Federal Trials and Great Debates in United States History

The Pentagon Papers
in the
Federal Courts

Second Edition

by

Jake Kobrick

Associate Historian
Federal Judicial History Office
Federal Judicial Center

Federal Judicial Center
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1

The Case in Context

A Short Narrative

On June 13, 1971, *The New York Times* stunned the nation by publishing a front-page story headlined, "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement." The subject of that article, and those that followed in the next two days, was *United States-Vietnam Relations: 1945–1967*, a forty-seven-volume history of American involvement in Vietnam, commissioned by Secretary of Defense Robert McNamara and prepared by a Pentagon task force between 1967 and 1969. The leaked study, classified "Top Secret—Sensitive," was based on documents from the Department of Defense, the CIA, and the Department of State. Once portions of it became public, the study became popularly known as the "Pentagon Papers."

Secretary of Defense Robert McNamara
discusses Vietnam at a press conference, 1965.

The *Times*'s initial coverage of the Pentagon Papers focused on events in 1964 and 1965 and suggested that President Lyndon Johnson's administration had repeatedly misled the public about the government's strategy in Vietnam. The articles and accompanying excerpts from the report revealed that the United States had carried out clandestine raids on North Vietnam for months before Congress had authorized escalation of the war via the August 1964 Tonkin Gulf Resolution. Moreover, that resolution had been drafted in advance of the purported North Vietnamese attacks on U.S. Navy ships that had ostensibly served as the basis for congressional action. The articles also cited findings that the administration had, by September 1964, decided that bombing North Vietnam would be necessary, even as Johnson ran for President on a platform of restraint, in contrast to his more bellicose opponent, Barry Goldwater. Other documents indicated that Johnson decided in April 1965 to use American ground troops for offensive action in Vietnam while concealing that major strategic change from the public.

Public Opposition to the Vietnam War and Tension at the Pentagon

The audience for the revelations contained in the Pentagon Papers was an American public already angry and dispirited about the Vietnam War. In the early stages of American involvement in Vietnam, most Americans supported the war, believing it to be a necessary part of the effort to contain the spread of communism. As the war escalated—resulting in more troops sent to Vietnam, more bombing by the United States, and more casualties, including Vietnamese civilians—public opinion began to turn. While activist groups such as Students for a Democratic Society had opposed the war since 1965, the antiwar movement was widespread by 1967, when the first massive protests were held in Washington. Debate over the war was a central issue in the 1968 presidential election.

Antiwar demonstrations at the I.R.S., top, and White House, above, 1971.

Protesters argued that the war was both immoral and unwinnable. They asserted that the United States did not have the right to dictate the fate of a foreign

country, that the American government had supported a repressive and corrupt regime in South Vietnam, and that mounting numbers of Americans and Vietnamese were dying for no valid reason. The increasingly unpopular draft disproportionately burdened the poor and people of color, and this unfairness was among the reasons that many young men resisted by burning their draft cards or fleeing to Canada. By 1970, polls showed that a majority of Americans thought military involvement in Vietnam had been a mistake. That year, the antiwar movement reached its peak with demonstrations on college campuses across the nation. The killings of student protestors by members of the National Guard at Kent State University in Ohio and Jackson State University in Mississippi sparked national outrage.

Misgivings about the Vietnam War reached the highest echelon of the Pentagon as well. While President John F. Kennedy and his successor, Lyndon B. Johnson, had initially harbored doubts about the wisdom of making a major commitment to the struggle in Vietnam, the deployment of U.S. ground troops in 1965 set a seemingly inexorable course. From that point onward, Johnson believed that to withdraw from Vietnam would result in a communist takeover of Southeast Asia and a corresponding loss of U.S. credibility in the eyes of the noncommunist world. As early as 1966, however, Secretary of Defense Robert McNamara was concerned about America's ability to win the war. By 1967, his doubts had flourished into a belief that the United States should withdraw its troops and seek a negotiated peace with North Vietnam. This stance put him at odds with President Johnson and military leaders, leading to his departure from the Pentagon in 1968. McNamara's change of heart played a role in his decision to commission the Pentagon Papers. Preserving the historical record of U.S. involvement in Vietnam would, he hoped, provide lessons to help prevent similar foreign misadventures in the future.

McNamara hoped a record of U.S. involvement in Vietnam would provide lessons for the future.

Government Secrecy and the National Security State

The Pentagon Papers were leaked at a time of already-diminished faith in government, due in large part to opposition to the Vietnam War and bolstered by a growing apprehension about excessive government secrecy. News coverage of the papers brought to the forefront of public debate concerns about the national security state that had emerged since World War II and the accompanying classification of government records. The modern system of

information classification originated from the nexus of the heightened fear of espionage that characterized the Cold War era and the development of increasingly sophisticated military technology that the government wished to conceal from the Soviet Union and other foreign adversaries. While most recognized that some degree of secrecy was necessary, many believed that the government was abusing its classification power. Journalists worried that the suppression of vital information was endangering the freedom of the press that was necessary for a well-functioning democracy. A campaign for greater transparency led by the American Society of Newspaper Editors resulted in the passage of the Freedom of Information Act in 1966, increasing the public's ability to access government records. Nevertheless, the balance between national security and the people's "right to know" remained a contentious issue.

The disclosure of the Pentagon Papers exacerbated the public's mistrust of the government, and of the executive branch in particular. The papers seemed to confirm the most pessimistic suspicions about the missteps that had led to a massive military commitment. A consistent theme of articles on the study was the extent to which each presidential administration since Harry Truman's had misled the public about U.S. involvement in Southeast Asia and about the likelihood of military success.

Reaction from the White House and the Battle in the Federal Courts

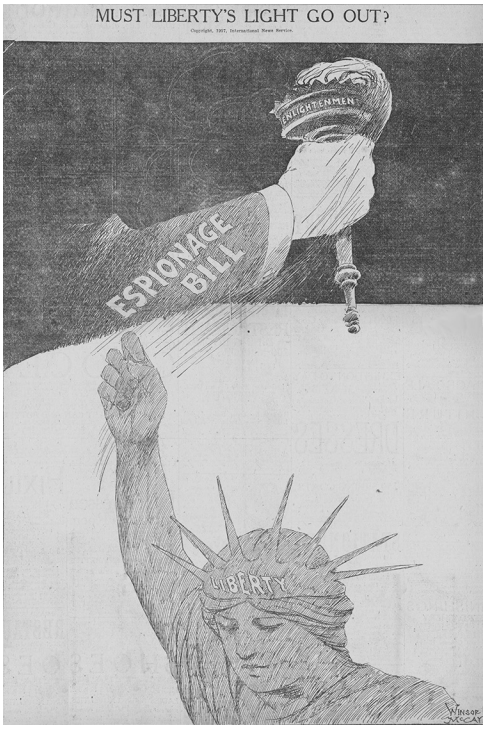
The publication in *The New York Times* of excerpts from a classified Defense Department study caught most people in the White House by surprise. The Defense Department made only fifteen copies of the study, which was narrowly circulated within the executive branch. President Richard Nixon had not been aware of the study, although Nixon's National Security Advisor, Henry Kissinger, had consulted with Defense Department staff members while they prepared the study, and Nixon's Secretary of Defense, Melvin Laird, learned of the report when he took office in 1969.

When Nixon learned of the *Times* article on June 13, 1971, he considered the action of the unknown leaker or leakers as "treasonable," but his initial reaction focused primarily on speculation about the partisan advantages of a report that was so critical of his Democratic predecessors. After consultations with Kissinger, counsel to the president John Ehrlichman, and Attorney General John Mitchell, Nixon decided that in addition to identifying and prosecuting the leaker, the Department of Justice should take legal action to halt further publication of the Pentagon Papers. Stopping the newspapers, he came to believe, was necessary to protect the sanctity of classified information.

On Monday, June 14, Justice Department lawyers filed suit against *The New York Times* in the U.S. District Court for the Southern District of New York, seeking two separate orders to stop publication: a temporary restraining order that would halt publication

until the court held a hearing and received evidence, and a preliminary injunction, a restraint of longer duration that would be issued after the hearing and remain in effect until the completion of a full trial. The Nixon administration's attempt to obtain an unprecedented prior restraint on a newspaper quickly fueled criticism from members of Congress, who asserted a "legislative right to know," and from a public that wanted free discussion of the nation's military and foreign policy.

The Pentagon Papers case was just the latest of several instances in which the federal government sought to impose restrictions on speech or the press during a time of war or other perceived national crisis. In 1798, during a naval conflict with France, the Federalists in Congress passed the Sedition Act, under which numerous people, including newspaper editors and a member of Congress, were convicted and imprisoned for speech or writings critical of the government. The government imposed various restrictions on free expression during the Civil War, including the military's arrest and prosecution of politician Clement Vallandigham for disloyal speech. Newspapers in the North sympathetic to the Confederacy were subject to repression as well. Some papers had their publication halted by order of the military, others were barred from the mail, and several editors were arrested. World War I perhaps represented the high-water mark for restrictions on First Amendment freedoms, as the government prosecuted large numbers of dissenters under the Espionage Act of 1917 and the Sedition Act of 1918 for speech alleged to be disloyal or seditious. Finally, the Cold War brought with it restrictions on the speech of American communists. In 1951, leaders of the Communist Party USA were convicted under the Smith Act for speech that was deemed to advocate the overthrow of the U.S. government.



The government has sought to restrict free expression in several moments of national crisis.

Although government attempts to limit speech during wartime were not unusual, the Department of Justice was seeking an unprecedented remedy in asking a federal court to halt a newspaper's publication of the Pentagon Papers. Never in the nation's history had the civilian federal government forbidden publication before the fact, as opposed to pursuing criminal prosecution of those whose speech was alleged to have violated the

law. Since the adoption of the Bill of Rights in 1791, both state and federal judges had understood freedom from prior restraint of publication to be at the very core of the rights protected by the First Amendment. As the Supreme Judicial Court of Massachusetts noted in 1825, freedom of the press "was intended to prevent all such previous restraints upon publications as had been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers." In keeping with this view of constitutional protection for free expression, state courts refused throughout the nineteenth century to grant injunctions against speech purported to be libelous. It was not until 1931 that the Supreme Court of the United States had occasion to weigh in on the issue, when it decided *Near v. Minnesota*. In striking down a Minnesota law permitting the state to seek court orders halting the publication of newspapers printing defamatory material, Chief Justice Charles Evans Hughes asserted that "the chief purpose" of freedom of the press was "to prevent previous restraints upon publication."

Despite the judiciary's historical aversion to prior restraint, on June 15, 1971, Judge Murray Gurfein granted the government's request for a temporary restraining order, stopping the *Times*'s presses after the paper had published the third article in its series on the Pentagon Papers. Lawyers for the *Times* argued that a preliminary injunction extending the duration of the restraint could not be imposed unless the government attorneys established that continued publication would cause grave and irreparable harm to the nation's security. The government, in the view of the newspaper's lawyers, had failed to meet this strict standard. After listening to testimony in a closed hearing, Judge Gurfein agreed with the lawyers for the *Times* and declined to impose a preliminary injunction, although he continued the temporary restraint while the Justice Department appealed his decision.

While the Justice Department and *The New York Times* challenged one another in the federal court in New York City, *The Washington Post* obtained a copy of the Pentagon Papers and began its own series of articles on June 18. The Justice Department acted quickly to halt publication by *The Washington Post* as well, filing suit in the U.S. District Court for the District of Columbia and requesting the same injunctions it had requested with respect to the *Times*. Unlike Judge Gurfein in New York, however, Judge Gerhard Gesell decided that the First Amendment did not permit a prior restraint of any duration, and he denied the administration's request for a temporary restraining order against the *Post*. The U.S. Court of Appeals for the District of Columbia Circuit disagreed, and by a vote of 2–1 imposed a temporary restraint and sent the case back to Judge Gesell with instructions to hold a hearing on the administration's claim that further publication would jeopardize national security. In a strongly worded dissent, Judge J. Skelly Wright lamented, "This is a sad day for America." As in New York a few days earlier, the Justice Department lawyers

and their witnesses failed to persuade a district judge that further publication of the Pentagon Papers would irreparably damage national security, and Judge Gesell declined to issue a preliminary injunction.

On June 23, the U.S. Court of Appeals for the Second Circuit, sitting in New York, and the U.S. Court of Appeals for the District of Columbia Circuit issued their decisions on the denial of preliminary injunctions against *The New York Times* and *The Washington Post*, respectively, and the two courts reached different results. The Second Circuit Court of Appeals sent the case back to Judge Gurfein of the district court for further hearings on a "special appendix" the government had filed with the court of appeals after the district court denied its motion for an injunction. In contrast, the court of appeals in Washington, D.C., upheld Judge Gesell's decision to deny the injunction. These differing decisions in virtually identical cases set the stage for a resolution by the Supreme Court of the United States.

The newspapers argued that the government had failed to demonstrate that publication would cause grave harm.

Solicitor General Erwin Griswold represented the Nixon administration. Griswold argued before the Court that a prior restraint on publication was justified by the President's authority to conduct foreign affairs and by his role as commander-in-chief of the armed forces, both of which were infringed upon by the publication of the Pentagon Papers. The Justice Department lawyers also filed a separate, sealed brief in which they identified specific documents from the Pentagon study and explained how the publication of such material could harm national security by, for example, hindering negotiations to end the war, damaging relations with U.S. allies, and interfering with talks over prisoners of war. The newspapers, on the other hand, continued to argue in their briefs to the Supreme Court that the government failed to establish a harm to national security sufficient to meet the very heavy burden of proof for the imposition of a prior restraint.

After hearing oral arguments on June 26, the Supreme Court issued its decision on June 30 in a brief per curiam, or unsigned, opinion. The Court held, by a vote of 6–3, that the government had not met its heavy burden of proving that a prior restraint was justified. The decision of the U.S. Court of Appeals for the Second Circuit was reversed, that of the U.S. Court of Appeals for the District of Columbia Circuit was affirmed, and the *Times* and the *Post* would be permitted to continue publishing the Pentagon Papers. Each of the nine justices released opinions explaining their concurring or dissenting votes. The most

Supreme Court of the United States Official Photo

The Supreme Court of the United States in 1971. Front row: Justice John M. Harlan, Justice Hugo L. Black, Chief Justice Warren E. Burger, Justice William O. Douglas, and Justice William J. Brennan, Jr. Back row: Justice Thurgood Marshall, Justice Potter Stewart, Justice Byron R. White, and Justice Harry A. Blackmun.

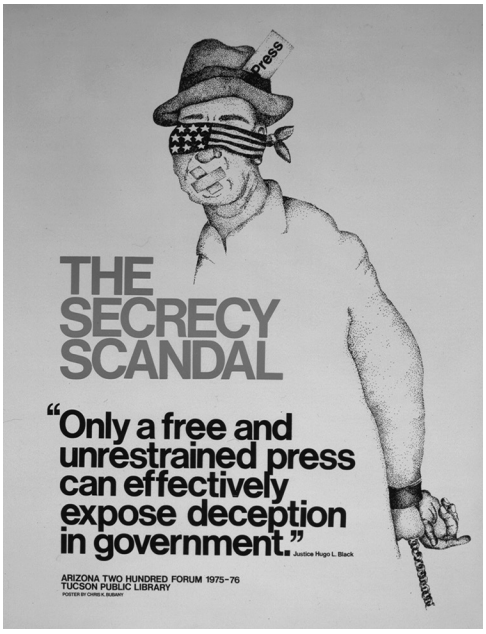
strongly worded concurrence came from Justice Hugo Black, a staunch supporter of free-speech rights, who called the temporary restraint on publication "a flagrant, indefensible, and continuing violation of the First Amendment." Chief Justice Warren Burger, who dissented, noted that *The New York Times* had the Pentagon Papers for three months before publishing them, while the courts were forced to decide in a matter of days whether the massive study posed a threat to national security. *The New York Times* and *The Washington Post* immediately resumed publication of articles based on the Pentagon Papers.

Daniel Ellsberg and the Aftermath of the Pentagon Papers

Within days of the first article appearing in *The New York Times*, FBI agents suspected that the Pentagon Papers had been leaked to the *Times* by Daniel Ellsberg, who had contributed to the study at the Defense Department and whom the FBI had investigated in 1970 following allegations that he had illegally copied the report. Ellsberg had been part of the defense establishment and an ardent supporter of United States military involvement in Vietnam. He graduated from Harvard, served in the Marine Corps, then returned for his Ph.D. at Harvard, where he worked alongside Henry Kissinger. Ellsberg worked at the RAND Corporation, a civilian think tank that worked closely with the Pentagon, and then in the highest echelons of the Department of Defense, planning military strategy for the Vietnam War. In 1965, he attempted to reenlist in the Marines to fight in Vietnam but was rejected because of his high status in the Defense Department. Instead, he went to Vietnam as a civilian, accompanying military units and meeting with leading American

strategists. After his return to the United States, Ellsberg worked on the Pentagon Papers project, writing much of the section on the Vietnam policy of the Kennedy administration. At some point in 1967, Ellsberg developed serious doubts about United States military involvement in Vietnam, although in 1969, Henry Kissinger asked him to prepare a list of policy options for the new Nixon administration.

While working again at the RAND Corporation in 1969, Ellsberg read the entire study, which galvanized his growing opposition to the war. Believing that the American people needed to know the truth about U.S. involvement in Vietnam, Ellsberg in 1969 began to photocopy the report from the RAND office in Santa Monica, California, and then sought ways to make the findings public. He met with Kissinger to urge him to read the full report. Ellsberg provided excerpts to several antiwar members of Congress, including George McGovern, but none agreed to release the report. In March 1971, Ellsberg delivered the photocopies to reporter Neil Sheehan of *The New York Times*. Following publication of the first article, Ellsberg went into hiding and orchestrated the release of further copies to other news outlets.



Justice Black's opinion resonated with a public increasingly wary of government secrecy.

In late June 1971, just before the Supreme Court issued its decision in the newspaper cases, a federal grand jury in Los Angeles indicted Ellsberg on charges of theft and espionage. Later that year, a revised indictment added to the charges and indicted as a co-conspirator Anthony Russo, who had assisted in photocopying the secret report. In January 1973, Ellsberg and Russo went on trial in the U.S. District Court for the Central District of California, with Judge Matthew Byrne presiding. After three months, the trial was interrupted by revelations about the strange and seemingly illegal activity of officials in the Nixon administration and staff associated with the President's reelection campaign. Federal prosecutors disclosed to Judge Byrne that in the wake of the Pentagon Papers leak, the White House had established a special unit, nicknamed the "Plumbers," to deter future leaks of classified material as well as to gather information on Ellsberg and Russo. Members of that unit conducted electronic surveillance of Ellsberg and broke into the Los Angeles office of Ellsberg's psychiatrist in search of Ellsberg's records. Judge Byrne refused to dismiss the case when a newspaper revealed that during the trial Byrne had met at least twice with John

Ehrlichman, and on one occasion with Nixon himself, to discuss their offer to appoint the judge director of the FBI. When further evidence established that the FBI had secretly and illegally recorded conversations between Ellsberg and one of the principal authors of the Pentagon Papers as early as 1969, the judge had little choice but to end the trial. Explaining that "the bizarre events have incurably infected the prosecution of this case," Judge Byrne in May 1973 finally dismissed the criminal charges against Ellsberg and Russo.

The aftermath of the cases had dramatic implications for the Nixon administration and the nation as a whole. Ellsberg's leak, and Nixon's overzealous response to it, initiated a chain of events leading to the most significant political scandal in American history. The "Plumbers" moved on from their illegal surveillance of Ellsberg and, in the months preceding the 1972 election, undertook surveillance of the Democratic Party. Two members of the Plumbers—E. Howard Hunt and G. Gordon Liddy, who had orchestrated the Ellsberg break-in—planned and supervised the June 1972 burglary of the Democratic Party headquarters at the Watergate complex in Washington, D.C. Nixon's efforts to cover up the White House's role in the burglary ultimately led to his resignation in August 1974.

The Judicial Process in the Pentagon Papers Case

A Chronology

June 14, 1971

The U.S. Department of Justice filed suit against *The New York Times* in the U.S. District Court for the Southern District of New York, seeking a temporary restraining order and a preliminary injunction against further publication of the Pentagon Papers.

June 15, 1971

U.S. District Judge Murray Gurfein granted the government's request for a temporary restraining order against the *Times*, to expire on June 19.

June 18, 1971

The Department of Justice filed suit against *The Washington Post* in the U.S. District Court for the District of Columbia, seeking the same orders it had requested with respect to the *Times*. U.S. District Judge Gerhard Gesell denied the government's request for a temporary restraining order.

June 19, 1971

Judge Gurfein denied the government's request for a preliminary injunction prohibiting further publication of the Pentagon Papers by the *Times*.

June 19, 1971

The U.S. Court of Appeals for the District of Columbia Circuit voted 2–1 to reverse Judge Gesell's denial of a temporary restraining order against the *Post*.

June 21, 1971

Judge Gesell denied the government's request for a preliminary injunction prohibiting further publication of the Pentagon Papers by the *Post*.

June 23, 1971

After hearing the case en banc, the U.S. Court of Appeals for the Second Circuit voted 5–3 to remand the case to the district court for further proceedings on the government's request for a preliminary injunction against the *Times*.

June 23, 1971

After hearing the case en banc, the U.S. Court of Appeals for the District of Columbia Circuit voted 7–2 to affirm Judge Gesell's denial of a preliminary injunction against the *Post*.

June 25, 1971

The Supreme Court of the United States granted certiorari in the *Times* and *Post* cases to resolve the conflicting decisions of the courts of appeals, consolidating the two cases for argument.

June 26, 1971

The Supreme Court heard arguments on the Pentagon Papers cases.

June 30, 1971

The Supreme Court held by a 6–3 vote that the government was not entitled to a preliminary injunction restraining publication of the Pentagon Papers by either the *Times* or the *Post*. Accordingly, the judgment of the Second Circuit was reversed and that of the District of Columbia Circuit affirmed.

2

The Federal Judiciary

Legal Questions Before the Federal Courts

Should the U.S. district courts have issued temporary restraining orders preventing further publication of the Pentagon Papers until hearings on the government's request for a preliminary injunction could be held?

Yes. Although prior restraints on publication are strongly disfavored under the First Amendment, temporary restraining orders were entered against both newspapers. Judge Murray Gurfein of the U.S. District Court for the Southern District of New York ordered *The New York Times* to halt publication of the Pentagon Papers upon the government's initial request. His counterpart in the District of Columbia, Judge Gerhard Gesell, declined to issue a restraining order against *The Washington Post*, but was reversed by the U.S. Court of Appeals for the District of Columbia Circuit.

In granting the restraining order, Judge Gurfein reasoned that the temporary harm caused by a brief halt in publication was outweighed by the irreparable harm to national security that could occur if the *Times* were allowed to continue publishing the Pentagon Papers. Judge Gesell, on the other hand, believed that a prior restraint on publication was expressly disallowed by the Supreme Court's 1931 decision in *Near v. Minnesota*. The court of appeals disagreed, holding that the Pentagon Papers might fall into the narrow exception for an imminent threat to national security suggested by the *Near* opinion and that the government was entitled to an order freezing the status quo so that a hearing on this question could be held. Judge J. Skelly Wright dissented,

insisting that all presumptions be made in favor of free speech and that the government had made no showing of specific harm sufficient to justify a restraining order.

Was the newspapers' publication of the Pentagon Papers prohibited by federal statute?

No. The Department of Justice argued that the *Times* and the *Post* had violated 18 U.S.C. § 793(e), part of the Espionage Act of 1917. That section prohibited the communication, delivery, or transmission of information relating to the national defense by anyone unauthorized to have such information and having reason to believe the information could be used to the injury of the United States or the advantage of a foreign nation. The statute provided for criminal penalties, but not for a prior restraint on publication. Nevertheless, the government argued that an injunction was authorized when a statute's criminal penalties were inadequate to accomplish the legislation's purpose.

Judge Murray Gurfein of the U.S. District Court for the Southern District of New York rejected the government's statutory argument, reasoning that the inclusion of the word "publish" in other sections of the Espionage Act, but not in section 793(e), indicated that Congress did not intend for that section to apply to the conduct of the *Times*. Moreover, the judge pointed out that Congress had, in forming the original Espionage Act during World War I, voted down a proposal to prohibit the publication of certain national defense information during wartime. Judge Gerhard Gesell of the U.S. District Court for the District of Columbia likewise declined to apply the statute to the conduct of the *Post*, simply noting that the law did not authorize a prior restraint.

In their opinions concurring in the Supreme Court's judgment that injunctions against the *Time*s and the *Post* were not warranted, Justices William Douglas, Byron White, and Thurgood Marshall agreed that section 793(e) could not serve as a basis for imposing a prior restraint. In dicta, Justice White noted his belief that the statute did authorize criminal penalties against the newspapers despite its omission of the word "publish."

Should the federal courts impose a prior restraint on publication of the Pentagon Papers in the form of a preliminary injunction?

No. None of the five federal courts that ruled on the Pentagon Papers cases held that a preliminary injunction—a prior restraint on publication that would remain in effect until a full trial could be held—was justified. The judges of the U.S. district courts in New York and Washington, D.C., both denied the government's requests for injunctions. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the denial of an injunction against the *Post*, while the Second Circuit sent the case back to the district court for further proceedings regarding the *Times*. Before the district court could take further action, the Supreme Court reviewed the case and ruled 6–3 that no injunctions should be issued.

