In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1873

The New York Times Co., et al., Petitioner

v.

United States of America, Respondent

United States of America, Petitioner,

v.

The Washington Post Company, et al, Respondent

BRIEF OF TWENTY-SEVEN MEMBERS OF CONGRESS as AMICI CURIAE

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This brief is filed on behalf of the following Members of Congress: Phillip Burton, John Dow, Bob Eckhardt, Don Edwards, Michael Harrington, Robert Kastenmeier, Edward Koch, Abner Mikva, Benjamin Rosenthal, William F. Ryan, James Abourezk, Bella S. Abzug, William R. Anderson, Herman Badillo, Jonathan B. Bingham, William Clay, Ronald V. Dellums, Sam Gibbons, Ella T. Grasso, Seymour Halpern, Peter Kyros, Parren Mitchell, Bertram L. Podell, Charles B. Rangel, Donald W. Riegle, Jr., James

H. Scheuer, and Lester L. Wolff.

Interest of Amici

The Members of Congress, on whose behalf this brief is filed, have a vital interest in the outcome of these cases, distinct from that of the plaintiff, the defendants, or the general public. As members of the national legislature they must have information of the kind involved in these suits in order to carry out their law-making and other functions in the legislative branch of the government. They seek to vindicate here a legislative right to know.

In addition as elected representatives of the people in their districts, Members of Congress have a particular and profound interest in having their constituents obtain all the information necessary to perform their functions as voters and citizens. More than any other officials of government, Members of Congress have relations with the public that gives them a crucial concern with the public's right to know.

We agree with the position of the defendants New York Times and Washington Post that the courts have no inherent authority, absent a statute, to prevent publication of the documents involved here, and that no such statutory authority exists. We confine our argument, however, to the broader constitutional issues and urge upon the Court

three fundamental propositions: (1) that information which comes to light other than by strictly lawful process is nevertheless entitled to the full protection of the First Amendment; (2) that the attempt by the Government to suppress publication of these documents violates both the legislative and the public right to know; and (3) that the doctrine of prior restraint forbids advance censorship of material published by the press.

I. INFORMATION WHICH COMES TO LIGHT OTHER THAN BY STRICTLY LEGAL PROCESS IS NEVERTHELESS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT

The general approach which ought to govern solution of the problem now before the Court has been well expressed by James Madison in his Report on the Virginia Resolutions:

> "In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands....Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits."*/

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*/ Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

The Government's approach has been quite different. The Government conceives of the problem as if the only issue were one of stolen goods. It bases its claim upon a proprietary interest in the information involved, urges that it is entitled to recover its stolen property, and contends that neither Members of Congress nor the general public can have any right to the purloined information.*/

The Government's position might be valid if all that was involved were a stolen automobile. It might even be sound as applied to the physical documents themselves, or to a copyrighted manuscript of a private author. But this approach has no valid application to information about public events. Such information, whether or not it comes to light within "the strict limits of the common law," is part of the common fund of knowledge available to the general public in its role as ultimate decision-maker. This information, therefore, comes within the ambit of the First Amendment and the issue moves to a higher, constitutional level.

It is well known to observers of public affairs that vast amounts of information become available to Congress and

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*/ After commencement of the proceedings the President, as a matter of grace, made the materials available to members of Congress. N.Y. Times, June 24, 1971.

the public in a manner which does not conform to the Executive's national security classification scheme. The affidavits of Max Frankel, Benjamin Bradlee, and other newsmen on file in the present proceedings make this entirely clear. Indeed, one of the principle functions of a free press in this country is to ferret out information which the Executive wishes to conceal. Executive officials themselves consistently disclose classified information, or engineer leaks, for the purpose of influencing public decision-making. Much other classified material emerges in memoirs, government documents taken when the official leaves office, and similar sources. The existence of such a communications system in fact marks the difference between a free press and a controlled press, between a democratic system of free expression and a totalitarian system of controlled expression.

