The Pentagon Papers in the Federal Courts

by

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The Pentagon Papers in the Federal Courts: A Short Narrative

On June 13, 1971, the *New York Times* published 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 on the next two days, was "United States–Vietnam Relations: 1945–1967," a 47-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 study, which was 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."

The *Times*' 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 its strategy in Vietnam. The articles and accompanying excerpts from the report revealed that the United States had carried out clandestine raids on North Vietnam in the months preceding the August 1964 attack by North Vietnam on a U.S. Navy ship in the Tonkin Gulf, and that the subsequent Tonkin Gulf Resolution by which Congress authorized escalation of the war had been planned in advance of the attack. The articles also cited the 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.

The revelations contained in the papers heightened popular opposition to the Vietnam War and mistrust of the government, particularly the executive branch. Opposition to the war had grown steadily at least since 1967, when the first massive protests were held in Washington, and debate on the war had been at the center of the presidential election of 1968. By 1970, popular polls showed a majority of Americans thought military involvement in Vietnam had been a mistake. Now the Pentagon 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 that of Truman had misled the public about United States involvement in Southeast Asia and about the likelihood of military success. These articles 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 Nixon administration's attempts to halt publication and enforce an unprecedented prior restraint on newspapers fueled criticism from members of Congress, who asserted a

"legislative right to know," and from a broad public that wanted a free discussion of the nation's military and foreign policy.

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 15 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 adviser, 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. In consultations with Henry 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.

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 following day, Judge Murray Gurfein granted the government's request for a temporary restraining order, stopping the *Times*' presses after the paper had published the third article in its series on the Pentagon Papers.

Lawyers for the *Times* argued that a prior restraint on publication, which federal courts had almost always prohibited as a violation of the First Amendment, could not be imposed unless the government attorneys established that continued publication would cause grave and irreparable harm to the nation's security, and the lawyers for the *Times* further argued that the administration's attorneys 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, 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. 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 Gessell 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 in New York sent the case back to Judge Gurfein of the district court for further hearings on a "special appendix" the government 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.

Before the Supreme Court, the Nixon administration was represented by Solicitor General Erwin Griswold, who argued 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. In their briefs to the Supreme Court, the newspapers continued to argue 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 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.

Within days of the first article 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 Marines 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 worked at the Department of Defense in the highest echelons of planning military strategy for the Vietnam War. In 1965, he attempted to reenlist in the Marines to fight in Vietnam, and when rejected because of his high status in the Defense Department, 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 Vietnam policy of the Kennedy administration. As 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 copy of the report from the RAND Corporation office in Santa Monica, California, and then sought ways to make the findings public. He met with Henry Kissinger to urge him to read the full report. Ellsberg provided excerpts to several anti-war 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.

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 coconspirator Anthony Russo, who had assisted in the photocopying of 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 or 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 the judge of the position of 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. Daniel 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 the 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.

Historical Documents

The publication of the Pentagon Papers

Neil Sheehan, memo to Max Frankel, March 26, 1971

In March 1971, shortly after receiving the Pentagon Papers from Daniel Ellsberg, New York 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.

[Document Source: Neil Sheehan papers, Library of Congress, Washington, D.C.]

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.)
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.

New York Times, first article on the Pentagon Papers, June 13, 1971

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 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.

[Document Source: Neil Sheehan, "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement," *New York Times*, June 13, 1971.]

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.

¶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.

Washington Post, first article on the Pentagon Papers, June 18, 1971

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 misrepresentations.

[Document Source: Chalmers M. Roberts, "Documents Reveal U.S. Effort In '54 to Delay Viet Election," *Washington Post*, June 18, 1971.]

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. 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 a court 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

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

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 gonna 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

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

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 Goddamn [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.

Richard Nixon/John Mitchell phone conversation, June 14, 1971

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

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

[Document Source: Miller Center, University of Virginia, http://millercenter.org/presidentialclassroom/exhibits/first-domino-nixon-and-pentagon-papers.]

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—

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.

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

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.

[Document Source: *United States v. New York Times Co. et al.,* U.S. District Court for the Southern District of New York, copy located in Gerhard Gesell papers, Library of Congress, Washington, D.C.]