In order to obtain injunctions against the newspapers, the government would have been required to demonstrate both a likelihood of success on the merits of the litigation and irreparable harm that would result without an injunction. Judge Gurfein of the U.S. district court in New York found that neither condition existed. He did not believe that the government had a likelihood of success at trial, given that the conduct of the *Times* was not prohibited by federal statute, as is explained above.

The judge also ruled—after hearing testimony from representatives of the Departments of State and Justice and the Joint Chiefs of Staff—that the government had failed to prove "that the publication of these historical documents would seriously breach the national security." Judge Gesell in the District of Columbia came to the same conclusion, adding that the government's interest was "inseparable from the public interest" and that "the public interest makes an insistent plea for publication." Citing the strong First Amendment interests at stake, the U.S. court of appeals agreed with Judge Gesell that the

The Federal Courts and Their Jurisdiction

U.S. District Court for the Southern District of New York

The U.S. District Court for the Southern District of New York heard the federal government's request for a temporary restraining order and a preliminary injunction barring *The New York Times* from further publication of the Pentagon Papers. The district court granted a temporary restraining order to last only a few days until the request for an injunction could be resolved. Shortly thereafter, upon hearing evidence in a public hearing as well as a closed one, the court denied the government's request for an injunction. The district court had jurisdiction over the matter because it was a civil case in which the United States was a plaintiff.

The district courts were established by Congress in the Judiciary Act of 1789, and they serve as the trial courts in each of the federal judicial districts. The U.S. District Court for the Southern District of New York was established in 1814, when Congress divided New York into two judicial districts. New York was subsequently divided into three and then four judicial districts, but the Southern District has always included Manhattan.

U.S. Court of Appeals for the Second Circuit

The U.S. Court of Appeals for the Second Circuit heard the federal government's appeal of the district court's denial of a preliminary injunction against *The New York Times*. After the case was heard by the full court, a majority voted to remand the case to the district court for hearings on a special appendix the government had filed in an attempt to prove that further publication of the Pentagon Papers would harm national security. The case went to the U.S. Supreme Court before the district court could hold further proceedings, however.

The U.S. courts of appeals were established by Congress in 1891. A court of appeals in each of the regional judicial circuits was established to hear appeals from the federal trial courts, and the decisions of the courts of appeals are final in many categories of cases. The

government had not provided proof sufficient to override those interests. The Supreme Court of the United States ruled by a 6–3 vote that no prior restraint on publication should be imposed on either of the newspapers. In a brief per curiam opinion, the Court held that the government had not met its heavy burden of proving that such a restraint was justified. Each of the nine justices wrote a concurring or dissenting opinion to explain his vote.

Justices Hugo Black and William Douglas took the strongest concurring positions, asserting that the First Amendment stood as an absolute bar to the imposition of a prior restraint on publication. Justice Black described the temporary restraining orders that had been issued against the newspapers as "a flagrant, indefensible, and continuing violation of the First Amendment." Justice William Brennan did not take an absolutist position but asserted that no prior restraint could issue unless the government showed "proof that publication must inevitably, directly, and immediately cause the occurrence of an event

Second Circuit consists of New York, Vermont, and Connecticut, and the Second Circuit court of appeals has always met in Manhattan.

U.S. District Court for the District of Columbia

The U.S. District Court for the District of Columbia heard the federal government's request for a temporary restraining order and a preliminary injunction barring *The Washington Post* from further publication of the Pentagon Papers. The district court declined to issue any such restraint on publication. The court had jurisdiction over the matter because it was a civil case in which the United States was a plaintiff.

Congress established the court in 1863 as the Supreme Court of the District of Columbia, which exercised a blend of original and appellate jurisdiction and had jurisdiction over both local and federal matters. In 1893, the court's appellate jurisdiction was transferred to the newly created Court of Appeals of the District of Columbia. In 1936, the court was renamed the District Court of the U.S. for the District of Columbia, and in 1948 it assumed its current name in conformity with the other U.S. district courts. At the time of the Pentagon Papers case, the district court was still exercising local in addition to federal jurisdiction; in 1973, its local jurisdiction was transferred to the Superior Court of the District of Columbia.

U.S. Court of Appeals for the District of Columbia Circuit

The U.S. Court of Appeals for the District of Columbia Circuit initially heard the federal government's appeal of the district court's denial of a temporary restraining order against *The Washington Post*. A three-judge panel heard the case and voted 2–1 to reverse the judgment of the district court. Four days later, the full appellate court heard the government's appeal of the district court's denial of a preliminary injunction against further publication of the Pentagon Papers. This time, the court voted 7–2 to affirm the district court's decision.

Congress created the court in 1893 as the Court of Appeals of the District of Columbia,

kindred to imperiling the safety of a transport already at sea." Justices Byron White and Potter Stewart both argued that while a prior restraint could be justified under some circumstances, the government had not shown that irreparable injury would result from publication of the Pentagon Papers. Justice Thurgood Marshall focused his opinion on separation of powers concerns, stating that the executive could not obtain a prior restraint without congressional authorization in the form of a statute.

Chief Justice Warren Burger and Justices Harry Blackmun and John Marshall Harlan dissented from the Court's judgment. All three believed that the Pentagon Papers cases had been resolved too hastily, and that the government should have been given more time to review the documents at issue in order to make its case. Several of the justices on both sides of the case, including Byron White in particular, emphasized that despite its failure to obtain injunctive relief, the government could potentially pursue criminal prosecutions of the newspapers under the espionage laws.

two years after it had created the U.S. courts of appeals for the First through Ninth Circuits. The court exercised both federal and local jurisdiction, hearing appeals from the Supreme Court of the District of Columbia as well as from local courts. The court was renamed the U.S. Court of Appeals for the District of Columbia in 1934, and in 1948 assumed its current name in conformity with the other U.S. courts of appeals. In the early 1970s the court's jurisdiction became exclusively federal.

Supreme Court of the United States

The Supreme Court heard the appeal of *The New York Times* from the judgment of the U.S. Court of Appeals for the Second Circuit restraining further publication of the Pentagon Papers, together with the U.S. government's appeal of the judgment of the U.S. Court of Appeals for the District of Columbia Circuit declining to impose a similar injunction against *The Washington Post*. The Court ruled 6–3 that no such preliminary injunctions were justified. Noting that prior restraints on publication were presumed to be unconstitutional, the Court held that the government had failed to make a showing of irreparable harm to national security sufficient to overcome such a presumption.

The Supreme Court is the nation's highest appellate court. The Constitution grants the Supreme Court original jurisdiction in cases in which states are a party and those involving diplomats, but it empowers Congress to determine the Court's size and the scope of its appellate jurisdiction. The Judiciary Act of 1789 established a Supreme Court with one chief justice and five associate justices. Congress subsequently increased and reduced the number of justices several times during the early- and mid-nineteenth century, though the Court has retained nine seats since 1869. Throughout its first century, the Supreme Court was responsible for deciding most civil appeals, and the justices had little control over a docket that was increasingly overcrowded. The Court gained discretionary power over the bulk of its appellate docket in 1925.

3

Biographies

Judges and Justices

Murray Gurfein

Judge Murray I. Gurfein of the U.S. District Court for the Southern District of New York was the judge who initially granted the federal government's request for a temporary restraining order preventing further publication of the Pentagon Papers by *The New York Times*. After holding a closed-door hearing, Gurfein decided that the government had not met its burden of showing that further publication would cause irreparable harm and declined to issue a preliminary injunction. The U.S. Court of Appeals for the Second Circuit ordered that the case be sent back to the district court for further proceedings, but the Supreme Court took the case before Gurfein could hear additional evidence.

American Jewish Historical Society

Gurfein

Gurfein was born November 17, 1907, in New York City. He graduated from Columbia University in 1926, then attended Harvard Law School, finishing second in his class in 1930. After clerking for Judge Julian Mack of the U.S. Court of Appeals for the Seventh Circuit, Gurfein served for two years as an assistant U.S. attorney in New York and then entered private practice. By 1935, he had returned to government service, working in the New York County district attorney's office until 1942.

During World War II, Gurfein served as an intelligence officer in the U.S. Army Office of Strategic Services, and he was an

assistant to former Supreme Court Justice Robert H. Jackson while Jackson was the chief U.S. prosecutor at the Nuremberg trials of Nazi war criminals. In 1946, Gurfein returned to private practice in New York City, where he remained until his appointment to the federal bench by President Nixon in 1971.

A new federal judge at the time of the Pentagon Papers litigation, Gurfein served for three more years on the district court before Nixon appointed him to the U.S. Court of Appeals for the Second Circuit, also based in New York City. During his tenure on the appellate court, he served as the chair of the Judicial Panel on Multidistrict Litigation from 1978 to 1979. Gurfein died on December 16, 1979, at the age of seventy-two.

Gerhard Gesell

Judge Gerhard A. Gesell of the U.S. District Court for the District of Columbia heard the federal government's case against *The Washington Post*, declining to issue a temporary restraining order against further publication of the Pentagon Papers. This ruling was reversed by the U.S. Court of Appeals for the District of Columbia Circuit. After a hearing on the government's request for a preliminary injunction, Gesell ruled for the *Post*, finding that the government had not demonstrated proof of irreparable harm sufficient to override the First Amendment issues at stake. Gesell's decision was affirmed by the court of appeals and subsequently upheld by the Supreme Court.

Historical Society of the D.C. Circuit

Gesell

Gesell was born on June 16, 1910, in Los Angeles, California, and grew up in New Haven, Connecticut. He earned his undergraduate and law degrees from Yale in 1932 and 1935, respectively. Immediately after law school, he moved to Washington, D.C., for a job as a trial lawyer with the Securities and Exchange Commission, eventually working under SEC Chairman William O. Douglas, later a justice of the Supreme Court. In 1941, Gesell joined the prestigious law firm of Covington & Burling, working on antitrust and other corporate litigation until his appointment to the bench in 1967. During World War II, he took a leave of absence from the firm to serve as counsel to a joint congressional committee investigating the attack on Pearl Harbor. From 1962 to 1964, he once again served the federal government as the chair of the President's Committee on Equal Opportunity in the Armed Forces.

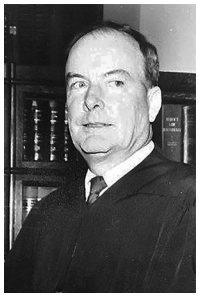
At the age of fifty-seven, Gesell was appointed to the U.S. district court by President Lyndon B. Johnson. His twenty-five-year tenure on the bench was filled with many notable cases. In 1969, he struck down the District of Columbia's ban on abortion, but his ruling was reversed by the Supreme Court. Gesell also presided over the trials of some of the Watergate defendants—including that of Charles Colson, special counsel to President Nixon—and ruled that Nixon's dismissal of special prosecutor Archibald Cox was illegal.

In the years following the Pentagon Papers case, Gesell tried Nixon aide John Ehrlichman and others for authorizing the burglary of the office of Daniel Ellsberg's psychiatrist. In 1989, Gesell presided over the trial of White House aide Oliver North for his role in the Iran-Contra scandal, during which the United States secretly supplied arms to Iran in order to fund rebels fighting in Nicaragua.

Gesell remained on the bench until his death, assuming senior status in January 1993 and dying on February 19, 1993, at the age of eighty-two.

J. Skelly Wright

Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit dissented from the court's 2–1 ruling reversing Judge Gesell of the district court and imposing a temporary restraining order on *The Washington Post*, halting its publication of the Pentagon Papers. Wright began his opinion by lamenting, "This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of our most precious freedom."



Wright

Wright was born on January 14, 1911, in New Orleans, Louisiana, and spent most of his life in that city. He completed both his undergraduate and legal studies at Loyola University in New Orleans, receiving his law degree in 1934. After several years teaching at the high school and then the university level, Wright went to work as an assistant U.S. attorney in the Eastern District of Louisiana. He held that position between 1937 and 1946, interrupted by a three-year stint as an officer in the Coast Guard during World War II. After a brief time in private practice shortly after the war, Wright was appointed U.S. attorney for the district in 1948; he remained in that job for only a year before being appointed to the federal bench by President Truman.

During his nearly thirteen years on the U.S. District Court for the Eastern District of Louisiana, Wright was best known for his rulings in cases brought by the NAACP challenging racial segregation and discrimination in Louisiana. In particular, Wright issued decisions permitting African Americans to attend the undergraduate school and law school at Louisiana State University, desegregating the city parks and buses of New Orleans, allowing interracial sporting events, and restoring hundreds of African-American voters to voting rolls. Most controversial was Wright's decision ordering the desegregation of New Orleans public schools in 1960, a ruling that caused him to be reviled among segregationists throughout the state.

In 1962, President John F. Kennedy appointed Wright to the U.S. Court of Appeals for the District of Columbia Circuit, removing him from the turmoil he faced in New Orleans. In his role as an appellate judge, he continued to issue decisions aimed at eliminating

racial discrimination, such as a ruling that classified as discriminatory the segregation of Washington, D.C., public schools resulting from residential patterns. Wright served as an active judge on the court of appeals until 1986 and as a senior judge for two years after that. He died on August 6, 1988, at the age of seventy-seven.

Hugo Black

Supreme Court Justice Hugo Black wrote the strongest concurring opinion in the Pentagon Papers case. Consistent with his absolutist position on the sanctity of free speech, Black wrote, "I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." Black stressed that a free press was absolutely essential to democracy and asserted that in reporting on the Pentagon Papers, the *Times* and the *Post* "nobly did precisely that which the Founders hoped and trusted they would do." His opinion also contained a pointed criticism of the Vietnam War: "among the responsibilities of a free press," he wrote, "is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."

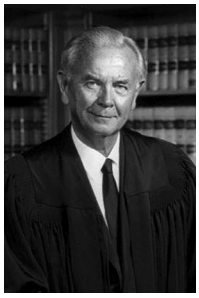
Black

Hugo Lafayette Black was born on February 27, 1886, in Clay County, Alabama. He graduated from the University of Alabama School of Law in 1906 and spent the next two decades mainly in private practice. Black successfully campaigned for the U.S. Senate in 1926, securing a surprise victory in a three-way primary that virtually assured success in the general election because of the Democratic Party's dominance in Alabama. In the Senate, Black eventually established himself as a critic of the Hoover administration's attempts to battle the Great Depression and subsequently became an ally of Franklin Roosevelt's New Deal administration. Black generally supported government interventions in the economy and distrusted the power of corporations but opposed measures designed to secure racial justice.

When Roosevelt nominated Black to the Supreme Court in 1937, the latter's previous opposition to federal antilynching legislation only briefly held up his confirmation hearings, and he was confirmed by a 63–16 majority. The subsequent revelation that Black had once been a member of the Ku Klux Klan, however, caused a more sustained political uproar and forced Black to take the unusual step of making a radio address to the nation to explain his past. Black's thirty-four-year tenure on the court belied accusations that he was a racist, as he became a respected civil libertarian and incurred the wrath of his native South in decisions supporting desegregation and banning mandatory school prayer. Black retired from active service on the Court on September 17, 1971, following a series of strokes, and died eight days later at the age of eighty-five.

William Brennan

Supreme Court Justice William J. Brennan, Jr., voted with the majority in the Pentagon Papers case, allowing publication of the papers to continue. His concurring opinion did not go quite as far as those of Justices Hugo Black and William O. Douglas, both of whom asserted that the First Amendment stood as an absolute bar to a prior restraint on publication. Brennan set a high standard for such a restraint, however, writing that a halt on publication could be justified only by "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."



Brennan

Brennan was born into a family of Irish-Catholic immigrants on April 25, 1906, in Newark, New Jersey. He attended the University of Pennsylvania and Harvard Law School, graduating from the latter in 1931. Brennan then joined a New Jersey law firm and practiced labor law until he enrolled in the army during World War II. Leaving the armed forces in 1945 at the rank of colonel, Brennan returned to private practice before beginning a career as a New Jersey state court judge. He served on the Superior Court from 1949 to 1952 and then as a justice on the state Supreme Court from 1952 to 1956. In October 1956, President Dwight Eisenhower made Brennan a recess appointee to the Supreme Court of the United States, and the Senate confirmed him the following year.

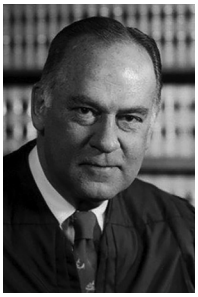
One of the longest-serving and most influential justices in the Court's history, Brennan was known as a liberal devoted to the protection of individual freedoms. In addition to his vote on the Pentagon Papers case, Brennan authored landmark opinions on reapportionment, criminal procedure, and First-Amendment issues such as libel, the free exercise of religion, and flag burning. Brennan retired from the Court in 1990 after thirty-four years of service. He died on July 24, 1997, at the age of ninety-one.

Potter Stewart

Supreme Court Justice Potter Stewart's concurring opinion in the Pentagon Papers case recognized the tension between the necessity for "a press that is alert, aware, and free," and the "confidentiality and secrecy" required for "the successful conduct of international diplomacy and the maintenance of an effective national defense." Stewart believed that the executive branch, because of its responsibility for foreign affairs and national security, was better situated than the judiciary to ensure the safety of classified information. Preventing the publication of damaging or sensitive information was, he asserted, "a function that the Constitution gave to the Executive, not the Judiciary."

Stewart was born into a family with a judicial pedigree: his father had been mayor of Cincinnati and then a justice on the Ohio State Supreme Court. Born on January 23,

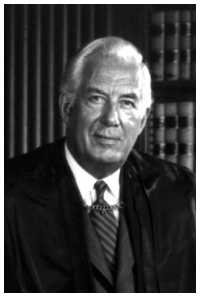
1915, in Jackson, Michigan, Stewart grew up in Cincinnati before attending boarding school in Connecticut. He attended Cambridge University in England on a yearlong fellowship before receiving undergraduate and law degrees at Yale University. He entered private practice with a New York City law firm after graduating in 1941. The next year, he joined the United States Naval Reserves, serving aboard oil tankers for much of World War II. He returned to New York after the war, before moving in 1947 to Cincinnati, where he continued to work in private practice in addition to serving on the city council and as vice mayor.


Stewart

In 1954, Stewart was appointed to the U.S. Court of Appeals for the Sixth Circuit at the unusually young age of thirty-nine. President Dwight Eisenhower gave Stewart a recess appointment to the Supreme Court of the United States in 1958 (the last recess appointment of a Supreme Court justice to date). He was confirmed by the Senate the next year. On the Court, Stewart established a reputation as a moderate justice capable of building coalitions and of controlling the shape of legal development with skillfully crafted concurring opinions. He was noted for his pithy prose and pragmatic reasoning. Stewart retired from active service on the Supreme Court in 1981 but continued to hear a reduced number of cases in the lower courts. He died at age seventy on December 7, 1985, after suffering a stroke.

Warren Burger

Chief Justice Warren Burger was one of three Supreme Court justices to dissent in the Pentagon Papers case, voting to grant the government's request for a preliminary injunction against further publication. Burger objected to the "unseemly haste" with which the case had been conducted, blaming *The New York Times* for not disclosing to the government that it had the Pentagon Papers until several months after it had obtained them. Had the *Times* informed the government of what it intended to publish, he wrote, the parties "might well have narrowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary."


Burger

Burger was born on September 17, 1907, in St. Paul, Minnesota. After graduating from the St. Paul College of Law in 1931, he spent the next two decades in private practice in St. Paul. Burger was active in Minnesota's Republican Party and was a strong supporter of Dwight Eisenhower's presidential campaign in 1952. In 1953, Eisenhower appointed him an assistant attorney general in the Civil Litigation Division of the Department of Justice, and three years later, Eisenhower appointed him to the U.S. Court of Appeals for the District of Columbia Circuit. When Chief Justice Earl Warren retired

in June 1969, President Richard Nixon appointed Burger to succeed him. Nixon was attracted by Burger's reputation as a "law and order" conservative who had been critical of the Warren Court's expansion of the rights of criminal defendants. The President and other Republicans hoped that Burger's leadership would steer the Supreme Court away from the liberalism that characterized the Warren era.

Despite Burger's conservatism, the Court issued several landmark decisions during his tenure that represented victories for liberal causes. Among these was *Roe v. Wade* (1973), in which Burger voted with the majority in protecting the right of women to obtain abortions. In 1974, Burger wrote the opinion in *United States v. Nixon* holding that the President could not assert executive privilege with respect to White House tape recordings, a decision seen by many as a precursor to Nixon's resignation. Among Burger's more conservative opinions was his concurrence in *Bowers v. Hardwick* (1986), in which the Court upheld Georgia's criminalization of sodomy.

Burger served as Chief Justice for seventeen years before retiring from active service in 1986, when William Rehnquist was elevated from associate justice to succeed him. He died on June 25, 1995, at the age of eighty-seven.

John Marshall Harlan II

Supreme Court Justice John Marshall Harlan was one of three justices to vote in favor of imposing a preliminary injunction against further publication of the Pentagon Papers. His dissenting opinion was joined by Chief Justice Warren Burger and Justice Harry Blackmun, making it the only opinion endorsed by all of the dissenting justices. Like the other dissenters, Harlan took issue with the speed with which the litigation had been conducted, and he asserted that the scope of judicial review should be extremely narrow in cases where the executive was exercising its authority over foreign affairs. It was not the role of the courts, he believed, to override the executive's determination that disclosure of the Pentagon Papers would irreparably harm national security.

Harlan

Harlan was born in Chicago, Illinois, on May 20, 1899, the scion of a prominent and affluent family of lawyers. His grandfather and namesake, Justice John Marshall Harlan, was one of the most celebrated justices in the Supreme Court's history (the II was not part of Harlan's legal name but is generally used to distinguish him from his grandfather). Harlan attended Princeton University and was a Rhodes Scholar at Balliol College, Oxford, where he began to study law. In 1924, he graduated from New York Law School and entered practice with a prominent Wall Street firm. He continued this practice until 1954, taking several breaks to work as a government lawyer. During World War II, Harlan served as chief of the Air Corps' Operations Analysis Section. On his return to private practice

in 1945, he established a national reputation as a litigator, arguing several cases before the Supreme Court.

On February 10, 1954, Harlan was appointed to the U.S. Court of Appeals for the Second Circuit. Less than a year later, President Dwight Eisenhower nominated Harlan to the Supreme Court. Although his confirmation was initially delayed by debate over Harlan's supposedly internationalist leanings and controversy over the Court's recent decision in *Brown v. Board of Education* (1954) (the first Justice Harlan had famously argued against the constitutionality of segregation in the late nineteenth century), he was confirmed by the Senate and joined the Court on March 17, 1955. Harlan's restrained view of the federal courts' role in the American system conflicted with the approaches of many of his more avowedly liberal colleagues on the Warren Court who saw the Supreme Court as an engine of social progress. Harlan's focus on procedural fairness over substantive results led some commentators to label him a conservative voice on the Court. In part as a result of these differences, and perhaps because of his grandfather's dissents in infamous cases such as *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905), Harlan developed a reputation as the Warren Court's "great dissenter." Though he differed with his colleagues on several major decisions, Harlan was also widely respected for writing lucid, principled opinions that frequently cut across partisan lines. Toward the end of his tenure, Harlan suffered from cancer and failing eyesight. His opinion in the Pentagon Papers case was his last. He retired from active service in September 1971, and died on December 29, 1971, at the age of seventy-two.

Lawyers

Erwin Griswold

Erwin Griswold served as solicitor general, the Department of Justice official designated to represent the United States government before the Supreme Court, from 1967 to 1973 under Presidents Johnson and Nixon. It was in this capacity that he argued the government's case that preliminary injunctions should be issued to halt further publication of the Pentagon Papers by *The New York Times* and *The Washington Post*. After being requested to do so by Attorney General John Mitchell, Griswold first argued before the U.S. Court of Appeals for the District of Columbia Circuit in the *Post* case (an unusual task for the solicitor general), and subsequently before the Supreme Court.

Griswold was born on July 14, 1904, in East Cleveland, Ohio. After graduating from Oberlin College in 1925, he attended Harvard Law School, from which he graduated with honors in 1928. He practiced law in Cleveland briefly before becoming a staff lawyer in the office of the U.S. solicitor general. In 1934, Griswold returned to Harvard Law as a professor and also served as dean from 1946 until he became the solicitor general in 1967.

During this time, Griswold was, according to his obituary in *The New York Times*, "a dominant figure in American legal education."

In the 1950s, Griswold became associated with two issues of national controversy. He emerged as a prominent critic of Senator Joseph McCarthy, particularly with respect to McCarthy's denunciation of witnesses' invocation of their Fifth Amendment right against self-incrimination. Later, he testified as an expert witness for the NAACP in segregation cases that its legal director, future Supreme Court justice Thurgood Marshall, brought to lay the foundation for *Brown v. Board of Education*. In the 1960s, Griswold served on the U.S. Civil Rights Commission under Presidents Kennedy and Johnson and publicly supported the Supreme Court's expansion of the rights of criminal defendants.

Department of Justice

Griswold

In 1973, Griswold returned to private practice in Washington, D.C., and continued to argue cases before the Supreme Court. In later years, he stated that while he believed at the time that publication of the Pentagon Papers would endanger national security, he felt in hindsight that the disclosures had caused no harm. Griswold died November 19, 1994, at the age of ninety.

