Supreme Court of the United States

In the Matter of:

NEW YORK TIMES COMPANY,

Petitioner,

v.

UNITED STATES

UNITED STATES,

Petitioner,

v.

THE WASHINGTON POST COMPANY, ET AL.

Docket No. ~~1835~~ 1873

Place Washington, D. C.

Date June 26, 1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NEW YORK TIMES COMPANY,

Petitioner,

vs.

UNITED STATES,

Respondent.

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Petitioner,

vs.

THE WASHINGTON POST COMPANY, ET AL.,

Respondent

The above-entitled matters came on for argument at 11:00 o'clock a.m., on Saturday, June 26, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Nos. 1873 and 1885, The New York Times against the United States, and United States against Washington Post Company.

Mr. Solicitor General, the Government's motion to conduct part of the oral arguments involving security matters in camera, as has been done in the District Courts in New York and Washington, and in the Courts of Appeal in the Second Circuit and the District of Columbia Circuit is denied by the Court. Mr. Justice Harlan, Mr. Justice Blackmun and I would grant a limited in camera argument, as has been done in all of the hearings in these cases until now.

Under the order granting the writ yesterday, counsel may, if they wish, submit arguments in writing under seal in lieu of the in camera oral argument.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT BY THE SOLICITOR GENERAL

ON BEHALF OF PETITIONER

THE SOLICITOR GENERAL: Mr. Chief Justice, may I say in respect of the announcement just made that all three parties have filed a closed brief as well as the open brief, and in addition, I have filed just within minutes two statements, one prepared by the State Department and one prepared by the Department of Defense,giving more detail about some of the items which are discussed in my closed brief. I believe that

those will all be before the Court.

Q Are you suggesting that these matters last filed are security matters, or they merely supplement?

A The only ones that are security matters that I have filed are all marked "Top Secret".

Q Thank you very much. I just wanted to be sure as to these last documents.

A The items filed by the Post and the Times I do not believe are marked "Top Secret", but they are marked "In Camera" in the caption of the items. I repeat, all three have also filed regular briefs, except not printed. Only the American Civil Liberties Union seemed to have the resources to produce the printed brief for this occasion.

I am told that the law students of today are indignantly opposed to final examinations because they say that no lawyer ever has to work under such pressure that he has to get things out in three or four hours. I can only say that I think it is perhaps fortunate that Mr. Glendon and Mr. Bickel and I went to law school under an earlier dispensation.

It is important, I think, to get this case in perspective. The case of course raises important and difficult problems about the Constitutional right of free speech and of the free press. We have heard much about that from the press in the last two weeks. But it also raises important questions of the equally fundamental and important right of the

Government to function. Great emphasis has been put on the First Amendment, and rightly so, but there is also involved here a fundamental question of separation of powers in the sense of the power and authority which the Constitution allocates to the President as Chief Executive and as Commander-In-Chief of the Army and Navy.

Involved in that there is also the questionof the integrity of the institution of the Presidency, whether that institution, one of the three great power under the separation of powers, can function effectively.

The problem lies on a wide spectrum, and like all questions of Constitutional law involves the resolution of competing principles. In the first place, it seems to me that it will be helpful to make some preliminary observations. If we start out with the assumption that never under any circumstances can the press be subjected to prior restraint, never under any circumstances can the press be enjoined from publication, of course we come out with the conclusion that there can be no injunction here. But I suggest, not as necessarily conclusive in this case, but I suggest that there is no such Constitutional rule, and never has been such a Constitutional rule.

We have, for example, the copyright laws. My son was in Toronto earlier this week, and he sent me copies of the Globe and Mail of Toronto, ten series of the story the Pentagon

is trying to kill, each one headed "Copyright New York Times Service". I have no objection to that, but these stories which have been published have been copyrighted by the New York Times and I believe by the Washington Post, and I have no doubt that perhaps in other cases, because these have already attracted much attention, the New York Times and the Washington Post would seek to enforce their copyright. I suppose it is very likely that in one form or another they have obtained royalties because of their copyright on this matter.

But let us also consider other fields of the law. There is a well known branch of the law that goes under the heading of literary property. In the Court of Appeals I gave the example of a manuscript written by Ernest Hemingway, let us assume while he was still living, unpublished, perhaps incomplete, subject to revision. In some way the press gets hold of it. Perhaps it is stolen. Perhaps it is bought from a secretary through breach of fiduciary responsibility, or perhaps it is found on the sidewalk. If the New York Times sought to print that, I have no doubt that Mr. Hemingway or now his heirs, next of kin, could obtain from the courts an injunction against the press printing it. Only this morning I see in the paper that a New York publisher is bringing a suit against News Day, a New York newspaper, because News Day has violated what the New York publisher considers to be its copyright in the forthcoming Memoirs of President Johnson.

Next, we have a whole series of law, a traditional branch of equity, involving participation in a breach of trust. There cannot be the slightest doubt, it seems to me, no matter what the motive, no matter what the justification, that both the New York Times and the Washington Post are here consciously and intentionally participating in a breach of trust. They know that this material is not theirs. They do not own it. I am not talking about the pieces of paper which they may have acquired. I am talking about the literary property, the concatenation of words, which is protected by the law of literary property. Again I say I don't regard this as controlling or conclusive in this case. I am simply trying to advance the proposition that there are many factors and many facets here, and that there is no Constitutional rule that there can never be prior restraint on the press or on free speech.

Now, in our main brief in this case which I may say was largely prepared by my associate, Mr. Friedman, last evening and last night, we have cited one case which comes very close to being an injunction by this Court against publications in the press. That is the Associated Press case in I believe 215 United States. The Associated Press is a cooperative of newspapers, and there the Associated Press sought and obtained an injunction against the dissemination of news by its competitor International Press, and that was granted on

copyright and related grounds.

But we have other areas in the law where this Court has approved against specific First Amendment claims injunctions in advance forbidding speech. One area of this is the labor law field, where as recently as 395 U.S. in Sinclair against the National Labor Relations Board, the Court unanimously affirmed the judgment of the Court of Appeals enforcing the Board's order, which included a provision requiring Sinclair to cease and desist from threatening the employees with the possible closing of the plant or the transfer of the weaving production with the attendant loss of employment, or with any other economic reprisals, if they were to select the above named or any other labor organization.

In 393 U.S., a case involving the Federal Trade Commission, the Federal Trade Commission against the Texaco, Inc., involving orders with respect to TBC, Tires, Batteries and Accessories, the Court approved the order of the Federal Trade Commission which restrained Texaco from using or attempting to use any device such as, but not limited to, dealer discussions. They were ordered not to speak to dealers about this subject, and the First Amendment was specifically referred to in the brief for the Respondent, and was not mentioned in this Court's opinion.

Q Mr. Solicitor General, of course, the Times in this case, and there are no doubt others, I did not under-

stand your brother counsel on the other side really questioned any of this. I thought at least for purposes of this case they conceded that an injunction would be not violative of the First Amendment, or put it this way, that despite the First Amendment, an injunction would be permissible in this case if the disclosure of this material would in fact pose a grave and immediate danger to the security of the United States; that is, for purposes of this case they conceded that, but they have said that in fact disclosure of this material would not pose any such grave and immediate danger.

A Mr. Justice, if they have conceded it, I am glad to proceed on that basis.

Q I am not conceding it for them, but that has been my understanding of what the issue is.

A I may say that their briefs were served on me within the last hour, which was entirely in accordance with this Court's order, but I have not seen their briefs. I do not know what is in their briefs.

Q In other words, I had thought in my analysis and I have not had the benefit of much more time than you have had, that this basically came down to a fact case, that the issues here are factual issues.

A And that, Mr. Justice, is extremely difficult to --

Q To argue here in this Court, I understand.

A In open court.

Q I was going to say, qualifying that, except as to the scope of the judicial review of the Executive determination, which I thought you presented.

A Mr. Justice, it was the latter point for which I was seeking to get this, because our contention, particularly with respect to the Washington Post case is that the wrong standard has been used.

Now, with respect to the actual factual situations, the only thing I can do is point to the close brief, which I have filed, in which there are ten specific items referred to. When I say specific items, I must make myself very clear. Some of those are collective. I have brought here, and perhaps you cannot see them, the 47 volumes that are supposed to be the background of this. They are included in the record of the Second Circuit Court of Appeals which has been filed with the Court. Let me say when we move onto this next item that it was inevitable that I delegate the question of preparing the supplemental statement which was covered by this Court's order yesterday. This Court, as did the Second Circuit, referred to the materials specified in the special appendix in the Second Circuit, and to such additional items as might be included on a supplemental statement filed at five p.m. yesterday. I had nothing to do with preparing that supplemental statement. I had able and conscientious associates who

did work on it. However, when I had a chance to see it last evening, particularly after the State Department called me at eight or nine o'clock at night and said they had four additional items, I said that the Court's deadline was five p.m. and that I could not add any additional items, then I examined it. Here is a copy of it. I find it much too broad. In particular it has at the end a statement in view of the uncertainties as to the precise documents in defendants' custody, and I say that has been an extreme difficulty in this matter -- we do not know now, and never have known what the papers are.

Q I thought the New York Times was required to and did give you a list of what they had.

