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## Pentagon Papers: National Security and Prior Restraint

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The recent arrest of Bradley Manning and the subsequent political condemnation of Julian Assange's whistleblower website Wikileaks for releasing classified diplomatic cables have invoked comparisons with Daniel Ellsberg and *New York Times v. United States*, more commonly known as the Pentagon Papers case. Both of these cases represent episodes in an ongoing battle between the government's claim of national security and the public's right to know. Consequently, the significance of the Pentagon Papers and the First Amendment battle that ensued needs to be re-explored. The Supreme Court ruling in the case of the Pentagon Papers provides a precedent on which to judge the government's ability to impose prior restraint under a national security umbrella. Following initial publications, the United States government, for the first time in its history, sought to enjoin the *New York Times* with prior restraint, which amounts to a government action restricting speech or publication before expression. The government contended that further publication of highly classified material would cause immediate and irreparable harm to national defense and security. Similar rhetoric continues to be employed in regard to the release of diplomatic cables by Wikileaks. Therefore, this paper will explore the issue of prior restraint and its viability under the First Amendment in matters of national security while arguing that the Pentagon Papers case serves as the most significant Supreme Court decision concerning the government's ability to abridge civil liberties through the employment of prior restraint. The Pentagon Papers provides the foundation by which to judge future contests between the government's national security claims and the public's right to know.

### The Pentagon Papers

What were the Pentagon Papers and why did they inspire a landmark First Amendment decision? The Pentagon Papers were a top-secret United States Department of Defense study chronicling American military and political involvement in Indochina from the end of World War II to May 1968. The study was commissioned in 1967 by Secretary of Defense Robert S. McNamara, whose exact motives continue to be a subject of debate. McNamara's prime motivation, however, is generally linked to a series of tough questions raised during a visit to the Kennedy Institute of Politics at Harvard University in November 1966. The study was an attempt to answer those questions

and explain why the administration's Vietnam policy had failed up to that point.<sup>1</sup> McNamara has insisted that he authorized the study to preserve government documents that chronicled the key decisions resulting in the United States involvement in an Asian land war.<sup>2</sup> Nonetheless, once authorized, McNamara had nothing to do with the construction of the study. The project mushroomed from its original scope and finally encompassed forty-seven volumes and thirty-six analysts.<sup>3</sup> "Analysts were drawn from mid-level ranks of the Pentagon, State Department, and military services; from think tanks such as the RAND Corporation and the institute for Defense Analysis."<sup>4</sup> Daniel Ellsberg was one of the analysts employed at RAND. The project was completed on January 15, 1969 only five days before Richard Nixon took the presidential oath. Overall, the Pentagon Papers represented a massive and authoritative study of how the Vietnam War was conducted by the United States.<sup>5</sup> The U.S. government deemed them so sensitive that "protecting them justified a major abridgement of the rights protected by the First Amendment to the Constitution of the United States."<sup>6</sup>

### Daniel Ellsberg

"There would have been no Pentagon Papers but for Robert McNamara, and there would have been no leak of the papers but for Daniel Ellsberg."<sup>7</sup> In order to understand the motive, you must understand the man. Daniel Ellsberg was born in 1931 in Chicago. He graduated in 1952 from Harvard University with a BA in Economics. He came of age in a nation politically defined by the tension of the Cold War. In his memoirs Ellsberg labels himself, during this period in his life, as a liberal cold warrior deeply committed to American postwar foreign policy.<sup>8</sup> He was able to avoid the Korean conflict by receiving a deferment until he completed college. A further deferment was granted when he won a Woodrow Wilson fellowship for a year of graduate study at Cambridge University.<sup>9</sup> Despite these deferments, he felt

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<sup>1</sup> David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Los Angeles: University of California Press, 1996), 19.

<sup>2</sup> *Ibid.*, 20.

<sup>3</sup> John Prados and Margaret Pratt Porter, ed., *Inside The Pentagon Papers* (United States: University Press of Kansas, 2004), 18.

<sup>4</sup> Rudenstine, *The Day the Presses Stopped*, 26.

<sup>5</sup> Prados and Porter, *Inside the Pentagon Papers*, 147.

<sup>6</sup> *Ibid.*

<sup>7</sup> Rudenstine, *The Day the Presses Stopped*, 33.

<sup>8</sup> Daniel Ellsberg, *Secrets: A Memoir of Vietnam and The Pentagon Papers Case* (United States: Penguin Books, 2002), 25.

