COURT RESTRAINS THE TIMES AGAIN; A HEARING TODAY

RULING FOR POST

JUN 22 1971

Capital Paper Wins in Trial, but Curb on Series Stands

Text of Judge Gesell's opinion is printed on Page 18.

By RICHARD HALLORAN
Special to The New York Times

WASHINGTON, June 21—A Federal district judge ruled today that The Washington Post could resume publishing a series of articles about United States involvement in the Vietnam war, but the United States Court of Appeals for the District of Columbia quickly ordered a stay until 5 P.M. tomorrow.

The appellate court also ordered a hearing before the entire nine-man court at 2 P.M. tomorrow. At issue is The Post's right to continue publishing articles based on a secret study by the Defense Department.

Judge Gerhard A. Gesell, in his opinion late this afternoon, said that the Government had failed to show that continued publication of The Post's articles would present "an immediate and grave threat to the national security."

Officers of The Washington Post and attorneys for the Government had no comment pending the outcome of the appeal to the higher court.

'The Fires of Distrust'

The white-haired judge, reading his handwritten opinion to a hushed courtroom, said that 'it should be obvious that the interests of the Government are inseparable from the interests of the public" and that terests of the public. "These are one and the same," he said, "and the public interest makes an insistent plea for publication."

He noted that the controversy over the war in Vietnam is of "paramount public importance." He said that antagonism had developed between the executive branch of Government and the press but that "censorship at this stage raises doubts and rumors that feed the fires of distrust."

The judge, who refused to

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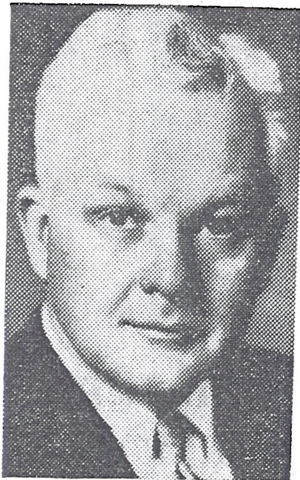

Judge Gerhard A. Gesell

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grant the Government a temporary restraining order last Friday night, said that there was no basis for adjusting the First Amendment, which gives Constitutional guarantees of freedom of the press, to the desires of a foreign government that might wish to have the information suppressed.

Judge Gesell ended his opinion with a warning that "this court will not under any circumstances grant a stay." Even so, Kevin T. Maroney, the Government attorney, pleaded for a brief stay until the Government could take the case to the Court of Appeals.

Judge Gesell glanced at the clock and replied: "You have 20 minutes to get upstairs." It was then 4:40 P.M. The Appellate Court's temporary restraining order, requiring Judge Gesell to hear the Government's case on its merits, expired at 5 P.M.

The Post was represented by William R. Glendon and the Government by Kevin T. Maroney, a Deputy Assistant Attorney General in the internal security division.

Testifying for the Governme in open session this morning, Dennis J. Doolin, a Deputy Assistant Secretary of Defense for international security affairs, asserted that the articles should be suppressed because they contained information bearing on current operations.

Mr. Doolin also testified on Friday in New York in the trial of the Justice Department's suit to enjoin The New York Times from publishing similar material. He did not say in open court in New York that the material affected current operational plans, but he and two other Washington officials gave secret testimony on this point.

Federal District Judge Murray I. Gurfein, however, wrote in his opinion that the testimony "did not convince this court that the publication of these historical documents would seriously breach the national security."

Judge Gesell came to much the same conclusion here. He said that revelation of the secret documents had caused no break in diplomatic relations, no armed attack on the United States, no war, no compromise of intelligence, no compromise of operational plans, and no compromise of scientific information.

Classification Explained

The Government also submitted as evidence a copy of the final report of the director of the Pentagon's study of American involvement in the war, asserting that he and 35 other researchers on the project felt that they were "writing history."

In a January, 1969, memorandum to the then Secretary of Defense, Clark M. Clifford, the director, Leslie H. Gelb, wrote that the "result was not so much a documentary history, as a history based solely on documents—checked and rechecked with ant-like diligence."

A Pentagon spokesman said tonight that Mr. Gelb's memorandum had been declassified "under existing procedures and regulations and in keeping with [Defense Department] policy on maximum release of information consistent with security" to satisfy the court's request for an explanation of the study's purpose.

