

ACTION TODAY SEEN

8 Justices Hold Closed Session on Appeal, Will Meet Again

Excerpts from Times petition are printed on Page 12.

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Special to The New York Times

WASHINGTON, June 24 — The New York Times asked the Supreme Court today to permit it to resume publication of material from the Pentagon study of the Vietnam war.

Chief Justice Warren E. Burger and seven other Associate Justices — Justice William O. Douglas was out of town — spent several hours in conference and then left for the day without acting on the appeal by The Times. They are expected to make a decision tomorrow.

Later today the Justice Department, turned down again by the Court of Appeals here, appealed to the Supreme Court in its effort to prevent The Washington Post from resuming publication of the same material.

Decisions in Conflict

The two appeals brought before the Supreme Court for the first time the question of any court's authority to restrain the press from publishing news that the Government says could seriously harm national security.

The prospects that the Supreme Court will hear the appeals are heightened because of the importance of the issues and also because lower courts' decisions are in conflict.

In New York, the United States Court of Appeals for the Second Circuit placed delays and restraints upon The Times'

right to publish, while the Appellate Court here held that The Post could not be enjoined from publishing the material.

Although the Supreme Court is scheduled to recess for the summer after holding a final public session Monday, it appears to have enough time to deal with the matter before then.

Closed Session Today

Tomorrow the Court will hold its usual closed Friday conference, and it is expected to decide then whether to review the two appeals. Under its rules it has complete discretion to hear the appeals or let the lower courts' decisions stand.

The rules favor review in important cases involving conflicting decisions below.

If review is granted the Justices could remain behind on Monday after they hand down

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their decisions and hear the case then or they could extend the term for a few days.

The action by the Justice Department came in the form of a motion by the Solicitor General, Erwin N. Griswold, to stay The Post from resuming publication pending a decision by the Supreme Court. The purpose, Mr. Griswold said, was to place The Times and The Post on an even footing.

He added that the Court could treat his application for a stay as a petition for review of the lower courts' proceedings.

Earlier in the day The Times brought the issue formally before the Court by asking it to lift the restraint on publication. The newspaper then asked in separate papers that the Court review and overturn the decision handed down yesterday by the Second Circuit Court of Appeals.

Today was the ninth day since Federal District Judge Murray I. Gurfein halted publication of The Times series. The series, which included documents accompanying the Pentagon study, appeared on June 13, 14 and 15, after which it was restrained.

The application by The Times for an immediate lifting of the restraint was addressed to Associate Justice John M. Harlan, who has jurisdiction over emergency petitions originating from the Second Judicial Circuit, which includes New York.

He referred the papers to the entire court because of the importance of the issues involved. Lawyers for The Times asked for oral arguments this afternoon on the sole question of lifting the restraint, but the request was not granted.

'Now No Longer Current . . .

In the application The Times complained that the United States Court of Appeals here had refused to enjoin The Washington Post from printing materials from the Pentagon papers, so it would be free to resume publication in its Saturday editions. The articles, plus the material that has appeared in other newspapers would inflict "irreparable harm" on its interests, The Times argued. "News no longer current is stale and of severely diminished intrinsic value," explained.

The Government, in a memorandum filed by Solicitor General Erwin N. Griswold, replied that for The Times to print the material now, would render moot the very issue of restraint that it had asked the Justices to decide. Mr. Griswold strengthened his position later in the day when he asked the Court to place The Post on the same footing with The Times by forbidding it to publish more of the material until the issue was settled.

The Times, in its petition for certiorari (review) of the Second Circuit's decision, listed eight respects in which it said the Constitution was violated by the delays and restrictions on publication imposed by the Appellate Court.

The 5-to-3 ruling, announced

yesterday, held that The Times could resume publication of the series in its Saturday issue but could not use any material that the Government contended was dangerous to national security.

The court also instructed Judge Gurfein to hold secret hearings as he did before handing down his decision last Saturday, next week, and to determine by Saturday, July 3, which portions of those items cited by the Government posed "such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

Longer Delay Is Possible

The Times petition for review argued that the delay resulting from that procedure—which would total 18 days on July 3 and might extend far beyond that as a result of further appeals—violated the free press guarantee of the First Amendment.

It also asserted that Congress had never given the Federal courts the power to impose "prior restraint" on newspaper publication and that the lower court's restraining orders violated the First Amendment and the separation-of-powers doctrine by doing so.

Further arguments were that the instruction by the Court of Appeals to Judge Gurfein were unconstitutionally vague and that the Government did not show that it was likely to win after all the evidence was in.

The Times maintained, furthermore, that a trial judge and an Appellate Court in the District of Columbia had held that the same material should not be enjoined and that any restraint of "articles relating to public affairs" might violate the First Amendment.

Both in the petition for review and in the application for an immediate lifting of the restraining order, The Times protested that the order for more hearings was based on assertions of fact made by the Government for the first time before the Court of Appeals. That amounts to offering testimony where cross-examination is impossible. The Times contended.

At issue was a secret "special appendix" given to the Court of Appeals Monday by the Justice Department. It is known to contain a 22-page typed inventory of portions of the 47-volume study that, according to the Government, would damage the nation's security if published.

The Court of Appeals gave the Government until tomorrow to add other items to the list if it wished, and Judge Gurfein was to hear secret testimony from Government officials as to how each item might affect security.

Today Mr. Griswold disclosed in his memorandum asking the Supreme Court not to lift the restrictions on The Times that the list took the form of sworn statements by Government officials. This bore out the assertions by counsel to The Times that the Court of Appeals relied on sworn "testimony" that had not been subjected to cross-examination.