VOL. CXX ....No. 41,431 © 1971 The New York Times Company —NEW YORK,

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

THURSDAY, JULY 1, 1971—

BURGER DISSENTS

First Amendment Rule Held to Block Most Prior Restraints

Decision, concurring opinions, dissents start on Page 17.

By FRED P. GRAHAM

Special to The New York Times

WASHINGTON, June 30 — The Supreme Court freed The New York Times and The Washington Post today to resume immediate publication of articles based on the secret Pentagon papers on the origins of the Vietnam war.

By a vote of 6 to 3 the Court held that any attempt by the Government to block news articles prior to publication bears "a heavy burden of presumption against its constitutionality."

In a historic test of that principle — the first effort by the Government to enjoin publication on the ground of national security — the Court declared that "the Government has not met that burden."

The brief judgment was read to a hushed courtroom by Chief Justice Warren E. Burger at 2:30 P.M. at a special session called three hours before.

Old Tradition Observed

The Chief Justice was one of the three dissenters, along with Associate Justices Harry A. Blackmun and John M. Harlan, but because the decision was rendered in an unsigned opinion, the Chief Justice read it in court in accordance with a long-standing custom.

In New York, Arthur Ochs Sulzberger, president and publisher of The Times, was asked at a news conference whether he thought the motto of The Times—"All the News That's Fit to Print"—had been upheld. "I think it was very much upheld," he said.

The case had been expected to produce a landmark ruling on the circumstances under which prior restraint could be imposed upon the press, but because no opinion by a single Justice commanded the support of a majority, only the unsigned decision will serve as precedent.

Uncertainty Over Outcome

Because it came on the 15th day after The Times had been restrained from publishing further articles in its series mined from the 7,000 pages of material—the first such restraint in the name of "national security" in the history of the United States—there was some uncertainty whether the press had

scored a strong victory or whether a precedent for some degree of restraint had been set.

Alexander M. Bickel, the Yale law professor who had argued for The Times in the case, said in a telephone interview that the ruling placed the press in a "stronger position." He maintained that no Federal District Judge would henceforth temporarily restrain a newspaper on the Justice Department's complaint that "this is what they have printed and we don't like it" and that a direct threat of irreparable harm would have to be alleged.

However, the United States Solicitor General, Erwin N. Griswold, turned to another lawyer shortly after the Justices filed from the courtroom

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and remarked: "Maybe the newspapers will show a little restraint in the future."

All nine Justices wrote opinions, in a judicial outpouring that was described by Supreme Court scholars as without precedent. They divided roughly into groups of three each.

The first group, composed of Hugo L. Black, William O. Douglas and Thurgood Marshall, took what is known as the absolutist view that the courts lack the power to suppress any press publication, no matter how grave a threat to security it might pose.

Justices Black and Douglas restated their long-held belief that the First Amendment's guarantee of a free press forbids any judicial restraint. Justice Marshall insisted that because Congress had twice considered and rejected such power for the courts, the Supreme Court would be "enacting" law if it imposed restraint.

The second group, which included William J. Brennan Jr., Potter Stewart and Byron R. White, said that the press could not be muzzled except to prevent direct, immediate and irreparable damage to the nation. They agreed that this material did not pose such a threat.

The third bloc, composed of the three dissenters, declared that the courts should not refuse to enforce the executive branch's conclusion that material should be kept confidential — so long as a Cabinet-level officer had personally decided that it should — on a matter of affecting foreign relations.

They felt that the "frenzied train of events" in the before them cases had not given the courts enough time to determine those questions, so they concluded that the restaints upon publication should have been retained while both cases were sent back to the trial judges for more hearings.

The New York Times's series drawn from the secret Pentagon study was accompanied by supporting documents. Articles were published on June 13, 14 and 15 before they were halted by court order. A similar restraining order was imposed on June 19 against The Washington Post after it began to print articles based upon some of the same documents.

Justice Black's opinion stated that just such publications as those were intended to be protected by the First Amendment's declaration that "Congress shall make no law . . . abridging the freedom of the press."

Paramount among the responsibilities of a free press, he said, "is the duty to prevent any part of the Government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.

"In my view, far from deserving condemnation for their courageous reporting, The New York Times, The Washington Post and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly," he said. "In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the founders hoped and trusted they would do."

Justice Douglas joined the opinion by Justice Black and was joined by him. The first amendment's purpose, Justice Douglas argued, is to prohibit "governmental suppression of embarrassing information." He asserted that the temporary restraints in these cases "constitute" a flouting of the principles of the First Amendment."

Justice Marshall's position was based primarily upon the separation-of-powers argument that Congress had never authorized prior restraints and that it refused to do so when bills were introduced in 1917 and 1957.

He concluded that the courts were without power to restrain publications. Justices Brennan, Stewart and White, who also based their conclusions on the separation-of-powers principle, assumed that under rare and extreme circumstances the courts would act without such powers.

Justice Brennan focused on the temporary restraints, which had been issued to freeze the situation so that the material would not be made public before the courts could decide if it should be enjoined. He continued that no restraints should have been imposed because the Government alleged only in general terms that security breaches might occur.

Justices Stewart and White, who joined each other's opinions, said that though they had read the documents they felt that publication would not be in the national interest.

But Justice Stewart, a former chairman of The Yale Daily News, insisted that "it is the duty of the executive" to protect state secrets through its own security measures and not the duty of the courts to do it by banning news articles.

He implied that if publication of the material would cause "direct, immediate, and irreparable damage to our nation or its people," he would uphold prior restraint, but because that situation was not present here, he said that the newspapers must be freed to publish.

