

NOV 1973 and 1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NEW YORK TIMES COMPANY,
PETITIONER.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,
PETITIONER

v.
THE WASHINGTON POST COMPANY, et al.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT AND THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
(SECRET PORTION)

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No. 1873

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v.

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There have been great difficulties in the process of this case. The United States does not know what materials are in the possession of the New York Times or the Washington Post, and neither District Court below was willing to receive disclosure of these papers, even in camera, without representation.

representatives of the United States present. It would appear in evidence that the papers already published by the two newspapers bear some relation to a compilation of 47 volumes entitled "United States-Vietnam Relations--1945-1967," prepared by a Vietnam task force in the Office of the Secretary of Defense. The covers and every page in this compilation are marked "Top Secret--Sensitive."

It was obviously impossible for the United States to prove directly that the publication of the papers held by the two newspapers would involve immediate and irreparable injury to the security of the United States. The only method by which the United States could proceed was to seek to show that there were items in the 47-volume study which would have this consequence.

When it appeared to be impracticable for the Washington Post to produce in camera the papers it had, the District Court said:

"THE COURT: I think if you feel that way, because of your problems, I can proceed on the assumption that you have all the documents the government is referring to. We will proceed on that basis. If you want to show that there are some documents you don't have, you can prove it. I will proceed on the assumption you do."

Accordingly, the government introduced evidence through witnesses, and through affidavits, which made specific reference to items in the 47-volume compilation. The 47 volumes were available in the courtroom in the District of Columbia, the relevant portions being regarded as incorporated by reference in the testimony and the affidavits considered by the District Court. The 47 volumes are a part of the record in the New York Times case in the Southern District of

New York, and have been transmitted to this Court as a part of the record here.

It is to these 47 volumes that references have been made in the "Special Appendix" mentioned in the decision of the United States Court of Appeals for the Second Circuit, and in the orders entered by this Court in these cases on June 25, 1971. This is likewise true of the items included in the "supplemental list" which was filed (in accordance with the decision of the Court of Appeals for the Second Circuit, and with the orders of this Court) by 5:00 p.m. on June 25, 1971.

The purpose of this portion of the Brief for the United States is to refer to a selected few of these items and to endeavor to show that the publication of these items could have the effect of causing immediate and irreparable harm to the security of the United States. A number of these items were considered hastily by Judge Gesell during the hearing before him on Monday, June 21, 1971. No trace of criticism is intended by the observation that Judge Gesell's consideration was hasty. This was inevitable under the circumstances. Nevertheless the consideration was necessarily hasty, and the presentation with respect to it was inevitably extremely difficult since no one knows yet what documents either of the newspapers actually have. It is true that they have provided "Inventories." However, these are not very helpful, and they do not, in general, identify particular documents. There are various versions of some of these documents, and the inventories do not show which version the papers have. It is also clear that they have some items

which are included in the 47 volumes.

We now turn to a few selected items from the 47 volumes which, we submit, involve a serious risk of immediate and irreparable harm to the United States and its security.

1. There are four volumes in the 47-volume compilation which are designated in their entirety. They are: Volume VI-C-1, VI-C-2, VI-C-3, and VI-C-4. These contain a comprehensive detailed history of the so-called negotiating track. Negotiations were carried on through third parties, both governments and individuals. These included the Canadian, Polish, Italian, Rumanian, and Norwegian governments. They also included individuals, some holding public office, and some private citizens, sometimes with the knowledge of their governments, and sometimes without their government's being informed.

These negotiations, or negotiations of this sort, are being continued. It is obvious that the hope of the termination of the war turns to a large extent on the success of negotiations of this sort. One never knows where the break may come and it is of crucial importance to keep open every possible line of communication. Reference may be made to recent developments with respect to China as an instance of a line of communication among many which turned out to be fruitful.

The materials in these four volumes include derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to

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nations or governments. The publication of this material is likely to close up channels of communication which might otherwise have some opportunity of facilitating the closing of the Vietnam war.

2. Closely related to this is the fact that there is much material in these volumes which might give offense to South Korea, to Thailand, and to South Vietnam, just as serious offense has already been given to Australia and Canada. South Korea, South Vietnam, and Australia have troops in Vietnam, and Thailand allows the use of airfields from which 65% of our sorties are launched.

