

*New York Times Co. v. United States:*

A Turning Point in the Freedom of the Press

Matthew Ng

Senior Division

Paper

Paper: 2,500 words

Process Paper: 500 words

### **Process Paper**

I came about my topic by way of an obituary. Daniel Ellsberg died on June 16, 2023. His death prompted articles about his life and the Pentagon Papers. This coincided with my search for a topic for this year's NHD. I had heard about the Pentagon Papers previously, in connection with Nixon and Vietnam, but knew little about the topic. Researching Ellsberg and the Pentagon Papers, I saw how it was indeed a turning point in history. It seemed only appropriate to honor Ellsberg by writing about his actions. The Pentagon Papers leak triggered a Supreme Court ruling that protected the ability of the press to provide transparency about the Government. This changed the relationship between the press and the Government.

Much of my research was conducted using books available through an online library. Books about the Vietnam War and the Nixon presidency provided useful background. The book, *Inside the Pentagon Papers*, provided detailed legal analysis of the case. For primary sources, the original articles from the *New York Times* provided a good overview. These articles pointed me to other primary sources, like notes by White House aides and Nixon's Oval Office recordings, available from the Nixon Presidential Library. I reviewed the court opinions connected to the major decisions to understand the full reasoning and context. Craig Whitlock, an investigative reporter for the *Washington Post* who published inside accounts of the Afghanistan war using confidential Defense Department memos, provided an interview that helped me understand how newsrooms operate today when publishing classified information.

In writing my paper, it was important to separate out the different threads around the Pentagon Papers presented by the source materials. Some of the sources focused on the Papers and the changing perspectives on the Vietnam War. Others provided exhaustive details about the Nixon White House. Finally, some sources described the legal proceedings in their entirety. My

challenge was to merge elements from each of these threads to show how the Court ruling changed the press' orientation, influenced Nixon's behavior, and, ultimately, provided a legal framework for Government accountability through the press.

My historical argument is that the most important consequence of the Pentagon Papers leak was the Supreme Court decision in denying prior restraint and allowing the publication of classified documents even if they were unauthorized leaks. This gave the press an important tool for Government accountability, and represented a turning point in the relationship of the press with the Government. This approach gave rise to various bombshell reports about unlawful surveillance of American citizens and prompted subsequent reform.

In today's political landscape, there is enormous temptation for leaders to avoid public scrutiny and accountability for their actions. If the Supreme Court had ruled that the Government could censor the press when unflattering information was disclosed, oversight would be much more difficult. The likelihood of unilateral executive actions compromising individual freedoms would be greatly increased. Providing a method to check executive power through the free press remains the most important legacy of the Pentagon Papers.

## **Historical Paper**

The Vietnam War was one of the defining events of the 1960s and 1970s. What started out as the United States providing military advisors to the South Vietnamese government became a full-scale American troop deployment by 1965. Richard Nixon won the presidency in 1968, partly by promising a quick withdrawal from Vietnam. Under President Nixon, the United States remained mired in Vietnam, despite mounting public opposition. Against this backdrop, a top-secret Defense Department study of the Vietnam War, commonly known as the Pentagon Papers, was leaked to the press. Classified excerpts published in the *New York Times* showed how multiple presidents had lied to the public about Vietnam. The Nixon administration sought to stop further publication. This action, called prior restraint, was the first time the federal government had attempted press censorship. In a landmark First Amendment case, *New York Times Co. v. United States*, the Supreme Court deemed such prior restraint unconstitutional, and ruled that the press was free to publish even classified information. This decision fundamentally changed the relationship between the press and the Government. It recognized the role of a free press in enlightening the electorate, and marked a turning point in the ability of the press to hold the Government accountable.

### *The Pentagon Papers and the Courts*

Defense Secretary Robert McNamara, frustrated over the quagmire in Vietnam, wanted an encyclopedic historical record of the war to provide an objective basis for evaluating the actions of the U.S. Government.<sup>1</sup> The Vietnam Study Task Force was commissioned on June 17,

---

<sup>1</sup> Leslie Gelb, *Final Report, OSD Vietnam Task Force & Index*, report, c. January 15, 1969, National Archives, <https://nara-media-001.s3.amazonaws.com/arcmedia/research/pentagon-papers/Pentagon-Papers-Index.pdf>.

1967. Thirty-six defense analysts worked over two years to create a 47-volume report, consisting of 3000 pages of analysis and 4000 pages of appended official documents, detailing the history of U.S. involvement in Indochina, from World War II until mid-1968.<sup>2</sup> The assessment of the war in the report was far more pessimistic than what was publicly conveyed. It documented outright lies from American leadership. For example, in the fall of 1964, President Lyndon Johnson was secretly planning large, full-scale bombing campaigns against North Vietnam, while simultaneously claiming during his presidential campaign that he wanted no wider war.<sup>3</sup>

Daniel Ellsberg was one of the analysts on the task force. Ellsberg started out, in 1961, deeply committed to winning the Cold War. A two-year stint in Vietnam, ending in 1967, convinced Ellsberg the war was hopeless. He joined the task force, hoping to influence U.S. policy from within. Seeing no policy changes, Ellsberg decided the only recourse was to generate public outrage by leaking the Pentagon Papers.<sup>4</sup> Failing to get prominent anti-war senators to enter the Papers into the public congressional record, Ellsberg proceeded to leak the Papers to *New York Times* reporter Neil Sheehan.<sup>5</sup> A contentious internal debate about publishing the Papers was eventually settled by *Times* owner, Arthur Sulzberger.<sup>6</sup> In a defining moment for American journalism, the *Times* began publishing excerpts starting on June 13, 1971.

