

Excerpts From Oral Arguments on U.S.

Following are excerpts from the oral argument before United States District Judge Murray I. Gurfein yesterday, by Michael D. Hess, Assistant United States attorney, and Floyd Abrams, representing The New York Times, on the Justice Department's request for a court order compelling The Times to turn over the classified documents to the Government for inspection:

MR. HESS: Your Honor, the Government brought on an order to show cause yesterday before your Honor late in the afternoon, asking that this motion be brought on today and asking for inspection of the documents in the hand of The New York Times. This is pursuant to Rule 34 of the Federal Rules of Civil Procedure.

Under Rule 34, a party need serve a notice of production on the other party to obtain documents. We have done this. The relevancy is a major criteria and here, your Honor, it is self-evident; the documents are the heart of this case. They are stolen or embezzled property by their very nature. They are top-secret, confidential documents.

The Government feels that we have a right to identify what was taken from us, we have a right to identify what The New York Times has in its possession.

THE COURT: Let me ask you this: Why is it not a fishing expedition in the sense of seeking general discovery, which is normally constitutionally prohibited?

MR. HESS: Well, your Honor, we feel it is not a fishing expedition because we want to show why these documents, or we will have to show, your Honor, why these documents should not be published, why they should be enjoined, why it will hurt the national interest to have them published. In order to do that we have to know what documents The Times has and what documents they intend to publish.

THE COURT: Couldn't you do that by interrogatory tomorrow, by asking the representative of The Times to testify and ask him what he has and what he intends to publish?

FRIDAY, JUNE 18, 1971

Effort to Obtain Documents

MR. HESS: That is what we would like to find out, your Honor, and if The Times would state with particularity to us.

THE COURT: Let me hold that in abeyance. That is a thought I had as you went along. I will hear the other side.

'An Astonishing Week'

MR. ABRAMS: Your Honor, this has been an astonishing week in the history of journalism. It is astonishing because the United States has chosen to bring The New

York Times to Court in an effort to enjoin publication of obviously newsworthy articles.

MR. ABRAMS: I am speaking of a motion such as the one before you this morning, your Honor, which was brought on by order to show cause yesterday in circumstances in which I hope I can persuade you, sir, that there is absolutely no need whatever for the Government to have these papers, with a single exception which I will come to in a moment.

What this motion is, your Honor, is an attempt to require The New York Times to make available to the United States Xeroxes, which is what The Times has, of certain papers which the United States in its complaint purported to specify.

Cites U.S. Complaint

In its complaint in this action, your Honor, the United States did not come in and say, "We don't know what the documents are, we don't know what The Times has." It filed a complaint, it referred to certain documents.

THE COURT: Does The Times have a fundamental objection and, if so, what is it, to letting the Government know what it has?

From Times

MR. ABRAMS: The Times has a most substantial constitutional problem with respect to production of these papers.

THE COURT: I am not asking about production. Listen to me very carefully. I am asking you now whether The Times would object to giving the Government a list, with description, only of the documents which it has in its possession coming from the Pentagon.

MR. ABRAMS: The Times is not prepared, Your Honor, to allow the Government to inspect the documents which The New York Times has. The Times will give a list which sets forth the documents that it has.

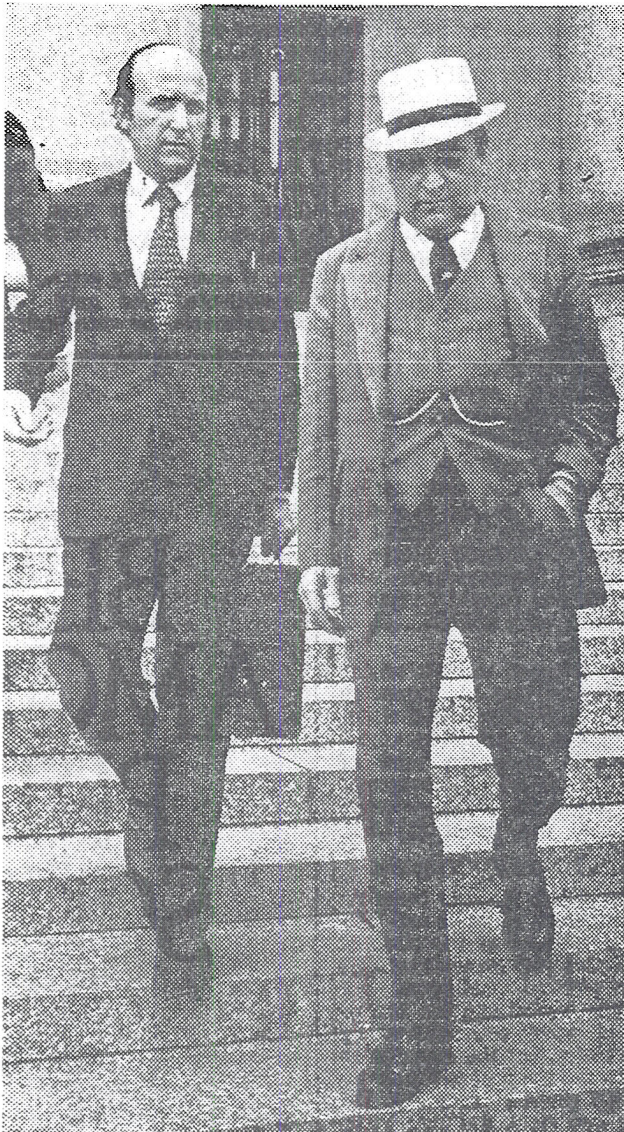
THE COURT: That, if you want to, can be made into the form of an order, but if you say you will produce it by, let's say, 5 o'clock today, I will accept that. Is that all right?

