Excerpts From Arguments in the U.S. Court of Appeals

Following are excerpts from the argument yesterday in the case of The New York Times before the United States Court of Appeals for the Second Circuit:

WHITNEY NOR H SEYMOUR Jr., for the Government — May it please the Court, Mr. Bickel, your associates, this is obviously a case of major national importance. It is important to the interests of the United States, which is engaged in combat in Southeast Asia, in delicate peace negotiations in the Mideast, in a war of nerves in Central Europe, and in sensitive discussions on strategic arms limitations.

his case directly involves the question of disclosure of top-secret documents which have a potential impact on multiple facets of the country's military, intelligence and foreign policy. The case is also important to the constitutional history of the country.

While in the past, courts have mouthed the existence of an exception to the First Amendment in proper circumstances, here for the first time are the circumstances which support the actual implementation of such an exception.

he case arises out of the preparation of a detailed analysis of the internal judgments, errors, mistakes, wisdom, what have you, that led us so deeply into the war in Vietnam. The study was ordered by former Defense Secretary McNamara. The study team was given access to virtually every available top-secret document in the military, intelligence and diplomatic agencies of the government, the Department of Defense, the Joint Chiefs of Staff, the Department of State, the Central Intelligence Agency, the National Security Agency.

The study was itself classified as top secret since it brought together all of this highly classified material in one place and wove it together. The result was contained in 7,000 pages in 47 volumes.

The defendants argued below, and the District Court found, that this was all merely history. But it was and is far more than that. It contains much that is current and of potential future damage to the interests of the United States.

'Failed' or 'Refused'

The defendants have consistently through the proceeding failed to come forward, or indeed refused to come forward, with any intormation to explain or justify their possession of these top-secret documents. But they have admitted in the three articles that they knew they are secret, they also know that their possession is unauthorized and that they have been asked not to publish, in the national interest, and have been asked to return the documents to the Government, which they have refused to do.

I think it is a fair summary of the defendants' position that they are the sole judges of what to publish and they are not subject to limitation by the Congress, they are not subject to limitation by the Executive, they are not subject to limitation by the courts.

To set the constitutional issues in their right perspective, the Government has the advantage of receiving a suggestion from a distinguished scholar at Princeton University who called our attention to the fact that probably the most artic late advocate of fre press in the country's history, Thomas Jefferson, expressly recognized that confidential documents relating to the nation's foreign relations were a proper exception from the right of publication.

I have since conferred with the scholar at Princeton, who explained that the letter was written in connection with the Burr trial, which I am sure the Court is familiar with, the prosecution of Aaron Burr in Richmond in 1807. And I would like to direct the Court's attention to one of the preliminary decision in that case by Chief Justice Marshall dealing with the subpoena that was addressed to Thomas Jefferson, then as President, on which Jefferson commented, in the quote that is in our brief.

What the Chief Justice then observed is that there is in fact an exception to another constit tional guarante, the constitutional guarante of due process of law, for state secrets, and that matters and papers dealing with military or foreign affairs claimed by the Executive to fall within that privilege are in fact exempted from the requirements of the Constitution in making them available to even a defendant in a criminal case.

PU 3d ad

Access to government documents has been and always will be a problem in a democracy. The Congers tried to deal with the problem by passing the Freedom of Information Act. The Executive orders of President Eisenhower and Kennedy, which are currently the ones that govern the classification of documents, speak very strongly about the need to declassify whenever possible so that the public can have access to information about the government's business.

The defendants say, however, that the whole scheme of classification as applied here is a cover-up to hide mistakes in government. But even assuming there were any truth to that argument and assertion, it certainly would not follow that all classified documents should be in the public domain, which is the position they have argued here.

It certainly would not follow that there are no secrets that should be properly classilow that there are no documents which are vital to the nation's security.

'Belied Right on the Face'

The conclusion that out of 7,000 pages here there is nothing that would jeopardize the nation's security seems to me to be belied right on the face of it as an argument.

Congress tried to deal with the problem of protecting national security documents by enacting Section 793 of Title 18, which of course we have referred to in our brief and Judge Gurfein referred to, which is a portion of the so-called Espionage Act. We believe that read in conjunction with the Freedom of Information Act, Congress has set forth a sound framework to encourage the disclosure of general documents which are to protect those relating to the national defense.

The District Judge concluded, however, that 793(e) does not apply because the word "publish" was not used in the statute. But we submit that a companion section, Section 1717, which deals with the mailability of newspapers which violate that esction, plainly shows that Congress did intend for 793 to apply in the case of newspapers.

JUDGE IRVING R. KAUFMAN—I want to make sure I understand you, Mr. Seymour. Are you arguing that if the documents are stolen documents from a Government office or agency, the newspaper under no conditions has any right to publish them?

MR. SEYMOUR—No, Your Honor, I am not. I recognize that the prior-restraint doctrine has a very restrictive area in which the exception will lie. But I am suggesting that it is a proper element for the Court to consider the circumstances under which the documents came into the newspaper's possession, and that it is a weight in the scales.

Indeed, let me suggest one other weight. We are now addressing the equity powers of the Court, and I submit that one of the clear doctrines of a court of equity is not to encourage breaches

10-23-71 NYT

Here in the Government's Case Against The Times

of trust, fiduciary obligation and the like or violations of statute. And having in mind that the documents here involve that kind of a breach of trust, encouraging their publication really is aiding and abetting.

