Post's Brief Against Enjoining Series on Vietnam

Following is the text of the brief filed by The Washington Post Co. before the U.S. Court of Appeals for the District of Columbia.

INTRODUCTION

This is a singular case. For the first time in this nation's history the Federal Government has sought to impose a prior restraint upon a publication by the press. Two Federal District Courts have now rebuffed the Government's effort to impose its will upon the press. Both courts have found that the possibilities of harm envisioned by the Government from publication cannot outweigh the First Amendment right, which is premised on the overriding right of the people to be informed. Twice the Government has been told on essentially the same facts that its claims of irreparable injury are insubstantial compared with the real injury which would result to the people from the prior restraint sought. In seeking to censor the press the Government has forgotten that in the words of Judge Gesell (Tr. 269) "the interests of the Government are inseparable from the public interest. These are one and the same and the public interest makes an insistent plea for publication." The problems and difficulties — real or imagined—which may accrue to the Government from these publications afford no warrant for their unprecedented demand to shackle the press.

FACTS

Ten days ago The New York Times began publishing a series of articles allegedly based upon papers from a document entitled "History of U.S. Decision Making Process on Vietnam Policy" covering the period of 1945-1967, which was prepared in 1967-68 at the direction of then Secretary of Defense Robert McNamara.

After the Times had published three installments in the series, the Government filed suit and obtained a temporary restraining order on June 15 prohibiting further publication of the series. On June 18 and 19, The Washington Post published two articles based on what appeared to be similar documents. This action ensued.

The Government alleges that the study consists of 47 volumes comprising approximately 7000 pages. The documents in the study range in age from 1945 to early 1968 and encompass analyses and commentary with supporting data consisting of cables, memoranda and other documents including newspaper clippings and speeches by former public officials. As stated by Judge Gesell, the documents include "material in the public domain and other material that was Top Secret when witten long ago, but not clearly shown to be such at the present time." (Tr. 267).

The documents in the possession of the Post, which are described in detail in the inventory prepared by the Post (Defendants' Exhibit 1), are substantially fewer in number (approximately 4415 pages), do not have the same pagination, and may be different in substance. (The Government has stated its belief that the documents in the possession of the Post may be from a working draft of the study.) Also, The Washington Post does not have a 1965 document entitled "Command and Control Study of the Tonkin Gulf Incident" prepared by the Defense Department's Weapon System Evaulation Group involved in the New York case.

The entire 47 volume series is classified "Top Secret-Sensitive." The classification "Top Secret" (there apparently is no "Top Secret-Sensitive") is defined by DOD as follows:

> TOP SECRET—The highest level of classification,
> TOP SECRET, shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation; 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 development vital to the national defense. The use of the TOP SECRET classification shall be severely limited to information or material which requires the utmost protection. (See Part 1, Appendix A.)

There is evidence with respect to the classification process that:

1. The overall classification of the series was necessarily fixed by the highest classification of any source material on which it is based. (Tr. 16)

2. The originator of a document generally determines its classification which is not changed unless the classifier establishes conditions for automatic downgrading and declassification. (Tr. 30) Mr. M[a]cClain, a Security Classification Officer with prime responsibility for policing declassification, acknowledged that he got few requests for declassification of Top Secret documents. (Tr. 30) Similarly, Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs, made few recommendations that documents be declassified. (Tr. 55)

3. No attempt was made to segregate classified documents in the study from non-classified documents in order to avoid over-classification (Tr. 16-17), nor had the study in issue been reviewed for purposes of downgrading and declassification. (TR 30-32) Mr. Doolin, however, had been reviewing the document for some time because of requests of access thereto by Senator Fullbright, which Mr. Doolin recommended against. (Tr. 35-36)

In addition to evidence as to the classification process with respect to the study, the Government introduced evidence that there were 15 copies of the study prepared, of which two went to former Secretaries McNamara and Clifford, but none to the White House. (Lofdahl Aff. Pl. Ex. 1)

Finally, the Government submitted affidavits *in camera* by Doolin, William B. Macomber, Deputy Under Secretary for Administration of the Department of State, both of whom testified on cross-examination, and by Lt. General Melvin Zais, Director of the Operations Directorate, Joint [Chief of] Staff, and Admiral Gayler of the National Security Agency.