The Executive regulations on classification can govern the internal operation of the Executive agencies. They cannot, under the First Amendment, control communication of information outside the government. To put it colloquially, a cat in the bag cannot be treated the same way as a cat outside the bag. Once the information gets outside the Executive --once the Executive loses its control for any reason--

the information becomes part of the public domain.*/

The results that flow from this state of affairs are twofold. First, once having lost control of the information the Government can, as a practical matter, rarely get the information back. The events of the past few weeks fully demonstrate the truth of this proposition. Second, Whatever the rights of the Executive may be with respect to the person who first obtained the information in breach of the classification rules, the Executive should not be allowed to try to regain control of the information through muzzling the press. Such an effort, involving suppression of information at whatever point it crops up in the communications system, under the guise of fact or opinion or even art or literature, could only be accomplished by the kind of controls that are characteristic of a police state.

II. THE ATTEMPT BY THE EXECUTIVE TO SUPPRESS PUBLICATION OF THESE DOCUMENTS VIOLATES BOTH THE LEGISLATIVE AND THE PUBLIC RIGHT TO KNOW

The defendants in these proceedings have, quite naturally, stressed the protection which the First Amendment extends to the speaker, the writer and the publisher of information. This case also presents, in a way no other case in our history has before, the other side of the First

*/ We are not discussing here the right of Congress, one of its members, or the general public to force the Executive to disclose information under powers inherent in the legislature, the First Amendment, or statutes such as the Freedom of Information Act

Amendment coin,--the right to listen, to hear, and to obtain information. Two aspects of this right to know are involved here. We discuss first the right of Members of Congress and second the right of the general public.

A. The Legislative Right to Know

The legislative right to know derives from the position and function of the legislative branch in the general structure of our government. It has been recognized many times in the decisions of this Court. See, e.g., Watkins v. United States, 354 U.S. 178 (1957). The legislative right to know also derives from the First Amendment. That constitutional mandate was designed to maintain an effective system of freedom of expression and members of the legislature are entitled, as are private citizens, to share its benefits and protections.

It would be hard to overestimate the importance to our form of government of the legislative right to know. That right is indispensable to the performance of every function of the legislative branch. Clearly legislative access to information ought to be at least on a par with that of the Executive. For the legislative function is not only to initiate the basic policies which the Executive branch must follow, but to review the administration of those policies by the Executive and revise them in the light of that knowledge.

The legislative right to know is of particular importance at this period of development in our national affairs. The constant growth of the executive power has been a major characteristic of our age. More and more the people of our country have been concerned that the expansion of executive power has upset the original balance contemplated by the framers of our Constitution, that monopoly of power in the Executive has resulted in the government losing touch with the needs and desires of its own citizens, and that enhanced power in our elected representatives is imperative to restore a healthy division of authority in government.

There are a number of reasons for this unparalleled and dangerous growth of Executive power in the United States. There can be no doubt, however, that one of the principal reasons is the far greater access of the Executive to information, and its unwillingness to share that knowledge with Congress and the public. In today's world, control of the information process is the key to power.

It is crucial to note, also, that the legislature cannot adequately perform its function upon the basis of "official" information submitted to it by the Executive branch. Every observer of government knows that "official" information, in most situations, tells only half the story.

Any bureaucracy, by the nature of the institution, tends to reveal only what it believes will support its own position and advance its own policies. A realistic fund of information must depend upon materials which lie far below the surface. The system of checks and balances cannot rest upon such bland sources of information as Executive hand-outs.

In this process of obtaining fuller, richer and more realistic information the press plays a vital role. It is not too much to say that this is perhaps the most important function of a free press. Obviously it is not a function that can be performed by a press under governmental constraint.

There is no need to stress here that the documents involved in these proceedings could not be more relevant to the issues now pending in Congress. Termination of the war in Vietnam, extension of Selective Service, appropriations for the conduct of the war, and numerous other questions are before the House and the Senate at this very moment. In addition, broader problems going to the respective powers of Congress and the President in connection with the making of war and the conduct of foreign relations are pressing for attention. It thwarts common sense that the information here in question should be withheld from Members of Congress.

