

Appeals Court Getting The Times Case Today

NYTimes

3 Judges Will Rule on Secret Papers

JUN 21 1971

By FRED P. GRAHAM

The court struggle between the Justice Department and The New York Times over publication of secret information will move to the Federal Court of Appeals today. With lawyers for both sides operating on an accelerated legal timetable, the case is likely to reach the Supreme Court by the end of the week.

At 10:30 A.M. today a three-judge panel of the United States Court of Appeals for the Second Circuit will hear arguments on the Government's appeal from the decision of Government's appeal from the decision of Federal District Judge Murray I. Gurfein in favor of The Times.

The argument is expected to be much shorter than the day-long trial of the case Friday. No witnesses will be heard, and, unlike Friday's session, no part of the argument is expected to be held in secret.

Instead, lawyers for both sides are expected to file secret briefs with the Court of Appeals today, in addition to the normal legal briefs, which will be made public. The secret briefs will discuss the "in camera" testimony in which three Washington officials gave Judge Gurfein their reasons why publication of the material would be harmful to the nation's security.

The oral arguments today

Continued on Page 10, Column 4

NYTimes

Reactions Focus on Security Rules

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By LACEY FOSBURGH

The controversy over the legal, ethical and political implications of the publication of secret documents on the United States involvement in Vietnam continued yesterday as present and former government officials described their reactions to the papers in speeches and interviews across the country.

Senator Edmund S. Muskie told an audience in Garden City, L. I., last night that as a result of the publication of the secret documents in The New York Times and The Washington Post "most of us share a common sense of pain and danger."

"There is the simple fact that countless citizens no longer believe in their government," the Maine Democrat told about 1,000 people who paid \$150 each to attend the annual Nassau County Democratic Committee dinner in the Garden City Hotel.

"What they do believe is that the government lies, and this disbelief has reached a new high with this week's publication of the Pentagon papers," he continued. "They are the daily front-page story and the urgent concern of anyone who cares about the trust that binds America together."

The Senator, considered a leading contender for the Dem-

Continued on Page 10, Column 1

TIMES CASE GOES TO APPEALS COURT

Continued From Page 1, Col. 6

should thus be completed in a few hours. Lawyers involved with the case think that the court could rule later in the day, but that a decision on Tuesday is more likely.

Whatever the decision, it is certain to touch off a scramble to get the case to the Supreme Court. Both sides have made it clear that if they lose, they will appeal immediately.

Within hours after the Court of Appeals rules, the losing side will be at the Supreme Court Building with papers asking for immediate relief.

Entire Court May Rule

Such emergency petitions for stays are normally addressed to the justice who is assigned to handle such matters for the judicial circuit where the case was heard. In this instance, that would be Justice John M. Harlan, who is the circuit justice for the Second Circuit.

Most lawyers believe that in a case of this Constitutional sig-

nificance—the first attempt by the Government to enjoin a newspaper from printing a story on grounds of national security—any action would be taken by the entire court, and not a single justice.

The Supreme Court will meet today to release opinions and is scheduled to adjourn for the summer after meeting again on Monday, June 28.

Lawyers involved with the case said that they could not speculate as to whether the Court would dispose of the matter swiftly by letting the Court of Appeals decision go into effect without hearing arguments. If the Supreme Court should decide to hear arguments itself, it might hear them on a speeded-up schedule, as the Court of Appeals has done, or might hold the case over until the new term begins in October.

The New York Times series, documenting the American involvement in Vietnam, appeared in the Sunday, Monday and Tuesday issues of last week before it was halted by Judge Gurfein's temporary restraining order.

The hearing today is scheduled for the 17th floor of the United States Courthouse on Foley Square.

The three-judge panel for the week—selected by lot—con-

sists of Chief Judge Henry J. Friendly and Circuit Judges J. Joseph Smith and Paul R. Hays.

The opposing lawyers will be the two who made the major legal arguments at Friday's hearing. Whitney North Seymour Jr., the United States Attorney, will argue for the Government; Prof. Alexander M. Bickel of the Yale Law School, an authority on constitutional law, will argue for the newspaper.

One eventuality that could delay a ruling would be a decision by a majority of the full Court of Appeals that the case is so important that the entire membership of the court should consider it. This would require a delay until the court's present complement of seven active judges could be assembled.

Order Expires at Noon

The Times is now under a restraining order, imposed Saturday by Judge Irving R. Kaufman of the Court of Appeals, that lapses at noon today. Unless the three-judge panel extends the restraining order, pending the announcement of its decision, The Times will be free to resume the series at that time.