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 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

Max Frankel, the chief of the New York Times' 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.

[Document Source: *United States v. New York Times Co. et al.,* U.S. District Court for the Southern District of New York, Civil File 71-2662, RG 21, National Archives and Records Administration, New York, N.Y.]

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

18. 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.
19. 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

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.

[Document Source: 64 Stat. 1003 (1950).]

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§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 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

After holding a closed hearing to examine the government's claims that it would be irreparably harmed by further publication, Judge 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.

[Document Source: *United States v. New York Times Co. et al.,* 328 F. Supp. 324 (1971).]

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 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

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 proper remedy available if the Post's publications violated the law.

[Document Source: *United States v. Washington Post Co. et al.,* U.S. District Court for the District of Columbia, Civil File 71-1235, RG 21, National Archives and Records Administration, Washington, D.C.]

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 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

By a 2 to 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 considered the court's approval of a prior restraint on publication "a sad day for America."

[Document Source: *United States v. Washington Post Co. et al.,* 446 F.2d 1322 (1971).]

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 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

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.

[Document Source: *United States v. Washington Post Co. et al.,* U.S. District Court for the District of Columbia, Civil File 71-1235, RG 21, National Archives and Records Administration, Washington, D.C.]

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 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

In their brief to the Supreme Court, the Nixon administration's attorneys again argued that the New York Times and 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.

[Document Source: *New York Times Co. v. United States,* Supreme Court of the United States, File 1873, RG 267, National Archives and Records Administration, Washington, D.C.]

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 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

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.

[Document Source: *New York Times Co. v. United States,* Supreme Court of the United States, Civil File 71-1235, RG 21, National Archives and Records Administration, Washington, D.C.]

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 Vietnam, 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.

New York Times' brief submitted to Supreme Court, June 26, 1971

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 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.

[Document Source: *New York Times Co. v. United States,* Supreme Court of the United States, File 1873, RG 267, National Archives and Records Administration, Washington, D.C.]

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.

Washington Post's brief submitted to Supreme Court, June 26, 1971

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' case before the Supreme Court.)

[Document Source: *United States v. Washington Post Co. et al.,* Supreme Court of the United States, File 1885, RG 267, National Archives and Records Administration, Washington, D.C.]

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

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.

[Document Source: *New York Times Co. v. United States,* Supreme Court of the United States, File 1873, RG 267, National Archives and Records Administration, Washington, D.C.]

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 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

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, 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.

[Document Source: *New York Times Co. v. United States,* Supreme Court of the United States, File 1873, RG 267, National Archives and Records Administration, Washington, D.C.]

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

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 Harlan dissenting—wrote separate opinions to explain their votes.

[Document Source: *New York Times Co. v. United States,* 403 U.S. 713 (1971).]

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 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 order. 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

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.

[Document Source: Harry A. Blackmun papers, Library of Congress, Washington, D.C.]

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 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

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.

[Document Source: Harold Leventhal papers, Library of Congress, Washington, D.C.]

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.

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

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' 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.

[Document Source: 117 Cong. Rec. 20284 (1971).]

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 2½ 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.

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

In the wake of the initial New York Times 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.

[Document Source: 117 Cong. Rec. 20634 (1971).]

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 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

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.

[Document Source: 117 Cong. Rec. 21108 (1971).]

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 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 at congressional hearing, June 23, 1971

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."

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The first statement to the subcommittee was made by Arthur Goldberg, who served as a justice on the Supreme Court of the United States 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.

[Document Source: U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Congress, 1st Session, pp. 9–14.]

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. 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 at congressional hearing, June 25, 1971

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.

[Document Source: U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Congress, 1st Session, pp. 234–38.]

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. . . .

[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 at congressional hearing, June 25, 1971

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.

[Document Source: U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Congress, 1st Session, pp. 248–50.]

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 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

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.

[Document Source: U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Congress, 1st Session, pp. 327–28.]

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.

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 William H. Rehnquist at congressional hearing, June 29, 1971

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 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 1986, and as chief justice from 1986 until his death in 2005.