President Nixon was initially pleased with the publication as it made the prior Democratic administrations look bad. National Security Advisor, Henry Kissinger, convinced

---

<sup>2</sup> Neil Sheehan. "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing US Involvement." *New York Times*, June 13, 1971, 1.

<sup>3</sup> Neil Sheehan. "Vietnam Archive: A Consensus to Bomb Developed before '64 Election, Study Says." *New York Times*, June 14, 1971, 1.

<sup>4</sup> Daniel Ellsberg, *Secrets: A Memoir of Vietnam and the Pentagon Papers* (New York: Penguin Books, 2002), 206.

<sup>5</sup> John Prados and Margaret Porter, *Inside the Pentagon Papers* (Lawrence: University Press of Kansas, 2004), 213-214.

<sup>6</sup> Sanford J. Ungar, *The papers & the papers; an account of the legal and political battle over the Pentagon Papers* (New York: Dutton, 1972), 104-105.

President Nixon that leaving the leak unchallenged made him look weak, and undermined the trust of foreign governments.<sup>7</sup> Attorney General John Mitchell warned the *New York Times* that publication of classified documents violated federal espionage law.<sup>8</sup> When the *Times* refused to stop, the Justice Department sought an immediate injunction with the District Court, citing irreparable harm from additional disclosure of classified information. This was the first time the federal government had sought to exercise prior restraint against a national newspaper. Judge Murray Gurfein ruled for the *Times*, writing, “A cantankerous 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.”<sup>9</sup> This ruling was appealed to the Second Circuit. Meanwhile, the *Washington Post* received a copy of the Papers and also started publishing. A similar injunction was sought against the *Post*.

This legal battle between the Nixon administration and the press had far-reaching constitutional implications. The only other case involving prior restraint was *Near v. Minnesota* in 1931, a civil proceeding where local officials sought to stop a Minneapolis tabloid from publishing salacious allegations against them.<sup>10</sup> In *Near*, the Supreme Court maintained the First Amendment protected the tabloid’s right to publish these allegations. The Pentagon Papers were much more significant. The federal government was seeking to censor and criminally prosecute the nation’s two premier newspapers, using the Espionage Act, over disclosure of top-secret

---

<sup>7</sup> “Richard Nixon and Henry A. Kissinger on 13 June 1971,” audio file, 13:25, Presidential Recordings Digital Edition, Miller Center for Public Affairs, University of Virginia, <https://prde.upress.virginia.edu/conversations/4002137>.

<sup>8</sup> Geoffrey Campbell, *The Pentagon Papers: National Security versus the Public’s Right to Know* (San Diego: Lucent Books, 2000), 27.

<sup>9</sup> *United States v. New York Times Company*, 328 F. Supp. 324 (S.D.N.Y. 1971), [law.justia.com/cases/federal/district-courts/FSupp/328/324/1428158/](http://law.justia.com/cases/federal/district-courts/FSupp/328/324/1428158/).

<sup>10</sup> *Near v. Minnesota*, 23 U.S. 697 (1931).

material, during a time of war.<sup>11</sup> The key question was whether First Amendment protection of the press extended to publication of state secrets. Given the stakes, the Supreme Court agreed to consolidate and fast-track these cases. Oral arguments took place on June 26, 1971. Four days later, the Supreme Court ruled 6-3 in striking down the Government's prior restraint.

The six justices in the majority were divided into two groups. One group took an absolutist position and held that the First Amendment made any restrictions on the press unconstitutional. Justice Hugo Black stated: "The press was to serve the governed and not the governors. The press was protected so that it could bare the secrets of the Government and inform the people."<sup>12</sup> The second group considered the standard proposed by *Near*, where prior restraint could be exercised if the information resulted in "direct, immediate, and irreparable damage to our nation."<sup>13</sup> The consequences had to be specific and dire, and not purely hypothetical.<sup>14</sup> The justices concluded that the Pentagon Papers did not meet this standard since they covered historical events prior to mid-1968.<sup>15</sup> Embarrassment of political leadership did not constitute irreparable damage. Justice William Douglas also noted that Congress had considered, but rejected, extending the Espionage Act to include unauthorized publication by newspapers, and therefore deemed this an inappropriate use of the Act.<sup>16</sup> The three dissenting justices primarily objected to how quickly the case was decided, without ample opportunity to examine

---

<sup>11</sup> *Gathering, transmitting or losing defense information*, 18 U.S.C. § 793 (1917), [www.govinfo.gov/content/pkg/USCODE-2022-title18/pdf/USCODE-2022-title18-partI-chap37-sec793.pdf](https://www.govinfo.gov/content/pkg/USCODE-2022-title18/pdf/USCODE-2022-title18-partI-chap37-sec793.pdf).

