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The Pentagon Papers Case: Recovering its Meaning Twenty Years Later

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INTRODUCTION

Twenty years ago—June 1971—the Nixon Administration sued the *New York Times*[1] in an effort to bar it from further publishing excerpts from a top-secret Pentagon study[2] that traced United States involvement in Southeast Asia from 1945 to 1968. It was the first time in the history of our republic that the national government sought to restrain the press from publishing information it already possessed because of national security considerations.[3] During the brief sixteen days[4] that it took the federal courts to resolve the dis-

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This article is drawn from D. RUDENSTINE, THE DAY THE PRESSES STOPPED: A HISTORY OF THE PENTAGON PAPERS CASE, to be published by the University of California Press.

1 New York Times v. United States, 403 U.S. 713 (1971). On June 18, 1971, three days after the government initiated suit against the *Times*, it commenced a prior restraint action against the *Washington Post*. These actions were consolidated before the Supreme Court.

2 This report, which was classified "Top Secret-Sensitive," became popularly known as the Pentagon Papers. It was commissioned by Secretary of Defense Robert S. McNamara in June 1967, and completed in January 1969. There are three published versions of the Pentagon Papers: BEACON PRESS, THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM: THE SENATOR GRAVEL EDITION (1971) (in four volumes); UNITED STATES GOVERNMENT PRINTING OFFICE, UNITED STATES-VIETNAM RELATIONS, 1945-1967: STUDY PREPARED BY THE DEPARTMENT OF DEFENSE (1971) (in twelve volumes); N. SHEEHAN, H. SMITH, E. KENWORTHY & F. BUTTERFIELD, THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES (1971). None of these versions contained the four volumes of the original study, which was bound in forty-seven volumes, that traced the diplomatic history of the Vietnam War from 1964 to 1968. These four volumes were eventually declassified, except for a relatively small amount of material, and are now published. *See* G. HERRING, THE SECRET DIPLOMACY OF THE VIETNAM WAR: THE NEGOTIATING VOLUMES OF THE PENTAGON PAPERS (1985).

3 *New York Times*, 403 U.S. at 725 (Brennan, J., concurring). A judicial order barring the press from publishing material it possesses is termed a *prior restraint*. Historically, prior restraints have been greatly disfavored because of their deep intrusion into first amendment values. *See generally* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981). Emerson, *The Doctrine of Prior Restraint*, LAW AND CONTEMP. PROBS. 648 (1955). For an examination of the reasons the administration claimed warranted a prior restraint action in the *Times* case, see *infra* notes 137-210 and accompanying text.

4 The action against the *Times* was begun on June 15, 1971, and the Supreme Court's decision was announced on June 30, 1971.

pute, two district courts held evidentiary hearings,[5] two other district courts restrained as many other newspapers from publishing reports based on the classified study,[6] two courts of appeals sitting en banc reviewed district court judgments,[7] and the Supreme Court Justices ruled six to three in favor of the press, writing no less than ten opinions.[8]

The Pentagon Papers Case, as it became popularly known as, was the subject of considerable commentary in the daily press and weekly news magazines during the litigation and immediately afterwards. While the matter was in the courts, the prior restraint action overshadowed the story of the Pentagon's classified study itself and was regular front page copy for newspapers and magazines. Following the conclusion of the legal proceedings, the action against the press was the subject of conferences, reflective news commentary, law review articles, and books.[9]

Although there has been a wealth of writing about the case, its significance as one of the most extraordinary affirmations of free press values has never been fully appreciated. Generally, students of the field have concluded that what was important about the outcome of this historic litigation was that the government lost. What is meant by this abbreviated critique is that the government's evidentiary basis for the relief it sought was exceedingly weak or non-existent ("far-

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[5] United States v. Washington Post, No. 71 Civ. 1235 (D.D.C. June 21, 1971); United States v. New York Times, No. 71 Civ. 2662 (S.D.N.Y. June 18, 1971).

[6] A federal district judge issued a temporary restraining order against the *Boston Globe* on June 22, 1971. N.Y. Times, June 23, 1971, at A1, col. 5. Similarly, the *St. Louis Post Dispatch* was restrained from further publication of the Pentagon study on June 26. N.Y. Times, June 27, 1971, at A27, col. 3.

[7] United States v. New York Times, No. 71-1617 (2d Cir. June 23, 1971) (en banc); United States v. Washington Post, 446 F.2d. 1327 (D.C. Cir. 1971) (en banc).

[8] New York Times v. United States, 403 U.S. 713 (1971). Each justice wrote individually in addition to a short per curiam opinion. *Id.*

[9] For a sampling of legal commentary on the Pentagon Papers Case, see Fiss, *Free Speech and The Prior Restaint Doctrine: The Pentagon Papers Case*, in THE SUPREME COURT AND HUMAN RIGHTS (1972). Kalven, *The Supreme Court 1970 Term Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3 (1971); Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 J. OF LAW REFORM 497 (1982); Rubin, *Foreign Policy, Secrecy and The First Amendment: The Pentagon Papers in Retrospect*, 17 HOW. L.J. 579 (1972). There are three books which discuss the case at length. *See* S. UNGAR, THE PAPERS AND THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS (1972). This was written immediately following the litigation, and is the only book exclusively devoted to the case. *See also* P. SCHRAG, TEST OF LOYALTY: DANIEL ELLSBERG AND THE RITUALS OF SECRET GOVERNMENT (1974) and H. SALISBURY, WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES (1980). The former is a history of the government's prosecution of Daniel Ellsberg, but it contains substantial material on the prior restraint actions. The latter is a history of the *Times* that devotes substantial material on the article against the *Times*, especially from the *Time*'s perspective.

fetched" was one respected observer's adjective[10]), and that if the administration had prevailed under these circumstances, it would have meant that the Court had deviated from established legal norms that favored freedom of the press in favor of repressive ones.

Many reasons explain this misconception of the case. The study itself was labeled a history and it ceased with events in 1968, thus giving strength to the perception that the documents in question did not implicate on-going military or diplomatic events. The transcripts and briefs, in which the government set forth its reasons as to why a prior restraint was required to protect the nation's security, were sealed during the litigation and remained so many years thereafter.[11] As a result, no one commenting on the case has had the opportunity to study the government's claims.[12] Because the judges and Justices who wrote opinions in the case respected the government's claims that the disputed material threatened serious national security considerations, they did not review the government's allegations and evidence in their published opinions.[13] The Supreme Court Justices lacked time to agree upon a majority opinion; instead, they wrote individual opinions and six of them joined in a short per curiam opinion.[14] Given the history of President Nixon's acrimonious relations with the press and the aggressive attacks on it during his presidency,[15] it was tempting—one might say irresistible—to conclude that the legal offensive against the *New York Times* and other newspapers was simply part of a coordinated campaign to repress the press.[16] The government's well publicized penchant for abusing the classification process strengthened public suspicion towards the government's allegations that the classified Pentagon Papers study contained information that would jeopardize national security if made public.[17] After

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[10] Fiss, *supra* note 9, at 51. (Professor Fiss's complete statement was: "But these explanations seem now, as they did then, farfetched.").