Alexander Bickel

Alexander M. Bickel, a Yale law professor at the time of the Pentagon Papers case, was the lead attorney for *The New York Times*. His initial appearance before Judge Murray Gurfein of the U.S. District Court for the Southern District of New York was his first time arguing a case in court. Soon afterwards, he argued successfully before the Supreme Court that publication of the papers should be allowed to continue. Notably, Bickel made the strategic decision to concede that the First Amendment might allow for a prior restraint on publication in some circumstances but argued that those circumstances did not exist with respect to the Pentagon Papers. An absolutist position that a prior restraint was never permissible, Bickel believed, was unlikely to gain the support of a majority of the Supreme Court.

Bickel was born on December 17, 1924, in Bucharest, Romania, and immigrated to the United States at the age of fourteen, settling with his family in New York City. He became a naturalized U.S. citizen in 1943 and served in the Army during World War II. After graduating from City College in 1947, he attended Harvard Law School, graduating with honors in 1949. Soon afterward, he served as a law officer in the State Department and then, from 1952 to 1953, as a clerk to Supreme Court justice Felix Frankfurter. Frankfurter became a significant influence on Bickel, and it was during Bickel's clerkship that he developed a strong interest in constitutional law.

In 1956, Bickel joined the faculty of Yale Law School, becoming a full professor in 1960. During his time at Yale he was considered a leading expert on the Constitution,

writing several books on the federal judiciary and the Supreme Court. Despite being a liberal Democrat, Bickel was critical of what he saw as the judicial activism of the Warren Court. In 1972, he was appointed by Chief Justice Warren Burger to a committee that recommended the establishment of a national court of appeals to reduce the Supreme Court's caseload. Occasionally mentioned as a candidate for the Supreme Court himself, Bickel was still a professor at Yale when he died on November 7, 1974, at the age of forty-nine.

William Glendon

William R. Glendon, a senior partner at the law firm of Rogers & Wells, was the lead attorney for *The Washington Post* in the Pentagon Papers case. Along with *Times* counsel Alexander Bickel, he argued before the Supreme Court that no injunction should be issued to prevent further publication of the Pentagon papers. After the Court ruled in his client's favor, Glendon expressed relief, describing the government's attempt at censorship as putting "freedom of the press as we know it in the balance."

Glendon was born in Medford, Massachusetts, on May 1, 1919, and grew up in nearby Stoneham. After graduating from Holy Cross College in 1941, he served in the U.S. Navy during World War II, participating in the invasions of North Africa, Italy, and France. After the war, he attended Georgetown Law School, graduating in 1947. He then served as an assistant district attorney in Washington, D.C., before entering private practice. In 1956, he moved to his firm's New York City office.

Although Glendon was primarily a trial attorney, he argued two additional cases before the Supreme Court following the Pentagon Papers case. In 1977, he won a securities fraud case, and in 1985, he argued on behalf of the village of Scarsdale, New York, whose trustees had voted to ban the public display of a Christmas crèche. The Court split 4–4 in the latter case, maintaining the decision of the U.S. court of appeals permitting the crèche to remain. Later in 1985, Glendon was elected mayor of Scarsdale. Glendon continued to practice law until the age of seventy-two. He died on December 25, 2008, age eighty-nine.

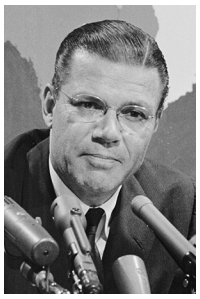
Other Important Figures

Robert McNamara

Robert McNamara served as Secretary of Defense under Presidents Kennedy and Johnson from 1961 to 1968. During these years, McNamara became the primary shaper of American policy in Vietnam. In 1967, he commissioned the Department of Defense study of the Vietnam War that came to be popularly known as the Pentagon Papers. McNamara later explained that he wished to ensure preservation of the historical record of the decisions made by political and military leaders prior to and during the war. Having come to see the war as a mistake, McNamara hoped that the study would help to prevent similar foreign policy missteps in the future.

McNamara was born on June 9, 1916, in San Francisco, California. He studied at the University of California, Berkeley, and then at Harvard Business School. After a year with the accounting firm of Price, Waterhouse & Company, he returned to Harvard to teach business administration. During World War II, he enlisted in the Army Air Forces, serving in England and India and rising to the rank of lieutenant colonel.

In 1946, McNamara took a job with the Ford Motor Company, helping to turn around what was then a troubled company. He rose through the organization's ranks quickly and was named president of the company, under chief executive Henry Ford II, in November 1960. It was only five weeks later, however, that President-Elect John F. Kennedy asked McNamara to join his incoming administration as the Secretary of Defense. When McNamara protested that he was not qualified for the job, Kennedy replied, "Look, Bob, I don't think there's any school for presidents either."



McNamara

In his early years at the Pentagon, McNamara dealt with Cold War events such as the Bay of Pigs invasion and the Cuban Missile Crisis. After the Gulf of Tonkin incident in August 1964, which led to a broad congressional authorization of the use of force against the communists in North Vietnam, his tenure was dominated by the Vietnam War. He was the chief architect of American strategy in Vietnam until his departure from the Defense Department in 1968, shaping policy to such an extent that many referred to the conflict as "McNamara's War." While he was initially optimistic about American prospects for victory, McNamara expressed doubts about the war in 1967, taking note of its growing unpopularity in the United States and urging President Johnson to negotiate a peaceful end to the conflict. His resistance to further escalation of the war put him at odds with both the President and military leaders, leading to McNamara's resignation.

After leaving office, McNamara became head of the World Bank, serving in that capacity until 1981. In retirement, he expressed regret over the Vietnam War and the role he had played in conducting it. He published a book, *In Retrospect: The Tragedy and Lessons of Vietnam*, in 1995, in which he admitted to having made many mistakes during his time at the Pentagon. McNamara was also the subject of the 2003 documentary, The Fog of War, for which he was interviewed extensively. He died on July 6, 2009, at the age of ninety-three.

Daniel Ellsberg

Daniel Ellsberg was the key figure in the Pentagon Papers case, although he was not directly involved in the federal government's lawsuits against *The New York Times* and *The Washington Post*. It was Ellsberg, a former Department of Defense employee who had contributed to the Pentagon Papers, who leaked the secret documents to *Times* reporter Neil

Sheehan in 1971. His actions set into motion the publication of the papers and the legal and political controversy that ensued. While the Pentagon Papers cases were pending in the federal courts in New York and Washington, Ellsberg was indicted in the U.S. District Court for the Central District of California on charges of espionage and theft. The case against him and co-defendant Anthony Russo was dismissed in 1973 by trial judge Matthew Byrne, after revelations of government misconduct that included illegal surveillance of Ellsberg by the FBI and a burglary at the office of Ellsberg's psychiatrist by members of a special White House unit known as the "Plumbers."

Ellsberg

Ellsberg was born in 1931 in Chicago, Illinois, but grew up in Detroit, Michigan. After graduating with honors from Harvard University in 1952, Ellsberg studied at Cambridge University in England and then joined the U.S. Marines in 1954. In 1957, Ellsberg returned to Harvard, earning his Ph.D. in economics in 1962. During his time as a graduate student, he impressed Harvard professor Henry Kissinger (later President Nixon's national security advisor and Secretary of State), when he delivered lectures on the use of irrational military threats to a seminar Kissinger taught.

In 1959, after being honorably discharged from the Marines, Ellsberg joined the RAND Corporation—a civilian research institute that performed work for the U.S. military—where he worked on issues related to nuclear war. Two years later, he began consulting for the Pentagon as well, and in 1964 he left RAND to work full-time for the Defense Department. His work at the Pentagon focused exclusively on the Vietnam War, and he helped to plan for the dispatch of U.S. ground troops to Vietnam in 1965. The following year, Ellsberg requested to go to Vietnam as a Marine company commander but was told he held too important a civilian position to be dispatched into combat. He went instead as part of a group from the State Department, studying the pacification program and going out on patrols with Army and Marine units, during which he was occasionally caught in combat.

Ellsberg's time in Vietnam helped to change his views of the war, and by 1967, he had become disillusioned with American policy and convinced that the United States should withdraw from the war. That same year, he accepted a request to join the Pentagon Papers project, where he wrote about the Kennedy administration's early Vietnam policy. In 1969, his stance against the war having deepened, he was asked by RAND to write a paper for Kissinger outlining the Nixon administration's options in Vietnam. During his work for Kissinger, Ellsberg requested and was granted access to the entirety of the Pentagon Papers. Shortly thereafter, in the hopes of spurring a change in American foreign policy toward Vietnam, Ellsberg made the fateful decision to copy the documents in secret.

After trying unsuccessfully to publicize the Pentagon Papers though government channels, he began in March 1971 to leak them to the *Times*.

Since the end of the Vietnam War, Ellsberg has continued to play a role in public life as an author, lecturer, and activist. Much of his time has been devoted to campaigning against the proliferation of nuclear weapons. He has written books on that topic as well as a memoir concerning his experience with the Vietnam War and the Pentagon Papers.

Neil Sheehan

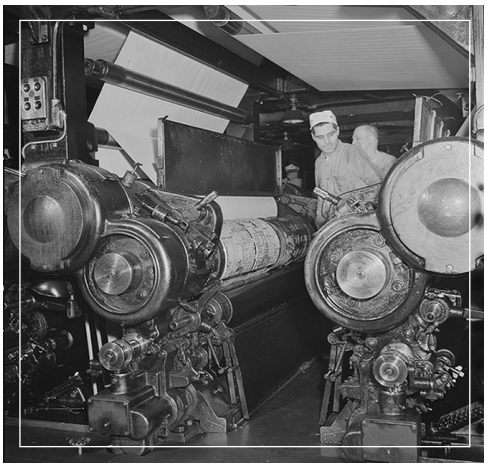
Cornelius Mahoney "Neil" Sheehan of the Washington, D.C., bureau of *The New York Times* was the first reporter to whom Daniel Ellsberg leaked the Pentagon Papers in March 1971. As a result, it was Sheehan's byline that appeared on the first articles about the secret Vietnam study. After Ellsberg gave him access to the papers in Cambridge, Massachusetts, Sheehan made copies and took them to Washington, D.C., where he spent weeks in a hotel room studying them in secret with a *Times* editor. After Sheehan had digested the material and prepared his first reports, extensive deliberations ensued among *Times* management about whether to go ahead with publication. Sheehan's first article on the Pentagon Papers was published on June 13, 1971. His reporting earned the *Times* a Pulitzer Prize in 1972.

Sheehan was born in Holyoke, Massachusetts, on October 27, 1936, and was raised on a dairy farm. He attended Harvard University, where he edited a literary magazine. Upon graduating in 1958, he joined the U.S. Army and was stationed in Korea and Japan. While in Japan, he began working for the Tokyo office of the United Press International wire service, and after his discharge from the military, he became a full-time UPI reporter. From 1962 to 1964, he worked in UPI's Saigon bureau, covering the war in Vietnam. He then joined *The New York Times*, which eventually sent him back to Vietnam. Sheehan's reporting emphasized the desire of the Vietnamese people to be free from foreign occupation, a stance that was viewed unfavorably by the U.S. government. It was during this assignment that Sheehan became friendly with Daniel Ellsberg, who was in the country working for the State Department. After returning to the United States, Sheehan joined the paper's Washington bureau, covering the Pentagon and then the White House.

In 1972, Sheehan published his first book about the Vietnam War and took a leave of absence from the *Times* to begin a book about John Paul Vann, a U.S. Army officer who played a prominent role in the war. The book was delayed significantly after Sheehan was seriously injured in a 1974 car accident, and two years later, he resigned from the paper. Finally published in 1988, *A Bright Shining Lie: John Paul Vann and America in Vietnam* won a Pulitzer Prize and a National Book Award. In 2009, Sheehan published another book, *A Fiery Peace in a Cold War*, about the U.S. intercontinental ballistic missile program.

4

Media Coverage and Public Debates



Like the Vietnam War itself, both the publication of the Pentagon Papers and the resulting decisions of the federal courts were extremely divisive. Many Americans expressed anger at *The New York Times* and *The Washington Post* for what they saw as an immoral act: publishing documents that Daniel Ellsberg had leaked illegally. Others echoed the argument the federal government had made in attempting to stop publication of the Pentagon Papers, namely that the disclosures had endangered national security. The author of a letter to the *Times* was especially critical of the publication of documents regarding American relations with other nations. "The inclusion of these references," he wrote, "might cause some loss of confidence in the reliability of the United States as a participant in international diplomacy." Some of the public's anger was aimed at Neil Sheehan, the *Times* reporter to whom

The New York Times pressroom (archival photo).

Ellsberg initially leaked the Pentagon Papers and who wrote most of the newspaper's coverage of them.

Opponents of the Pentagon Papers' exposure also directed criticism at the judges and justices whose rulings had allowed publication to continue. These objections, like those aimed at the newspapers, were based primarily on the fact that the documents had been obtained illegally and the belief that their publication had endangered national security. The writer of a letter to Justice Harry Blackmun (who had dissented from the Supreme Court's ruling in favor of publication) complained, "Presumably, any publication can now publish anything it gets its hands on, even if it means a death sentence for the nation." Some critics focused on what they believed was an intrusion upon the separation of powers. By allowing the publication of documents the executive branch had deemed classified, they argued, the federal judiciary had undermined the President's role as the person having primary responsibility for protecting national security and conducting foreign affairs.

Reflecting the deeply divided nature of public opinion, both of the newspapers, as well as the jurists involved, also received letters from the public supporting the release of the Pentagon Papers. A large number of Americans saw the episode as a triumph of the First Amendment and a vindication of the freedom of the press. The author of a letter to Justice William Douglas, written a few days before the Supreme Court's ruling, expressed the hope that the Court would not permit the government "to take over the press and tell them what to print or not to print." Neil Sheehan received grateful letters, such as one thanking him for "the invaluable service you have rendered" and "the wonderful job you have done." Letters to Post editor Benjamin Bradlee praised his "courageous stand" and "real patriotism." One correspondent asserted that the "dangers to this democratic republic of an ill-informed or misinformed populace far outweigh the 'horrendous' dangers to national security and defense put forth by those … who urged that the public be kept in the dark."

Much of the enthusiasm for the publication of the Pentagon Papers derived from hostility toward U.S. participation in the Vietnam War and a feeling that the government had deceived the American public about the conduct and progress of the war. A letter to Justice Blackmun stressed that it was "the discredited Government officials, bureaucrats, generals, and 'intellectuals,'" and not those who disclosed the Pentagon Papers, who were to blame for the "tragic results" in Vietnam. A writer to the *Times* criticized the "extraordinary and continuous pattern of deception and self-deception" the Pentagon Papers had revealed. "The real scandal is not Dr. Ellsberg's dramatic opening of the curtain," he continued. "It is what has been going on behind it."

The Pentagon Papers also sparked discussion within Congress. Prior to the Supreme Court's ruling, twenty-seven members of Congress submitted an amicus curiae brief ask-

ing the Court not to restrain publication of the papers. Citing a fear of growing executive power, the brief argued for a "legislative right to know," as well as legislators' "particular and profound interest in having their constituents obtain all the information necessary to perform their functions as voters and citizens." The Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations held hearings on the government's handling of sensitive information while the Pentagon Papers cases were pending in court. The subcommittee's chair, Democrat William S. Moorhead of Pennsylvania, cited the Pentagon Papers as an example of unwarranted "restrictions by the executive on the free flow of information to the Congress and to the public through the mass media."

Members of Congress opposed to the Vietnam War, such as Senator George McGovern of South Dakota, were angered by the revelations contained in the papers. After reading the initial *Times* coverage, McGovern accused former Secretary of Defense Robert McNamara of lying to Congress about the conduct of the war. The documents clearly showed, McGovern argued, that the Johnson administration "did not adequately inform the American people and the Congress about the policy it was pursuing" in Vietnam. The Nixon administration, he lamented, "has joined in the effort to suppress the truth." The day before the Supreme Court issued its ruling, Senator Mike Gravel of Alaska convened a hearing of the Buildings and Grounds Subcommittee, which he chaired, for the purpose of reading a portion of the Pentagon Papers and having the remainder entered into the formal hearing record. In October 1971, Beacon Press published "The Senator Gravel Edition" of the Pentagon Papers.

Following publication of the Pentagon Papers in *The New York Times* and *The Washington Post*, other major newspapers, such as *The Boston Globe*, the *Chicago Sun-Times*, and the *St. Louis Post-Dispatch* obtained copies of the documents and began to report on them as well. Unsurprisingly, press coverage of the Pentagon Papers litigation was weighted mostly in favor of the documents' publication, although this sentiment was not unanimous. *The Wall Street Journal* came out strongly in favor of the right to publish, calling the freedom "to speak and publish without prior restraint or censorship" a "fundamental principle of our democracy." An editorial in the *St. Louis Post-Dispatch* called Attorney General John Mitchell's attempt to halt publication a "monumental blunder" that showed the Nixon administration's hostility to the First Amendment. *The Detroit News*, on the other hand, accused *The New York Times* of acting irresponsibly in publishing the Pentagon Papers. No editor, its editorial proclaimed, should have the "power to substitute his personal definition of national interest as a basis for declassification." Likewise, conservative columnist William F. Buckley noted that while the American people routinely pass judgment on their elected officials at the ballot box, "[w]e are not given such power over The

Times and The Washington Post."

The Pentagon Papers case has lived on in popular culture. It has been the subject of a large number of books, including a memoir by Daniel Ellsberg. In 2010, PBS aired a documentary entitled "The Most Dangerous Man in America: Daniel Ellsberg and the Pentagon Papers." *The Post*, Steven Spielberg's 2017 film recounting the role of *The Washington Post* in publishing the papers, received critical acclaim and was nominated for an Academy Award for Best Picture.

5

Historical Documents

The Publication of the Pentagon Papers

Neil Sheehan, memo to Max Frankel, March 26, 1971[1]

In March 1971, shortly after receiving the Pentagon Papers from Daniel Ellsberg, Times *reporter Neil Sheehan prepared a memo for Washington bureau chief Max Frankel, laying out the points he wished to emphasize in the articles he was to write on the Pentagon report. Among Sheehan's observations were that President Lyndon Johnson had planned to escalate the war despite his claims to the contrary, that Pentagon officials seemingly gave little thought to the human costs of the war, and that no one involved in making U.S. policy seriously considered, during the time covered by the study, the possibility of withdrawal from Vietnam.*

Memo to: Max Frankel
Ex: Sheehan
Subject: Inside History of Vietnam War

…

1. The first piece in whatever series we decide on must give the reader a sense of the scope and flavor of the entire thing.
2. The first piece, and probably subsequent pieces, must include, in the narrative, mileposts to orient the reader historically. Probably a chronology of u.s. involvement in vietnam (from the public record) should accompany each piece.)

1. Neil Sheehan papers (on file with the Library of Congress).

3. Program of south vietnamese covert and overt operations (the 34/A OPS) were NOT a SVN operation except that SVN personnel were used. The whole operation was American—down to almost daily approval of moves by the White House. After Tonkin Gulf, U.S. adopted various tactics designed to provoke the enemy into actions that could then be "retaliated against."
4. Johnson said "We didn't seek a wider war." But the entire strategy of bombing was designed as a wider war. It was assumed from the earliest stages of planning that there would be bombing of the north.
5. The FIREBREAKS. The president and the pressures of the bureaucracy. Once a target list was prepared, it was easier to keep following it than to change direction. Also, since the plans have been made, we might as well use 'em. There is a great deal of evidence that BUREAUCRATIC MOMENTUM was an important factor in everything, and this provides excellent insight into how government works.
6. There was total rejection, on all sides, of any idea of withdrawal from Vietnam. It was just not part of the considerations, from the beginning. And the evidence is clearer than it has ever been that the u.s. was doing what it was doing in Vietnam strictly—and unequivocally—for u.s. purposes. South Vietnamese welfare or interests simply were not factors in u.s. thinking, except when SVN attitudes got in the way of u.s. policy. In which case, SVN thinking was considered only because we needed them (not they us, as much) as a cover for our operations.
7. Startlingly clear is the absence of moral or human considerations in the decision process in any of the material so far examined. The personalities involved, the bureaucratic method, the military requirements—all of these no doubt are partial reasons for this lack of "humanity" in these mss. The contrast with the popular understanding of the war as something that affects—kills—human beings, is fascinating.
8. As mentioned above, but worthy of special attention and extended treatment, is the clear evidence that pressure on Hanoi would not dissuade Hanoi from helping the VC, and the clear evidence that this was realized throughout the administration but that the pressure was nevertheless exerted.
9. Recognition that the roots of the insurgency were in the south.

…

17. The need to keep bolstering whatever SVN government was in power at the moment—not for the purposes of the SVN, but for u.s. purposes. The clear feeling throughout that the South Vietnamese were mostly an annoyance, and that u.s. policy would have been easier to carry out without such annoyances.

The New York Times, first article on the Pentagon Papers, June 13, 1971[2]

In the first of three articles published before the U.S. District Court for the Southern District of New York halted publication with a temporary restraining order, The New York Times *on June 13 published a summary of the broad findings of the Pentagon's study and a more detailed account of the events leading up to the August 1964 Tonkin Gulf Resolution, by which Congress granted President Lyndon Johnson broad authority to conduct military operations in Vietnam. The resolution followed trumped-up reports of North Vietnamese attacks—allegedly unprovoked—upon American vessels in the Gulf of Tonkin. Contrary to the administration's public statements, however, U.S. forces had for months been carrying out secret attacks on the North—a "covert war," as the* Times *described it—in hopes of provoking a response that might justify U.S retaliation. Far from being a spontaneous response to North Vietnamese aggression, the Tonkin Gulf Resolution had already been drawn up in principle; the Johnson administration had been awaiting an opportune time to introduce it. Because the resolution became the basis for the escalation of American military operations in Vietnam into a full-fledged war, the revelations about the administration's deception threatened to undermine public support for American participation in the war.*

A massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago, demonstrates that four administrations progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time.…

The study led its 30 to 40 authors and researchers to many broad conclusions and specific findings, including the following:

- That the Truman Administration's decision to give military aid to France in her colonial war against the Communist-led Vietminh "directly involved" the United States in Vietnam and "set" the course of American policy.
- That the Eisenhower Administration's decision to rescue a fledgling South Vietnam from a Communist takeover and attempt to undermine the new Communist regime of North Vietnam gave the Administration a "direct role in the ultimate breakdown of the Geneva settlement" for Indochina in 1954.
- That the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of "limited-risk gamble," which it inherited, into a "broad commitment" that left President Johnson with a choice between more war and withdrawal.

2. Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times, June 13, 1971, at 1.

- That the Johnson Administration, though the President was reluctant and hesitant to take the final decisions, intensified the covert warfare against North Vietnam and began planning in the spring of 1964 to wage overt war, a full year before it publicly revealed the depth of its involvement and its fear of defeat.
- That this campaign of growing clandestine military pressure through 1964 and the expanding program of bombing North Vietnam in 1965 were begun despite the judgment of the Government's intelligence community that the measures would not cause Hanoi to cease its support of the Vietcong insurgency in the South, and that the bombing was deemed militarily ineffective within a few months.
- That these four succeeding administrations built up the American political, military and psychological stakes in Indochina, often more deeply than they realized at the time, with large-scale military equipment to the French in 1950; with acts of sabotage and terror warfare against North Vietnam beginning in 1954; with moves that encouraged and abetted the overthrow of President Ngo Dinh Diem of South Vietnam in 1963; with plans, pledges and threats of further action that sprang to life in the Tonkin Gulf clashes in August, 1964; with the careful preparation of public opinion for the years of open warfare that were to follow; and with the calculation in 1965, as the planes and troops were openly committed to sustained combat, that neither accommodation inside South Vietnam nor early negotiations with North Vietnam would achieve the desired result.

The Washington Post, first article on the Pentagon Papers, June 18, 1971[3]

After obtaining a copy of the Pentagon Papers, The Washington Post *began its own series of articles on June 18, three days after the issuance of a temporary restraining order halted publication by* The New York Times. *The* Post*'s first article focused on the successful efforts of the Eisenhower administration to undermine popular elections in Vietnam following the Geneva Conference of 1954, thus revealing both the roots of American involvement in Vietnam and the long pattern of government secrecy and misrepresentation.*

The Eisenhower administration, fearful that elections throughout Vietnam would bring victory to Ho Chi Minh, fought hard but in vain at the 1954 Geneva Conference to reduce the possibility that the conference would call for such elections.

But the following year it was South Vietnamese President Ngo Dinh Diem, far more than the American government, who was responsible for the elections' not taking place.

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3. Chalmers M. Roberts, *Documents Reveal U.S. Effort In '54 to Delay Viet Election*, Wash. Post, June 18, 1971, at A1.

Diem flatly refused even to discuss the elections with the Communist regime in Hanoi.…

A March [1954] memorandum from the Chairman of the Joint Chiefs of Staff, Adm. Arthur Radford, to Secretary of Defense Charles Wilson on the JCS views about the then-impending negotiations said this about "establishment of a coalition government":

"The acceptance of a settlement based on the establishment of a coalition government in one or more of the Associated States [Vietnam, Laos and Cambodia] would open the way for the ultimate seizure of control by the Communists under conditions which might preclude timely and effective external assistance in the prevention of such seizure."