<sup>12</sup> *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

<sup>13</sup> *Ibid.* 730.

<sup>14</sup> Gabriel Schonfeld, "Rethinking the Pentagon Papers." *National Affairs*, No. 57 (Fall 2023), <https://www.nationalaffairs.com/publications/detail/rethinking-the-pentagon-papers>.

<sup>15</sup> Ungar, *The papers & the papers; an account of the legal and political battle over the Pentagon Papers*, 243.

<sup>16</sup> *New York Times Co.*, 721.

the leaked materials. Consequently, they sought to defer to the executive branch in such matters of national security.<sup>17</sup>

### *A Turning Point for the Press*

This Supreme Court decision was a turning point in the relationship between the press and the Government. Hedrick Smith of the *New York Times* hailed this as a declaration of independence for all media from governmental control.<sup>18</sup> This decision meant the Government could not shield itself from public accountability by classifying embarrassing documents. Except in rare circumstances, stolen and leaked top-secret documents could be published with impunity.

The significance of this decision is best appreciated by looking at news coverage in the 1960s. Until the mid-1960s, the press felt it had a patriotic duty to support the military. For example, an ABC News report in 1966 lauded the U.S. troops in Vietnam as the “greatest men in the world ... They came over here to win.”<sup>19</sup> Vietnam was the first war where reporters were embedded with the troops and this access was highly coveted by news organizations. Reporters willingly allowed government sources to shape their news narrative, fearing that refusal would cost them access.<sup>20</sup> Reporters that did not toe the line were sidelined. In one incident in 1962, Homer Bigart, from the *New York Times*, and Francois Sully, from *Newsweek*, reported on the corruption of the South Vietnamese leadership that allied with the United States. The South Vietnamese government demanded their expulsion, and the U.S. embassy acquiesced. The *Times*

---

<sup>17</sup> *New York Times Co.*, 751.

<sup>18</sup> Judith Ehrlich and Rick Goldsmith, “The Most Dangerous Man in America,” video file, 92:00, YouTube, posted by Paper Trail Documentary, August 6, 2023, <https://www.youtube.com/watch?v=6c2od1Zn9YQ>.

<sup>19</sup> Campbell, *The Pentagon Papers: National Security versus the Public's Right to Know*, 20.

<sup>20</sup> Daniel Hallin, *The Uncensored War: The Media and Vietnam* (New York: Oxford University Press), 1986, 21.



quietly rotated Bigart out of Vietnam temporarily. *Newsweek* not only agreed to the expulsion of Sully, it also ran a series of positive stories about the South Vietnamese, to regain favor and access.<sup>21</sup>

Starting in the mid-1960s, the tone of the reporting shifted, perhaps due to graphic scenes of death and suffering reporters encountered. CBS News anchor, Walter Cronkite, epitomized this shift. After the Tet Offensive in 1968, when North Vietnamese troops launched a surprise attack on Saigon, Cronkite broadcasted the brutal raw video footage, followed by his claim that a stalemate was the best the U.S. could hope for.<sup>22</sup> While Cronkite's reporting did not sugarcoat reality, it was far more restrained than what the *New York Times* did in publishing the Pentagon Papers. The *Times* essentially highlighted how successive administrations had deceived the American people. H.R. Haldeman, Nixon's Chief of Staff, said it meant "You can't trust the Government; you can't believe what they say ... [The] implicit infallibility of presidents, which has been an accepted thing in America, [was] badly hurt by this."<sup>23</sup>

An emboldened press became more adversarial and eager to expose misdeeds and hold political leaders accountable. In May 1973, Seymour Hersh of the *New York Times* published a secret report detailing how the Federal Bureau of Investigation (FBI) had set up a domestic intelligence program to infiltrate and wiretap Black activists.<sup>24</sup> Hersh followed with a bombshell report in December 1974 that revealed the Central Intelligence Agency (CIA) had conducted a surveillance program against thousands of antiwar dissidents and civil rights activists during the

---

<sup>21</sup> William Hammond, *Public Affairs: The Military and the Media, 1962-1968*. (Washington DC: United States Army Center of Military History, 1990), 24-25, [https://history.army.mil/html/books/091/91-13/CMH\\_Pub\\_91-13-B.pdf](https://history.army.mil/html/books/091/91-13/CMH_Pub_91-13-B.pdf).

<sup>22</sup> Walter Cronkite, "Report from Vietnam, Feb 27, 1968," video file, 31:06, YouTube, posted by Clips from the Past, Feb 18, 2023, <https://www.youtube.com/watch?v=V2ev-GalTng>.

<sup>23</sup> "Conversation 519-001," recording, June 14, 1971, audio file, 55:56, White House Tapes: 1971-1973, Nixon Presidential Library and Museum, <https://www.nixonlibrary.gov/white-house-tapes/519/conversation-519-001>.

<sup>24</sup> Seymour Hersh. "A Broad Program." *New York Times*, May 24, 1973, 1.

