ESSAYS

THE PENTAGON PAPERS AFTER FOUR DECADES

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Forty years have passed since the Supreme Court affirmed the First Amendment right of the press to publish materials from, and articles about, a multivolume top secret study prepared for the Pentagon in the midst of the war in Vietnam about how the United States had come to be embroiled in that conflict.[1] Since the relief sought by the government was an injunction against publication of what had become known as the Pentagon Papers and the ruling was rooted in the "heavy presumption" against such prior restraints on speech, we cannot know how the case would have been decided if it had arisen in the context of a criminal prosecution.[2]

What we do know is that both from a jurisprudential and an on-the-ground practical perspective, the victory of the press was enormous in impact. From the former point of view, when one reads the opinion of the six jurists who voted for the *New York Times* and, in particular, the critical and ultimately controlling concurring opinion of Justices Stewart and White, a test is articulated that is so nearly impossible to meet—no prior restraints permitted in the absence of proof that publication "will surely result in direct, immediate and irreparable damage to our Nation or its people"[3]—that it is difficult to imagine it ever being met. It is no surprise that the

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1. New York Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 713 (1971) (per curiam).

2. Dictum in the concurring opinion of Justices White and Stewart asserted that they "would have no difficulty" sustaining a criminal conviction of the *Times* "on facts that would not justify . . . the imposition of a prior restraint." *Id.* at 737 (White, J., concurring).

3. *Id.* at 730 (Stewart, J., concurring).

solitary case in which the government even sought to do so in the four decades since the *Pentagon Papers* case related to an article describing the construction of a hydrogen bomb, and that even there, the case was dropped before an appeal was taken from the entry of a prior restraint in light of publication of similar information elsewhere.[4]

But the victory in the *Pentagon Papers* case did not come easily. The vote was close (6–3) and the decisive votes of Justices White and Stewart were accompanied by a concurring opinion by those Justices observing that it was "not easy" for them "to deny relief based on the government's good-faith claims . . . that publication will work serious damage to the country."[5]

I first wrote about the *New York Times* case in the spring of 1981, ten years after I was co-counsel to the *Times* and had been asked by the magazine to assess the impact of the case.[6] Three decades have passed and while my general views are similar to those expressed then, I think less these days about the impact of the case than the vagaries of litigation and the utter unpredictability of the events in it. Who amongst us who tried the case, for example, could have predicted that the government would persuade a clear majority of the Court that significant harm would befall the nation if the *New York Times* was permitted to continue publishing and commenting on portions of the Pentagon Papers, but that it would still lose the case? Or that a strong judicial consensus that significant harm would result if publication continued would be followed by *no* harm at all? Who, as well, would have predicted that the failure of the government to review a critical document with care would lead it to argue the case,

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4. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (granting a preliminary injunction against the magazine *Progressive*, which planned to publish an article titled, *The H-Bomb Secret: How We Got It–Why We're Telling It*, containing detailed plans for the construction of a hydrogen bomb). Ironically, Professor Alexander Bickel, the chief counsel to the *New York Times* in the *Pentagon Papers* case, had suggested in one oral argument that a prior restraint might "possibly" be constitutionally entered if "the hydrogen bomb turns up." Transcript of Oral Argument of Alexander Bickel, *Pentagon Papers*, 403 U.S. 713, *reprinted in* 2 JAMES C. GOODALE, THE NEW YORK TIMES COMPANY VS. UNITED STATES: A DOCUMENTARY HISTORY 869–880 (Arno Press 1971); *see also* FLOYD ABRAMS, SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT 56–58 (Penguin Group 2005) (discussing the government's attempt to obtain a prior restraint order against *Progressive*'s publication of *The H-Bomb Secret* article).

5. *Pentagon Papers*, 403 U.S. at 733; *see also* ABRAMS, *supra* note 4, at 47.