The appellees submitted eleven Affidavits from reporters and editors of The Washington Post which primarily attested to the following matters.

First, that there is excessive overclassification by the Government of information in the defense and foreign policy area. Illustrative of this point is paragraph 15 of the Affidavit of Murrey Marder (Ds Ex. 6),* relating to his discussions with McGeorge Bundy, then National Security Adviser to the President, in which they both concluded that at best five per cent of the highly classified documents with which Mr. Bundy regularly dealt actually warranted being treated as "secrets."

Second, that there is extensive dissemination of classified information by Government officials to the press and resulting publication of reports based thereon. The Affidavits and the stories attached thereto of Bernard D. Nossiter (Ds Ex. 9), Mar[i]lyn Berger (Ds Ex. 10), and Ben Bagdikian (Ds Ex. 7) are illustrative of this point, as are the following two examples from the Affidavits of Chalmers Roberts (Ds Ex. 3) and Benjamin Bradlee (Ds Ex. 4). At pages 3 and 4 of his Affidavit Mr. Roberts states:

> "On December 20, 1957, The Washington Post ran on page one an article I wrote (attached) with an eight column headline reading" 'Secret Report Sees U.S. in Grave Peril' and with the subhead saying: 'Enormous Arms Outlay Is Held Vital to Survival.' The first paragraph of the story read: 'The still top-secret Gaither Report portrays a United States in the gravest danger in its history.'
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> "President Eisenhower to whom the Gaither Report had been sent, wrote in retirement in 1965 in the second volume of his memoirs, 'Waging Peace,' (p. 221): 'When my associates and I considered and discussed the report, I remarked, 'It will be interesting to find out how long it can be kept secret.' A roughly accurate account soon appeared in a local publication.' Eisenhower proceeded in his memoirs, to make public for the first time additional data from the Gaither Report. To the best of my knowledge this highly classified document to this day remains classified."

At page 4 of his Affidavit Mr. Bradlee stated:

> "For example, I was present in the office of a Congressman in 1958 or 1959 when he gave me a 'secret' State Department document about foreign aid. Before he handed the document over he took a pair of scissors from his desk and carefully removed the 'secret' label from each page. His stated purpose for giving me this document was to kill the foreign aid bill."

Third, that the extensive classified information received by the press has generally been handled in a responsible fashion. Illustrative is paragraph 5 of the Affidavit of Ben H. Bagdikian (Ds Ex. 7) where it is pointed out that The Washington Post knew that U-2 spy planes were flying over Russia some months before Gary Powers' plane was shot down but did not publish this information.

Fourth, because information in the area of national defense and foreign policy is so extensively classified, it is necessary for a free press —charged with the obligation to insure that the Government's version of events competes for public acceptance with versions developed by independent journalism—to secure independent sources of classified information in this area. This point is aptly stated in the Affidavit of Murrey Marder (Ds Ex. 6) at page 3:

> "But a free press, if it is to remain free, cannot be bound by what the government disseminates in either classified or non-classified information; it must be free to test the validity of both by exercising its own resources to obtain contradictory versions of both types of information."

This point is also strikingly illustrated in the discussion of Mr. Marder's article on American intervention in the Dominican Republic, which discussion appears at pages 2 and 3 of his Affidavit (Ds Ex. 6).

Fifth, the widespread knowledge of authorities in the field with respect to the true history of America's involvement in Vietnam, and the resulting fact that the information contained in the materials here in question appears to be largely confirmatory of material previously published. This is pointed out in the Affidavits of both Chalmers M. Roberts (Ds Ex. 3 at p. 7) and Murrey Marder (Ds Ex. 6, at pp. 3 and 4) who state that the portions of the materials in question that they have reviewed appear fully confirmatory of knowledge that they have previously had and to the extent new details are included these too fit within the framework of their previous understanding.