Johnson and Nixon administrations.<sup>25</sup> Daniel Schorr of CBS News reported on how the CIA had broken U.S. law by attempting to assassinate foreign leaders.<sup>26</sup> Taken together, these reports painted a picture of corruption at the very institutions that were supposed to defend Americans' security. These disclosures led to the Church Committee investigation of the practices of the CIA and National Security Agency (NSA) in 1975, and passage of the Foreign Intelligence Surveillance Act in 1978.<sup>27</sup>

### *Consequences for Nixon*

President Nixon fully understood the implications of the ruling. Washington was always rife with gossip, and now it was “rewarding for a government official to leak and newspapers to play with them on doing so.”<sup>28</sup> White House Counsel, John Dean, noted “The leak of the Pentagon Papers changed the character of the Nixon White House. It was the beginning of the dark period ... [and] a defining moment for the Nixon presidency.”<sup>29</sup> The press worried President Nixon for two major reasons.

The first reason was that President Nixon feared exposure of his illegal actions during the 1968 presidential campaign. President Johnson had proposed a bombing halt of North Vietnam in exchange for peace negotiations. Nixon knew successful talks would put his opponent, Hubert Humphrey, over the top in a tight race. Nixon convinced the South Vietnamese leadership to

---

<sup>25</sup> Seymour Hersh. “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years.” *New York Times*, December 22, 1974, 1.

<sup>26</sup> Jon Marshall, *Watergate's Legacy and the Press: The Investigative Impulse* (Evanston: Northwestern University Press, 2011), 126.

<sup>27</sup> “Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee).” *United States Senate*, <https://www.senate.gov/about/powers-procedures/investigations/churchcommittee.htm>.

<sup>28</sup> “Nixon again deplores leak of bombing in Cambodia,” *New York Times*, March 11, 1976, 27.

<sup>29</sup> Ehrlich and Goldsmith, “The Most Dangerous Man in America.”

avoid the negotiations, promising them a better deal once he became president. Nixon's sabotage likely extended the war.<sup>30</sup> He believed the Brookings Institute held evidence of his communications with the South Vietnamese, and this evidence was about to be leaked to the press. In desperation, President Nixon issued a criminal order to firebomb the Brookings Institute and steal the evidence.<sup>31</sup>

The second reason for President Nixon's concern was because the ruling stripped away his ability to muzzle the press. President Nixon was helpless to prevent the *Washington Post* from publishing stories about the Watergate investigations daily. The break-in of the Democratic National Committee office by White House operatives would have remained a local burglary investigation. However, leaks from Deputy FBI Director Mark Felt to the *Post* highlighted how the CIA had worked hand-in-glove with the White House to obstruct the FBI investigation and protect the president. Felt helped the *Post* stitch together the narrative of the White House's coverup through abuse of the federal agencies.<sup>32</sup> These accounts kept Watergate in the public eye and eventually led to obstruction of justice charges against President Nixon and his aides.<sup>33</sup> Viewed in light of what Hersh and Schorr had done, Watergate was another instance where corruption exposed through press leaks brought accountability and change.

### *Relevance in the Current Era*

---

<sup>30</sup> John Farrell. "Nixon's Vietnam Treachery." *New York Times*, December 31, 2016, 38.

<sup>31</sup> "Conversation 525-001," recording, June 17, 1971, audio file, 54:42, White House Tapes: 1971-1973, Nixon Presidential Library and Museum, <https://www.nixonlibrary.gov/white-house-tapes/525/conversation-525-001>.

<sup>32</sup> Marshall, *Watergate's Legacy and the Press: The Investigative Impulse*, 79-80.

<sup>33</sup> John D. O'Connor, "I'm the Guy they called Deep Throat." *Vanity Fair*, Jul. 2005, <https://www.vanityfair.com/news/politics/2005/07/deepthroat200507>.

The Pentagon Papers ruling continues to be relevant in this era, either by influencing public opinion through published leaks of classified information or in shaping legislation. For example, in 2013, Edward Snowden, an NSA contractor, revealed to the *Washington Post* the widespread surveillance of American citizens by the NSA through tapping the servers of tech companies.<sup>34</sup> The public outcry that followed resulted in passage of the USA FREEDOM Act in 2015, limiting the collection of personal data to individuals under reasonable, articulable, suspicion.<sup>35</sup>

In October 2000, Congress passed legislation making unauthorized disclosure of classified information a felony. President Bill Clinton vetoed this because he feared the bill would chill free speech and open debate.<sup>36</sup> President Clinton's explained his decision by citing Justice Potter Stewart's concurrence, highlighting how the free flow of information was the only effective restraint upon executive tyranny.<sup>37</sup>

### *Questioning the Legacy of the Pentagon Papers*

Legal scholars, like Geoffrey Stone from the University of Chicago, argue that the Supreme Court decision "has taken a symbolic weight that has swamped its technical holding."<sup>38</sup> Instead of absolute First Amendment protection for the press, the ruling was fragmented. Nine justices wrote nine separate opinions. Two of the justices held that while the Government could

---

<sup>34</sup> Barton Gellman and Laura Poitras, "U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program," *Washington Post*, Jun 7, 2013, A1.

<sup>35</sup> *USA FREEDOM Act of 2015*, Public Law No. 114-23, 129 Stat. 268 (2015), <https://www.congress.gov/114/plaws/publ23/PLAW-114publ23.htm>.

<sup>36</sup> Prados and Porter, *Inside the Pentagon Papers*, 213-214.