A They prepared an inventory, but from it, it is not possible to tell whether they are the same papers that we have. Part of the problem here is that a great mass of this material is not included in the 47 volumes. It is background material, earlier drafts of some papers which are materially different from what is included in the 47 volumes, and as a result we cannot tell from the inventory what is included. For example, one of the items already published, which has caused a certain amount of controversy publicly and internationally, is a telegram to the Canadian Government. That is not in the 47 volumes and is not referred to in the 47 volumes. Where they got it, how they got it, what it is, I do

not know. But in this supplemental memorandum, it is stated under my signature that the petitioner specifies in addition to the foregoing any information relating to the following, and then there are list 13 items. Frankly I regard that as much too broad.

Therefore, I am saying here that we rely with respect to this factual question only on the items specified in the supplemental appendix filed in the Second Circuit and on such additional items as are covered in my closed brief in this case.

Q Mr. Solicitor General, does your closed brief cover all of the items on the special appendix and any that you think should be added to it?

A No, Mr. Justice, it does not refer to all of them. What I tried to do in my closed brief, I spent all of yesterday afternoon in constant successive conversations with the individuals from the State Department, the Defense Department, the National Security Agency, and I said, "Look, tell me what are the worst, tell me what are the things that really make trouble." They told me and I made longhand notes of what they told me. From that I prepared the closed brief.

Q Well, Mr. Solicitor General, if we disagreed with you on those that you have covered, the remainder of the items need not be looked at?

A Mr. Justice, I think thatthe odds are strong

that that is an accurate statement. I must say that I have not examined every one of the remainder of the items.

Q Are you making an argument that even if those ten that you have covered do not move us very far that nevertheless the cumulative impact of all of the others might tip the scale?

A And that there ought to be an opportunity for a full and free judicial consideration of each of the items covered in the supplemental appendix. It is perfectly true that there was a trial before Judge Gesell in the District Court of the United States. I referred to it in my closed brief as "hastily conducted" and have said that there was no trace of criticism in that. Judge Gesell started the trial at eight o'clock last Monday morning, and was under orders from the Court of Appeals to have his decision made by five p.m., and there are 47 volumes of material, and millions of words. There are people in various agencies of the government who have to be consulted, and Mr. Glendon quite appropriately conducted cross examination which took time. Much of the material had to be presented by affidavits, and there simply has not been a full careful consideration of this material. To the best of my knowledge, based on what was told me yesterday afternoon by the concerned persons, the ten items in my closed brief are the ones on which we most rely, but I have not seen a great many of the other items in the special

appendix simply for sheer lack oftime.

Q What was the length of the trial before Judge Gurfein in New York?

A Mr. Seymour?

A The in camera proceedings, your Honor, were approximately four hours, including cross examination and argument.

Q What was the length of the hearing in the Court of Appeals for the Second Circuit?

A The total argument there, public and in camera, was just over three hours. The in camera portion I would guess was about an hour.

Q Decisions were rendered in the New York case by the District Court within two days afterwards.

A Within less than 24 hours after, your Honor. The hearing finally finished at 10:45 p.m., on Friday night. Decision was rendered at 2:25 p.m., Saturday afternoon.

Q What was the time interval in the decision by the Court of Appeals?

A I believe it went one full day, that is, the decision was rendered late on the day of the 23rd. The argument was finished shortly after five on the 22nd.

Q And in the District of Columbia proceedings, of course, you do not know, but perhaps the Solicitor General does.

A The trial in the District of Columbia occurred between eight a.m. and five p.m., including the decision last Monday. I participated in the oral argument in the Court of Appeals, and it occupied two hours and a half, two hours and forty-five minutes. It started at about 2:15 and was over I think just before five.

That is the entire amount of judicial time which has been devoted to millions of words.

Q Mr. Solicitor General, I don't want to bring in a red herring in this case, or what might be, but do you also say that the ten items you have talked about fully justify the classification that has been given them and which still remains on them?

A Mr. Justice, I am not sure whether this case turns on classification.

Q I agree it probably does not.

A No judicial proceeding has been brought under the Freedom of Information Act by either newspaper. There is provision there for starting a proceeding in court in case materials are wrongly determined. No judicial determination has been made that any classification was arbitrary or capricious. There is a complication here which people who live with this become familiar with, which is that any compilation takes the classification of the highest classified item.

Q I understand that, but on those ten documents

I won't press you any more. You think it perhaps need not be answered in this case, and is perhaps irrelevant, is that correct?

A I think it need not be answered, but my position would be that as to those ten items, it is more than ten documents, as to those ten items, that they are properly classified "Top Secret". One of the items, I should make plain, is four volumes of the 47 volumes, four related volumes, all dealing with one specific subject, the broaching of which to the entire world at this time would be of extraordinary seriousness to the security of the United States. As I say, that is covered in my closed brief, and I am not free to say more about it.

Q As I understand it, Mr. Solicitor General, and you tell me, please, if I misunderstand it, your case does not really depend upon the classification of this material, whether it is classified or how it is classified. In other words, if the New York Times and the Washington Post had this material as a result of the indiscretion or irresponsibility of an Under Secretary of Defense who took it upon himself to declassify all of this material and give it to the papers, you would still be here.

A I would still be here. It will be one string off my bow.

Q I did not understand it was a real string on

your bow. That is why I am asking you the question.

A Maybe it is not, but there are those who think it is, and I must be careful not to concede away in this Court grounds which some responsible officers of the Government think are important.

Q Secondly, I understand, and tell me if I am wrong again, that your case really does not depend upon any assertion of property rights, by analogy to the copyright law. Your case would be the same if the New York Times had acquired this information by sending one of its employees to steal it, as it would if it had been presented to the New York Times on a silver platter by an agent of the government. Am I correct?

A Yes, Mr. Justice, but I don't think that literary property is wholly irrelevant here. But my case does not depend upon it.

Q Your case depends upon the claim, as I understand it, that the disclosure of this information would result in an immediate grave threat to the security of the United States of America.

A Yes, Mr. Justice.

Q However it was acquired, and however it was classified.

A Yes, Mr. Justice, but I think the fact that it was obviously acquired improperly is not irrelevant in the consideration of that question. I repeat, obviously acquired

improperly.

Q May I ask, Mr. Solicitor General, am I correct that the injunctions so far granted against the Times and the Post have not stopped other newspapers from publishing materials based on this study or kindred papers?

A It is my understanding, Jr. Justice, though I have not had an opportunity to read everything that has been published in other newspapers, it is my understanding that except with respect to the items in the New York Times, the Washington Post and the Boston Globe, there has not been published anything else which is not covered by material already published either in this series, or elsewhere. It would appear to us that other papers sought to get into the act, and they have assigned their writers to write what they can, but we have not been able to find new disclosures of previously unpublished material in these other articles.

Q Then are you suggesting that these other newspapers do not in fact have either this study or access to this study or parts of it?

A Mr. Justice, I do not know. I have no information whatever.

Q But you are not telling us that they do not.

A No.

Q There is the possibility that they do have either the study, the same thing the Post and Times have.

A There is the possibility that anybody has it.

Q But if that were the fact, I have always thought the rule was that equity has to be rather careful not to issue ineffective injunctions. Ins't that a factor to be considered in these cases?

A No, I appreciate that. I am trying to say that on the basis of the information now known, this is not that situation. I repeat, I have not read these other articles. I am advised by people who have that they do not contain new disclosures, that they are -- it has now become fashionable and popular, and you are not a good newspaper unless you have got some of this stuff, and they have put out articles with all kinds of window-dressing, probably very well written, but not containing new disclosures. I am not able to testify to that, and I cannot point to anything in the record which supports that. Certainly we are concerned about the problem of the effectiveness of any order which might be issued here.

Q I gather you do agree that the ordinary equitable principle is not to issue useless injunctions, is it not?

A Not to issue a useless injunction, and it is our position that there is nothing in this record or known outside the record which would indicate that this injunction would be useless.

Q Mr. Solicitor General, one detail in that

connection. Is there anything in the record, or any intimation anywhere, that the possession by the other newspapers is attributable to the New York Times or to the Washington Post?

A No, Mr. Justice. We do not know what they have or how they got it. That is equally true with the New York Times and the Washington Post.

Q Have either of these newspapers denied it?

A Denied that --

Q That the possession on the part of the other newspapers is not attributable to them?

A I don't know. I don't believe that has been an issue in the Washington Post case. Mr. Seymour advises me there was nothing like that in the New York Times case.

Q Mr. Solicitor General, in terms of equity on an injunction, however, to the extent anything has been published and has already been revealed, the United States is not seeking an ijunction against further publication of that particular item.

A No, Mr. Justice. I think at that point we would agree that it becomes futile. It is useless.

Q Would that mean, Mr. Solicitor General, that if the Government were to prevail here, and that at some time some document within the scope of the injunction that the Government got was published in some other newspaper, that then either the Times or the Post could run in and to that

extent then get the injunction modified?

A I would think so, Mr. Justice.

Q But that is the only thing they could do, is that it?

A I would think so, yes. I may say that it was stated in both lower courts,in New York by Mr. Seymour and here by me, that the President last January directed a complete review of classification of all materials. Several Secretaries of State, Defense, and the Chairman of the Joint Chiefs of Staff authorized us then to say that they are prepared to appoint immediately a joint task force to conduct an exhaustive declassification study of the 47 volumes, that they will conduct the study on an expedited basis, and will complete it within any reasonable time that the Court may choose. They suggest a minimum of 45 days. Upon completion of the study, the Government will withdraw its objection to the publication of any documents which it has found no longer are relevant to the national security.

Q Mr. Solicitor General, is the United States pressing separately your request or your cause of action for the return of the materials, wholly aside from injunction against publication?

A It is not involved in this case in this Court at this time.

Q It is not?

A No.