[11] The sealed record was initially unsealed at the request of Anthony Lewis, the *New York Times* columnist, who initiated government review of the court papers during President Carter's administration. Through the cooperation of former U.S. Attorney Rudolph Giuliani and former Solicitor General Charles Fried, I secured the unsealing of additional court papers. Some phrases, sentences, and paragraphs remain sealed.

[12] The only exception to this is Salisbury, who appears to have had access to the once-sealed transcript of the evidentiary hearing held before Judge Gurfein on June 18, 1971. *See* H. SALISBURY, *supra* note 9, at 304-08.

[13] *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971).

[14] *Id.*; *see also* discussion, *infra* notes 249-257 and accompanying text.

[15] *See infra* notes 22-37 and accompanying text.

[16] The existence of such a coordinated campaign was affirmed by William Safire. *See* W. SAFIRE, BEFORE THE FALL: AN INSIDE VIEW OF THE PRE-WATERGATE WHITE HOUSE 341 (1975).

[17] *See generally* M. HALPERIN & D. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW (1977); Halloran, *Secrecy Label Is Used Too Often By Pentagon, Ex-*

the Court permitted the press to continue to publish the top secret documents and the material was made public, no one perceived the shock waves of harm that the Nixon Administration had predicted would reverberate.[18]

In this anniversary article,[19] my main focus is on the legal significance of the Pentagon Papers Case. I maintain that the important meaning of the case has been drastically discounted. The Supreme Court's decision should not only be understood as a significant affirmation of the right of the press to be free of censorship, but it should also be viewed as one of the most important judicial decisions protecting the press from governmental censorship ever reached by any court in any western democracy.

Even though my primary effort is aimed at recovering the case's significant legal meaning, I also briefly assess its political importance. The Nixon Administration's decision to sue the *Times* constituted a dramatic turning point in the Nixon Presidency, and ultimately led to events that prompted Nixon to engage in a cover-up following the break-in of the Democratic Party headquarters at the Watergate, which in turn forced him to resign the Presidency.[20] Furthermore, this historic litigation constitutes a strong affirmation of democratic values in the ideological struggle between national security with its demands for secrecy, and democracy with its requirement for accountable political processes.[21]

I. THE ADMINISTRATION'S REASONS FOR SUING THE *TIMES*

It is important to fully explore the reasons for the administration's decision to take the legal offensive. This is true because failure

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Aide Testifies, N.Y. Times, June 25, 1971, § 1 at 12, col. 6. As it turned out, the Nixon Administration all but conceded during the litigation that it was prepared to declassify much of the study, but it insisted that it needed forty-five to ninety days to review the 2.5 million words so that the information that it believed threatened national security could be safeguarded. Rosenbaum, *Review of Report Proposed by U.S.*, N.Y. Times, June 23, 1971, at 1, col. 5.

[18] Rosenthal, *What a Free Press Is All About*, N.Y. Times, June 11, 1972, § 4 at 6, col. 1. *But see infra* note 221.

[19] This article draws on much material not previously publicly available. I have had access to the once sealed record in the case (*see supra* note 11) and to the notes and memoranda prepared by Nixon and his former White House aides which were recently made public at former President Richard Nixon's archives (Nixon Presidential Materials Project, Alexandria, Virginia). I have conducted thirty interviews with former members of the Nixon and Johnson Administrations, as well as others. This article also utilizes material obtained from the case files of former Justices Black, Brennan, Douglas (all at the Manuscript Collection at the Library of Congress), and Harlan (Manuscript Collection at Princeton University Library), as well as communications with Justice Blackmun and Chief Justice Burger.

[20] *See infra* notes 275-88 and accompanying text.

[21] *See infra* notes 289-301 and accompanying text.

to accept the fact that national security considerations had a significant impact on the administration's decision to seek a prior restraint obscures the significance of the *Times*'s (as well as the *Post*'s) ultimate triumph in the Supreme Court. If the government is thought to have brought the lawsuit merely as part of a campaign against the press, it becomes more difficult to believe that the government had a reasonably strong claim for a prior restraint, and that the newspapers' victory in the Supreme Court was any more than a prosaic application of well established law in a case where the evidence introduced by the government lawyers was weak. But if the government is seen as having initiated the prior restraint action because of legitimate national security concerns, it becomes more credible that the Nixon Administration had substantial legal grounds for the ruling it sought. From this perspective, the Supreme Court's judgment in favor of the newspapers takes on a wholly different meaning; it becomes an extraordinary decision in which the Supreme Court preferred the newspapers' right to publish over reasonable objections that further publication seriously threatened the national security.

The common belief at the time was[22] (and still is[23]) that the administration sued the *Times* for a prior restraint to intimidate the press.[24] In *The Politics of Lying*,[25] David Wise cited the prior restraint action as a prime example of the Nixon Administration's "unprecedented effort . . . to downgrade and discredit the American press."[26] A 1971 report of the American Civil Liberties Union written by Fred Powledge characterized the prior restraint action as the "most dramatic" part of the Nixon Administration's campaign against press freedoms.[27] The following year, Sanford Unger reported that the "strong presumption of legal observers was that . . . it was impossible to view the crisis over the Pentagon Papers in perspective without considering the overt hostility of the Nixon administration toward the press and the inhibiting effect that hostility had

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22 *See infra* notes 33-37 and accompanying text.

23 2 S. AMBROSE, NIXON—THE TRIUMPH OF A POLITICIAN 1962-1972 (1989); H. PARMET, RICHARD NIXON AND HIS AMERICA (1990).

24 Although the most common view was that the Nixon Administration sued the *Times* to repress the press, others have expressed differing opinions. For example, the investigative reporter Seymour Hersh has asserted: "The Pentagon Papers posed no threat to national security but provided a vital opportunity to score political points against the antiwar movement and the liberal Democrats." S. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 386 (1983).

25 D. WISE, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER (1973).

26 *Id.* at 17.

27 F. POWLEDGE, THE ENGINEERING OF RESTRAINT: THE NIXON ADMINISTRATION AND THE PRESS 15 (1971).

produced."[28]

This belief was understandable. Nixon viewed the press as the enemy and hated it.[29] As William Safire confessed after years of working closely with Nixon, "I must have heard Richard Nixon say 'the press is the enemy' a dozen times."[30] By the time Nixon became President, his acrimonious and distrustful relations with the press were long standing and well known. Indeed, many of his confrontations with the press had become common political reference points. Perhaps the most famous of these were his "Checkers" speech in 1952 (when he tried to save his position as Eisenhower's vice-presidential running mate in the face of reports of a secret slush fund),[31] and his "last press conference" (after he lost the 1962 California gubernatorial election) in which he told the press: "You won't have Nixon to kick around anymore."[32]

Nixon's actions after he assumed the Presidency further supported the view that the prior restraint action was part of an offensive against the press. In the fall of 1969, Vice President Spiro Agnew delivered several speeches that encouraged the public to distrust and discredit the national press services.[33] This was paralleled by intimidating inquiries of the television networks by Dean Burch, whom Nixon had only recently appointed to head the Federal Communications Commission.[34] Federal investigators subpoenaed the files, including unused photographs, of national news magazines as part of ongoing criminal investigations.[35] Reporters were brought before grand juries and asked to reveal their sources.[36] When these actions were viewed in the light of Attorney General John Mitchell's best remembered public statement ("You'd be better informed if, instead of listening to what we say, you watch what we do"),[37] the administration's purpose in suing the *Times* may have seemed self-evident.