In a paragraph about "self-determination through free elections," the JCS said in part:

"The Communists, by virtue of their superior capability in the field of propaganda, could readily pervert the issue as being a choice between national independence and French colonial rule. Furthermore, it would be militarily infeasible to prevent widespread intimidation of voters by Communist partisans. While it is obviously impossible to make a dependable forecast as to the outcome of a free election, current intelligence leads the Joint Chiefs of Staff to the belief that a settlement based upon free elections would be attended by almost certain loss of the Associated States to Communist control." …

By the time the Geneva Conference opened, as has been known for many years, the United States had actively considered the idea of military intervention.…

President Eisenhower approved the policy statement set at the National Security Council table [in January 1954].…

The immediate aim was to help the French by expediting "and if necessary" increasing aid, to "assist them in:

"a. An aggressive military, political and psychological program, including covert operations, to eliminate organized Viet Minh forces by mid-1955.

"b. Developing indigenous armed forces, including logistical and administrative services, which will eventually be capable of maintaining internal security without assistance from French units." …

The NSC paper noted that if such actions as those outlined were taken "the United States should recognize that it may become involved in an all-out war with Communist China and possibly with the USSR and the rest of the Soviet bloc, and should therefore proceed to take large-scale mobilization measures."

The Response of the Nixon Administration

Transcripts of President Richard Nixon's conversations with aides regarding the Pentagon Papers and Daniel Ellsberg, June 13–29, 1971

As these transcriptions of his conversations with aides reveal, President Nixon's first response to the publication of the Pentagon Papers focused on the "treasonable action" of the leakers and the potential political advantages of a report that so seriously criticized previous Democratic administrations. Following conversations with aide John Ehrlichman and Attorney General John Mitchell—both of whom warned that the government could be waiving its rights if it failed to act—the President decided to seek an injunction to restrain further publication. In a conversation with special counsel Charles Colson on June 29—the day before the Supreme Court allowed publication of the Pentagon Papers to continue—the President agreed that the prosecution of Daniel Ellsberg was needed to deter similar leaks of classified information in the future.

Richard Nixon/Henry Kissinger phone conversation, June 13, 1971[4]

Nixon: [Deputy national security advisor Alexander] Haig was very disturbed by that New York Times thing … Unconscionable damn thing for them to do.… Uh, fortunately it didn't come out in our administration … according to Haig, it's all relates to the two previous administrations, is that correct?

Kissinger: That is right.… In public opinion, it actually, if anything, will help us a little bit, because this is a gold mine of showing how the previous administration got us in there.

Nixon: I didn't read the thing [unclear], give me your view on that, in, in a word.

Kissinger: It just shows massive mismanagement of how we got there, and it [unclear] pins it all on Kennedy and Johnson.

Nixon: Huh, yeah [laughing?].…

Kissinger: I think they outsmarted themselves, because they had put themselves, they had sort of tried to make it Nixon's war, and what this [unclear] proves is that, if it's anybody's war, it's Kennedy's and Johnson's.…

Nixon: This is treasonable action on the part of the bastards that put it out.…

Kissinger: It's, it's treasonable, there's no question—it's actionable, I'm absolutely certain that this violates all sorts of security laws.…

Nixon: A congressional committee could call [the leaker] in, put him under oath, you know, and then he's guilty of perjury if he lies.… because you gotta have the questions, and the investigations, and know what it is. Well we're not gon-

4. National Security Archive, George Washington University, http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/transcript.pdf.

na get disturbed; these are, these things happen you know, [former secretary of defense Clark] Clifford pops off, and this guy pops off. I would think it would infuriate Johnson, wouldn't you?

KISSINGER: Oh [unclear] basically, it doesn't hurt us domestically, I think, I'm no expert on that, but no one reading this can then say, uh, that this president got us into trouble. [Unclear] this is an indictment of the previous administration. It hurts us with Hanoi, because it just shows how far our demoralization has gone.

NIXON: Good God.

KISSINGER: But basically, uh, I think they, the decision [the North Vietnamese] have to make is do they want to settle with you, they know damn well that you are the one who held firm, and, and no matter how far they, much anyone else is demoralized doesn't make any difference.…

NIXON: But I wouldn't, that's [unclear], don't worry about this, uh, Times thing; I just think we gotta expect that kind of crap, and, uh, we just plow ahead, plow ahead.

RICHARD NIXON/JOHN EHRLICHMAN PHONE CONVERSATION, JUNE 14, 1971[5]

EHRLICHMAN: Hello, Mr., Mr. President, the attorney general has called a couple times, about these New York Times stories; and he's advised by his people that unless he puts the Times on notice; uh, he's probably gonna waive any right of prosecution against the newspaper; and he is calling now to see if you would approve his, uh, putting them on notice before their first edition for tomorrow comes out.…

NIXON: Hell, I wouldn't prosecute the Times. My view is to prosecute the God-damn [expletive] that gave it to 'em.

Ehrlichman: Yeah, if you can find out who that is.

NIXON: Yeah. I know, I mean, uh, could the Times be prosecuted?

EHRLICHMAN: Apparently so.…

NIXON: Hmm, does [Attorney General John Mitchell] have a judgment himself as to whether he wants to or not?

EHRLICHMAN: Yeah, I think he wants to …

NIXON: How do you feel about it?

EHRLICHMAN: Well, uh, I'd, I'd kinda like to have a cause of action against them in the sack in case we needed it. I'd hate to, I'd hate to waive something as good as that.

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5. National Security Archive, George Washington University, http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/ehrlichman.pdf.

Richard Nixon/John Mitchell phone conversation, June 14, 1971[6]

Nixon: What is your advice on that, uh, Times thing John? Uh, you w- you would like to do it?

Mitchell: Uh, I would believe so, Mr. President, otherwise we will look a little foolish in not following through on our, uh, legal obligations, and, uh …

Nixon: Well look, look, as far as the Times is concerned, hell they're our enemies—I think we just oughta do it, and anyway. Henry [Kissinger] tell him what you just heard from [former national security advisor Walt] Rostow.

Kissinger: Well, Rostow called on behalf of [former President Lyndon] Johnson, and he said that it is Johnson's strong view that this is an attack on the whole integrity of government … if whole file cabinets can be stolen and then made available to the press, uh, you can't have orderly government anymore. And he said if the president defends the integrity, any action we take he will back publicly.…

Mitchell: Uh, we've got some information we've developed as to where these copies are, and who they're likely to, uh, have leaked them, and the prime suspect, according to your friend Rostow, you're quoting, is a gentleman by the name of Ellsberg, who is a left-winger that's now with the Rand Corporation, who also have a set of these documents.…

Nixon: Subpoena them. Christ, get them.

Richard Nixon/Charles Colson phone conversation, June 29, 1971[7]

Nixon: Well, with—the point is that the Ellsberg case, however it comes out, is going to get all through this government among the intellectual types, and the people that have no loyalties, the idea that they will be the ones that'll determine what's good for this country.

Colson: That's right.

Nixon: Goddamn it, they weren't elected and they're not going to determine it that way.

Colson: Well, and the other side of that problem, Mr. President, is that if you allow something like that to go unpunished, then you just encourage—

Nixon: Mm-hmm.

Colson: —an unending flow of it.

Nixon: That's right.

Colson: And on the other hand, if you nail it hard, it helps to keep people—

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6. National Security Archive, George Washington University, http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/mitchell.pdf.

7. Conversations Concerning the Daniel Ellsberg and the Pentagon Papers (June 22–30), Famous Trials, https://famous-trials.com/legacyftrials/ellsberg/nixononpp.html#Conversations_Concerning_the_Daniel.

Nixon: Right.

Colson: —in line and discourage others.… And the argument is, "Well [Ellsberg has] made a hero of himself, and the harder we hit him the more we build him up." But the way I sized the fellow up—building him up doesn't, doesn't help the other side because he's not an—

Nixon: Because he's a natural enemy.

Colson: He's not an appealing personality. He's a damn good guy to be against.

Nixon: Mm-hmm. Mm-hmm.

Colson: We've had all sorts of reports as you know of his tie-in with other people. I think an awful lot of this will fall out.…

Nixon: Of course, if you could get him tied in some with Communist groups that would be good.… That's my guess, that he's in with some subversives, you know.

The Court Proceedings Involving *The New York Times* and *The Washington Post*

On June 14, 1971, the United States government filed suit in federal court seeking to stop *The New York Times* from publishing any more material from the stolen Pentagon Papers. The government requested a temporary restraining order—an immediate and short-term measure designed to freeze the status quo until the court had a chance to conduct an initial review of the evidence—as well as a preliminary injunction, a restraint of longer duration that would remain in effect until the completion of a trial. Judge Murray Gurfein, appointed to the bench by President Richard Nixon only a month earlier, granted on June 15 a temporary restraining order set to expire four days later.

The New York Times, brief submitted to U.S. District Court for the Southern District of New York in opposition to government's request for preliminary injunction, June 17, 1971[8]

The brief submitted by The New York Times *in the district court in New York argued that the government attorneys offered no evidence to support their allegation that publication of the Pentagon Papers would cause irreparable harm to national security.*

The United States here seeks the remedy of a temporary injunction on the basis that it will assertedly suffer "irreparable harm" to its "defense interests" if the New York Times is not judicially forbidden to publish further articles such as those previously published. The

8. United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), *copy of brief located in* Gerhard Gesell papers (on file with the Library of Congress).

moving papers of the United States purport to support the proposition that publication by the Times of further excerpts will "prejudice the defense interests of the United States and result in irreparable injury to the national defense." … Beyond those general allegations, thus far unsupported by a single fact presented to this Court, the United States has not made the slightest effort to prove that defense interests of the nation would in fact be harmed by publication of the series. The United States has not suggested that the articles thus far published have revealed information which can in any way endanger or injure American armed forces or that there is any prospect of future articles having this effect. The Times has not published sailing dates of troop transports, not published secret plans of future military maneuvers, not published data relating to weapons systems or the like. It has instead published part of an historical record and, we submit, in doing so has served the nation as the First Amendment intended it to.

Max Frankel, affidavit submitted to U.S. District Court for the Southern District of New York, June 17, 1971[9]

Max Frankel, the chief of The New York Times*'s Washington bureau, submitted an affidavit to the district court explaining that the media's use of classified government information was not only routine but was essential to the operation of a free press.*

1. Without the use of "secrets" that I shall attempt to explain in this affidavit, there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people. That is one reason why the sudden complaint by one party to these regular dealings strikes us as monstrous and hypocritical—unless it is essentially perfunctory, for the purpose of retaining some discipline over the Federal bureaucracy.
2. I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as *secrets*—varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—Government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same Government, by

9. United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), *affidavit available at* Nat'l Archives & Records Admin., Record Grp. 21, New York, N.Y.

the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.…

3. Obviously, there is need for some secrecy in foreign and military affairs. Considerations of security and tactical flexibility require it, though usually for only brief periods of time. The Government seeks with secrets not only to protect against enemies but also to serve the friendship of allies. Virtually every mature reporter respects that necessity and protects secrets and confidences that plainly serve it.
4. But for the vast majority of "secrets," there has developed between the Government and the press (and Congress) a rather simple *rule of thumb*: The Government hides what it can, pleading necessity as long as it can, and the press pries out what it can, pleading a need and right to know. Each side in this "game" regularly "wins" and "loses" a round or two. Each fights with the weapons at its command. When the Government loses a secret or two, it simply adjusts to a new reality. When the press loses a quest or two, it simply reports (or misreports) as best it can. Or so it has been, until this moment.

Espionage Act of 1917, as amended[10]

The U.S. government claimed that newspapers publishing material taken from the Pentagon Papers were violating Section 793(e) of the Espionage Act of 1917, which barred communicating information regarding the national defense to those not entitled to receive it. The section provided for criminal penalties, but not for a prior restraint on publication; nevertheless, the government asserted that an injunction was authorized when, as in this instance, a statute's criminal penalties were inadequate to accomplish the legislation's purpose. Judge Murray Gurfein of the U.S. District Court for the Southern District of New York, in the opinion excerpted below, declined to accept the government's statutory argument, reasoning that the inclusion of the word "publish" in other sections of the Act, but not in Section 793(e), meant that Congress did not intend for that section to apply to the conduct of The New York Times. *Moreover, the judge pointed out that Congress had, in forming the original Espionage Act during World War I, voted down a proposal to prohibit the publication of certain national defense information during wartime.*

§793. Gathering, transmitting or losing defense information.

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national

10. 18 U.S.C. § 793 (1950).

> defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it …
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

U.S. District Court for the Southern District of New York, decision on government's request for preliminary injunction, June 19, 1971[11]

After holding a closed hearing to examine the government's claims that it would be irreparably harmed by further publication, Gurfein on June 19 declined to impose a preliminary injunction but continued the temporary restraining order to allow the government to appeal his decision. In his decision, Gurfein emphasized that the administration's call for prior restraint was unprecedented in the federal courts and, even in this preliminary decision, cast serious doubt on the administration's interpretation of the Espionage Act of 1917. On June 23, the U.S. Court of Appeals for the Second Circuit reversed Judge Gurfein's decision and remanded the case to the district court for further proceedings.

This case is one of first impression. In the researches of both counsel and of the Court nobody has been able to find a case remotely resembling this one—where a claim is made that national security permits a prior restraint on the publication of a newspaper.…

The Government does not contend, nor do the facts indicate, that the publication of the documents in question would disclose the types of classified information specifically prohibited by the Congress. Aside from the internal evidence of the language of the various sections as indicating that newspapers were not intended by Congress to come within the purview of Section 793, there is Congressional history to support the conclusion. Section 793 derives from the original espionage act of 1917.… At that time there was proposed in H.R. 291 a provision that "(d)uring any national emergency resulting from a war to which the United States is a party … the President may, by proclamation, prohibit the publishing or communicating of … any information relating to the national defense, which in his judgment is of such character that it is or might be useful to the enemy." This provision for prior restraint on publication for security reasons limited to war time or threat of war was

11. United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971).

voted down by the Congress.…

It would appear, therefore, that Congress recognizing the Constitutional problems of the First Amendment with respect to free press, refused to include a form of precensorship even in war time.…

This Court does not doubt the right of the Government to injunctive relief against a newspaper that is about to publish information or documents absolutely vital to current national security. But it does not find that to be the case here.… Without revealing the content of the testimony, suffice it to say 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.…

The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.…

For the reasons given the Court will not continue the restraining order which expires today and will deny the application of the Government for a preliminary injunction.

U.S. District Court for the District of Columbia, decision on government's request for temporary restraining order, June 18, 1971[12]

When The New York Times *series on the Pentagon Papers began,* The Washington Post *scrambled to obtain its own copy of the papers, and a few days after the district court in New York issued a temporary restraining order against the* Times*, the* Post *began to publish its own series. The government quickly filed suit in the U.S. District Court for the District of Columbia, seeking the same restraining orders it had pursued against the* Times*. Unlike Judge Murray Gurfein in New York, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia refused to impose even a temporary restraining order to prevent* The Washington Post *from publishing material on the Pentagon Papers until further proceedings could be held. Gesell reasoned that allowing the government to present evidence would not change the outcome, because criminal prosecution, rather than prior restraint, was the only remedy available if the* Post*'s publications violated the law.*

The Court has before it no precise information suggesting in what respects, if any, the publication of this information will injure the United States and must take cognizance of

12. United States v. Wash. Post Co., No. 71-1235 (D.D.C.), *decision available at* Nat'l Archives & Records Admin., Record Grp. 21, Washington, D.C.

the fact that there are apparently private parties in possession of this data which they will continue to leak to other sources.

What is presented is a raw question of preserving the freedom of the press as it confronts the efforts of the Government to impose a prior restraint on publication of essentially historical data. The information unquestionably will be embarrassing to the United States but there is no possible way after the most full and careful hearing that a court would be able to determine the implications of publication on the conduct of Government affairs or to weigh these implications against the effects of withholding information from the public. It is to be strongly regretted that the Post has been unwilling to allow the Court to pursue this matter over the next two or three days and voluntarily to withhold publication. Unfortunate as this may be, the Post's position does not obviate the necessity for the Court to determine the law, particularly since the Attorney General has stated he will pursue this action regardless of what result is reached in the Times case. The Post stands in serious jeopardy of criminal prosecution. This is the only remedy our Constitution or the Congress has provided. The Post will be allowed to publish and the request for a temporary restraining order is denied.

U.S. Court of Appeals for the District of Columbia Circuit, decision on government's appeal of denial of temporary restraining order, June 19, 1971[13]

By a 2–1 vote, a panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed Judge Gesell's decision to deny the government a temporary restraining order, holding that a short-term restraint was justified to permit judicial determination of the potential threat to national security posed by further publication. Judge J. Skelly Wright filed a dissent from the opinion of Judges Spottswood Robinson and Roger Robb. Wright asserted that the court's approval of a prior restraint on publication marked "a sad day for America."

Majority Opinion

We think the law permits 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. The District Court nevertheless found that the Government had not advanced even a basis for a temporary restraint to determine whether there is any merit to its claim. Under the circumstances, we think the District Court erred in that ruling.

We are aware that the Government has not set forth particular elements of prejudice

13. United States v. Wash. Post Co., 446 F.2d 1322 (D.C. Cir. 1971).

to the national defense, and that the document in question covered a period which ended three years ago.… We do not understand how it can be determined without a hearing and without even a cursory examination of the material that it is nothing but "historical data" without present vitality.

While we are advertent to the heavy burden the Government bears to demonstrate ample justification for any restraint on publication, we are unable to escape the conclusion that the denial of a temporary restraining order may possibly threaten national security. Judicial responsibility, in our view, cannot properly be discharged without some inquiry into the matter.

Judge J. Skelly Wright, Dissenting Opinion

This is a sad day for America. Today, for the first time in the two hundred years of our history, the executive department has succeeded in stopping the presses. It has enlisted the judiciary in the suppression of our most precious freedom. As if the long and sordid war in Southeast Asia had not already done enough harm to our people, 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 and I must forcefully state my dissent.…

Under the First Amendment of our Constitution, prior restraints upon speech and press are even more serious than subsequent punishment. There is no question as to the extent of the deterrent effect. A restraining order, imposed by a court, applies directly against a particular individual or newspaper and carries very specific and very severe penalties for contempt. It is imposed before the speech at issue has even seen the light of day.…

Since we are dealing with "essentially historical data," the executive department has an even greater burden to suggest what specific sort of harm may result from its publication. Yet it seeks to suppress history solely on the basis of two very vague allegations: (1) the data has been classified as "top secret," because (2) the data is said to adversely affect our national security. These allegations are made in *completely conclusory fashion* in the only two affidavits submitted to this court. The affidavits contain *no facts* whatever to support the conclusions or to specify the anticipated harms. Of course, the Government may not know precisely which documents the Post has. But it has identified the 47-volume report from which the documents are taken. The Government could suggest and support at least *one* specific harm that would result from publication of *anything* in the 47 volumes. It has not even done that.

With the sweep of a rubber stamp labeled "top secret," the executive department seeks to abridge the freedom of the press. It has offered no more. We are asked to turn our backs on the First Amendment simply because certain officials have labeled material as unfit for the American people and the people of the world. Surely, we must demand more.

To allow a government to suppress free speech simply through a system of bureaucratic classification would sell our heritage far, far too cheaply.…

Whatever temporary damage may come to the image of this country at home and abroad from the historical revelations in these Pentagon Papers is miniscule compared to the lack of faith in our government engendered in our people from their suppression. Suppression breeds suspicion and speculation. I suggest the truth is not nearly so devastating as the speculation following suppression. We are a mature people. We can stand the truth.

U.S. District Court for the District of Columbia, decision on government's request for preliminary injunction, June 21, 1971[14]

After the court of appeals remanded the case to the district court, Judge Gesell held a hearing on the government's request for a preliminary injunction against The Washington Post. *The evidence presented at the hearing failed to persuade Gesell that further publication would cause irreparable injury to the national security, and he denied the injunction. Two days later, the full U.S. Court of Appeals for the District of Columbia voted 7–2 to affirm Gesell's decision. That conflict between the D.C. court's decision and the decision of the U.S. Court of Appeals for the Second Circuit, which had reversed the denial of a preliminary injunction against* The New York Times*, made likely an appeal to the Supreme Court of the United States.*

This court was directed by the Court of Appeals 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.

The role of quasi-censor thus imposed is not one that any District Judge will welcome to have placed on him by an appellate decision. It has been a doubly difficult role because the material to be censored is unavailable for there is absolutely no indication of what the Post actually will print and no standards have been enunciated by the Court of Appeals to be applied in a situation such as this, which is one of first impression.…

The Court finds that the documents in question include 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. 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 or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world.…

On the other hand, it is apparent from detailed affidavits that officials make use of

14. United States v. Wash. Post Co., No. 71-1235 (D.D.C. 1971), *decision available at* Nat'l Archives & Records Admin., Record Grp. 21, Washington, D.C.

classified data on frequent occasions in dealing with the press and that this situation is not unusual except as to the volume of papers involved.

The Court of Appeals apparently felt that the question of irreparable injury should be considered; that is, that the Court should weigh the equities of the situation in the traditional manner; and this Court has attempted to do so.…

Our democracy depends for its future on the informed will of the majority, and it is the purpose and effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay.…

There is not here a showing of an immediate grave threat to the national security which in close and narrowly-defined circumstances would justify prior restraint on publication.

The Government has failed to meet its burden and without that burden being met, the First Amendment remains supreme. Any effort to preserve the status quo under these circumstances would be contrary to the public interest. Accordingly, the Government's prayer for a preliminary injunction is denied.

The Supreme Court Case

Government's brief submitted to Supreme Court, June 26, 1971[15]

In their brief to the Supreme Court, the Nixon administration's attorneys again argued that The New York Times *and* The Washington Post *should be restrained from any further publication of the Pentagon Papers because of the serious harm to national security that would otherwise result. The government attorneys conceded that such harm would not necessarily follow immediately, but insisted that the "grave and irreparable" nature of the eventual harm justified a bar on publication. Because no federal statute explicitly authorized a prior restraint on publication, the administration stressed the inherent authority the executive branch derived from the President's responsibility for the conduct of foreign affairs and the President's role as commander-in-chief of the armed forces.*

The President's power to conduct foreign affairs....

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to

15. N.Y. Times Co. v. United States and Wash. Post Co. v. United States, 403 U.S. 713 (1971) (Nos. 1873, 1885), *brief available at* Nat'l Archives & Records Admin., Record Grp. 267, Washington, D.C.

the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.…

The President's Authority as Commander-in-Chief.

Under Article 2, §2, cl. 1 of the Constitution, the President, as Commander-in-Chief of the armed forces of the United States, has not only the duty of conducting military operations, but also the duty of protecting "the members of the armed forces from injury, and from the dangers which attend the rise, prosecution, and progress of war."… The latter responsibility includes the duty to preserve military secrets whose disclosure might threaten the safety of United States troops engaged in combat.…

The classified material that was submitted to the district court in the *Post* case and that the government intends to submit to the district court on the remand in the *Times* case—significant portions of which are discussed in our sealed brief filed in this Court—demonstrates that publication of the Defense Department studies would pose a serious danger to the armed forces. Of course, it cannot be said with absolute certainty that this result would follow from publication. But the government need not show that such disastrous consequences are inevitable; it is enough that there be a real likelihood of the event.…

While, of course, the judiciary's duty to enforce the guarantees of the First Amendment cannot be abdicated, we submit that instances in which disclosure of particular state secrets would endanger troops in combat or otherwise imminently imperil the national security are among the "special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment," even from prior restraint.

Secret portion of government's brief submitted to Supreme Court, June 26, 1971[16]

In addition to its main brief outlining the legal arguments in support of its request for an order barring further publication of the Pentagon Papers, the government submitted a sealed brief in an attempt to demonstrate the harm to national security that further publication would bring. In its secret filing, the government referred to specific parts of the Pentagon Papers, which, if disclosed, would disrupt, among other things, relations with U.S. allies, the ongoing military effort in Vietnam, covert CIA operations, and negotiations over American prisoners of war.

The purpose of this portion of the Brief for the United States is to refer to a selected few of these items and to endeavor to show that the publication of these items could have the effect of causing immediate and irreparable harm to the security of the United States.…

1. There are four volumes in the 47-volume compilation which are designated in their entirety. They are: Volume VI-C-1, VI-C-2, VI-C-3, and VI-C-4. These contain a comprehensive detailed history of the so-called negotiating track. Negotiations were carried on through third parties, both governments and individuals. These included the Canadian, Polish, Italian, Rumanian, and Norwegian governments. They also included individuals, some holding public office, and some private citizens, sometimes with the knowledge of their governments, and sometimes without their governments being informed.

   These negotiations, or negotiations of this sort, are being continued. It is obvious that the hope of the termination of the war turns to a large extent on the success of negotiations of this sort. One never knows where the break may come and it is of crucial importance to keep open every possible line of communication. Reference may be made to recent developments with respect to China as an instance of a line of communication among many which turned out to be fruitful.

   The materials in these four volumes include derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to nations or governments. The publication of this material is likely to close up channels of communication which might otherwise have some opportunity of facilitating the closing of the Vietnam war.

2. Closely related to this is the fact that there is much material in these volumes which might give offense to South Korea, to Thailand, and to South Vietnam, just as serious offense has already been given to Australia and Canada. South Korea, South Viet-

16. *Id; see also* https://nsarchive2.gwu.edu/NSAEBB/NSAEBB48/griswoldbrief.pdf.

nam, and Australia have troops in Vietnam, and Thailand allows the use of airfields from which 65% of our sorties are launched.