6. Floyd Abrams, *The Pentagon Papers a Decade Later*, N.Y. TIMES MAG., June 7, 1981, at 22.

and the Court to decide it, on the basis of a pervasive misapprehension of what documents the *New York Times* actually had? Or that, but for the fortuity that a lower court had rendered a later-reversed ruling on the issue of the right of journalists to protect their confidential sources,[7] the *New York Times* might have been gravely compromised in its efforts to defend the case?

One conclusion I offered in 1981 I would repeat without qualification today. I concluded then that "[n]one of the dire consequences of publication foreseen by the government came to pass."[8] Preparing my article, I had interviewed all the government witnesses in the case who would speak with me. None could cite a single example of harm sustained by the nation as a result of publication, and some—a number, in fact—commented on benefits from publication.[9] Indeed, Erwin Griswold, then-United States Solicitor General who argued the case for the government and drafted briefs claiming that further publication of portions of the top secret documents made available by Daniel Ellsberg to the *New York Times* would "irreparably" damage the nation, observed in an article he wrote in the *Washington Post* in 1989 that he had "never seen a trace of a threat to the national security from their publication"[10] and in another article, two years later, that "[i]n hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers."[11] Professor David Rudenstine reached an identical conclusion in his authoritative study of the case in 1996.[12]

Most tellingly, the government itself appeared to agree with this conclusion. Not many months after the case ended, the Department of Justice took a closer look at the question of whether publica-

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7. Caldwell v. United States, 434 F.2d 1081, 1089–90 (9th Cir. 1970), *rev'd*, 408 U.S. 665 (1971) (holding that the First Amendment does not relieve a reporter from obligations to respond to a grand jury subpoena and to answer questions relevant to a criminal investigation).

8. Abrams, *supra* note 6, at 24.

9. *E.g.*, *id.* at 25, 72 (observing that a number of then-Congressmen considered the publication of the Pentagon Papers critical to their understanding of the war and for determining how to vote on war-related matters).

10. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

11. Erwin N. Griswold, Op-Ed., *No Harm Was Done*, N.Y. TIMES, June 30, 1991, at E15.

12. DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE 328–29 (1996) (stating that publication of the Papers had "no impact on the course of the war").

tion had done any harm. A particularly powerfully phrased affidavit submitted by the United States in the case against the *Washington Post* had been that of Lieutenant General Melvin Zais of the Joint Chiefs of Staff.[13] In the affidavit, Zais stated that publication had the potential of "causing exceptionally grave damage to the national security of the United States and grave damage to the well-being and safety of its deployed armed forces in Southeast Asia."[14] When Assistant Attorney General Robert Mardian, in the course of preparing an Espionage Act case against Ellsberg, asked for backup in December 1971, he dismissed a memorandum written in support of the affidavit as "totally inadequate."[15]

> The reasons he cited were the same as those that had plagued the government's case at the Pentagon Papers trial. Although the assessment states that the compromise of the study "had a severely adverse impact on the defense interests of the United States," the injuries described therein primarily concern internal political matters in Vietnam and situations which are embarrassing to this country, but which cannot fairly be termed injuries to our defense interests. Furthermore, the injuries described are conjectural and highly speculative, and any causal relationship between the compromise of the study and such injuries is, at best, attenuated and probably incidental.[16]

Well said, yet for all that, what I now think none of us who earlier commented on the case—certainly not I—have emphasized enough is that while the government lost the case, it succeeded in persuading a clear majority (and perhaps the entirety) of the Court that notwithstanding that the most recent materials in the Pentagon

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13. Affidavit of Melvin Zais, United States v. Wash. Post Co., 403 U.S. 713 (1971) (no. 1885) (on file with author); *see also* Brief for Respondents at 6, United States v. Wash. Post Co., 403 U.S. 713 (1971) (No. 1885), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/wpbrief.pdf; RUDENSTINE, *supra* note 12, at 197–99.

