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If a nation expects to be ignorant and free . . . it expects what never was and never will be.

—Thomas Jefferson, 1816

WASHINGTON — The clash between the Nixon Administration and The New York Times over publication of the Pentagon papers on Vietnam is a classic encounter with roots that go back to the 18th century.

But it also raises new questions that the Supreme Court eventually may be asked to decide on the meaning of the First Amendment to the Constitution: "Congress shall make no law . . . abridging freedom of speech or of the press . . ."

Is the Justice Department correct in asserting that re-printing documents labeled "top secret" is a violation of some espionage law and may be halted by a federal judge?

Or is The Times more in accord with American traditions when it claims that the government action is "censorship" of material that should be disclosed in the best interests of the Nation?

The government won the first round of the legal battle when U. S. District Judge Murray Gurfein ordered the newspaper to stop publishing material from a 1968 study of how the United States got deeply into war in Vietnam.

The Arguments

The first three episodes printed by The Times indicated that the Johnson Administration was secretly planning the use of American Air Power and ground forces in Vietnam in 1964 while the President was saying that we had no intention of sending U. S. troops into combat or bombing North Vietnam.

Even after Johnson decided to use Americans in combat, the documents indicated, his orders were kept secret for two months at his request.

The Nixon Administration, taken by surprise, said the documents, spread over several pages of The Times each day, came from a 47-volume Pentagon study dealing with Vietnam policy making since World War II.

The newspaper obtained the documents "without lawful authority," the Justice Department argued, and should be prohibited from

publishing any further articles in the series. The Times said only that Neil Sheehan, one of its Washington reporters, obtained the material from non-Pentagon sources three months ago.

Alexander M. Bickel, a Yale law professor defending The Times, said Gurfein's restraining order against The Times represented the first time in history that a judge directed a newspaper not to print something.

The precedents against judicial restraints before publication stretch far back into English common law. The U. S. Supreme Court has rejected "prior restraint" even for newspapers that are regarded as obscene by police. In its most recent decision on press freedom, the high tribunal expanded the immunity of newspapers from libel suits in any reporting on events of public interest.

The First Amendment priv-

ileges of newspapers, radio and television are based on the theory that the public has a "right to know" about its government, public men and issues of the day.

One of the founding fathers who helped shape the Constitution, Thomas Jefferson, put it this way in 1787:

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

Even earlier, the right of colonial editors to criticize the British governors was upheld in the famous libel trial of John Peter Zenger, publisher of The New York Weekly Journal, in 1735.

When Zenger argued the truth of his article in de-

THE TIMES CASE

A Classic Clash On America's Right to Know

fense, his accusers said that was a "very high aggravation of a libel, that it tends to scandalize the government, by reflecting on those who are entrusted with the administration of public affairs."

Basic Right

The colonists demanded press freedom as a basic right under their new Constitution, recalling how Englishmen had been fined, sent to prison and maimed for making speeches or writing articles offensive to the Crown.

Even so, threats to that freedom soon developed. The Alien and Sedition Laws of 1798 provided severe penalties for Americans who criticized the government. Only a few persons were prosecuted, however, and the laws were soon repealed. When Jefferson became President, he pardoned those who had been jailed and Congress paid

back the fines that were imposed under the sedition statute.

During World War I, however, the Supreme Court upheld the conviction of an anti-draft pamphleteer under the Espionage Act of 1917. Justice Oliver Wendell Holmes Jr., in a famous opinion, held:

"The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent . . ."

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . . no court could regard them as protected by any constitutional right."

Although the clear - and -

present - danger phrase still is quoted, Holmes' opinion has lost its force as the law of the land. The antiwar demonstrations and picketing of draft induction centers during the Vietnam war clearly would be barred if his 1919 decision had prevailed.

Another Element

The Justice Department action against The Times, however, contains another element: Documents classified as top secret by the Pentagon appearing in the newspaper's columns.



TIMES EDITORS DISCUSS BAN ON VIET REPORT
From left: Jim Greenwield, Max Frankel, and Robert Crandall

—AP Photo

Many Washington newsmen have received "top secret" information in the past from military officials who were anxious to plant a favorable story or undercut a rival service. But the volume of The Times' disclosures may set a new record, one Justice Department official said, since it covered several pages of three editions.

Coincidentally, it was The

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New York Times which toned down a story about the ill-fated Bay of Pigs invasion of Cuba in 1961. President John F. Kennedy, who was deeply embarrassed by the failure of the American - supported Cuban exile force, later told one of the newspaper's executives: "If you had printed more about the operation you would have saved us from a colossal mistake."

viet missile in testimony designed to win congressional approval of the antiballistic missile (ABM).

Most Washington newsmen believe the Pentagon fed classified data to Sen. Henry Jackson (D-Wash.) concerning new "missile holes" being dug in the Soviet Union that was used to bolster Pentagon claims of growing Russian military might.

Members of Congress also have bristled at the secrecy shown by the Pentagon. The late Rep. Glenard Lipscomb (R-Calif.) once complained: "It is difficult to discern, sometimes, whether the Department of Defense is primarily interested in keeping information from the enemy or in keeping it from the American people."

Testimony on military programs, usually delivered in closed session, is censored before it is made public. Even the questions are deleted in many cases.

When the Pentagon put a "secret" label on a document describing prospective military aid to an African nation and he later learned the description was "general defense equipment," former Sen. Albert Gore (D-Tenn.) gibed: "Oh, what a secret."

Nixon, when he was vice president in 1954, made a background speech to a newspaper editors' convention urging the sending of American troops to avert a French defeat in Indochina. When stories identified Nixon as the speaker, President Eisenhower rejected the proposal.

Clifton Daniel, a New York Times executive who told the story, commented: "It is not so easy, even for presidents, to know always what is really in the national interest. One is tempted to say that sometimes — sometimes — even a mere newspaperman knows better."

James Reston, a New York Times vice president and columnist, has a different view about national security matters and the press. Reston said he knew about the American U-2 flights over the Soviet Union for a year before a U-2 was shot down in 1960 but never wrote a word about it. Reston also agreed to withhold information that the Soviets had placed missiles in Cuba in 1962 to give Kennedy another 24 hours to prepare for the eyeball-to-eyeball confrontation that ended with withdrawal of the missiles.

Other 'Leaks'

There are self-serving "security leaks" from the Pentagon and other Washington agencies. Defense Secretary Melvin Laird, for example, personally declassified new intelligence on the SS-9 So-