Introduction: A Reconsideration

The presses began to roll at 6:13 P.M. on Saturday, June 12, 1971. Three minutes later the first newspapers arrived in the city room at the *New York Times*. In 24-point type over columns 4–7 on page 1 the understated headline for the Sunday paper of June 13, 1971, read as follows:[1]

VIETNAM ARCHIVE: PENTAGON STUDY TRACES
3 DECADES OF GROWING U.S. INVOLVEMENT

The opening paragraph of the news article written by Neil Sheehan stated that a "massive" Pentagon study commissioned by former Secretary of Defense Robert S. McNamara on "how the United States went to war in Indochina" demonstrated 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."[2]

The next day, Monday, the *Times* ran a second article by Sheehan under a headline that stated: "VIETNAM ARCHIVE: A CONSENSUS TO BOMB DEVELOPED BEFORE '64 ELECTION, STUDY SAYS." The lead paragraph of this second report stated that the "Johnson Administration reached a 'general consensus' at a White House strategy meeting on September 7, 1964, that air attacks against North Vietnam would probably have to be launched" in early 1965. The report claimed that this consensus on bombing "came at the height" of the presidential election contest between President Lyndon B. Johnson and Senator Barry Goldwater, "whose advocacy

of full-scale air attacks on North Vietnam had become a major issue."[3] The *Times* promised additional reports with supporting government documents in the succeeding days.

The *Times* series was based on a secret Pentagon study prepared between June 1967 and January 1969. It was officially entitled "History of U.S. Decision Making Process on Vietnam Policy." Only fifteen copies of the completed study were made, and they were classified "top secret—sensitive." The study was bound into forty-seven volumes, consisted of two-and-a-half million words, and weighed sixty pounds. The *Times*'s disclosure of the top secret study was probably the single largest unauthorized disclosure of classified documents in the history of the United States.

The *Times* reports caught President Richard Nixon and his top White House aides completely off guard, and, with few exceptions, neither Nixon nor his aides seemed to know of the existence of the Pentagon study. Nixon's initial reaction was not to interfere with the *Times* series.[4] But by early Monday evening he had changed his mind and decided that his administration would ask the courts to enjoin the *Times* from publishing further reports, which it did on Tuesday in federal court in Manhattan. It was the first time since the adoption of the U.S. Constitution that the federal government had sued the press to stop it from disclosing information because of national security.

The government's request for an injunction went before U.S. district judge Murray I. Gurfein, a Nixon appointee who questioned the *Times*'s patriotism for publishing classified material that pertained to the war. Gurfein granted the government a temporary restraining order and scheduled an evidentiary hearing for Friday of that week.[5] His order was the first ever to enjoin publication because of national security. Suddenly, the Pentagon documents became the most sought-after set of papers in the nation, and the government's success in blocking publication, at least temporarily, attracted national and international attention: the case pitted Nixon's administration against the nation's premier newspaper, would determine whether the Pentagon study would be published, and held out the promise of defining press freedoms during wartime.

By Friday, June 18, the *Washington Post* had gained possession of some of the Pentagon Papers and had begun to publish parts of the classified history. This action forced the government to begin a second lawsuit, which it filed in U.S. district court in Washington, D.C.

Meanwhile, Judge Gurfein's courtroom Friday morning was electric with excitement and anxiety as the crowd awaited the morning's hearing, which began with a number of preliminary motions. Professor Alexander M. Bickel, a Yale Law School professor and the *Times*'s lead attorney, told

Gurfein the government contended that the nation's security would be gravely harmed if the *Times* published one more installment of what the press had already labeled the Pentagon Papers. Bickel then announced that the *Washington Post* had published its own Pentagon story in that morning's newspaper using some of the same classified documents the *Times* possessed and that as far as he could ascertain the Republic still stood.[6] The crowd cheered; Gurfein banged his gavel, demanding quiet. Eventually, Judge Gurfein announced that the public would be excluded from that part of the hearing during which the government would present its evidence as to why further disclosures would injure the nation's security.

The Friday hearing lasted well into the night, ending shortly after eleven o'clock. During most of the proceedings Gurfein was obviously sympathetic toward the government and agitated, if not hostile, toward the *Times*. Gurfein's disposition was so undisguised that by the time the public was excluded and the courtroom doors were locked and guarded to prepare for the national security witnesses, the government's lawyers must have felt confident they would win the day. But as it turned out, the closed hearing was a disaster for the government. Because of a variety of factors, including the refusal of the government witnesses to anchor their general assertions that further disclosures would injure the national security in the details of the classified study, Gurfein emerged from the closed hearing deeply annoyed and exasperated.