<sup>9</sup> *Ibid.*

obligated to fulfill his patriotic duty and applied for the officer candidate's course in the Marines upon his return from Cambridge in the summer of 1953.

In 1959, Ellsberg became a strategic analyst at the RAND Corporation and consultant to the Defense Department and the White House, specializing in problems of the command and control of nuclear weapons, nuclear war plans, and decision making. In addition, he worked on the crisis-management team staffing ExComm (Executive Committee of the NSC) during the Cuban missile crisis in 1962.<sup>10</sup> In July 1964, he became Special Assistant to Assistant Secretary of Defense John McNaughton on Vietnam.<sup>11</sup> Ellsberg wanted to better appraise the current policy in Vietnam so he volunteered to serve as a special liaison officer under retired Major General Edward G. Lansdale, who was returning as a member of the State Department.<sup>12</sup> Ellsberg's time in Vietnam had a profound effect on his cold warrior mindset. When he arrived in 1965, he believed the war's tactics were "morally justified on the assumption that the war itself was necessary."<sup>13</sup> However, his experience led him to believe that war in Vietnam could not be won if the United States continued to adhere to current policy. When he returned to the U.S. he went back to work for RAND while simultaneously attempting to alert various government officials to the pitfalls of the current policy in Vietnam, however, his claims failed to elicit support. Ellsberg's return from Vietnam marked the beginning of his disillusionment with both the war and the system supporting it. In his memoirs he summarizes his dismay:

What I saw as a major "lesson of Vietnam" was the impact on policy failures of internal practices of lying to superiors, tacitly encouraged by those superiors, but resulting in a cognitive failure at the presidential level to recognize realities. This was part of a broader cognitive failure of the bureaucracy I had come to suspect. There were situations—Vietnam was an example—in which the U.S. government, starting ignorant, did not, would not learn.<sup>14</sup>

"This was Daniel Ellsberg's frame of mind when, in the late summer of 1967, he was asked to join the staff of the Pentagon Papers project."<sup>15</sup>

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<sup>10</sup> Ellsberg, *Secrets*, 33.

<sup>11</sup> Rudenstine, *The Day the Presses Stopped*, 34–35.

<sup>12</sup> Ellsberg, *Secrets*, 102–126.

<sup>13</sup> Rudenstine, *The Day the Presses Stopped*, 36.

<sup>14</sup> Ellsberg, *Secrets*, 185.

<sup>15</sup> Rudenstine, *The Day the Presses Stopped*, 37.

Ellsberg chose to study the Kennedy administration's 1961 policy in Vietnam because it was a period "of which he knew little and wanted to know more."<sup>16</sup>

For Ellsberg, as well as most Americans, the events of 1968 deepened the growing disillusionment with the Vietnam War. In January, thousands of North Vietnamese soldiers launched the Tet offensive on South Vietnamese urban centers. The attack shocked an American public who largely believed that the war was going well. In April, Ellsberg attended a conference entitled "America in a Revolutionary World" at Princeton University, which led to his first encounter with civil rights and antiwar activists.<sup>17</sup> Two nights prior, the nation had watched Lyndon B. Johnson announce that he would not run for re-election. At the conference, Ellsberg met a young Indian woman named Janaki, who was a follower of Gandhi. She urged him to read Martin Luther King's *Stride Toward Freedom* and introduced him to oppositional sentiment toward Vietnam. They stayed together and continued to talk through the next day. At the end of that day, April 4, 1968, they learned that Martin Luther King had been assassinated. Two months later, while in Chicago, Ellsberg turned on the television to news that Robert Kennedy had been shot following a speech at the Ambassador Hotel.

The death of Robert Kennedy caused Ellsberg to believe that both America and the situation in Vietnam would never change. Ellsberg comments,

I knew now as I wept, though I hadn't thought about it before, that I loved Bobby. He was the only politician I ever felt that way about. I realized at this moment that all my hopes had been on him. Not just for Vietnam, but for my country. I had a sudden vision that the war wasn't going to end. I was thinking: Maybe there's no way, no way, to change this country.<sup>18</sup>

On November 5, 1968 Richard Nixon defeated Herbert Humphrey on the promise to end the war in Vietnam "with honor."<sup>19</sup> On March 4, 1969 Ellsberg walked out of the RAND Washington office with two large briefcases containing an entire version of the McNamara study.<sup>20</sup>

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<sup>16</sup> Ellsberg, *Secrets*, 186-187.

