elect to withhold it, at least temporarily. But always the judgment should be independently made—and made in full awareness of the responsibility imposed by its exercise.

A high classification on a document does not cause the experienced newsman to say, “I must not print that.” If, through whatever circumstances, such a document comes into his hands, its classification would alert him to the fact that he has potentially significant, and possibly harmful, information in his possession; that it should be analyzed with care, perhaps summarized or paraphrased rather than quoted directly; and that someone in an official position—rightly or wrongly—considered that disclosure of the information would be prejudicial. At this point, the newsman must, I think, ask himself—prejudicial to whom or to what?

To those who would cite the espionage laws as flatly prohibiting the media from publishing classified material, I would merely cite those first few words of the first amendment: “Congress shall make no law . . . .”