<sup>37</sup> William J. Clinton, "Statement by the President," November 4, 2000, the White House Office of the Press Secretary, <https://sgp.fas.org/news/2000/11/wh110400.html>.

<sup>38</sup> Adam Liptak, "The Pentagon Papers: A First Amendment Case That Made an Incoherent State of the Law," *New York Times*, June 9, 2021, <https://www.nytimes.com/2021/06/09/us/supreme-court-pentagon-papers-prior-restraint.html>.

not stop the actual publication, the leaker and the press could still be prosecuted. Both Ellsberg and Snowden faced prosecution, and a grand jury was convened against the *New York Times* but no charges were filed. The ruling was tailored to the media landscape of the 1970s, where establishment newspapers could be trusted to responsibly adjudicate the security implications of what they published. Stone argued that, today, with everyone “publishing” on social media, and websites like WikiLeaks indiscriminately dumping classified documents without redaction, the Pentagon Papers ruling may need to be reconsidered by the Supreme Court.<sup>39</sup>

While Stone may be correct in a legal sense, the symbolism of this ruling is key. The public believes the Court granted the press absolute immunity to publish. Attempted press censorship would provoke an immense backlash from the public, if not the courts. For example, when the *New York Times* published classified information in 2018 about the U.S. military’s ability to disrupt North Korean missiles, President Donald Trump sought prior restraint against the *Times* but was advised against it by White House counsel.<sup>40</sup> Despite his personal animus against the *Times*, even President Trump recognized that press censorship came with serious political and legal consequences. According to Craig Whitlock of the *Washington Post*, nowadays, the president or cabinet-level officials may bring extreme pressure on newspapers to kill particular stories, or request redactions for security reasons, but since the Pentagon Papers ruling, no legal injunction against publishing has ever been sought.<sup>41</sup>

---

<sup>39</sup> Jen Patja Howell, Jack Goldsmith, Lee Bollinger, and Geoffrey Stone, “National Security, Leaks and Freedom of the Press,” podcast, April 22, 2021, audio file, 52:29, *The Lawfare Podcast*, Lawfare Media. <https://www.lawfaremedia.org/article/lawfare-podcast-national-security-leaks-and-freedom-press>.

<sup>40</sup> David E. Sanger. “The Pentagon Papers: Leaning on Journalists and Targeting Sources, for 50 Years.” *New York Times*, June 9, 2021, <https://www.nytimes.com/2021/06/09/us/pentagon-papers-journalism-leaks.html>.

<sup>41</sup> Craig Whitlock, Telephone interview by author, 24 Mar. 2024.

## *Conclusion*

The Pentagon Papers case was the turning point in history that changed the relationship between the press and the Government. An emboldened press became more aggressive in soliciting leaks from whistle-blowers, and publishing news that challenged prevailing government narratives. Today, with the threat of terrorism at home and multiple wars abroad, the temptation is ever present for public officials to take actions that are expedient but lacking in proper oversight. In such times, the First Amendment protections for the press are crucial to prevent executive overreach. To quote Justice Stewart:

The only effective restraint upon executive policy and power ... may lie in an enlightened citizenry, in an informed and critical public opinion which alone can here protect the values of democratic government ... Without an informed and free press, there cannot be an enlightened people.<sup>42</sup>

---

<sup>42</sup> *New York Times Co.*, 728.

## **Annotated Bibliography**

### **Primary Sources**

Clinton, William J. "Statement by the President." November 4, 2000. The White House Office of the Press Secretary. <https://sgp.fas.org/news/2000/11/wh110400.html>.

This was a statement by President Bill Clinton explaining the rationale for his veto of H.R. 4392, the "Intelligence Authorization Act for Fiscal Year 2001" because it contained a broad provision making unauthorized disclosure of classified information a felony. This source highlighted how the legal arguments made in the concurring opinions in the Pentagon Papers ruling continued to influence legislation years later.

"Conversation 519-001." Recording, June 14, 1971. Audio file, 55:56. White House Tapes: 1971-1973, Nixon Presidential Library and Museum. <https://www.nixonlibrary.gov/white-house-tapes/519/conversation-519-001>.

This secret recording, done by President Nixon in the Oval Office, covered the meeting between President Nixon and his aides discussing the implications of the Pentagon papers leak where H.R. Haldeman explained how such a leak could undermine the faith the people had in their government and in the president. This recording helped me understand the mood of the White House and the alarm caused by the leak.

“Conversation 525-001.” Recording, June 17, 1971. Audio file, 54:42. White House Tapes: 1971-1973, Nixon Presidential Library and Museum. <https://www.nixonlibrary.gov/white-house-tapes/525/conversation-525-001>.

This specific recording made using Nixon’s Oval Office tape recorder captured President Nixon ordering his Chief of Staff to implement a plan for illegally breaking into the Brookings Institute to get the secret file on the bombing halt. To date, this source remains the only direct evidence of President Nixon ordering a crime, and helped me understand the panic and desperation in the White House after the Supreme Court ruling.

Cronkite, Walter. “Report from Vietnam, Feb 27, 1968.” Video file, 31:06. YouTube. Posted by Clips from the Past, Feb 18, 2023, [www.youtube.com/watch?v=V2ev-GalTng](http://www.youtube.com/watch?v=V2ev-GalTng).

