

Texts of Legal Papers Served on The

Following are the texts of a United States Government complaint and a United States District Court temporary restraining order served on The New York Times Company, its officers and several of its employees yesterday in connection with a series of articles and documents on the Vietnam war that The New York Times has been publishing. Also included is the text of a memorandum of law submitted by the Government in support of its petition for the restraining order.

UNITED STATES OF AMERICA, Plaintiff

v.

NEW YORK TIMES COMPANY, ARTHUR OCHS SULZBERGER, HARDING F. BANCROFT, IVAN VEIT, FRANCIS A. COX, JAMES C. GOODALE, SYDNEY GRUSON, WALTER MATTSON, JOHN McCABE, JOHN MORTIMER, JAMES RESTON, JOHN B. OAKES, A. M. ROSENTHAL, DANIEL SCHWARZ, CLIFTON DANIEL, TOM WICKER, E. W. KENWORTHY, FOX BUTTERFIELD, GERALD GOLD, ALLAN M. SIEGAL, SAMUEL ABT, NEIL SHEEHAN and HEDRICK SMITH, Defendants

The United States of America, by its attorney, Whitney North Seymour Jr., United States Attorney for the Southern District of New York, at the direction of the Attorney General of the United States, brings this action against the defendants and alleges as follows:

[1]

This Court has jurisdiction over the subject matter of this action pursuant to Title 28, United States Code, Section 1345.

[2]

This is a civil action to obtain an order enjoining the dissemination, disclosure or divulgence without authority by the defendants of official information classified "Top Secret" or "Secret" in the interests of the national defense under the authority and pursuant to the requirements of Executive Order 10501 entitled "Safeguarding Classified Information."

[3]

Defendant New York Times Company is a corporation with its principal place of business in the City and State of New York and which publishes a daily newspaper under the title of The New York Times. The individual defendants are employees and/or officers of the aforementioned company, serving in the following capacities: Arthur Ochs Sulzberger, President and Publisher; Harding F. Bancroft, Executive Vice President; Ivan Veit, Executive Vice President; Francis A. Cox, Vice President; James C. Goodale, Vice President; Sydney Gruson, Vice President; Walter Mattson, Vice President; John McCabe, Vice President; John Mortimer, Vice President; James Reston, Vice President; John B. Oakes, Editorial Page Editor;

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Times in Case Brought

by the Government

A. M. Rosenthal, Managing Editor; Daniel Schwarz, Sunday Editor; Clifton Daniel, Associate Editor; Tom Wicker; Associate Editor. Defendants Neil Sheehan, Hedrick Smith, E. W. Kenworthy, Fox Butterfield, Gerald Gold, Allan M. Siegal and Samuel Abt are employees and/or reporters for the aforementioned publication.

[4]

At a time and place and in a manner unknown to the plaintiff the defendants without lawful authority obtained a copy of certain documents consisting of 47 volumes entitled "History of U.S. Decision-Making Process on Vietnam Policy", covering the period 1945-1967, prepared in 1967-1968 at the direction of then Secretary of Defense Robert McNamara and which is and at all times material herein has been classified "Top Secret-Sensitive," and the internal documents from which the said study was drawn are variously classified as "Top Secret" and "Secret," pursuant to the aforementioned Executive Order 10501 as evidenced by the attached affidavit of J. Fred Buzhardt, General Counsel of the United States Department of Defense.

[5]

Also, at a time and place and in a manner unknown to the plaintiff the defendants without lawful authority obtained a copy of a document described as a "one-volume command and control study of the Gulf of Tonkin incident" dated Feb. 26, 1965, prepared for the Joint Chiefs of Staff by the Weapons Systems Evaluation Group of the United States Department of Defense which is and at all times material herein has been classified "Top Secret" pursuant to the aforementioned Executive Order 10501, as evidenced by the aforementioned attached affidavit.

[6]

As defined in Executive Order 10501 "Top Secret" information is "... that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or

scientific or technological developments vital to the national defense," and "Secret" information is defined as "... defense information or material the unauthorized disclosure of which could result in serious damage to the nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations."

[7]

On June 13, 1971, The New York Times published an article entitled "Vietnam Archive: Pentagon Study Traces Three Decades of Growing U.S. Involvement," authored by defendant Sheehan and an article entitled "Vast Study of War Took a Year," authored by defendant Smith. These articles were represented to be

the initial article in a series written by defendants Sheehan, Smith, defendant E. W. Kenworthy and defendant Fox Butterfield. The series was represented to be one reporting on [a history of] the United States' decision making process on Vietnam policy for the period 1945-1967. The articles in the series and the classified documents upon which they are based were edited by defendants Gold, Siegal, and Abt. In the aforementioned article, authored by the defendant Sheehan, it is asserted that "most of the study (described in the article as 'a massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago') and many of the appended documents have been obtained by The New York Times and will be described and presented in a series of articles beginning today." It was also asserted in the June 13 issue of The New York Times with respect to the aforementioned "one-volume command and control study" that the Times had obtained a summary of that study.