Nevertheless, all the evidence (and only some of it can be reviewed in these pages), suggests that it is a mistake to interpret the Nixon administration's decision to sue the *Times* for a prior restraint as intended to advance—either solely or mainly—the administration's

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28 S. UNGAR, *supra* note 9, at 114.

29 W. SAFIRE, *supra* note 16.

30 *Id.* at 342.

31 R. MORRIS, RICHARD MILHOUS NIXON: THE RISE OF AN AMERICAN POLITICIAN 810 (1990).

32 1 S. AMBROSE, NIXON: THE EDUCATION OF A POLITICIAN 1913-1962, at 671 (1987).

33 D. WISE, *supra* note 25, at 231; F. POWLEDGE, *supra* note 27, at 8.

34 F. POWLEDGE, *supra* note 27, at 11.

35 *Id.*

36 *Id.* at 11-12.

37 W. SAFIRE, *supra* note 16, at 265.

war against the press. Unquestionably, it was not long after legal proceedings began that some members within the administration began to view the lawsuit precisely in such terms.[38] But these considerations were not initially responsible for driving the administration to undertake legal action.[39] Rather, the reasons behind the prior restraint action were more complicated and subtle, and included substantial national security considerations.[40]

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Nixon learned of the *Times* report only on Sunday morning, and he was completely surprised by it.[41] Not only had he been unaware that the *Times* had the papers, he did not even know of the existence of the Pentagon's secret history until he read about it in the newspaper.[42] Nevertheless, the surprise of the publication did not dissipate Nixon's good spirits following his daughter's wedding the day before.[43]

Nixon met with H.R. Haldeman, his primary White House aide, at 10:00 A.M. Sunday in the oval office.[44] Haldeman made copious notes of Nixon's remarks as he routinely did whenever he met with the President. For a brief five minutes, Nixon discussed the wedding, the tensions between Pakistan and India, Defense Secretary Melvin Laird's recent effective support of the President, and the *Times* report. Nixon told Haldeman that the *Times* report was "really tough" on Kennedy; it made "victims" of Kennedy, McNamara, and Johnson; it made Walt Rostow the "key villain"; it "hurt the war" and "will cause terrible problems with SVN [South Vietnam]"; and it was "criminally traitorous" for someone to turn the documents over to the *Times* and for the *Times* to publish them. But Nixon emphasized to Haldeman that the *Times* publication "doesn't hurt us," that "we need to keep clear of the *Times* series," and that the "key is for us to *keep out of it*."[45]

Unlike his strong emotional reaction to so many news reports,[46] Nixon's initial response to the *Times* Pentagon Papers report was restrained. He understood that the report damaged the Kennedy and

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38 J. LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 70-71 (1976).

39 *See infra* notes 41-136 and accompanying text.

40 *See infra* notes 62-136 and accompanying text.

41 H. KLEIN, MAKING IT PERFECTLY CLEAR: AN INSIDE ACCOUNT OF NIXON'S LOVE HATE RELATIONSHIP WITH THE MEDIA 344 (1980).

42 *The Secret History of Vietnam*, NEWSWEEK, June 28, 1971, at 12.

43 H. SALISBURY, *supra* note 9, at 216.

44 Handwritten notes by H.R. Haldeman, June 13, 1971, Box 43, The Nixon Presidential Materials Project, Alexandria, Va. [hereinafter Haldeman Notes].

45 *Id.*

46 2 S. AMBROSE, *supra* note 23, at 325-26.

Johnson Administrations as well as the Democratic Party in general. He knew that it would make it more difficult for his administration to execute his war policies. But Nixon did not believe that the *Times* publication hurt his own administration, and he saw no political, diplomatic or national security reason to take any steps to interfere with the daily newspaper's publication plans.

Mid-Sunday afternoon, Henry Kissinger, Nixon's national security advisor, challenged Nixon's decision to let the *Times* go forward with its publication plan without interference when they had a thirteen minute, long-distance telephone conversation.[47] Neither Nixon nor Kissinger has publicly disclosed the details of this call, but Kissinger has admitted that he "encouraged" Nixon to oppose "this wholesale theft and unauthorized disclosure."[48] In addition, Haldeman has maintained that Kissinger, who "really knew how to get to Nixon," told Nixon that his decision to do nothing "shows you're a weakling, Mr. President."[49] According to Haldeman, Kissinger argued that Nixon's decision to "keep out of it" indicated that the President "didn't understand how dangerous the release of the Pentagon Papers was."[50] Kissinger claimed that

> the fact that some idiot can publish all of the diplomatic secrets of this country on his own is damaging to your image, as far as the Soviets are concerned, and it could destroy our ability to conduct foreign policy. If other powers feel that we can't control internal leaks, they will never agree to secret negotiations.[51]

Kissinger's prodding influenced Nixon. By early Monday morning, Nixon's reaction to the *Times* publication had changed dramatically.[52] He was now seething, furious at the *Times* and at whomever was responsible for the leak. And he wanted something done about

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47 President Richard Nixon's Daily Diary, June 13, 1971, Box FC 26, Nixon Archives [hereinafter Nixon's Daily Diary].

48 H. KISSINGER, WHITE HOUSE YEARS 730 (1979).

49 H. HALDEMAN, THE ENDS OF POWER 110 (1978) (quoting H. Kissinger).

50 *Id.*

51 *Id.* John Ehrlichman and Charles Colson, two important White House aides, share Haldeman's view that Kissinger pushed Nixon into retaliating against the *Times*. Ehrlichman has written that Kissinger "fanned Richard Nixon's flame white-hot" and claimed that "[w]ithout Henry's stimulus during the June 13 to July 6 period, the President and the rest of us might have concluded that the Papers were Lyndon Johnson's problem, not ours. After all there was not a word about Richard Nixon in any of the forty-three volumes." J. ERLICHMAN, WITNESS TO POWER: THE NIXON YEARS 301-02 (1982). Colson has quoted Kissinger as charging that there "can be no foreign policy in this government" because these "leaks are slowing and systematically destroying us", and insisting that "the President must act—today." C. COLSON, BORN AGAIN 57-58 (1976).