For the past many months, we have been steadily withdrawing troops from Vietnam. The rate at which we can continue this withdrawal depends upon the extent to which we can continue to rely on the support or other nations, notably South Vietnam, Korea, Thailand, and Australia. If the publication of this material gives offense to these countries, and some of them are notably sensitive, the rate at which our own troops can be withdrawn will be diminished. This would be an immediate military impact, having direct bearing on the security of the United States and its citizens.…

3. There are specific references to the names and activities of CIA agents still active in Southeast Asia. There are references to the activities of the National Security Agency. This may not be exactly equivalent to the disclosure of troop movements, but it is very close to it.…
5. Volume IV-C-6(b), page 129, sets forth the United States intelligence community's estimate of the Soviet reaction to the Vietnam War. This was made in 1967, but is in large part still applicable. The disclosure of this information will give Soviet intelligence insights into the capacity of our intelligence operations, and may strengthen them both by giving them better understanding of us, and by leading them to correct matters on their side.…
11. Finally, reference should be made to prisoners of war. We are currently engaged in discussions on the prisoner of war issue, in some cases with governments which are not wholly friendly. It is obvious that these conversations are conducted on the understanding that they will be confidential, and they are not very likely to be fruitful if that confidence is broken.…

    There is one of these in particular which it is very likely that we will not be able to proceed further with as a result of the publication of the papers which has already been made by the New York Times and the Washington Post. The longer prisoners are held, the more will die.

The New York Times's brief submitted to Supreme Court, June 26, 1971[17]

The New York Times *focused much of its Supreme Court brief on the potentially severe impact of a prior restriction on publication, noting that its effect on speech was substantially more powerful than a criminal sanction following publication. If a prior restraint were ever constitutional, argued the* Times*, it would have to be imposed pursuant to a clear legislative mandate*

17. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (No. 1873), *brief available at* Nat'l Archives & Records Admin., Record Grp. 267, Washington, D.C.

rather than an inherent power of the executive. In this case, the government could point to no statutory authority to support its position that the Times *should be censored.*

Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted, they cause irremediable loss, a loss in the immediacy, the impact of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt. The violator of a statute punishing speech criminally knows he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint therefore stops more speech, more effectively. A criminal statue chills. The prior restraint freezes.…

This country's experience with censorship of political speech is happily almost non-existent. Through wars and other turbulence, we have avoided it. Given the choice of risks, we have chosen to risk freedom, as the First Amendment enjoins us to do.

We have not opted for some naïve insistence that all our processes of government take place in the open, or that those charged with heavy responsibilities, executive, legislative or judicial, be denied privacy in their decisional processes. But we have preserved the values of decisional privacy without resorting to censorship. We have met the needs for privacy by safeguarding it at the source, as in the Government's internal procedures for maintaining information security. In some limited measure, we have used the deterrent force of the criminal sanction to safeguard privacy and security. But we have not censored.

The Washington Post's brief submitted to Supreme Court, June 26, 1971[18]

In its brief to the Supreme Court, The Washington Post *emphasized that the government had failed to prove that it would suffer irreparable harm if the courts did not restrain further publication of the Pentagon Papers. A general allegation that disclosure of the secret documents would cause the United States embarrassment and potentially hinder its diplomatic efforts was insufficient to justify censorship, the* Post *argued. Furthermore, the brief pointed out that the government's decision to label the Pentagon Papers "top secret" did not relieve the Court from conducting its own assessment of whether publication of the documents could be restrained consistent with the First Amendment. (Note: the* Post*'s case,* United States v. Washington Post Company et al.*, was consolidated with* The New York Times*'s case before the Supreme Court.)*

The overall classification of the Vietnam History was necessarily fixed by the highest classi-

18. United States v. Wash. Post Co., 403 U.S. 713 (1971) (No. 1885), *brief available at* Nat'l Archives & Records Admin., Record Grp. 267, Washington, D.C.

fication of any source material on which it is based. By reason of this so-called "derivative classification" practice, such items as the public speeches of Presidents and other governmental officials are classified "Top Secret." …

No attempt was made to segregate classified and nonclassified documents of the Vietnam History for the purpose of avoiding overclassification, nor had the Vietnam History been reviewed for purposes of downgrading and declassification.…

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

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.…

The Government has failed to satisfy either of those requirements in the Courts below. Thus, even if this were a non-constitutional case, the Government could not prevail.…

This, however, is not an ordinary case. It constitutes a precedent-shattering attempt by the Government to impose a prior restraint which would prohibit the Post from publishing material of the highest political importance concerning the most critical issue facing this nation today. Where such First Amendment rights are involved, the Government bears a burden even greater than is normally the case, for the balance is always weighted in favor of free expression, especially where the proposed infringement involves a prior restraint.…

II. The Government Has Failed To Prove An Immediate And Grave Threat To National Security.…

The District Court did find 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 government 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."

Embarrassment to the United States because foreign governments do not fully comprehend the operation of the principles governing our free institutions is obviously 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.

III. Respondents Are Not Bound By The Government's Classification System.

It now appears that the Government, having failed to establish to the satisfaction of either of the Courts below that publication of material from the Vietnam History will in fact gravely and irreparably endanger the national defense, intends to rely upon the argument that it may, by its own *ipse dixit*, label or classify any of its documents "Top Secret" or "Secret"; that its decisions in this regard are not subject to challenge, judicial or otherwise, even where those documents come into the hands of third parties; and that the Government may thereby preclude publication of the contents of those documents. Thus, the Government conveniently seeks to relieve itself of the burden which the Courts below—and the Constitution—impose upon it.…

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 Government's use of labels—even "Top Secret-Sensitive"—does not relieve the Courts of their duty independently to determine, on the basis of the record made below, whether the injunction the Government here seeks would, if issued, impinge upon the Respondents' First Amendment rights.

Amicus brief of 27 members of Congress submitted to Supreme Court, June 25, 1971[19]

Twenty-seven members of the U.S. House of Representatives, all but two of them Democrats, filed a brief urging the Supreme Court not to restrain further publication of the Pentagon Papers. The brief argued that the executive branch had become too powerful and that information such as that contained in the Pentagon Papers was subject to a "legislative right to know," essential for members of Congress to carry out their constitutional function as the elected representatives of the people.

The Members of Congress, on whose behalf this brief is filed, have a vital interest in the outcome of these cases distinct from that of the plaintiff, the defendants, or the general public. As members of the national legislature they must have information of the kind involved in these suits in order to carry out their law-making and other functions in the legislative branch of the government. They seek to vindicate here a legislative right to know.

In addition as elected representatives of the people in their districts, Members of

19. N.Y. Times Co. v. United States and Wash. Post Co. v. United States, 403 U.S. 713 (1971) (Nos. 1873, 1885), *brief available at* Nat'l Archives & Records Admin., Record Grp. 267, Washington, D.C.

Congress have a particular and profound interest in having their constituents obtain all the information necessary to perform their functions as voters and citizens. More than any other officials of government, Members of Congress have relations with the public that gives them a crucial concern with the public's right to know.…

The legislative right to know is of particular importance at this period of development in our national affairs. The constant growth of the executive power has been a major characteristic of our age. More and more the people of our country have been concerned that the expansion of executive power has upset the original balance contemplated by the framers of our Constitution, that monopoly of power in the Executive has resulted in the government losing touch with the needs and desires of its own citizens, and that enhanced power in our elected representatives is imperative to restore a healthy division of authority in government.

There are a number of reasons for this unparalleled and dangerous growth of Executive power in the United States. There can be no doubt, however, that one of the principal reasons is the far greater access of the Executive to information, and its unwillingness to share that knowledge with Congress and the public. In today's world, control of the information process is the key to power.…

There is no need to stress here that the documents involved in these proceedings could not be more relevant to the issues now pending in Congress. Termination of the war in Vietnam, extension of Selective Service, appropriations for the conduct of the war, and numerous other questions are before the House and the Senate at this very moment. In addition, broader problems going to the respective powers of Congress and the President in connection with the making of war and the conduct of foreign relations are pressing for attention. It thwarts common sense that the information here in question should be withheld from Members of Congress.

In sum, to close off access to the kind of material the Government is now attempting to suppress would cripple the legislature in the performance of its constitutional functions. It would go far to relegate the legislative branch to second rate status in relation to the Executive, to jeopardize the balance of power between the branches of government and to alter the whole constitutional structure.

Amicus brief of National Emergency Civil Liberties Committee submitted to Supreme Court, June 25, 1971[20]

The National Emergency Civil Liberties Committee, acting on behalf of a group of scholars and political commentators that included Noam Chomsky, Hans Morgenthau, and Howard Zinn,

20. *Id.*

filed a brief in support of the newspapers' right to publish the Pentagon Papers. The brief stressed the importance of the papers to the ongoing public debate over the Vietnam War.

Delay in the publication of the materials in question will irreparably injure the public interest even though it may not result in similar or equal injury to the New York Times or the Washington Post.

Both newspapers are commercial enterprises. Their financial wellbeing is not likely to be affected by a delay in the publication of these documents. Whether they are published Sunday or a month from Sunday or six months hence, the circulation of these papers is not likely to be seriously affected and it may therefore well be concluded that no irreparable injury, in a legal sense, will result from such delay. But the public interest is quite another matter. We are engaged now in a great national debate concerning the war in Vietnam and the origins of that war play an important role in the debate. Whether the war was in fact legal or not legal, whether or not the President usurped his power, whether or not Congress was misled as to the facts giving rise to hostilities, whether or not the public was given misleading information—all of these issues and many others are central to this great national debate.

And the papers which are the subject of this action are central to these issues.

On June 16, the Senate of the United States voted on the McGovern-Hatfield Amendment calling for a December 31 deadline [to cease] hostilities in Vietnam. That amendment was defeated by a margin of only a few votes. The House equivalent of the McGovern-Hatfield Amendment was voted on a day or two later. It may be that revelation of further information such as that which the Times and Post have already published could have influenced the votes of five or six Senators and affected the outcome in the Senate, and that a different result in the House might have followed. Irreparable injury may therefore already have occurred to the public interest as a result of the temporary restraining orders and stays issued by the Courts below.

But the debate is not over, and will undoubtedly continue or even increase in intensity as long as the war goes on. Congress still has before it appropriation bills, a bill for the extension of the draft, and numerous other important items of legislation which have a close relationship to the conduct of hostilities in Vietnam.

The government has argued that publication of the materials in question have threatened the national security. We believe, to the contrary, that the very bringing of these actions by the government, with the grave threat to free speech which they pose, and the delays in publication ordered by the Courts below create a far greater threat to the continuation and vigor of American democracy.

Every day that passes during which vital information is kept from the Congress and the public, serious irreparable injury is suffered by the public interest.

Supreme Court of the United States, concurring and dissenting opinions in *New York Times Co. v. United States*, June 30, 1971[21]

On June 30, 1971, the Supreme Court of the United States issued a brief per curiam, or unsigned, order reversing the decision of the Second Circuit and affirming that of the D.C. Circuit. The Court held that the government had not met its heavy burden of showing that a prior restraint on publication could be justified in keeping with the First Amendment. All nine justices—Hugo Black, William Brennan, William Douglas, Thurgood Marshall, Potter Stewart, and Byron White concurring and Harry Blackmun, Warren Burger, and John Marshall Harlan dissenting—wrote separate opinions to explain their votes.

Justice Hugo Black, concurring opinion

I believe that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.…

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, *The New York Times, The Washington Post*, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

Justice William J. Brennan, concurring opinion

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated

21. N.Y. Times Co. v. United States and Wash. Post Co. v. United States, 403 U.S. 713 (1971)

that such cases may arise only when the Nation "is at war," during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." [Case citations omitted.] Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." [Case citation omitted.] Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient.…

Justice Potter Stewart, concurring opinion

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high or-

der. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.

Chief Justice Warren Burger, dissenting opinion

In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste.…

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.…

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude, without an adequate record, and surely without time for

adequate treatment either in the prior proceedings or in this Court.

Justice Harry A. Blackmun, memorandum regarding opinion of Justice Byron White, June 30, 1971[22]

Justice Harry Blackmun circulated a memorandum to his fellow justices rebutting Justice Byron White's assertion that the circumstances under which a prior restraint on publication could be invoked were severely limited because Congress had not chosen to authorize such a remedy explicitly. Protection of the executive branch's authority over foreign policy did not depend on congressional authorization, asserted Blackmun. Congress, moreover, could not authorize a remedy broader than that already allowed by the First Amendment, under which, Blackmun believed, prior restraints in national security cases were permissible whether or not authorized by statute.

I do not see how congressional legislation could provide any authority for prior restraint in a national security (or other) case which is not now permitted by the First Amendment.…

Justice White looks for congressional "guidance and direction" and laments that it would be impractical for the courts to adjudicate requests for injunctions in national security cases because the material upon which a decision is rendered could not be described in the opinion.

I do not understand the role of Congress envisioned by Justice White. I am not persuaded that judicial protection of the executive authority in matters of foreign affairs depends upon authorization by Congress—or is limited to the adjudication of criminal prosecutions for violation of espionage statutes.…

The judiciary—as is the case with the self-appointed newspaper editors—cannot be the supervisor of the Executive in the area of foreign affairs. The experience, expertise and human resources for such an endeavor does not lie in the judicial community.

The "national press," in my view, has less of a mandate for the position of supervisor. In Footnote 1, Justice White seems to view a newspaper as something other than a "private party"—and as an entity with greater authorization under the First Amendment than is enjoyed by "private parties." Newspapers do perform a function and "freedom of the press" is essential, but that freedom is limited, certainly, by a responsibility for national security. I cannot believe that the First Amendment licenses the jeopardizing of national security—for the small price of 10 years and $10,000.…

I fail to grasp the sanctity of the doctrine of prior restraint in national security cases.… In my view, there is no justification for this rather empty adherence to prior restraint where the cost to the country could be the disclosure of critical national security information by any self-appointed guardian of the people who is willing to endure the criminal

22. Harry A. Blackmun papers (on file with the Library of Congress).

punishment. Resolution of the problem requires a balancing of interests—and I would favor tipping the balance in the direction of the elected Executive and the checks provided to the Congress and the voters by the Constitution, rather than to an absolute First Amendment rule and newspaper editors whom I cannot vote out of office and whose primary interest, witness the SG's example presented at oral argument, is to sell newspapers.

Judge Harold Leventhal, letter to Judge Walter Bastian, July 1, 1971[23]

Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit, who voted against granting the government a preliminary injunction to prevent The Washington Post *from publishing the Pentagon Papers, wrote to Judge Walter Bastian, a senior judge on the same court, the day after the Supreme Court's ruling. Leventhal described the documents in question as "lukewarm tea," and expressed bafflement that the government was exerting so much effort to prevent their publication.*

As you have read in the newspapers, we have had an exciting time these past weeks in what we call the Washington Post case, but is generally dubbed the New York Times case. Since I was one of the 7-2 majority that was affirmed by the 6-3 vote of the Supreme Court I naturally think the High Court did the right thing. There were a number of documents that I would prefer not be published, but I could not conceivably refer to them as posing an immediate and irreparable injury to the Government. And while ordinarily I would agree that a case should be tried carefully, when it comes to stopping the presses on a responsible newspaper I think the "heavy burden" on the Government requires an almost climactic showing.…

I can assure you that the secret, no, top secret, documents given to the judges under seal, seemed lukewarm tea. One document was not even given to us under seal; it was passed up by the Government with the request that we read it in the courtroom and hand it right back. For once, I departed from my compulsive notetaking,—and for more than one reason: I could barely comprehend why the Government was so exercised, especially since the alleged secret was one which could not help being known to the other side.

23. Harold Leventhal papers (on file with the Library of Congress).

Congressional Response to the Publication of the Pentagon Papers and the Related Court Decisions

U.S. Representative James Abourezk, remarks in House of Representatives, June 16, 1971[24]

A few days after The New York Times *began its series on the Pentagon Papers, Democratic Representative James Abourezk of South Dakota spoke in support of the Nedzi-Whalen Amendment—an unsuccessful measure, sponsored by Democrat Lucien Nedzi of Michigan and Republican Charles Whalen of Ohio—that would have cut off further funding for weapons in order to end U.S. involvement in the Vietnam War. Relying on the* Times*'s reports, Abourezk claimed that the Johnson and Nixon administrations had, since 1964, carried on a campaign of deception in order to maintain public support for the war.*

Mr. Speaker, in 1964 the American people were told that a vote for Lyndon Johnson was a vote for peace. We voted for him and we got war. In 1965, 1966, and 1967 we were told that just 1 more year of patience would bring victory and an end to the war. We waited patiently and the war went on. In 1968 we were told that a vote for President Nixon was a vote for his plan to end the war. The Nation voted for Nixon and so far we have gotten 2 ½ more years of war.…

After all of the half-truths, overoptimistic hopes, and outright lies we have been fed about Vietnam, it really should not come as a great surprise that this war was planned and plotted by a Johnson administration which at the very same time was saying it was against a Vietnam war. What the revelations by the New York Times really show is that from the very beginning top Government officials knew that the people of the United States would not support a massive land war in Asia. They knew that the only way the war could be carried on was through a policy of official deception. This is the policy that was adopted in 1964, and which has continued to this day.

It is this policy of deception which has produced such double think terms as protective reaction, and free fire zone. It is this policy which has fostered the grizzly body count that deceives the people of America and demeans our Nation around the world. And it is this policy that has led directly to the most crippling distrust of government in the history of our Nation.

24. 117 Cong. Rec. 20284 (Jun. 16, 1971).

U.S. Senator George McGovern, remarks in Senate, June 17, 1971[25]

In the wake of The New York Times*'s initial coverage of the Pentagon Papers, Democratic Senator George McGovern of South Dakota accused government officials, including former Secretary of Defense Robert McNamara, of lying to the Senate Foreign Relations Committee during its 1968 hearings on the Tonkin Gulf incident. While McNamara had denied that U.S. personnel had participated in military operations against North Vietnam in the months leading up to the Tonkin clash, the Pentagon Papers revealed that American forces had carried out covert attacks during this period. In 1972, McGovern won the Democratic nomination for President and ran as an antiwar candidate against incumbent Richard Nixon. Despite the growing unpopularity of the Vietnam War, Nixon defeated McGovern in a landslide.*

Mr. President, the documents published by the New York Times relating to American military involvement in Indochina have clearly shown that the administration did not adequately inform the American people and the Congress about the policy it was pursuing there.

There is documentary evidence now available which indicates that as late as 1968, when the Foreign Relations Committee held hearings on the Gulf of Tonkin incident, high administration officials continued to deny the extent of American military involvement and planning at the time of the incident.…

From the evidence now available, we can already identify some of the most flagrant efforts to deceive the American people. On February 20, 1968, Secretary of Defense McNamara told the committee that South Vietnamese operations against the north:

> Were under the command of the South Vietnamese and were carried out by the South Vietnamese. There were no U.S. personnel participating in it, to the best of my knowledge.

But the documents printed and summarized in the New York Times show that from February 1, 1964, "an elaborate program of covert military operations against the state of North Vietnam" began—Pentagon quote. United States personnel were involved. The operations were directed, not by the South Vietnamese, but through a section of the Joint Chiefs of Staff called the Office of the Special Assistant for Counterinsurgency and Special Activities.

At other points in the hearings, Secretary McNamara denied knowledge of an advance draft of the Gulf of Tonkin resolution, prior to the actual incident, and of plans in late 1963 and early 1964 for extending the war into the north. In the first case, Mr. McNamara either was not frank in his answer or he was implicitly admitting that his own

25. 117 Cong. Rec. 20634 (Jun. 17, 1971).

subordinates had escaped his control in preparing such a draft. In the second case, he was simply not honest. The Times quotes a memo from Mr. McNamara to the President dated December 21, 1963 concerning CIA and U.S. military plans for operations in the north. He wrote:

> They (the plans) present a wide variety of sabotage and psychological operations against North Vietnam from which I believe we should aim to select those that provide maximum pressure with minimum risk.

A careful examination of the Foreign Relations Committee hearings and related documents show, when compared with the documents in the New York Times, a consistent pattern of deception by the Defense Department about the state of American military preparations and planning prior to the Gulf of Tonkin incident.

There can be no excuse for failing to tell the truth years after the fact. The documents show that we became involved in Vietnam, not to protect that country, but for many extraneous reasons and mainly to prevent our own humiliation. Obviously that is why the Defense Department officials did not want to admit even later what they had done.

But I cannot understand why the present administration has joined in the effort to suppress the truth. Their actions implicate them in the conspiracy of silence.

U.S. Representative William S. Moorhead, remarks in House of Representatives, June 21, 1971[26]

U.S. Representative William Moorhead, Democrat from Pennsylvania and chair of the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, announced that his subcommittee would hold hearings to examine government policies regarding the handling of sensitive information. Moorhead believed that the Pentagon Papers case demonstrated the executive branch's overly restrictive approach to sharing information with Congress and the public. Moorhead's reference to the administration's "violent attacks" on the news media was almost certainly a response to Vice President Spiro Agnew's sharp criticism of media coverage of the Vietnam War.

Mr. Speaker, the constitutional right of the legislative branch to receive documents, reports, and other types of classified as well as unclassified information from the executive, must be constantly exercised if we are to fulfill our duties as elected representatives of the American people. Many Members have become increasingly alarmed by the manifestations of erosion of public confidence in Government at all levels, triggered in part by

26. 117 Cong. Rec. 21108 (Jun. 18, 1971).

violent attacks on the news and broadcasting media by top administration officials. These attacks have been accompanied by both subtle and heavy-handed restrictions by the executive on the free flow of information to the Congress and to the public through the mass media. Examples include the current New York Times and Washington Post cases and the refusal to provide congressional committees with vitally needed documents on Vietnam.

All Members are fully conscious of the important need for safeguarding vital defense security. Congress has enacted many laws to deal with this defense requirement and such laws have been fully implemented by Executive orders and regulations to govern the handling, dissemination, use, and periodic declassification of such information.

Fine constitutional as well as operational lines have been drawn between the national security requirements, on the one hand, and the need for an informed electorate, on the other, in the exercise of a free press under the first amendment. Our hearings will explore every facet of this complex constitutional issue, for background purposes as well as the administrative and legislative details of Government information procedures.

Statement of Hon. Arthur J. Goldberg, Former Supreme Court Justice, at congressional hearing, June 23, 1971[27]

Ten days after The New York Times *began publishing the Pentagon Papers, William Moorhead's subcommittee began hearings to determine, in Moorhead's words, "whether or not the right of the people and the peoples' representatives in Congress to adequate information is being thwarted and, if so, to recommend legislation for procedural mechanisms to reestablish a proper balance between these shifting constitutional rights."*

The first statement to the subcommittee was made by Arthur Goldberg, who served as a justice on the U.S. Supreme Court from 1962 to 1965, when he resigned to become the U.S. ambassador to the United Nations. Goldberg urged Congress to take a more active role in balancing the executive branch's need for secrecy and the public's right to know, reasoning that the latter could not be adequately protected if elected representatives were not full partners in the evaluation and safeguarding of vital information.

In this case, the drama is virtually unprecedented: the most powerful government in the world has taken powerful newspapers into court. And as the world watches with fascination and incredulity, America is forced to confront constitutional and political questions of the utmost gravity in an atmosphere of crisis.

Some of these questions will be resolved by the Supreme Court of the United States.

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27. House of Representatives, 92nd Congress, 1st Session, U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations 9–14 (1971).

It would not be appropriate to discuss the precise legal issues awaiting judicial resolution and I do not propose to do so. But the broader questions of reconciling the needs of the government and the rights of the citizen to information on the operations of government are appropriate for discussion and resolution, consistent with our Constitution, by this committee, by like committees, and by Congress at large. It is the broader philosophical questions which underpin our constitutional framework, rather than the narrower legal questions, that I should like to discuss this morning.

We are witnessing what some regard as a classic conflict between freedom and responsibility; between order and liberty; between the right of the public and their representatives to know—in the name and spirit of democracy—and the Executive's need to withhold—in the name of security. But, I believe, as I have said before—in a majority opinion of the Supreme Court—that "freedom and viable government are … indivisible concepts." [Case citation omitted.] They can be reconciled—they must be reconciled—if our form of government is to survive as it has done for almost 200 years.…

Given this premise, is there an orderly framework in which the rights and needs of the public, the press, Congress and the executive can be rationalized and reconciled? I think there is, on the basis of the following guidelines:

First, in mandating government by the consent of the governed, our constitutional system requires that the people be adequately and honestly informed about the great issues that affect their lives and welfare. If this means the government must, by and large, be conducted in a goldfish bowl, so be it, for in no other way can it retain the consent of the governed. The first amendment was conceived as a basic safeguard of the public's right to know, as well as the press' right to publish. Without the first amendment—indeed the whole Bill of Rights—we all know our Constitution would not have been adopted. A firm commitment was made at the time that there would be a Bill of Rights. The language of the first amendment in this connection needs recalling.

"Congress shall make no law … abridging the freedom of speech or of the press …." I would hope, as Justice Cardozo has felicitously said, that this "preferred right" on which all other rights rest will be preserved against further erosion. This provision also applies—while directed at the Congress—now by decisions of the Supreme Court, to the States and also to actions of the Executive.

