

# WHEN EVERYTHING IS CLASSIFIED, NOTHING IS CLASSIFIED

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The *New York Times* was Daniel Ellsberg’s plan B. It’s not bad having the *Times* as a backup plan, but Ellsberg initially hoped that Congressional skeptics of the Vietnam War—Senator Fulbright, Senator McGovern, Senator Mathias, and Congressman McCloskey—would be his allies in disclosing the buried truths of the Pentagon Papers.<sup>1</sup> One by one, they read what only Ellsberg was prepared to show them, but turned him down.<sup>2</sup>

Ellsberg returned to a familiar and receptive journalist, the *Times*’ Neil Sheehan, to whom he had begun leaking information as early as 1968.<sup>3</sup> Ellsberg’s approach then was purposeful—“a leak a day of a closely held secret, something that showed high-level access.”<sup>4</sup> As any plumber knows, today’s leak is tomorrow’s torrent.

When Ellsberg approached Sheehan in 1971, he was sitting on “more than 7000 pages—1.5 million words of historical narratives

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1. DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 326–28 (2002) (Fulbright); *id.* at 358–63 (McGovern); *id.* at 366–68 (Mathias); *id.* at 382–83 (McCloskey).

2. *Id.* at 363, 365–68.

3. *Id.* at 206–09, 365–66 (describing Ellsberg’s leak to Sheehan of secret and top secret government documents in March 1968).

4. *Id.* at 206.

plus a million words of documents—enough to fill a small crate,”<sup>5</sup> as the *Times* would describe it, of accumulated documents and analysis of successive administrations’ assessments of the situation in Vietnam.<sup>6</sup> The archive showed what those administrations knew, what they had disclosed, and what they were blind to.

“The overall effect of the study . . . is to provide a vast storehouse of new information—the most complete and informative central archive available thus far on the Vietnam era,” Hedrick Smith wrote in the article that accompanied the first installment from the Pentagon Papers themselves.<sup>7</sup> Smith did not disclose how the *Times* had acquired the Papers.

Sheehan first saw what Ellsberg had collected and copied on March 12.<sup>8</sup> The *Times* began printing the Pentagon Papers on June 13.<sup>9</sup> A cadre of the newspaper’s top reporters and editors had had three months to assess what had fallen into its hands. Things moved more swiftly after that. By the third installment, the Nixon administration had acquired an injunction halting the *Times*’ further publication.<sup>10</sup> Ellsberg delivered a second collection to the *Washington Post* and the disclosures resumed. The *Post* also was enjoined.<sup>11</sup> The legal process was put on a fast track,<sup>12</sup> argued before the U.S. Supreme Court on June 26 and decided on June 30 with the succinct rebuff that the government had not met the “heavy burden of showing justification for the enforcement of such a [prior] restraint.”<sup>13</sup>

Other writers in this collection of essays will focus on the legal parameters of the decision. However, from a journalistic perspective, this was a vindication for the right to publish. But any sense of victory had to be tempered by the sting of the unprecedented attempt to suppress that right. Nor was the Supreme Court decision a

5. Hedrick Smith, *Vast Review of War Took a Year*, N.Y. TIMES, June 13, 1971, at A1, available at <http://www.nytimes.com/books/97/04/13/reviews/papers-first.html>.

6. *Id.*

7. *Id.*

8. ELLSBERG, *supra* note 1, at 372–74.

9. See Smith, *supra* note 5; see also *id.* at 384–86.

10. Temporary Restraining Order, *United States v. N.Y. Times Co.*, No. 71-2662 (S.D.N.Y. June 15, 1971), reprinted in 1 THE NEW YORK TIMES COMPANY VS. UNITED STATES: A DOCUMENTARY HISTORY 27 (Arno Press 1971).

11. *United States v. Wash. Post Co.*, 403 U.S. 943 (1971) (sustaining a limited temporary restraining order against the *Washington Post*); see also ELLSBERG, *supra* note 1, at 395–96.

