

COURTS DIFFER ON VIETNAM PAPERS; THE TIMES SERIES IS STILL HELD UP, WASHINGTON POST ESCAPES A BAN

U.S. APPEALS CASE

District Judge Rules No Prior Restraint Can Be Imposed

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Special to The New York Times

WASHINGTON, June 18—A Federal District judge authorized The Washington Post tonight to continue publication of classified information in a series of articles on the history of America's involvement in Vietnam.

The Department of Justice sought to appeal the ruling of District Judge Gerhard A. Gesell at once in the Court of Appeals.

The first of the articles, based on the Pentagon report on the United States involvement in Vietnam, appeared in today's issue of The Post.

Judge Gesell said it was unfortunate that The Post refused to cooperate with the Government's request for a voluntary postponement of the series while the constitutional issue was argued in court.

Prior Restraint Rejected

But he said that the Government had no right to seek prior restraint of The Post's articles and that its only recourse was to bring criminal action against those it might accuse of violating security regulations after publication of the material.

The ruling came within an hour of the 9 P.M. deadline The Post's editors had set for publication of the second installment in its series.

"We're going, boy, we're going," said Benjamin C. Bradley, the executive editor, when he learned of the decision.

Judge Gesell's decision was bound to have a major impact on the proceedings in New York, where The New York Times is under a temporary restraining order of another Federal judge barring publication of the Vietnam study material until 1 P.M. tomorrow.

The Government moved to halt The Post's series as it had acted against The Times articles three days ago, after The

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U.S. FAILS TO STOP WASHINGTON POST

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Post refused today to stop publication of the articles voluntarily.

In a key paragraph in his ruling, Judge Gesell declared:

"What is presented is a raw question of preserving the freedom of the press as it confronts the efforts of the Government to impose a prior restraint on publication of essentially historical data. The information unquestionably will be embarrassing to the United States, but there is no possible way after the most full and careful hearing that a court would be able to determine the implications of publication on the conduct of Government affairs or to weigh these implications against the effects of withholding information from the public."

Times Proceedings Cited

Judge Gesell said that the Government's determination, announced earlier in court, to proceed against The Post regardless of the outcome of the case against The Times, together with The Post's stated determination to publish the material tonight, required that he act.

He warned, at the same time, that the newspaper had placed itself "in serious jeopardy of criminal prosecution" by making the material public.

In an earlier hearing on the Government's request, Judge Gesell had said that The Post would not agree to his request for a delay over the weekend, to weigh carefully the issue of prior restraint of a free press.

Roger A. Clark, the attorney for The Washington Post Company, insisted that the court would be "treading on dangerous ground if it tries to determine what is news."

The Justice Department sought a temporary restraining order against continuation of the series, which began in this morning's issues of the paper and a permanent injunction against the use of material from the documents, asserting that to continue the articles would cause "irreparable injury" to the national security of the United States.

Kevin T. Maroney, a deputy assistant attorney general, argued in court this evening that The Post, in printing the material, was taking the position that its judgment was superior to that of the Government. "Their judgment cannot prevail over the judgment of the Secretary of Defense," Mr. Maroney said.

History has shown that information of this sort cannot be suppressed, Mr. Clark argued.

If the Post were restrained, he continued, "the irreparable injury, in my judgment, would be to the system that has worked for 200 years."

The relationship between the Government's action against the Post articles and its earlier court action against The New York Times was argued in the courtroom tonight.

Judge Gesell stated that the principle of comity—courtesy as between equal—should apply and that he believed The Post would suffer no irreparable injury if it were delayed in publication while the Times was under a restraining order. He said that to deny the Government's request for a similar order against The Post would be to decide the case in New York, because The Times could then argue that it had been damaged by the restraint.

Mr. Clark contended that persons who had made the sensitive documents available to the two newspapers out of a "moral fervor" were likely to make them available to others.

Obviously there has been "a leak in the dike" that cannot be plugged, The Post's lawyer said.

When Judge Gesell asked whether the Government knew if any publications other than The Times and The Post had

obtained access to the information, Mr. Maroney said he had no information that they might, but he added: "It was news to us to see it in The Post this morning."

Asked what position the Justice Department might take if The Times were permitted to publish its articles tomorrow, Mr. Maroney said the case against The Post would continue because different publications might print different parts of the massive Pentagon study.

Mr. Maroney said that the Government was not seeking to impose prior restraint on The Post but to secure the return of top secret documents that the newspaper had "in unlawful possession."

The Post's executive editor, Benjamin C. Bradlee, had vowed since receiving a midafternoon telephone call from the Justice Department seeking a voluntary halt in the series, to proceed with the articles and to "fight" the request for a court injunction.

Earlier Mr. Bradlee said in an interview that The Post welcomed the court challenge on the issue of prior restraint of the free press.

"It seems to me that they've got two people to tangle with now," he said. "It helps the cause. The issue is more joined and more important than ever."

He said that it was likely the Government would be faced with the prospect of a continuing series of newspapers gaining access to the documents.

"It's sure to show up somewhere else," Mr. Bradlee said. "What did it take us to get it—two days—after it was in The Times?"

The Post was understood to have received copies of some of the Pentagon study documents through the mail on Monday and to have obtained another group of the Pentagon papers later this week. The newspaper's editors would not disclose the source of their documents, nor did they allude to the method of their receipt in the article this morning.

The article did not appear in

the first two editions of The Post. Mr. Bradlee said that was attributable to lengthy discussions with the newspaper's lawyers. Other employees said that The Post had also taken into account the possibility that if the article had appeared in its early editions, available at 10:30 o'clock last night, the Justice Department might have been alerted to seek to halt the publication of the information between editions.

About half-a-dozen Post reporters were said to have been assigned to the study of the Pentagon documents, working under Chalmers M. Roberts,

Other reporters working on the material included Murray Marder, Marilyn Berger and Bernard C. Nossiter. They were said to be preparing a series of six or seven articles, although one Post editor said privately that there was enough material in the documents to publish articles "all year."

Mr. Bradlee said that the decision to publish the first article in a series, while The Times was under a temporary order restraining it from continuing with its account of the documents, has been reached after extensive discussion.

In a formal statement, he said:

"We carefully examined all the material available to us and concluded that we had an obligation to our readers to publish this story, which contains important information on the history of our involvement in Vietnam and which, in our opinion, does not reveal information which could be used to the injury of the United States or to the advantage of any foreign nation."

Informally, members of The Post staff were delighted that their newspaper had proceeded from where The Times, under court order, had left off. Several of the writers said that they had toasted the first installment this morning after—to the surprise of some of them—it appeared in the late editions.