Second, there is no possible justification that I can conceive for denying to Congress the information necessary to the performance of its duties. If the people have a right to know, their representatives have a need to know. Nothing can contribute more to the weakening of Congress and undue concentration of power in the executive than the latter's recalcitrance in sharing information with Congress. With adequate information, Congress under our constitutional framework can be the full partner which was envisioned in our

separation of powers, in the evolution of policy and the resolution of our foreign and domestic problems—this is what the Founding Fathers perceived. Without it, Congress cannot appropriately perform functions entrusted to it under our Constitution.

Third, as the history of civilization, ancient and modern, teaches, any government, including our own, has more to fear from a captive press than from a zealous press, more to fear from the journalistic apologist for an administration—any administration—than the journalistic antagonist of an administration. By commanding freedom for the press, our Constitution seeks to inspire responsibility by the press. As an essential safeguard, the framers of our Constitution vested in the courts the duty of assuring the constitutional freedom of the press as well as the orderly exercise of the Government.…

Mr. Chairman, I regret exceedingly the confrontation which has come between the press and our Government. I am one who believes that we have had too many confrontations lately. In resolving this terrible dilemma, there is surely no easy solution. But there are ways in which all of us may proceed to preserve the vital balance between press, the Congress, the public, and the executive branch of the Government.

First, we presumably will receive guidance from the Supreme Court on the fundamental constitutional questions at issue.

Second, we should distill the best from among the various thoughtful proposals being advanced by Members of Congress, on the question of reforming our classification procedures. It is my own feeling that here is an area in which Congress should act to define more precisely what documents are properly to be classified, and the duration of any classification. The present system whereby the executive branch itself determines the rules for disclosure of its own documents has proved inadequate for keeping Congress and citizen informed. It would be appropriate, I feel, for Congress to draw upon the various proposals of its Members and others and lay down more specific guidelines.

Third, I believe that our statutes dealing with disclosure of information merit careful revision so that they may better conform to constitutional requirements as defined by the Supreme Court of precision and clarity. In such revision, we must bear in mind again what the Supreme Court has said:

> The first and fourteenth amendment rights of free speech and free association are fundamental and highly prized, and "need breathing space to survive." "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." [Case citations omitted.]

Fourth, I can see no conceivable reason why the chairman of the appropriate committees of Congress cannot be furnished copies of executive reports and memorandums essential to the performance of congressional responsibilities under appropriate security

arrangements. I am sure that the average constituent, the average member of the public, must be completely puzzled why access to certain such documents is denied to responsible Members of Congress when newspapers seem to have such documents at hand.

Fifth, I think the present impasse makes it imperative that a select committee of Congress conduct a special investigation into the causes and conduct of the war in Vietnam. Regardless of how the various lawsuits turn out, such an investigation is necessary to preserve public trust in the candor and competency of our public officials and, indeed, of our Government itself. This investigation should occur at an appropriate date fixed in the judgment of Congress and should be accompanied by public disclosure of those documents whose classification is no longer merited. I myself haven't the slightest doubt that such a select committee will carefully screen the documents to preserve necessary confidentiality. That is done in proceedings in Congress all of the time, where the Foreign Affairs Committee, the Armed Services Committee, other committees of Congress holding hearings and at various stages release or not release some material to the press. But I would put that power in the select committee. I also have no doubt that the public today, along with Congress, is entitled to know, subject only to genuine national and diplomatic security considerations, all that occurred leading to the momentous decisions of this tragic war. In fact, I see no escaping from this at the present time in light of what has occurred in recent days.

Statement of Richard P. Kleeman, Washington Correspondent for the *Minneapolis Tribune*, and Chairman, Freedom of Information Committee, Sigma Delta Chi, at congressional hearing, June 25, 1971[28]

Reporter Richard Kleeman, who chaired the Freedom of Information Committee of Sigma Delta Chi, a professional journalists' organization, argued that prior restraints on publication constituted unwarranted government censorship. Kleeman stressed that while members of the press could not perform their function effectively without disclosing sensitive information, the vast majority of journalists handled such material carefully and responsibly and were thus qualified to exercise independent judgment, free from government supervision.

I would like to comment on a recent claim that freedom of the press and freedom of information have become partisan issues: as the current chairman of a committee that—under many chairmen before me—has been at least as critical of Democratic as of Republican administrations on these issues, I find that view, now or at any time in the past, unwarranted.…

28. *Id.* at 234–38.

[O]n the question of the Government's right to restrain publication in advance: our society would agree with the Hughes decision in *Near v. Minnesota* in 1931 that such prior restraint "is of the essence of censorship," and we reject the idea of Government censorship in all but the most limited of wartime, battlefield situations.

On the other hand, I do not believe there are many—if any—reporters, editors or broadcasters who are not sensitive to the occasional need for restraint—preferably by mutual agreement—imposed by the exigencies of national security. This concept also was dealt with in the 1931 Hughes opinion when it said that:

> No one would question but that a government might prevent actual obstruction to its recruitment service or the publication of the sailing dates of transports or the number and location of troops.

I think you would have to take those as merely examples of a class of information, rather than limiting it to those specifics. What I think the responsible reporter or editor would say is that the judgment of the effect of what he might write or publish in a security-sensitive area is but one of many judgments they are constantly called upon to make in gathering, editing, and publishing the news. What they do not want is a government—or a court—standing beside them saying, "Print this—don't print that."

The present situation is not by any means the first time—nor will it be the last—that highly classified documents have come into the possession of aggressive, enterprising newsmen. Perhaps half—maybe more—of what a good reporter writes consists of material that someone, in or out of government, would prefer not to see reported. Sometimes reporters having security-sensitive information elect to publish it—I would say most often they do—on some few occasions, they elect to withhold it, at least temporarily. But always the judgment should be independently made—and made in full awareness of the responsibility imposed by its exercise.

A high classification on a document does not cause the experienced newsman to say, "I must not print that." If, through whatever circumstances, such a document comes into his hands, its classification would alert him to the fact that he has potentially significant, and possibly harmful, information in his possession; that it should be analyzed with care, perhaps summarized or paraphrased rather than quoted directly; and that someone in an official position—rightly or wrongly—considered that disclosure of the information would be prejudicial. At this point, the newsman must, I think, ask himself—prejudicial to whom or to what?

To those who would cite the espionage laws as flatly prohibiting the media from publishing classified material, I would merely cite those first few words of the first amendment: "Congress shall make no law …."

Statement of J.W. Roberts, Washington Bureau Chief, Time-Life Broadcasting, and Chairman, Freedom of Information Committee of the Radio-Television News Directors Association, at congressional hearing, June 25, 1971[29]

In his statement to the Moorhead subcommittee, J.W. Roberts of Time-Life Broadcasting characterized the Pentagon Papers controversy as part of a larger trend of curtailment of press freedom in the United States. Like Richard Kleeman, Roberts believed that journalists should be trusted to handle sensitive information in a responsible fashion, without interference from government officials.

The court injunctions forbidding some of the Nation's outstanding newspapers to publish information those papers believe it necessary for the public to know is only the latest, but most serious, in a long chain of events harmful to freedom of the press.…

The Government has, in deciding to seek the injunction, done serious harm to the voluntary approach which has usually settled the questions of news reports involving matters of national security.

It seems hard to believe the Government can raise a question of national security now when in days of serious harm to the national security, World War I and World War II, journalists were allowed to make their own decision as to what confidential material to make public. Certainly I can't see any existing threat to the national security equal to the world war days.

The Government also has taken a most intriguing move in delivering those 47 volumes of the McNamara study to Congress. The Government says it is doing it because there is such a danger that Congress would make judgments on the basis of what the Government calls "incomplete data" and "distorted impression" from the documents published so far that it had to deliver them to Congress. But it seems to me there is just as much danger that the public will reach judgments on the same faulty basis. Why, therefore, shouldn't the public have a right to know what the Congress needs to know in order to do the job?

I would hope the committee also considers other legal problems, those involving subpoenas both from the Federal and State and local government.

The U.S. Justice Department has been attempting to force newsmen to serve as Federal investigators, by issuing subpoenas for confidential information, including films and tapes in various cases involving demonstrations, or operations of organizations like the Black Panthers. More and more state and local prosecutors and defense attorneys are doing the same thing, with a resulting curb on freedom of information. It is hard enough to persuade a source who wants to remain anonymous to talk on film or on audio tape even

29. *Id.* at 248–50.

by masking faces or electronically distorting voices. Subpoenas which allow outside legal forces to uncover those sources simply persuade those sources never to talk again and the public loses vital information on community problems.

Remarks of U.S. Representative William S. Moorhead at congressional hearing, and letter from members of the House Committee on Government Operations to Secretary of Defense Melvin Laird, June 28, 1971[30]

During his subcommittee's hearings on the Pentagon Papers, Chairman Moorhead announced that seven members of the House Committee on Government Operations had signed a letter to Secretary of Defense Melvin Laird requesting that he deliver the entire 47-volume study, as well as a separate study of the Tonkin Gulf incident, to the committee. The letter cited a statute requiring executive agencies to submit to the committee any information relating to a matter within its jurisdiction upon a request by seven of its members. Although Laird failed to comply with the committee's request, he delivered both studies to the president pro tempore of the Senate and the Speaker of the House for use by members of Congress.

Remarks of Rep. Moorhead

For the past several years, we have seen leading administration spokesmen beat the drums for "law and order." All citizens have been entreated to respect the law and abide by the laws of the land. Special attention has been paid by the President, the Vice President, and the Attorney General to those citizens whose hair might be slightly longer than the norm.

I submit that if these public officials expect Americans to respond and abide by the law, they must set the example. Today, the Secretary of Defense has that opportunity and sacred obligation. His oath of office requires it. I hope that he will counsel with the Attorney General—and perhaps even with the President—and that he will agree to abide by the law of the land—the law spelled out in title 5 of the United States Code in section 2954 and provide the 47 volumes of the so-called "Pentagon Papers" and the Tonkin Gulf study to our Government Operations Committee, where our subcommittee members and staff who are cleared for top-secret security, as well as those on other subcommittees, may have full access to analyze these documents that are clearly within both the Foreign Operations and Government Information jurisdictional mandates.

A messenger is standing by at the door to deliver this letter, which is now signed by the required number of members, directly and immediately to Secretary Laird's office in the Pentagon.

30. *Id.* at 327–28.

Letter to Secretary Laird

Dear Mr. Secretary: We, the undersigned members of the House Committee on Government Operations, pursuant to our statutory authority under title V, section 2954, of the United States Code (entitled "Information Furnished Committees of Congress on Request"), and in the exercise of our jurisdictional authority under statutes, rules, and precedents of the House of Representatives, hereby request that you furnish and submit to this committee a full and complete set of all volumes making up the so-called "History of the Decisionmaking Process in Vietnam." This is the same data referred to by the President on June 23, 1971, in his announced decision to provide copies of these volumes to the Speaker of the House and the President of the Senate. We also request, under the same statutory authority cited above, a full and complete copy of the "Command and Control Study of the Gulf of Tonkin Incident."

Copies of these two separate series of documents are requested to be delivered to room 2157, Rayburn House Office Building, by 5 p.m., Wednesday, June 30, 1971.

In view of the reported security classifications assigned to the above-captioned documents, the committee will assure the fullest measures to guarantee their integrity while in custody of the committee. Only staff members of the Government Operations and Foreign Affairs Committee having top-secret security clearances shall be permitted to study such documents in addition to Members of the House as provided under House rule XI, clause 27(c). When not in use, said documents will be stored in locked, GSA-approved security file cabinets.

With best regards,
Sincerely, Ogden Reid, William S. Moorhead,
Henry S. Reuss, John E. Moss, John Conyers,
Paul N. McCloskey, Jr., Bill Alexander.

Statement of Hon. William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, at congressional hearing, June 29, 1971[31]

Assistant Attorney General William Rehnquist worked on the Pentagon Papers case on behalf of the Nixon administration and evaluated the law of prior restraint to determine the administration's chances of securing an injunction to prevent further publication of the papers. In his testimony before the Moorhead subcommittee, Rehnquist laid out his view of executive privilege, asserting that the withholding of certain sensitive information by the President was both justified by the doctrine of separation of powers and necessary to the effective operation of the

31. *Id.* at 358–66.

executive branch, particularly in the areas of national defense and foreign relations. Later in 1971, Richard Nixon nominated Rehnquist to the Supreme Court of the United States, where he served as an associate justice until Ronald Reagan appointed him chief justice in 1986. He served in that position until his death in 2005.

The doctrine of executive privilege, as I understand it, defines the constitutional authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the Government. This doctrine is implicit in the separation of powers established by the Constitution.

Related to the doctrine of executive privilege, but by no means coextensive with it, is the classification of material in the possession of the executive branch under the provisions of executive orders. These executive orders established rules governing the classification of documents involving national defense information, and prohibit disclosure by executive branch personnel of documents so classified to anyone not authorized to receive them. The Freedom of Information Act, which may be said to have established a "right to know" on the part of the public, as against the Government, exempts from its disclosure requirements "matters that are … specifically required by executive order to be kept secret in the interest of the national defense or foreign policy." This exemption in the Freedom of Information Act justifies refusal on the part of the executive to make classified material available to the general public. But the mere fact of classification by itself, of course, does not constitute a sufficient basis for withholding information from a committee of Congress, since most, if not all, congressional committees themselves are fully authorized to receive classified documents.

Third, and particularly in the public eye now, is the extent of the authority of the executive branch to seek the aid of the judicial branch in preventing the publication of material where such publication would be dangerous to the national security. By hypothesis, in this third situation, the material in question is already in the hands of the potential publisher, so there is no question of the executive being compelled to furnish it in order that it may be published. It is this question, of course, which has been the subject of the current litigation in the cases involving the New York Times and the Washington Post.…

The Constitution nowhere expressly refers either to the power of Congress to obtain information in order to aid it in the process of legislating, nor to the power of the Executive to withhold information in his possession, the disclosure of which he feels would impair the proper exercise of his constitutional obligations. Nonetheless, both of these rights are firmly rooted in history and precedent.

It is well established that the power to legislate implies the power to obtain infor-

mation necessary for Congress to inform itself about the subject to be legislated upon, in order that the legislative function may be exercised effectively and intelligently.…

In the field of foreign relations, the President is, as the Supreme Court said in the *Curtiss-Wright* case, the "sole organ of the Nation" in conducting negotiations with foreign governments. He does not have the final authority to commit the United States to a treaty, since such authority is reposed in the U.S. Senate and, of course, if implementing legislation is required, that legislation must come from the Congress. But the frequently delicate negotiations which are necessary to reach a mutually beneficial arrangement which may be embodied in the form of a treaty often do not admit of being carried on in public. Frequently the problem of overly broad public dissemination of such negotiations can be solved by testimony in executive session, which informs the members of the committee of Congress without making the same information prematurely available throughout the world. The end is not secrecy as to the end product—the treaty—which, of course, should be exposed to the fullest public scrutiny, but only the confidentiality as to the negotiations which lead up to the treaty.

The need for extraordinary secrecy in the field of weapons systems and tactical military plans for the conducting of hostilities would appear to be self-evident. At least those of my generation and older are familiar with the extraordinary precautions taken against revelation of either the date or the place of landing on the Normandy beaches during the Second World War in 1944.

The executive branch is charged with the responsibility for such decisions, and has quite wisely insisted that where lives of American soldiers or the security of the Nation is at stake, the very minimum dissemination of future plans is absolutely essential. Such secrecy with respect to highly sensitive decisions of this sort excludes not merely Congress but all but an infinitesimal number of the employees and officials of the executive branch as well.…

[I]n the area of executive decisionmaking, it has been generally recognized that the President must be free to receive from his advisers absolutely impartial and disinterested advice and that those advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed either by Congress, by the press, or by the public at large.

Again, the aim is not for secrecy of the end-product. The ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will generally be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given situation.

Public Response to the Court Decisions

Letters to the editor of *The New York Times*, June 25–July 12, 1971[32]

This selection of letters to the editor of The New York Times *in June and July of 1971 reveals some of the issues that concerned Americans in the wake of the publication of the Pentagon Papers. Some were concerned that the leak had harmed the country's diplomatic relations with its allies and felt that the newspapers had acted irresponsibly in publishing classified information. Others focused on what the Pentagon Papers revealed about American mistakes in Vietnam and contrasted the United States with countries in which political speech was routinely suppressed.*

From William C. Rogers, Director, Minnesota World Affairs Center, University of Minnesota, June 25, 1971

To the Editor:

The President cannot reply to foreign governments that he is not responsible for the actions of The Times and ask that our behavior be excused. As the President he is ultimately responsible to other countries for American foreign policy. The buck stops with him. This fact is hard for most of us to grasp, but it is usually understood by the occupant of that lonely office.

For fear of offending foreign governments, responsible democracies such as England, France and the United States do not usually open confidential files to public view until as many as twenty or thirty years after the diplomacy involved was conducted. The fact that domestic political advantages can be gained and lost by the publication of such documents does not excuse the embarrassment to other countries and the damage which can be done to the conduct of our foreign relations.

Was The Times unaware of this problem? Could it not at least have removed references to diplomatic dealings with countries other than Vietnam? The inclusion of these references may not cause the loss of any lives, but it might cause some loss of confidence in the reliability of the United States as a participant in international diplomacy.

For a nation of our size and importance this could be a very serious problem.

From Stanley Hoffman, Professor of Government, Harvard University, July 6, 1971

To the Editor:

The Pentagon papers reveal an extraordinary and continuous pattern of deception and self-deception. Decisions made on the assumption—rarely examined, and ritually re-

32. N.Y. Times, July 14, 1971, at 34; July 18, 1971, at 12; July 19, 1971, at 24.

peated—of the crucial importance of Vietnam for American interests.

Scenarios based on the wishful conviction that American expertise, might and tricks would suffice to galvanize a perpetually crumbling South Vietnam and to discourage Hanoi from its own inexorable commitment. Contingency plans that never envisaged what should be done in case these wishes turned out to be delusions.

A war continued despite the evidence of failure because of domestic pressures by the hawks and also because of unwillingness to acknowledge failure in a situation that left no other choices than mass extermination for victory, perpetual war for stalemate, and recognition of defeat.

Even men like Robert McNamara did not fully draw the lessons and consequences of their own disillusioned diagnosis, and realize that the whole castle of cards would probably collapse should the Americans ever withdraw, or that we could not, at the conference table, ever obtain from the Vietcong and from Hanoi the renunciation our arms had not been able to impose. The very fact that public support for the war had to be drummed up by arguments about Vietnam's vital importance of course made retreat even more difficult and our predicament more acute.

And yet, if the public had been told the truth—that we were trying to "save" an inept and corrupt regime artificially created by the U.S. from the only authentic and determined nationalist political force in Vietnam—no support would probably have been obtained in the first place.

At a time when "Vietnamization" still aims at perpetuating the Saigon regime, and still reflects wishful thinking about the miraculous effects of continuing (although reduced) U.S. military support and economic aid, as well as about Hanoi's ultimate exhaustion, only so courageous an act as Dr. Ellsberg's could illuminate the landscape, show the patterns, and sound the most informed of warnings.

The real scandal is not Dr. Ellsberg's dramatic opening of the curtain. It is what has been going on behind it—including the discretion, the timidity, the silence of those who knew the truth about the play but chose not to reveal it. The real surprise is that there weren't more Ellsbergs in high places.

Rather than caricaturing him—as Joseph Kraft has done in his July 4 Week in Review article—as a James Bondish publicity seeker, we should salute in Ellsberg a man who deliberately risked criminal prosecution, character assassination and the sacrifice of his public career because of his conviction that the truth has greater value than security norms, and because he thought that he could better serve his country by making it face the realities than by preserving "secrets" that only help prolong a pointless and bloody disaster.

From Shirley Hazzard, New York, July 12, 1971.

To the Editor:

Having recently and briefly visited South Korea, Singapore, Kuwait, Saudi Arabia and Ethiopia, Vice President Agnew reports that the leaders of those countries are "appalled" by the publication of the Pentagon papers.

It is inevitable that high officials in countries having little or no tradition of representative government or freedom of expression will be shocked by this illustration of the democratic process by which a nation can call its appointed representatives to account. Mr. Agnew will shortly be visiting Morocco, where mass executions have recently taken place without trial; he will no doubt have further commendable reactions to report from the officials he encountered at Rabat.

In citing the disapproval of such leaders as if it were an appropriate response, Mr. Agnew once again betrays the tragic incomprehension of other peoples and conditions that has led the United States into catastrophic error in Vietnam. If the leadership of this country has not yet adopted the model attitudes of the Saudi or Ethiopian regimes, it may be due to some assertion of reason by a literate public informed by a free press. Or perhaps there has been a slip in translation, and these heads of state professed themselves "appalled" by what the Pentagon documents disclosed, rather than by the fact of their disclosure.

Letters to jurists regarding the Pentagon Papers, 1971

The Pentagon Papers case garnered a great deal of attention throughout the United States, leading many members of the public to express their views on the case to the jurists involved, such as district court judges Murray Gurfein and Gerhard Gesell, court of appeals judge J. Skelly Wright, and Supreme Court justices Harry Blackmun, Byron White, John Harlan, and William Douglas. The letters addressed to the judges and justices were split between those who felt that the courts had acted properly to protect the freedom of the press and those believing that the newspapers had been allowed to flout the law and endanger national security.

Letter to Judge Gerhard Gesell from James William Bender III, Alexandria, Virginia, June 22, 1971[33]

What I am concerned about, Sir, and why you and others so involved didn't take it in to consideration—is how can a Newspaper or any other form of news media, defend their right to publish items from stolen or purloined documents? Why as defenders of the law wasn't the first question—not on the right of publication—but the right of the Post or

33. Gerhard Gesell papers (on file with the Library of Congress).

Times to have unlawful possession of this purloined material? …

Would appreciate a reply—not on your decision for or against publication—but as to why the question was not settled as to how these papers could illegally have in their possession such documentation. You'd send a man to jail for acting as a "Fence" for stolen goods—wouldn't you?

Letter to Judges Gerhard Gesell and Murray Gurfein, June 21, 1971 from Albin Anderson, Grand Junction, Colorado, June 21, 1971[34]

Re: United States of America vs. The New York Times and Washington Post.
Gentlemen:

Your respective actions in the above entitled matters reflect, again, the ease with which the federal courts disregard the doctrine of the separate but equal apportionment of federal powers among the legislative, executive and judicial branches of the federal government.

The issue raised by the publication of portions of the classified Pentagon report on the origins of the Vietnam conflict, is not whether the publication would impair national security but whether the material represents portions of government reports which the Executive branch determines to be classified and top secret. That determination is within the sole and exclusive constitutional competence of the executive department and is not subject to review, amendment or nullification by either the congressional or judicial departments.

A shroud of secrecy and confidentiality must necessarily cover much of the toil of the executive department in national and international fields, and if that cover may be pierced at will by congressional inquiry or judicial review, then the American dream will slowly become the nightmare recalling the pattern of European parliament or despotic governments which our wise Forefathers sought to avoid.…

A copy of this letter is being sent to the Chief Justice with the suggestion that he cause all judges of the inferior federal courts to attend seminars on Constitutional Law with the Constitution and "The Federalist" as the two principal sources of study and review. Many federal judges need to be helped to return to the duty of enforcing the Constitution as it exists in the light of the spirit in which it was written instead of using it as a vehicle for the expression and enforcement of personal predilictions.…

34. *Id.*

Letter to Justice Harry A. Blackmun from Daniel M. Wilkes, Orinda, California, July 1971[35]

Dear Sir:

I believe strongly that in the case of The New York Times and the "Pentagon Papers" the Court has deprived me of inherent Constitutional rights.

I have read all of the opinions, and in none do I find reference to what I, as a lay citizen, believe to be a central right that has been violated by the decision. This is the right of the citizen to hold accountable those to whom he yields power to make decisions on his behalf. It seems to me that a disoriented, rattled Court has legislated a part of this right out of existence in the New York Times case, and that this issue has not even crossed the minds of any of the Justices of the Court.

Under our system, the President is vested with authority to provide for national defense and to conduct foreign affairs. He is directly accountable to the voters for these responsibilities. The Times arrogated to itself the right to dilute these powers, and the Court concurred. Nor is it clear what limits there are on the powers of the Times—or any publication—to decide what will injure the nation. Neither the Times nor any other publication is accountable to me. Nor is the Supreme Court.

The decision sent a shudder of fear and foreboding through me and many of my acquaintances, for the reasons cited above. If citizens have lost faith that they have any influence over their government, the Court need not look afield for reasons.

The best that can be said for the Court's decision is that it makes a game of the national safety. Presumably, any publication can now publish anything it gets its hands on, even if it means a death sentence for the nation. After publication, the Court, if its members survive, will decide among the ruins whether or not the nation has been injured.…

Letter to Justice Harry A. Blackmun from Guy A. Schepis, vice president, CT Engineering Corp., Lawndale, California, July 26, 1971

Dear Associate Justice Blackman:

Through no fault of yours, the Supreme Court has made a complete mockery of our industrial security program, a hero of a man accused of violation of our espionage laws, and has further confused and split the nation.

The decision in favor of allowing the newspapers to publish information still classified Top Secret, in the guise of "freedom of the press", astounds and infuriates sane and law-abiding Americans.