12. See ELLSBERG, *supra* note 1, at 402–03.

13. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 713 (1971) (per curiam).

slam dunk; the Court divided 6–3 to lift the injunctions, with Chief Justice Warren Burger, Justice Harry Blackmun, and Justice John Marshall Harlan II dissenting.

The Pentagon Papers were the clear linchpin for the cascading tumble of U.S. Vietnam policy and the Nixon presidency. True, it took the bumbling plumbers of Watergate and President Nixon's audacious Oval Office tapes to further the fall. But it also derived from the degree of encouragement the Pentagon Papers engendered in reporters who would discover and disclose the Watergate cover-up.

“The implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this,” Nixon chief of staff H. R. Haldeman told the President on the day after the *Times*' first disclosure.<sup>14</sup> “It shows that people do things the President wants to do even though it's wrong, and the President can be wrong.”<sup>15</sup>

Presidential fallibility has been almost a staple of reporting on the Achilles' heels of nearly every President since Nixon—Reagan's Iran-Contra scandal,<sup>16</sup> Clinton's impeachment,<sup>17</sup> George W. Bush's purported Iraqi weapons of mass destruction.<sup>18</sup>

Forty years beyond the Pentagon Papers, the media landscape is dramatically altered. In the digital world and the 24/7 news environment, there is a daily barrage of information, analysis, and especially, opinion. The Internet is ubiquitous; we carry it around with us on our cell phones and iPads. It is at once transparent and shallow, dense and deep.

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14. Audio Tape: Richard Nixon, Bob Haldeman 519–001, White House Tapes—Presidential Recording Program, (June 14, 1971, 8:49 AM–10:04 AM), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/nixon.html> (to hear complete audio of the recording, scroll to middle of page and click bold text link that reads: “Audio: Nixon Oval Office meeting with H.R. Haldeman, Monday 14 June 1971, 3:09 P.M.”; for a complete transcript of the audio recording, click on the bold text link that reads “Transcript,” immediately below the Haldeman audio link).

15. *Id.*

16. See, e.g., Bernard Weinraub, *Iran Payment Found Diverted to Contras; Reagan Security Adviser and Aide Are Out*, N.Y. TIMES, Nov. 26, 1986, at A1, available at <http://www.nytimes.com/1986/11/26/world/iran-payment-found-diverted-to-contras-reagan-security-adviser-and-aide-are-out.html>.

17. See, e.g., James Bennet, *Impeachment: The President—Clinton Impeached; President Digs In*, N.Y. TIMES, Dec. 20, 1998, at A1, available at <http://www.nytimes.com/1998/12/20/us/impeachment-the-president-clinton-impeached-president-digs-in.html>.

18. See, e.g., John Diamond, *Iraq Assessments 'Dead Wrong,' Bush Told*, USA TODAY, Apr. 1, 2005, at 7A.

Today's analog for Daniel Ellsberg may be the enigmatic computer hacker Julian Assange. The Vietnam-era Pentagon Papers are echoed in the massive digital dump of government documents and cables on WikiLeaks that began in the latter half of 2010.<sup>19</sup> The WikiLeaks cables—as yet uncounted but numbering in the hundreds of thousands—centered on confidential digital dispatches and documents about the U.S. wars in Iraq and Afghanistan.<sup>20</sup> There are parallels, and there are divergences. The Pentagon Papers were commissioned by the Department of Defense as a focused assessment of U.S. Vietnam policy.<sup>21</sup> The WikiLeaks cables are an undigested harvest of a broad swath of government-originated intelligence. Beyond documents, each trove includes a rich collection of diplomatic cables that can both enlighten and embarrass.

The *New York Times* was one of five international publishers, along with the *Guardian* in Great Britain, *Der Spiegel* in Germany, *El Pais* in Spain, and *Le Monde* in France sought out by Assange to publish WikiLeaks' massive array of materials<sup>22</sup> that were gathered electronically by a disillusioned young American soldier, U.S. Army Pfc. Bradley Manning.