Q But is the Government trying to get these materials back from the Times or the Post?

A I can certainly say the Government would like to get them back.

Q That was not my question. My question is is the Government attempting to?

A The Government is not at this time seeking an order for their return.

Q I thought that was part of your lawsuit, part of your request for relief.

A I believe it was, but we did not appeal with respect to that, nor is it covered in our petition for certiorari. Is that not right?

A That is correct.

Q Mr. Solicitor General, on this 45 day study, does that depend on how we rule in this case, or is the Government going to do it anyhow?

A Mr. Justice, I will urge the Government to do it anyhow.

Q Well, are they?

A First, if this Court does not allow any injunction, it will be futile, because the material will be published, and there will not be any particular advantage to have a post mortem to say, "Oh, well, it was all right anyhow."

Q Suppose the Court decides the other way. Will the study be made?

A The study is going to be made. I will do my best to see that the study is made, and I believe I have the full support of the entire Administration with respect to that.

Q Would it not be important without this case that the Government has a right to find out what is available to be published? Is that not part of their job?

A It is a massive operation. There is not the slightest doubt in my mind that there has been as long as I can remember, which is quite a while, massive over-classification of materials, and there has been much too slow review to provide declassification. The Government is in the process of taking steps to try to find a way to work that problem out.

Q But if this Court would be chance rule against you, then the Government would surely do it, wouldn't they?

A If the Court should rule against us here, then it seems to me that it becomes moot with respect to these items. They can be published, and whether we classify them or declassify them is an academic question.

Q The Court would then have done the job for you, is that not correct?

A Yes, the Court will in effect have declassified the materials.

Q I had thought the standard that you were operating under here in terms of a prior restraint was not necessarily equivalent to the standard that might be operative in a criminal proceeding. Whether or not a newspaper may be enjoined from publishing classified information does not necessarily determine some criminal proceeding.

A You are certainly right, Mr. Justice, if I may say so, in terms of an examination question. I find it exceedingly difficult to think that any jury would convict or that an appellate court would affirm a conviction of a criminal offense for the publication of materials which this Court has said could be published. Simply as a practical matter whether it was a crime or not, these are the same materials that were involved in the New York Times case. All we did was publish them. I find it difficult to think that such a case should be prosecuted or could effectively be prosecuted.

Q But the standard concededly is not the same.

A It is not the same issue, and I repeat, I think it would technically be a crime if the materials remained classified. Now, if I may get on --

Q Mr. Solicitor General, just before you do, this brings me back to my original question of a few moments ago as to what the real basic issue in this case is. As I understand it, you are not claiming that you areentitled to

an injunction simply or solely because this is classified material.

A No.

Q Nor do I understand it that you are claiming that you are entitled to an injunction because it was stolen from you, that it is your property. You are claiming rather and basically that whether or not it is classified or however it is classified, and however it was acquired by these newspapers, the public disclosure of this material would pose a grave and immediate danger to the security of the United States of America, period.

A Yes, Mr. Justice.

Q Now, isn't that correct?

A Yes, Mr. Justice.

Q So declassification vel non does not have much to do with the basic issue, does it?

A I agree with you, except that it is part of the setting. If this material had never been classified, I think we would have a considerably greater difficulty in coming in and saying -- for example, suppose the material had been included in a public speech made by the President of the United States.

Q Then it would be in thepublic domain already. That is something else.

A All right. We come in and say, "You can't

print this because it will gravely affect the security of the United States." I think we would plainly be out.

Q You would have a very shakey case on the facts. This, therefore, is a fact case, is it not? Until we can decide this case, we have to look at the facts, the evidence in this case that has been submitted under seal.

A In large part, yes, Mr. Justice, but I am still trying to get some help from the background and the setting which I repeat, it is not irrelevant, that the concatenation of words here is the property of the United States, that this has been classified under Executive Orders approved by Congress, and that it obviously has been improperly acquired.

Q That may have a great deal to do on the question of whether or not somebody is guilty of a criminal offense, but I submit it has very little to do with the basic First Amendment issue before this Court in this case.

A All right, Mr. Justice, I repeat, unless we can show that this will have grave, and I think I would like to amend it -- I know the Court's order has said "immediate", but I think it really ought to be "irreparable harm to the security of the United States".

Q I would think with all due respect to my colleague that the question of classification would have an important bearing on the question of the scope of judicial

review of an Executive classification.

A I think, Mr. Justice, that is true, but I also think the heart of our case is that the publication of the materials specified in my closed brief will, as I have tried to argue there, materially affect the security of the United States. It will affect lives. It will affect the process of the termination of the war. It will affect the process of recovering prisoners of war. I cannot say that the termination of the war or recovering prisoners of war is something which has an immediate effect on the security of the United States. I say that it has such an effect on the security of the United States that it ought to be the basis of an injunction in this case.

I would like to get to the question of the standard which was used by the District Judge in this case. I think it is relevant to point out that on page 267 of the transcript in the District Court before Judge Gesell, he said, "The Court further finds that publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process -- not in the past -- now in process, or contemplated for the future whether these negotiations involve Southeast Asia or other areas of the world. This is not so much because of anything in the documents themselves, but rather results from the fact that it will appear to foreign governments that this government

is unable to prevent publication of actual government communications when a leak such as the present one occurs."

Thus the Judge rejected as a standard in this matter the whole question of the ability of the Department of State, and that means the President, to whom the foreign relations are conferred by the Constitution, to conduct delicate negotiations now in process or contemplated for the future. I suggest to the Court that it is perfectly obvious that the conduct of delicate negotiations now in process or contemplated for the future has an impact on the security of the United States.

Now, the standard which the Judge did apply is one which with the benefit of 20-20 hindsight, I would have written differently. Executive Order 10501 provides the basis for security classification issued by President Eisenhower in 1953, after a comprehensive study by a commission on these matters. The definition of Top Secret in Section 1(a) of Executive Order 10501 is, "Top Secret shall be authorized by appropriate authority only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material that the defense aspect of which is paramount and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation, such as" -- this was not intended to be all-inclusive, but illustrative -- "such as

leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war or the compromise of military or defense plans or intelligence operations or scientific or technological developments vital to the national defense."

Judge Gesell has used that as the standard. He made no reference whatever to the succeeding classification, which is Secret, and there is also a classification which is Confidential. But Judge Gesell has used as the basis of his decision, and I suggest this was fundamental error, that there is no proof -- this is on page 269 of the transcript of the hearing before Judge Gesell -- there is no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans -- in my closed brief I contend that he was wrong on that -- a compromise of intelligence operations, and in my closed brief I contend that he was plainly wrong on that, or a compromise of scientific and technological materials.

If the standard is that we cannot prevent the publication of improperly acquired material unless we can show in substance and effect, because that is what he really meant, that there will be a break in diplomatic relations or that

there will be an armed attack on the United States, I suggest that the standard which Judge Gesell used is far too narrow. Perhaps it lies in between. My own thought would be that in the present parlous state of the world, considering negotiations in the Middle East, considering the SALT Talks now going on -- it is perhaps not inappropriate to remember that SALT is Strategic Arms Limitation Talks, the consequences of which obviously have in all likelihood not the prevention of a nuclear attack tomorrow, maybe not next week, but only by success in this kind of negotiations can we have any hope that our children and our children's children will have a world to live in.

I suggest that when it is found by the District Court that the publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, that should be enough by itself to warrant restraint on the publication of the now quite narrowly selected group of materials covered in the special appendix and dealt with in some detail in my closed brief, and the related papers which have been filed with the Court this morning.

Q Could I ask you a question before you sit down? I had understood from your papers and the brief that you filed this morning that the only specific relief at this stage, this juncture of the proceeding you are asking for is

(a) that the Court of Appeals decision in the Times case should be affirmed, namely, that the further hearings before the District Court ordered by the Court of Appeals should go forward to a conclusion, and as regards the Washington Post case, that you are asking only that the proceedings there be conformed to the proceedings in the Court of Appeals in the Second Circuit, and that therefore these broader questions that you have been talking about are not before the Court at the moment, in your judgment.

A No, Mr. Justice, I think I cannot agree with that. It is our position that Judge Gesell used the wrong standard, as I have just said, and it is our view that the judgment of the Second Circuit should be affirmed, and the case remanded to Judge Gurfein for further hearing under a proper standard which I hope this Court will develop and announce, and that the decision of the Court of Appeals would be reversed and the case remanded to Judge Gesell for further hearing and the application of the proper standard which this Court has decided, because it is our view, as I have endeavored to contend, that in rational terms in the modern world, the standard that Judge Gesell applied is just too narrow, and as I have said, the standard should be great and irreparable harm to the security of the United States. In the whole diplomatic area, the things don't happen at 8:15 tomorrow morning. It may be weeks or months. People tell me that already channels of

communication on which great hope had been placed have dried up. I haven't the slightest doubt myself that the material which has already been published and the publication of the other materials affects American lives and is a thoroughly serious matter. I think to say that it can only be enjoined if there will be a war tomorrow morning, when there is a war now going on, is much too narrow.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Mr. Bickel.

ORAL ARGUMENT BY ALEXANDER M. BICKEL, ESQ.

ON BEHALF OF PETITIONER

MR. BICKEL: Mr. Chief Justice, may it please the Court, we began publishing on June 13. We published on the 14th and the 15th, with no move from the Government until the evening of the 14th, despite what is now said to be the gravest kind of danger which one would have supposed would have been more obvious than it turned out to be.

