

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No.

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UNITED STATES OF AMERICA,

Plaintiff-Appellant,

- v -

NEW YORK TIMES COMPANY, ARTHUR  
OCHS SULZBERGER, HARDING F.  
BANCROFT, IVAN VETT, FRANCIS A. COX,  
JAMES C. GOODALE, SYDNEY GRUSON,  
WALTER MATTSON, JOHN McCABE, JOHN  
MORTIMER, JAMES RESTON, JOHN B. OAKES,  
A. M. ROSENTRAL, DANIEL SCHWARZ,  
CLIFTON DANIEL, TOM WICKER, E. W.  
KENWORTHY, FOX BUTTERFIELD, GERALD  
GOLD, ALLAN M. SIEGAL, SAMUEL ABT,  
NEIL SHEEHAN and HEDRICK SMITH,

Defendants-Appellees.

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SPECIAL APPENDIX RELATING TO IN CAMERA PROCEEDINGS  
AND SEALED EXHIBITS  
SUBMITTED BY APPELLANT UNITED STATES

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Sealed by Order  
of the Court  
June 21, 1971

### Preliminary Statement

This Special Appendix contains a brief summary of the testimony in the in camera proceeding in the court below, together with the Government's analysis of the significant portions of the Top Secret study on Vietnam, the publication of which would seriously damage the national security of the United States.

#### SUMMARY OF TESTIMONY

During the in camera proceedings below, the District Court heard testimony from two Defense Department and one State Department official concerning the areas of national security that would be jeopardized by publication of the Top Secret study on Vietnam (Exhibits 7 and 7-1). The following is a summary of the highlights of that testimony.

Testimony of Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs.

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Mr. Doolin testified that the disclosure of intergovernmental communications, contained in the

47 volume study, would affect prisoners of war negotiations being conducted by the United States (p. 5). He also referred to material bearing on signal intelligence and electronic intelligence in the study (p. 6).

Disclosure of documents in the study, according to Mr. Doolin's testimony, could have an adverse impact on various military forces in Vietnam (p. 8), and on SEATO operational plans (p. 10). Although some of the documents did not seem to be prejudicial to the national defense, when individually examined, Mr. Doolin indicated that in combination the documents might be extremely prejudicial (p. 13).

Mr. Doolin testified that articles from the study published by the Times prior to the restraining order had produced expressions of grave concern by the Prime Minister of Australia (p. 25), and that Sweden may no longer be willing to act as an intermediary in the conduct of United States diplomacy (p. 28).

Testimony of Vice Admiral Francis J. Blouin,  
Deputy Chief of Naval Operations for Plans  
and Policy.

Admiral Blouin testified that the 47 volume study is full of highly sensitive material and war plans (p. 50). It describes air strikes against various targets and numbers of aircraft striking various targets (p. 50).

contains information on potential targets for bombing and contingency plans (p. 50). It also discloses our command apparatus (p. 51), and our timing system (p. 51).

Rules of engagement, which do not change drastically, are found in the study (p. 52), as are details regarding use of aircraft against particular targets (p. 57), and the capability of the United States to deploy its ground troops (p. 58). The study contains details of our decision-making processes and our reaction times in making decisions (pp. 61-62). In addition, it describes the involvement of Thai forces in Laos, although the Thai government has publicly denied the presence of its forces in Laos (p. 68).

Testimony of William Macomber, Deputy Under Secretary  
State for Administration.

Mr. Macomber testified that one of the source documents for the study is a telegram from Mr. Seaborn, the Canadian representative to the International Control Commission. The telegram describes statements made by him to North Vietnamese officials on behalf of the United States. Mr. Macomber stated that publication of the telegram makes it "almost impossible for the United States to approach third countries and ask them to do delicate things. . . ." (pp. 75-77).

Mr. Macomber testified that the documents also disclose that Australia sent troops to South Vietnam at the instance of the United States, whereas the public position of the Australian government is that troops had been sent pursuant to a SEATO commitment. This disclosure, Macomber testified, might undermine our relations with Australia (p. 77).

Mr. Macomber referred to a message from

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He also described an "eyes only" telegram sent by  
M. Kellyn Thompson, the then United States Ambassador  
to the Soviet Union, in which Ambassador Thompson  
sets forth his estimate of Soviet reaction to military  
escalation by the United States (p. 79).

Finally, Mr. Macomber described the possible  
effects of publication of the study on current prisoner-  
of-war negotiations (pp. 81-82), and on "domestic  
advisers to the policy makers in diplomatic matters"  
(p. 84).