<sup>17</sup> *Ibid.*, 209.

<sup>18</sup> *Ibid.*, 220.

<sup>19</sup> *Ibid.*, 225.

<sup>20</sup> *Ibid.*, 244.

## Releasing the Papers

Ellsberg's six-month study of the Pentagon Papers led him to the revelation that American involvement in Vietnam had never had a sense of legitimacy, and that the war had continued due to acts of aggression by successive American presidents.<sup>21</sup> Later that year, Ellsberg attended a conference at Haverford College, near Philadelphia. One of the speakers, a young man named Randy Kehler, set in motion a chain of events that led to the Supreme Court. Kehler, like Ellsberg, had graduated from Harvard. Kehler, during the latter part of his speech, announced his imminent imprisonment for draft resistance. Upon hearing this, Ellsberg began to cry and had to leave. After a few minutes in a nearby men's room Ellsberg came to the realization that he had to do something to help bring an end to the war. More importantly, he decided that he was willing to go to prison in order to accomplish such a goal. He came to the realization that "the only way to change the president's course was to bring pressure on him from outside, from congress and the public."<sup>22</sup>

Ellsberg began sneaking various parts of the McNamara study out of RAND and photocopying them at a friend's advertising agency during the late hours of the night. Considering the level of technology at the time, this was an exhausting process. Ellsberg attempted to deliver the study publicly through congressional channels but these attempts failed. Ellsberg met with both Senator J. William Fulbright, chairman of the Foreign Relations Committee and Senator George McGovern, but their political positions prevented them from serving as the desired outlet. In February, 1970 Ellsberg contacted Neal Sheehan, a reporter for the *New York Times*, who he knew from his time in Vietnam, to inquire about the publishing the study.

## The *New York Times*

On June 13, 1971 the *New York Times* front page carried the first installment of the McNamara study, which following its release became known as the Pentagon Papers. Second and third installments followed. On June 15<sup>th</sup>, however, the *Times* received a telegram from the Department of Justice ordering the paper to cease further publication.

The telegram reached the *Times* after most of the senior executives and editors had gone home for the evening. Robert C. Mardian, the assistant attorney general for internal security, telephoned Harding Bancroft, executive vice president of the *Times* in order to relay the demands of the Justice Department. Bancroft indicated to Mardian that he would have to consult with other *Times* officials before he could

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<sup>21</sup> Ibid., 250.

<sup>22</sup> Ibid., 276.

provide an answer. The debate over whether or not to continue to publication took place on the fourteenth floor of the *Times* building. Bancroft, James Goodale, the *Times* in-house counsel, Abe Rosenthal, managing editor, and Sydney Gruson, executive assistant to the publisher, convened to weigh the legality of continuing publication. The executive absent was Arthur Ochs Sulzberger who was visiting London. However, the group was able to reach him through London correspondent Anthony Lewis.<sup>23</sup> On the advice of Goodale, Sulzberger approved continued publication. Bancroft called Mardian and informed him that the *Times* “were respectfully declining to comply with the government’s request that it voluntarily cease publication of its Pentagon Papers series.”<sup>24</sup> A formal telegram was also sent stating that “the *Times* believed that the threatened legal action was properly a matter for the courts to decide, that the *Times* would oppose any request for an injunction, and that the *Times* would of course abide by the final decision of the court.”<sup>25</sup>

The *Times* search for legal counsel began when they were informed that Lord, Day and Lord could not represent them. Bancroft preferred Herbert Wechsler, a Columbia Law Professor, who had represented the *Times* before the Supreme Court in *New York Times v. Sullivan*, a landmark case in which the court concluded that the First Amendment provided qualified protection against libel claims.<sup>26</sup> Wechsler, however, was unable to grant the request because of a teaching commitment in Europe.<sup>27</sup> Goodale suggested Alexander Bickel, a Yale law professor, and Floyd Abrams, a young partner at a Wall Street law firm.

Prior to the telegram, Mardian asked William H. Rehnquist, then the assistant general in charge of the Justice Department’s Office of Legal Counsel, “to examine the possibility of forcing the *Times* to stop publishing articles based on the Pentagon Papers by obtaining a legal injunction, or court order.”<sup>28</sup> Rehnquist immediately went to the 1931 Supreme Court ruling in *Near v. Minnesota*, which had established that prior restraints are suspect under the First Amendment.<sup>29</sup>

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<sup>23</sup> Prados and Porter, *Inside the Pentagon Papers*, 120.