Q Mr. Bickel, aren't you going to allow some time for somebody to really see what this means before they act and some pleadings drawn, and get lawyers into the courts?

A I plan to return briefly to this point. I point out now only that as was evident to us at the hearings when we cross examined some of the Government witnesses, high ranking people in the Government quite evidently read these

things on Sunday morning, the following day, and no great alarm sounded.

We were then enjoined, under prior restraint, on the 15th, and we have been under injunction ever since. This is the eleventh day, I guess, under the order of the Court of Appeals for the Second Circuit. We would remain under injunction presumably until the 3rd of July, with the distinct possibility of more time added after that if appellate proceedings are required.

Now a word simply on what was had before the hearing that was had before Judge Gurfein. It took place on Friday last, I believe. It started first thing in the morning with open hearings. We went in camera, as Mr. Seymour said, for something upward of four hours. I do not know the exact time. The record will clearly show that the Judge's sole purpose, in camera, and continuously expressed intent was to provoke from the Government witnesses something specific, to achieve from them the degree of guidance that he felt he needed in order to penetrate this enormous record.

It is our judgment, and it was his, that he got very little, perhaps almost nothing. The point, however, that I want to leave with you is that at no time in the course of these hearings did the Government object to their, what is now called the speed or rapidity of them; at no point was more time asked for. Of course, we all labored, as I think is only proper under the knowledge that a great newspaper was being restrained from publishing, and that expedition was desirable.

But there is no evidence that I know of, that Judge Gurfein rushed the proceedings, or would have rushed them, if the Government had asked for more time. I think the Government gave Judge Gurfein all it had.

Now the Government based its complaint against us, framed in very general terms, on a statute, first one section of it and finally Section 793 (e) of the statute. We have a substantial portion of our brief that is still devoted to arguing that that statute is inapplicable. Judge Gurfein so held it to be, and I take it that the order of the Court of Appeals forthe Second Circuit is at least open to the interpretation that that holding of Judge Gurfein's is, if not affirmed, at any rate, accepted.

If I may, at this point, take up Mr. Justice Stewart's question to the Solicitor General, referring to our position, we concede, and we have all along in this case conceded for purposes of the argument that the prohibition against prior restraint, like so much else in the Constitution, is not an absolute. But beyond that, Mr. Justice, our position is a little more complicated than that, nor do we really think that the case, even with the statute out of it, is a simple -- presents indeed a simple question of fact. Rather, our position is twofold. First, on principles, as we view them, of the separation of powers, which we believe deny the existence of inherent Presidential authority on which an injunction can be based.

First on those, and secondly, on First Amendment principles, which are interconnected, and which involve the question of a standard before one reaches the facts, a standard on which we differ greatly from the Solicitor General. On both these grounds, we believe that the only proper resolution of the case is a dismissal of the complaint.

Q What was the first ground?

A The first ground, which I am about to enter upon, is the question of the separation of powers, with the statute out of this case.

Q Yes?

A As I conceive it, Mr. Justice, the only basis on which the injunction can issue is a theory, which I take it the Solicitor General holds, of an inherent Presidential power.

Now an inherent --

Q Based upon --

A His constitutional --

Q -- the power of the Executive in the area of international relationships and in the area of the defense of the nation?

A I so assume.

Q Under the Constitution of the United States?

A I so assume. The reason for that being that a court has to find its law somewhere. As Holmes would have said, I suppose, some legislative "will" must be present from

which the court draws the law that it then applies, and that legislative will has to be the President's, if there is no statute.

I do not for a moment argue that the President does not have full inherent power to establish a system of classification, that he does not have the fullest inherent power to administer that system and its procedures within the Executive Branch. He has his means of guarding security at the source. In some measure he is aided by the criminal sanction. But in any event, he has full inherent power, and the scope of judicial review of the exercise of that power will presumably vary with the case in which it comes up, but I am prepared to concede the decision in the Epstein Case, for example, which is cited, I think, in both briefs, that under the Freedom of Information Act, the scope of review is limited, limited to examining whether it is proper.

Nor are we arguing that the President does not have standing, in the sense in which Baker and Carr distinguishes between standing and just his ability, standingto come into court, which is I think the burden of most of the cases that the Government cites. The question that I do argue is whether there is inherent Presidential power to make substantive law, not forthe internal management of the Government, but outgoing, outlooking substantive law, which can form the basis for a judicially issued injunction, imposing a prior restraint on

speech.

The decisive issue that ties in this point and our ultimate First Amendment point is, of course, the exception carved out by Chief Justice Hughes in Near v. Minnesota, for that narrow area in which he accepted that a prior restraint on speech might be applied. This is an exception that is made to a rule more solidly entrenched in the First Amendment than any other aspect of it, a rule that is deeply part of the formative experience out of which the First Amendment came, a rule against prior restraint, based on the experience that prior restraints fall on speech with a special brutality and finality and procedural ease all their own, which distinguishes them from other regulations of speech. If the criminal statute "chills" speech, prior restraint "freezes" it.

It is within that well established doctrine that the exception arises. As Chief Justice Hughes formulated it, it referred to -- actually, it said we would all assume that a prior restraint might be possible, to prevent actual obstruction of the recruiting service, and this is the Chief Justice's language, or the publication of sailing dates of transports, or the number and location of troops. I suppose that under the present law, the "recruiting service" part of that exception is problematic, but on the sailing dates of ships and the location of troops, there is a very specific statute. It is 18 USC 794, which has not been cited against us, which is

inapplicable, which is why it has not been cited against us, because that is not what we report. That is not in our paper.

That being the case, there is no applicable statute under which we are covered. The question arises, as a matter of inherent Presidential authority, what kind of feared event would give rise to an independent power on the part of the President? It is a question, in a sense, that was saved in Hiribayashi v. the United States, the first of the Japanese exclusion cases. It is a question which, in its own context, of course, Youngstown Sheet and Tube Company v. Sawyer answered in the negative.

My suggestion would be that whatever that case, that extremity, that absolute other extremity, in which action for the public safety is required, whatever that case may be in which, under this Constitution, under its rules of separation of powers, when the President has independent, inherent authority to act domestically against citizens, let alone to impose a prior restraint, whatever that case may be, it cannot be this case. Whatever that case may be, it surely is of a magnitude and of an obviousness that would leap to the eye, and that is why, in part, Mr. Chief Justice, I mentioned at the beginning, the period of time that has passed. I would suppose that, stretching our imaginations, and trying to envisage that case, the one characteristic of it suggested by the example that Chief Justice Hughes recited, suggested by the

phrase that the Second Circuit used, which is probably why the Solicitor General resists the word "immediate," the single characteristic that we can immediately see of such an imagined event would be that it is obvious that the public safety is an issue, that time is of the essence. I submit that that cannot be this case. It cannot be that it has to take the Government, which has been reviewing these documents for many months, not just in connection with this case, but in reply to an inquiry made by Senator Fulbright, as the record of our hearings in New York shows, it cannot be that a Government consisting, after all, of more than just the five witnesses we heard in New York, or the ones that were heard here, over this length of time, has an unfamiliarity with these documents, substantial as they might be, which is so great that, when news of their publication comes up, nobody in the Government knows that somewhere in those documents is one which presents a mortal danger to the security of the United States.

I would submit, secondly, that while error is always possible, Judge Gurfein and the Court of Appeals for the Second Circuit, which affirmed him on the record that he had before him, and Judge Gesell, in the Court of Appeals here, all of those judges cannot have been that wrong.

Q Professor Bickel, this is not your case, but reading from Judge Wilke's dissent, "when I say 'harm' I mean the death of soldiers, the destruction of alliances, the

greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate, as honest brokers, between would-be beligerents."

I take it that you disagree fundamentally with that statement?

A Not entirely, Mr. Justice Blackmun. For example, the death of soldiers -- I would disagree that impairment of diplomatic relations can be a case for prior restraint, I would say, even under a statute.

I would not disagree that the death of soldiers, as in the troop ship, or as in the example that Chief Justice Hughes gave. The difficulty I would have would be that nothing that any of these judges, including Judge Wilke, because he, I suppose, is talking about what might yet be shown by the Government, nothing that any of these judges have seen is related by a direct, causal chain, to the death of soldiers or anything grave of that sort. I have heard it, and everything that I have read -- what characterizes every instance in which the Government tries to make its case factually is a chain of causation, whose links are surmise and speculation, all going toward some distant event, itself not of the gravity that I would suggest --

Q You know these records better than I do, but then going back to Judge Wilke, he says, "But on careful, detailed study of the affadavits and evidence, I find the

number of examples of documents which, if in possession of the Post," and I repeat, this is the Post case, "and if published would clearly result in great harm to the nation."

Now I repeat my question. You, therefore, disagree fundamentally with what he seems to say?

A I beg your pardon, Mr. Justice. I am not as familiar as I should be with the Washington Post case. I had thought that Judge Wilke dissented on the ground that he would like more evidence to come in. If this is a statement about the evidence that he heard, or that was heard before Judge Gesell, then, depending on what the standard is that he has in mind, I would think that that language does not quite communicate to me what the standard is, and I doubt that it is the narrow standard that I would contend for.

Depending on the standard that he has in mind, he is either wrong about his standard, or seven judges disagreed with him. I am sorry. I am not sufficiently familiar with the Washington Post case.

Q Professor, your standard that you are contending for is grave and immediate, or not? Is that too general for you?