On Saturday Judge Gurfein denied the government's request for a preliminary injunction. In his opinion he wrote that the government had failed to offer any "cogent reasons" to support its request for an injunction. He claimed that the case did not present a "sharp clash" between the *Times*'s right to publish and the government's legitimate interest in keeping some national defense information confidential. He also reminded his readers that security is not "at the ramparts alone." A secure nation requires a free press, even one that is "cantankerous," "obstinate," and "ubiquitous."[7]

On Monday U.S. district judge Gerhard A. Gesell, who presided over the government's action against the *Washington Post*, reached the same result. By Wednesday, June 23, two U.S. courts of appeals had reviewed the two cases but had reached different conclusions: the Second Circuit sitting in New York ordered Judge Gurfein to hold additional hearings in the *Times* case; the D.C. Circuit affirmed Judge Gesell's order denying the government a prior restraint.

Both the *Times* and the government requested the Supreme Court to review the cases immediately: the *Times* because it considered every moment under restraint an unwarranted intrusion into its editorial discretion

in deciding what to publish, the government because it considered further disclosures of the top secret study as potentially endangering the national security. On Friday, June 25, the U.S. Supreme Court announced it would immediately review both cases. Because of this development, the *Times* case never returned to Judge Gurfein. The Court ordered the parties to file their legal briefs and participate in oral argument the very next morning. On Wednesday, June 30, a mere fifteen days after the government first went to court against the *Times*, the Supreme Court denied the government the injunctive relief it sought, thereby freeing the newspapers to continue publishing their reports. The nine justices divided six to three and wrote ten opinions—an unsigned majority opinion plus nine individual opinions.[8]

The sole fact that the government lost its first effort to restrain the press made the Supreme Court's decision in the Pentagon Papers case unusually important, even when assessed against the background of American legal history—a history studded with significant judicial decisions. But the significance of the Pentagon Papers case is far greater and more compelling than that. Because no previous administration had tried to enjoin the press from publishing information it possessed, there were no controlling judicial decisions. Many Supreme Court decisions bore some relationship to the constitutional issues raised by the government's lawsuits, but the similarities were not sufficiently close to be strongly binding. As a result the court was left with substantial discretion as to how to decide these two cases. Moreover, it was extremely likely that the Court took very seriously the government's forceful representation, including the dozens of specific citations to the classified documents that it declared would injure national security if disclosed. The government also appealed to the Court's sense of fundamental fairness by contending it needed more time to prepare its evidence, given the voluminous nature of the documents and their importance. Finally, the Court had ordinarily deferred to the government in cases involving national security. Given the fact that the disputed classified documents in this case pertained to the Vietnam War, which was still in progress—and in which large numbers of American soldiers were directly involved in combat—one might well have expected the Court to accede to the government's request for an injunction.

Yet instead of deferring to the government's judgment on military, intelligence, and diplomatic matters, the Court concluded that the government's evidence fell short of what was legally required. It reached its conclusion even though it could simply have remanded the two cases to the district courts for additional hearings, thus avoiding—at least temporarily—a final resolution on the issue of the injunction. It reached this

conclusion in spite of the fact that more than a majority of the justices concluded (whether rightly or wrongly) that the newspapers had already—or were likely—to disclose information harmful to the nation's security.

Although the *Times* and the *Post* resumed publication of the Pentagon Papers immediately following the Supreme Court decision, these disclosures did not directly or immediately alter the course of the Vietnam War. The disclosures did disturb President Nixon, and they became the occasion for a major congressional debate over the war. But there is no evidence that the actual publication of the Pentagon Papers reports caused Nixon to change his war policies.

Nor did the publication revitalize the somewhat moribund antiwar movement. President Johnson's decision not to seek reelection in 1968 and President Nixon's reduction of the number of U.S. troops in Vietnam from 1969 to 1971 cooled the antiwar fires. Although Nixon's decision to invade Cambodia in 1970 caused opposition to the war to flare up once again, the episode was short-lived. Thus, the antiwar movement lacked a sharp focus or strong impetus when the *Times* first published its initial extracts from the Pentagon Papers, and the Supreme Court's decision allowing publication to continue did not change this situation.