The Supreme Court must now make clear to the people of the United States their

35. Harry A. Blackmun papers (on file with the Library of Congress).

philosophy regarding law and order vs. freedom of any individual or newspaper to publish classified information simply because "in their opinion" the people should know. The Supreme Court ruled that the information was not dangerous to the security of the United States, which may be true; however, that was really not the issue. It is incredible that the real issue, that of allowing a newspaper to publish classified information, was overlooked in favor of the old "freedom of the press" routine. Has the Supreme Court now established a precedent condoning law-breaking and disclosure of classified information? Is it now only a matter of interpretation by individuals? Let's hope not, for our country would suffer a serious regression and we might well revert back to a nation of troglodytes.…

Letter to Justice Harry A. Blackmun from Zalkind Klublock Silverglate, Boston, Massachusetts, July 21, 1971

Dear Justice Blackmun:

I find it incredible that a man such as yourself, with a reputation (perhaps overrated) for intelligence and intellectual integrity, could have the temerity to suggest that it is the Times and other newspapers, and perhaps even your Brothers who supported the Court's majority opinion, rather than the discredited Government officials, bureaucrats, generals, and "intellectuals", who deserve the blame for "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 well as the holding of prisoners of war and other tragic results of the current undeclared war in Indo-China. If the majority of the Justices on the Court had your respect for civil liberties, criticism of this insane war might never have gotten loud enough to make the Government aware that it was fighting a war which even its own citizens consider unwarranted, immoral and illegal. I trust that you will remain in the minority on momentous issues such as these for a long time to come.

Letter to Justices Harry A. Blackmun, Byron White, and John Harlan from Eileen Woods, San Francisco California, July 17, 1971[36]

Messrs. Blackmun, White and Harlan:

Gentlemen:

I have noted for a long time the attempt of this Administration, particularly, to cow, intimidate, and generally to suppress the communications media.

I disagree with this un-American procedure. I think you should actually consult with the Bill of Rights, and not depend on instructions from The White House, including John Mitchell. Of course, if you wish to tear this country apart further, you can proceed as you

36. *Id.*

have. Do you wish to widen the gap between the administration and the people? It seems to me this is obviously true.

And just what do you mean, Blackmun, by threatening newspapers because they have shown the stupidity and downright inordinate duplicity of this and prior Administrations? I noted in your dissent that you did so threaten. Just what punishment would you think suitable for the people in power who have "generated" at least 6 million refugees in Indo-China, been responsible for probably 1-1/2 million deaths there, and who knows how many permanently wounded, maimed, etc., excluding the 50 thousand U.S. soldiers killed, I don't know how many wounded, and have brought on drug addiction in the countless thousands, and made murderers.

Naturally, you are out of touch with ordinary people in this country, and probably don't care much about them, either, but there is a grass roots opinion, which you are hearing now from a tax-paying white American citizen, age 59 plus, and who is

VERY MUCH ASHAMED

Letter to Justice William O. Douglas from Mrs. Jacque Foreman, San Angelo, Texas, June 25, 1971[37]

Dear Mr. Justice Douglas:

I am hopeful that you, as a representative of the people of the United States, will see to it that the government is NOT allowed to take over the press and tell them what to print or not to print. If we let the government take over the press, we might as well put up a big sign which says: "America Has Gone Communist." Taking over the press is just about the last step we have left to take.

The so-called "secret" Vietnam papers would not, I do not believe, jeopardize the national security. I feel sure they would undoubtedly show that the leaders of our nation were selfish, that they wanted the Vietnam War for their own private political reasons, and that the welfare of our nation and its people was not considered even a little teeny bit.

The Vietnam War has been political, is continuing to be political, and unless we do something about it, right now, we are going to be in real trouble. Our nation was founded on a Constitution—the greatest in the world—by the people, of the people and for the people. Let's not sell our nation down the river. Surely political ambitions can be put aside, for a change, in an effort to save this most wonderful, but most mismanaged, nation in the world.

37. William O. Douglas papers (on file with the Library of Congress).

Letter to Justice William O. Douglas from Harold Berry, Detroit, Michigan, July 19, 1971

Dear Justice Douglas:

Although it is customary to write Congressmen and Senators for the purpose of exerting influence, I realize that Justices of the Supreme Court are immune from this type of pressure.

However, as a citizen most concerned with the status of American liberties, I feel compelled to extend words of praise to you for articulating so well the ideals embodied in the First Amendment in connection with the recent New York Times case.

Your opinion should stand out in history books and is absolutely inspiring in this era which has witnessed so many failures of democratic practice.

Letter from Reverend George R. Davis (pastor and friend of President Lyndon B. Johnson), National City Christian Church, Washington, D.C., to justices of the Supreme Court, U.S. Senator Mike Gravel, and editors and publishers of *The New York Times* and *The Washington Post*, July 2, 1971[38]

It is frightening to know that the majority opinion of the Supreme Court was based in the final analysis:

1) Upon an act of theft;
2) And the papers taken from that act of theft were released by certain newspapers at a time based upon their own whim;
3) That they were released on the eve of an important decision about to be made in the Congress of the United States;
4) That Mr. Ellsburg released those papers (whoever took them), to a carefully selected number of newspapers, which in itself contradicts any idea of freedom of the press…
5) That this action by the Supreme Court suggests that any employee working in any office in any place of business, the government, military, education, or any other facet of American life, is justified "stealing" what he comes to the conclusion, according to "his good conscience", is his to take, because he believes he is serving a noble end. …

I was literally amazed that the publishers and legal representatives of the major newspapers involved declared that they received all news and then published what they saw fit to publish or believed should be published, but in the same breath denied to the government the right to decide what it would or would not release, and that these newspapers retained stolen documents to be used according to their concept of "freedom of the press"

38. Gerhard Gesell papers (on file with the Library of Congress,).

without revealing this to the authorities, and did not believe they were morally obligated to share this news with other newspapers.…

I wanted to be one of a handful of Americans who would be writing their objections, over against the thousands who, no doubt, will be commending these recent actions by the press and courts as being noble and high-minded.

Letters to Neil Sheehan, June–July 1971[39]

Neil Sheehan, the reporter who authored The New York Times*'s articles on the Pentagon Papers, received a great deal of mail from the public during and after the litigation. Like the letters to the judges and justices who participated in the case, the correspondence aimed at Sheehan was split between those who viewed him as a hero and those who condemned him as a traitor.*

From Edith Macko, Somerville, N.J., June 17, 1971

Attention of Neil Sheehan:

I for one and I hope that that many more of my fellow Americans feel that your unnecessary spying on our special security files for the articles on the "Vietnam War" was totally unnecessary. In trying to reveal to our nation a "scoop" you have helped to endanger the security of all of us. You have tried to make us feel that we cannot trust our government, instead you have caused many of us to think just what kind of newspaper the "New York Times" is! Whose side our you really on? Your "security" in obtaining this information must have been tighter than those who secured it from you. This leaves me with a feeling of a very widened insurity of your paper.

Frankly you have not done us a service—because you have lost respect in our eyes—you forgot to remember a principle code of ethics—(If the people have a right to know) let it come from those who do know!

Thanks for nothing!

From G. D. Batcheller, Major USMC, Quantico, Virginia, 5 July 1971

Dear Mr. Sheehan,

I find polite words completely inadequate to convey to you my complete and total revulsion for your actions in the handling of the top secret Pentagon papers. Your decision to serve as Ellsberg's pander places you in company with some of the most illustrious traitors of the century. Your treason is especially despicable in that you cloak it with a right from the Constitution that you so enthusiastically, and profitably, undermine.

39. Neil Sheehan papers (on file with the Library of Congress,).

You are a source of revulsion to decent Americans, a source of embarrassment to our friends, a source of comfort to our enemies "foreign and domestic", and a source of joyous anticipation to Adolph, who must be stoking his ovens and eagerly awaiting your arrival.

I am sure circulation is up, and I know the Supreme Court has decided that you have a legal right to practice your treason. My satisfaction comes from the knowledge that we all die. When your time comes you will pay the price.

From Mrs. Kenneth S. [Margaret] Clark, New York, N.Y. , June 15, 1971

Dear Mr. Sheehan,

From the bottom of my heart, I send you my thanks for the invaluable service you have rendered, and my most sincere congratulations on the wonderful job you have done.

Most of us deserve to know the truth. Then perhaps there is a chance to see clearly and end this tragic most immoral deed, this horrible war.

If only people knew the whole truth, nothing but the truth, the way it started. When it really started.…

You have done an unforgettable job. We should be grateful to you indeed, and the Times should be proud of you always.

Press Response to the Court Decisions

Many newspapers published editorials on the Pentagon Papers case, both during the litigation and in the wake of the Supreme Court's decision to allow publication to proceed. Unsurprisingly, a large majority of the editorials favored publication, arguing that the government conducted its affairs with excessive secrecy and that a prior restraint would pose a greater threat to freedom and security than would the public exposure of classified information. Some columnists, including conservative author William F. Buckley, decried the Court's decision, however, believing that newspaper editors were not accountable to the public in the same manner as elected officials and were not qualified to make unilateral decisions in matters affecting national security.

"The Vietnam Documents," June 16, 1971[40]

The day after it was temporarily ordered to halt publication of the Pentagon Papers by Judge Murray Gurfein of the U.S. District Court for the Southern District of New York, The New

40. N.Y. Times, June 16, 1971, at 44.

York Times *published an editorial decrying "an unprecedented example of censorship" and asserting its obligation to inform the American public about the content of the papers.*

What was the reason that impelled The Times to publish this material in the first place? The basic reason is, as was stated in our original reply to Mr. Mitchell, that we believe "that it is in the interest of the people of this country to be informed.…" A fundamental responsibility of the press in this democracy is to publish information that helps the people of the United States to understand the processes of their own government, especially when those processes have been clouded over in a hazy veil of public dissimulation and even deception.

As a newspaper that takes seriously its obligation and its responsibilities to the public, we believe that, once this material fell into our hands, it was not only in the interests of the American people to publish it but, even more emphatically, it would have been an abnegation of responsibility and a renunciation of our obligations under the First Amendment not to have published it. Obviously, The Times would not have made this decision if there had been any reason to believe that publication would have endangered the life of a single American soldier or in any way threatened the security of our country or the peace of the world.

The documents in question belong to history. They refer to the development of American interest and participation in Indochina from the post-World War II period up to mid-1968, which is now almost three years ago. Their publication could not conceivably damage American security interests, much less the lives of Americans or Indochinese. We therefore felt it incumbent to take on ourselves the responsibility for their publication, and in doing so raise once again the question of the Government's propensity for over-classification and mis-classification of documents that by any reasonable scale of values have long since belonged in the public domain.

We publish the documents and related running account not to prove any debater's point about the origins and development of American participation in the war, not to place the finger of blame on any individuals, civilian or military, but to present the American public a history—admittedly incomplete—of decision-making at the highest levels of government on one of the most vital issues that has ever affected "our lives, our fortunes and our sacred honor"—an issue on which the American people and their duly elected representatives in Congress have been largely curtained off from the truth.

It is the effort to expose and elucidate that truth that is the very essence of freedom of the press.

"Freedom and Restraint," June 23, 1971[41]

The immediate issue in the Post and Times cases is direct and simple: Is an American free to speak and publish without prior restraint or censorship? The answer, under the First and Fourteenth Amendments to the Constitution, is a resounding yes. The only exceptions arising from court interpretations of the Constitution are in cases where utterances would represent a clear and present danger to the nation.

Up until now, this fundamental principle of our democracy has been so well accepted that the government has never before attempted to block a newspaper from publishing on national security grounds.

There are those, no doubt, who feel that the Constitutional prohibition against pre-publication restraint grants too broad a right to the organized press—newspapers, magazines and book publishers—allowing it to act irresponsibly with impunity. To some extent it does, but our forefathers judged and events have proved that this was a small risk to run for the precious right for all citizens to have freedom of thought and expression. And in fact, the organized press cannot act with impunity. While prior censorship is proscribed, authors, publishers and speakers can be held responsible after the fact if they have caused damage out of malice or have disregarded the law. Laws on this are admittedly liberal in the interests of freedom of expression but it is not easy in this country to do widespread malicious damage with impunity. Even if they are allowed to publish, the Times and Post still will be accountable for what they publish.

There are other restraints. It is sometimes argued that the organized press has no right to override the decisions of government on what should or should not be confidential information. After all, this argument goes, the government is elected and can be held responsible by the public but the press cannot be.

In reality, newspapers—and particularly successful and influential newspapers—are subject to much the same kinds of restraints and pressures from the public as government. Their influence, as with government, depends upon public confidence. If their readers lose confidence they are in much the same position as failed government leaders. Unlike government, however, their primary role in our society is to give the public information honestly and fearlessly. They should be judged by the public on how well they perform their role within the limits of national security.

"Our Colleagues Err on War Secrets Issue," June 27, 1971[42]

The Detroit News does not agree with those of our press colleagues contending that na-

41. Wall St. J., June 23, 1971, at 14.
42. Detroit News, June 27, 1971, at 1.

tional interest—and the cause of a free press—are served by the current battle over publication of secret Pentagon papers.…

We do not believe the New York Times and other involved newspapers acted responsibly and in the public interest when—without even trying to use established procedures for declassification of secret papers—they chose to publish an edited version of what it now appears was an incomplete account of our involvement in the Vietnam war.

Despite our devotion to, and dependence upon, the basic rights guaranteed under the First Amendment, we do not accept the premise that the doctrine of a free press is an unrestricted license to print any secret document, the publication of which, in an individual editor's opinion, would be in the national interest.…

Granted, the bureaucratic tendency to cover mistakes with a "top secret" stamp is a problem. It always has been and newspapers have an obligation to fight it. But the solution does not lie in a grant to an individual—be he editor, scientist or public official—of power to substitute his personal definition of national interest as a basis for declassification.

"Disclosure and Security," July 2, 1971[43]

The State Department and some other branches of this administration claim that they are reviewing their classification policies and we can only hope that it will prove to be a really serious effort. We would hope that Congress will also exert strong pressure for greater disclosure and there are signs that it will do just that. Unwarranted secrecy and the failure to inform the public and Congress in advance of vital policy decisions has seriously weakened the credibility of the United States government.

Restoring that credibility may well be more vital to the nation's security than anything else the government could do. Substantive action, not mere salesmanship, will be needed and one of the most effective actions would be wholesale declassification of information that should long ago have been in the public domain.…

Newspapermen might wish that the full court could have been unequivocal in upholding the freedom guaranteed by the First Amendment. The freedom was upheld, however, and that is what matters for the moment. If it all has led to a better understanding of where the nation's security really lies then it has all been worthwhile.

In our view, the nation's security lies in a continuing willingness of its people to face unpleasant facts, to engage in full and earnest debate and to protect the free, democratic institutions that make those things possible.

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43. Wall St. J., July 2, 1971, at 6.

"Mr. Mitchell Should Go," June 22, 1971[44]

It is difficult to see how John N. Mitchell can remain the Nixon Administration's Attorney General after the monumental blunder of the legal attack on The New York Times and the Washington Post. Mr. Mitchell's career in Washington has been a series of mistakes, but perhaps none so damaging to the Administration as this one.

It is a worse error because it needn't have happened. Instead of moving to accept the situation when The New York Times published historical articles based on secret Pentagon papers, Mr. Mitchell tried informally to have them stopped: and when his appeals to The Times and the Post failed, the Justice Department rushed precipitately into court with suits it has already lost in the lower courts and is likely to lose in the higher.

But no matter what the courts do, Mr. Mitchell has lost. He has shown where his Administration stands on constitutional rights, specifically on the First Amendment. If the media had not already been turned against the Administration by the harassment of Mr. Nixon's spokesman Vice President Agnew, Mr. Mitchell has given it an unassailable reason for hostility. From a tactical viewpoint, Mr. Mitchell has wrongly taken the Administration out on a limb from which it cannot retreat.…

We think it likely Mr. Mitchell is motivated in part by philosophical conviction, in part by a misguided zeal for political advantage. But whatever prompts him to act, he has shown a really astonishing gift for doing the wrong thing. Thus he hurried to court in The New York Times case with the unprecedented claim that national security permits prior restraint on the publication of a newspaper. After hearing the evidence United States District Judge Murray Gurfein ruled against the Government, a ruling Mr. Mitchell might well have foreseen had he deliberated a little more on the implications of what he was about to do.

Mr. Mitchell is Mr. Nixon's former law partner and intimate adviser, but the question is how long the President can continue to accept such consistently bad advice. The President owes it to the people, not to speak of his party, to allow Mr. Mitchell to withdraw from public life.

"A loss, not a gain," July 4, 1971[45]

The Supreme Court's 6-to-3 decision to permit publication of articles on the origin of the Vietnam war based on top secret Pentagon documents represents a net loss for freedom of the press.

The Houston Post defends the rights guaranteed by the First Amendment. Free speech and a free press come to the same thing—the right of the people to be informed,

44. St. Louis Post-Dispatch, June 22, 1971, at 24.
45. Oveta Culp Hobby, Houston Post, July 4, 1971.

to dissent. But to be a free press means to accept the responsibility of being a free press.

As Justice Oliver Wendell Holmes showed long ago, the First Amendment's protection cannot be unlimited. We are guaranteed free speech, he said, but we cannot falsely cry "Fire!" in a crowded theater.

Newspaper editors are not employes of the government, but they must share with the government the responsibility of protecting the people. When editors set themselves above not the law but the security of the country, the country may be endangered.

Publication of the Pentagon documents is too grave a responsibility for decision by any editor acting alone. It is impossible for an editor to know what is sensitive and what is not sensitive in the government's operations.

But an editor can ask if a document affects the nation's well-being; a procedure exists for declassifying documents that may no longer be sensitive. The newspapers concerned did not ask if the documents were sensitive, if they could be declassified.

The question does not concern the government's embarrassment but whether the vital interests of the people were endangered.

"Mr. Blackmun's Dissent," July 6, 1971[46]

Let's face it, Justice Blackmun made a very telling point about The New York Times in his dissenting opinion. The paper had taken to using the argument of time pretty much as convenient. Sometimes it gave the impression that every second counted. Other times, that what the hell we are dealing in matters that are ancient history.

Justice Blackmun remarked the irony that The New York Times took three months to prepare its handling of the Pentagon Papers. Then, when The Times fired its first shot on a Sunday morning, the Justice Dept., the following day at noon, sent a telegram to The Times announcing that it would seek an injunction against continued publication of the series.

The Times was apparently outraged at a) the length of time the Justice Dept. took in communicating its position (why hadn't Martha Mitchell called The Times the evening before?), and b) at the delay, caused by the lower court's injunction, in making the series available to the public.

In other words, if The Times, having come into possession of the documents early in March, could wait until the middle of June to publish the papers, then why shouldn't the courts have been given a little time to ponder the question whether the series contained information the release of which might be gravely prejudicial to the national interest? Under the circumstances, Mr. Blackmun concluded, the courts, under the synthetic pressure of the situation, had been stampeded into giving opinions which took only cursory account of the factual situation.…

46. William F. Buckley, Universal Press Syndicate, July 6, 1971.

Accordingly, said Mr. Blackmun, we are left pretty much at the mercy of the discretion of the newspaper publishers, in this case The New York Times and The Washington Post. "I strongly urge," said Mr. Blackmun, "and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America."

It is a thin lifeline. Not because there is any reason to suppose that the publishers of these papers desire anything less than the best for America, but because we are in fact asked to rely on the final authority of two individuals, Mr. Sulzberger and Mrs. Graham, who came by dynastic succession to their authority. Every now and then, on a fixed schedule, we are given the opportunity to pass judgment on the work of our political representatives.

We are not given such power over The Times and The Washington Post.

"The Crisis Coming for a Free Press," July 12, 1971[47]

Although the Supreme Court refused to impose a prior restraint on further publication of the Pentagon Papers, investigative journalist I.F. Stone believed that the justices' individual opinions—especially those of Justices Byron White and Thurgood Marshall, which suggested that the government might be able to prosecute the newspapers after the fact—as well as the indictment of Daniel Ellsberg on charges of espionage and theft, signaled an impending government crackdown on the freedom of the press.

In the Pentagon Papers, the government had a poor case on the facts. It had an even poorer case on the law. It is a pity that the upshot was not the kind of historic defense of a free press that the weak pleadings and the grave circumstances called for. *The press did its duty but the Supreme Court did not.* Its splintered opinions left a bigger loophole than before for prior restraint—something English law abandoned in 1695 and the American press has never experienced. In addition five of the nine Justices encouraged the government to believe that they would give it wide latitude if it sought to punish editors for publishing official secrets *after* they did so instead of trying to enjoin them in advance. Two Justices indeed spent most of their opinions helpfully spelling out possibilities for successful criminal prosecution. It will be a miracle if this Administration, which is almost paranoid in its attitude toward the media, is not encouraged to include editors and reporters among the "all those who have violated Federal criminal laws" the Attorney General now says he will prosecute.

Fresh Need for Secrecy

The coming attempt to prosecute for violation of the government's classification orders involves nothing less than the future of representative government. For if the government

47. I.F. Stone, I.F. Stone's Bi-Weekly, Vol. XIX, no. 14, July 12, 1971, at 1–4.

can continue to abuse its secrecy stamps to keep the press, the Congress and the people from knowing what it is really doing—then the basic decisions in our country are in the hands of a small army of faceless bureaucrats, mostly military. The struggle comes at a climactic moment when Hanoi's new peace offer and public weariness with the war make it all the more necessary for the bureaucratic machine to prevent new leaks by intimidating its own mavericks and the press. Duplicity is more requisite than ever when the other side makes it necessary plainly to choose between release of the prisoners or continued pursuit of a military-political victory in South Vietnam. From every indication, Nixon's answer, however veiled, will be to pursue the war. This will intensify his conflict with the media.…

Nullifying the Intent of the Framers

The government made an even poorer showing on the law. Solicitor General Griswold's argument was downright trivial and the few precedents he cited were irrelevant and quoted out of context. Unfortunately the newspaper lawyers were no better. Never was a great case argued so feebly. No one took the First Amendment as his client. The defense lawyers argued the case as narrowly as possible in order to get their newspaper clients off the hook. Prof. Alexander Bickel, whom the *New York Times* retained specially for the occasion, is no firm defender of the First Amendment; he holds the "balancing" view Frankfurter among others propounded. This holds, as Griswold flatly said during argument, that where the First Amendment says "Congress shall make no law… abridging freedom of the press," it does not mean what the plain words say but only that freedom of the press must be "balanced" against other public considerations. Bickel agrees with Griswold. This nullifies the intention of the Framers.

Daniel Ellsberg and the Criminal Case Involving the Release of the Pentagon Papers

Walter Cronkite, CBS News interview with Daniel Ellsberg, June 23, 1971[48]

A few days before Daniel Ellsberg surrendered to authorities and was indicted by a federal grand jury on charges of theft and espionage, he gave an interview to Walter Cronkite of CBS News at an undisclosed location. Ellsberg stressed his belief that the executive branch had become too powerful and too secretive and criticized the United States government for ignoring the impact of its foreign policy on the Vietnamese people.

48. Transcript of CBS News Special Report: "The Pentagon Papers: A Conversation with Daniel Ellsberg," June 23, 1971, Theodore F. Koop papers (on file with the University of Iowa Libraries, Iowa City, Iowa).

Ellsberg: So far, I think, both from the papers themselves and from the reaction to them from the public and from the administration, I think the lesson is that the people of this country can't afford to let the President run the country by himself, even foreign affairs any more than domestic affairs, without the help of the Congress, without the help of the public. Obviously, the public needs more information than it's gotten from the past four Presidents in the area of Vietnam, if they're to discharge their responsibilities, I think.…

It seems to me that the—again, the leaders … have fostered an impression that I think the rest of us have been too willing to accept over the last generation, and that is that the Executive Branch is the government, and that indeed they are leaders, in a sense that may not be entirely healthy, if we're to still think of ourselves as a democracy. I was struck, in fact, by President Johnson's reaction to these revelations as "close to treason," because it reflected to me this sense of—that what was damaging to the reputation of a particular administration, a particular individual, was in effect treason, which is very close to saying "I am the state." And I think that quite sincerely many Presidents, not only Lyndon Johnson, have come to feel that. What these studies tell me is we must remember this is a self-governing country. We are the government.…

[T]he fact is that in the seven to ten thousand pages of this study, I don't think there is a line in them that contains an estimate of the likely impact of our policy on the overall casualties among the Vietnamese or the refugees to be caused, the effects of defoliation in an ecological sense. There's neither an estimate nor a calculation of past effects, ever. And the documents simply concern the internal concerns—reflect the internal concerns of our officials. That says nothing more nor less than our officials never did concern themselves, certainly in any formal way or in writing, and I think in no informal way, either, with the effect of our policies on the Vietnamese.

"Unlike the Others, He Was 'A Man Driven,'" July 4, 1971[49]

A July 1971 profile of Daniel Ellsberg in The New York Times *focused on his passionate and forceful opposition to the Vietnam War as well as his flair for the dramatic.*

At first glance Mr. Ellsberg seemed an unlikely candidate for such a role. He is a defense intellectual like many others. Like others, he was trained as an economist and compiled a brilliant record at Harvard and in Cambridge, England. Like others he worked in the 1950's for the Rand Corporation, a semi-public center of defense studies in Santa Monica, Calif. Like others he was drawn to the Pentagon of Robert McNamara in the 1960's. Like

49. Joseph Kraft, N.Y. Times, July 4, 1971, at 1.

others he was an early advocate of the Vietnam war and went on the spot to help in the fighting. Like others, he changed his views and became a dove.