A The standard that I would contend for, and the difficulties of words are simply enormous -- one has to bring into one's mind an image of some event and try to describe it. The stand that I would contend for would

have two parts to it. Let me also say that I would differentiate between a standard applicable to the President, acting on his own, the President acting in the case that was saved in Hiribayashi, for example, and a prior restraint being imposed pursuant to a well-drawn statute, which defines the standard and the case. I would demand less of the statute than I would demand ofthe President.

But the standard, in general, that I would have in mind,would, at one end, have a grave event -- danger to the nation. Some of the things described in the description of top secret classification in the Executive Order that the Solicitor General read off, I think, would fit that end of the standard.

At the other end would be the fact of publication, and I would demand, and this would be my second element, that the link between the fact of publication and the feared danger, the feared event, be direct and immediate and visible.

Q I take it then that you could easily concede that there may be documents in these 47 volumes which would satisfy the definition of "top secret" in the Executive Order, and nevertheless, would not satisfy your standards?

A That would be chiefly for the reason that, as is notorious, classifications are imposed --

Q No, my question was this. Let us concede, for the moment, that there are some documents that are

properly classified Top Secret. You would say that does not necessarily mean that your standard is satisfied.

A That is correct, Mr. Justice. I would say that --

Q I have not read anything in any of your documents or in any of these cases which the newspapers suggest for a moment that there is no document in these 47 volumes which satisfies properly the definition of top secret.

A I don't know about that.

Q -- You do not deny that, do you?

A I have no knowledge. I have never been near the documents, Jr. Justice.

Q But your position must be then that even if there is a document or so, none of them satisfies your standard.

A I would say that today. If asked that question on the day I appeared before Judge Gurfein, on a temporary restraining order, my answer would have been I expect not, I trust the people at the Times. I am fairly certain by now, Mr. Justice, after all of this time, having read the submissions of the Government, although I was hit with another one this morning, not a separate submission, but an explication of earlier ones that I have not had a chance to glance at yet. This literature, like some scholarly literature, tends to get ahead of us. Having read the submissions of the Government, I am flatly persuaded that there is nothing in there that would

meet my standards for a statute or independent Executive action, because if there were, it surely should have turned up by now. It cannot be after I gather the Solicitor General had the same experience yesterday afternoon that I saw Judge Gurfein having. Please show me. Now, which are the three, which are the five, which are the ten? Which is the most important of these? All that one ever got, all that I have ever heard have been statements of the feared event in terms of effect on diplomatic relations. If it is a military matter, then it was in terms of the addition of a possible cause to a train of causal factors, to a train of events that is well on the rails as is, and propelled by sufficient other facts. That sort of statement is the only thing we have heard, and I would submit that that does not meet any possible First Amendment standard. It does not meet it either in the statement of the seriousness of the event that is feared, or what is more important and more obvious in this case, in the drawing of the link between the act of publication as the cause of that event and the event that is feared. That link is always, I suggest, speculative, full of surmises, and a chain of causation that after its first one or two links gets involved with other causes operating in the same area, so that what finally causes the ultimate event becomes impossible to say which the effective cause was. The standard I would propose under the First Amendment would not be satisfied by such things.

Q Your standard is that it has to be an extremely grave event to the nation and it has to be directly proximately caused by the publication.

A That is exactly correct.

Q I gather then that your basic argument with the statutory or regulatory definition of Top Secret is with the word "could", because that definition says "unauthorized disclosure of which could result in" and so forth.

A Yes, I was addressing myself only to the events.

Q You would insist that it would probably result?

A I would insist that for purposes certainly of any action in the President's inherent power, which is the case before us.

Q Mr. Bickel, it is understandably and inevitably true that in a case like this, particularly when so many of the facts are under seal, it is necessary to speak in abstract terms, but let me give you a hypothetical case. Let us assume that when the members of the Court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense had been that they were nineteen years old and had low draft numbers. What should we do?

A Mr. Justice, I wish there were a statute that covered it.

Q Well, there is not. We agree, or you submit, and I am asking in this case what should we do.

A I am addressing a case of which I am as confident as I can be of anything that your Honor will not find that when you get back to your chambers. It is a hard case. I think it would make bad separation of powers law. But it is almost impossible to resist the inclination not to let the information be published, of course.

Q As you know, and I am sure you do know, the concern that this Court has term after term with people who have been convicted and sentenced to death, convicted of extremely serious crimes in capital cases, and I am posing you a case where the disclosure of something in these files would result in the deaths of people who are guilty of nothing.

A You are posing me a case, of course, Mr. Justice, in which that element of my attempted definition which refers to the chain of causation --

Q I suppose in a great big global picture this is not a national threat. There are at least 25 Americans killed in Vietnam every week these days.

A No, sir, but I meant it is a case in which the chain of causation between the act of publication and the feared event, the death of these 100 young men, is obvious,

direct, immediate.

Q That is what I am assuming in my hypothetical case.

A I would only say as to that that it is a case in which in the absence of a statute I suppose most of us would say --

Q You would say the Constitution requires that it be published, and that these men die, is that it?

A No, I am afraid that my inclinations to humanity overcome the somewhat more abstract devotion to the First Amendment in a case of that sort. I would wish that Congress took a look to the seldom used and not in very good shape Espionage Acts, and cleaned them up some so that we could have statutes that are clearly applicable, within vagueness rules, and whatnot, so that we do not have to rely on Presidential powers. But the burden of the question is do I assume that the event has to be of cosmic nature.

Q That is the question.

A No, sir. The examples given by Chief Justice Hughes himself are not. A troop ship is in a sense that 100 men o r the location of a platoon is in a sense that 100 men. I don't assume that. I do honestly think that that hard case would make very bed separation of powers law.

Q Let me alter the illustration a little bit in the hypothetical case. Suppose the information was sufficient

that Judges could be satisfied that the disclosure of the link the identity of a person engaged in delicate negotiations having to do with the possible release of prisoners of war, that the disclosure of this would delay the release of those prisoners for a substantial period of time. I am posing that so that it is not immediate. Is that or is that not in your view a matter that should stop the publication and therefore avoid the delay in the release of the prisoners.

A On that question, which is of course a good deal nearer to what is bruited about, anyway, in the record of this case, I can only say that unless -- which I cannot imagine can be possible -- the link of causation is made direct and immediate, even though the event might be somewhat distant, but unless it can be demonstrated that it is really true if you publish this, that will happen, or there is a high probability, rather than as is typical of those events, there are seventeen causes feeding into them. Any one of those other than the publication is entirely capable of being the single effective cause, and the real argument is, well, you add publication to that, and it makes it a little more difficult. I think, Mr. Justice, that is a risk that the First Amendment signifies that this society is willing to take. That is part of the risk of freedom that I would certainly take.

Q I get a feeling from what you have said, although you have not addressed yourself directly to it, that

you do not weigh heavily or think that the courts should weigh heavily the impairment of sources of information, either diplomatic or military intelligence sources. I get the impression that you would not consider that enough to warrant an injunction.

A In the circumstances of this case, Mr. Justice, I think, or I am perfectly clear in my mind that the President, without statutory authority, no statutory basis, goes into court, asks an injunction on that basis, that if Youngstown Sheet and Tube Company v. Sawyer means anything, he does not get it. Under a statute, we don't face it in this case, and I don't really know. I would have to face that if I saw it. If I saw the statute, if I saw how definite it was --

Q Why would the statute make a difference, because the First Amendment provides that Congress shall make no law abridging freedom of the press. Do you read that to mean that Congress could make some laws abridging freedom of the press?

A No, sir. Only in that I have conceded, for purposes of this argument, that some limitations, some impairment of the absoluteness of that prohibition is possible, and I argue that, whatever that may be, it is surely at its very least when the President acts without statutory authority because that inserts into it, as well --

Q That is a very strange argument for the

Times to be making. The Congress can make all this illegal by passing laws.

A I did not really argue that, Mr. Justice.

Q That was the strong impression that was left in my mind.

A I replied to the Chief Justice on a case that arose without a statute, and tried to distinguish, because it i: is crucial for purposes of this case to distinguish between the authority which is here claimed of the President to act independently without a statute, and the possibly greater authority of the whole Government through the machinery of legislation to act in similar premises of which I concede nothing that I don't have to, Mr. Justice.

Q I have one question which is prompted by this exchange. Generally speaking there are, as I understand it, no statutes granting immunity to newspaper reporters from disclosing their sources, but there is a firm claim made by newspapers, by reporters, and there have been a number of cases on that. If I read the briefs and the accounts of those other cases in California and several others places, the claim of the newspaper is that the First Amendment protects them from revealing their source even to a grand jury in the investigation of criminal matters, because otherwise the newspapers' sources would dry up. That is generally the thesis of the press, is it not?

A There are some cases that are on the Court's docket, as you know, Mr. Justice, for next fall. One of them with which I am most familiar is the Caldwell case from California, in which there was a refusal to reveal sources upheld by the Court of Appeals for the Ninth Circuit, even to the point of not requiring an appearance before the Grand Jury. But the claim is very substantially qualified. That is to say, Caldwell holds -- one does not know how far that might be taken and perhaps some of the other cases will require the argument to take it somewhat farther, but Caldwell on its own holds that in circumstances where the Government, as indeed Attorney General Mitchell's regulations themselves provide, which were issued after the Caldwell case started, in cases where the Government has not shown a clear necessity for the evidence, has not shown that it has not been able to get it elsewhere, has not shown that it is inescapably central to the proof of whatever crime it is that the grand jury is investigating, that in those circumstances where the claim of confidential communications is made by the reporter, there is a sufficient First Amendment interest to protect that claim on the theory that if confidential sources dry up, and the theory runs they would dry up if there were no protection of confidentiality, there would be a diminished flow of news.