52 Haldeman Notes, *supra* note 44, June 14, 1971.

it.[53]

Nixon told Haldeman to find out what the statute of limitations was on criminally prosecuting the *Times*. He had not decided that criminal charges should be brought against the *Times*—that decision would have to await a complete legal analysis—but he wanted the possibility evaluated.[54]

Nixon also instructed Haldeman to have the administration take the offensive against those who had leaked the report.[55] Nixon ordered Haldeman to focus on Leslie Gelb, the former Pentagon Paper's staff director; on others who had worked on the project; and on the Brookings Institute, which he considered a center for anti-administration activity.[56] Nixon also directed Haldeman to limit the *Times* access to the administration.[57] He told Haldeman to be "tougher" with the *Times* and that it was now time to "really cut them off."[58] Though he cautioned Haldeman that no one should do anything obvious, he emphasized that he wanted the *Times* access to the White House strictly limited.[59] As furious as Nixon was with *Times* on Monday morning, however, he did not consider the possibility of suing the *Times* for a prior restraint.[60] That had to wait until the Justice Department made the suggestion.[61]

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Robert Mardian, Assistant Attorney General for Internal Security Affairs, knew nothing about the *Times*'s Pentagon Papers series until he reached his office Monday morning, having just arrived in Washington from Los Angeles on the red eye.[62] When he read the *Times* Monday edition, he was alarmed by its national security ramifications.[63] He sent for the Sunday *Times* and consulted with Mitchell and officials from the Departments of State and Defense to determine the publication's effect on national security and diplomatic relations.[64]

Mardian had no trouble persuading John Mitchell, the Attorney General, that the *Times* publication required Justice Department re-

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53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *See infra* notes 62-135 and accompanying text.
62 S. UNGAR, *supra* note 9, at 108.
63 *Id.*
64 *Id.*; Interview with Robert Mardian, former Assistant Attorney General, in Washington, D.C. (June 2, 1988) [hereinafter Mardian Interview].

view. Mitchell liked Mardian and shared his political outlook; as Mitchell remembered years later, Mardian was "a very bright lawyer in whom I have the greatest confidence."[65] They decided to establish several task forces working under Mardian's direction, drawing lawyers from different parts of the Justice Department to staff them.[66] The task forces evaluated different questions: the potential criminal liability of the *Times* and its source for publishing the Pentagon Papers; the scope and character of the Pentagon Papers study itself; the national security consequences of the *Times* publication; and the drafting of various legal documents in the event that the administration decided to initiate legal proceedings against the *Times*. Mitchell and Mardian chose William H. Rehnquist, then an assistant Attorney General, to head another task force to evaluate the government's chances of securing an injunction that would stop the *Times* from publishing future installments of its Pentagon Papers series.[67] Rehn-

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[65] Interview with John Mitchell, former United States Attorney General, in Washington, D.C. (Apr. 6, 1988) [hereinafter Mitchell Interview].

[66] Mardian Interview, *supra* note 64. Mitchell by-passed both the Justice Department's Civil and Criminal Divisions when he told Mardian to direct and coordinate the review of the *Times* publication. He had several reasons for doing so. He trusted Mardian, and the administration's reaction to the *Times* publication was potentially political dynamite. He thought that the subject matter clearly touched on security matters: The *Times* was publishing classified, top secret documents that bore upon a war in progress. As of Monday morning, Mitchell—neither did Nixon or Mardian for that matter—did not have a clear idea whether the administration would initiate legal proceedings against the *Times*, and if it did, whether the proceeding would be civil or criminal. There was certainly a possibility that a review of the legal alternatives would persuade Mitchell and his aides that the administration should take no legal steps against the *Times*. *Id.*; Mitchell Interview, *supra* note 65.

[67] Monday, June 14, was Rehnquist's first day in the office following back surgery, and he worked only half a day. Interview with William H. Rehnquist, former Assistant Attorney General for the Office of Legal Counsel, in Washington, D.C. (Jan. 4, 1989) [hereinafter Rehnquist Interview]. Nevertheless, the fact that Mardian asked him to evaluate the law of prior restraint meant that he would play a disproportionately important role as the administration decided how to react to the *Times* publication. *Id.*

Although he almost certainly read a number of relevant Supreme Court opinions, Rehnquist best remembers reading *Near v. Minnesota*, 283 U.S. 697 (1931), the leading Supreme Court case on prior restraint decided forty years earlier. Rehnquist Interview, *supra*. In *Near*, a Minneapolis county attorney sued a local newspaper, *The Saturday Press*, its editors and publisher for publishing "malicious, scandalous and defamatory articles" which in substance stated that "a Jewish gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties." 283 U.S. at 703-04. The state supreme court affirmed the lower court order permanently enjoining the newspaper from further publication and the individual defendants from editing, publishing, circulating or selling any publication that was malicious, scandalous or defamatory. *Id.* at 706. By a five to four vote, the United States Supreme Court reversed the judgment of the Minnesota court. *Id.* at 697.

Rehnquist, in his interview stated that he was interested in that portion of Chief Justice Hughes's majority opinion that discussed the circumstances in which a court may grant a prior restraint. Although Hughes wrote that the "chief purpose" of the first amendment was to guard against prior restraints, he conceded that courts may grant them "in exceptional cases."

quist advised his Justice Department colleagues that a prior restraint was theoretically available, and that the administration's chances of securing one depended upon the evidence it could present to support its claim for relief—evidence that he did *not* evaluate.[68]

Near, 283 U.S. at 716. Hughes quoted Justice Oliver Wendell Holmes' familiar statement that "[w]hen 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." *Id.* (*quoting* Schenck v. United States, 249 U.S. 47, 52 (1919)). Hughes also stated that he thought that a prior restraint could be secured to: stop "obscene publications"; secure community life against "incitements to acts of violence and the overthrow by force of orderly government"; bar " 'words that may have the effect of force' "; and "prevent actual obstruction [of governmental] recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.*

Although Hughes did not detail the circumstances as to when a prior restraint might be available, what he wrote allowed Rehnquist to emphasize that the on-going war in Vietnam enhanced the Administration's chances of securing one. It also permitted him to advise that if the *Times* publication threatened national security in a way comparable to the examples offered by Hughes in *Near*, that would seem to offer the possibility for the administration to secure a prior restraint stopping the *Times* from further publishing the classified history. In writing his memorandum, Rehnquist made no evaluation of the harm to national security resulting from the *Times* publication, and he never reviewed the Pentagon Papers study itself. Rehnquist Interview, *supra*.

The importance of Rehnquist's role that Monday did not depend upon exceptional legal ability. There was nothing remarkably insightful about his conclusion that Hughes's opinion in *Near* did not completely close the door on prior restraint; Hughes had specifically so stated. Rather the significance of Rehnquist's role depended upon his influence within the administration. That influence certainly reflected the general perception that he was a lawyer of superior ability. But it was also based on his conservative political credentials. Rehnquist had been a strong supporter of Barry Goldwater in 1964. He was also considered politically loyal within the Nixon Administration, having vigorously defended the invasion of Cambodia and supported Nixon's law-and-order measures, including the right to wiretap citizens when national security was involved. Although Nixon called him a "clown" because of his pink shirts and his sideburns, J. DEAN, BLIND AMBITION: THE WHITE HOUSE YEARS 50-51 (1976), and although he could not pronounce his name correctly (Renchburg), J. LUKAS, *supra* note 38, at 512, Rehnquist's judgment on legal questions was very respected at the Justice Department and the White House. As Kleindienst wrote in explaining why Nixon nominated Rehnquist to the Supreme Court: "For over two and a half years he discharged the difficult requirements of his position with such distinction that he was indeed regarded by all as *the* lawyer for the Department of Justice, as well as for the executive branch." R. KLEINDIENST, JUSTICE: THE MEMOIRS OF AN ATTORNEY GENERAL 22 (1985). Ehrlichman's memoirs contain a similar view: "In 1969, when I was [White House] Counsel, I sent him more than a few tough questions, mixed issues of law and politics, and he handled them well, with a sensitivity to the President's objectives and to the practicalities of our situation." J. EHRLICHMAN, WITNESS THE POWER: THE NIXON YEARS 136 (1982).