POTENTIAL IMPACT OF PUBLICATION OF EXHIBITS  
7 AND 7A ON THE NATIONAL SECURITY  
OF THE UNITED STATES

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A. CURRENT MILITARY OPERATIONS

For the past eighteen months the United States has been withdrawing United States forces from the Republic of Vietnam at the fastest rate possible consistent with capabilities of the South Vietnamese armed forces in taking over the combat role and consistent with the retention of adequate military security for the United States forces remaining. This withdrawal rate has been and is now planned to continue to be based on certain overall assumptions which are critical, inasmuch as this rate of withdrawal is as fast as possible within the lowest level of prudent risk. One major assumption that is implicit in the current withdrawal rate is that the planned support which we expect from our allies and from the Republic of Vietnam will continue without major change. The delicate military balance which we have been maintaining has a high risk of being upset. Disclosure of the material in this study would impede our current rate of withdrawal and diminish the planned efforts of the Army of the Republic of Vietnam and other free world forces. Additionally, were the Vietnamization program to be weakened, the safety and security of our forces could be seriously jeopardized unless our withdrawal rates were slowed to compensate for this weakening.

Publication of "Top Secret" documents concerning Southeast Asia will jeopardize the military support we are receiving from foreign forces because of their political and other consequences. Should the level of allied security in Southeast Asia fall below prudent risk, an adverse snowballing affect could not be ruled

etc. This is particularly so were the North Vietnamese and Viet Cong forces to mount an initiative and accomplish a major localized or tactical victory over the South Vietnamese forces.

The overall publication of the documents must also be considered in terms of the potential Government of Thailand reaction to a public disclosure of documents which impact upon Thai political attitudes, both within country and without. Thailand bases for stationing United States tactical airplanes and B-52's are essential to the safety and well-being of the United States forces now deployed in Southeast Asia. Obviously a basic tenet of our planning for the Vietnamization program and troop withdrawal has always been and continues to be that there will be adequate air support for the allied forces during the withdrawal period. The air bases in the Republic of Thailand are of utmost importance to maintaining the level of risk to our troops in Southeast Asia at a prudent level and any loss of freedom of operation from our air bases in Thailand below those which are now currently planned would not give sufficient support to our Southeast Asia campaign for completing Vietnamization and the remaining United States forces. The current interdiction program against the enemy supply routes into South Vietnam as well as the air support available to United States and allied forces engaged in combat would be unacceptably crippled in the event the status of these air bases are changed.



Without continued support from the Republic of Thailand, air support missions would be substantially reduced, permitting the North Vietnamese to build major supply bases in preparation for mounting sizeable force attacks against the United States, South Vietnamese, and other free world forces remaining in South Vietnam.

Information contained in the documents could also have an impact upon the attitudes, expectations, and interests in South Korea, and there is a possibility that the release of this information might cause the Government of Korea to withdraw Korean troops faster than is currently envisioned. Such a change in withdrawal rate would be extremely serious and would require the United States to make a re-assessment of her planned withdrawal rates. At the present time, the Republic of Korea is maintaining some 49,000 troops in the Republic of Vietnam, and these troops are providing the security to important population areas.

Publication of documents will also have an impact upon the attitudes, expectations, interests, and allied solidarity of those countries of Southeast Asia, including Korea, Thailand, Japan, and the Philippines, upon whose bases and troops participation in our current operation planning relies. The military risks and dangers of adverse reactions of those countries are of major military proportions to the stability of the situation in South Vietnam.

Publication of the documents clearly would have some effect upon the internal political processes of the South Vietnamese Government. By stimulating instability in the South Vietnamese armed forces or their current operational planning, the relative threat to South Vietnam

itself would be increased. One of the military steps which the South Vietnamese high command presumably would take would be to terminate their cross-border operations and return their participating forces to bolster the security of the homeland. Particularly in the case of Cambodia, withdrawal of these forces would allow the North Vietnamese and the Viet Cong forces to reestablish the series of base areas along the Cambodian-South Vietnamese border from which they could mount increased military activity throughout South Vietnam. The implication to Vietnamization, the security of the United States forces in Southeast Asia, and our redeployment efforts in such a circumstance is obvious.

