

# RULING IN CAPITAL

## Appellate Judges Still Restrain Paper to Allow U.S. Move

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WASHINGTON, June 23—

The United States Court of Appeals ruled tonight that The Washington Post had a Constitutional right to publish articles based on a secret Pentagon study of how the United States became involved in Vietnam, but restrained the newspaper from continuing its series until Friday night to allow a Government appeal.

In a ruling by seven of the nine judges, the Court said that the "vitality of the principle that any prior restraint on publication comes into court under a heavy presumption against its constitutional validity" had been established by the Supreme Court.

### Friday Deadline Set

Two judges wrote dissenting opinions, although one of them, Malcolm R. Wilkey, said he dissented only from "blanket, total affirmance" of the district court's decision Monday in favor of The Post.

An appeal to the Supreme Court by the Justice Department had been pledged before the decision, but the Court of Appeals gave the Government until 6 P.M. Friday to make the appeal.

Also today, the Justice Department announced that it did not plan to take legal action against The Chicago Sun-Times, which yesterday published a story that it said was based on Government documents. The material, the department said, was taken from documents which were declassified by President Johnson in 1968.

Still barred by court orders from publication of material based on the Pentagon study, however, was The Boston Globe. But The Globe obtained a modification of an earlier order that all documents in its possession be turned in to the court. The Globe was allowed to place the material in a safe deposit box.

### Failure of Proof Seen

Meanwhile, there were widespread reports that several newspapers in various parts of the country would publish articles based on the secret Pentagon study.

In the ruling involving The Washington Post, the opinion, which was unsigned and in the name of the Court of Appeals, said that the Government had failed to prove its argument that national security required the prevention of publication

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of articles based on the Pentagon study.

"Our conclusion to affirm the denial of injunctive relief is fortified," the court said, "by the consideration [of] the massive character of the 'leak' which has occurred."

The opinion referred to the several newspapers that have published material based on the study and said that the proliferation of newspapers involved raised "substantial doubt that effective relief of the kind sought by the Government can be provided by the judiciary."

The two judges suggested in their dissent that they would have liked to have seen further examination by the lower court of The Post's right to publish an undisclosed number of "specific documents" that the Government had apparently said in a secret session would be specifically harmful to the national interest if they were made public.

### Wilkey Defines 'Harm'

Judge Wilkey wrote that he had not seen any of the original documents. But he said he had seen affidavits citing documents that, if possessed and published by The Post "could clearly result in great harm to the nation."

He said that by "harm" he meant "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate as honest brokers between would-be belligerents."

Judge Wilkey said that since neither the appellate judges nor the district judge had seen these documents he would prefer to remand the case to the district court for further consideration. He suggested that the Government could thus identify those documents it objected to having published and thus release the remainder for publication.

At the same time Judge Wilkey made it clear that he had no objection to the lower court's refusal to prevent publication of "the vast majority of these documents."

Judge George E. MacKinnon said in his dissent that the court unfortunately faced a "blind record" regarding the documents. He also complained that the court's ability to deal with the case was "complicated" by the release of the entire study to Congress, "where the problem of disclosure may be compounded."

He said that the widespread nature of the publications — in The New York Times, then The Post, The Boston Globe and The Chicago Sun-Times —

would minimize the value of any restraining order.

Even so, Judge MacKinnon said, "at the very least I would remand to the District Court for a more precise ruling by the trial court" on those documents the Government does not want to see in print.

"I would not reward the theft of these documents by a complete declassification," he stated.

### Secret Hearing by 9

The decision by the Appeals Court came several hours after a secret, unannounced hearing by the nine judges.

Justice Department officials said that they understood the court was receiving an affidavit from the Government stipulating additional materials that it believed ought to be examined by the lower court to determine whether publication might jeopardize national security.

Lawyers for The Post and the Government were closeted more than four hours before the hearing in the United States Court House at Constitution Avenue and John Marshall Place.

Neither court nor the lawyers confirmed that the two sessions took place this afternoon. But the lawyers were seen to assemble and go to an area where there is a hearing room. The hearing room was closed off to all but the participants in the case.

Both sides made it evident that they would appeal the eventual verdict of the Court of Appeals to the Supreme Court. Kevin T. Maroney, Deputy Assistant Attorney General in the internal security division, said that the Government would seek a stay of execution if necessary, from Chief Justice Warren E. Burger.

The Appeals Court received the case Monday night, after Judge Gerhard A. Gesell of the District Court for the District of Columbia ruled that the Government had not proved that there would be irreparable injury to the national security if The Post were permitted to continue its series of articles.