14. Affidavit of Melvin Zais, *supra* note 13; *see also* RUDENSTINE, *supra* note 12, at 197.

15. ABRAMS, *supra* note 4, at 51 (quoting Memorandum from Assistant Attorney General Mardian (Dec. 1971) (on file with author)).

16. *Id.* at 51–52.

Papers had been written three years before publication of any of it in the press, significant harm would nonetheless occur as a result of the publication that the government sought to suppress. Justices Black and Douglas, the two most resolutely absolutist defenders of the First Amendment on the Court, acknowledged that the "disclosures may have a serious impact."[17] Justices White and Stewart, whose votes ultimately led the Court to its 6–3 decision in favor of the *New York Times*, concluded that they were "confident" that publication "*will* do substantial damage to public interests."[18] Justice Blackmun concluded his chilling dissenting opinion with the observation that further publication could clearly result in great harm to the nation, including "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiations with our enemies . . . ."[19] And there is no reason to believe that the other two dissenters—Chief Justice Burger and Justice Harlan—did not share those sentiments.

How catastrophic a picture did the government paint of the harm that continued publication would do? The first draft of Justice Marshall's concurring opinion tells the tale: "If the government believes the assertions it is making in this Court," he wrote, "then the newspapers, their publishers and some of their staff and editors could in good faith be prosecuted" under the Espionage Act.[20] In fact, Marshall wrote, "given the announced intention of the newspapers to publish additional stories" based upon the Pentagon Papers, "it would appear that there is a conspiracy within the staffs of the *Washington Post* and *New York Times* to violate that statute."[21] The representations by the government began with an affidavit by J. Fred Buzhardt, the General Counsel of the Department of Defense, who opined that the two days of publication by the *New York Times* of excerpts from the study and associated commentary that had already occurred had "prejudiced the defense interests of the United States" and that further publication would "result in irreparable injury to the

17. *Pentagon Papers*, 403 U.S. 713, 722 (1971) (Black, J., concurring).

18. *Id.* at 731 (White, J., concurring) (emphasis added).

19. *Id.* at 762 (Blackmun, J., dissenting) (quoting United States v. Wash. Post Co., 446 F.2d 1327, 1330 (D.C. Cir. 1971) (Wilkey, J., dissenting), *aff'd, sub nom*. *Pentagon Papers*, 403 U.S. at 713).

20. ABRAMS, *supra* note 4, at 49 (quoting Justice Marshall's first draft of his opinion) (draft copy on file with author).

21. *Id.*

national defense."[22] Government witnesses sought to persuade the courts of the accuracy of those assertions. The government filed a secret brief in the Supreme Court raising the ante still further, asserting that the revelation of materials set forth in the four "negotiating volumes" of the Pentagon Papers—volumes that detailed efforts of the United States to extricate itself from the Vietnamese conflict—would do immeasurable harm to the nation.[23] It was this argument that was most relied upon by Solicitor General Griswold in both his brief and in his oral argument. Griswold not only addressed that issue first in his brief but wound up his oral argument by referring to materials in the Pentagon Papers "which will affect the problem of the termination of the war in Vietnam [and] . . . the return of prisoners of war."[24]

In the brief itself, Griswold had summarized the issue by stating that interference with ongoing negotiations was the rub of the problem.

> These negotiations, or negotiations of this sort, are being continued. It is obvious that the hope of the termination of the war turns to a large extent on the success of negotiations of this sort. One never knows where the break may come and it is of crucial importance to keep open every possible line of communication. Reference may be made to recent developments with respect to China as an instance of a line of communication among many which turned out to be fruitful.
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> The materials in these four volumes include derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to nations or governments. The publication of this material is likely to close up channels of commu-

22. Affidavit of J. Fred Buzhardt, *Pentagon Papers*, 403 U.S. 713 (1971), *reprinted in* 1 JAMES C. GOODALE, THE NEW YORK TIMES COMPANY VS. UNITED STATES: A DOCUMENTARY HISTORY 3–4 (Arno Press 1971).