<sup>24</sup> Rudenstine, *The Day the Presses Stopped*, 100.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, 101.

<sup>27</sup> *Ibid.*

<sup>28</sup> Geoffrey A. Campbell, *The Pentagon Papers: National Security Versus the Public’s Rights to Know* (United States: Lucent Books, 2000), 26-27.

<sup>29</sup> Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Vintage Books, 1991), 90-93.

### *Near v. Minnesota*

It is impossible to talk about the Pentagon Papers without discussing the prior restraint decision handed down in *Near v. Minnesota*. Anthony Lewis has labeled the 1931 First Amendment case as “the Court’s first great press case.”<sup>30</sup> Jay M. Near was a muckraking journalist who started a weekly newspaper in Minneapolis entitled *The Saturday Press*. In his paper, Near often voiced corruption allegations against Floyd B. Olsen, who at the time was the county attorney of Hennepin County, which included Minneapolis.<sup>31</sup> Olsen invoked a state statute called the Public Nuisance Law, which allowed judges to enjoin publications if they fit the criteria of a public nuisance. A judge granted Olsen’s request and *The Saturday Press* was quickly put out of business. Near appealed to the Minnesota Supreme Court, but his claim was rejected. Near was out of options considering his financial situation. However, the American Civil Liberties Union and Robert “Colonel” McCormick rallied to his cause.

The Supreme Court heard arguments in January of 1931. Chief Justice Hughes delivered the opinion of the court, which held that protection against prior restraint was at the heart of the First Amendment. One particular paragraph in the majority opinion, however, acknowledged that prior restraint might be applicable in certain situations. Chief Justice Hughes wrote:

the protection even as to previous restraint is not absolutely unlimited.... When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right...no 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.<sup>32</sup>

“After reviewing the Court’s *Near* decision, Rehnquist advised that, because of the ongoing Vietnam War, the government had a reasonable chance of getting an injunction against the *Times*.”<sup>33</sup> Fred W. Friendly comments that “*Near*’s ultimate legacy was finally realized forty years

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<sup>30</sup> Lewis, *Make No Law*, 90.

<sup>31</sup> *Ibid.*, 91.

<sup>32</sup> Fred W. Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press* (United States: Vintage Books, 1981), 152.

<sup>33</sup> Campbell, *The Pentagon Papers*, 26.

later, almost to the day, in the clash between the power of the presidency of the United States and the *New York Times*.<sup>34</sup>

It is also important to consider the contextual developments in the forty years between the *Near* decision and the Pentagon Papers case. America, in the time between these two cases, witnessed World War II, the development of nuclear weapons, the rise of a national security state, the establishment of the Department of Defense and the Central Intelligence Agency, the advent of television and the growth of mass media, and the Korean and Vietnam Wars. Furthermore, Justices Black and Douglas held an expansive view of protections implicit in the First Amendment.<sup>35</sup> Within this context, the United States pursued its case against the *New York Times*.

### Lower Courts

On June 15, both parties entered Judge Murray I. Gurfein's courtroom in the federal courthouse in Manhattan. Judge Gurfein was a graduate from Harvard Law School and had served in Army Intelligence during World War II. He was later an assistant to Robert H. Jackson, the United States Chief Counsel, at the Nuremberg war crimes trials.<sup>36</sup> Judge Gurfein had been appointed to the district court by Nixon and had taken office just a few days prior to the government's suit against the *Times*. The Pentagon Papers case was his first. The U.S. position was argued by Michael D. Hess, who headed the civil division within the U.S. Attorney's office. During the morning Bickel and Abrams had met with *Times* officials and decided to "concede that the First Amendment to the constitution permitted the government to obtain a prior restraint in narrowly defined circumstances, but insist that those circumstances were not present in this case."<sup>37</sup> Bickel also stressed an inherent authority argument contending that the executive branch could not sue without a congressional statute. This argument, however, was largely defeated after Justice Black reminded him, during oral argument before the Supreme Court, that "congress shall make no law." Hess's main argument surrounded the top secret nature of the documents in question, and that further publication could "result in exceptionally grave injury to the national defense."<sup>38</sup> Judge Gurfein granted the government a temporary restraint, which effectively enjoined the *Times* from further publication. However, he did not order the *Times* to return the documents in their possession and scheduled another hearing for Friday. Judge Gurfein granted the order believing

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<sup>34</sup> Friendly, *Minnesota Rage*, 175.