Q Yes, but the thing is that the newspapers and newspaper reports claim for themselves the right which this

argument now would deny to the Government.

A Mr. Justice, I know there is an appearance of unfairness or unevenness about it, but I think the answer that a reporter would make, and an answer that I find wholly persuasive, is that neither in this case nor in a case like Caldwell does the New York Times nor does the reporter claim somethingfor himself, but rather the claim is made in order to vindicate the First Amendment and those interests which that great document serves. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you. Mr. Glendon.

ORAL ARGUMENT BY WILLIAM R. GLENDON, ESQ.

ON BEHALF OF RESPONDENT

MR. GLENDON: Mr. Chief Justice, your Honors, General Griswold, Mr. Bickel, I think it might be helpful if I address my attention to the facts which lie behind these cases, or this case, the Washington Post case, as it comes before your Honors, because I think we have heard here a familiar plea, familiar to us who have been involved in this case over this last intense week, that some more time is needed while the First Amendment is suspended. We first faced this question, Judge Gesell did, some week ago, and after a hearing on the temporary restraining order, unconvinced by the generality and lack of specificity, he denied the temporary restraining order.

The Government, of course, aswas its right,

promptly went up to the Court of Appeals, and in an extraordinary late session -- everything has been late, I may say, in this case, late hours, anyway -- the Court of Appeals, two to one, Judges Robb and Robinson, granted a temporary restraining order to the Government to give them some time, and thus for the second time in two weeks, and the second time in two hundred years, the United States succeeded in obtaining a prior restraint against the press.

Now, the Court of Appeals stated in its order that it would send it back, send it to the District Court, and the District Court would try it to determine whether the granting of an injunction for the publication of the material would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as to justify the extraordinary relief that was asked, to wit, a prior restraint.

Q Before you proceed, Mr. Glendon, do you raise that as the proper test?

A I think that is the proper test, your Honor, yes. That is the test that we tried the case on, sir, and I think the implications of the words may require some development, and I am sure there will be arguments as to exactly what those words mean, but that is the test we tried the case on.

Q Then would you repeat the words so that I

will have them in mind?

A So prejudice the defense interests of the United States, or result in such irreparable injury to the United States as would justify restraining the publication.

Q Then that would not cover the simple deaths, say, of a hundred or two hundred young men.

A Your Honor, that is a hard case you put, obviously. I think we all have to measure this case in the light of what we have before us, and what we know we have before us.

Q We have a lot of things under seal that I for one have not seen. I have seen some of it, but I have not seen all of it.

A I am going to address myself to those, your Honor, and I am going to point out as best I can within the limits here, as did other courts, and the Government has not yet brought anything like that case to your Honors, nothing like that. What we have heard, your Honor, is much more in the nature of conjecture and surmise.

Q Can anyone know in any certain sense the consequences of disclosure of sources of information, for example, the upsetting of negotiations , if that were hypothetically true, in Paris or possible negotiations that we don't know anything about in the release of war prisoners, and that sort of thing? How does a government meet the

burden of proof in the sense that Judge Gesell laid it down? That does not bring any battleships to the outer limits of New York Harbor, or set off any missiles, but would you say that it is not a very grave matter?

A Your Honor, I think if we are to place possibilities or conjecture against suspension or abridgement of the First Amendment, the answer is obvious. The fact, the possibility, the conjecture or the hypothesis that diplomatic negotiations would be made more difficult or embarrassed does not justify, and this is what we have in this case, I think, and is all we have, does not justify suspending the First Amendment. Yet this is what has happened here. Conjecture can be piled upon surmise. Judge Gurfein used the words up in New York, and I am sure used it respectfully, but he said when there is a security breach, people get the jitters. I think maybe the Government has a case of the jitters here. But that, I submit, does not warrant the stopping the press on this matter, in the absence of a showing.

I would like to turn to that, because this matter, as I don't have to say, does not come undeveloped before your Honors. Two fine District Court judges, two fine Courts of Appeals have considered this, and in each I think it is fair to say even in the New York Case, the Government did not meet its burden. So it says to us, but one more time, just one more time. This is where I was a moment ago when I said that

Judge Robb and Judge Robinson agreed to give them a chance.

Now, we had a hearing in the District of Columbia, and I would like if I may to comment upon what the Government said, and it said it twice, about that hearing, because really your Honors are being asked to on a representation, and I know it is a sincere representation by General Griswold, but on a representation that if we are given some more time, maybe we can find something. Here is what the Government said in its brief, and it said it again yesterday. They said in New York the Government was not able to present to the Court all of the evidence relating to the impact of the disclosure of this material upon foreign relations and national defense that it was able to present to the District Court in the Washington Post case.

The Government was accorded the fullest hearing that it wanted. We started at the unusual hour of eight o'clock in the morning. The Government's case proceeded through the luncheon hour. We cross examined as we felt was necessary. The Court had plenty of time to consider the matter. He delivered, I think you will agree, whether you agree with his result, a finely reasoned opinion, so there was no rush and no pressure. Then the matter went up to the Court of Appeals, and the Court of Appeals had a session of some three hours the next day. I might say, too, and I think this is perhaps important, there has been no restriction on the

Government's latitude, because they did have these in camera hearings which frankly were very difficult from our point of view to deal with, but they did have them, and they had an in camera hearing in the Court of Appeals. So to say now that we need more time I think does not measure up to the other side of the equation which you are being asked to consider, and that is to restrain two newspapers while others are publishing from giving their readers the news. It is, of course, their readers that we feel, and I think properly, whose rights are involved, too, their right to know. In talking about currency and immediacy, there is now involved in this country -- the country is engaged in an intense national debate. Things are happening this week on that score. These lawsuits undoubtedly precipitated the Executive to turn over these documents to the Congress.

Senator Fulbright, as I am sure you are all aware, has been trying for some two years, I understand, to get these documents. I think it is of interest here, because we are dealing with this case and these documents. I think classification is important here in your consideration of these cases, because these documents were classified Top Secret. They were classified Top Secret because some unknown individual who is not presented to the Court, whose subjective judgment could not be explored, despite the District Judge asking that he be brought in -- perhaps there was a good reason, we don't

know -- decided that they were Top Secret. They were all Top Secret because one was Top Secret. There had been no review of these documents except for one individual who said that he had been reviewing them for some two years for sensitivity, and the sensitivity arose from Senator Fulbright's frequent request to get these documents so that Congress could make the laws, and perhaps the public would be informed.

Q Does the record tell how long the Post has had these documents in its possession?

A It does not show, your Honor.

Q Does it show, if you know, how long the New York Times had the documents in their possession before the Post got them?

A The record in our case does not show that, your Honor, but I have read, and perhaps these gentlemen could answer better than I, I understood they had them in their possession for some months, a month or two.

Q I heard it mentioned somewhere three or four months.

A Yes. It is not in the record, but that is my best answer.

After this proceeding was brought, and I think again it is part of the significance of this proceeding, and during the course of it, although starting out as a point that these documents were Top Secret and none could be disclosed,

the Government has offered to review them, and perhaps some of them, they say, will be declassified, which I suppose is some sort of admission that the original classification and the original attitude towards them was wrong.

Q It could be that something classified in 1965 properly would no longer be subject to classification, or even 1969 or 1970.

A That is correct, your Honor, and furthermore some of these documents which were classified go back of course to 1945. The documents are that ancient. The document itself is entitled "The History". It is called a history, and from what I have seen of it, that is what it is.

The Court in our case had before it, and your Honors will see the evidence of which I am aware, and there apparently has been today additional references made to the documents, but it is a fact, and I think it is a significant fact that the Judge there asked the Government to show him a document. These extravagant claims were made, and I say this respectfully, but this has been a case of broad claims and narrow proof. Substantial claims have been made. If you accept them, they would be worried, but we are talking here about proof.

Q Was there an order at any time to produce all of the documents in the possession of either of the newspapers for examination?

A There was not, your Honor.

Q Was there a request for such an order?

A The Government made such a request, and because of the concern that the newspaper has as to the protection of its source, the documents we were advised would indicate the source, the documents that we had would indicate the source.

Q Who denied that request, the District Judge?

A Yes, and here is how he resolved it.

Q He let that override the Federal Rules of Civil Procedure on Discovery?

A Here is how he resolved it, your Honor. I think he did it very fairly. He said if you are not willing to produce the documents -- we do not have all of the documents -- but if you will not produce all of the documents because of your claim of First Amendment source protection, then I will assume that you have all of the documents, and therefore the Government can show me any document, and I will accept that as being in your possession for the purposes of the case. I think that under the circumstances that was a very fair way to do it. I, no more than any other lawyer, like to be in that position, but I have to respect my client's assertion, which is a substantial and I think a valid assertion that a newspaper is entitled to protect its source. So that is the way it was, your Honor.

Q Mr. Glendon, I recall an ancient doctrine of equity about people who come into equity with certain burdens on them. Doesn't it strike you as rather extraordinary that in a case which largely centers on protection of sources the newspapers are refusing to reveal documents on the grounds that they must refuse in order to protect their sources?

A Your Honor, I don't understand that that is the issue here.

Q I don't know about the issue. It is in this case. This is an equity proceeding, and there are certain standards about people coming into equity with clean hands, which is one of them, and prepared to do equity.

A We did not come into equity. The Government came into equity.

Q You were brought in.

A We were brought in kicking and screaming, I guess.