I. Portions of Exhibits 7 and 7A the disclosure of which would present increased risks to the safety of U.S. forces

VOL IV. C. 7(a), VOL I, para 1 B, pages 9-10;  
VOL I, para II C. 2, page 100 - Specific details on JCS recommendations for an intensified bombing program against NVN. These specifics reveal sensitive details about current contingency plans, such as winning the major ports, cutting bridges on the LOCs from China to Hanoi, and the number of sorties required.

VOL IV. C. 6, page 52 - Provides CINCPAC and NIE 14.3-66 assessment of enemy force structure in SVN in 1966, and would allow enemy to assess accuracy of US estimates at that time and draw conclusions on the extent to which he was capable of avoiding detection in combat situations.

VOL IV. B. 3, Chronology, pages 1-23;  
VOL IV. C. 5, Chronology, pages 11-33;  
VOL IV. C. 6, Chronology, pages i-xviii - Detailed chronology of step-by-step development of the advisory buildup in SVN, 1961-67; buildup of US forces, Mar-Jul 1965; and US ground strategy and force developments, 1965-67, providing insight into US decision making process and reaction times.

VOL. IV. C. 4, pages vii, xii, 14, 17 and 20;  
VOL. IV. C. 5, page 9 - Exposes two major military operational plans which had been used in 1964 and in 1965 for planning of emergency deployments of United States ground combat forces into Southeast Asia. These planned deployments were to be used by the Commander in Chief, Pacific, to meet any military offensive moves against the United States by the armed forces of the

People's Republic of China. Although these particular operational plans are no longer in use, the discussions relating to these plans do reveal possible total force commitments and planned areas of operation which appear valid for future operations. Such information, if disclosed to an enemy planner, presumably would, if combined with other intelligence generally held by the intelligence communities of foreign countries, seriously compromise current war planning for Southeast Asia.

VOL IV, C. 10 - Provides statistical information of operational and intelligence nature which would give the enemy a basis for measuring the allied effort and his (enemy) success in combatting that effort.

VOL V, B. 4, pages 313-320 - Contains a special national intelligence estimate and refer to other pertinent estimates reflecting intelligence community data on the situation.

VOL V, B. 4, pages 295-311 - Reveal aspects of SEATO contingency war plans and relationships which are still in effect to a considerable extent and could destroy usefulness of SEATO as an organization, and future alliances between the countries concerned. It could reveal to the communists the limited costs of an all out effort to take all of Southeast Asia.

VOL IV, C. 5, pages 11-32; VOL IV, C. 6 (a), pages i-xvii - Chronologies provide insight into deployment times for major US units, which would be invaluable for a potential enemy in estimating US capability to react to contingencies or in reinforcing committed forces.

VOL VI, C. 4, pages 21, 22, Summary -  
Direct quote of Saigon Embassy message 10856  
from Lodge to Secretary of State, TS, dated  
14 Nov 66 and Saigon Embassy message 12247  
to Secretary of State, TS/NODIS, 30 Nov 66.  
Presumably would assist enemy in analyzing  
and possibly breaking codes employed at that  
time and thereby all traffic of that period.

VOL VI. C. 4, pages 1, 2, Ohio - Quotes  
SECRET-EXDIS message, 10 June 1967 OLSO-4531  
to Secretary of State and State SECRET-EXDIS  
message 213389 to OSLO. Presumably would  
assist in breaking codes in use during  
period. Many similar examples are interspread  
throughout this volume.

II. Portions of Exhibits 7 and 7A the disclosure of  
which would slow the U.S. program of shifting  
military responsibility in Vietnam to South  
Vietnamese forces

VOL IV, C. 8, pages i-viii, 1, 2, 3, 5, 7, 10,  
14 and following pages. VOL IV, C. 9(a)  
pages iii, iv, vi-ix, 1, 17, 20, 21, 32,  
55-58 and following pages. VOL IV, C. 9(b),  
pages ii-iv, vi-vii, 7, 15, 17, 23, 25, 33  
and following pages - Comments on the  
Pacification Program in the basic volume on  
Pacification and in volumes on "The Evolution  
of the War" endanger the essential Government  
of Vietnam interest in and support of the  
pacification program by:

(1) Citing overparticipation by the US  
in a program which should have been  
essentially Vietnamese in character.

(2) Documenting friction and competition  
between US agencies in Vietnam and Washington  
to the detriment of the program.

(3) Documenting efforts by the US to use foreign aid or US withdrawal as "leverage" to exert pressure on the GVN despite its status as a sovereign state.

(4) Criticising the Vietnamese Government for lack of interest and emphasis on Pacification.