The importance of what Rehnquist did that Monday was not the fact that he provided information about prior Supreme Court decisions to his Justice Department colleagues, although that was surely useful. No administration had ever tried to secure a prior restraint either before or after Hughes wrote his opinion in *Near*. That meant that in the minds of most people the nation's political tradition—which did not include instances of prior restraint—overshadowed Hughes's summary of formal legal rules. But given the unusual respect that was accorded him as "the" administration's lawyer, Rehnquist's conclusion helped legitimatize within the administration the possibility of putting forward an unprecedented legal claim.

[68] Rehnquist Interview, *supra* note 67; Mardian Interview, *supra* note 64.

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While Rehnquist evaluated the law of prior restraint, Mardian and his aides encountered many obstacles as they assessed the national security consequences of the *Times* publication.[69] The State Department was of little to no help to Mardian. As the department's spokesman, Charles W. Bray 3d, told news reporters early Monday morning, it was "difficult" for the department to comment on the classified history because it was unable to determine even if it had a copy of it.[70]

Secretary of State William Rogers, apparently influenced by foreign leaders who were upset by the *Times* disclosures and who complained to the State Department, told Mitchell, as Mitchell recalled many years later, that further publication of the Pentagon Papers by the *Times* was "inimical to the national interest."[71] Rogers also told Mardian that he was "outraged" by the *Times* publication, and advised the Assistant Attorney General to sue the newspaper in an "action in replevin"—a legal action to regain possession of stolen property.[72]

The White House was no more help to Mardian than the State Department. Only Henry Kissinger[73] and Alexander Haig[74] had any first hand knowledge of the study. But Kissinger had spent Monday flying from California to Washington.[75] And Haig may not have told anyone that he was familiar with the study.[76] Indeed, Haig may not even have volunteered to his White House colleagues that a copy of the classified history was in the National Security Council safe.[77] As for Nixon's other White House aides, the existence of the study was a "mystery," as Herbert Klein, Nixon's Communications Director,

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[69] Mardian Interview, *supra* note 64.

[70] N.Y. Times, June 15, 1971, at A18, col. 6. Only later in the day, after the study was found in the personal files of William P. Bundy, who had been Assistant Secretary of State for East Asian and Pacific Affairs in the Johnson Administration, were department analysts in a position to begin reviewing the enormous document. But whatever efforts these analysts might have made (and it is unclear whether they made any), Mardian does not remember ever receiving an evaluation of the defense and diplomatic consequences of the *Times* publication from the State Department. Mardian Interview, *supra* note 64.

[71] Mitchell Interview, *supra* note 65.

[72] Mardian Interview, *supra* note 64.

[73] S. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 321, footnote (1983).

[74] *Id.* at 386.

[75] H. SALISBURY, *supra* note 9, at 235.

[76] *Id.* at 228, footnote.

[77] H. KLEIN, *surpa* note 41, at 344. It was Klein's impression that when White House staff members tried to determine what the administration should do in response to the *Times* report, there was "more confusion within the White House than at any other time" during his tenure. *Id.*

characterized it.[78] Mardian does not recall receiving any reports, evaluations or recommendations from White House aides, including Haig and Kissinger; he simply pursued his own appraisal on that hectic Monday.[79]

In contrast to the White House and State Department, the Defense Department was in a position to help Mardian evaluate the risks to national security posed by the *Times* report. The study was prepared at the Pentagon, and although no one who had worked on the study was still employed there, the department had several copies of the study. In addition, Secretary of Defense Melvin Laird and at least one of his aides were familiar with its contents.[80]

Laird's position fluctuated that Monday as the administration decided what to do. Mitchell remembered that Laird telephoned him to report that further publication by the *Times* would harm national defense.[81] But Laird recently denied that he ever offered that assessment to Mitchell or to anyone else in the administration.[82] Laird contended that he was glad the papers were in the public domain for he felt that they strengthened his policy recommendations that the United States should pull its troops out of South Vietnam far more quickly than it was doing.[83]

As pleased as Laird might have been that the papers were out, he was sufficiently loyal to the Nixon Administration to make a public statement in which he asserted that the Pentagon Papers contained "highly sensitive information and should not have been made pub-

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78 *Id.*

79 Mardian Interview, *supra* note 64.

80 On November 11, 1969, Senator William Fulbright requested of Secretary of Defense Melvin Laird that the Pentagon's classified history be declassified and made available to the Senate Foreign Relations Committee. Laird denied this request in a letter dated December 20, 1969. The Senator wrote the Defense Secretary repeating this request on January 19, 1970, April 20, 1970, and July 20, 1970. The Defense Secretary never acceded to the Senator's request. 116 CONG. REC. S27,827-28 (1970) (correspondence between Fulbright and Laird); *see also* Naughton, *Laird Refused '69 Fulbright Request for the Pentagon Study on Vietnam*, N.Y. Times, June 17, 1971, at A18, col. 6. In considering the Senator's request, the Defense Secretary asked Dennis James Doolin, Deputy Assistant Secretary of Defense for International Security Affairs, to review the classified study and make a recommendation. United States v. New York Times, 71 Civ. 2662 at 56 (S.D.N.Y. 1971) (unpublished transcript of evidentiary hearing).

81 Mitchell Interview, *supra* note 77.

82 Interview with Melvin Laird, former Secretary of Defense (Mar. 6, 1989) [hereinafter Laird Interview].

83 *Id.* Mardian indirectly has supported Laird's contention. Mardian has accused Laird of "foot-dragging" on that critical Monday. He has claimed that he asked Laird to have the Pentagon review the national security threat posed by the *Times* publication, and that he never received this report. Mardian Interview, *supra* note 64.

lic."[84] Laird also criticized the paper's release on the ground that national energies should be directed toward extricating the United States from Vietnam, not raking "over the coals" of past policies.[85]

What seems plausible is that Laird had two somewhat opposing reactions to the *Times* report. He was genuinely upset about the threat to national security posed by the possibility that the *Times* would publish material that seriously disrupted diplomatic initiatives or information he believed contained important intelligence matters.[86] But he was also pleased that the newspaper had published the classified material. As a result, Laird probably expressed to Mitchell his worry that the *Times* might publish something harmful to the national security, but stopped short of urging Mitchell to sue the newspaper. But given the haste with which these conversations were conducted, Mitchell probably understood Laird's qualified concerns to mean that further publication by the *Times* would jeopardize national security, and then passed that judgment along to Mardian as further evidence that the administration must act.