At 8 A.M. today lawyers for the Government and The Washington Post will begin a trial before U.S. District Judge Gerhard A. Gesell. Judge Gesell ruled Friday that the courts had no legal authority to enjoin a newspaper on "national security" grounds from publishing material.

However, the Court of Appeals for the District of Columbia quickly reversed the ruling and ordered the judge to hear the Government's evidence, to determine whether publication of the material would severely damage the national security. He was ordered to give his decision by 5 P.M. today.

Reactions Focus on Security Methods

Continued From Page 1, Col. 7

ocratic Presidential nomination in 1972, said that the danger of "loss of trust" and "corrosion of ideals" was so great that specific steps must be taken to prevent any government from operating in so secret a fashion in the future.

To this end, Senator Muskie said he intended to introduce legislation to create an independent seven-man board with authority to declassify secret government documents.

"After a two-year waiting period, the board could make a document public and at any time send relevant documents to the appropriate committee of the Congress," he said. "This system would give the President and the departments the strongest incentive to be frank about the facts, which would in any case come out almost immediately or very soon."

"It is said that in the modern world nations always decide in secrecy," he added, "but in a free country, that is not necessary and it is not safe."

Javits 'Encouraged'

Senator Jacob K. Javits, the senior Republican Senator from New York, said here that he was "encouraged" by the week's events because "now the courts will decide what is harmful to the national interest," rather than "a government official just marking things 'classified' and that's it."

Speaking on the WNBC-TV program "Newsight," Senator Javits praised The New York Times for "historic journalistic courage" in printing the classified material. He said he was convinced the confrontation in the courts between the news-

paper and the Justice Department would end "in favor of The Times."

"I read the series and I didn't see anything that would be harmful to the national interest," he said.

In Washington, Senator Stuart Symington said. "It's been obvious to us for years that the executive department has been taking advantage — as it is today—in classifying in order to cover up various matters they do not want people to know."

Johnson Reaction Reported

Former President Lyndon B. Johnson, who figures prominently in the secret documents published so far, was described by Time Magazine as eager to "defend himself" against their contents.

Giving no source for its information, the magazine said in its latest issue that Mr. Johnson "feels strongly that the documents do not tell the true story because they are mostly contingency plans, some of which neither he nor Secretary of State Dean Rusk ever heard of."

According to Time, Mr. Johnson "believes that his greatest mistake in the Vietnam war was waiting until he had been in office 18 months before sending more American soldiers into battle, for by then he felt that Vietnam was almost lost."

In the same issue, Time describes former Secretary of Defense Robert McNamara as hoping "that the man who leaked the report will be forgotten."

Again giving no source for its report, the magazine describes Mr. McNamara as believing "the

country should forget about the many who leaked them and get on with the task of learning from the Pentagon papers."

Dr. Daniel Ellsberg, a former Pentagon official who has been named in some reports as the one who gave the secret study to The New York Times, told Newsweek magazine, "I'm glad it's out. I'm flattered to be suspected of having leaked it."

In its current issue the magazine said that Dr. Ellsberg was interviewed last week in Cambridge, Mass., where he is a researcher for the Massachusetts Institute of Technology. Newsmen have been unable to find him since then.

"He flatly refused to comment on whether he had, in fact, turned the classified papers" over to reporters, the magazine said.

The magazine, describing him as "happy" that the information had become public, quoted Dr. Ellsberg as having said. "We have a good starting point for a real understanding of the war." He described the papers as "the U.S. equivalent of the Nuremberg war-crimes documents."

The magazine says that he also told of repeated attempts last fall to persuade the Nixon Administration to study the report. He said he visited Henry A. Kissinger, the President's adviser for national security affairs, in September because, as Newsweek put it, "he was convinced that the Nixon Administration was merely continuing the same strategy Johnson had followed."

"I asked him if he had a copy of the McNamara study," Dr. Ellsberg said. "Yes," he said. "Did you read it?" I asked. "No," Kissinger said. "Anybody on

your staff work it over?" Again Kissinger said, "No." I urged him to read at least the summaries. "But we make decisions very differently now," Henry said. Now he can read it in the papers."

Here in New York City the controversy over the Pentagon study reached into the editorial offices of The Daily News. More than 70 reporters, editors and other news employees signed a statement in support of publication of the secret study and in protest against an editorial

that appeared in The News on Thursday.

"We want to emphasize the issue is not the one of the Vietnam war," one reporter explained in a news conference, "but rather why didn't management support freedom of the press."

At issue are several phrases emphasizing support for The Times's actions and the concept of a free press that appeared in the first edition of Thursday's News, but were deleted in the second edition.