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Court Order Halts Post's Viet Articles

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The Washington Post today suspended publication of a series of articles based on a secret Pentagon study of the origins of the Vietnam war after a federal appeals court issued a temporary restraining order at 1:20 a.m. Saturday pending a full hearing Monday on whether the articles could endanger national security.

Attorneys for The Post said last night that they would not seek reversal of the U.S. Court of Appeals decision from Chief Justice Warren E. Burger "at this time."

Instead, they said they would prepare testimony for the hearing on the government's request for an injunction against the Post, which U.S. District Court Judge Gerhard A. Gesell scheduled for 8 a.m. Monday.

Gesell, who had ruled Friday night that The Post could continue with its series, is working under an order by the U.S. Court of Appeals for the District of Columbia that he conclude his hearing and make a decision by 5 p.m. Monday.

The Post decision not to appeal to the Supreme Court was made only after the newspaper learned yesterday that a judge on the Second Circuit Court of Appeals in New York had delayed until noon Monday a decision on whether a similar series of articles can appear in The New York Times.

The Justice Department has contended that the articles in both newspapers—based on a 47-volume study entitled "History of U.S. Decision-Making Process on Vietnam Policy"—could result in "irreparable injury" to the defense interests of the United States.

But both newspapers have argued against that contention and claim that the constitutional right of freedom of the press is at stake.

Gesell, after summoning lawyers for the government and The Post to his chambers yesterday morning to arrange the Monday hearing, said he would spend today studying the majority and dissenting opinions of the appeals court.

Writing for himself and Judge Roger Robb, Appellate Judge Spottswood W. Robinson II said in the opinion restraining The Post that "freedom of the press, as important as it is, is not boundless."

He asserted that the government should have an opportunity to prove its allegations that the series of articles in The Post would endanger national security.

In a sharply worded dissent, Judge J. Skelly Wright insisted that "neither obscenity nor the overthrow of the government" is at stake in the Post series of articles, which he said appears to be based primarily on material of a historical nature.

"This is a sad day for America," Wright wrote at the start of his attack on his colleagues' decision in the government's favor.

He complained that the Justice Department allegations about the Post articles had been "vague" and insubstantial.

The three appeals judges debated for three hours over their decision in the Post case early Saturday morning, although attorney Roger Clark, representing the newspaper, had warned them that the presses would be rolling with editions containing the second installment in the Post series moments after their 35-minute hearing concluded.

By the time the order restraining The Post had been issued, a considerable number of copies of Saturday's newspaper had already been printed.

The second installment of the Vietnam series had also been distributed to the 325 clients of the Los Angles Times/Washington Post News Service.

Apprised of those facts, the appeals court clarified its decision to say that its original order did not prevent publication of the second installment so long as it was not changed from the version which appeared in the early editions of Saturday's Post.

Its initial order at 1:20 a.m., asserting that The Post had obtained its copy of the Pentagon study "without lawful authority," directed Gesell to determine whether publication of material from the document "would so prejudice the defense interests of the United States or result in such irreparable injury (as to) justify restraining the publication."

Legal authorities interpreted that directive as meaning that Gesell would have to weigh the nature of the material in the Pentagon study, as did U.S. District Court Judge Murray I. Gurfein in New York in the Times case.

It was not immediately clear, however, whether Gesell would hold a closed hearing in the Post case. He has repeatedly expressed from the bench his distaste for closed court proceedings except under the most extraordinary circumstances.

At issue before Gesell and the appeals court here is the question of whether the national espionage act provides for prior restraints on publication of sensitive material.

"We think the [Internal Security Act of 1950, which includes the espionage law] permits an injunction against publication of material vitally affecting the national security," Robinson said in the majority opinion.

"We are aware that the government [in its arguments] has not set forth particular elements of prejudice to the national defense," the majority said, "and that the document in qusetion covered a period which ended over four years ago."

"But we also recognize," Robinson added, "that the government may not have been able to make specific allegations without knowing precisely what parts of the document are held by" The Post.

Wright acknowledged that prior restraint might be permissible in "very exceptional" situations, but insisted they must be "very convincingly established by the party seeking an injunction."

He accused his colleagues of acting "quite literally in the dark" and attacked the government for using "the sweep of a rubber stamp labelled 'top secret' to abridge freedom of the press."

"As if the long and sordid war in Southeast Asia had not already done enough harm to our people," Wright said, "it now is used to cut out the heart of our free institutions and system of government. I decline to follow my colleagues down this road."

Wright was named to the appeals court by President Kennedy in 1962, and Robinson was elevated to the appellate bench from U.S. District Court here by President Johnson in 1966.

Robb was named to the court by President Nixon in 1969.

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