OPINIONS BELOW

A. Opinion of Judge Gesell.

Judge Gesell found that the study in question stretches back over a period well into the early 1940's and that it "includes material in the public domain and other material that was Top Secret when written long ago but not clearly shown to be such at the present time." And he determined that it was apparent from the "detailed affidavits" filed by the appellees that "officials make use of classified data on frequent occasions in dealing with the press and that this situatio is not unusual except as to the volume of papers involved."

He further found that "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, a compromise of intelligence operations, or a compromise of scientific and technological materials" as a result of the publication of this study.

Judge Gesell also found that "publication of the documents in the large" may interfere with diplomatic negotiations "not so much because of anything in the documents, themselves, but rather resulting 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." He then noted that "many of these governments have different systems than our own and can do this; and they censor."

In further considering what appears to be the thrust of the government claim of injury i.e. diplomatic relations, the Judge stated that "there has been some adverse reaction in certain foreign countries, the degree and significance of which cannot now be measured even by opinion testimony. No contemporary troop movements are involved, nor is there any compromising of our intelligence."

In considering the security classification of the subject documents, the Judge noted that there had been no effort "made by the Government to distinguish Top Secret and other material, to separate the two, or, indeed, to make any effort once the publication was completed, to determine the degree, the nature or extent of the sensitivity which still existed in 1968 or for that matter exists at the present time."

The Judge also noted in this regard the Government's statement that it was now "engaged in declassifying some of the material and requested time to complete this process with the thought that permission would then perhaps be given to The Post to publish what is ultimately declassified out of the whole." Considering the proof, he concluded that while the criteria of the Top Secret classification was clear "the Government has not presented, as it must on its burden, any showing that the documents at the present time and in the present context are Top Secret."

The Judge also pointed out that equity deals with "realities and not solely with abstract principles", and that the publications enjoined "concern an issue of paramount public importance, affecting many aspects of Government action and existing and future policy." And citing the need for an informed electorate, he stated that "the equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay."

Finally, referring again to the Government's principal argument, the Judge found that there was no way in which it could adjust the First Amendment "to accommodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

Thus, Judge Gesell found that there was no showing of an immediate grave threat to the national security justifying a prior restraint on publication, and therefore, the Government having failed to meet its burden, "the First Amendment remains supreme." Accordingly, he denied a preliminary injunction.

B. Opinion of Judge Gurfein.

Insofar as here pertinent, Judge Gurfein, who heard the New York Times case, stated: * *

> "This Court does not doubt the right of the Government to injunctive relief against a nowspaper that is about to public (sic) information or documents absolutely vital to current national security. But it does not find that to be the case here."

Referring to the *in camera* proceedings at which representatives of State, Defense and the Joint Chiefs of Staff testified, Judge Gurfein stated that this testimony "did not convince this Court that the publication of these historical documents would seriously breach the national security."

Judge Gurfein considered the consequences of a breach of security, pointing out:

> "It is true, of course, that any breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us."

but determined that

> "no cogent reasons were advanced as to why these documents, except in the general framework of embarrassment previously mentioned, would vitally affect the security of the nation. In the light of such a finding the inquiry must end."

Accordingly Judge Gurfein found there was no irreparable injury to the Government sufficient to justify injunctive relief.

In discussing the invasion of the constitutional rights here involved Judge Gurfein noted that prior restrain on publication is unconstitutional. Near v. Minnesota, 283 U.S. 697 (1931). Noting that the Free Press provision was not absolute, Judge Gurfein nonetheless held that:

> "Fortunately upon the facts adduced in this case there is no sharp clash such as might have appeared between the vital security interest of the Nation and the compelling Constitutional doctrine against prior restraint."

Returning again to the Government's claim of embarrassment from publication the Court stated:

> "If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach we must learn to live with it. The security of the Nation is not at the ramparts alone."

