

Excerpts From the Government Brief

Following are excerpts from the Government brief submitted yesterday to the United States Court of Appeals for the Second Circuit, seeking to prevent publication by The New York Times of further articles in its series on Vietnam:

Brief by The Times

The authority and responsibility of the President for the protection of official information affecting the national security has been delegated by Executive Order 10501.

Pursuant to Executive Order 10501, the Secretary of Defense has classified the documents involved in this case as top secret. Defendants have not been authorized either to possess or disclose the contents of those documents.

In dealing with the Executive function to say who may have access to secret military information, we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the Executive branch any greater or any clearer; if any powers of the executive are demanding of judicial enforcement, they must surely include the power to exercise effective control of classified defense information.

By denying the relief requested in this case, the District Court has sanctioned a disclosure of defense information in violation of the Freedom of Information Act and the Espionage Act.

Jefferson's View Cited

The exception to the free press doctrine which the Government argues for today is precisely the type of exception our forefathers had in mind when the doctrine was first put into operation in the early days of the Republic. Julian P. Boyd, the distinguished editor of the Papers of Thomas Jefferson

at Princeton University, has called our attention to the following statement made by President Thomas Jefferson on June 17, 1807, to Federal Attorney George W. Hay of the District of Virginia:

"... All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their Executive functionary only. He of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication."

Appellee has conceded that some information is so prejudicial to the national defense that its publication should be enjoined. The example frequently discussed in oral argument, derived from *Near v. Minnesota*, is the date of sailing of a troop ship. We believe the record abundantly demonstrates that the information in the possession of The Times falls within the exception recognized in *Near* in that its publication would gravely and irreparably damage the defense of the United States. In many specifics, the damage that might be done in terms of human lives far exceeds the number of troops carried on any troop ship.

The documents in question are, in large part, classified "top secret-sensitive" pursuant to the provisions of Executive Order 10501, entitled "Safeguarding Official Information in the Interests of the Defense of the United States." That Executive Order reserves the "top secret" classification "for defense information or material which requires the highest degree of protection." It provides that the "top secret" classification "shall be applied only to 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."

'Recently Reviewed and Retained'

It is hardly proper to ignore the "top secret" classification so recently reviewed and retained by officials at the highest level of government who have intimate and detailed knowledge of the facts on which the defense of this nation rests. Great deference must be accorded their considered judgment that disclosure would so damage the national defense that the "top secret" classification is proper. Surely they are in a better position than The Times, however well-intentioned it is, to judge whether "unauthorized disclosure . . . could result in exceptionally grave damage to the nation." As Judge Learned Hand pointed out many years ago, "The services must be trusted to determine what information may be broadcast without prejudice to the 'national defense.'" "The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. What is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with." *Eptain v. Resor*, (1970).

The Government has carefully determined that the information presently in The Times's possession is highly prejudicial to the national defense. Its "top secret" classification, reasonably made in the first instance and buttressed by recent review, is highly persuasive, if not conclusive of that fact. This decision whether the classified document should be published does not rest with the newspaper. In Jefferson's phrase it is the Executive who "must be the sole judge of which of them the public interests will permit publication."

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United Press International

AFTER DECISION: Katharine Graham, publisher of The Washington Post, leaving Federal Court in Washington yesterday with attorney for paper, William R. Glendon.