23. Brief for the United States (Secret Portion) at 4–5, *Pentagon Papers*, 403 U.S. 713 (1971) (Nos. 1873, 1885).

24. Transcript of Oral Argument at 81, *Pentagon Papers*, 403 U.S. 713 (No. 1873).

> nication which might otherwise have some opportunity of facilitating the closing of the Vietnam war.[25]

And that

> [f]or the past many months, we have been steadily withdrawing troops from Vietnam. The rate at which we can continue this withdrawal depends upon the extent to which we can continue to rely on the support of other nations, notably South Vietnam, Korea, Thailand, and Australia. If the publication of this material gives offense to these countries, and some of them are notably sensitive, the rate at which our own troops can be withdrawn will be diminished. This would be an immediate military impact, having direct bearing on the security of the United States and its citizens.[26]

That the government failed to persuade the Court that the publication of such materials would, in the language of the critical concurring opinion of Justices Stewart and White, "surely result in direct, immediate and irreparable harm to the Nation or its people"[27] is certainly the central teaching of the case. As Professor John Cary Sims, the author of a particularly incisive study of the case, concluded:

> The fatal defect in the Government's case—and one that fully justified the decision by Justices Stewart and White to allow the resumption of publication despite their statements that the Government was correct in its allegations about at least some of the documents—was an almost total default by the Government in its efforts to demonstrate that injury would be a direct and immediate result of publication.[28]

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25. Brief for the United States (Secret Portion), *supra* note 23, at 4–5.

26. *Id.* at 5.

27. *Pentagon Papers*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

28. John Cary Sims, *Triangulating the Boundaries of* Pentagon Papers, 2 WM. & MARY BILL RTS. J. 341, 426 (1993).

But to me, as a practicing lawyer who participated in the case, it is harder to concentrate on the issue of what harm publication of the negotiating volumes *might* have done than on the reality that the *New York Times* never had those volumes in the first place.

Early in the case, the government sought the production of all the classified materials in the *New York Times*' possession from the Pentagon Papers.[29] It needed to know, it claimed, what materials the *New York Times* had in order to prepare for a hearing on the government's motion for a preliminary injunction.[30]

In an affidavit filed with the court, I argued that the production the government sought could not be made without revealing the identity of the *New York Times*' source (Ellsberg, whose name was then secret) since his fingerprints were on the copy in the *New York Times*' possession.[31] In support of our opposition, I urged in a brief submitted to the district court that the case that was "pre-eminent" in the field was *Caldwell v. United States*,[32] a then-recently decided Ninth Circuit ruling, holding not only that the First Amendment protected *New York Times* reporter Earl Caldwell from being required to reveal his confidential sources, but that he did not have to appear before a federal grand jury at all.[33] Writs of certiorari had been granted by the Supreme Court in *Caldwell*[34] and in two other cases at the time our brief was filed,[35] but as of that moment *Caldwell* was good law.

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29. Plaintiff's Memorandum in Support of its Motion for the Production of Documents, United States v. New York Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971), *reprinted in* GOODALE, *supra* note 22, at 221–23.

30. *Id.*

31. Affidavit of Floyd Abrams, United States v. New York Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971), *reprinted in* GOODALE, *supra* note 22, at 249–50.

32. Caldwell v. United States, 434 F.2d 1081, 1089 (9th Cir. 1970) (holding that a reporter cannot be held in contempt for failure to appear when there is nothing for him to testify to that has not already been made public), *rev'd*, 408 U.S. 665 (1971).

33. *Id.* at 1090; *see also* Memorandum of Defendant New York Times Company in Opposition to Motion for Production of Documents, United States v. New York Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971), *reprinted in* GOODALE, *supra* note 22, at 239.

