The New York Times/Mike Lien

**IN APPEAL TO SUPREME COURT: Lawyers representing The New York Times in Pentagon papers case enter the court. Lawrence J. McKay is at right. Others, from left: Floyd Abrams, Mathias E. Mone and William E. Hegarty.**

# Excerpts From Petition to High Court by The Times

Special to The New York Times

*WASHINGTON, June 24—Following are excerpts from the petition by The New York Times to the Supreme Court for review:*

Petitioner New York Times Company prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on June 23, 1971.

1. Whether, consistent with the First Amendment, a court may restrain a newspaper from publishing articles relating to public affairs.

2. Whether, consistent with the First and Fifth Amendments, the Court of Appeals may properly remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where publication of the articles was not prohibited by any statute and where the basis for remand was the submission to the Court of Appeals of assertions of fact not before the District Court.

3. Whether, consistent with the First Amendment and the principle of separation of powers, the Court of Appeals may adopt a standard which permits the Executive to obtain injunctive relief against publication by a newspaper of articles relating to public affairs, in the absence of any statute enacted by Congress.

4. Whether a remand by the Court of Appeals to the District Court in a case in which the United States seeks to restrain publication by a newspaper of articles relating to public affairs, in which the Court of Appeals instructs the District Court to enjoin publication of items which "pose such grave and immediate danger to the security of the United States as to warrant their publications being enjoined," is unconstitutionally vague and impossible of application by a court of law.

5. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a news-

paper of articles relating to public affairs in circumstances in which the United States at its request had been provided an in camera hearing to enable it to fully and frankly set forth its evidence, and at which hearing it had wholly failed to set forth evidence demonstrating any need for an injunction and where remanding the case would substantially delay publication of the news articles.

6. Whether, consistent with the First Amendment, the Court of Appeals may remand a case to the District Court which had denied a preliminary injunction sought by the United States to restrain publication by a newspaper of articles relating to public affairs, where two District Courts had held, and a Court of Appeals held, that no irreparable harm would be suffered by the United States if such articles were published and there was no reasonable certainty that the United States would succeed on the merits.

7. Whether, consistent with the First Amendment, a newspaper may be restrained from publishing articles relating to public affairs for a period of time of as much as 18 days while it is judicially determined whether the newspaper may publish the articles.

8. Whether, consistent with the First Amendment, a court may issue a temporary restraining order against the publication by a newspaper of articles relating to public affairs in the absence of a showing by the applicant that it was reasonably certain that the applicant would prevail on the merits.

On the same day the United States Court of Appeals for the Second Circuit remanded this action to Judge Gurfein, the United States Court of Appeals for the District of Columbia Circuit, in a per curiam decision, affirmed the ruling of Judge Gesell denying the motion of the United States for a preliminary injunction against The Washington Post. The two cases are, as the respective complaints of the Government demonstrate, in most respects virtually identical. Many of the same documents are involved in each. Government witnesses in one case testified in the other. Substantial portions of the "special appendix" submitted by the United States in The New York Times litigation was submitted in affidavit form in the Washington Post litigation. That the two Courts of Appeal to have heard these cases should have decided as differently as was done is itself a compelling reason for the granting of certiorari.

Apart from the plain inconsistency between the two appellate decisions, the effect of the inconsistency is that The New York Times remains under a prior restraint against publishing articles (on a subject first disclosed to the American public by The Times) while The Washington Post, as well as numerous other newspapers throughout the country, is free to publish its articles. We do not claim that The Washington Post should be enjoined, nor that any other paper should be enjoined from publishing these documents of public interest. We do submit that it is most inequitable that some papers should be free to publish articles of this sort while others are not. This is, if anything, all the more unfair to The New York Times and its readers since it was the first newspaper to report on the documents referred to in the litigation.

**'Condition of Free Society'**

The case on its face presents urgent issues of overriding public importance which should be promptly decided by this Court. For the first time in American history, a newspaper has been enjoined from publishing news. The injunction has, as of the day of the writing of this petition, remained in effect for a total of nine days. In the light of the finding of Judge Gurfein that "no cogent reasons" had been adduced by the Government which could conceivably support the supression of The Time's articles, the continuation of the prior restraint in effect for yet additional hearings imposes an unsupportable burden on a free press.