This video showed Cronkite’s broadcast from Saigon in Feb. 1968 after the Tet Offensive by the North Vietnamese Army, where he showed the devastation inflicted by the offensive and concluded with a commentary from Cronkite indicating his belief that the war was unwinnable. This source helped me understand how the war was portrayed on television and how it shaped the feelings Americans had towards the war.

Ellsberg, Daniel. *Secrets: A Memoir of Vietnam and the Pentagon Papers*. New York: Penguin Books, 2002.

In this book, Ellsberg described his service with the State Department, and the Vietnam Study Task Force, and how his feelings about the secrecy and lies from various presidential administrations changed his stance towards the war. This book was an important source about Ellsberg’s life, and what drove him to leak the Papers.



Frankel, Max. "Court Step Likely." *New York Times*, June 15, 1971, 1.

This article described the contents of the telegram that was sent by Attorney General Mitchell to the *New York Times* as well as the request for an injunction submitted to the Southern District of New York. This source provided first-hand information on the scope of the injunction and the legal threats made against the *New York Times*.

*Gathering, transmitting or losing defense information*, 18 U.S.C. § 793 (1917),

<https://www.govinfo.gov/content/pkg/USCODE-2022-title18/pdf/USCODE-2022-title18-partI-chap37-sec793.pdf>.

This source provided the text of the United States Code Title 18 Section 793 which is part of the Espionage Act of 1917. It covered the handling of defense information and which specific actions, including communication of the information, were considered acts of espionage. This source showed the legal basis for the injunction sought against the press.

Gelb, Leslie. *Final Report, OSD Vietnam Task Force & Index*. Report. c. January 15, 1969.

National Archives. <https://nara-media-001.s3.amazonaws.com/arcmedia/research/pentagon-papers/Pentagon-Papers-Index.pdf>.

This is the memorandum from the chair of the Vietnam Study Task Force that accompanied the submission of the Pentagon Papers report to the Secretary of Defense. This source highlighted for me the original purpose and scope for generating the Pentagon Papers report.

Gellman, Barton, and Laura Poitras. "U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program." *Washington Post*, June 7, 2013, A1.

This article in the *Washington Post* broke the news of the NSA surveilling foreign terror targets by tapping into the servers of the largest tech companies, and thereby incidentally also collecting personal information from American citizens. This source showed how the press continued to hold the Government accountable in recent years, just like in the 1970s.

Graham, Fred. "Supreme Court, 6-3, Upholds Newspapers on Publication of the Pentagon Report; Times Resumes its Series, Halted 15 Days." *New York Times*, July 1, 1971, 1.

In this article, the *New York Times* announced that the Supreme Court had ruled for the 6-3 for the *Times* and allowed the continued publication of the Pentagon Papers. This article helped highlight for me the key points made in the concurring and dissenting opinions and provided an easy, concise way of understanding the decision.

Hersh, Seymour. "A Broad Program." *New York Times*, May 24, 1973, 1.

This news article reported on a program approved by President Nixon that was run by the FBI to infiltrate, burglarized and wiretap different activist groups like the Black Panthers. This information was obtained from a secret report prepared for the president and subsequently leaked to Hersh. This article was a useful example of the type of aggressive reporting made possible by the Supreme Court ruling.

---. "Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years." *New York Times*, December 22, 1974, 1.

This article publicized the leak from within the State Department of the illegal surveillance of American citizens that were antiwar dissidents by the CIA and NSA. This source highlighted how the intelligence apparatus had been abused to monitor American citizens without showing probable cause.

*Near v. Minnesota*, 23 U.S. 697 (1931).

The full-text of the Supreme Court opinion for *Near v. Minnesota* in which Minnesota officials sought an injunction against Jay Near of *The Saturday Press* for publishing material that was scandalous and defamatory. This Minnesota state gag law against the press was found unconstitutional by the U.S. Supreme Court. This opinion helped lay out the legal precedent at the time *New York Times Co. v. United States* was argued.

*New York Times*. "Nixon again deplores leak of bombing in Cambodia." March 11, 1976, 27.

This article covered Nixon's deposition taken in 1976 as part of a lawsuit by Mort Halperin, one of the authors of the Pentagon Papers. This source provided a window into Nixon's state of mind, and showed his paranoia towards various Government officials who were all too willing to leak secrets to the press in an effort to undermine Nixon's administration.

*New York Times Co. v. United States*, 403 U.S. 713 (1971).

The full-text of the Supreme Court ruling for *New York Times v. United States* in which the prior restraint sought by the Department of Justice against the *New York Times* for the publication of the Pentagon Papers was deemed unconstitutional. This source was the basis for understanding the decision through a record of each Justice's opinion.

“Richard Nixon and Henry A. Kissinger on 13 June 1971.” Audio file, 13:25. Presidential Recordings Digital Edition, Miller Center for Public Affairs, University of Virginia.  
<https://prde.upress.virginia.edu/conversations/4002137>.

This White House tape of the conversation between President Nixon and National Security Advisor Kissinger showed President Nixon's lack of concern initially about the Pentagon Papers leak. This recording documented Kissinger's role in riling up President Nixon about the Pentagon Papers leak, convincing him that this was a treasonous act that needed to be punished severely. This source was useful in documenting the initial White House response to the leaks.

