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Post Upheld by Appeals Court

Publications Ban Extended 2 Days

By Sanford J. Ungar
Washington Post Staff Writer

The U.S. Court of Appeals here ruled last night that The Washington Post may resume publication of its series of articles based on a secret Pentagon study of the origins of the Vietnam war. But it extended a temporary restraining order against publication until 6 p.m. Friday to give the government time for an appeal to the Supreme Court.

The Justice Department said last night, however, that it had not yet decided whether to appeal.

In a 7-to-2 decision announced at 8:05 p.m., the appellate court fully upheld a ruling Monday by U.S. District Court Judge Gerhard A. Gessell that the government had failed to prove that the Post articles would be dangerous to national security.

A brief five-paragraph majority opinion, signed only "by the court," said that the seven judges' decision had been "fortified by the consideration that the massive character of the 'leak' which has occurred, and the disclosures already made by several newspapers, raise substantial doubt that effective relief of the kind sought by the government can be provided by the judiciary."

Within hours of the appeals court order, the Los Angeles Times and the 11 members of the Knight newspaper chain had joined The Post, The New York Times, The Boston Globe and the Chicago Sun-Times in publishing articles drawn in full or in part from the Pentagon study.

In its ruling, the appeals court observed that "the vitality of the principle, that any prior restraint on publication comes into court under a heavy presumption against its constitutional validity, was recognized by the Supreme Court of the United States as recently as May 17."

The judges referred to an opinion last month by Chief Justice Warren E. Burger, setting aside an injunction prohibiting an interracial group in Chicago from passing out leaflets which charged a real-estate broker with "block-busting" sales tactics.

Katharine Graham, president of The Washington Post, said of the appellate court decision:

"We are naturally delighted. The court's opinion sustains the great American tradition of freedom of the press. And it vindicates our decision to publish this historic material."

The appeals court, referring to the hearing before Gesell, stated its reasoning for denying the injunction against the Post this way:

"The government's affidavits and testimony, presented [illegible] several of the documents. The district court found either that disclosure of these specific documents would not be harmful or that any harm resulting from disclosure would be insufficient to override First Amendment interests. Having examined the records made before the district court, we agree with its conclusion."

"In our opinion," the court continued, "the government's proof, judged by the standard suggested in Near v. Minnesota . . . does not justify an injunction."

The Near case, decided by the Supreme Court in 1931, established a stiff standard for the government in cases where it seeks to obtain prior restraint on publication.

Two judges, dissenting in part from the majority opinion, said they would have preferred sending the Post case back to Judge Gesell for "a more precise ruling."

That suggestion paralleled the decision in a New York case involving a similar series of articles in The New York Times. A five-judge majorty of the Second U. S. Circuit Court of Appeals ordered U. S. District Court Judge Murray I. Gurfein to hold new hearings on the issue of national security.

One of the dissenters on the Washington court, Judge Malcolm R. Wilkey, said that "on careful detailed study of the affadavits in evidence," he had found examples of documents, which, if published, "could clearly result in great harm to the nation."

Wilkey defined that "harm" as "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 [illegible] would be belligerents."

In his own one-page dissent, Judge George E. MacKinnon complained that "we should not entirely abdicate our responsibility to protect the security of our nation's military and diplomatic activities even though the ability of any court to act effectively is greatly impaired by the present climate of disclosure."

MacKinnon also revealed, for the first time, that "by agreement of the parties some of the documents [in the Pentagon study] will be protected."

At no time during open court hearings in the case did The Post agree not to print any material in the documents the newspaper possesses.

But Post Executive Editor Benjamin C. Bradlee last night explained the "agreement" mentioned by Judge MacKinnon as follows:

"Judge MacKinnon's opinion mentioned an agreement of the parties that some of the documents will be protected. This refers to a stipulation at the [secret] hearing before the Court of Appeals that our counsel felt was essential to avoid needless delay in the court's consideration of the matter. The items in question actually are very limited quotations from two documents which The Post did not deem to be of reportorial significance. The stipulation was made on the express condition that it was without prejudice to The Post's position on the issues of the case."

Bradlee refused to identify or describe the "very limited quotations," on the basis of the court's order not to reveal what had happened during the secret session.

A spokesman for the Justice Department said last night, however, that "there is no agreement" concerning any part of the 47-volume Pentagon study entitled "History

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