The *Times* addressed WikiLeaks with much the same thoroughness it had used in assessing the Pentagon Papers. It dispatched a top military affairs reporter, Eric Schmitt, to reprise the Neil Sheehan role. Schmitt, like Sheehan earlier, judged that the dispatches he had seen regarding Afghanistan were authentic.<sup>23</sup> Assange, an international gadfly, came off as a bit more suspicious than the intense intelligence insider Ellsberg. In each case, the *Times* protected its interests. Sheehan, unknown to Ellsberg, had secretly copied the Pentagon Papers that Ellsberg had provided access to but

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19. Paul Farhi and Ellen Nakashima, *Pentagon Papers, Part 2? Parallels, and Differences, Exist*, WASH. POST, July 27, 2010, at C1.

20. *Id.*

21. DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE I* (1996).

22. Paul Farhi, *Leak of a Leak Lets New York Times Break WikiLeaks Ban*, WASH. POST, Nov. 30, 2010, at C1.

23. See Clint Hendler, *The Story Behind the Publication of WikiLeaks's Afghanistan Logs*, COLUM. JOURNALISM REV. (July 28, 2010, 2:18 PM), [http://www.cjr.org/campaign\\_desk/the\\_story\\_behind\\_the\\_publicati.php](http://www.cjr.org/campaign_desk/the_story_behind_the_publicati.php); see also *A Note to Readers: The Decision to Publish Diplomatic Documents*, N.Y. TIMES, Nov. 29, 2010, at A10 (explaining the *New York Times*' decision to publish the classified cables from WikiLeaks and justifying the decision based on the important public interest in the illumination of U.S. diplomatic efforts that have been met with varying degrees of success).

had not handed over.<sup>24</sup> The newspaper could have moved forward with or without Ellsberg's further collaboration. The cables obtained by WikiLeaks in contrast, were essentially handed over to the five handpicked news organizations.

"We regarded Assange throughout as a source, not as a partner or collaborator, but he was a man who clearly had his own agenda," *Times* executive editor Bill Keller wrote.<sup>25</sup>

WikiLeaks had, as Keller mused, "generated much speculation that something—journalism, diplomacy, life as we know it—had profoundly changed forever."<sup>26</sup> If it had, it was primarily in the McLuhanesque way of suggesting that the medium was the message more than the content. Pilfering a bulging thumb drive had a "you-can-do-it-too" insouciance compared to Ellsberg's nightly routine of stuffing his briefcase at the Rand think tank, then smuggling the documents back to his safe the next morning after copying them.

Indeed, the WikiLeaks website is solicitous: "We provide an innovative, secure and anonymous way for independent sources around the world to leak information to our journalists."<sup>27</sup> The WikiLeaks flood induced a wave of analytical articles examining parallels, but mostly divergences, from the case of the Pentagon Papers.<sup>28</sup> Floyd Abrams, the First Amendment scholar who appears

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24. See Chris Daly, *Wikileaks and the Pentagon Papers*, PROF CHRIS DALY'S BLOG (Oct. 3, 2010, 10:27 PM), <http://journalismprofessor.com/2010/10/03/wikileaks-and-the-pentagon-papers> (providing a detailed account of the sequence of events surrounding the Pentagon Papers saga).