Sheehan, Neil. “Vietnam Archive: A Consensus to Bomb Developed Before '64 Election, Study Says.” *New York Times*, June 14, 1971, 1.

This article summarized the plans in September 1964 made by the Joint Chiefs, at President Johnson's direction, for sustained bombardment of North Vietnam starting in early 1965. This source was useful in showing how President Johnson was hiding his true intentions from the public, during a presidential campaign where he claimed to be a candidate of peace.

---. "Vietnam Archive: Pentagon Study Traces 3 Decades of Growing US Involvement." *New York Times*, June 13, 1971, 1.

This article by Sheehan was the initial publication summarizing the content of the Pentagon Papers and the process used by the Vietnam Study Task Force to generate this report. The source provided a first-hand look at the article that set in motion the battle between the *Times* and the Nixon administration.

Smith, Hedrick. "Vast Review of War Took a Year." *New York Times*, June 13, 1971, 1.

This article was a complement to Sheehan's article announcing the publication of the Pentagon Papers. This article focused on the members of the Vietnam Study Task Force, the scope of the report they generated and the process used to generate this report. This article helped set the framework for the Papers while Sheehan covered the content.

*USA FREEDOM Act of 2015*, Public Law No. 114-23, 129 Stat. 268 (2015),  
[www.congress.gov/114/plaws/publ23/PLAW-114publ23.htm](http://www.congress.gov/114/plaws/publ23/PLAW-114publ23.htm).

This is the text of the USA FREEDOM Act which was passed in response to the gathering of telephone and electronic records of American citizens as part of the NSA's surveillance of foreign terror targets. This Act was a consequence of Snowden's exposure of these programs. This source showed the continued impact on civil liberties made possible by a free press exposing unconstitutional surveillance.

*United States v. New York Times Company*, 328 F. Supp. 324 (S.D.N.Y. 1971),  
[law.justia.com/cases/federal/district-courts/FSupp/328/324/1428158/](http://law.justia.com/cases/federal/district-courts/FSupp/328/324/1428158/).

This source provided the full-text of District Judge Gurfein's opinion in which he denied the Government's injunction against the *New York Times* to stop the *Times* from continued publication of the Pentagon Papers. Judge Gurfein's opinion provided me with the outline of the key legal arguments against prior restraint that the Supreme Court later adopted.

## Secondary Sources

Campbell, Geoffrey. *The Pentagon Papers: National Security versus the Public's Right to Know*.

San Diego: Lucent Books, 2000.

This book traces the history of the Pentagon Papers leak and focuses specifically on the legal proceedings as the case made its way through the District Court, the Second Circuit Court of Appeals, and finally, the Supreme Court. This book provided details about the oral arguments at the Supreme Court and also analyzed the reasoning of each Justice as expressed in their written opinion.

Ehrlich, Judith and Rick Goldsmith. "The Most Dangerous Man in America." Video file, 92:00.

YouTube. Posted by Paper Trail Documentary, August 6, 2023.

<https://www.youtube.com/watch?v=6c2od1Zn9YQ>.

This is a documentary about Daniel Ellsberg's life, his service with the Marines and the State Department, and his work with the Vietnam Study Task Force. Included in this documentary are interviews with Nixon administration officials that helped provide a window into how the leak and publication of the Papers were perceived by various White House officials.

Farrell, John. "Nixon's Vietnam Treachery." *New York Times*, December 31, 2016, 38.

This op-ed described Nixon's attempts to undermine the peace talks and bombing halt orchestrated by President Johnson, the so-called Chennault Affair. This article helped underscore how much Nixon feared public exposure for his actions. While this was

classified a secondary source since it was an op-ed published years later, it was useful in understanding President Nixon's state of mind as the classified leaks happened.

Hallin, Daniel. *The Uncensored War: The Media and Vietnam*, New York: Oxford University Press, 1986.

This book examined in detail the behavior of both the print news media and television news and made the case that the news media was very dependent on official sources, and allowed the government to shape the news narrative in the 1960s. This source was very valuable in building the case that the bold, adversarial press was not present prior to the Pentagon Papers ruling.

Hammond, William. *Public Affairs: The Military and the Media, 1962-1968*. Washington DC: United States Army Center of Military History, 1990.  
[https://history.army.mil/html/books/091/91-13/CMH\\_Pub\\_91-13-B.pdf](https://history.army.mil/html/books/091/91-13/CMH_Pub_91-13-B.pdf).

In this book, Hammond reconstructed the history of the relationship between the military and the news media from internal Department of Defense documents in order to describe the challenges and tensions faced by both groups. This source helped provide specific examples in the 1962-1968 period where the government strong-armed the press in providing positive coverage in exchange for access.



Howell, Jen Patja, Jack Goldsmith, Lee Bollinger, and Geoffrey Stone. “National Security, Leaks and Freedom of the Press.” Podcast, April 22, 2021. Audio file, 52:29. *The Lawfare Podcast*, Lawfare Media. <https://www.lawfaremedia.org/article/lawfare-podcast-national-security-leaks-and-freedom-press>.