MR. ABRAMS: We would be prepared to advise the Government this afternoon of the documents.

Would Limit Question

THE COURT: So that would then limit the question of whether there are other documents—that will be under some kind of affirmation by somebody or other—

MR. ABRAMS: Wait a minute, sir. The Government has filed a complaint here and referred to two kinds of documents, Your Honor, one supposed 47-volume series and one summary with respect to the Tonkin Gulf. That is the issue as framed



The New York Times/Meyer Liebowitz

LAWYERS FOR THE TIMES: Floyd Abrams, left, and Lawrence McKay leaving U.S. Court House yesterday.

by the Government in this case.

With respect to that issue as framed, we will be prepared to advise what we have. We are absolutely unprepared, sir, to go through our files and make available to the Government, or to advise the Government of anything else which is outside the scope of those issues as framed in the complaint.

THE COURT: Why is that?

MR. ABRAMS: Why is that? Because that would be an ultimate fishing expedition through files of a newspaper, which are as protected by the First Amendment as one could imagine.

THE COURT: Without deciding anything at this moment, I just want to put this question: does The New York Times, so that the whole matter can be adjudicated, have any other documents besides those mentioned in the complaint which came from the same source?

MR. ABRAMS: Your Honor, The New York Times is not prepared to advise the Government with respect to any documents whatsoever,

with the exception of the documents referred to in the complaint in this action and which were referred to in the stories published in The New York Times. A newspaper has a great many sources of information, a great many documents, a great many employees, a great many secrets, which is the essence in good part, your Honor, of journalism.

No 'Fishing Expedition'

THE COURT: I must wonder, why, limiting the category as I have to unauthorized documents and avoiding by all means any fishing expedition into the files of The New York Times or any other newspaper, there could not be merely a listing and not a turning over—we are not talking about that now—or an answer to the question of are there any other documents that came from the Pentagon, so that the Court can view the entire matter. That's all I am asking you.

MR. ABRAMS: This is a case, as your Honor has pointed out and as we are very well aware, sir, of immense magnitude. Issues of

this sort are ones which I as counsel wish to talk to my client about.

THE COURT: All right. Let me put it this way:

The Government has asked for very broad relief, namely the actual production for inspection and copying of your documents, which I am taking under advisement, which you are now arguing.

There is a second branch to the Government's request, which is that that discovery and inspection include documents beyond those already disclosed to be in the possession of The New York Times.

Without discussing the merits or whether or not I will grant the motion by the Government for the actual production and inspection of the documents, I ask whether you have any objection to making a list available to the Government of what you have.

At first I thought you said you had no objection. Then I thought you said that you objected to anything beyond what the Government already knew through the publication of The New York Times. And I therefore ask you, without revealing the documents at this point or bringing them into Court, whether The New York Times is willing, in order to get the issues in this matter in some perspective, to tell the Government what else it has which is by way of unauthorized documents from the same source.

Would Consult Client

MR. ABRAMS: Your Honor, sir, I will speak to my clients with respect to that.

I think that the most significant aspect of the motion before your Honor today relates to the basic request that the Government be permitted to inspect the documents in the possession of The New York Times in what Mr. Hess calls an organized manner.

We have submitted today, your Honor, an affidavit from James L. Greenfield, the Foreign Editor of The New York Times, in which Mr. Greenfield says to this Court, under oath, that he has examined these documents, that they consist of Xerox copies of the documents referred to in the articles which have appeared in The New York Times, and that many of the Xerox copies bear handwritten notations.

Production of these documents in accordance with the plaintiff's application, Mr. Greenfield says, would facilitate identification by the plaintiff or certain of its agencies of the confidential source of the material which has been the basis for the articles published in The New York Times.

Your Honor, this case, then, among other things, imposes many of the same problems that the case of Earl Caldwell, a New York

Times reporter, posed. That case is now in the United States Supreme Court.

