

TIMES ASKS SUPREME COURT TO END RESTRAINTS ON ITS VIETNAM SERIES; U.S. LOSES IN MOVE TO CURB POST

REHEARING DENIED

Government Appeals New Decision on Capital Paper

Courts of Appeals decision in *The Post* case, Page 13.

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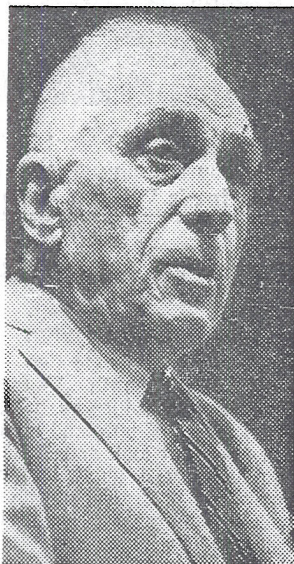
The Justice Department failed today to win a new hearing in the Court of Appeals on its effort to stop The Washington Post from resuming publication of information contained in the secret Pentagon study of the Vietnam war.

The Government, denied the rehearing in a 7-2 vote of the Appeals court, asked the Supreme Court tonight to overrule the decision.

In essence, the Justice Department asked the Supreme Court to do what the appeals court refused today, to send back to a trial court the issue of whether a small, but unspecified section of the lengthy Pentagon study should be kept secret.

New Arguments Invoked

The appeals court earlier reaffirmed, by the same 7-2 vote, its ruling yesterday that the Government had not demonstrated any grounds for preventing the publication of a single document in the Pentagon papers.



Justice John M. Harlan



The New York Times
Chief Justice Burger

"The matter is now ripe for presentation to the Supreme Court," the appeals judges declared in a written opinion.

In seeking the rehearing, the Government invoked several new arguments in legal briefs, adopting the view that it was trying to protect The New York Times and that The Washington Post had rendered uncertain a secret "agreement" on some documents The Post had promised not to print.

Yesterday, Judge George E. MacKinnon referred in his dissent to an "agreement" between The Post and Government lawyers that "some of the documents will be protected."

Benjamin C. Bradlee, executive editor of The Post, said that the comment referred to the newspaper's willingness to stipulate that it would not pub-

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lish "very limited quotations from two documents which The Post did not deem to be of reportorial significance."

But the Justice Department said later that the Government had not accepted The Post's offer as a settlement to the issue of whether the most sensitive documents in the study could be printed.

The Post is under a temporary restraining order issued by the appeals court to permit the Government time to appeal to the Supreme Court. The restraining order is scheduled to expire at 6 P.M. tomorrow. Unless the Supreme Court extends the order, the Post will be free to resume publishing articles on the pentagon papers in its Saturday editions.

The Justice Department argued in a legal brief filed with the court this afternoon that such a situation would be unfair to The Times. The Times is appealing to the Supreme Court a decision by another appeals court, in New York, that includes an opportunity for the Government to argue anew that some documents possessed by The Times could damage national security if published.

In a counterargument filed with the District of Columbia appeals judges, The Post's attorneys said they "strenuously oppose this effort at still further delay. The Constitution simply

does not permit a prior restraint based on consideration of 'fairness' to another litigant."

The appeals court again agreed with The Post. The judges took note of new articles published today by The Los Angeles Times and the eight members of the Knight Newspaper Company.

"The increasing disclosures increase our concern, expressed in our opinion yesterday, whether effective relief of the kind sought by the Government can be provided by the judiciary," the court wrote.

The Post's legal memorandum said that the Government had been reviewing the Pentagon study since 1969 and "has had almost two weeks to come up with one instance of substantial peril to the national security" it excerpted from the 47-volume study. "They have failed to do so," the newspaper's lawyers added.

Clarification Sought

The Justice Department also argued that a new hearing before District Court Judge Gerhard A. Gesell, who ruled Monday against the Government's effort to stop the articles with an injunction, would clear up "uncertainty" over some documents that The Post stipulated it would not print.

The stipulation apparently was offered Tuesday at a secret session of the Appeals Court. Word of it first became public was when Judge MacKinnon referred yesterday to an "agreement" that "some of the documents will be protected."

In its brief today, the Justice

Department appeared to be accusing the newspaper of having reneged on the agreement that last night it said did not exist.

Judging from "items appearing in The Washington Post" this morning—presumably Mr. Bradley's comment, which was printed in The Post—"there appears to be uncertainty as to just what items are covered by the undertaking of counsel" the Government petition said.

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