This podcast was an interview of Geoffrey Stone from the University of Chicago and Lee Bollinger from Columbia University on the 50<sup>th</sup> anniversary of the Pentagon Papers ruling from the Supreme Court. The legacy of the ruling is examined, along with the limitations of the ruling in the modern digital era and a press landscape that is greatly transformed. This source helped shape the counter argument against the significance of the Pentagon Papers decision.

Liptak, Adam. “The Pentagon Papers: A First Amendment Case That Made an Incoherent State of the Law.” *New York Times*, June 14, 2021. <https://www.nytimes.com/2021/06/09/us/supreme-court-pentagon-papers-prior-restraint.html>.

Liptak is a journalist and lawyer that covered the Supreme Court for the New York Times. The article is Liptak’s analysis of the different opinions from the individual justices in the Pentagon Papers ruling, and why, on the whole, the ruling is not the win for the press that people generally believe it to be. This article was also part of the counter-argument against the significance of the Pentagon Papers decision.

Marshall, Jon. *Watergate's Legacy and the Press: An Investigative Impulse*. Evanston: Northwestern University Press, 2011.

This book covered the history of investigative journalism from the Johnson administration to the Obama administration. This source was useful in showing how exposure of government misdeeds was not just limited to Watergate, and highlighted the effort of other journalists during that same era.

Oakes, James. "The Doctrine of Prior Restraint since the Pentagon Papers." *University of Michigan Journal of Law Reform*, Vol. 15 (Spring 1982): 497 – 519.

Judge James Oakes was one of the judges on the Second Circuit Court of Appeals that heard the Justice Department's appeal for prior restraint against the *New York Times*. In this journal article, Judge Oakes explained the legal precedents in place when he heard the case and his rationale for voting against the Government's request for an injunction.

O'Connor, John D. "I'm the Guy they called Deep Throat." *Vanity Fair*, July 2005.

<https://www.vanityfair.com/news/politics/2005/07/deepthroat200507>.

This was the first interview where Mark Felt, former Deputy Director of the FBI, confirmed he was the source of leaks to Bob Woodward and Carl Bernstein of the *Washington Post* regarding the details of the ongoing FBI investigation into Watergate. The details in this article show how the press used leaks of confidential government investigations to keep Watergate in the public view and pressure Nixon through these leaks.

Prados, John, and Margaret Porter. *Inside the Pentagon Papers*. Lawrence: University Press of Kansas, 2004.

This book reviews the legal framework of the Pentagon Papers ruling by the Supreme Court through an examination of the historical events leading up to the case, including first-hand perspectives from the different individuals involved, like Ellsberg. This book was valuable in my research because it provided an in-depth analysis of the subsequent implications, including governmental actions in the 2000s war on terror.

Sanger, David E. “The Pentagon Papers: Leaning on Journalists and Targeting Sources, for 50 Years.” *New York Times*, June 9, 2021. [https:// www.nytimes.com/2021/06/09/us/pentagon-papers-journalism-leaks.html](https://www.nytimes.com/2021/06/09/us/pentagon-papers-journalism-leaks.html).

This article described how the Pentagon Papers ruling had resulted in a truce whereby the Government agreed to not seek prior restraint while the press allowed the Government to review and redact details in stories prior to publication. This article showed recent examples where the ruling served to prevent press censorship.

Schonfeld, Gabriel. “Rethinking the Pentagon Papers.” *National Affairs*, No. 57 (Fall 2023). <https://www.nationalaffairs.com/publications/detail/rethinking-the-pentagon-papers>.

In this article, Schonfeld examined the legacy of the Pentagon Papers leak on the public perception of the Vietnam War, and how much the ruling has been misunderstood by both sides. My counter-argument was shaped by Schonfeld’s position that the ruling by the Supreme Court was not an absolute authorization for publishing leaks, and Ellsberg has better, legal options for opposing the war.

“Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee).” *U.S. Senate Historical Office*,  
<https://www.senate.gov/about/powers-procedures/investigations/church-committee.htm>.

This source by the Senate historian provided the formal summary of the official Church Committee Report investigating the activities of the CIA and NSA in surveilling U.S. citizens as well as the outcome of the committee’s recommendation. This was classified as a secondary source since it was not the original Church Committee report, but a summary written by the Senate historian several years after the Church Committee hearings, when the legislative outcomes were in place.

Ungar, Sanford J. *The papers & the papers; an account of the legal and political battle over the Pentagon Papers*. New York: Dutton, 1972.

Ungar was a journalist for the *Washington Post* when the leak and publication of the Pentagon Papers took place. This book was useful in providing a detailed account of Daniel Ellsberg and his interactions with the newspapers, as well as the internal deliberations in the newsrooms of the *New York Times* and the *Post* about the publication of the leaked documents.

Whitlock, Craig. Telephone interview by author. 24 Mar. 2024.

Whitlock is an investigative reporter for the *Washington Post* and authored a book, *The Afghanistan Papers*, exposing how the Defense Department’s internal view of the war in Afghanistan was very different from the optimistic public pronouncements, just like during the Vietnam War. During the interview, Whitlock explained to me how

the Pentagon Papers ruling had changed the dynamics of the newsroom in their interactions with political leaders, and the process with which classified information is gathered and published today.