In sum, to close off access to the kind of material the Government is now attempting to suppress would cripple the legislature in the performance of its constitutional functions. It would go far to relegate the legislative branch to second rate status in relation to the Executive, to jeopardize the balance of power between the branches of governments and to alter the whole constitutional structure.

B. The Public Right to Know

The public right to know has been repeatedly recognized by this Court as a vital aspect of our system of freedom of expression. As Mr. Justice Brennan said in his concurring opinion in Lamont v. Postmaster General:

> "It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful....I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (1965).

The public right to know was the basis of the decision upholding the fairness doctrine in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), and the

right to read what one pleases in Stanley v. Georgia, 394 U.S. 557 (1969). Lower Federal courts have likewise applied the principle to uphold the interests of the public as recipients of information in an untrammeled system of freedom of expression. See, e.g., Office of Communications of United Church of Christ v. F.C.C., 359 F. 2d 994 (D.C. Cir. 1966); Mandel v. Mitchell, 39 L.W. 2530 (1971).

Members of Congress, of course, have the same interests as other citizens in protection of the right to know. They also have a particular interest as members of the legislative branch. Effective performance of their duties as elected representatives depends upon a knowledgeable constituency. Members of Congress and the people they represent must operate on a shared basis of understanding, upon a common wavelength. It is vital to the functioning of a democratic system that the electors have enough information to grasp the issues upon which their representatives are voting. It is likewise essential to the Member of Congress that he relate to the ideas and responses of his constituents. This reciprocal relation depends upon the fullest access possible to a common store of information. The public right to know, therefore, takes on a special importance when it concerns matters pending before the legislature.

Once again, it is difficult to imagine any information more relevant to the public right to know than the documents which the Government is here trying to keep the public from seeing.

The precise degree of protection afforded by the doctrine of the right to know, as embodied in the First Amendment, has not yet been fully developed. It may be some years before the specific rules can be worked out. Yet the starting point is clear. It is that members of the public have, as a general proposition, the right to know all information upon which decisions that affect their lives and property are based. This is the fundamental premise of a democratic system. Exceptions to the general rule must be narrow and specific. They would be recognized only in such special areas as military weapons and operations, current negotiations with a foreign country, or damage to individual reputation by premature disclosure of investigative data.

Wherever the line of exceptions may be drawn it has not been reached in these cases. Judge Gurfein and Judge Gesell have both found, after a full hearing, that no substantial breach of national security is involved. The withholding of the information here in question has a maximum impact upon the constitutional right to know and the function it is designed to perform. There is no sound ground

for not giving full effect to the constitutional principle in these cases.

A genuine and whole hearted insistence upon maintaining the right to know is vital to the welfare of the nation and its ability to cope with the many problems that now confront it. Much of the frustration, mistrust and misunderstanding that prevails in many quarters of the land today is due to our failure to keep the decision-making process on a more open and observable basis. Vigorous enforcement of the constitutional right to know would go far to restore confidence in our institutions and evoke support from the people who are most affected by their operation.

III. THE DOCTRINE OF PRIOR RESTRAINT FORBIDS ADVANCE CENSORSHIP OF THE MATERIAL HERE INVOLVED

The doctrine of prior restraint, growing out of revulsion to the English censorship laws, holds that governmental restrictions cannot be imposed upon expression in advance of publication. Even though the expression may be subject to subsequent punishment or can otherwise be restricted at a later point, it cannot be proscribed prior to publication. The doctrine was made part of our constitutional law in Near v. Minnesota, 283 U.S. 697 (1931). It has since been repeatedly confirmed. See e.g., Lovell v. Griffin, 303 U.S. 444 (1938); Kunz v. N.Y., 340 U.S. 290 (1951); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968).