Mardian met still other difficulties as he tried to assess the national security risks presented by the *Times* publication. No one in the Justice Department was familiar with the Pentagon Papers study; indeed, neither Mardian, nor Mitchell, nor any of their aides even knew of the study before the *Times* broke the story of the secret history.[87] Moreover, the two experienced some delay in trying to secure one of the small number of copies of the study then in existence.[88] But when they did receive it, they were nothing short of overwhelmed by the study's forty-seven volumes containing over 2.5 million words. It was clear that no lawyer at the Justice Department could quickly read the study from cover to cover and identify particular passages that were injurious to the national security. As a result, Mitchell and Mardian both recalled that they never even attempted to review the study once it arrived at the Justice Department.[89] What Mardian did decide was that he would have to rely upon the judgments of others in trying to assess the risks to national security presented by the *Times* publication.[90]

Government officials advising Mardian and his aides were them-

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84 Frankel, *Mitchell Seeks to Halt Series on Vietnam But Times Refuses: Court Step Likely*, N.Y. Times, June 15, 1971, at A18, col. 5.

85 *Id.*

86 Laird Interview, *supra* note 82.

87 Mitchell Interview, *supra* note 65; Mardian Interview, *supra* note 64.

88 Mardian Interview, *supra* note 64.

89 *Id.*; Mitchell Interview, *supra* note 65.

90 Mardian Interview, *supra* note 64.

selves disadvantaged since they were not able to determine precisely which documents the *Times* had.[91] In its Sunday news report, the *Times* announced that it possessed "most" of the Pentagon Papers study, described as consisting of 3,000 pages of analysis and 4,000 pages of official documents, but it did not offer more details.[92] Although a *Times* report stated that the newspaper was missing four volumes of the study that detailed the history of diplomatic relations from 1964 to 1968, the government officials assumed for the purpose of advising Mardian that either the *Times* had the entire study or that it might still obtain those sections the newspaper stated it did not have.[93]

Moreover, as government officials reviewed the *Times* report, they concluded that the *Times* had documents in addition to the Pentagon Papers. They identified some of the documents as early drafts of what became the final version of the Pentagon Papers.[94] They knew that others were part of a classified study on the Tonkin Gulf incident —a document prepared by the Defense Department's Weapons System Evaluation Group in 1965.[95] But there were still other papers that they could not identify at all.[96] It was difficult enough for Mardian, his aides, and defense officials to assess the national security threat posed by a 7,000 page secret history of the war. But to assess the risk to national security posed by the publication of documents that could not be identified was an impossible task.

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For several reasons, Mardian and his aides eventually concluded that the *Times* publication threatened the nation's security. Mardian and his aides concluded that publication by the *Times* of material detailing diplomatic efforts to end the war and to secure the release of the prisoners of war would have grave consequences.[97] The study reviewed the evolution of the Johnson Administration's policies toward a negotiated settlement and the sporadic diplomatic contacts between the United States and North Vietnam. In addition, it traced efforts by

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91 *Id.*

92 Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times, June 13, 1971, § 1, at 1, col. 3.

93 Smith, *Vast Review of War Took a Year*, N.Y. Times, June 13, 1971, § 1, at 1, col. 4; Mardian Interview, *supra* note 64.

94 Mardian Interview, *supra* note 64.

95 *Id. See also* United States v. New York Times, 71 Civ. 2662 at 48 (S.D.N.Y. June 18, 1971) (transcript of unpublished in camera evidentiary hearing) (Frances J. Blouin).

96 Mardian Interview, *supra* note 64.

97 *Id.*; Telephone Interview with Jerry W. Friedheim, former Deputy Assistant Secretary of Defense for Public Affairs (Mar. 6, 1989) [hereinafter Friedheim Interview]; Mardian Interview, *supra* note 64.

numerous other nations to bring the two antagonists to the conference table. For example, four volumes described separate efforts by two Canadians, Blair Seaborn and Chester Ronning, to bring about settlement talks; the initiatives undertaken by Poland, and codenamed MARIGOLD; the overture named SUNFLOWER which involved a direct United States approach to North Vietnam in Moscow, and parallel attempts by British Prime Minister Harold Wilson and Soviet Premier Alexei Kosygin to begin peace talks; a series of peace moves from early 1967 through early 1968 in which Norway, Sweden, Rumania and Italy took turns as intermediaries; and an attempt by Henry Kissinger, acting as a private citizen at the behest of the United States government, to arrange talks with North Vietnam through two French intermediaries.[98]

As Mardian explained years later, publication of material focusing on diplomatic matters would embarrass the political leaders of Sweden, Canada and other countries.[99] His characterization of Sweden's role illustrated his point: "Sweden ostensibly was hosting anti-Vietnam [war] conferences in Sweden and putting on a face to the North Vietnamese that they were against us, but at the same time (they) were doing our bidding."[100] Sweden was "whoring for us" by publicly condemning us and yet they were "carrying our baggage to the North Vietnamese."[101]

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[98] G. HERRING, *supra* note 2.

Although Mardian and Mitchell were unaware of it at the time, most of the diplomatic initiative covered in the study were, as one student of the subject has concluded, "described in some detail and with remarkable accuracy in contemporary newspaper accounts and in such books as Kraslow and Loory's *Secret Search for Peace in Vietnam*," which was published in 1968. G. HERRING, *supra* note 2, at xxii. But it is uncertain what impact that fact would have had on these two Justice Department officials had they known it. As they might have viewed it, there was an important distinction between a reporter or scholar claiming that Sweden or Canada or Poland acted as an intermediary, and the publication of government documents that proved the same point. The former permitted the United States and foreign leaders to deny the validity of the claim, thus possibly reducing the degree of political embarrassment to compromised foreign leaders and enhancing the possibility that these foreign governments would continue to act as go-betweens. The latter undeniably established the intermediary role, created severe political embarrassment for foreign leaders within their own countries, strained with the United States, and almost certainly ended that nation's willingness to act as an intermediary.

[99] Mardian Interview, *supra* note 64.

[100] *Id.*

[101] *Id.* Mardian was not alone in this view that the study, especially the four diplomatic volumes, contained highly sensitive material. When he prepared the volumes, Gelb treated the four diplomatic volumes as especially sensitive and permitted only three or four staff members access to them. G. Herring, *supra* note 2, at x. And during the litigation over the government's claim for a prior restraint, Paul Warnke, a former top Pentagon official in the Johnson Administration, told 20 newsmen at breakfast that public disclosure of diplomatic moves detailed in the diplomatic volumes could create such serious problems that the Nixon Adminis-

Defense and intelligence officials told Mardian that publication of the classified study compromised intelligence interests.[102] Mardian remembered that the National Security Agency pored over the study and "kept coming up with more and more reasons why this particular information couldn't be published."[103] He recalled great concern among intelligence officials that the publication of some documents within the study would reveal covert information sources.[104] He explained:

> the disclosure of the communiqué would disclose the nature and location of our intelligence gathering—in other words, the fact that we knew of a troop movement within a matter of minutes from the time it began meant that there could be only one way that we could have that information.[105]

Laird recently agreed with Mardian's recollection. He maintained that there were a dozen or so paragraphs, some of which were published (although he would not specify which paragraphs), which disclosed intelligence sources.[106]

There was another factor that deeply influenced Mardian. Because government officials were unfamiliar with the Pentagon Papers, and did not know exactly what documents the *Times* possessed in addition to the classified history and the command study, their worst fears escalated as they speculated about what the next edition of the newspaper would contain. "On Monday, we weren't sure how bad it could be," Mardian remembered many years later.[107] This only served to strengthen their conviction that the *Times* Pentagon Papers series was at odds with defense and diplomatic interests.