25. Bill Keller, *The Boy Who Kicked the Hornet's Nest*, N.Y. TIMES MAG., Jan. 30, 2011, at 33, 34.

26. *Id.*

27. WIKILEAKS, <http://213.251.145.96> (last visited Mar. 22, 2011).

28. Compare Fahri & Nakashima, *supra* note 19 (contending that the WikiLeaks and Pentagon Papers controversies are parallel in that they both portrayed ongoing wars in worse terms than government officials publicly acknowledged), with Floyd Abrams, Op-Ed., *Why WikiLeaks Is Unlike the Pentagon Papers*, WALL ST. J., Dec. 29, 2010, at A13 (rejecting claims that the two controversies are parallel and arguing that the *New York Times* withheld the most damaging volumes about diplomatic efforts from its release of the Pentagon Papers for fear of harming U.S. diplomacy, while WikiLeaks apparently releases information regardless of diplomatic considerations), and David Martin, *WikiLeaks vs. the Pentagon Papers*, CBSNEWS.COM (July 26, 2010, 6:06 PM), [http://www.cbsnews.com/8301-503544\\_162-20011710-503544.html](http://www.cbsnews.com/8301-503544_162-20011710-503544.html) (acknowledging differences between the two controversies, including how the WikiLeaks cables provide a detailed view of a foreign war long-perceived by the public as foundering, rather than expose a much worse picture of a foreign war than what was thought to be true by the American public, as was the case with the Pentagon Papers release).

elsewhere in this Issue,<sup>29</sup> recently drew a clear line between the Pentagon Papers that revealed “a pervasive lack of candor by the government to its people” and WikiLeaks that “revels in the revelation of ‘secrets’ simply because they are secret.”<sup>30</sup>

While WikiLeaks finds the act of disclosure an end in itself, Ellsberg sought to transform policy. Notably, Ellsberg retained four volumes of diplomatic cables that accompanied the forty-three-volume Pentagon Papers as his means of protecting the diplomatic process.<sup>31</sup> In contrast, WikiLeaks has titillated us with the insiders’ view of diplomatic confidentialities. One of the benefits over time of WikiLeaks could be its revealing perspective on those not yet in the headlines. When demonstrations against Egyptian President Hosni Mubarak broke out in January of 2011, we knew more about his grip on power—“he seems to be trusting to God and the ubiquitous military and civilian security services”—from the “Wiki-leaked” 2009 cable of the U.S. Ambassador in Cairo, Margaret Scobey.<sup>32</sup> By mid-February 2011, after eighteen days of persistent, massive demonstrations, Mubarak was swiftly and astonishingly gone.<sup>33</sup> Egypt’s military assumed temporary power, pending elections later in the year.<sup>34</sup> The leaked cables added insight for distant observers, but were peripheral to the events. That might not always be the case if leaked documents inflame or exacerbate a situation.

While journalists have a great appreciation for sunshine laws that open the work of governmental bodies to public scrutiny, most are inclined to accept a need for some degree of secrecy. Reporters who travel with troops in combat areas understand the sensitivities of exposure and are generally not inclined to disclose troop strengths and movements. They are willing to make certain tradeoffs for access, as when deployed or embedded with troops.

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29. Floyd Abrams, *The Pentagon Papers After Four Decades*, 1 WAKE FOREST J.L. & POL’Y 7 (2011).

30. Abrams, *supra* note 28.

31. *Id.*

32. E.g., Simon Tisdall, *WikiLeaks Cables Cast Hosni Mubarak as Egypt’s Ruler for Life*, GUARDIAN (LONDON), Dec. 9, 2010, <http://www.guardian.co.uk/world/2010/dec/09/wikileaks-cables-hosni-mubarak-succession>.

33. Charles Levinson et al., *Fall of Mubarak Shakes Middle East*, WALL ST. J., Feb. 12, 2011, at A1.

34. Margaret Coker, Matt Bradley & Tamer El-Ghobashy, *Mideast Unrest Spreads: Protests Target Iran, Bahrain, Libya; Egypt Dissolves Parliament, Sets Elections*, WALL ST. J., Feb. 14, 2011, at A1.

Reporters can, though, be frustrated by the military penchant to classify or over-classify what may already be public knowledge and to hide behind the system of secrecy. In their opinion striking the injunction that prohibited publication of the Pentagon Papers, the Supreme Court Justices were frustrated, too.

“For when everything is classified, then nothing is classified,” wrote Justice Potter Stewart, concurring with the Court’s per curiam decision.<sup>35</sup> “[A]nd the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion.”<sup>36</sup>

Justice Stewart found that “the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion.”<sup>37</sup> But he was not absolutist: “In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.”<sup>38</sup>

Justice Byron White, concurring with the judgment, added, “That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.”<sup>39</sup> White suggested the government already had recourse to criminal code prohibitions against publishing certain photographs and drawings of military installations or classified information about cryptographic intelligence. “I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint,” White wrote.<sup>40</sup>

If the *Times* and the *Post* could not find carte blanche in the Court’s ruling, the Justices’ rebuking should have made the Nixon administration blanch.