[Document Source: U.S. Government Information Policies and Practices—The Pentagon Papers: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 92d Congress, 1st Session, pp. 358–66.]

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 information 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 breaches 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

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.

[Document Source: *New York Times*, June 25, July 6, and July 12, 1971.]

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 repeated—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, 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 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

[Document Source: Gerhard Gesell papers, Library of Congress, Washington, D.C.]

From James William Bender III, Alexandria, Virginia, June 22, 1971

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 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

[Document Source: Gerhard Gesell papers, Library of Congress, Washington, D.C.]

From Albin Anderson, Grand Junction, Colorado, June 21, 1971

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. . . .

Letters to Justice Harry A. Blackmun, July 1971

[Document Source: Harry A. Blackmun papers, Library of Congress, Washington, D.C.]

From Daniel M. Wilkes, Orinda, California, July 16, 1971

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. . . .

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 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. . . .

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

[Document Source: Harry A. Blackmun papers, Library of Congress, Washington, D.C.]

From Eileen Woods, San Francisco, California, July 17, 1971

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 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 do'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

Letters to Justice William O. Douglas

[Document Source: William O. Douglas papers, Library of Congress, Washington, D.C.]

From Mrs. Jacque Foreman, San Angelo, Texas, June 25, 1971

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.

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 *Washington Post*, July 2, 1971

[Document Source: Gerhard Gesell papers, Library of Congress, Washington, D.C.]

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" 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

Neil Sheehan, the reporter who authored the New York Times' 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.

[Document Source: Neil Sheehan papers, Library of Congress, Washington, D.C.]

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.

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

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 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.

[Document Source: *New York Times*, June 16, 1971.]

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

[Document Source: *Wall Street Journal*, June 23, 1971.]

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

[Document Source: *Detroit News*, June 27, 1971.]

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

[Document Source: *Wall Street Journal*, July 2, 1971.]

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.

"Mr. Mitchell Should Go," July 3, 1971

[Document Source: *New Pittsburgh Courier* (reprinted from *St. Louis Post Dispatch*), July 3, 1971.]

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

[Document Source: Oveta Culp Hobby, *Houston Post*, July 4, 1971.]

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, 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

[Document Source: William F. Buckley, Universal Press Syndicate, July 6, 1971.]

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. . . .

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

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.

[Document Source: I.F. Stone, *I.F. Stone's Bi-Weekly,* Vol. XIX, no. 14 (July 12, 1971), 1–4.]

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 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

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.

[Document Source: Transcript of CBS News Special Report: "The Pentagon Papers: A Conversation with Daniel Ellsberg," June 23, 1971, Theodore F. Koop papers, 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

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

[Document Source: Joseph Kraft, *New York Times*, July 4, 1971.]

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 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

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.

[Document Source: *Time*, July 5, 1971.]

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 academic, 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."

WGBH-TV, Boston, "The Advocates": "Should the Government Drop the Charges against Daniel Ellsberg?," October 5, 1971

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.

[Document Source: WGBH Media Library and Archives, http://openvault.wgbh.org/catalog/903d38-should-the-government-drop-the-charges-against-daniel-ellsberg.]

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 indicated 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. . . .

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 countries 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

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.

[Document Source: Peter Schrag, *Saturday Review*, vol. LIV, no. 46 (Nov. 13, 1971), 34–39.]

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 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

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.

[Document Source: Manuel S. Klausner and Henry Hohenstein, *Reason*, vol. 5, no. 2 (June 1973), pp. 5–18.]

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 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

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 Ellsberg 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.

[Document Source: *United States v. Anthony Russo and Daniel Ellsberg*, U.S. District Court for the Central District of California, Criminal File 9373, RG 21, National Archives and Records Administration, Riverside, Cal.]

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. . . .

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

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.

[Document Source: "Text of Ruling by Judge in Ellsberg Case," *New York Times*, May 12, 1973.]

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.

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

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. 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 insure that the investigation did not result in the exposure of highly sensitive national security operations conducted by either the Plumbers or the CIA.

[Document Source: "Text of a Statement by the President on Allegations Surrounding Watergate Inquiry," *New York Times*, May 23, 1973.]

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 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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