Approved For Release 2004/10/13 : CIA-RDP88-01350R000200240003-5

p-Rembar, Charles
Ungar, Sanford
Soc.4.01.2 The Papers & The Papers
Soc.4.01.1 NY Times
Orig. under Rembar

Publishing venture

The Papers & The Papers

By Sanford J. Ungar.
319 pp. New York:
E. P. Dutton & Co. $7.95.

By CHARLES REMBAR

In December of 1941, the most evil men the world has known had conquered France, held all of Central Europe, were deep in Russia and had England ripe for taking. Unless the United States stood in the way, the world was about to submit to a rule of maniac brutality and the utter destruction of freedom. The Army and Navy, at the President's direction, prepared a report on how to fight the Nazis. A correspondent for The Chicago Tribune obtained a copy. Bertie McCormick, who owned the Tribune, hated Roosevelt and hated Communism. He may have hated the Nazis too, but that particular hate was at best a distant third. He published the report. There was no prosecution. The Tribune made its disclosure on Dec. 4, 1941. Three days later the Japanese made the matter moot.

Six months later America, at Midway, had its first important victory in the war. The battle was won not so much by brave sailors and fierce admirals as by desk-bound intellectuals who had deciphered the Japanese code. Eventually, the Japanese might deduce that their code was broken, but the longer it took them to arrive at that deduction, obviously the better. Nevertheless, The Tribune story on the battle ran the following subheads: "NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA: Knew Dutch Harbor Was A Feint." The Tribune also gave information about the Japanese force. If the Japanese did not know their code was broken, they could find it out by buying a copy of The World's Greatest Newspaper. Proceedings looking toward an indictment were begun but dropped, apparently because they would entail divulging other military information.

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Thirty years later, The New York Times, followed by The Washington Post and other newspapers, published material from the Pentagon Papers. This time the Government went to court, to enjoin installments not yet published. The suits against The Times and Post quickly reached the Supreme Court, where a grand chance to give substance to the architecture of the First Amendment was very badly fumbled. The newspapers won, but their victory was meager.

In "The Papers & The Papers," Sanford J. Ungar states several times that the struggle in the courts was more prominent and significant than what was struggled over. He accordingly uses the subtitle "An Account of the Legal and Political Battle Over the Pentagon Papers." We are promised more than we are given.

He is quite correct in this judgment. Though he does not explicitly tell us why the litigation was more important than the disclosure of the content of the Papers, there are good reasons. Those opposed to the war in Southeast Asia would only find confirmation in the Papers for what they already knew. Those in favor would say that waging war is full of tricks and, in dire circumstances, means are justified by ends; duplicity, they feel, is an appropriate weapon against a duplicitous enemy (even if it is turned upon the home folks). On the other hand, the definition of freedom that might result from the case itself would have a permanent effect.

But having turned our eyes in the right direction, Mr. Ungar does his best work elsewhere. His penetration of the case is shallow, his treatment of the law inadequate. Our law is important to all of us, our Constitutional law especially. And all of us can understand it, when it is decently explained; appreciation of the law is in the American marrow. A book that undertakes to deal with a great case

has an obligation to the citizen.

This case, apart from its main question, raised problems of terrifying import. Near its beginning, for example, the Government asked that a large part of it be heard "in camera"—that is, in the judge's chambers, in secrecy. The reason, the Government said, was that there would be testimony whose revelation would jeopardize the national interest. There are exceptions to our [illegible] to protect the privacy of individuals.

But this was a public matter, and if the court's decision had resulted in suppression of the Papers, how would the public know whether the decision was an intelligent one, made on the basis of supporting evidence—whether it was a proper exercise of the power which the Constitution has entrusted to the judiciary? On the other hand, it might very well have been the fact—so far as the court then knew — that the evidence, broadcast, would create a peril to the nation. A difficult and interesting point, worth going into. Mr. Ungar describes the Government's morbid preoccupation with secrecy (sometimes the Government agents were afraid to let opposing lawyers see things that were being typed out by Government secretaries), but all he does is describe it.

There was another hobble on the litigation that he mentions not at all. If the hearing was to be held in secret, who would be admitted? In the New York district court, Times counsel asked that Harding Bancroft, executive vice president of The Times, and Max Frankel, head of the Washington Bureau, be allowed to accompany counsel into chambers. The Government objected. The day before, the Government demanded that The Times state whom they wanted present at the hearing. The Times gave four names. "Quick clearance" of the four had been obtained, but Bancroft and Frankel were not among them, and the Government was concerned about the presence of anyone whose "security" had not been checked. The judge settled the particular point by taking the responsibility on himself. He said that Bancroft and Frankel were well known and had "access in Washington to all sorts of people." Suppose they had been less well known. Would they have been excluded? Suppose one of the four previously named had failed to pass the test. Could the Government, a litigant, exclude witnesses that the opposing litigant might need to make its case?

How about the judge himself? This one, Murray Gurfein, happened to be a brand-new judge (who did an excellent job, [illegible]) and presumably his security had been ap-

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