[8]

On June 13 and 14, the defendants have without authority intentionally and knowingly published excerpts and other portions of the aforementioned classified defense information knowing that such information had been classified "Top Secret" or "Secret" pursuant to the authority of Executive Order 10501. At the time of such publication the said defendants, and each of them, knew, or had reason to believe, that such information could be used to the injury of the United States and to the advantage of a foreign nation and notwithstanding such knowledge and belief did willfully communicate, de-

liver and transmit said information by the publication thereof, to persons not entitled to receive such information.

[9]

The publication of the information published as aforesaid on June 13 and June 14, 1971, has prejudiced the defense interests of the United States and the publication of additional excerpts from the documents hereinbefore referred to would further prejudice the defense interests of the United States and result in irreparable injury to the United States.

[10]

The defendants have publicly announced their avowed determination to continue publishing excerpts and other portions of the aforementioned "Top Secret" or "Secret" documents relating to the national defense and unless the defendants, and all persons in active concert and participation with the defendants are enjoined from such, the national defense interests of the United States and the nation's security will suffer immediate and irreparable harm, for which injury plaintiff has no adequate remedy at law.

WHEREFORE, the plaintiff, the UNITED STATES OF AMERICA, prays:

[1]

That this Court enter its order enjoining the defendants, their agents, servants and employees and all persons acting in concert with them from further dissemination, disclosure or divulgence of the information heretofore described in paragraphs 4 and 5 of this complaint, or any excerpt, portion or summary thereof.

[2]

That the Court order the defendants and each of them having possession of the documents referred to in the complaint to deliver said documents and any copies, excerpts, duplications or other tangible evidence of such documents to the plaintiff herein.

[3]

That this Court, pending the final determination of this cause, issue a preliminary injunction, restraining and enjoining the defendants in the manner and form aforesaid.

[4]

That, pending the issuance of the aforesaid preliminary injunction, this Court issue forthwith a temporary restraining order restraining and enjoining the defendants in the manner and form aforesaid and further ordering said defendants to deliver to this Court all the documents and materials referred to in paragraph 2 of the prayer herein to be held

by this Court *in camera* pending a final order of this Court.

[5]

That this Court grant such other, further, and different relief as the Court may deem just and equitable.

JOHN N. MITCHELL
Attorney General
of the United States

WHITNEY NORTH SEYMOUR JR.
United States Attorney

By: MICHAEL D. HESS
Chief, Civil Division

Temporary Restraining Order

#71 Civ. 2662

UNITED STATES OF AMERICA, Plaintiff

v.

NEW YORK TIMES COMPANY, ARTHUR OCHS SULZBERGER, HARDING F. BANCROFT, IVAN VEIT, FRANCIS A. COX, JAMES C. GOODALE, SYDNEY GRUSON, WALTER MATSON, JOHN McCABE, JOHN MORTIMER, JAMES RESTON, JOHN B. OAKES, A. M. ROSENTHAL, DANIEL SCHWARZ, CLIFTON DANIEL, TOM WICKER, E. W. KENWORTHY, FOX BUTTERFIELD, GERALD GOLD, ALLAN M. SIEGAL, SAMUEL ABT, NEIL SHEEHAN and HEDRICK SMITH, Defendants

MEMORANDUM

The United States seeks a temporary restraining order and a preliminary injunction against The New York Times, its publisher and other officers and employees to restrain them from further dissemination or disclosure of certain alleged top secret or secret documents of the United States referred to in a verified complaint filed herewith. I have granted the order to show cause as to why a preliminary injunction against the defendants should not be entered and have made it returnable Friday morning, June 18.

Preliminary thereto the Government has requested a temporary restraining order and also a direction from this Court to require the defendants to deliver to the Court certain documents and other tangible evidence to be held by the Court pending final determination of the cause. At this stage of the proceedings I do not direct The New

York Times or the other defendants to produce the documents pending the outcome of the litigation. I do not believe that The New York Times will wilfully disregard the spirit of our restraining order. I am restraining The New York Times and the other defendants, however, from publishing or further disseminating or disclosing the documents consisting of 47 volumes entitled "History of United States Decision-Making Process on Vietnam Policy," covering the period 1945-67, prepared in 1967-68 at the direction of the then Secretary of Defense, Robert

McNamara, the internal documents from which the aforesaid documents were prepared, and a one-volume "Command and Control Study of the Tonkin Gulf Incident," prepared in 1965 for the Joint Chiefs of Staff by the Weapon System Evaluation Group of the United States Department of Defense, pending the hearing of the Government's application for a preliminary injunction.