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tration's law suit against the *Times* was warranted. Berger, *Warnke Opposes Publication of Report on Diplomacy*, The Washington Post, June 24, 1971, at A13, col. 1.

102 Mardian Interview, *supra* note 64; Laird Interview, *supra* note 82.

103 Mardian Interview, *supra* note 64.

104 *Id.*

105 *Id.*

106 Whether or not the Pentagon Papers study contained documents that compromised intelligence secrets became a hotly contested issue during a court hearing on the government's request for a prior restraint later in the week. Nevertheless, there is no reason to doubt that defense and intelligence officials reported to Mardian that the *Times* report threatened intelligence interests. Although such officials are often adverse to risk and too easily alarmed by the disclosure of classified material, there was sufficient cause for concern in this case—given the magnitude of the classified information involved and its unsifted nature—to make responsible officials deeply uneasy. Particularly because they really did not know the entire scope of what might be contained within the Pentagon Papers, because they were completely surprised by the *Times*'s sudden publication of the material, and because they were compelled to assess the possible threat to intelligence secrets under great time pressure, it is not surprising that Mardian and others were generally apprehensive. Laird Interview, *supra* note 82.

107 Mardian Interview, *supra* note 64.

Even though Mardian concluded that further publication by the *Times* would harm national security, that did not necessarily mean he would recommend a suit against the newspaper for a prior restraint. Mardian could have concluded that future *Times* installments might retard the peace process and harm intelligence interests, but that those potential injuries were too uncertain to warrant a prior restraint.[108] He might have reasoned that, absent evidence that further publication would immediately endanger life[109] (as in the publication of the sailing time and course of a troop ship[110]), the administration would lose its effort to stop the *Times* and be sorely embarrassed.

But that was not to be. Mardian's sense of what the government ought to do was influenced by his political perspective. As he saw it, the government should not have to risk harm to the nation's security while unelected newspaper editors made judgments about which top secret document to publish.[111] Rather than emphasize the downside of suing the *Times*—the hypothetical nature of the injuries and the stringent requirements for securing a prior restraint—Mardian approached the matter from the opposite direction. The possibility that serious harm might result, combined with the fact that prior cases had not foreclosed the possibility of securing a prior restraint, was the only opening that Mardian needed before deciding that a suit against the *Times* was necessary. Moreover, Mardian considered the press arrogant, presumptuous and often wrong. He thought that the press's role in making our political system work fell far short of presuming the knowledge and authority to declassify top secret documents that related to a war in progress. In addition, Mardian was from the West, had been a Goldwater supporter, and was deeply suspicious of what he viewed as the liberal eastern press. Whatever uncertainty he might have had about the necessity or wisdom of trying to stop the Pentagon Papers series was further discounted because it was the *Times* that published it.[112]

Given Mardian's perspective, a prior restraint emerged in his eyes as the only legal remedy that would protect the national defense. A criminal prosecution would take many days to begin and a trial might not be held for months, perhaps a year or more. And even if the *Times* were convicted, the imposed penalty would only deter the paper from publishing similar material in future situations. The pro-

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108 *See infra* notes 228-35 and accompanying text.

109 *Id.*

110 Near v. Minnesota, 283 U.S. 697, 716 (1931).

111 Mardian Interview, *supra* note 64.

112 *Id.*

ceeding would be completely ineffective in preventing the harm to national security that Mardian feared would occur during the next few days as the *Times* continued its series.

Mardian also viewed an action for a prior restraint as a means of gaining the time he needed to assess the situation. As he recalled years later, he conceived of a prior restraint action against the *Times* as a way of saying: "Hey! Give us a chance to find out how damaging it is before you go any further."[113] He described his office that Monday as chaotic, resembling a crowded railway station at rush hour with admirals, generals, and national security officials coming and going.[114] There were more people to consult and there was more research to do than could be accomplished in the few remaining hours before the *Times* went to press again. No one in the administration (least of all Mardian) thought that the newspaper would respond favorably to an informal request that it delay its planned installments while government officials assessed the defense implications. Mardian hoped that he might gain the needed time by obtaining a temporary restraining order that would bar the *Times* from publishing additional excerpts pending an evidentiary hearing.[115]

But Mardian was only an assistant attorney general. There would be no lawsuit without Mitchell's approval. Mitchell, however, fully supported Mardian's assessment that the administration should try to prevent the *Times* from publishing further excerpts from the classified history.

Mitchell spent very little time reviewing the *Times* matter because he did not think it required his special attention. As he saw it: "There's so goddamn many things going on in the Justice Department that it's just another one that you take as it comes along."[116] Mitchell's schedule on that Monday included attending a drug conference at the White House in the morning, a noon meeting with Haldeman, and

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113 *Id.*

114 *Id.*

115 Although it is beyond the scope of this article, it should be noted briefly that Mardian was a very controversial figure during the Nixon years. This was true both inside and outside the government. W.N. Seymour, Jr. noted in his memoir that Mardian was "widely regarded both inside and outside the Department as a dangerous man. His constant emphasis on using the criminal justice system to repress activities by 'subversives' was a source of genuine concern." W. SEYMOUR, UNITED STATES ATTORNEY: AN INSIDE VIEW OF JUSTICE IN AMERICA UNDER THE NIXON ADMINISTRATION 201 (1975).

Salisbury commented that it was Mardian who gave the Pentagon Papers case its "Kafka-like quality." H. SALISBURY, *supra* note 9, at 287. Salisbury also quoted Haldeman, who had a reputation for being abrasive, as saying that: "Mardian was very abrasive. It may sound funny for me to say that—but it was true." *Id.*

116 Mitchell Interview, *supra* note 65.

lunch with Nelson Rockefeller, Governor of New York.[117] Along the way, he huddled with Klein, Nixon's Communications Director, in Klein's office to figure out "what was coming next and how we should handle it."[118] But Mitchell never paused long enough to review either relevant legal precedents, or the actual evidence that the *Times* series might threaten national security in some significant way.[119]

As a result Mitchell endorsed Mardian's recommendations in large part because Mitchell was completely dependent upon Mardian's assessment of the law of prior restraint and the national security risks.[120] Mitchell also supported them because he shared Mardian's political perspectives. Like Mardian, Mitchell saw no reason to chance the nation's security in the face of claims by Rogers and Laird that the Pentagon Papers contained material that "would jeopardize the American Government's relationship with other governments" if disclosed.[121] As Mitchell recalled years later, the decision to seek a prior restraint against the *Times* was "a very simple thing . . . [since] nobody in the government believed that the newspapers had *carte blanche* to publish anything they wanted to that was inimical to the best interest of the United States."[122]

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As convinced as Mardian became that the administration should sue the *Times* for a prior restraint, and as powerful as Mitchell was within the administration, no legal action against the *Times* was conceivable without Nixon's approval. Nixon was certainly furious at the *Times* on Monday morning, but he did not consider the possibility of suing the *Times* for a prior restraint until the Justice Department made the suggestion.[123] As Mardian remembers, he himself had more than one conversation with Haldeman during the day in which Haldeman was skeptical about a prior restraint action. Mardian felt that he first had to persuade Haldeman and then, through him, Nixon.[124] In the end, however, Nixon was not difficult to persuade, even though he

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117 *Id.*

118 H. KLEIN, *supra* note 41.

119 *Id.* at 344; Mitchell Interview, *supra* note 65.