<sup>35</sup> Campbell, *The Pentagon Papers*, 68.

<sup>36</sup> Rudenstine, *The Day the Presses Stopped*, 105.

<sup>37</sup> *Ibid.*, 103.

<sup>38</sup> *Ibid.*, 105.



that “any temporary harm may result from not publishing is far outweighed by the irreparable harm that could be done to the interest of the United States Government.”<sup>39</sup>

A significant development took place between the two hearings. Ben H. Bagdikian, assistant managing editor for national affairs at the *Washington Post*, obtained four thousand pages of the Pentagon Papers from Daniel Ellsberg. Internally, the debate surrounding publication proceeded in a fashion similar to that of *Times*, which is noted above. However, it is important to consider the position and motives behind the *Post's* publication. Benjamin C. Bradlee, who became executive editor in 1968, had set his sights on transforming the *Post* into one of the nation's great newspapers.<sup>40</sup> He wanted the *Washington Post* to be mentioned in the same breath as the *New York Times*.<sup>41</sup> The Pentagon Papers and the subsequent injunction provided the *Post* with the opportunity to do just that. Publication by the *Post* also provided Bickel with an argument against any penalties that might be levied against the *Times* in the Friday hearing.<sup>42</sup> Also, a complete set of the Pentagon Papers was delivered to Judge Gurfein's chambers without any security attachment, which puzzled Gurfein considering its supposed highly volatile nature.

Throughout the Friday hearing Bickel contended the main point of the government's defense in light of the publication by the *Post*. Bickel commented,

Publication by the *Post* demonstrated the ineffectiveness of using a prior restraint to protect the national security in this case, and the *Post* was now in a scoop the entire Pentagon Papers story while the *Times* was forced to remain idle. The government has claimed that grave danger to the national security would occur if another installment of a story that *Times* had were published. Another installment of that story had been published. The republic stands and it stood for the first three days.<sup>43</sup>

Bickel was clearly arguing against the Government's claim that the publication of the Pentagon Papers would have disastrous effects on national security. Nonetheless, the point of the Friday hearing was to determine whether the temporary order should be lifted or whether the government would be granted a further injunction. Judge Gurfein

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<sup>39</sup> Ibid., 107.

<sup>40</sup> Ibid., 125.

<sup>41</sup> Ibid.

<sup>42</sup> Prados and Porter, *Inside the Pentagon Papers*, 121.

<sup>43</sup> Rudenstine, *The Day the Presses Stopped*, 143.

delivered his decision on Saturday, which stated that the temporary injunction was to be dissolved only after the government had an opportunity to seek a stay from the Second Circuit Court of Appeals.<sup>44</sup> Gurfein's decision claimed that "this case did not present a sharp clash between vital security interests and the right of the *Times* to publish the disputed material, because no cogent reasons were advanced as to why these documents except in the general framework of embarrassment would vitally affect the security of the nation."<sup>45</sup> Also, Gurfein indicated in his decision that he was guided by the majority opinion of Chief Justice Hughes in *Near v. Minnesota*.<sup>46</sup> Appeals Judge Irving R. Kaufman was in his office that Saturday afternoon, on the request of Judge Gurfein, awaiting the government's inevitable appeal. "Kaufman was nationally known for sentencing Ethel and Julius Rosenberg to death in 1951."<sup>47</sup> Kaufman continued the injunction because he did not want to be solely responsible for awarding victory to the *Times*. Consequently, the injunction was extended until Monday, June 21.

On June 23, the appellate court reversed Gurfein's order and sent the matter back to the lower court in order to determine whether items in the Pentagon Papers presented a grave and immediate danger to the United States.<sup>48</sup> Also, at this time, the *Washington Post* was making similar arguments in the U.S. District Court for the District of Columbia. After a short hearing, the court ruled in favor of the *Post*. The government immediately appealed to the appellate court, which reversed the ruling of the lower court and temporarily enjoined the paper from further publication. On Friday, June 25, the nine Supreme Court justices voted five to four to continue the stays, and set June 26 as the day it would hear arguments in the two cases.<sup>49</sup>

### The Supreme Court

The *Times* lawyers notified Solicitor General Erwin Griswold that they intended to appeal to the Supreme Court. They filed a twenty-page petition for a writ of certiorari providing the reasoning for the Supreme Court to review the case. The petition set forth five arguments for granting immediate review. "It was only with its third argument, however, that the *Times* petition finally got to the heart of the case and its basic reason for immediate review."<sup>50</sup> "For the first time in American History, a newspaper has been enjoined from publishing news, and the

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<sup>44</sup> Ibid., 169-171.