34. United States v. Caldwell, 402 U.S. 942 (1971) (granting certiorari).

35. Branzburg v. Pound, 461 S.W.2d 345, 348 (Ky. 1970) (holding a state statute did not permit a journalist to refuse disclosing confidential sources to a grand jury after being subpoenaed), *cert. granted, sub. nom.* Branzburg v. Hayes, 402 U.S. 942 (1971), *aff'd*, 408 U.S. 665 (1972); *In re* Pappas, 266 N.E.2d 297, 302–03 (Mass. 1971) (ruling that journalists do not have a constitutional privilege to refuse to appear and to testify after being subpoenaed by a grand jury), *cert. granted*, 402 U.S. 942 (1971), *aff'd*, *sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972).

In oral argument on the motion, I urged the Court to follow *Caldwell*,[36] and federal district Judge Murray Gurfein, in the midst of close questioning, observed that the case had established a "tremendous privilege" for newspapers. Of that, he said, there was "no doubt."[37]

Ultimately, Judge Gurfein persuaded both sides to agree to a Solomonic solution: the *New York Times* would not turn over the documents it had obtained from Ellsberg. It would, however, tell the government what documents were in its possession.[38]

And so we did. But if the *Caldwell* ruling, reversed a year later in *Branzburg v. Hayes*,[39] had not been citable when the *Pentagon Papers* case was argued, we would have had far less powerful authority to cite to Judge Gurfein. And if he had ordered the *New York Times* to turn over to the government its original copy of the Pentagon Papers with Ellsberg's fingerprints on them, the very nature of the case would have turned dramatically against the *New York Times*.

Had the court ordered the *New York Times* to turn over its copy of the Pentagon Papers to the government, covered as they were with Ellsberg's fingerprints, I have no doubt the newspaper would have refused. It would have concluded that it had no other choice in order to protect its source. Had the order been disobeyed, the court could have sanctioned the *New York Times* severely, possibly thwarting or at least limiting its ability to defend itself in the action. And whatever those sanctions, the nature of the case as it reached the Supreme Court would have been entirely different, with the *New York Times* viewed as having arrogantly arrogated to itself not only the right to make national security determinations contrary to those of the Department of Defense but to ignore binding court orders. While the Supreme Court might let the *New York Times* decide what to print, it would never allow it to decide which court orders to obey. Worse yet, by defying a court order of Judge Gurfein, the *New York*

36. Transcript of Hearing of Argument on Production of Times copy of Pentagon Papers, United States v. New York Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971), *reprinted in* GOODALE *supra* note 22, at 282–91.

37. *Id.* at 289.

38. *Id.* at 295.

39. Branzburg v. Hayes, 408 U.S. 665, 667 (1972) (reversing *Caldwell* and holding that the First Amendment is not violated by requiring journalists to appear and testify before state or federal grand juries).

Times would have entered the Supreme Court in impossibly compromised circumstances. It was difficult enough to lure Justices White and Stewart barely over the line to vote for the *New York Times*. Arguing the case for an entity already in contempt of court (whether Judge Gurfein had or had not used those words) would have made success in that effort far less likely.

But Judge Gurfein saved the day and in the document I drafted describing the documents in the *New York Times*' possession, we began by stating that "[t]he following is an inventory list of materials in The New York Times's possession relating to the Vietnam Archive commissioned by Secretary of Defense McNamara" and concluded that "the Times has no other materials in its possession relating to this Archive."[40] That unambiguous language was not intended as some sort of hint as to what Ellsberg had made available to the *New York Times*; it was full disclosure that the paper had *no other material* than that listed. We then set forth twenty-eight topics covered by the documents in the *New York Times*' possession. From the first listing ("United States Policy in Indochina 1940 to 1950"[41]) to the final one ("A Summary of the Command and Control Study on the Tonkin Gulf Incident"[42]) none could possibly have related to negotiations to end the war. Nor did the government ever ask for clarification, if any was needed, as to just what documents the *New York Times* had received.