Nor is there any evidence that the *Times* or the *Post* actually published any of the information that injured national security. As former Solicitor General Erwin N. Griswold, who represented the government before the Supreme Court, concluded years after the case was over: "none of the material which was 'objectionable' from my point of view was ever published by anyone, including the newspapers, until several years later."[9]

But the sheer disclosure of the Pentagon Papers did wreak political havoc within the United States. The publication sparked a huge controversy about whether the government—and the Johnson administration in particular—had intentionally misled the American public about the war. This had a powerful impact on the political prospects of many Democratic party leaders, some of whom were considering running for the party's presidential nomination in 1972. It intensified dissension within the Democratic party, and that in turn weakened the party's capacity to elect a president from its own ranks. It increased the public's distrust of the national government, especially the executive branch. This public distrust has deepened over the years and must now be seriously taken into account by any president who wishes to govern effectively.[10]

The Pentagon Papers episode ultimately had a devastating impact on Nixon and his administration. During the sixteen days of litigation, Nixon decided to use the entire dispute as a means to strike at those he considered

to be his political enemies; to intimidate the press; to strengthen his reelection bid in 1972; and to divide the Democrats. The Supreme Court's ruling only intensified his feelings that his administration needed to do more to protect itself from those he believed were conspiring to undermine his capacity to govern. The result was that Nixon and his top aides, especially Henry Kissinger, created an atmosphere of crisis, making possible a number of decisions and actions that ultimately proved disastrous. It was in this atmosphere that the so-called Plumbers Unit was created, leading eventually to the Watergate break-in and all the events that John Mitchell termed the "White House horrors." The cover-up following the Watergate burglary was an outgrowth of this sequence. When the burglary and cover-up became public, they were central factors in undermining Nixon's political support, thus forcing him to resign the presidency in August 1974.[11] The Pentagon Papers affair, in short, led directly to the unraveling and final disintegration of the Nixon presidency.

But there is more to the significance of the Pentagon Papers affair than even these important considerations. The Pentagon Papers case was a crucible for testing the strength and resilience of many elements that are critical to the democratic order, and the entire history of the case discloses the subtle and complex workings of institutions that are vital to a democratic process. Ironically, it reveals that much of the strength or weakness of a democracy can depend upon two institutions that are not in any strict sense accountable from a political perspective: the press and the courts. These institutions, depending on how they function, clearly have enormous power either to strengthen or to weaken the power of the executive branch. This balance and counterbalance of different kinds of power is of course inherent in our Constitution and its underlying theory. The Pentagon Papers case provides an unusual opportunity to examine the interaction among the separate but independent powers and to assess how effectively—and how scrupulously—they perform.

A history of the Pentagon Papers affair also chronicles the activities of the press, the courts, and the executive branch as they struggled with one of the most important challenges facing any modern-day democracy—the balance between the legitimate needs of government to keep some information secret and of the people to be informed about their government and matters of vital importance. How, for example, should the press approach the question of its responsibilities when its reports bear on important national security matters? What responsibilities should courts assume—and what principles should they follow—in resolving disputes between the press and the government when national security issues are

involved? A detailed history of this case cannot possibly offer definitive answers to these questions. It can go far to explain, however, how the Supreme Court addressed these questions, and how it arrived at its conclusions, in one of the most dramatic and important legal conflicts in American history. It also lays bare the multitude of considerations at stake for different individuals and groups at major turning points in the turbulence of events. One can, in other words, watch democracy in action, at a time of crisis, and attempt to evaluate how it resolved issues that were laden with immediate practical consequences and profound theoretical implications.

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At the time it was my belief that the government was merely trying to suppress information that would be politically embarrassing and might undermine support for its war policies. I also had the impression from news reports that the government was trying to steamroll its way to a legal victory by having national security officials make dire warnings of what might happen if the government lost. Indeed, I accepted as true what many said at this time—the government did not offer any specific references to the Pentagon Papers to support its allegations that publication of the top secret study would seriously harm national security.