“[F]or the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says,” Justice Hugo Black wrote, also in a concurrence. “I believe that every moment’s continuance amounts

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35. *Pentagon Papers*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

36. *Id.*

37. *Id.* at 728.

38. *Id.*

39. *Id.* at 733 (White, J., concurring).

40. *Id.* at 737.

to a flagrant, indefensible, and continuing violation of the First Amendment.”<sup>41</sup>

And there were dissents. Chief Justice Burger viewed the case as an easy call only for “those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject.”<sup>42</sup> The Chief Justice complained that the whole process was being rushed and that certainly he did not have a full grasp of what was being enjoined, nor for that matter was the government itself likely to be certain. “Interestingly, the *Times* explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants!”<sup>43</sup> Burger then concluded, “The *Times* thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.”<sup>44</sup>

Indeed, even after nearly three months of authenticating and assessing, the *Times* still wrestled with the decision of publishing or not. “All the reporters and editors directly involved were strongly for publication,” A. M. Rosenthal wrote in 1991, on the twentieth anniversary of the decision to publish the Pentagon Papers.<sup>45</sup> Rosenthal was the *Times*’ managing editor at the time of publication. But the newspaper’s outside legal counsel, the venerable New York firm Lord, Day & Lord, disagreed and walked out. “But we also had lawyers who understood the First Amendment and the purpose of newspapers,” Rosenthal recounted, citing the newspaper’s chief in-house counsel James Goodale.<sup>46</sup>

The decision fell to publisher Arthur Ochs Sulzberger, Sr., who gave the order to print on June 11, 1971.<sup>47</sup> Two days later the Pentagon Papers were public. Ironically, that same Sunday edition of

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41. *Id.* at 714–15 (Black, J., concurring).

42. *Id.* at 748 (Burger, C.J., dissenting).

43. *Id.* at 751 n.2.

44. *Id.*

45. A. M. Rosenthal, *On My Mind; The Pentagon Papers*, N.Y. TIMES, June 11, 1991, at A23.

46. *Id.*

47. See RUDENSTINE, *supra* note 21, at 56–58 (describing the decision to print the documents and relating that Sulzberger’s announcement of his decision to publish was initially understood by Rosenthal and the *Times*’ Washington Bureau Chief, Max Frankel, as a joke).

the *Times* also included photos of the White House wedding of President Nixon's daughter Tricia.<sup>48</sup>

After the *Times* and *Post* were enjoined, Ellsberg increased his efforts. Reports based on all or part of the Pentagon Papers appeared in the *Boston Globe*, the *St. Louis Post-Dispatch*, the *Los Angeles Times*, the eleven Knight newspapers, the *Baltimore Sun*, the *Christian Science Monitor*, and *Newsday*.<sup>49</sup> The *Globe* and the *Post-Dispatch* were also enjoined;<sup>50</sup> the others were not. The broadcast networks—ABC, CBS, and NBC—reported heavily on the legal battle between the press and the government, but all three turned down Ellsberg's offer to provide them with their own sets of the Pentagon Papers.<sup>51</sup> Broadcast networks, unlike newspapers, use the airwaves under federal licensing.<sup>52</sup>

The leaking of the Pentagon Papers is an ongoing subject of assessment, as we are doing here. Did Ellsberg embolden a generation of leakers? Some, but not battalions. The threat of prosecution has not gone away.<sup>53</sup> The Pentagon Papers did not open the floodgates. Nearly forty years passed between Ellsberg's effort and the efforts of WikiLeaks without anything approaching their magnitude. Investigative journalism rose another notch with the Watergate revelations that brought President Nixon to resignation in 1974. The success of the *Washington Post's* Watergate reporters Bob Woodward

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48. See Nan Robertson, *Tricia Nixon Takes Vows in Garden at White House*, N.Y. TIMES, June 13, 1971, at A1 (accompanying Neil Sheehan's story first publishing the Pentagon Papers on page A1).