The theory of the prior restraint doctrine is that a system which requires a publisher to submit his material in advance to a government censor is so repressive by its very nature as to be inevitably destructive of free expression. The reasons for this have been stated as follows:

> "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows."*

So oppressive is a scheme of prior restraint that it is not an exaggeration to say that it smacks of totalitarian rather

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* T.I. Emerson, The System of Freedom of Expression (1970), p. 506.

of national security would occur. The Court would then issue a

than democratic methods of control.

All the parties to these cases, and all the courts that have passed on the various aspects of them, recognize the critical importance of the doctrine of prior restraint. The issue here has turned, not on the validity of the doctrine, but upon whether an exception should be made to it in the case of national security. In a dictum in Near v. Minnesota the Court stated that there might be exceptional cases where the doctrine would not be applied, mentioning "actual obstruction to /the/ recruiting service or the publication of the sailing dates of transports or the number and location of troops;" "obscene publications;" and "incitements to acts of violence and the overthrow by force of orderly government." 283 U.S. at 716 . An actual exception has been made in the case of motion picture censorship boards to the extent of upholding laws which require abvance screening of films against possible illegal obscenity. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961); Freedman v. Maryland, 380 U.S. 51 (1965). No other exceptions have been permitted. It has never been suggested by any court that the press could be subject to any form of advance censorship.

In the cases at bar, for the first time in the history of this country, various formulations have been proposed for an exception applying broadly to national security matters. The Government, if we understand its position correctly, urges that an exception be made for any substantial breach of national security, and that the publication of any classified document would per se constitute such a breach. Judge Gurfein would allow an exception

of national security would occur. The Court would then issue a

for "information or ducuments absolutely vital to current national security." The Court of Appeals for the Second Circuit approved censorship of items which "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

We submit that any of the above formulations would effectively nullify the prior restraint doctrine in the area of national security matters and would gravely jeopardize the whole system of freedom of expression. The Government's proposal would permit an injunction against the publication of any classified material unless the publisher could show that the classification was arbitrary and capricious. If this Court sanctions such a rule the press will be at the mercy of the Department of Justice. The Government will be in a position to leak any classified information that serves its own purposes and shut off countervailing information. The Executive would be arrogating to itself dictatorial power over the dissemination of large quantities of information bearing upon national defense, foreign policy, and most of the other important issues of the day.

The formulations of Judge Gurfein and the Court of Appeals for the Second Circuit, although more stringent on their face, would be almost equally destructive of a free press in America. We do not make this statement lightly. We ask the Court to consider carefully how the doctrines put forward in these courts below would operate in practice. Under any of these formulations the Executive can hold up publication simply by alleging that a serious breach of national security would occur. The Court would then issue a

restraining order, allow the Government to present its case, and then decide whether there was sufficient danger to warrant issuance of an injunction against publication. This process in itself is a system of prior restraint. It involves an examination of the material by Executive officials, an order to withhold publication, and a governmental decision as to whether the material could be published or not. The exception has swallowed up the rule.

Moreover, most of the proceeding - certainly the critical parts - would take place in camera. Both the New York Times and the Washington Post cases followed this procedure, on the ground that otherwise the injury to national security would occur in the course of hearing the case. Only the defendants and their counsel were permitted to attend the in camera session. More than that, no one was allowed to be present unless he was first given security clearance by the Government. Hence the plaintiff in the case was able to dictate what individual defendants, and what counsel, were entitled to participate in determination of the issue. Such a procedure can hardly be recommended in a democratic society.

In any event, we submit that any rule for allowing exceptions which would create a system of prior restraint in the very process of applying the rule cannot be reconciled with the First Amendment. We do not say that under no circumstances can an exception to the prior restraint doctrine be justified. But it seems clear that a rule based, as are the rules suggested above, upon the gravity of the breach of security can only operate to install a full, not exceptional, system of prior restraint in the whole "national security" area.