There were several reasons for my skepticism. The Pentagon Papers seemed no more than a history (which was what the government entitled the study) of America's involvement in Vietnam from 1945 to 1968.[12] In addition that is what the *Times* said the documents were: "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."[13] At the time and under the circumstances of the case I placed more trust in the *Times* than I did in the Nixon administration. Judge Gurfein's ultimate ruling against the government seemed to confirm my initial disbelief that continued publication of the remaining Pentagon Papers would injure current military, diplomatic, or intelligence interests. Once the Supreme Court ruled against the government and the newspapers published their reports with no apparent harm to the national security, the evidence seemed overwhelming that the government's lawsuits against the *Times* and the *Post* were nothing more than an effort at brazen and unwarranted censorship.

That remained my view until I decided to obtain some of the basic legal

documents in the case in the late 1980s. One of the first I obtained was labeled "Special Appendix," a government document submitted to a federal appeals court in the *Times* case that was sealed during the litigation. It alleged that further publication of the classified material would injure current troop movements, disclose current and important intelligence matters, and harm current diplomatic efforts aimed at ending the war and gaining the release of American prisoners. In support of these allegations it provided numerous specific page references to the Pentagon Papers. This document, along with others, eventually caused me to begin rethinking the meaning of the litigation over the Pentagon Papers, just as many had claimed that the disclosures of the Pentagon Papers themselves had caused them to reconsider the U.S. military intervention in Vietnam.

Reconsidering the Pentagon Papers case was an incremental, uncertain, and complex process. My first expectations were quite limited, but the more I inquired, the more I expanded the scope of my inquiry. Before long I began to focus on why McNamara had originally decided to commission the study, why Daniel Ellsberg had decided to make the papers available to the *Times*, why the *Times* and the *Post* had determined they would publish the papers, and why the Nixon administration sued the newspapers. Suddenly, every aspect of the litigation seemed open to careful review and analysis and less clear-cut than I had originally thought.[14]

This book is a consequence of that reconsideration. It is based in large part on fresh material not previously available, as well as information that may have been available but was not generally considered in full detail by those who have already written—and very helpfully—about this important episode in American history.

The conclusions I eventually reached differed substantially from the conception of the case I once held and from what I think was (and remains) the dominant view of the case.[15] Although I strongly approve—as I did in 1971—of the Supreme Court's decision, I no longer regard the legal dispute as an effort by the Nixon administration merely to withhold deeply embarrassing information. Nor do I understand the legal attack on the *Times* simply as part of the administration's general campaign to intimidate the press or view the case as one in which the ultimate outcome was relatively predictable because it was based on the application of well-settled, concrete, and definite legal principles applied to a situation in which the government's evidence was unequivocally insufficient.

Instead, I think that the Justice Department lawyers, who first determined whether the government should respond to the *Times* series, and the national security officials with whom they consulted accepted that the *Times*'s Pentagon Papers series potentially threatened important national

security interests. They urged the administration to sue the *Times* for a prior restraint because it was the only way to gain time to assess the full implications of this massive leak of classified documents and because it was the only effective legal remedy against the *Times*. Moreover, by the time the litigation was reviewed by the Supreme Court, the government had significantly marshaled its evidence and sharpened its allegations. Indeed, it now appears that the Pentagon Papers did contain some information that could have inflicted some injury—at least to a degree that makes the concerns of national security officials understandable—if disclosed, which it was not.

For example, the government's sealed brief in the Supreme Court, which contained many references to the Pentagon Papers, claimed that the disclosure of this information would cause "immediate and irreparable harm to the security of the United States." It stressed that making public the recent diplomatic history of the war would likely "close up channels of communication which otherwise would have some opportunity of facilitating the closing of the Vietnam war." It claimed that further disclosures might reduce the rate of American troop withdrawal from Vietnam. It asserted that the top secret documents identified some CIA agents and activities as well as other intelligence operations and assessments. It also alleged that the classified material contained current military plans.[16]

Although the government's references to the Pentagon Papers did not in the end convince the justices on the high court that additional publication would cause immediate and irreparable harm to the national security, that did not mean that further publications would necessarily be totally harmless. There is an enormous difference between concluding that the Pentagon Papers contained absolutely no information that could injure the national security in one respect or another and concluding that it contained information that would result in immediate and irreparable harm. Thus, concluding that the government's evidence fell short of the legal requirements for a prior restraint did not mean the government's overall case was so weak that further disclosures did not threaten national security.