The memorandum was declassified yesterday, the spokesman said, after it was determined that it was "the only evidence available as to the original purpose."

Other Government evidence in open session came from George MacClain, director of the security classification management division, who explained the top-secret classification given the study. He acknowledged that parts of its came from unclassified or nonsecret materials, including books and newspaper articles.

After Mr. Doolin's testimony, the court went into closed session, over the objections of attorneys for The Post. In a trial memorandum, they asserted that they "should not be forced to trial under handicaps which a secret trial would necessarily entail."

The judge, however, was persuaded over the weekend by the Government lawyers that the sensitive nature of the material required a secret session.

Testimony in the closed session was given by Mr. Doolin, by William B. Macomber Jr., Deputy Under Secretary of State for administration and by other Government witnesses.

The remarks of Judge Gesell in the open session this afternoon suggested that, in the closed session, the Government officials evidently emphasized that the publication of the secret documents would impair American diplomatic relations around the world.

The release of the study was evidence that the United States could not maintain the security of confidential communications from its own diplomats and from other governments, the officials reportedly testified.

The bulk of The Washington Post's evidence was presented in the form of affidavits. Its executive editor, Benjamin C. Bradlee, while not revealing the source of The Post's copy of the study, indicated that the newspaper had acquired it in three parts.

"On Monday, June 14, 1971," he wrote, "I was given the manuscript of a book on the origins and conduct of the war in Vietnam. This manuscript contains major, verbatim quotations from the classified documents contained in the materials involved in this case."

"I was informed by the authors of this manuscript that the materials involved in this case were available to the authors. This manuscript is being generally distributed to publishers with a view to publication." He did not name the authors or the title of the manuscript.

The same day, he wrote, "The Washington Post received two fragments of the materials involved in this case. One included 135 pages. The other included 41 pages."

But he wrote that "the acquisition of these materials was completely distinct from the acquisition on which The Post's June 18 and June 19 articles were based." Those were the first two articles that appeared in The Post before it was enjoined, early Saturday morning, from further publication pending today's hearing.

Mr. Bradlee also affirmed that he and other editors had "read the galley proofs of former President Johnson's book to be published in November, 1971." He asserted that "this manuscript contains extensive, verbatim quotations from classified documents involved in this case."

'Backgrounders' Cited

In a second affidavit, Mr. Bradlee set the theme that ran through several others submitted by editors and reporters of The Post. He said:

"The executive branch of the Government normaly, regularly, routinely and purposefully makes classified information available to reporters and editors in Washington. This information is made available in two ways—in private conversations originated by the reporter or the Government official, and in the infamous backgrounders normally, but not exclusively, originated by the Government."

He said that this information was made available for many reasons. Among those he cited were the following:

¶To influence the reporter's story in the direction a Government oficial thinks best.

¶To create a climate of public opinion favorable to such beliefs.

¶To test the climate of public opinion on certain options being considered by the Government.

¶To curry favor with a particular reporter or newspaper.

¶To influence the American electorate and in certain instances a foreign electorate.

8 JUDGES TO SIT

JUN 22 1971

Appeals Court Here Terms the Issue of Vital Importance

Excerpts from Government's brief are on Page 18.

By FRED P. GRAHAM

A three-judge panel of the United States Court of Appeals here extended yesterday the restraining order against publication by The New York Times of material drawn from a classified Pentagon study of the Vietnam war to permit all eight members of the court to hear the case at 2 P.M. today.

Chief Judge Henry J. Friendly announced at the beginning of a three-judge hearing yesterday morning that because of the "extraordinary importance" of the issue, it would be considered by the entire court.

The effect was to put off for another day the hearing on the Government's appeal of its unsuccessful attempt in Federal District Court here to enjoin The Times from further publication of articles and documents on the origins of the United States involvement in the Vietnam war.

New Appeal by the U.S.

The series ran for three days last week before it was halted by the courts pending a final decision on the Government's suit.

Meanwhile the Justice Department is appealing a decision in favor of The Times by United States District Judge Murray I. Gurfein. He ruled here Saturday that publication could not be enjoined because the articles were embarrassing to the Government but not damaging to national interests.

Yesterday the Justice Department shifted its legal ground from the arguments it had made before Judge Gurfein. It served notice in a brief filed by Whitney North Seymour Jr., the United States Attorney here, that it would urge the Court of Appeals to rule that the free-press guarantee of the First Amendment no longer applies once the Executive branch designates informa-

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Judge Henry J. Friendly

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tion as secret.