And in considering the Government's claims of danger to our security Judge Gurfein fittingly observed:

> "Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be [s]uffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know."

In this fashion, Judge Gurfein considered the same arguments based on substantially the same evidence as did the Court here, and arrived at the same result.

ARGUMENT

I. The Findings Of The District Court Must Be Sustained Unless They Are Shown To Be Clearly Erroneous.

It is important at the outset to frame the procedural posture in which appellant finds itself on this appeal. It is hornbook law that in any case—even a case in which no constitutional principles are at stake—a plaintiff may not obtain the extraordinary remedy of a preliminary injunction unless it can establish to the satisfaction of the Court, not only that it will probably succeed at the final hearing, but also that absent preliminary injunctive relief, it will suffer grave and irreparable injury. See, e.g., Industrial Bank of Washington v. Tobriner, 405 F. 2d 1321 (D.C. Cir. 1968); Young v. Motion Picture Association of America, Inc., 299 F. 2d 119 (D.C. Cir. 1962), cert. den. 370 U.S. 922 (1962).

Appellant has failed to satisfy either of those requirements in the Court below— just as it previously failed to satisfy those requirements in the New York District Court.

At this point, therefore, even if this were a non-constitutional case, appellant on this appeal would be required to meet substantially more demanding tests than those imposed on it in the court below.

In order to obtain reversal in this Court of a denial of a preliminary injunction, appellant would be required to show that the District Court had clearly abused its discretion (Young v. Motion Picture Association of America, Inc., supra; Cox v. Democratic Central Committee of District of Columbia, 200 F. 2d 356 (D.C. Cir. 1952); Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319 (2d Cir. 1969), cert. den. 394 U.S 999 (1969); and that the findings of fact below were "clearly erroneous." Rule 52(a), F. R. Civ. P., 5 Moore's Federal Practice 52.07 at 2732. See e.g., Cox v. Democratic Central Committee of District of Columbia, supra; Craggett v. Board of Education of Cleveland City Sch. 2d 941 (6th Cir. 1964). See, Dist., 338 F. 2d 941 (6th Cir. 1964). See, also, Liberty Lobby, Inc. v. Pearson, 390 F. 2d 489 (D.C. Cir. 1968) (Burger, J); United States v. Brown, 331 F. 2d 362 (10th Cir. 1964).

But this is not an ordinary case. It constitutes a precedent-shattering attempt by the Government to impose a prior restraint which would prohibit appellees from publishing material of the highest political importance, about the most critical issue facing this nation today. Where such First Amendment rights are involved, appellant bears a burden even greater than is normally the case. For in such a case, the balance is always weighted in favor of free expression, and this is especially true where the proposed infringement involves a prior restraint, Liberty Lobby, Inc. v. Pearson, supra.

II. The Government Was Required To Show An Immediate Grave Threat To National Security.

In formulating the issue to be tried on remand, this Court imposed upon the Government the burden of proving that publication of the classified material "would 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 thereof. . .See Near v. Minnesota, 283 U.S. 697, 715-16 (1931)" (Order dated June 19, 97) (Emphasis supplied). Clearly, a showing of some prejudice to the defense interests of the United States or some irreparable injury is insufficient. The prejudice must be so extraordinary and the irreparable injury so great as to justify this unprecedented infringement on First Amendment freedoms.

