

Excerpts From Arguments in U.S. Case

Following are excerpts from arguments before Judge Murray I. Gurfein in United States District Court here yesterday in the case of the United States Government against The New York Times Company and 22 of its officers and employes in connection with publication in The Times of secret papers on the Vietnam war:

ALEXANDER BICKEL, for The Times—Your Honor, the new matter I wish to bring to your attention first thing this morning. The Washington Post has begun publication, under a headline, and I will go into that in a moment more thoroughly, "Documents Reveal U. S. Effort in '54 to Delay Viet Election," heavily quoting from the same documents that The New York Times is alleged to possess, and the publication proceeds from portions of those documents which The New York Times has not yet published. It is the first in a series.

Now, Your Honor, The Washington Post runs a news service to 345 clients, including The New York Post among them, which has the article, "More War Secrets," and we have, if Your Honor wishes to see, what went out from the Washington Post News Service.

The New York Post in introducing the series, which it gets from The Washington Post News Service, says, "The Washington Post has obtained access to sections of the Pentagon report on the Vietnam war, part of which appeared in The New York Times before the Government got a temporary injunction to halt publication. The first in a series of articles based on previously unpublished parts of the report begins here."

These articles were published, those portions that The New York Times is under temporary restraining order not to publish. These stories have gone out on the wire services. There are three AP stories, one UPI story quoting heavily from The Post, so that I think, Your Honor, without any exaggeration, we can assume this story is out and available, those portions of it which

The New York Times had not printed before are out and available and will be made available by every news medium in the United States to the public. We suggest, Your Honor, that this radically changes the posture of the case, it radically changes the position of the temporary restraining order that Your Honor issued.

May I add, before I go on to that, the stories, as we read them in The Washington Post, quote heavily and at great length—I see no difference from what The Times itself did—from documents of exactly the same sort that The Times had, there are quotations from National Security Council documents, there are ample quotations, at length, for more than a column, with my red markings on them, and perhaps your Honor will examine it yourself, the length of these quotations, from cavils, various documents of exactly the same sort, and it is the portion of them that The Times has not yet printed.

Question About Document

THE COURT—Would The Times then voluntarily show me what you have? You still have not done anything about that and I am in the dark and I don't know whether it was the same document or another document.

MR. BICKEL—We have now given the Government a list which I think is responsive to that request.

THE COURT—But it is not responsive to an allegation that The Washington Post is publishing the same thing. I have nothing before me that indicates that.

MR. BICKEL—Your Honor has the list which we have made available to the Government of documents in the possession of The New York Times, which I think will confirm that The Washington Post, as it itself says, is publishing from the same documents and from the portion of the documents that The Times has not yet published, what The New York Times has.

SATURDAY, JUNE 19, 1971

Against Times Over

Vietnam Documents

May I say parenthetically that your Honor is aware, of course, that this is a different issue for us because—this is a separate issue for us because there is a separate constitutional ground that The Times relies on, the Caldwell ground, essentially, which disables The Times, in its view, from making available the copies of the documents that it has.

The Government is in a perfect position to confirm what The Washington Post stories are and I think, from the list, so is your Honor.

Times Readers Deprived

It seems to us that the radical change in the situation is that there is now a situation which the readers of The New York Times alone in this country are deprived of this story. This is a degree of irreparable damage which varies, is different, it seems to me, altogether from the situation that confronted your Honor on Tuesday last when you granted the temporary restraining order.

The Washington Post, I simply want to say, is in our

view doing exactly what is its right to do and, indeed, is doing, in our view, its duty as a newspaper.

But the fact is that the readers of The New York Times, probably by afternoon the single newspaper in the country of which it can be said, are being deprived and thus The Times and they are irreparably damaged, are being deprived of access to a story which every other medium in the country now has, or will have, 345 papers directly from The Washington Post News Service, and as Your Honor knows there is also a question under an order such as Your Honor issued whether The Times is free or in what position The Times is free to report the story as it is appearing elsewhere.

From the Government's point of view, the situation is equally radically changed. We suggest to Your Honor that the case is simply, in the simplest terms, moot, that there is no national security consideration, if there ever was one, which we don't concede, left in this case, there is nothing for Your Honor to protect with a temporary restraining order.

Issue of Permanent Injunction

I will add only that it seems to us also that the possibility of prevailing and getting a permanent injunction, which is of course relevant on the hearing this morning and relevant as well on the temporary restraining order in an attenuated fashion — that possibility, it seems to us, has vanished.

It seems to us quite clear that if there was any further reason to demonstrate that all The Times did is what every newspaper in the country would do given the opportunity, that The Times acted within the well-understood usages of the newspaper profession and this proves it and in our view of the case that defeats the Government's case, that makes it impossible to speak of this within the First Amendment as an unauthorized or unlawful publication within 793-E.