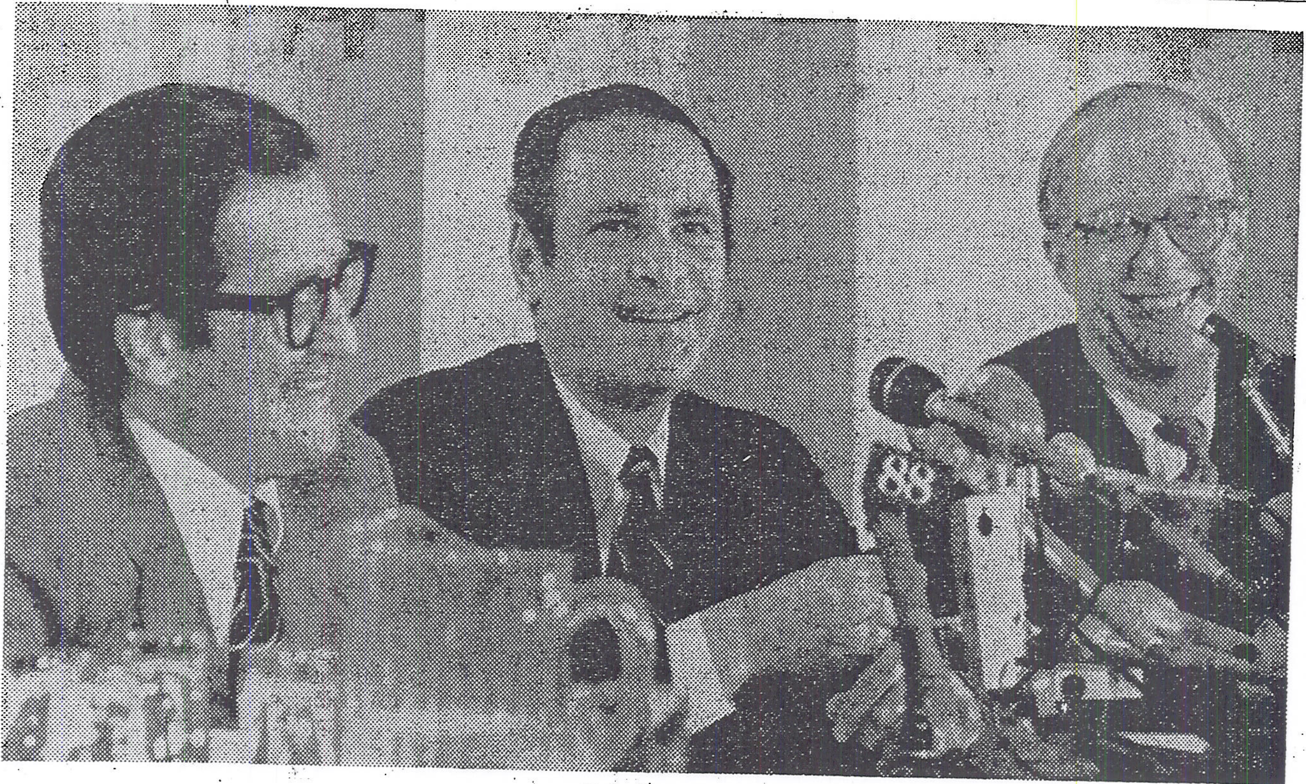
Justice White added that Congress had enacted criminal laws, including the espionage laws, that might apply to these papers. "The newspapers are presumably now on full notice," he said, that the Justice Department may bring prosecutions if the publications violate these laws. He added that he "would have no difficulty in sustaining convictions" under the laws, even if the breaches of security were not sufficient to justify prior restraint.

The Chief Justice and Justices Stewart and Blackmun echoed this caveat in their opinions — meaning that one less than a majority had lent their weight to the warning.

Chief Justice Burger blamed The Times "in large part" for the "frenetic haste" with which the case was handled. He said that The Times had studied the Pentagon archives for three or four months before beginning its series, yet it had breached "the duty of an honorable press" by not asking the Government if any security violations were involved before it began publication.

He said he found it "hardly believable" that The Times would do this, and he concluded that it would not be harmed if the case were sent back for more testimony.

Justice Blackmun, also focusing his criticism on The Times,



Associated Press

'DELIGHTED' WITH COURT RULING: Arthur Ochs Sulzberger, president and publisher of The New York Times, at conference on Vietnam papers with A. M. Rosenthal, left, managing editor; James C. Goodale, right, general counsel.

said there had been inadequate time to determine if the publications could result in "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate." He concluded that if the war was prolonged and a delay in the return of United States prisoners result from publication, "then the nation's people will know where the responsibility for these sad consequences rests."

The Justice Department initially sought an injunction against The Times on June 15 from Federal District Judge Murray I. Gurfein in New York.

Judge Gurfein ruled that the material was basically historical matter that might be embarrassing to the Government but did not pose a threat to national security. Federal District Judge Gerhard A. Gesell of the District of Columbia came to the same conclusion in the Government's suit against The Washington Post.

The U. S. Court of Appeals for the Second Circuit, voting 5 to 3, ordered more secret hearings before Judge Gurfein and The Times appealed. The U. S. Court of Appeals for the District of Columbia upheld Judge Gesell, 7 to 2, holding that no injunction should be imposed. Today the Supreme Court affirmed the Appeals Court here and reversed the Second Circuit.

The Supreme Court also issued a brief order disposing of a few other cases and adjourned until Oct. 4, as it had been scheduled to do Monday.