But unlike all the others Mr. Ellsberg gave the impression of a man driven. If his mind seemed especially powerful, so did the strength of his feelings. Officials and journalists who encountered him over the years were repeatedly impressed by his bent for dramatization and self-dramatization. He loved to run covert operations and once demonstrated the possibilities by leaving a dinner party only to return five minutes later disguised as an Arab. One State Department aide recalls that on a routine jeep trip around Saigon, Mr. Ellsberg made him keep his head under cover and carry and even cock a gun. Many newsmen remember that Mr. Ellsberg was always arranging clandestine meetings at odd hours and that whether in Saigon or Santa Monica or Washington he would keep looking over his shoulder, persuaded he was being followed.…

He ran his operation with all the skill of the trained strategist. The first massive leak of the full papers, minus only three volumes on peace negotiations which Mr. Ellsberg thought should be kept confidential, went—he implied last week—to The Times. A schedule of subsequent leaks to papers all over the country was worked out.

Just before The Times began publication, Mr. Ellsberg and his wife slipped away from their home in Cambridge. As soon as his name surfaced he appeared on the Cronkite show, then slipped from sight again. When an injunction stopped The Times from publication, The Washington Post popped up with the material; then The Boston Globe, The St. Louis Post-Dispatch, The Chicago Sun-Times and The Los Angeles Times. By the time he gave himself up Monday, Mr. Ellsberg was virtually certain publication could not be stopped. "It's a beginning of history," he said in his Thursday press conference, "a beginning of honest history."

"Ellsberg: The Battle Over the Right to Know," July 5, 1971[50]

In July 1971, Time *magazine published an extensive piece on Daniel Ellsberg, detailing his personal history and attempting to provide some insight into his motivation for leaking the Pentagon Papers.*

One fundamental question bothers many Americans. Just who is this man Ellsberg, a distinctly minor figure who dares to challenge four Presidents, assails the decisions of some of the keenest minds ever to have been attracted to national security service, and scatters classified documents like chain letters across the country? …

Ellsberg is too complex a man to fit neatly any mold, even that of the insulated aca-

50. Time, July 5, 1971.

demic, so shocked at his first sight of a combat-torn body that he denounces war. Ellsberg's conversion was much more gradual—although, as with nearly everything he has done, once he had a change of mind he threw all of his spirit and intelligence into it, moving from one extreme to another.…

At Harvard, which he attended on a Pepsi-Cola scholarship, Ellsberg similarly spread his talents broadly. He debated, edited the campus literary magazine, wrote editorials for the daily Crimson, was elected to Phi Beta Kappa, and married a Radcliffe sophomore.…

Ellsberg's education was interrupted by four years of service shortly after the Korean War. He was described by a fellow Marine as a "tough, hard-nosed hatchet man." …

From Harvard, Ellsberg moved to the Rand "think tank," where his expertise in probability theory, particularly as applied to war analysis, was much in demand.… When the Pentagon's Assistant Secretary of Defense John McNaughton, an expert on nuclear test bans, needed an assistant in 1964, Ellsberg landed the job. Now he was on the inside of U.S. strategic studies—and a most contented man. He was so engrossed in his work that he was surprised and shaken when his wife Carol sued for divorce later that year.… With his neglected marriage broken, he seemed to be re-examining his whole life, which had centered on a successful but conventional career. He still did not question U.S. aims in South Viet Nam, but he was concerned about the lack of success and wanted to view the problems in the field. Major General Edward Lansdale, recruiting more help for his highly independent intelligence operations, yielded to Ellsberg's pleas to be allowed to join him in Viet Nam.…

Despite his occasional displays of bravado, Ellsberg began to worry about needless killing. He was later to tell a U.S. Congressional conference about flying over a "free-fire zone" with a U.S. pilot who triggered his M-16 at almost anyone who moved on the ground. "This game goes on daily in almost every province of Viet Nam," Ellsberg complained. "I am sure the Viet Cong will come out of this war with great pride in the fact that they confronted American machines and survived. I came out of that plane with a strong sense of unease." …

After the Communist Tet offensive of 1968, Ellsberg began to despair of U.S. success in the war and to review more introspectively his own involvement in the previous planning.…

What Ellsberg claims has been a U.S. callousness toward Vietnamese deaths and a preoccupation with lowering its own casualties to an acceptable level has been a recurrent theme of his criticism.…

Ellsberg has helped fulfill his prophecy of mounting stress in the U.S. unless the war ends, a prophecy offered before the Senate Foreign Relations Committee last year. Said Ellsberg: "Personally, I have thought in the last couple of years of protest in this country

that it was still possible to exaggerate the threat to our society that this conflict posed for us. But I am afraid that we cannot go on like this, as seems likely, unless Congress soon commits us to total withdrawal, and survive as Americans. I think that what might be at stake if this involvement goes on is a change in our society as radical and ominous as could be brought about by our occupation by a foreign power. I would hate to see that."

"The Advocates": "Should the Government Drop the Charges against Daniel Ellsberg?," October 5, 1971[51]

In October 1971, Boston public television station WGBH devoted an episode of its weekly debate program, "The Advocates," to the question of whether Daniel Ellsberg's prosecution for theft and espionage should be abandoned. University of Southern California law professor Howard Miller—along with his witnesses, former U.S. Senator Ernest Gruening, newspaper editor John Siegenthaler, and MIT professor Noam Chomsky—advocated Ellsberg's exoneration, claiming that he had performed a valuable public service by leaking the Pentagon Papers. National Review *publisher William Rusher and his witnesses, Leo Cherne of the Research Institute of America and former ambassador to Vietnam Elbridge Durbrow, argued that Ellsberg had harmed national security and that not to prosecute him would constitute a selective application of the law.*

> Miller: The Government is about to prosecute Daniel Ellsberg for returning a set of documents to those who own them, the people of the United States. Those prosecuting are the very people who support the policy that Ellsberg exposed as a fraud. In a kind of premature 1984, the lie is prosecuting the truth.…
>
> Rusher: A federal grand jury has indicted Daniel Ellsberg for violating the U.S. Criminal Code. If this happened to you or me, we would have to stand trial. But Ellsberg's friends now argue that he should be exempt from prosecution because he acted with a political purpose in mind. Is this the kind of America we want? Should there be one law for Daniel Ellsberg and another for the rest of us? …
>
> Miller: The question is often asked, What if others do what Daniel Ellsberg has done? The answer to that question is another question. What if they don't? If at this moment another Vietnam were being planned secretly and deceitfully, wouldn't we want another Daniel Ellsberg to tell us about it now? In fact, Daniel Ellsberg has breached no law. The law under which he was indicted requires that it result in injury to the United States.
>
> The disclosure has resulted in benefit to the United States. What Daniel Ellsberg did is commit the unforgivable sin. He breached the wall of secrecy between the Government and the people.…

51. WGBH Media Library and Archives, http://openvault.wgbh.org/catalog/V_A47A093E99C04E7C-99F4A7410D9DE4AE.

Gruening: Well, [Ellsberg] has exposed the deception, the betrayal of the elected public servants of their responsibility to the American people. He has exposed how the leading officials, starting with the President and all his surrounding advisors, lied the American people into this war with the countless deaths and wounded and all the other disastrous consequences. He has exposed how the Gulf of Tonkin Resolution was a completely spurious episode and how the Gulf of Tonkin Resolution had been drafted months before by an assistant Secretary of State before the Tonkin Gulf episode happened.

He has exposed how while Lyndon Johnson was campaigning for election in his own right and telling the American people that he would never send American boys to fight a ground war on the continent of Asia … all the time he was planning to do this and escalating the war.…

Rusher: Let us begin by conceding at once that Daniel Ellsberg is no ordinary criminal, that whether he is right or wrong about the Vietnam War, he sincerely believed he was right and that he committed the crimes in question with the best of political intentions. What you and I must consider is whether in those circumstances he should be completely immune from prosecution as Mr. Miller and his witnesses contend.…

Ambassador Durbrow was formerly in 1957–61 Ambassador to Vietnam and then alternate U.S. Representative to NATO until 1967. He also served in the Foreign Service for six years in Moscow on three separate assignments. Ambassador Durbrow, just how great was this service that Daniel Ellsberg performed for the American people?

Durbrow: In my estimation, unfortunately, he did a great disservice to the American people.

Rusher: Why is that? …

Durbrow: Having been almost forty years in the diplomatic business, the confidentiality of your negotiations, your talks, your dealings with your foreign colleagues is vital and critical. We cannot carry on foreign relations without it. The fact that many things that our foreign colleagues have told us come out in these Pentagon Papers is going to make it more difficult and in some cases probably impossible for us to have meaningful confidential discussions with our allies, which some four or five countries have already formally protested the publication of these documents. Other countries have given oral protestations, either abroad in their respective counties or in Washington about the publication of these documents, thereby making it much more difficult for us to carry on our business in the protection of the United States.…

Rusher: Has any damage been done to our security, sir?

Durbrow: Yes, in my estimation, a great deal of damage has been done. The documents give code names to some of our projects that are ongoing. The enemy learns this, he's heard about this code project, he didn't know what it was all

> about, he gets a verbatim text and he starts running it through other sources and gets a much better picture and harmful to the United States. Actually, in the parts of the Pentagon Papers which were released, sixty documents from the State Department and thirty documents off and on, give a number of one or two, from the Pentagon did deal with ongoing U.S. diplomatic, intelligence and military negotiations today.

"The Ellsberg Affair," November 13, 1971[52]

A November 1971 profile of Daniel Ellsberg in the Saturday Review *used Ellsberg's own words to describe his motivation for releasing the Pentagon Papers.*

Ellsberg fits none of the conventional patterns of dissent; he is not a man of gestures, a burner of draft records, a self-immolator, not a marcher or a signer of petitions. He is, rather, a man who took it upon himself to commit the highest crime of all: breaking the rules of the club. He stole their secrets. That he should, as a consequence, become something of a national hero … deserves some note.…

What we do have is Ellsberg's own account of his conversion, his gradual discovery that the war was based on "lies, deception, and secrecy," and his decision that if the Pentagon study, of which he was one of the authors, were not published, the administration would find a pretext for escalating the war again. To his knowledge, he said, he was the only person to have read the entire study who had also had field experience in Vietnam.

The conversion was as gradual as it was absolute, and Ellsberg speaks of a time "when I walked through American society looking for a place to stand." The problem was how to get leverage—to achieve something—not only in bringing the war to an end but in exposing the structure and practices that sustained it. For a year before the Pentagon Papers were published, Ellsberg, now a senior research associate in international studies at MIT, was writing and speaking about the war, trying to demonstrate that Vietnam had not been a hopeless quagmire or the result of poor intelligence, but the consequence of a series of deliberate Presidential decisions, going back to 1946, in which domestic political considerations—particularly the fear of being the President who "lost" Indochina to the Communists—overruled a series of pessimistic and "remarkably accurate" intelligence estimates of the prospects of American success.

Ellsberg's conversion did not begin with the immorality of the war but with its futility and with the lies that were used in its defense.…

It was the systematic deception, which started at the lowest echelons and ran through the entire government structure from the platoon leader to the President of the United

52. Peter Schrag, Saturday Rev., vol. LIV, no. 46, Nov. 13, 1971, at 34–39.

States, that began to place the daily brutality in its ugliest light.…

"I remember very well," Ellsberg told a television interviewer, "thinking that this is a system I have spent fifteen years serving, in the Marine Corps, Defense Department, State Department, Vietnam, Rand Corporation, serving the President.… It's a system that from top to bottom has come to act reflexively, automatically, to conceal murder for political convenience by lying." He had said earlier, "All along, I was skeptical of this policy of deception, and yet I helped write some of those lies. I was well aware of them. I did not expose them." …

In making the Pentagon Papers public, Ellsberg said later, he hoped to set an example for other defectors and that "a few other ex-officials would come clean." But the act was also an effort to establish credibility with the people he was trying to reach. The students were always polite, there were no hecklers, but clearly there was also Ellsberg's own unresolved sense of personal complicity: "When I first started facing such audiences and the person introducing me felt compelled to go down the whole list of my past associations, my heart would sink with each sentence." If a man was willing to risk death for the nation in war, should he not also be willing to risk prison to stop a war he regarded as brutal and unjust? Ellsberg thought of himself as a war criminal.

"Why I did it! An interview with Daniel Ellsberg concerning government security, government hypocrisy, and the Pentagon Papers," June 1973[53]

In June 1973, as he awaited trial on theft and espionage charges, Daniel Ellsberg gave a detailed and wide-ranging interview to Reason *magazine, in which he expounded upon his goals in leaking the Pentagon Papers, his thoughts on what the papers revealed about the conduct of the Vietnam War, and his fears of future limitations on freedom of the press in the United States.*

Reason: What did you want to accomplish? What was your purpose in embarking on the activities that led to your dissemination of the Pentagon Papers?

Ellsberg: The only thing that I could personally hope to achieve by my own efforts was to make these documents available to the American public for them to read and to learn from. I couldn't force them to read the documents—let alone to learn from and act on them—but I could hope to make it possible for them to read them as opposed to the situation where the studies were sitting in my safe at the Rand Corporation. In that situation I was almost the only person in the country authorized to study and derive lessons from them. The theory was that those lessons would be put to use by the Executive Branch. But what the Pentagon Papers told me when I read them was that the Executive Branch was determined not to learn lessons from its experience in Vietnam. While the

53. Manuel S. Klausner and Henry Hohenstein, Reason, vol. 5, no. 2, June 1973, at 5–18.

United States Government had experienced a series of failures that called for a change in our policy, successive administrations had really seen our experience as a succession of adequate successes. Each President had managed to postpone the day when the country, and specifically when he, would have to acknowledge a mistake or defeat.…The history in the Pentagon Papers told me that if others were to learn a different lesson it would have to be people outside the Executive Branch and they would have to have the physical capability to read the papers. So the papers had to leave my safe.…

Reason: Did you also have a purpose in disclosing the Pentagon Papers of trying to show any detriment in the Government's policy of classifying information?

Ellsberg: Yes. A very important secondary objective—second only to the objective of getting a change in our Vietnam policy—was the hope of changing the tolerance of Executive secrecy that had grown up over the last quarter of a century both in Congress and the courts and in the public at large.…

Reason: What do you view as the major lies that the Pentagon Papers have disclosed in terms of American Presidents' announcements about the war and our involvement in Indochina.…

Ellsberg: I would say a major deception that runs right through five Administrations is the clear deceit that we were significantly, let alone essentially, concerned with freedom from foreign intervention for the Vietnamese people. I would say that to look at these papers you can only conclude that five Administrations were very clear in their mind that they believed foreign intervention—by ourselves—was both essential and legitimate and was the cornerstone of our policy.…

Reason: There are a number of American conservatives that deplore your conduct and Anthony Russo's conduct in disclosing the contents of the Pentagon Papers to the American public. They feel this is an unpatriotic act that really was in defiance of American policy and you should be punished therefor—but at the same time there are many American conservatives who have applauded disclosures of confidential information and leaks in other situations such as the Otepka case. It was felt that the disclosure was one that would aid in the battle to cleanse the State Department of Communists. Could you comment on that?

Ellsberg: Well, that's two special viewpoints I think, that don't exhaust the points of view on this situation. To see our act as unpatriotic or against American policy is, I think, to identify the government with the Executive branch—indeed with the President—and to take not just the position, "my country right or wrong," but, "my President right or wrong." And that's really a position that wipes out the distinctions between American democracy and monarchic or autocratic forms of government. To see our act as a clearly disobedient or disloyal one is still to equate loyalty with obedience to a single boss. And that wasn't the founding theory of our American government. It's certainly possible to see our act as a mistake or misguided somehow, but that judgment has to be made in

> the light of the rather complex obligations that any American should recognize toward the Constitution, towards several branches of government, towards his countryman, toward humane feelings. I think that it is hard to apply that more complicated test and conclude that we did the wrong thing.

Defendants' motion to dismiss indictment in Pentagon Papers criminal case, May 1, 1973[54]

On May 1, 1973, Daniel Ellsberg's attorneys filed a motion in the U.S. District Court for the Central District of California to dismiss the criminal indictment against him and Anthony Russo, charging that the government had engaged in severe and persistent misconduct that made a fair trial impossible. Many of the improper actions, the defense alleged, originated in the Nixon White House and were directly connected to the Watergate scandal. Most damning were charges that E. Howard Hunt and G. Gordon Liddy, two members of the special White House investigative unit known as the "Plumbers," had orchestrated a burglary of Ellsberg's psychiatrist's office in Los Angeles and that Nixon advisor John Ehrlichman had met with trial judge Matthew Byrne to discuss a possible appointment as director of the FBI. On May 11, Judge Byrne dismissed the case.

The defendants hereby move for a dismissal of the Indictment.

From the very beginning, this proceeding has been characterized by prosecutorial abuse extending all the way to the White House itself, which is unparalleled in the history of American jurisprudence. The result has been a prosecution which is a travesty on justice. Almost every rule intended to provide a fair trial for persons accused of crime has been flagrantly and arrogantly violated by the prosecution in the course of this two-year proceeding.…

3. The Government engaged in unauthorized and illegal electronic overhearing of conversations of counsel and/or legal consultants for the defendants. The first disclosure of such surveillance to the court and defense counsel was delayed for almost three months from the time of the Court's order for disclosure.…
4. In May, 1972, Bernard Barker, one of the Watergate team and a close associate of [E. Howard] Hunt and [G. Gordon] Liddy, arranged and conducted an assault upon the defendant Ellsberg while he was at a public meeting in Washington DC in opposition to the Cambodian invasion. He was assisted by a number of Cuban emigrants, some of whom were later convicted of the Watergate burglary.…

54. United States v. Anthony Russo and Daniel Ellsberg, Criminal File 9373 (C.D. Cal. May 1, 1973), *motion available at* Nat'l Archives & Records Admin., Record Grp. 21, Riverside, Cal.

This unpleasant story has been climaxed by the disclosure, in the past few days, of events which occurred some time ago but of which the defendants learned as recently as last Friday (April 26), yesterday (April 30), and today.

On Friday, the defendants were advised by the court that two persons, while on the staff of the White House, may have burglarized the files of a psychiatrist treating defendant Ellsberg. It now appears that Mr. [John] Ehrlichman has known about the burglary for some time (we still do not know how long), but that instead of advising the police, and notifying this court, he contended himself with directing Hunt and Liddy not to do it again. We know further that the Hunt-Liddy investigation was the result of a decision made "directly out of the White House." …

But even this was not the end. Only yesterday we learned, not through the Court or the prosecution, but through a press report, "that about a month ago" the same Mr. Ehrlichman invited the Presiding Judge to visit the San Clemente White House to discuss with him "a proposed future assignment in government." …

Given the extraordinary interest the White House has shown in this case, we would, were we to use blunt language, characterize this as an attempt to offer a bribe to the court—an attempt made in the virtual presence of the President of the United States—which was frustrated only because the Judge refused to listen to the offer.…

To compel the defendants to complete this trial under these circumstances is an insult to the Constitution and to the integrity of this court. The trial is an abomination. The prosecution should never have been brought and it should not continue a day longer.

U.S. District Court for the Central District of California, dismissal of indictment in Pentagon Papers criminal case, May 11, 1973[55]

On the 89th day of the trial of Daniel Ellsberg and Anthony Russo on federal charges of theft and espionage, Judge William Byrne of the U.S. District Court for the Central District of California dismissed all charges against the defendants and barred the government from retrying them. Byrne's ruling was based on revelations of improper government conduct, including the burglary of Ellsberg's psychiatrist's office by a special White House investigative unit known as the "Plumbers"—a unit that was implicated in the Watergate scandal a short time later.

The disclosures made by the Government demonstrate that governmental agencies have taken an unprecedented series of actions with respect to these defendants.

After the original indictment, at a time when the Government's rights to investigate the defendants are narrowly circumscribed, White House officials established a special unit to investigate one of the defendants in this case.

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55. *Text of Ruling by Judge in Ellsberg Case*, N.Y. Times, May 12, 1973, at 14.

The special unit apparently operated with the approval of the F.B.I., the agency officially charged with the investigation of this case.

We may have been given only a glimpse of what this special unit did regarding this case, but what we know is more than disquieting. The special unit came to Los Angeles and surveyed the vicinity of the offices of the psychiatrist of one of the defendants.

After reporting to a White House assistant and apparently receiving specific authorization, the special unit then planned and executed the break-in of the psychiatrist's office in search of the records of one of the defendants.

From the information received, including the last document filed today, it is difficult to determine what, if anything, was obtained from the psychiatrist's office by way of photographs.

The Central Intelligence Agency, presumably acting beyond its statutory authority, and at the request of the White House, had provided disguises, photographic equipment and other paraphernalia for covert operations.

The Government's disclosure also revealed that the special unit requested and obtained from the C.I.A. two psychological profiles of one of the defendants.

Of more serious consequences is that the defendants and the court do not know the other activities in which the special unit may have been engaged and what has happened to the results of these endeavors.

They do not know whether other material gathered by the special unit was destroyed, and though I have inquired of the Government several times in this regard, no answer has been forthcoming.…

Within the last 48 hours, after both sides had rested their case, the Government revealed interception by electronic surveillance of one or more conversations of defendant Ellsberg. The Government can only state and does only state that the interception or interceptions took place.…

Of greatest significance is the fact that the Government does not know what has happened to the authorizations for the surveillance, nor what has happened to the tapes nor to the logs nor any other records pertaining to the overheard conversations.…

There is no way the defendants or the court or, indeed, the Government itself can test what effect these interceptions may have had on the Government's case here against either or both of the defendants.…

Moreover, no investigation is likely to provide satisfactory answers where improper Government conduct has been shielded so long from public view and where the Government advises the court that pertinent files and records are missing or destroyed.

My duties and obligations relate to this case and what must be done to protect the right to a fair trial.

The charges against these defendants raise serious factual and legal issues that I would certainly prefer to have litigated to completion.…

However, while I would prefer to have them litigated, the conduct of the Government has placed the case in such a posture that it precludes the fair, dispassionate resolution of these issues by a jury.…

Under all the circumstances, I believe that the defendants should not have to run the risk, present under existing authorities, that they might be tried before a different jury.

The totality of the circumstances of this case, which I have only briefly sketched, offend "a sense of justice." The bizarre events have incurably infected the prosecution of this case.…

I am of the opinion, in the present status of the case, that the only remedy available that would assure due process and a fair administration of justice is that this trial be terminated and the defendants' motion for dismissal be granted and the jury discharged.

Aftermath of the Pentagon Papers Cases

President Richard Nixon, statement regarding Watergate, May 22, 1973[56]

The Pentagon Papers episode had an important connection to the Watergate scandal that occurred shortly thereafter. It was President Nixon's secret investigative unit—the "Plumbers," created in the wake of Daniel Ellsberg's leak—that was responsible for both the break-in of Ellsberg's psychiatrist's office and the later burglary of the Democratic Party headquarters at the Watergate complex. In a May 1973 statement, the President denied attempting to impede the Watergate investigation by steering it away from the White House, explaining that he had acted only to ensure that the investigation did not result in the exposure of highly sensitive national security operations conducted by either the Plumbers or the CIA.

On Sunday, June 13, 1971, The New York Times published the first installment of what came to be known as "the Pentagon papers." Not until a few hours before publication did any responsible Government official know that they had been stolen. Most officials did not know they existed. No senior official of the Government had read them or knew with certainty what they contained.

All the Government knew, at first, was that the papers comprised 47 volumes and some 7,000 pages, which had been taken from the most sensitive files of the Departments of State and Defense and the C.I.A., covering military and diplomatic moves in a war that

56. *Text of a Statement by the President on Allegations Surrounding Watergate Inquiry*, N.Y. Times, May 23, 1973, at 28.

was still going on.…

There was every reason to believe this was a security leak of unprecedented proportions.…

Therefore during the week following the Pentagon papers publication, I approved the creation of a special investigations unit within the White House—which later came to be known as the "plumbers." This was a small group at the White House whose principal purpose was to stop security leaks and to investigate other sensitive security matters. I looked to John Ehrlichman for the supervision of this group.…

At about the time the unit was created, Daniel Ellsberg was identified as the person who had given the Pentagon papers to The New York Times. I told [the head of the unit] Mr. Krogh that as a matter of first priority, the unit should find out all it could about Mr. Ellsberg's associates and his motives. Because of the extreme gravity of the situation, and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment. I did not authorize and had no knowledge of any illegal means to be used to achieve this goal.

However, because of the emphasis I put on the crucial importance of protecting the national security, I can understand how highly motivated individuals could have felt justified in engaging in specific activities that I would have disapproved had they been brought to my attention.…

The work of the unit tapered off around the end of 1971. The nature of its work was such that it involved matters that, from a national security standpoint, were highly sensitive then and remain so today.

These intelligence activities had no connection with the break-in of the Democratic headquarters, or the aftermath.

I considered it my responsibility to see that the Watergate investigation did not impinge adversely upon the national security area.…

It did seem to me possible that, because of the involvement of former C.I.A. personnel, and because of some of their apparent associations, the investigation could lead to the uncovering of covert C.I.A. operations totally unrelated to the Watergate break-in.…

I wanted justice done with regard to Watergate; but … I also had to be deeply concerned with insuring that neither the covert operations of the C.I.A. nor the operations of the special investigations unit should be compromised.… It was certainly not my intent, nor my wish, that the investigation of the Watergate break-in or of related acts be impeded in any way.

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