The majority opinion of this Court directing remand establishes beyond dispute the nature of the irreparable injury which the Government was required to show below. That opinion pointed out that, although Near v. Minnesota, supra, generally prohibited prior restraints on publication, there was a "narrow area, embracing prominently the national security, in which a prior restraint on publication might be appropriate" and that "the instant case may lie within that area" The majority of this Court further noted that, in its view, the law permitted the issuance of "an injunction against publication of material vitally affecting the national security. In this case, the Government makes precisely that claim—that publication by appellees will *irreparably harm the national defense.*" (Emphasis supplied throughout)

Accordingly, this case was remanded to the District Court to permit it to develop a factual record sufficient to pass upon this issue. * * *

The Court below was under no misapprehension as to the issue before it on remand. It observed that it had been directed by this Court "to determine whether publication of material from this document would 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 thereof." (Emphasis supplied)

The Near case itself, relied on by this Court, is enlightening as to the gravity of the injury required to be proved in order to justify a prior restraint on publication. That case speaks of "actual obstruction" to the Government's "recruiting service," the "publication of the sailing dates of transports," and "the number and location of troops." While we recognize, of course, that this list is not all-inclusive, it was obviously intended to embrace only the most serious, immediate and substantial threats to the Government's ability to wage war, imminent risk of death to American military personnel, grave breaches of the national security, and the like.

Embarrassment to the United States because foreign Governments do not fully comprehend the operation of the principles governing our free institutions is not the kind of injury to the national defense which this Court, or any other Court, should recognize as a reason justifying the abrogation of those hard-won liberties of speech and press which are the envy of all whose freedoms are suppressed. Such embarrassment cannot justify the issuance of the unprecedented injunction here sought any more than embarrassment to prominent American statesmen and politicians could justify the penalties imposed under the historically and judicially discredited Alien and Sedition Acts. See New York Times Co. v. Sullivan, 376 U.S. 254, 276, et seq. (1964). The constitutional imperatives of an informed citizenry can tolerate no such infringement on our cherished freedoms.

III. The Government Has Failed to Establish Any Threat To National Security

We turn, now to the findings of the Court below, findings based upon a full evidentiary hearing, conducted primarily *in camera* so as to afford the Government the widest latitude to develop the evidence in support of its claims.

The District Court found that:

(1) The classified report embraced materials in the public domain, as well as materials that might have properly been classified top-secret long ago, but which were not shown to be so now;

(2) The Government had offered no proof that publication of those materials would lead to a definite break in diplomatic relations, an armed attack on the United States, an armed attack on an ally, a war, a compromise of military or defense plans, intelligence operations, or scientific and technological materials;

(3) The Government had failed to demonstrate that publication would result in any immediate, grave threat to the national security;

(4) The report itself contained no information concerning contemporary troop movements; and

(5) Publication of the materials would in no way whatsoever compromise United States intelligence.

The District Court found that publication of the documents "may" interfere with the ability of the State Department to conduct delicate negotiations but, significantly, such interference would result

> ". . . 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. Many of these governments have different systems than our own and can do this; and they censor."

This is the only finding which even remotely bears on the Government's claim that the interests of the United States may somehow be compromised by the publication of these historical documents.

It may be that some foreign governments which, under different systems employing censorship as a way of life, may not fully comprehend why their repressive measures are here rejected, but this fact constitutes no valid reason for compromising those principles which have served freedom so long and so well. It is truly shocking that a Government dedicated to the preservation of free institutions should for the first time in its long history doggedly pursue its efforts at censorship merely because some foreign governments with systems alien to our own cannot understand why we do not emulate their censorial practices.

In any event, Judge Gesell effectively puts this contention in its proper constitutional perspective, stating (Tr. 271):

> "In interpreting the First Amendment, there is no basis upon which the Court may adjust it to accomodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

IV. The Appellee Is Not Bound By The Government's Classification System

The Government's position below was based largely on the argument that it has the statutory power to classify documents and that, once such classification has been imposed, it may not successfully be challenged, in a declassification proceeding, unless it has been established that the Government's classification was arbitrary and capricious. The argument conveniently ignores the fact that this is not a declassification proceeding; this is not a case where a private party seeks access to classified documents in the exclusive custody or control of the Government. This is a case where, for the first time in the history of the Republic, our Government seeks, through prior restraint, to preclude publication of documents in the hands of those sought to be enjoined, and many other persons as well.