Q You are now in the position of making demands on the First Amendment. You say the newspaper has a right to protect its sources, but the Government does not.

A I see no conflict, your Honor. I see no conflict at all. We are in the position of asking that there not be a prior restraint in violation of the Constitution imposed on us, and that equity should not do that. We are also in the position of saying that under the First Amendment we are

entitled to protect our sources, and frankly I just do not find any conflict bearing on it.

The record shows, and I think this is important in your Honors' consideration, too, we are, as I said, talking about allegedly Top Secret documents, and the record shows that these nomers of Secret and Top Secret are honored perhaps in the breach in Washington, in the way the Government does business, and in the way it perhaps has to do business. But it is certainly true that there is massive over-classification of documents in Washington. We have in the record instances where one government official or another has quite clearly indicated that while everything on his desk may be classified in one fashion or another, in fact, perhaps one per cent or two per cent or five per cent of it really is classified. I think that is a realistic fact of life here.

We also have clearly in the record that the Government and the press who have some mutual perhaps antagonism is not quite the word, but they are naturally in opposite corners -- the press is trying to get as much news as it can and the Government, particularly where it may be embarrassing or where it may be overly concerned or may feel it is embarrasing or may, in Judge Gurfein's words, have the jitters, is trying to prevent that sometimes. On other occasions, the Government engages itself in leaks, because some official will feel that in the public interest it is well for the public to

know, and that overrides any particular judgment of security or classification.

The record, your Honors will find, is replete with instances where leaks of confidential, Secret and Top Secret material have been given to the press, or the press has found them out and published them, and of course nothing has happened. I think that is significant because here this is the sort of thing we feel we are talking about. As far as classification itself is concerned, and you will remember the documents that we are talking about are a mixed bag.

Q Mr. Glendon, wouldn't you be making the same argument if your client had stolen the papers?

A I don't think the source or how we obtained them features in this case.

Q Then it would not make any difference? The leak aspect has no relevance to the case, either.

A I think it is relevant as background.

Q Then it would be relevant if you stole them? Then you would be making the same argument if your client sent an agent into the Government and stole these papers, and then the Government attempted to restrain your publication of them.

A I do not think that the manner --

Q Then one is as irrelevant as the other?

Q It is not customary in the Government to leak

47 volumes at a time, is it?

A Your Honor, that is certainly true. It is certainly not customary. The size here is different, but I think you will find, your Honors, in the affadavit that we have attached, and the exhibits that we have attached to our affadavits, indicating secret stories, or allegedly secret stories, based on secret information, that there is probably more secret information there than you will find in these documents, if you examine them.

Q What basis did it have on this case?

A I think it is simply a matter of background, your Honor, an atmosphere to show that this is not an untoward or unknown situation. When we hear about how our foreign allies or our foreign friends will be shocked or appalled or anything else, it is simply not so. This happens. This is one of the facts of life.

I was starting to refer to a district judge telling the Government to show, which was what he was supposed to do, and that is what the Court of Appeals sent it back for, and he requested to show these documents, these top secret documents. They were in the courtroom, and the Government was invited and it has been invited to show -- let us look at what we are talking about, instead of dealing just with abstractions and conjectures. This was on the so-called "secret" transcript, and I am not going to avert to it, other than to say that the

one document that the Government produced in response to this invitation was set forth certain options with reference to the war, and I will not go any further than that, which I think any high school boy would have no difficulty in either putting together, himself, or readily understanding. All of them are on the public press.

Now this is the sort of proff that we have been faced with, and this is the will 'o the wisp that we have been chasing.

Q Then Mr. Glendon, I come back to you with the same inquiry I made of Professcr Bickel. At least it was close enought to persuade one judge of the Court of Appeals to disagree with what you have just said.

A Your Honor, that is true. I would like to revert to a fact that the other members of the Court of Appeals felt constrained, after they read that particular dissent to just yesterday issue an amendment to their opinion in which they reiterated that they disagreed with Judge Wilke, which to me was some indication of the strength and depth of their feeling. But your Honor is right. Judge Wilke felt, and I say to your Honor, respectfully, that is not based on the record. There is nothing in the record that I know of, and I think I know the record as far as it has been disclosed to me, and perhaps there was some new material this morning that was not, but as far as the record has been disclosed to me, there is

absolutely nothing to justify that statement, and I say the Court of Appeals felt strongly enough about it to issue another statement, to issue an amendment in which they specifically said they disagreed.

Q The issues in this case then really are factual issues, are they not? As I understand it, and this was my understanding initially -- I have not heard anything really to modify my understanding -- you agreed that an injunction could issue despite the First Amendment if it was shown by the Government that there was something here the disclosure of which would directly cause a grave, irreparable and immediate danger to the country. You agreed that an injunction could issue. You just simply say they have shown nothing of the kind. Isn't that right?

A They have shown nothing of that kind, or by any other measurable standard that I understand could possibly be involved in this case.

Q So it is a matter of fact.

A Take the Top Secret definition or anything else. But there is something behind this, too, which I think perhaps is a legal issue, and that is the scope of the review here.

Q The scope of the review of what?

A Review of the findings of the District --

Q Of fact, the findings of fact under Rule

52(a), isn't it?

A That is right.

Q These are factual issues.

A There is one legal question perhaps I will come to later, and that is the utility of an injunction here.

Q I take it then you do assert that there is not a single document in the 47 volumes which is now entitled to a Top Secret classification as defined in the Executive Order?

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A No.

Q You said as tested by the top secret standard, or any other, there has been no showing made?

A Any other standard, I am talking about. I think that the standard is reasonably clear here, but whether you use words such as "gravely prejudicial" to the United States, or "irreparably injure the defense" of the United States, whatever the standard may be.

Q Assume the standard, as made more specific by the tests of the top secret classification -- assume that was the standard. You would say that it has not been satisfied in this case?

A Clearly.

Q By any document?

A By anything the Government has brought forward.

Q By any document in these papers, on the specified list?

A Your honor, the Government came into court. They suspended the First Amendment; they stopped us from printing, and they said they were going to prove this. This is an injunction proceeding. Now it may be that the Government would feel that the courts should become the Defense Department's security officer, and that the courts should delve into this pile of paper, 47 volumes, on its own, from time to time,

whenever the Government is so moved, that the courts should work for them. I say, your Honor, in our system, as I understand it, when you bring a case, you are supposed to prove it, and when you come in claiming irreparable injury, particularly in this area of the First Amendment, you have a very, very heavy burden.

Q Do you agree that Judge Gesell applied the top secret definitions as his guide?

A Yes, I think that would appear so.

Q That is the way he measured the case?

A He looked at it that way, from his opinion. Yes, your Honor, as far as I can determine.

Q Would you accept that standard?

A Yes, I think that fits in clearly to what we are talking about under the doctrine of Near v. Minnesota. Yes, sir.

Q If the trial judge uses clearly erroneous standards, then the case is not simply controlled by facts, is it?

A I am sorry?

Q If a trial judge, in these circumstances, used a standard to judge the facts, and the standard was clearly erroneous, then this is not just a fact case, is it?

A I think, as I understand it, the "clearly erroneous" rule would apply to the facts, what facts he found.

Q But if he used the wrong standards, then it ceases to be just a fact case?

A I feel that he used the right standard. Your honors will determine that here, and I think that as far as the law is concerned, that that is substantially the standard. You can, perhaps, use alternative words, but the thing is, I think, is immediacy and currency, current injury to the United States, as this court -- has been so substantial, that it justifies what has been done here. It is not just that the United States has been injured. Judge Gesell made a point, which I think is a very good one, that I think perhaps the Government may forget that the interests of the United States are the people's interests. You are weighing here, and this is why I suppose we are here, but you are weighing here an abridgment of the First Amendment, the people's right to know. That may be an abstraction, but it is one that has made this country great for some 200 years. You are being asked to approve something that the Government has never done before. We were told by the Attorney General to stop publishing this news. We did not obey that order, and we were brought into court. We ended up being enjoined.

I do think that when you come to that balance, in face of the proof that exists here, that the decision is quite clear that the First Amendment must survive, because they have not made out a case.

Q Do you think that Judge Gurfein and Judge Gesell used the same standard of review?

A I think essentially they did, Mr. Justice.

Q They did not consider it a matter of review, did they? They considered it a matter of their original findings.

A Yes.

Q They were not reviewing any classification?

A No, they were not reviewing. They were making an original determination. Under the circumstances and the proof before them, it was not the kind of irreparable injury --

Q It was a de novo hearing on whether or not the publication would --

A Yes.

Q It was not reviewing any classification by the Executive Department, was it? They did not consider that that was what they were doing?

A No, that is featured in the evidence, your Honor, as to how the classification got put on there. That, of course, is --

Q That is basically irrelevant, is it not?

A No. Because the Government says, and you must listen, they say, it is top secret, and that is it.

Q No, I have not heard the Solicitor General say that here today at all.

A That is my understanding of their whole --

Q I asked him that question, and he said that there were those in the Government who would like to make that argument, but he was not pressing it.

A Well, it is the argument that we have heard along. You see, having classified it top secret, they move from there to show no proof.

Q No, the Government has not, in this Court, made the argument that simply because it is top secret, they are entitled to an injunction. They have not made that argument.

A I was trying to say that, having classified the document top secret, that is the premise of their case. They have not yet come into this Court and proven they are top secret, and yet they say that we cannot publish them because they are top secret.

Q I have not heard that argument made, with all respect.

Q As I understand the argument of both of the lawyers, it seems to me that they have argued it on the premise that the First Amendment, freedom of speech, can be abridged by Congress if it desires to do so.