In this espect, it is fundamental ". . . that a free press is a condition of a free society." Associated Press V. United States (1945). Of those rights, to be free of prior restraints on what the press may publish is one of the best-established and most fundamental. See Near v. Minnesota (1931) and Liberty Lobby, Inc. v. Pearson (1968). As this court recently observed in Organization for a Better Austin v. Keefe (May 17, 1971), "any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity." The decision of the Court of Appeals, by continuing still longer the prior restraint on The Times, has seriously throttled this right.

At the same time, the decision imperils the "open and robust debate" which the First Amendment is supposed to foster. New York Times Co. v. Sullivan (1964). This court's opinion in Freedman v. Maryland (1965) reaffirmed that it causes irreparable injury to our society to stifle the immediacy of speech, except in the most extraordinary circumstances. Such circumstances, as has been found by two District Courts and one Court of Appeals, are not present.

Following extensive evidentiary hearings both in open court and in camera and full arguments and briefing by the parties, Judge Gurfein denied the United States' application for a preliminary injunction. The ultimate relief demanded by the Government is, of course, injunctive, and Judge Gurfein's denial concluded, at the very least, that there was no reasonable certainty that the United States would succeed on the merits and that it would suffer no irreparable harm if the motion were not granted.

For the Court of Appeals to reverse, to any degree, the denial of a preliminary injunction by the District Court it would properly have to have found not only that Judge Gurfein was guilty of a "clear abuse of discretion" but also that his findings of fact were "clearly erroneous." This Court of Appeals could not do the record below. The fact that Judge Gesell and the United States Court of Appeals for the District of Columbia Circuit in The Washington Post case reached the same result as Judge Gurfein gives additional force to Judge Gurfein's decision.

**'Inherent Power' Doctrine**

Essential to the Government's contention in this case was the assertion that United States had "inherent power" to enjoin The Times from publishing the documents in question. That this contention should have been made is not surprising, since the Government totally failed to prove that any statute was in fact violated by the publication. The only statute upon which the Government relied, 18 U.S.C. 793 (E), is inapplicable since, inter alia, it relates to espionage and not publication by newspapers, and since Congress, in other sections of

the Espionage Act, did prohibit publication of materials it saw fit. Legislative history of Section 793 (E), as Judge Gurfein found, plainly demonstrates its inapplicability to the current situation, as do considerable portions of its text.

Judge Gurfein's holding should have been sustained by the Court of Appeals not only because the only statutory authority asserted by the United States does not support the claims the Government makes under it in this case, but because even if it did, it would be unconstitutional as applied. Both as a statute imposing restraint on speech and as a criminal statute (although here invoked to support an extraordinary civil action) it must be read closely so as to avoid the vice of vagueness.

Consistent and unbroken administrative practice by the United States under Section 793 — applying the section only to ordinary espionage situations—coupled with the fact that numerous publications similar and even equivalent to those made and still contemplated by The Times have been common in newspapers. magazines and books in the United States for many years, is conclusive against the attempted application of Section 793 in this case.

All this being true, the Government is forced back to its raw position that the executive has "inherent" power to enjoin acts injurious to national security and that, apparently, the courts have a similar inherent power to issue injunctions restraining such activities. The cases are legion demonstrating that there is no inherent executive authority such as that asserted by the Government in this litigation.

Finally, the test established by the Court of Appeals is not only circular but enacts a prohibition not found in any statute of Congress and which, if so found, would be patently unconstitutional.

Given the profound importance of a free press to a free society recognized in Associated Press v. United States (1945) and Near v. Minnesota (1931), an early determination of the propriety of enjoining publication by a newspaper of articles of great public interest is of vital importance.

The Times has been restrained from publishing accounts of the Defense Department studies since June 15. During this interval, first The Washington Post and more recently The Boston Globe have published articles based upon these studies. In addition, other newspapers and the national news wire services have reported accounts of these articles and even published them.

Thus, not only has the public's right to know been infringed for over a week, but The Times, which courageously initiated the publication of the documents, is being pre-empted by other newspapers. Such irreparable injuries should not be permitted to continue absent a review by this Court.