49. See Brief of the Respondents at 25, N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971) (No. 1885), 1971 WL 167582 at \*25; RUDENSTINE, *supra* note 21, at 383–84. Some strongly questioned the practicality of government attempts to censor the Pentagon Papers at all. As one newspaper was enjoined by the courts, the Pentagon Papers documents then quickly emerged in another major newspaper that was not yet enjoined. And as that newspaper was enjoined, another newspaper published—on and on. During oral arguments on the government's request to enjoin publication of the Pentagon Papers in the *Washington Post*, Judge Roger Robb of the Court of Appeals for the D.C. Circuit asked the U.S. Solicitor General, "Would you be asking us to ride herd on a swarm of bees?" Fred C. Shapiro, *Comment*, NEW YORKER, July 3, 1971, at 17–18.

50. RUDENSTINE, *supra* note 21, at 384.

51. See *id.* at 127 (explaining Ellsberg's efforts to publicize the Pentagon Papers through broadcast media and noting that the networks' refusal was based on their vulnerability to government sanction under the Communications Act of 1934).

52. Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064 (codified as amended 47 U.S.C. § 151 et seq. (2006)).

53. See, e.g., Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A13 (discussing the Justice Department's search to find avenues to prosecute WikiLeaks founder Julian Assange).

and Carl Bernstein spurred legions of aspiring reporters toward journalism schools which themselves flourished and became academic cornerstones, or at least tuition-rich cash cows, for their universities. The economic downturn of recent years, though, has taken a heavy toll on the news business<sup>54</sup> and costly, time consuming investigative efforts have been pared back dramatically across the media. At the same time, the explosion of the Internet and the proliferation of new media have dissipated journalistic and quasi-journalistic efforts over a broader, irregular, and unregulated landscape. In that environment, the First Amendment makes everyone a publisher and almost no one responsible. Had the Internet been in play in 1971, Ellsberg could have posted the entirety of the Pentagon Papers himself, never involved the *New York Times*, and never forced the courts to address the First Amendment protection of the press.

President Nixon unwittingly voiced the postscript to the Pentagon Papers in one of his recorded Oval Office conversations. Ellsberg had been arrested, tried, and had the charges against him dismissed.<sup>55</sup> In a 1973 conversation with Haldeman and Alexander Haig, the President anguished that “the sonofabitching thief is made a national hero and is going to get off on a mistrial. And the *New York Times* gets a Pulitzer Prize for stealing documents.”<sup>56</sup>

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*Personal postscript.* In the early 1970s, I was a Bonn-based correspondent for Westinghouse Broadcasting. Toward the end of the lengthy Paris peace talks—they stretched from 1968 to 1973—I joined my Paris colleague Bernard Redmont to help cover the talks. After a few days of observing the numbing posturing and pretensions of the diplomats and politicians on both sides, I asked Bernie how he had endured years of reporting on the talks. “Well, the first thing you have to realize,” he said, pausing for broadcaster’s effect, “is that they all lie.”

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54. See, e.g., Richard Pérez-Peña, *Paper Cuts: An Industry Imperiled by Falling Profits and Shrinking Ads*, N.Y. TIMES, Feb. 7, 2008, at C1 (discussing “major downsizing” and “grim financial reports” coming from national newspaper institutions caused by the “shrinking profits and tumbling stock prices” of the recent recession).

55. See Martin Arnold, *Pentagon Papers Charges Are Dismissed; Judge Byrne Frees Ellsberg and Russo, Assails ‘Improper Government Conduct’*, N.Y. TIMES, May 11, 1973, at A1 (indicating that a federal district court judge declared a mistrial in the criminal prosecution of Daniel Ellsberg after the government claimed it lost recorded telephone conversations obtained through wiretapping).

56. ELLSBERG, *supra* note 1, at 457.