A I did not make that argument.

Q I understood you to. I did not understand you to make any other argument, or your colleague. You were talking about standards. I am not talking about standards.

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Under the First Amendment, Congress shall make no law abridging freedom of the press. I understand you to say that Congress can make a law.

A No, your Honor, I do not say that.

Q You do not say that?

A Never. I do not say that. No, sir. I am sorry, your Honor. I say that we stand squarely and exclusively on the First Amendment.

Q Thank you, Mr. Glendon.

MR. CHIEF JUSTICE BURGER: Mr. General, you have about 12 minutes or thereabouts left.

ORAL ARGUMENT IN REBUTTAL BY

THE SOLICITOR GENERAL

THE SOLICITOR GENERAL: Mr. Chief Justice, and may it please the Court, I should like to make it plain that we are not at all concerned with past events in this case. We are not interested in protecting anybody. That should be obvious enough simply from the date of the materials which are involved. We are concerned with the present and future impact of the publication of some of this material. When I say "future," I do not mean in the 21st Century, but I also do not mean to limit it to tomorrow, because in this area, events of great consequence to the United States happen over periods of six months, a year, perhaps two or three years.

What we are concerned with is the impact on the

present and the reasonably near future of the publication of these materials.

Now it is perfectly true that prior restraint cases with respect to the press are rare, or conceivably non-existent. I am not ready to concede that they are non-existent, but I cannot point to one now. I have not had time to make a really thorough research. I did point out that there are prior restraint cases as recently as last term, with respect to freedom of speech, which is the First Amendment in exactly the same terms as the freedom of the press.

There is the Associated Press Case, which comes about as close to being a prior restraint on the press case as you can get without perhaps being technically a prior restraint. The reason, of course, that there are not prior restraint cases with respect to the press is that ordinarily, you do not find out about it until it has been published.

Reference has been made to the fact that, oh, there are leaks all the time. There are a great many leaks, but I would point out that there is also a very wide respect of the security classification system and its potentiality on the security of the United States. Senator Fulbright did not publish this material. He requested of the Secretary of Defense what use he could make of it, and I have seen on the television other members of Congress who said that they had some of the material but felt it not appropriate to use it, because it

was classified top secret.

Q Mr. Solicitor General, what particularly worries me at this point is that I assume that if there are studies not now being made, in the future there will be studies made about Cambodia, Laos, you name it. If you prevail in this case, then in any instance that anybody comes by any of those studies, a temporary restraining order will automatically be issued. Am I correct?

A It is hard for me to answer the question in such broad terms. I think that if properly classified materials are improperly acquired, and that it can be shown that they do have an immediate or current impact on the security of the United States, that there ought to be an injunction.

I think it is relevant, at this point --

Q Wouldn't we then -- the Federal courts -- be a censorship board, as to whether this does --

A That is a pejorative way to put it, Mr. Justice. I do not know what the alternative is.

Q The First Amendment might be.

A Yes, Mr. Justice, and we are, of course, fully supporting the First Amendment. We do not claim or suggest any exception to the First Amendment. We do not agree with Mr. Glendon when he says that we have set aside the first amendment, or that Judge Gesell or the two coursts of appeal in this case, have set aside the [illegible] by issuing the

injunction, which they have. The problem in this case is the construction of the First Amendment.

Now Mr. Justice, your construction of that is well-known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that "no law" does not mean "no law," and I would seek to persuade the Court that that is true.

As Chief Justice Marshall said, so long ago, it is a Constitution we are interpreting, and all we ask for here is the construction of the Constitution, in the light of the fact that it is a part of the Constitution, and there are other parts of the Constitution that grant powers and responsibilities to the Executive, and that the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.

It has been suggested that the Government moved very slowly in this matter. The Times started publishing on Sunday. Well, actually, it was on Monday, which is pretty fast as the Government operates, in terms of the consultations that have to be made, the policy decisions that have to be made. On Monday, the Attorney General sent a telegram to the New York Times, asking them to stop and to return the documents. The New York Times refused. On Tuesday, the United States started this suit.

It suggested that there have been full hearings, everything has been carefully and thoroughly considered, but there is clear evidence of haste in both records. This is apparent from the times which have been stated, and I would like to point out that even now, at this point, the hearing is on the question whether a preliminary injunction should be granted. The only hearings that have been held in any courts are as to whether a preliminary injunction should be granted. They were no intended to be full, plenary trials, but merely sufficient to show the probability of possible success. There simply was not time to prepare a comprehensive listing or a comprehensive array of expert witnesses. The Government relied on the fact that the District judge would examine the study, and on the record, he concededly refused to do so. This was at the heart of the decision of the Court of Appeals for the Second Circuit, in its decision to remand for a full week of hearings on the merits.

Q I am not sure that I understand what you said. The Court of Appeals relied on the assumption that the District judge would examine the evidence, and the District judge refused to do so?

A No. That there had not been a full hearing with respect to this.

Q Which case are we talking about now?

A I am talking about the New York Times Case

in the Second Circuit. The Second Circuit sent it back to the judge for a hearing --

Q As I understood it, there was no claim that Judge Gurfein did not consider everything that was then before him, but that new matter was brought to the attention of the Court of Appeals for the Second Circuit?

A On the contrary, Mr. Justice, the full 47 volumes were offered to Judge Gurfein, and he refused to examine them.

Q He did not. He did not refuse to, he failed to.

A No, Mr. Justice, he said that he would not examine them.

Q He said that he did not have time to, but he did ask the Government to please bring forward the worst.

A No, I think that really came at a later stage.

Q Then a new matter was brought to the attention of the Second Circuit --

A Brought to the attention of the Second Circuit Court of Appeals, and they sent it back not for an instant hearing, but for one limited, and properly so.

Everything about this case has been frantic. That seems to me to be most unfortunate. I would like to point out that the New York Times --

Q No. The reason is, of course, as you know, Mr. Solicitor General, that unless the Constitutional law, as it now exists, is changed, a prior restraint of publication by a newspaper is presumptively unconstitutional.

A It is a very serious matter. There is no doubt about it, and so is the security of the United States a very serious matter. We have two important constitutional objectives here which have to be weighed and balanced, and made as harmonious as they can be. But it is well known that the Times had this material for three months. It is only after the Times has had an opportunity to digest it, and it took them three months to digest it, that it suddenly becomes necessary to be frantic about it. It was not so terribly important to get it out and get it to the public while the Times was working over it, but after that, now the Times finds it extremely difficult to accept an opportunity for the courts to have an adequate chance first, to resolve the extremely difficult question of the proper construction of the First Amendment in this situation, and I concede that is an extremely difficult question. If the proper construction is the one which Mr. Justice Black has taken for a long time and is well known, of course, there is nothing more to be said. But our contention is that that is not the proper construction.

Q And the counsel on the other side do not disagreewith you, Mr. Solicitor General. They do not take

Mr. Justice Black's position, at least for purposes of argument in this case.

A Very reluctantly they were pushed into conceding that there might be some cases where there could be those suggested --

Q Mr. Glendon said that he thought Judge Gesell's standard was the correct one. Mr. Nichols said that he was making no claim that there is an absolute prohibition of a prior restraint.

A Frankly, I do not think it is much of a limitation to say that it can be enjoined if it will result in a break of diplomatic relations or a war tomorrow. As I have already said, we think the standard used by Judge Gesell is wrong.

Q Do you think they differ from the standards of Judge Gurfein?

A I am sorry?

Q I said, do you think that the standards that Judge Gesell used were different from those which Judge Gurfein used?

A I am not sure what standard Judge Gurfein used, because much of this material Judge Gurfein did not have specifically called to his attention. The standard which Judge Gesell used is to say that unless it comes within that illustrative language, and the definition of top secret, that

it does not meet the requirement, and I contend that that is wrong. I believe, and have sought to show in the closed brief which is filed here, that there are materials, or there are items in this material which will affect the problem of the termination of the war in Vietnam, which will affect negotiations such as the SALT Talks, which affect the security of the United States vitally over a long period, and which will affect the problem of the return of prisoners of war. I suggest that however it is formulated, the standard ought to be one which will make it possible to prevent the publication of materials which will have those consequences.

Q I still am not clear as to the basis for your view that the case, the District of Columbia case, should be remanded. I got it originally, from your papers, that you thought that it should be remanded in order to have the fuller hearing that the Court of Appeals may have been lacking before Judge Gurfein. This morning you said that you thought it should be remanded because the standard used by Judge Gesell was erroneous.

A Essentially, in the Court of Appeals, there has been a hearing, though it lasted only one long day. However, our basic claim there would be that it ought to be remanded for hearing, and I would be content to have it for hearing on this record, but for determination on the right standard. In the Second Circuit case, from Judge Gurfein,

there has not yet been the kind of hearing that we think there ought to be. We think there ought to be such a hearing, and that Judge Gurfein should have the benefit of this Court's views as to what the proper standard is, in coming to his conclusion, as a result of that hearing.

Q I understand, also, that you do claim that there are materials in this record which do satisfy those categories of top secret?

A Yes, Mr. Justice. I do not think that is essential, but I think there are some.

Q I know, but if Judge Gesell used those standards, the top secret standard, for judgment, he was wrong in saying that none of the material --

A Yes, Mr. Justice, because there is reference in there, among other things, to communications, and I think that is established in this record.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

The case is submitted.

(Whereupon, at 1:13 o'clock p.m. the argument in the above-entitled matter was concluded.)