The questions raised by this action are serious and fundamental. They involve not only matters of procedure, but matters of substance and presumptively of constitutional implication as well. I have, in effect, been asked by the parties to pass on the merits of the litigation upon the arguments made on the order to show cause. I believe that the matter is so important and so involved with the history of the relationship between the security of the Government and of a free press that a more thorough briefing than the parties have had an opportunity to do is required. I have granted the restraining order because in my opinion any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States Government if it should ultimately prevail. I have intentionally expressed no opinion on the merits, but I believe this matter is brought in good faith by the United States and that on the balancing of interests mentioned, both parties deserve a full consideration of the issues raised.

Accordingly, the restraining order will be in effect until Saturday afternoon at 1 o'clock unless the Court directs otherwise.

The parties are requested to brief as thoroughly as possible the points adverted to in the oral arguments by 5 P.M. Thursday, June 17, 1971.

M. I. GURFEIN
U.S.D.J.

Dated: June 15, 1971.

Memorandum of Law

PRELIMINARY STATEMENT

This action has been commenced to preliminarily and permanently enjoin defendants and their agents from further disseminating documents consisting of 47 volumes entitled "History of U.S. Decision-Making Process on Vietnam Policy." Plaintiffs further seek to gain the recovery of the aforementioned documents from defendants. This memorandum is submitted in support of plaintiff's application for an order temporarily restraining the defendants from further disseminating the aforementioned documents and requiring the delivery of the documents to this court pending the determination of

plaintiff's motion for a preliminary injunction.

STATUTE RELIED UPON

Section 793 (d) of Title 18 of the United States Code provides as follows: "Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive or willfully retains the same and fails to deliver it upon demand to the officer or employee of the United States entitled to receive it. . . ."

ARGUMENT

Defendants are in possession of a 47-volume study entitled "History of the United States Decision-Making Process on Vietnam Policy." This study is currently classified as "Top Secret-Sensitive" * pursuant to the provisions of Executive Order 10501. As defined in the Executive Order, top-secret information is "that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the nation. . . ."

On June 13, 14 and 15, 1971, defendants published documents contained in the study. By telegram dated June 14, 1971, defendants were advised by the Attorney General of the United States that further publication of the contents of the study will cause irreparable injury to the defense interests of the United States. In the telegram, defendants were requested to cease publication of the contents of the study and to return the study to the Department of Defense. Defendants have expressed the intention to continue to publish documents contained in the study until they are restrained from doing so by an order of this Court.

Section 793 (d) of Title 18 of the United States Code provides for criminal penalties against a person who, while lawfully in possession of information relating to the national defense which could be used to the injury of the United States, willfully communicates that information to persons not en-

*In determining whether information properly has been classified top secret, the test to be applied by the court is whether the classifying authority acted capriciously. *Epstein vs. Resor*, 296 F. Supp. 214 (N. D. Calif. 1969).

titled to receive it or willfully fails to deliver it, on demand, to the officer of the United States entitled to receive it. The applicability of Section 793 (d) has not been restricted to criminal actions. *Dubin v. United States*, 289 F. 2d 651 (Ct. Cl. 1961).

Further publication of the contents of the study and defendants' continued refusal to return all of the papers to the Department of Defense will constitute a violation of Section 793 (d). Moreover, such publication will result in irreparable injury to the interests of the United States, for which there is no adequate remedy at law. An injury is deemed irreparable when it cannot be adequately compensated in damages due to the nature of the injury itself or where there exists no pecuniary standard for the measurement of the damages. *Luckenbach S. S. Co. v. Norton*, 12 F. Supp. 707,709 (E. D. Pa. 1937). Irreparable injury also means "that species of damage, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other." *Anderson v. Soosa*, 38 Cal. 2d, 825,243 P. 2d 497,503 (1952). The inadequacy of a remedy at law exists where the circumstances demand preventive relief. *Cruikshank v. Bidwell* 176 U.S. 73,81 (1900).

In the instant case, defendants will suffer no injury if they cease to publish the contents of the study in their possession pending the determination of plaintiff's motion for a preliminary injunction. On the other hand, the national interest of the United States may be seriously damaged if the defendants continue to publish the contents of the study. Under circumstances in which no injury will result to defendants from the cessation of publication of the study in their possession and irreparable injury may result to the United States, the granting of a temporary restraining order is appropriate.

CONCLUSION

For the foregoing reasons, the plaintiff's application for a temporary restraining order pending the determination of its motion for a preliminary injunction should be granted. Plaintiff's application for an order temporarily restraining the further publication of the contents of the study in defendant's possession should be granted.

Dated: New York, New York
June 15, 1971

Respectfully submitted,

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the Southern District of
New York, Attorney for the
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