<sup>45</sup> Ibid., 171.

<sup>46</sup> Ibid., 174.

<sup>47</sup> Ibid., 181.

<sup>48</sup> Campbell, *The Pentagon Papers*, 36.

<sup>49</sup> Ibid., 37.

<sup>50</sup> Rudenstine, *The Day the Presses Stopped*, 261.

continuation of the prior restraint imposes an unstoppable burden on a free press.”<sup>51</sup> This was the *Times* most powerful claim and would serve as the constitutional issue debated in the court. In the lower courts, the government had failed to prove that further publication would threaten national security; however, the *Times* was still under injunction. The petition seeking review was submitted on Thursday, June 24. “By Friday, Chief Justice Burger, Justices Harlan, White, and Blackmun favored restraining the both papers until the fall.”<sup>52</sup> Justices Black, Douglas, Brennan, and Marshall, on the other hand, opposed any continuation. Justice Stewart broke the tie and the Court agreed to review both cases immediately. Consequently, the lawyers of both sides only had about twenty hours to prepare their briefs and oral arguments.

Solicitor General Griswold’s briefs laid out eleven items he felt had the best chance of convincing the court that further publication would cause irreparable harm to U.S. national security.<sup>53</sup> The eleven points stressed how further publication would prove harmful to national security and hinder future attempts to successfully resolve the conflict.<sup>54</sup> “The sealed brief concluded by emphasizing the government’s view that the First Amendment is not absolute, meaning there are instances in which the right of the press to publish material must be weighed against the government’s right to conduct negotiations and wage war.”<sup>55</sup>

The *Times* briefs merely reiterated the position that had been taken and maintained in the lower courts, which argued that the government had failed to justify prior restraint. Bickel and the *Times* continued to concede the fact that the First Amendment did not absolutely prohibit prior restraints on the press. This concession is arguably the most significant development throughout the cases’ litigation. The oral arguments proceeded along these basic claims. Both lawyers were peppered by a number of questions from one justice or another. Justice Stewart, however, was the most vocal throughout in his attempt to break the case down to the issue at hand. One of Justice Stewart’s questions embodies the issue of prior restraint and its permissibility under the First Amendment as laid out by Chief Justice Hughes in the *Near* decision. Justice Stewart asked,

Solicitor Griswold, your case depends upon the claim, as I understand it, that the disclosure of this information would

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<sup>51</sup> *Ibid.*, 261.

<sup>52</sup> *Ibid.*, 263.

<sup>53</sup> University of Southern California Annenberg Center for Communication Leadership, “Top Secret: The Battle for The Pentagon Papers,” <http://www.topsecretplay.org> (accessed Dec 2, 2010).

<sup>54</sup> Rudenstine, *The Day the Presses Stopped*, 269–271.

<sup>55</sup> Campbell, *The Pentagon Papers*, 41.

result in an immediate grave threat to the security of the United States of America, and basically this case comes down to a fact case, and that the issues here are factual issues?<sup>56</sup>

Solicitor Griswold conceded the point, but throughout the remainder of his argument continued to define the threat of future publication in vague rhetoric. William R. Glendon, arguing for the *Post*, commented during his argument that “this case has been about broad claims and narrow proof.”<sup>57</sup> This question also alluded to the argument which Bickel and the *Times* had been making throughout, which contended that the government had failed to provide the factual evidence justifying prior restraint. Bickel’s oral argument, consequently, was consistent with the position that he had maintained throughout the legal process.