So, Your Honor, I am moving now for an order to vacate your temporary restraining order and if Your Honor desires, we are having papers prepared and will hand them up to the bench as soon as they become available. But I move orally now that the order be vacated.

MICHAEL D. HESS, for the Government—Pursuant to Your Honor's suggestion, the parties got together yesterday after court to discuss the possibility of our obtaining a list from The Times. The list that we got then was just four pages long. The items on those four pages were stated in very broad terms, and, frankly, Your Honor, they did not help us as much as we had hoped.

THE COURT—What I am really asking you is, does the Government intend to move against The Washington Post, if you know?

MR. HESS—I do not know at this moment, Your Honor, but we will show you that the case is certainly not moot and that there are serious problems of foreign relations that will result if The Times does publish, and that issue still remains in the case this morning. They are the defendants here. Your Honor. They are the only ones before Your Honor, and we wish to proceed as planned.

THE COURTS—In denying interventions I said that The Times could adequately represent the interests of the reading public, and I meant it. Now Professor Bickel makes the point that in the present situation the readers of The New York Times are the only readers who cannot read this material.

Position Called Unique

MR. HESS—Your Honor, I would say that The Times put themselves, in a way, in this position by opening the subject, being the first to announce that they were going to publish and coming into this Court and asking this Court to decide. They said they would agree that the Court should decide. We would say that they put themselves in this unique position.

MR. BICKEL: First of all, Your Honor, we are not in this Court because we came into this Court seeking its approval of our publishing enterprise. We are in this Court because the Government brought us in this Court. The Government obtained from your Honor a temporary restraining order on the basis that there was relatively no damage, no injury, to The Times in imposing a temporary restraint on publication, and, on the other hand, that there was serious damage impending to the Government.

We suggest to Your Honor that the position has changed radically on both sides. There is now damage to The Times and from the Government's point of view the security interest is not visible with the naked eye any longer. These things are coming out.

The Government says it may move against The Washington Post. It may move against The Washington Post—when?

We are talking about a

publication of maybe two, three days, a series, and The Times's story is gone. That is simply not sufficient, your Honor, at this stage to outweigh the interest of The Times.

The Government's position in this court, Your Honor, was that grave danger to the national security would occur if another installment of a story that The Times had were published. Another installment of that story has been published. The republic stands and it stood the first three days...

We don't see how the national interest can now remain in danger in the Government's view of this case which prevailed with Your Honor on Tuesday last. This story is out. We have information that Congressman McCloskey has a copy and is about to put it in the Congressional Record. Every news medium in the United States has access to exactly what The Times is alleged to have. How can it be said that The Times is in a special position of being the only one in the media under a restraining order and how can the damage that is thus done to the readership of The Times be supportable?

THE COURT—You pose a very difficult problem. The question is still, so far as the United States security is concerned, that a free and independent press ought to be willing to sit down with the Department of Justice and screen these documents that you have or The Washington Post has or anybody else has as a matter of simple patriotism to determine whether the publication of any of them is or is not dangerous to the national security.

If you disagree, then surely you would have the right and the Government has the right equally to go into a court and ask a court to make that decision. I am concerned about things that come right to the surface. The lack of perhaps paraphrase of code messages, I use that as one illustration, I am concerned about material sent by foreign governments which do not belong to the United States under the rules of international law, as I know them, they are merely in our custody, and a few other limited categories of that type or perhaps the revelation of methods of intelligence gathering, all of which as patriotic citizens I think the press as well as anybody else agrees should be kept sacrosanct not to deprive anybody of a right to express an opinion, mind you, but in order to protect what is dear to all of us, the security of the country.

Explanation Requested

I say that only preliminary to my asking you again in good faith whether The Times cannot supply us, supply the Court—and I can order it, you know, I am trying to stay so closely within the ambit of your Constitutional protection that if I can do it without an order, I would rather do it—I don't understand, though, frankly, why a patriotic press should not be willing to subject these papers not to censorship of any kind, except from a limited security point of view. I wish you would answer that because it is troubling me.

MR. BICKEL—We are prepared, if Your Honor so wishes, to expand the list that we have handed the U. S. Attorney. Beyond that, I think we can assume we are all, as the light is given to us to see, equally interested in the national security and equally interested in the First Amendment.

THE COURT — I assume that and that is why I made the suggestion.

MR. BICKEL — Precisely. We know of no allegation in

any of the Government's papers of nothing that is substantial and specific that suggests that anything that The Times put in print broke a code, compromised a code, came within five miles of an existing code that the United States is interested in the security of.

THE COURT—With all due respect, I may say that neither you nor I nor The New York Times is competent to pass on that subject as to what will lead to the breaking of a code.

WHITNEY NORTH SEYMOUR Jr., for the Government—. . . as we see it, the issue in this proceeding is a very simple one, and that is whether, when an unauthorized person comes into possession of documents which have been classified under lawful procedures, that person may unilaterally declassify those documents in his sole discretion.

