

U.S. ASKING COURT FOR ORDER TO SEE TIMES DOCUMENTS

A HEARING TODAY

NYTimes Newspaper Asserts It Fears Its Sources Will Be Exposed

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By FRED P. GRAHAM

The Justice Department asked United States District Judge Murray I. Gurfein yesterday to order The New York Times to turn over for the Government's inspection the secret Pentagon study from which its Vietnam series has been drawn.

Late yesterday Judge Gurfein signed an order instructing The Times to appear in his court at 10 A.M. today to give reasons why it should not be ordered to produce the huge document.

The action came at about 5:30 P.M. after a lawyer for The Times, Floyd Abrams, met with Government attorneys in the United States Attorney's office here and told them that The Times would not voluntarily surrender the documents.

Called Important to Case

The Government asserted in papers filed with Judge Gurfein that examination of the papers "is important to the proper presentation of the Government's case" in proceedings for an injunction pending before the judge.

On Tuesday, the judge granted a temporary restraining order barring The Times from publishing further material from the documents for four days, and ordering a hearing for tomorrow morning on whether the publication ban should be continued thereafter.

In arguments before Judge Gurfein, Tuesday, a lawyer for The Times insisted that to turn the documents over to the Government might permit agents to trace the source that had given the documents to the newspaper.

First Amendment Cited

The Judge was told that the Times feared that scientific tests of the study and its accompanying documents might permit the Government to trace the copying machine used to duplicate them, exposing the source. Arguing that the First amendment shields newspapers from being forced to disclose their confidential sources, The Times lawyers asserted that the Constitution thus protects the newspaper from having to surrender the documents.

The Times's lawyer, Prof. Alexander M. Bickel of the Yale Law School, also argued that the Government had its own copies of the 7,000-page work, which were available for the Government lawyers' inspection. Government sources have said that at least 15 copies were initially made when the study was written in 1968.

These arguments were made in opposition to the Justice De-

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partment's efforts to get The Times to give the archive back to the Government permanently, Judge Gurfein refused to order The Times to return them, and the Government returned to him yesterday with the demand that it be permitted to "inspect and copy" the papers.

Affidavit With Demand

The demand was accompanied by an affidavit by Michael D. Hess, the chief of the civil division in the United States Attorney's office here. In it, he said that the Government did not know precisely what documents The Times had, and that it needed to know to argue its case properly tomorrow.

Mr. Hess said that The Times had admitted having a 47-volume study entitled "History of U.S. Decision-Making Process on Vietnam Policy," plus a summary of a document on the Tonkin Gulf incidents. He said that the Government also suspected that The Times has additional secret papers, and he demanded that all be delivered to the United States Attorney's office for inspection.

Under the Federal Rules of Civil procedure, the Government was required to ask The Times to turn over the papers voluntarily before it could ask for an order requiring that they be yielded. Mr. Abrams, a partner in the New York law firm of Cahill, Gordon, Sonnett, Reindel & Ohl, went to the United States Attorney's office and refused to comply voluntarily. Mr. Hess then obtained the show-cause order from Judge Gurfein yesterday.

In a related development, Representative Edward I. Koch, Manhattan Democrat, and five other persons asked permission to join the suit as defendants,

to represent the interests of the reading public.

The action, which was filed by lawyers for the American Civil Liberties Union, asserted that neither the Government nor The Times was in a position to protect the readers' right "to acquire information about the conduct of the United States Government [that is] vital to their interests as American citizens."

The others in the action are Aryeh Neier, executive director of the A.C.L.U., Edwin J. Oppenheimer, a law clerk who is preparing a legal brief challenging the constitutionality of the Vietnam war, and Edward J. Ennis, Ira Glasser and Nancy Lee Ennis, who said they depended upon The Times for much of their information on world affairs.

Judge Gurfein will also hear arguments on their request to join the suit at the hearing this morning.

In Washington, the Department of Justice said yesterday that it had not ruled out filing criminal charges in the case.

John W. Hushen, the department's spokesman, said in response to a question that "we would not rule out the filing of criminal charges." The department has thus far taken only civil actions.

Mr. Hushen would not speculate on the question of whom criminal charges might be brought against. He said only, "Against people who have violated Federal law." Asked what Federal laws, he mentioned these possibilities: "Theft of Government property, removal of Government property, unlawful publication of classified documents, or conspiracy to commit any one of the three."

In the meantime, reliable sources report that lawyers in the State Department were making their way through the study of the war to determine what foreign policy interests might be damaged by the publication of more material.