"National defense documents, properly classified by the Executive, are an exception to an absolute freedom of the press, and should be protected by the courts against unauthorized disclosure," Mr. Seymour argued.

Previously, the Government had not disputed the idea that the First Amendment covered situations in which the Government sought to enjoin the press from printing secret material. Rather, it asserted that the present situation posed an extraordinarily serious threat to the national security and that even material protected by the First Amendment could be supressed.

Judge Gurfein had held that the evidence showed "embarrassment" but not substantial danger to the nation. Appellate courts will normally not overturn such findings of fact unless the record shows that they are clearly wrong.

The new argument made by the Justice Department, if accepted by the courts, would permit the Government to block publication of any documents properly stamped with a secret classification without proving grave danger to the nation.

The Government brief protested that Judge Gurfein's decision had "sanctioned a disclosure of defense information in violation of the Freedom of Information Act and the Espionage Act." The result, the brief said, is to undercut the President's power to enforce the authority given him by Congress to keep information confidential.

Attorneys for The Times filed an 83-page brief, stressing Judge Gurfein's finding that the Government failed to prove —even in secret testimony— that the information could harm the country. Both sides filed sealed, secret briefs commenting on the testimony of the Government's witnesses "in camera."

The postponement yesterday created a likelihood that the case involving The Times would reach the United States Supreme Court late this week, at about the time as a similar appeal affecting The Washington Post.

Thus the first Supreme Court test in the nation's history of the Government's power to halt press publications on "national security" grounds appeared to be shaping up just as the Court was about to end its current term.

Final Session Due Monday

The Supreme Court is expected to hold its final session of the current term next Monday, when it will hand down the rest of its decisions for the term.

Before then the Court of Appeals here will undoubtedly deliver its decision—probably some time Wednesday. Lawyers for both sides have indicated that the loser will immediately ask the Supreme Court for emergency relief.

Under the Court's procedures such a plea could be denied by Justice John M. Harlan, who has jurisdiction over the Second Circuit. Due to the importance of the issue and the fact that the case of the Washington Post is also pending, most lawyers involved expect the full Supreme Court to act.

The Court could rule without a hearing, after reading the appeal papers. It could also meet to hear arguments later this week or stay to hear arguments on Monday, after its opinions have been announced. All the members were present when decisions were announced yesterday except Justice William O. Douglas, who has written his opinions for the year and has gone to his summer retreat at Goose Prairie, Wash.

When the three-judge Court of Appeals panel met at 10:30 A.M. yesterday, Judge Friendly announced that all the members had conferred by telephone over the weekend and were "in accord in their belief that this appeal raised questions of such extraordinary importance that it shoould be heard by all the judges."

The Courts of Appeals for the 11 circuits in the country are of different sizes, but they all normally sit in three-judge panels. However, whenever a majority of the members feel that the entire court should hear a case, it is heard "en banc."

One Seat Is Vacant

The Second Judicial Circuit, which encompasses New York and Connecticut, has a normal complement of nine judges but one seat is vacant. The court today will consist of Judge Friendly and Judges Wilfred Feinberg, Paul R. Hays, Irving R. Kaufman, J. Edward Lumbard, Walter R. Mansfield, James L. Oakes and J. Joseph Smith.

During the brief hearing yesterday, a dispute broke out over Mr. Seymour's statement that the Government wished to submit sworn affidavits of officials to "point out the significance" of certain parts of the Pentagon study.

Circuit court judges are appointed by the President and confirmed by the Senate in the same manner as district court judges and justices of the Supreme Court.

Alexander M. Bickel, a Yale professor of constitutional law who is among counsel for The Times, protested that the Justice Department was trying to take "a second bite of the apple." He asserted that the Government, having failed at the trial last week to prove a threat of grave harm, was now attempting to add testimony that was not subject to cross-examination.

Two civil-liberties lawyers asked for permission to argue as friends-of-the-court in the hearing today in opposition to the Government.

Norman Dorsen, general counsel for the American Civil Liberties Union, said he wished to speak for it and for 27 members of Congress who oppose the Government's position. Victor Rabinowitz made a similar request in the name of the National Emergency Civil Liberties Union.

Judge Friendly said that the full court would rule on both motions today.