The task of formulating a workable rule for exceptions is a complex one. Any such rule would probably have to be couched in terms of allowing the exception only for certain very specific kinds of information. As the Court suggested in Near, information on troop movements in times of war might fall within the excepted category. Perhaps details concerning the design of military weapons would be another category. Beyond the immediate area of military operations there should be few, if any, classes of information subject to advance restraint. Very little consideration has been given to the problem and no one is in a position to give a satisfactory answer at this time.

Even Judge Gesell's formulation in his opinion refusing a preliminary injunction would raise troubling questions unless considered in the context of his rulings taken as a whole. Judge Gesell, after considering these matters in the preliminary injunction stages, gave a stricter formulation than did Judge Gurfein, requiring a "showing of an immediate, grave threat to the national security...in close and narrowly defined circumstances." Applying this test Judge Gesell correctly refused to apply any restraint.

The Government's complaint contained no allegation of any concrete facts which would suggest a breach of national security in any specific area that might conceivably be subject to an exception to the prior restraint rule. Under such circumstances no temporary restraining order should have been issued and the complaint should have been dismissed. Therefore, the decision of the Court of Appeals for the District of Columbia

should be further elucidated. "Closely and narrowly defined circumstances" must be shown to be as narrow as those exceptional circumstances alluded to in Near v. Minnesota.

We urge the Court to follow this course. Especially we urge the Court not to accept any formulation of exceptions to the prior restraint rule which will undermine the force and vitality of that traditional doctrine.

CONCLUSION

The issues involved in these cases go to the heart of the decision-making process in this country. The tendency of government in recent years has been toward ever more secrecy in its operations, and toward a consequent monopoly of power in the hands of a few high Executive officials. We suggest that this direction of events is fraught with danger. Secrecy in government is fundamentally anti-democratic. It perpetuates bureaucratic errors and leads ultimately to disaster. It is time our constitutional doctrines were called into play in opposition to those forces and invoked to promote conditions under which an open, representative and balanced government will be assured.

We respectfully submit that the complaints in these proceedings should be dismissed.

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June 25, 1971

APPENDIX

Matters Pending Before Congress the Consideration of Which Would be Affected by the Materials Involved in these Proceedings

While the Justice Department was preparing its case to restrain publication of this highly pertinent material, and while the legal action in the District Court for the Southern District of New York was going on, Congressmen were giving official recognition to the pertinence of the articles by inserting them in the Record.[1/]

During the very period during which the temporary restraining order was in effect and was blocking further installments, both the House and Senate were dealing with Legislative topics whose subject matter made the content of the Task Force Study germane

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1/ Congressmen McCloskey and Harrington inserted the New York Times installments of Sunday, June 13, and Monday, June 14, in the Congressional Record on June 14, 1971 (H-5096 - 5136; E-5794 - 5832). On the same day Senator McGovern inserted the same documentation (S-8977 - 9015). On the next day Senator McGovern inserted the third installment which appeared in the Tuesday, June 15, New York Times in the Congressional Record (S-9111 - 9130), and Congressmen McCloskey and Harrington inserted the same article in the Record (H-5202 - 5222; E-5878 - 5896).

to the Congressional debate. On June 16, 1971, two votes were taken in the Senate and 4 in the House on topics to which the study is germane.

In the Senate these included the vote on the Chiles Amendment, which barred use of funds supplied under H. R. 6531 (an amendment to the Selective Service Act which provided pay increases for military personnel) to support U. S. forces in Indochina after June 1, 1972, under certain conditions.[1/] The vote on this amendment was: Nay, 52; Yea, 44. Thus, a change of 5 votes would have switched the result. Also, the Senate considered the McGovern-Hatfield Amendment, also to H. R. 6531, to amend the Selective Service Act. This provided for the shorter cut-off date to December 31, 1971. The vote on this amendment was: Nay, 55; Yea, 42. A seven vote change would have been required to change the result.