And I may say that the United States, as our brief points out, has not appealed from the kind of protective order that Mr. Caldwell received at the District Court level in San Francisco. Indeed, your Honor, as our memorandum of law points out, the very guide lines issued by the Attorney General of the United States with respect to the issuance of subpoenas would, in our view, not be met by the Government in this equivalent of a subpoena.

We submit to your Honor that nothing should be done in this case which could compromise the confidential source—

THE COURT: Do you see any distinction between Caldwell, where first there was a grand jury investigation in a criminal sense and, second, where the sources purportedly of Caldwell were a private organization, the Panthers, whereas here the Government claimed that the source had to be, by virtue of the statute and the Executive order, an unauthorized source? Do you make any distinction? I am not passing on it yet. I just want to hear your view on it.

MR. ABRAMS: I make one distinction and that is, as your Honor correctly points out, Caldwell was a criminal case. I would say that if the courts had to choose between requiring production of documents in criminal cases and civil cases, they would be more likely to require them in criminal cases.

THE COURT: You answered one part of my question and, if you want to, you may answer the other part, and that is: is there a difference between a source which by statute is illegal and the Panthers, which are free citizens of the United States?

MR. ABRAMS: Your Honor, as you will see tomorrow, or this afternoon, sir, we very vigorously take the position that The Times has done nothing illegal whatsoever.



The New York Times

REPRESENTS THE U.S.:
Michael D. Hess, chief of the civil division of the U.S. Attorney's office.

It is not our position, your Honor, that on the constitutional issue here we are asserting a privilege in the sense that there is a lawyer-client privilege. We are asserting the rights of The New York Times and its public under the First Amendment.

THE COURT: You are talking of the Caldwell right?

MR. ABRAMS: Yes, sir. If your Honor has no further questions.

THE COURT: No.

Do you have anything further to say, Mr. Hess?

MR. HESS: If I may just have a moment, I would like to emphasize two distinctions in the Caldwell case.

First, there was an appearance before a grand jury. The decision speaks of the scope of the grand jury's investigatory power. Here, as Mr. Abrams has stated, we are concerned with a civil proceeding and with an often-used discovery rule of civil procedure.

Says Ruling Was Narrow

The Caldwell case, the circuit judge on Page 1089 narrows his ruling and says that the Government there had to make a compelling showing of need. That was a different context, a criminal grand jury investigatory proceeding.

Here we feel we have shown the need, although it is a different type of proceeding—

THE COURT: But there, too, the investigation and suppression of crime was held to be subordinate to the privilege of the newspaper, because obviously if the reporter had been compelled to testify and to give his sources, it might well have led to indictments. And yet the Court held that the First Amendment privilege was so strong that it would not do it.

MR. HESS: There they were not talking about stolen or embezzled papers. Here we are. And there, despite Mr. Abrams' representation, I disagree, they were not dealing with papers that bore on the security of the nation and here we are.

If I might add one more thing, we would have no objection, with regard to the notation in Mr. Greenfield's affidavit, if The New York Times wanted to block out any handwritten notations on the papers.

THE COURT: All right. Maybe I am jumping ahead.

MR. ABRAMS: That there has been no violation of statute whatsoever.

THE COURT: I did not say The Times committed a violation necessarily—I am not passing on that—but whether the person who gave it to The Times did.

MR. ABRAMS: What was involved, your Honor, in the Caldwell case was an investigation of the Black Panthers, which the United States Government tied into an alleged assassination plot of the President of the United States. I think, in terms of the gravity of what is being talked about here, the government could not underestimate what it was saying at least but, in the Caldwell case, unsuccessfully.

MR. ABRAMS: May I just return, sir, to the point made by Mr. Hess, really two final points?

First, the Caldwell case, your Honor, did not involve papers at all. It involved testimony and it involved identification of people, what they were doing, what Mr. Caldwell saw.

Sullivan Case Is Cited

With respect to the distinction, your honor, between civil and criminal actions, I would strongly urge upon the Court reference to the New York Times vs. Sullivan case.

THE COURT: There are only two things that are troublesome. Otherwise there is a tremendous privilege that Caldwell created for newspapers. Is there any case that you know of where the documents were obtained illegally and, second, where the only lead to the source is indirect and not direct?

MR. ABRAMS: I believe, sir, that there is a Pennsylvania case. In re Taylor is the name of the case. I believe that that related to documents which were obtained illegally by a newspaper in the City of Philadelphia.

THE COURT: I know that case. I would like to see that case. There is another Philadelphia case, I think, involved in the stealing of documents from a private organization by some people who gave it to the newspapers.

MR. ABRAMS: We would be happy, of course, to supply your Honor with that authority.

THE COURT: All right. Give me that authority when you find it.

MR. ABRAMS: I take it your honor will reserve decision.

THE COURT: I will reserve decision. Thank you very much.