### The Decision

John Prados comments that “in the Pentagon Papers case the Supreme Court had to decide very quickly whether, notwithstanding the First Amendment, the government was entitled to an injunction to stop newspapers from publishing secrets about the ongoing war.”<sup>58</sup> The Court announced its decision in *New York Times Co. v. United States* on June 30, 1971. In a six-to-three decision, the Court held that the government had failed to provide adequate evidence justifying prior restraint. The three-paragraph per curiam (no written majority opinion) decision was accompanied by nine separate opinions.<sup>59</sup> “The short decision held that there was a heavy presumption against the constitutional validity of prior restraints of expression and that the government had not met its “heavy burden” of showing justifications for a prior restraint of the press.”<sup>60</sup> The *Times* and *Post*, therefore, were free to continue publication. The long-term significance of the decision, however, was that it left room for the justification of prior restraints in matters concerning national security. Justices Black, Douglas, Brennan, Stewart, White, and Marshall concurred while Chief Justice Burger, Justices Harlan and Blackmun dissented. The opinion of Justice Black, which was joined by Justice Douglas, stands out above the others due to his absolutist views concerning the First Amendment. In his concurring opinion Justice Black commented that “every moment’s continuance of

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<sup>56</sup>The Oyez Project, *New York Times v. United States*, 403 U.S. 713 (1971) available at: [http://oyez.org/cases/1970-1979/1970/1970\\_1873](http://oyez.org/cases/1970-1979/1970/1970_1873) (accessed, November 25, 2010).

<sup>57</sup> *Ibid.*

<sup>58</sup> Prados and Porter, *Inside the Pentagon Papers*, 198.

<sup>59</sup> *Ibid.*, 198.

<sup>60</sup> *Ibid.*

the injunctions against these newspapers amounts to a flagrant, indefensible violation of the First Amendment.”<sup>61</sup>

Justices Stewart and White stated that “a prior restraint could only be issued when the government proved that disclosure would cause direct, immediate, and irreparable damage to the nation.”<sup>62</sup> Justice Stewart stated that the President had enormous power in the area of defense and international relations and the only effective restraint may lie in an enlightened citizenry.<sup>63</sup> Justices Brennan and Marshall’s opinions were not joined but they concurred along similar lines as Justices Stewart and White. The dissenting opinions of Justices Harlan, Burger, and Blackmun focused on the haste in which the litigation was conducted. However, they did claim “that courts should defer to the executive branch on national security matters.”<sup>64</sup>

Michael J. Gaffney notes “that since there was no written majority opinion and the nine opinions do not reflect a consensus on how a court should determine whether the government has met its “heavy burden,” the decision leaves room for future courts to maneuver.”<sup>65</sup>

### Subsequent developments in an ongoing battle

The decision handed down by the Supreme Court did not effectively end the battle between the government’s national security claims and the public’s right to know. Anthony Lewis notes that in the subsequent years following the Pentagon Papers, the Supreme Court became increasingly deferential to the executive branch of the government whenever it claimed national security was at risk.<sup>66</sup> Therefore, the Pentagon Papers case “did not eradicate the government’s interest in prior restraints on publication of classified information and did not diminish the national security state’s addiction to classified information.”<sup>67</sup> The government’s continued desire to conceal and manipulate information has resulted in massive over-classification and broad national security claims.

One such broad claim took place in 1979 when the government was able to enjoin *The Progressive Magazine* from publishing an article entitled “The H-Bomb Secret: How We Got it and Why We’re Telling It.”<sup>68</sup> The government “insisted that the article presented an immediate,

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<sup>61</sup> *Ibid.*, 199.

<sup>62</sup> Rudnestine, *The Day the Presses Stopped*, 313.

<sup>63</sup> *Ibid.*, 309.

<sup>64</sup> *Ibid.*, 320.

<sup>65</sup> Prados and Porter, *Inside the Pentagon Papers*, 200.

<sup>66</sup> Anthony Lewis, *Make No Law*, 241.

<sup>67</sup> Prados and Porter, *Inside the Pentagon Papers*, 202.

<sup>68</sup> *Ibid.*, 205.

direct, and irreparable harm to the interests of the United States because the article's synthesis of the information gave it a new and different character than it otherwise had."<sup>69</sup> The broad national security rhetoric is nearly identical to that employed against the *Times* in the Pentagon Papers case. The evidence before the court even included assertions from both the secretary of defense and the secretary of state claiming that the article's publication would irreparably impair the national security of the United States.<sup>70</sup> A federal district judge in Washington asserted that "the article could possibly provide sufficient information to allow a medium-size nation to move faster in developing a hydrogen weapon, and that a ruling against the United States could pave the way for thermonuclear annihilation for us all."<sup>71</sup> While the appeal was pending, the government was forced to drop the litigation once it became apparent that the alleged secret was already in the public domain. Nonetheless, the government was able to effectively enjoin the publication for six months with broad national security claims. Further government employment of prior restraint against the press, however, has been, and is likely to continue to be rare.<sup>72</sup> Prior restraint claims since the Pentagon Papers have largely focused on individuals and the violation of secrecy agreements.