'No Longer Top Secret'

JUDGE WALTER R. MANSFIELD—Am I correct in understanding that some of this material is still classified top secret even though it is conceded that it is no longer top secret?

MR. SEYMOUR: No question about it, Your Honor. We made the point down below that the reason for the classification of the entire study was that it included top-secret material, very substantial amounts of it. But we pointed out very clearly there that there were at least two volumes that did not have classified documents in them at all, and we'll go further and say that there are undoubtedly in other portions matters that could be excepted.

The vice here is that The Times never took the trouble to try to see if they couldn't get a clarification into what might be declassified and published and what was not. and therefore they presumed in themselves the role of the declassifier, and we think that was the vice.

I have no doubt at all that the Court ultimately could use some equitable remedy to help achieve a separating of the wheat from the chaff.

JUDGE MANSFIELD: You agree that we are not bound by the Government's classification?

MR. SEYMOUR: I agree with that with certain caveats. No. 1, I believe it is a fair constitutional principle that the Executive's privilege on military, foreign affairs documents is a substantial privilege. I do not believe it is an absolute privilege, and indeed I believe the Supreme Court case which is on the additional citations I gave you made it perfectly clear that there is, as in all things, the process of reason and one has to make sure that it has been properly exercised under the circumstances.

JUDGE WILFRED FEINBERG—The Times has put in some affidavits below that leaks of secret or classified information are commonplace or have been frequent and that the Government has not moved in the past. I assume that that is sort of an estoppel argument or an argument along those lines. What do you say to that?

MR. SEYMOUR: Two things, your Honor. No. 1, all of the instances that I saw in the affidavits were one-shot disclosures. That is, you did not have the warning. They did not say the day before, "Tomorrow we are going to publish a classified document."

And indeed, if you examine the affidavits closely, you will see that very seldom did they go so far as to stay that they were classified. In cost cases they said they believed they were classified. So that there just was simply practically no opportunity to move to enjoin it.

The only opportunity there was, and this is the second point, is a possible criminal prosecution, but for very clear and plain policy reasons they would have been foolhardy in the extreme when you are concerned about how foreign nations or intelligence agents may be responding to the disclosure of classified information.

One way to tell the world at large that in fact it is an accurate account of the classified document is to prosecute it as such. And so, quite obviously, pulling back on any sanction after the fact is the only simple way to protect the national security.

JUDGE KAUFMAN — The mistake The New York Times made here was nat to publish it all at one time.

MR. SEYMOUR—Well, If you call it a mistake. It certainly was that step that gave us the opportunity to have the Court pass on the question rather than the Times editors assuming that total power themselves.

JUDGE JAMES L. OAKES—But didn't the Government more or less sleep on its rights from Saturday night, when The Times first hit the street, until Tuesday afternoon, when it brought this proceeding?

I think "sleeping" is probably a pretty good word, Your Honor. If I may divulge a personal anecdote, the night the telegram was sent, Monday night, after the agonizing decision process was made as to whether to enjoin or not, the Assistant Attorney General in charge of Security Division tried to reach me to advise be that this had been done so that we could get our legal wheels rolling.

I was down in Washington for the U. S. Attorney's Conference. He gat the name of my hotel from my secretary at 12:30 a tnight. He then tried to rouse me from my sleep, but with good fortune the operator rang the phone in my children's room. They are trained to sleep through alarm clocks. So in fact we did slep on our rights until eight o'clock the following morning.

I should also say, however, my Chief Assistant was not as fortunate, and Mr. Hess, who is here, was roused in the middle of the night.

JUDGE OAKES: But there are other atorneys in the United States Department of Justice.

MR. SEYMOUR: Obviously what we are dealing with is a terribly difficult problem. Let us not blank the fact, as indicated before, that what the Government has done in this case is a terribly unpopular thing. We are being vilified from all sides.

JUDGE MANSFIELD—Mr. Seymour, doesn't this just boil down to an issue of fact that was decided by Judge Gurfein, and isn't our position simply to determine whether his finding was clearly erroneous or not supported by substantial evidence?

MR. SEYMOUR—I don't think it is as simple as that, your Honor. I do think that one branch of the argument of the Government on which this Court, we believe, should base its decision is that a presumption of regularity should attach to the Executive's classification of these documents and his assertion that they are not to be released.

Recognizing that the Court can look behind just the stamp on the face, we tried to deal with that in the court below by showing that the Executive Order had been fully complied with in terms of a reclassification procedure and a regular review, and I would say without hesitation, your Honor, that if The Times here had done what it has since done—indeed, you will recall in an editorial in yesterday's paper, in addition to commenting on the merits of this appeal it urged the declassification of this document. If that kind of approach, of mobilizating public opinion to bring about declassification, had been instituted rather than declassifying unilaterally, we probably would have had some results.

JUDGE MANSFIELD — Do you say that each and every one of those documents today is actually of a nature that should be classified top secret?

MR. SEYMOUR—Your Honor, I am not going to arrogate unto myself what we say The Times cannot arrogate unto itself. There are very clear procedures in existence for reviewing and declassifying by the agencies concerned. Indeed, if I may Your Honor, I have been expressly authorized to advise the Court, on behalf of the Secretary of State, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, the following:

Transcription of the hearings, including The Times's argument, was not complete at the time this edition went to press.