For the past many months, we have been steadily withdrawing troops from Vietnam. The rate at which we can continue this withdrawal depends upon the extent to which we can continue to rely on the support of other nations, notably South Vietnam, Korea, Thailand, and Australia. If the publication of this material gives offense to these countries, and some of them are notably sensitive, the rate at which our own troops can be withdrawn will be diminished. This would be an immediate military impact, having direct bearing on the security of the United States and its citizens.

There are further references to these items in the "Special Appendix" filed in the United States Court of Appeals for the Second Circuit in the New York Times case, and in this Court.

3. There are specific references to the names and activities of CIA agents still active in Southeast Asia. There are references to the activities of the National Security Agency.

~~The items designated are specific references to~~
persons or activities which are currently continuing. No
designation has been made of any general references to CIA
~~activities.~~

This may not be exactly equivalent to the disclosure of troop movements, but it is very close to it.

4. Volume V-B-4(a), pages 249-257, 259-311, contains specific reference to SEATO Contingency Plan 5 dealing with communist armed aggression in Laos. This discloses what the military plans are. The SEATO plans are continuing plans. This involves not only the disclosure of military plans, but a breach of faith with other friendly nations.

Similarly, Volume IV-A-1, pages A26 to A-31, discloses SEATO Operations Plans 4 and 6 dealing with military positions with respect to Laos, Cambodia, Thailand and Pakistan. These are continuing military plans made by us jointly in association with the other nations which are parties to SEATO. Such publication not only discloses the plans to possible enemies, but also involves risk of loss of support of friendly nations.

5. Volume IV-C-6(b), page 129, sets forth the United States intelligence community's estimate of the Soviet reaction to the Vietnam War. This was made in 1967, but is in large part still applicable. The disclosure of this information will give Soviet intelligence insights into the capacity of our intelligence operations, and may strengthen them both by giving them better understanding of us, and by leading them to correct matters on their side.

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6. Closely related is Volume IV-C-6(b), page 157. This is a United States intelligence board estimate of Soviet capacity to provide various types of weapons to North Vietnam. There is much about it that is current, and its disclosure to the Soviet Union would give them information which could lead to serious consequences for the United States.

7. [Volume IV-C-6(b), page 168, is an internal memorandum of the Joints Chief of Staff on May 27, 1967, containing a recommendation that a nuclear response might be required in the event of a Chinese attack on Thailand. Although such a recommendation was never formally made, the disclosure that this was considered as a possibility, though in an internal memorandum, could have very serious consequences to the security of the United States.]

8. Volume IV-C-7(b), pages 161-163, contains the full text of a telegram from Llewellyn Thompson when he was Ambassador to Moscow in 1968. This gives the assessment of one of our most experienced diplomats of Soviet reaction to United States course of action in Vietnam.

The publication of this telegram would provide valuable intelligence information for the Russians. It is important to them to know what we think about them. Moreover, we cannot have an effective ambassador abroad if he is not able to report candidly and in confidence to the Secretary of State and the President.

The publication of this telegram would impair Mr. Llewellyn's continuing effectiveness. He is now an important and valuable member of our SALT talks delegation dealing with strategic arms limitation, which surely directly

¹¹
affects the security of the United States.

9. Volume IV-C-9(b), page 52, contains reference to extremely confidential discussions which took place between the military staffs of South Vietnam and Laos, given to us in confidence, relating to possible South Vietnamese military action in Laos with the consent of Laos military authorities. The publication of this not only involves a breach of confidence, but also involves grave risk of reactions from the other nations involved.

10. Finally, we come to the important matter of communications intelligence covered by the affidavit of Vice Admiral Gayler, who is Director of the National Security Agency.

This is not a matter of United States codes and cyphers. These are now regarded as not destructible, or sufficiently nondestructible to be practically effective.

The question which is involved is the codes and cyphers of other countries, particularly the codes and cyphers of unfriendly nations.

There are various items in these volumes, among those which have been specified, which will have the following consequences:

(a) They will make the enemy aware of significant intelligence successes.

(b) With this information, the intelligence analyst of an enemy country can estimate our capacity. He can also control methods of dissemination of messages by his own country, in such a way as to minimize our chance of successful interception.

~~[(c) Cutting down successful interception~~

by our communication intelligence will directly affect our current military operations. Signal intelligence now gives direct support to our troops today, and saves many lives. It also helps, directly in the recovery of downed pilots.