The position of the Government in the proceeding is equally simple. These are stolen documents. They are classified. They compromise our current military and defense plans and intelligence operations and jeopardize our international relations.

Contrary to some of the suggestions in counsel's argument, and in the brief, that what this amounts to is a bald attempt at suppression

and censorship, we have attempted to approach the matter with the highest regard for the Constitutional rights of all concerned and in an orderly, lawful process.

As your Honor will recall, the proceeding began with the sending of a very polite telegram from the Attorney General to The Times asking them if they would voluntarily cease publication and return the documents. The Times in its discretion refused to do so.

We then, with as much notice as we could under the circumstances, approached the Court to have the matter decided judicially under our system, and again, during the course of those preliminary proceedings, Your Honor also asked The Times if they would voluntarily suspend publication so that the matter could be considered reasonably by the Court, and again The Times refused to do so, and it was only in those circumstances that the temporary restraining order was signed.

We are now at the point where we are presenting the matter on the merits, and I think it is important to recognize at the outset that our sole purpose here is to present the evidence to the Court so that the matter can be decided impartially and objectively on the facts and

on the merits and in accordance with the law.

We are prepared, in fact, to do what we believe the defendants should have done in reverse—that is, to submit to the Court, under appropriate protections, the classified documents so your Honor yourself can make the determination as to whether the Government's position is sound.

In doing so, we remind Your Honor that the Congress in its wisdom has enacted the Freedom of Information Act, which was precisely designed to take care of the problems of access to Government documents, that there in fact has been a specific test under that act and the under the Congressional intention about the declassification of documents, and that the present law is that only if the classification has been arbitrary or unsupported will the documents be declared to be declassified and available for unauthorized distribution.

THE COURT—That is a statutory matter, Mr. Seymour.

MR. SEYMOUR—Yes, sir.

THE COURT—But we are talking of the Constitutional matter beyond that. I think that the question then would be whether, assuming that in the guise of security—you must face that question —



AT U.S. COURT HOUSE: Alexander M. Bickel, left, and Floyd Abrams, with sunglasses, lawyers for The Times, arriving for session yesterday. Behind them are, from

left: Max Frankel, the Washington correspondent; Tom Wicker, associate editor; Harding F. Bancroft, executive vice president, and James C. Goodale, vice president.

The New York Times/Neal Boenzi

a government wishes to suppress matters that might be embarrassing to it domestically, the Government has the right to do that under the First Amendment.

Mr. SEYMOUR — I think that is very fair statement of the issue, and we are prepared to meet it head-on.

Suppression Charge Denied

Contrary, again, to counsel's allegations both in the brief and in the argument that this is an attempt by the Government to suppress the publication of historical data, or as I think he just said censorship to avoid matters which might cause discomfiture, the concern of the United States in this proceeding is a very fundamental one and it deals directly on the merits with the security of the United States, military matters, defense matters, intelligence matters, international relations, and we intend to show by live witnesses and documentary evidence that some of these matters may have occurred a few years ago, some going back beyond that, that interwoven in the materials which have been the subject of these presentations are documents which still have current vitality, whose disclosure would currently adversely affect the military alliances, diplomatic efforts relating to a number of sensitive matters, including military matters, and present and future military and defense plans and strategy.

Obviously we approach this proceeding on the assumption that The Times acted in complete good faith and had no knowledge itself of these potential consequences, or indeed, if they had, they would have forebore from publishing it. We wish we had had an opportunity to discuss it with them under less tense circumstances, but this was the only option that was ultimately left open to us when they refused to voluntarily suspend.

That good faith, however, does not alter the fundamental fact that the defendants had in their possession material that was classified, that they were not author-

ized to have that material, and they decided on their own to declassify it and to operate as if it were not protected under the Executive order and the statutes, without making any effort to determine whether there could be any objection to doing so.

The starting point in the Government's proof today, your Honor, will of course be the Executive orders, Executive Order 1051 as amended, promulgated by Presidents Eisenhower and Kennedy, and the Government will offer proof, first of all, that The Times has already published verbatim texts of classified documents: secondly, that although it may not be obvious to the layman, to the trained intelligence man there are already disclosures which are harmful to the interests of the United States; that the international relations of the United States have already been impaired; and that we are not dealing with matters of closed history but matters which have very current vitality and significance.

Witnesses Described

The proof we will offer will be documents and live witnesses. And I should point out, your Honor, that the witnesses that you will hear are career officers of the military and diplomatic services.

After preliminary testimony by the first witness, about the nature of the documents in question and the procedures that were followed, we will then move to have testimony that relates to the specific classified material heard en camera and the documents received en camera under appropriate protections that maintain the classification of the documents.

Obviously, as we approach the task, it is more difficult because we have only this list as to what The Times has in its possession. And so, on the basis of that, we are going to have to speculate to some extent as to precisely what they do have. But to get the issue properly before your Honor, we are left with little alternative.