(5) Describing prominent Vietnamese, many of whom are still active in the government, of corruption, inability, inertia, or lack of interest in the essential program.

Disclosure of these statements in an official Top Secret report presumably would subject the GVN and key officials to vituperation; cause the Pacification Program to be considered as US rather than Vietnamese; result in diversion of GVN emphasis to less critical programs; jeopardize US advisor relations with their Vietnamese counterparts; and endanger other critical programs in Vietnam.

VOL IV. C. 9 (a) and (b), US/GVN Relations 1963-1967, parts I and II. VOL IV B. 3, page 59 - Recounts in detail US disappointment with GVN efforts in government administration and conduct of the war, and US failure to generate effective leverage on the GVN in behalf of changes felt by the US to be essential. Public revelation of the extent to which the US has criticized Vietnamese efforts and attempted to control GVN decisions would make all facets of relations with the South Vietnamese more complicated at a time when the United States is entering a very delicate phase of the withdrawal process wherein we seek to win GVN support for new programs of the utmost significance to their own survival and to the security and effectiveness of US forces which remain in South Vietnam.

Particularly sensitive negotiations involve US efforts to solicit effective actions from the GVN in controlling the drug traffic to US forces. Many key GVN officials who are discussed and criticized in the studies still occupy key positions in the GVN.

VOL IV. C. 5 (c), US Ground Strategy and Force Deployments 1965--1967, Vol III - This section covers in great detail the processes involved in US decision making. Of course, there are variations to these processes, but the basic blueprint is there. To know how your adversary thinks and how he develops his plans provides a substantial advantage to the enemy and most often will tip the scales of victory in his favor. This applies not only to the battlefield but to the political arena as well. With the information provided in the volume noted, the enemy is in a better position to pre-determine what your next course of action is most likely to be and therefore be prepared to counter your strategy. The knowledge by the enemy of this information could have a decided detrimental impact upon the present Vietnamization program and US redeployment objectives. At a time when the capabilities of the US forces are being seriously reduced by domestic pressures and fiscal constraints any further aid and comfort provided to our potential enemies can only be dangerous to the security of the United States.

VOL IV. C. 9 (b), Part II - Discloses GVN weaknesses and US attempts to influence GVN actions, involving many of the current leadership. Provides enemy with much data against GVN government and leadership and would promote communist propaganda against US role. Current GVN leadership is expected to continue. Damage by exposure of their position and efforts would be severe. A loss of leadership at this critical time could collapse the GVN and affect US programs for successful troop withdrawals.

## B. CURRENT DIPLOMATIC RELATIONS

The United States has received the cooperation of a number of third countries in carrying out delicate diplomatic missions on sensitive and vital issues. The United States has approached, and continues to approach, governments of other countries, some of them not friendly to the United States, for their assistance in possibly achieving a resolution of the situation of American prisoners of war in North Vietnam. Some countries have played a useful role in getting food and medicine and other relief packages through to our prisoners of war and in other ways assisting in easing conditions for the prisoners of war and their families in the United States. These efforts, which the United States Government has made a priority item, necessarily depend on the generous services of other countries as intermediaries. The United States' apparent lack of ability to preserve the confidential character of sensitive communications involved in the publication of Exhibits 7 and 7A would seriously undermine our efforts to make such arrangements.

I. Brief outline of third party diplomatic contacts with Hanoi described in Exhibits 7 and 7A:





II. Portions of Exhibits 7 and 7A the disclosure of which would compromise other foreign relations of the United States.

(A) In Section IV.C.7(b), Volume II, at pages 161-62 of the study is a Top Secret cable dated March 1, 1968 from Ambassador Thompson in Moscow to the Under Secretary of State marked "LITERALLY EYES ONLY" containing Ambassador Thompson's careful and detailed assessment of probable Soviet attitudes toward various possible United States military actions with respect to North Vietnam and possible Soviet countermoves.



(B) The classified documents concerning the period of the coup d'etat against President Ngo Dinh Diem in November 1963 and United States relations with the successor regimes reveal the degree of direct United States pressures and influence on the Government of Vietnam some years ago, especially in 1963 and 1964. Examples are communications regarding United States support for the CGM and an Embassy Saigon airgram of December 24, 1964, which related a brutally frank lecture to Vietnamese generals by the American Ambassador. These United States interventions diminish the stature of present Vietnamese political figures in and out of the Government, who are identified in the secret documents. Among them are President Thieu and Vice President Ky.

(C)