An understanding of United States cryptologic capabilities has direct value to present and potential enemies of the United States. It is immediately connected with current combat operations.

11. Finally, reference should be made to prisoners of war. We are currently engaged in discussions on the prisoner of war issue, in some cases with governments which are not wholly friendly, [~~such as Sweden and Russia.~~] It is obvious that these conversations are conducted on the understanding that they will be confidential, and they are not very likely to be fruitful if that confidence is broken. This is covered by the oral testimony of Mr. Doolin in both cases.

There is one of these in particular which it is very likely that we will not be able to proceed further with as a result of the publication of the papers which has already been made by the New York Times and the Washington Post. The longer prisoners are held, the more will die.

There is, finally, the whole question of the institution of the Presidency--the power constitutionally inhering in the President as Chief Executive and as Commander-in-Chief of the Army and Navy to conduct the foreign affairs of the United States in a way which will not be unduly hindered, to protect the lives and safety of men in Vietnam, and to be able to assure his top military aides, the Joint Chiefs of Staff, that the lives and safety of men in Vietnam, for whom they, and the President, and the Nation are responsible, will not be endangered or subjected to unnecessary risk. The Federal Judiciary has been referred to as "the least dangerous branch." The Presidency can go to great lengths to provide for such protection by establishing security classification schemes, and by using great care in the selection of its personnel. But, in a nation as large and complicated

as this one is, there will inevitably be weak spots in any system. When such weak spots occur, the Presidency is powerless to provide the required protection except with the aid of the courts. In a proper allocation of powers, under the separation of powers, each branch should support the other, in appropriate circumstances. Just as the executive has used its power, through United States marshals, and through military force, to enforce the judgments of the courts, the courts should support the Presidency in a narrow and limited area where such protection is needed in the effective meeting of the President's responsibility, and in the safeguarding of American lives. This is not a question of exception to the First Amendment, but of rational interpretation of that provision wholly consistent with its history and purpose.

Since the publication of materials by the Times and Post, a considerable number of communications have been received from foreign governments. Reference will be made to two of these.

On June 25, 1971, there was received from the American Ambassador to a friendly country a telegram stating that the principal minister of that country

informed me last night (June 24) that [the head of state] had instructed him to express privately and confidentially grave concern over the unauthorized publication of the classified Pentagon documents relating to Viet-Nam. [The minister] indicated that it was not the substance of these documents which upset the [head of state], but rather the principle involved, namely that highly classified confidential documents which might contain information or secret exchanges between the United States government and other governments, might irresponsibly find their way into the press. [The minister] pointed out that in his

relations with us the [head of state] is completely frank in his discussion of highly sensitive confidential matters. However, he has felt able to be frank with us because he felt that we would tightly guard the substance of confidential discussions and exchanges with him. If we are not able to do this, said [the Minister], it would have a very inhibiting effect on [this nation's] ability to exchange views with us on confidential matters with full frankness.

A formal message has also been addressed to the Secretary of State by the British Ambassador, the Rt. Hon. the Earl of Cromer, in which the Ambassador says:

I write to express the concern of Her Majesty's Government about the unauthorized publication of confidential exchanges between our two governments. I am instructed to inform you that Her Majesty's Government is concerned about maintaining the general principle rather than about any specific individual items . . . Her Majesty's Government only wishes to preserve the principle that exchanges between governments should be kept confidential in the interest of good relations.

This is a great and free country. It must remain a great and free country. It has a remarkable Constitution, of which the First Amendment is surely an important part. But it is, as Chief Justice Marshall so wisely observed in the formative days of our republic, a Constitution which the court is expounding. It is a Constitution which has worked, and which must continue to work. Long experience has shown that sound constitutional construction is not to be found in absolutist or doctrinaire constructions of any of the provisions of the Constitution. It is not suggested that the First Amendment must yield to any other provision of the Constitution. It is suggested that the First

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Amendment must be construed in the light of the fact that it is a part of a constitution, particularly, where foreign affairs are so directly involved, and where, in a very real sense, the workability and the integrity of the institution of the Presidency may be seriously impaired. The Constitution should be construed in such a way as genuinely to preserve a free press, while likewise leaving to the Presidency the protection which it requires for the free flow of information from foreign nations and for the free development of thought and ideas between the President and his immediate advisers.

Respectfully submitted.

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Solicitor General

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