I also think that prior judicial decisions did not compel the outcome in the case. There was, of course, a wealth of prior cases construing the First Amendment and delineating numerous aspects of freedom of the press. But the Pentagon Papers litigation was the federal government's first effort to enjoin the press because of national security considerations. As a result this was a case of first impression, a lawyer's term meaning that there was no prior judicial decision in a similar case that was directly applicable. This gave the judges substantial discretion in defining the pertinent legal

standard. In fact the judges had such discretion that they could have enjoined the newspapers from publishing the Pentagon reports without overruling even one prior decision.

Thus, prior case law left unresolved several highly important questions as to what the government had to prove to win a prior restraint. For example, precisely what kind of injury to the national security did the government have to prove to win? Would it be sufficient for the government merely to prove that additional disclosures of classified information would possibly injure diplomatic efforts aimed at securing a peace settlement? Or would the government have to prove that additional reports might reveal information that would endanger the lives of one, ten, or one hundred soldiers? Or would the government have to prove that public disclosure would inflict some irreparable and profound blow to the overall security of the nation?

Prior judicial decisions also left undefined what the government had to prove with regard to the quickness and directness with which a disclosure would cause the feared injury. Thus, would it be enough for the government merely to prove that the disclosure would cause the threatened injury at some indefinite time in the future? Or would the government have to prove that the harm to the nation's security would follow almost immediately and directly after publication? Furthermore, how likely must it be that the publication would cause injury? Would it be sufficient if the government only proved it was possible that publication would injure national security? Or would the government have to prove it was highly likely, if not a virtual certainty, that disclosure would inflict injury? Or were the relevant considerations so complicated that no simple formulation of a legal standard was possible?

Because prior decisions did not answer these questions, the outcome in the Pentagon Papers case was hardly a foregone conclusion. Indeed, the Supreme Court could have decided the Pentagon Papers case either way—for the press or for the government—without straying beyond the parameters defined by prior case law.

Moreover, the difficulty of the case—and ultimately its full significance—cannot be fully appreciated without recognizing that the nation was at war when the government tried to suppress these documents marked top secret. Another day's installment of the Pentagon Papers would endanger military, diplomatic, and intelligence matters, the government claimed; it asserted that in cases involving national security the courts had an obligation to defer to the executive branch; and it maintained that the judges lacked the training, information, and experience to make sound judgments when national security matters were in dispute.

Nonetheless, the newspapers prevailed. The fact that they did in the midst of all these circumstances makes their triumph a matter of exceptional importance not only for the freedom of the American press but for American democracy as a whole.

I surprised myself as I came to these conclusions. But I was also taken aback by how difficult it was to persuade others to reconsider their own views, not about the ultimate legal outcome, but about the strength of the government's overall claim, the indeterminacy of legal precedent, and the complexity of the issues presented. Once, when I gave a paper on my evolving reassessment of the case at a Benjamin N. Cardozo School of Law conference, Leonard B. Boudin, a prominent lawyer who represented many leaders of the antiwar movement (including Daniel Ellsberg), asked to make a comment when I finished speaking. Although I have long forgotten his precise words, the gist of his statement was a sense of disbelief that anyone could think the government lost the Pentagon Papers case for any reason other than that its allegations concerning the threat to national security were fabricated. Boudin was certainly not alone in his reaction. I was often struck by a particular irony: individuals deeply committed to a strong free press consistently arguing that the Pentagon Papers case was in fact not so significant, essentially because the final outcome was all but inevitable.

The writing of this book involved another surprising turn. When I began my research I was only partially aware of the unusually close links between the Pentagon Papers episode and Nixon's Watergate scandal. Some writers had of course already identified these links and had characterized the Pentagon Papers case as an important turning point in the evolution of Nixon's presidency.[17] My own study confirmed this linkage and its significance to Nixon's presidency. Previous studies, however, have tended to focus on Nixon's presidency as a whole. They have inevitably treated the Pentagon Papers case as a relatively minor episode within a larger and more complex whole, without focusing intensely on the complicated dynamics that led the Nixon administration to sue the *Times* or on how the struggle over the Pentagon Papers so embroiled the Nixon administration that it became a watershed experience for Nixon and his top aides. This book addresses these important matters, explaining why the Nixon administration sued the *Times* and why and how the administration's efforts to keep the Pentagon Papers confidential transformed it so as to set the stage for decisions and actions that made its ultimate demise possible.