

# A 5-TO-3 DECISION

~~JUN 24 1971~~

## Court Here Orders Gurfein to Weigh Security Issue

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By FRED P. GRAHAM

The United States Court of Appeals here ordered a further delay yesterday in the publication by The New York Times of material from Pentagon papers on the American involvement in the Vietnam war.

Arthur Ochs Sulzberger, publisher of The Times, said that it would appeal to the United States Supreme Court as soon as possible. He has instructed the counsel to The Times to prepare the necessary papers for immediate application.

The Appellate Court's brief 5-to-3 decision contained two major provisions.

It held that after Friday, June 25, The Times could resume publication of its series but could not use any material that the Government contended dangerous to national security.

### Secret Hearings Ordered

It also instructed Federal District Judge Murray I. Gurfein to hold secret hearings next week and to determine by Saturday, July 3, which portions of the study "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

The Supreme Court is due to recess for the summer next Monday.

A crucial item in the decision here by the full bench of the Circuit Court was a sealed list filed last Monday by the United States Attorney here, Whitney North Seymour Jr. The document, called a "special appendix," contained a lengthy list of items in the 47-volume Pentagon study that the Government said would cause grave national danger if disclosed.

### Opportunity for Government

Alexander M. Bickel, counsel to The Times, objected to this, asserting that at the trial before Judge Gurfein the Government had cited only half a dozen items as being dangerous. He protested that to add to the list at the appeals level was tantamount to inserting testimony there.

But the Court of Appeals ruled yesterday that the Government must be given an opportunity to prove in secret testimony that the items on the list, plus any additions that the Government makes between now and Friday, do pose a sufficiently grave threat that they should be barred from publication.

No direct disclosures have

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been made as to the length of the list, but there were hints during the arguments that it already contains substantial portions of the Pentagon study of the origins of United States involvement in Vietnam.

The Times series, which included the publication of documents accompanying the study, appeared on June 13, 14 and 15 before it was halted by Judge Gurfein pending his consideration of the Government's suit to enjoin further publication. Since then, there have been almost daily court hearings and several extensions of the restraining order.

### Breakdown on Decision

The unsigned opinion issued yesterday was supported by Chief Judge Henry J. Friendly and Judges J. Edward Lumbard, J. Joseph Smith, Paul R. Hays and Walter R. Mansfield.

Judges Irving R. Kaufman, Wilfred Feinberg and James L. Oakes signed a brief dissent. It said: "We dissent and would vacate the stay and affirm the judgment of the court below."

By implication the majority opinion accepted the finding of Judge Gurfein that matter cannot be banned from publication essential because it is classified "top secret" by the executive branch.

Judge Gurfein also rejected the Government's assertion that it could rely on the Espionage Act of 1917 to enjoin publication of any document "relating to the national defense" that it had reason to believe could harm the United States, and the Court of Appeals did not dispute that decision.

However, by accepting Judge Gurfein's ruling that courts can bar publication of any matter that poses "grave and immediate danger" to the national security, the Court of Appeals opened the possibility that resumption of The Times series could be delayed for months while the various courts combed through the massive study to consider items singled out by the Government.

In the lower court proceedings lawyers for The Times have insisted that the courts have the legal authority to block publication of material only if disclosure is a violation of law and constituted an extraordinary breach of security.

Yesterday's ruling by the Court of Appeals would permit suppression of material in the Pentagon study if the threat was grave enough, without requiring that the disclosure violated law.

### TEXT OF THE DECISION

*Following is the text of the majority opinion handed down by the Appeals Court:*

Upon consideration by the court en banc, it is ordered that the case be remanded to the District Court for further in camera proceedings to determine, on or before July 3, 1971, whether disclosure of any of those items specified in the special appendix filed with this Court on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularly on or before June 25, 1971, pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined, and to act accordingly, subject to the condition that the stay heretofore issued by this court shall continue in effect until June 25, 1971, at which time it shall be vacated except as those items which have been specified in the special appendix as so supplemented and shall continue in effect as to such items until disposition by the district court.



Arnold Newman  
**Wilfred  
Feinberg**



The New York Times  
**Henry J.  
Friendly**



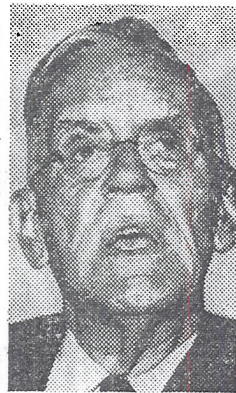
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