### *Snepp v. United States*

During the late 1970s and 1980s there were several instances where the government invoked prior restraint in order to prevent former CIA employees from publishing knowledge ascertained during the course of their careers. The most famous of these was the case of Frank Snepp. "When Snepp went to work for the CIA in 1968, he signed a secrecy agreement promising that he would not publish any information or material relating to the Agency, its activities or intelligence activities generally, either during or after term of employment without specific prior approval by the agency."<sup>73</sup> However, in 1977 Snepp wrote a book entitled *Decent Interval*, which was critical of the American evacuation of South Vietnam. The government sued Snepp for violating his secrecy agreement and not seeking a republication review and demanded that he turn over all profits derived from publication. Both the district and appellate courts sided with the government. "Sneep sought Supreme Court review, but the composition of the Court had changed in the several years since the

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<sup>69</sup> Rudenstine, *The Day the Presses Stopped*, 353.

<sup>70</sup> Prados and Porter, *Inside the Pentagon Papers*, 206.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, 216.

<sup>73</sup> *Ibid.*, 207.

Pentagon Papers case.”<sup>74</sup> William Rehnquist, who had encouraged the government to pursue an injunction against the *Times*, was now a Supreme Court Justice. Snepp’s petition argued that his secrecy agreement was unenforceable because it was a prior restraint on speech protected by the First Amendment.<sup>75</sup> However, in a per curiam opinion the court dismissed Snepp’s First Amendment claims and affirmed the decision of the lower courts. “Justice Steven’s dissent warned that a drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen’s right to criticize his government.”<sup>76</sup>

### **Bradley Manning and Wikileaks**

A recent disclosure of highly sensitive classified material will perhaps one day eclipse the scope of the *Times* release. In the forty years between the two cases there have been significant developments in the national security contextual framework. For example, the attacks on September 11, and the subsequent “War on Terror” has led to the expansion of executive power and secrecy.<sup>77</sup> Furthermore, the government has created the Department of Homeland Security while Congress has passed multiple Intelligence Authorization Acts, which provide substantial protections against the disclosure of classified information.<sup>78</sup>

Bradley Manning is a twenty-two year old intelligence analyst in the United States Army, who in the summer of 2010 released around 260,000 diplomatic cables to the whistleblower website Wikileaks. Manning was arrested on July 29, 2010 and transferred to a military prison in Virginia. His case is still pending a military tribunal. Public and political attention, therefore, has shifted from Manning to Julian Assange, the founder of Wikileaks, who began releasing the cables in November. His actions have sparked condemnation from the both the State Department and the Obama administration. Daniel Ellsberg, on the other hand, has expressed praise for both Assange and Manning during several public media appearances. The governments national security claims, prior to the document release, were remarkably similar to those alleged during the Pentagon Papers case. The United States, through foreign and corporate cooperation, has targeted the financial capacity of the website in an attempt to prevent further publication. However, the documents have been in the public domain for some time, and as Alexander Bickel so eloquently noted: “The republic still stands.”

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid., 208.

<sup>76</sup> Frank Snepp, *Irreparable Harm: A Firsthand Account of How One Agent Took on the CIA in An Epic Battle Over Free Speech* (United States: University of Kansas Press, 1999), 343-344.

<sup>77</sup> Prados and Porter, *Inside the Pentagon Papers*, 214.

<sup>78</sup> Ibid., 215.

So, what is the lasting significance of the Pentagon Papers in regard to civil liberties? The historical significance of the decision is that it continues to provide the precedent by which to determine the validity of prior restraint under the First Amendment when it is employed by the government in the name of national security. The Court held that there was a heavy presumption against the constitutional validity of prior restraints on expression and that the government had failed to meet its heavy burden. However, the decision left room for future Courts to maneuver. "Excessive secrecy in the name of national security can undermine constitutional rights and civil liberties."<sup>79</sup> Justice Stewart was correct when he noted "that the only effective restraint may lie in an enlightened citizenry." The only way to maintain such balance is with a free and informed press, which thanks to the Pentagon Papers case is free from prior restraint.

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<sup>79</sup> Ibid., 217.