It is impossible to say that, had The New York Times installment, due to be printed on June 16, been printed that day, it would have changed 5, or 7 Senators' minds; but it is also impossible to say that it would not have. It is certain, however, that the articles were of the type that afford the kind of persuasion or conditioning that affects votes on issues like these before the Senate.

1/ Congressional Record, June 16, 1971, S-9275.

The House was on the same day acting on the Military Procurement Authorization Bill (H. R. 8687). The House continued consideration on June 17, 1971, taking up the Nedzi-Whalen Amendment (providing a deadline after which funds under the procurement act should not be used for Indochina war support); the Harrington Amendment (to delete a title of H. R. 8687 providing an authorization for Vietnamese forces and their allies, and local forces in Laos and Thailand); and considering several other amendments variously establishing cutoff dates and restrictions respecting funds which might find their way into support of the Indochina war.

Debate on these amendments was wide-ranging. For instance, Congressman John F. Flynt, Jr., of Georgia, reviewed what he called the mistaken premise upon which the Tonkin Gulf Resolution was enacted, the misinformation that was afforded the public and the Congress in that connection, the circumstances of its repeal, and the fact that the present war is being waged without a congressional declaration of war.1/ Congressman Sidney R. Yates of Illinois noted in debate that it is now clear that the facts surrounding the Gulf of Tonkin episode were kept from Congress at the time it voted on that resolution. He noted that we are

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1/ Congressional Record, June 17, 1971, H-5363.

reading in the press today the results of giving more and more power to the President and deferring to his judgment in the early 1960's.[1]

Congresswoman Margaret M. Heckler, of Massachusetts, citing the revelations in The New York Times of the deceptions practiced on the Congress early in the Vietnam buildup, said it was clear that Congress must now express its will. She went on to mention The New York Times' revelation that the Gulf of Tonkin Resolution was drafted three months before the incidents occurred.[2]

Congressman Lionel Van Deerlin, after referring to The New York Times series of articles, said that he did not think the war would have been allowed to progress the way it has if Congress had been properly informed back in 1964 and 1965.[3] Congresswoman Bella Abzug, of New York, called for full access to the entire McNamara study, saying she believed the information is necessary to enable the Congress to make a realistic assessment of the prospects for a speecy and total termination of the American military role in Indochina.[4]

1/ Congressional Record, June 17, 1971, H-5370.

2/ Congressional Record, June 17, 1971, H-5371.

3/ Congressional Record, June 17, 1971, H-5370.

4/ Congressional Record, June 17, 1971, H-5378.

Congressman Paul McCloskey, of California,[1] Congressman Bertram Podell, of New York,[2] Congressman James Abourezk, of South Dakota,[3] and Congressman William Ryan, of New York,[4] were among Members of Congress who discussed The New York Times documents during debate on the Military Procurement Authorization Act of 1971.

The question of candor of public officials during the development and the conduct of the war was a prominent feature of the debate on the Procurement Act, and such question of candor, or lack of it, was related to the desirability of Congressional action or Congressional expression calculated to bring the war to an end.

Nor have the issues which arose in these bills become moot by the defeat of the Hatfield-McGovern Amendment and the passage of the Military Procurement Authorization Act. There are at least four classes of legislation in the House in which the issue will undoubtedly be raised again: Foreign Aid Appropriations and Authorization Bills, Military Construction Authorization Bill,

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1/ Congressional Record, June 16, 1971, H-5305.

2/ Congressional Record, June 16, 1971, H-5311.

3/ Congressional Record, June 16, 1971, H-5331.

4/ Congressional Record, June 17, 1971, H-5379.

Defense Appropriation Bill, and Vietnam Disengagement Act. Also, there is presently a discharge petition on the Speaker's desk for the discharge of the Vietnam Disengagement Act (H. R. 4101).

NOS. 1873 and 1885

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FOR THE SECOND CIRCUIT AND FOR THE DISTRICT OF COLUMBIA CIRCUIT

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