Robert L. Keuch
Chief, Appeals and Research Section
Internal Security Division

Frederick W. Lambert
Office of Legal Counsel

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cc: Files
Mr. Rehnquist
Mrs. Gauf
Mr. Kauper
Mr. Fygi
Mr. Lambert

Permanent Injunctive Relief Against the Publication of the Defense Department Vietnam Study by the New York Times.

During our conversation this afternoon with Dan McAuliffe, you asked for a memorandum discussing some of the prerequisites for issuance of a permanent injunction against the publication by the New York Times of the Defense Department Vietnam Study. Specifically, you asked whether statutory authorization is necessary for the Attorney General to seek such an injunction. Moreover, you asked for a discussion of the nature of the governmental interest that would have to be established to enable a permanent injunction to issue against the publication of these documents.

I have concluded, on the basis of two Supreme Court decisions, that a specific statute authorizing the Attorney General to seek equitable relief is not necessary. As to the requisite governmental interest that must be established, I have concluded that Judge Gurfein must be convinced that there will be irreparable damage to the national security from the release of the Defense documents and that this damage will be of the magnitude contemplated by the language in the Supreme Court decision of Near v. Minnesota, 283 U.S. 697, 716, which stated that in exceptional circumstances First Amendment prohibitions of prior restraint against speech and press are not absolute. In what follows I suggest a possible approach toward making this showing, however, ultimate success of or failure in securing the injunction will depend to a large extent upon the factual contents of the documents.

[redacted]

I. Specific Statutory Authority is Not Required to Authorize a Suit for Injunctive Relief by the Attorney General.

In United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) the Attorney General brought suit to cancel a patent for land issued in the name of the United States. In upholding the general right of the Attorney General to institute suits for equitable relief the Court stated as follows:

> "But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter." (Emphasis added at 285).

The validity of this holding was recognized in United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960). In that case § 10 of the Rivers and Harbors Act of 1899 (30 Stat. 1121, 1151, 33 U.S.C. 403) - a criminal prohibition - was held to create a sufficient governmental interest in the Attorney General to seek an injunction against the obstruction of a river. See also, Wyandotte Co. v. United States, 389 U.S. 1 (1967); Sanitary District v. United States, 266 U.S. 405. The existence of a similar criminal statute (18 U.S.C. 793(e)) proscribing the communication of information contemplated by New York Times would seem to make the suit for permanent injunctive relief a legitimate exercise of the power of the Attorney General.

II. Establishing a Sufficient Showing of Irreparable Harm to the United States to Secure an Injunction Against the Publication of Classified Information.

In the case of Near v. Minnesota, 283 U.S. 697, 716 (1931), the Supreme Court laid down a general prohibition against governmental "prior restraint" of free speech. A Minnesota statute providing for injunctive relief against certain publications was struck down as violative of the First Amendment. The extended opinion of the Court discussed in detail the history and policy favoring subsequent criminal and civil remedies for abuse of the free speech and press guarantee rather than prior equitable restraint. But the Court was careful to point out that the general prohibition against prior restraint is by no means absolute. Specifically, Justice Hughes noted:

> ". . . the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that may be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right.'"
> (Emphasis added at 716)

It is doubtful that the existence of a declared State of war was intended to be the sole prerequisite for establishing the existence of an "exceptional" case. Indeed, the Schenck case, from which the Near Court quoted with approval, is well-known for Mr. Justice Holmes' statement that the First Amendment would not protect a false warning of fire in a crowded theatre. It would seem that there could be a variety of unusual and very infrequent emergency situations that would come within the exceptional terms of Near.

Thus, armed conflict in the magnitude of the Vietnam War presents a situation that is indistinguishable in terms of practical effect from a declared war. As such, the situation is one directly contemplated by the Supreme Court as requiring careful attention toward balancing the right of free expression against the security interest of the country.

After eschewing an absolutist approach to applying the prior restraint prohibition in all situations, the Near opinion went on to suggest some forms of speech that might be enjoinable in situations relating to the national security. It stated as follows:

> "No one would question but that a government might prevent actual obstruction of the recruiting service or the publication of the sailing date of transports or the numbers and location of troops . . . The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force.'" [Citations omitted]

This passage is a clear recognition that the dissemination of certain information may be highly prejudicial to the defense efforts of the country. It is also significant that the foregoing passage, like the earlier "exceptional case" phrase, is not worded in absolute terms. Thus, it can be argued that it is not necessary to allege with unerring accuracy what specific harm to the country definitely will occur, but rather the kinds of possible harm that may occur. In summary, it can be argued that it is sufficient to establish a probability -- or if the harm is very great even the possibility -- that dissemination of certain information will threaten the defense of the country.

It should be argued that a "Top Secret" designation, unless arbitrary or capricious, should carry a heavy presumption of establishing a per se government interest overriding the general prohibition against prior restraint. It is simply impossible to foresee with clarity the exact manner in which certain sensitive information may damage both defense efforts and foreign relations.

For example, the publication of highly classified documents carries the risk of disclosing information that might be used with other independently gathered intelligence information to aid a foreign power to the detriment of the United States. In addition, it has been suggested that release of verbatim communications that had been telegraphed from distant locations might aid a foreign power in breaking cryptographic codes. If they had intercepted the coded version earlier and if they were able to match it with the verbatim published copy, it might be a simple task to decipher secret codes. This would present a continuing present danger to the country. Finally, specific information concerning uncompleted currently-in-progress military activities might endanger the lives of American troops.

Each of these examples underscores the general governmental interest supporting an injunction against publication. While there may be legitimate disagreement about the propriety of classification, and criticism and comment on this issue from the press, the determination of what is prejudicial to the defense of the country simply cannot be left to reporters untrained in assessing the short or long-range impact of disclosing sensitive information. Moreover, the judiciary, in deciding questions such as this, should be exceedingly hesitant to substitute its judgment for that of the Executive Branch in matters of national defense. One case has so held. Epstein v. Resor, 421 F. 2d 930 (9th Cir. 1970) cert. den. 38 U.S. Law Week 3496. In line with this holding, it should be argued that in camera scrutiny of classified documents should be had only in the most exceptional situations.