Nonetheless, the government pressed harder in the Supreme Court on the potential harm to the diplomatic relations between the United States and foreign nations from the revelation of materials in the "negotiating volumes" than on anything else.[43] And when, on the twentieth anniversary of the Pentagon Papers, former Solicitor General Griswold (having finally learned that the negotiating volumes had never been in the *New York Times*' possession) came to discuss it, he disparagingly referred to the case as one involving a "phantom decision" since it had wrongly assumed inaccurate facts.[44]

That was an ungenerous judgment from counsel to the party that had been told precisely what documents the *New York Times* had

40. Appendix *infra* 17–18.
41. Appendix *infra* 17.
42. Appendix *infra* 18.
43. *See* Brief for the United States (Secret Portion), *supra* note 23, at 14–17.
44. *See* Griswold, *supra* note 11.

in its possession—and therefore which documents it did not have—and had ignored that information in its submission to the Supreme Court. But it makes the case no less authoritative, no less binding and, in a sense, all the more important. For if material such as the government claimed the *New York Times* possessed was insufficient to warrant a prior restraint, it seems all the less likely that almost any news published by the press will be enjoined in the future. That is not a bad result in a case in which the Supreme Court thought, however incorrectly, that it was allowing publication to continue of information likely to inflict significant harm on the nation.

ESSAY APPENDIX

The following is a list of documents by title of Pentagon Papers in the *Times*' possession, delivered June 17, 1971. *

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The following is an inventory list of materials in The New York Times's possession relating to the Vietnam Archive commissioned by Secretary of Defense McNamara. The Times has no other materials in its possession relating to this Archive.

United States Policy in Indochina 1940 to 1950.

United States Aid for France in Indochina 1950 to 1954.

United States Involvement in the French-Indochina War 1950 to 1954.

The United States and France's Withdrawal from Vietnam 1954 to 1956.

Geneva Conference of 1954.

Origins of the Insurgency in South Vietnam 1954 to 1960.

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* Precise and comprehensive transcription of the document before the Supreme Court. 1 JAMES C. GOODALE, THE NEW YORK TIMES COMPANY VS. UNITED STATES: A DOCUMENTARY HISTORY 292–94 (Arno Press 1971).

The Kennedy Commitments and Programs 1961 to 1963.

The Coup Against Ngo Dinh Diem 1963.

The Advisory Buildup 1961 to 1967.

The Strategic Hamlet Program 1961 to 1963.

Phased Withdrawal of United States Forces 1962 to 1964.

United States-South Vietnamese Relations 1963 to 1967.

United States Programs in South Vietnam 1963 to 1965.

The First Phrase in the Buildup of United States Forces March to July 1965.

Marine Combat Units Go to Danag - March 1965.

Pacification Programs 1965 to 1967.

The Ground War in South Vietnam 1965 to 1968 in three volumes.

The Military Pressures Against North Vietnam in three volumes - February 1964 to January 1965.

The Beginning Stage of the Bombing Campaign Against North Vietnam – January 1965 to March 31, 1968.

Internal Policy Commitments
A chronological list and summary of major internal policy documents for the Roosevelt, Truman, Eisenhower, Kennedy and Johnson Administrations on Indochina.

Public Policy Statements on Indochina for Four Administrations, Truman, Eisenhower, Kennedy and Johnson.

Documents Relating to Studies covering the period 1950 to 1954 including the Geneva Conference of 1954.

Documents Relating to the Kennedy Period including the Coup Against President Diem and covering the years from 1961 to 1963 plus two documents for this period not cited in the

narrative, a message from President Kennedy to Ambassador Lodge and Mr. Lodge's reply, in late 1963.

Documents Relating to the Study of Military Pressures Against North Vietnam February 1964 to January 1965.

Documents Relating to the Study of the Beginning Stage of the Air War Against North Vietnam January 1965 to June 1965.

Documents Relating to the Studies on the Ground and Air Wars for 1965 to 1968.

A Summary of the Command and Control Study on the Tonkin Gulf Incident[.]