We are here concerned with a Constitutional case. The question is whether prohibition of publication of historical documents constitutes a violation of the First Amendment. The use of labels—even the label "Top Secret-Sensitive" by the Government—does not relieve the Courts of their duty independently to determine, on the basis of the record made below, whether the injunction the Government seeks would, if issued, impinge upon the defendants' First Amendment rights.

Under our constitutional system, the Courts are the ultimate guardians of these fundamental First Amendment rights. It is the Judiciary, not the Executive, which has the right—indeed the duty—independently to examine the evidence to determine whether an injunction would be fact abridge consitutional protections. Wood v. Georgia, 370 U.S. 375, 386 (1962); Craig v. Harney, 331 U.S. 367 (1947).

As was said in NAACP v. Button, 371 U.S 415, 429 (1963):

> " . . . a state cannot foreclose the exercise of constituional rights by mere labels."

In New York Times Co. v. Sullivan, 376 U.S. 254, the Supreme Court said (at 285):

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.

Speiser v. Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see. . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennakamp v. Florida, 328 US 331 335, 90 L ed 1295, 1297, 66 S Ct 1029; see also One, Inc., v. Olesen, 355 US 371, 2 L ed 2d 352, 78 S Ct. 364; Sunshine Book Co. v. Summerfield, 355 US 372, 2L ed 2d 352, 78 S Ct 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 US 229, 235, 9 L ed 2d 697, 702, 83 S Ct 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

V. 18 U.S.C. 793 (e) Is Not Applicable

Although the Government relies on Section 793(e) of U.S.C. Title 18 as the sole statutory support for its application for a preliminary injunction, it has conveniently ignored the fact that Congress, in amending the section in 1950, provided in Section 1(b) of the amendatory statue that:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or speech as guaranteed by the Constitution of the United States . . ." (P.L. 831, 81st. Cong. 2d Sess. Sept. 23, 1950, c. 1024, Tit. I).

We note also that Judge Gurfein, in the New York Times case, has expressly held, for many reasons there set forth, that the statute invoked by the Government does not even apply to publications by newspapers.

VI. The Granting of the Preliminary Injunction Will In Any Event Be Futile

It has already become obvious that, despite the continuation of this ill-conceived litigation, the Government's efforts to suppress the truth will ultimately prove futile. Copies of all or substantial portions of the Vietnam Report have already found their way into the hands of an undetermined number of persons outside the Government.

Benjamin Bradlee, the Post editor, has already been given portions of the materials from two other sources, two other completely distinct sources.

Yesterday afternoon, at or about the very time this Court was issuing its order continuing the restraint against appellees, Congressman Paul McCloskey announced on an NBC network television station that he intended to reveal the contents of unpublished portions of the report on Wednesday if the Department of Defense won't declassify them. Only this morning the Associated Press reported that the Boston Globe printed today what it said were hereto unpublished portions of a secret Pentagon study of the origins of the Vietnam war.

Thus, one thing is certain: Public revelation of the contents of this controversial report will continue apace, and all of it will soon become available to the American public. In such circumstances, no useful purpose could possibly be served by the injunction here sought, and the District Court's decision to deny injunctive relief should, without regard to the First Amendment principles to which we have adverted, therefore be affirmed. E.g., Humble Oil & Refining Company v. Harang, 262F. Supp. 39, 43-44 (E. D. La. 1966); Elliott v. Amalgamated Meat Cutters, Etc., 91 F. Supp. 690, 698 (W.D. Mo. 1950).

CONCLUSION

Based upon clear and unambiguous findings of the Court below, and for each of the reasons assigned, the order denying a preliminary injunction should be affirmed.

Respectfully submitted,
ROYALL, KOEGEL & WELLS

*Defendants' Exhibits are referred to as "Ds. Ex."

**The questions herein set forth are taken from the June 20, 1971 Sunday edition of the New York Times and are believed to be accurate.

***District Judge Gurfein in New York viewed the issue before him precisely as did a majority of this Court. He held that the issue was whether publication would result in "serious security breaches vitally affecting the interests of the nation." (Emphasis supplied).