120 Mitchell's minimal involvement in what he later termed this "monumental law suit" against the *Times* was typical of him. Mitchell had not wanted to become Attorney General and was not primarily interested in running the Justice Department. Mitchell Interview, *supra* note 65. Indeed, the political commentator, Richard Harris, quoted Mitchell at the time as saying: " 'This is the last thing in the world I wanted to do.' " R. HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER AND FREEDOM IN AMERICA 105 (1970).

121 Mitchell Interview, *supra* note 65.

122 *Id.*

123 *See supra* notes 52-61 and accompanying text.

124 Mardian Interview, *supra* note 64.

had decided on Sunday morning that his administration should not interfere with the *Times* publication plans. As for the skepticism that Mardian encountered, it may have been attributable merely to the fact that Nixon and Haldeman needed some time to become accustomed to the idea that the administration would take legal action. By late afternoon, Nixon had given his approval.

In his memoirs, Nixon claimed that he approved the prior restraint action against the *Times* because the National Security Agency was "immediately worried"[125] that some of the "more recent documents could provide code-breaking clues;"[126] the CIA was "worried that past or current informants would be exposed;"[127] the State Department was "alarmed"[128] because the study "would expose Southeast Asia Treaty Organization contingency war plans that were still in effect;"[129] and the *Times* publication "shook"[130] the international community because the study contained material relating to the secret role of other governments as diplomatic go-betweens. In addition, Nixon asserted that the *Times* publication came at a "particularly sensitive time" because Kissinger's secret trip to China was only three and a half weeks away, secret negotiations with North Vietnam were underway in Paris, and the SALT talks were on-going.[131] Although Nixon portrayed these considerations as important, he insisted in his memoirs that there was an "even more fundamental reason for taking action to prevent publication."[132] Nixon claimed that an important principle was at stake in this case:

> [I]t is the role of the government, not the New York *Times*, to judge the impact of a top secret document. . . . If we did not move against the *Times* it would be a signal to every disgruntled bureaucrat in the government that he could leak anything he pleased while the government simply stood by.[133]

Nixon's explanation for why he approved the suit against the *Times* is incomplete and misleading. As we have seen, Nixon's reaction to the *Times* publication evolved from Sunday morning when he decided that his administration should do nothing to interfere with the *Times* publication; to Monday morning, when he was contemplat-

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125 R. NIXON, R.N.: THE MEMOIRS OF RICHARD NIXON 509 (1978).
126 *Id.*
127 *Id.* at 509.
128 *Id.* at 508.
129 *Id.* at 508-09.
130 *Id.*
131 *Id.* at 511.
132 *Id.* at 509.
133 *Id.*

ing criminal proceedings against the *Times*; to late Monday afternoon, when he gave the green light to a prior restraint action. Nevertheless, Nixon's memoirs make no mention of this evolution.[134]

Given that Nixon did a complete reversal from Sunday morning to Monday afternoon, the reasons he offers for his approval of the prior restraint action fail to reflect the evolution of his own thinking as we have seen it develop. Rather, they seem to represent a summary of the views advanced by Mardian and others, and that were perfectly acceptable as public positions.

No one can deny that Nixon's approval of the legal action against the *Times* may have reflected some apprehension on his part about intelligence secrets, future unauthorized disclosures, or current diplomatic initiatives. But given what we know about the events of Sunday and Monday—Nixon's change of mind, Kissinger's call to Nixon on Sunday, and Haldeman's claim that it was Kissinger who caused Nixon to take action against the *Times*—it seems unlikely that these factors alone caused Nixon to approve legal action against the *Times*. What is more plausible is that these factors made a prior restraint against the newspaper credible and publicly defensible in Nixon's mind, but only after Kissinger made Nixon afraid that he would appear weak if he did nothing. As Nixon's biographer, Stephen Ambrose, concluded after years of study: "Nixon hated to appear weak."[135]

Once Nixon was willing to take some legal action against the *Times*, he did not concern himself with the pros and cons of a criminal prosecution as opposed to a civil action for a prior restraint. When Mitchell and Mardian recommended that the administration try to stop the *Times* from further publication, he reviewed neither the legal precedents for such a legal offensive nor the evidence supporting the claim that the *Times* series jeopardized national security. He did not even consult more than one or two White House aides before approving the action. From Nixon's perspective, if he had to take legal action against the *Times*, he was willing to do so following the Justice Department's lead.

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It is important that national security factors not be seen as the sole cause of the administration's decision to seek a prior restraint. This would be as much of a distortion of what actually happened as the claim that the administration sued to repress the press. Nixon, after all, seems to have approved the prior restraint action to avoid

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134 *Id.* at 508-15.

135 2 S. AMBROSE, *supra* note 23 at 271.

appearing weak to other international leaders and without reviewing with his aides the national security implications of further publication. But it is equally essential not to underestimate the critical impact that the nation's security had on the decision to seek a prior restraint.

If Mardian and Mitchell only wanted to take advantage of the *Times* Pentagon Papers series to intimidate the press, other, less risky legal remedies were available. They could have promptly initiated a grand jury investigation on how the *Times* secured the classified study. (Later in the summer, the administration began such an investigation.[136]) Or they could have initiated a grand jury investigation concerning whether the *Times* publication violated any espionage statutes. Either proceeding would have been a powerful and frightening weapon to use against the newspaper. Either would have intimidated the press as much as a prior restraint action and probably more so. Admittedly the administration may not have prevailed, but its chances of prevailing would probably have been greater in either of these proceedings than it was in the prior restraint action.

But it was Mardian's and Mitchell's assessment of national security risks that caused them to seek a prior restraint. Indeed, their recommendation that the administration seek a prior restraint (as opposed to another legal remedy) is inexplicable unless one accepts the centrality of national security considerations in their thinking.

II. THE STRENGTH OF THE GOVERNMENT'S CLAIM FOR A PRIOR RESTRAINT

A. *The Allegations*

The administration had initially sued the *New York Times* for a prior restraint on June 15. While that proceeding was pending, it began a second action[137] only three days later against the *Washington Post*, which had secured a large part of the Pentagon Papers and had begun publishing excerpts from them.[138] Ultimately, both cases were decided by the Supreme Court, and it would require a complete history of both legal proceedings to carefully parse out the allegations made and evidence presented by the government in each case. I propose to summarize the government's evidence as embodied in the record of both cases and presented to the Supreme Court.[139]

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136 S. UNGAR, *supra* note 9, at 283.

137 United States v. The Washington Post, No. 71 Civ. 1235 (D.D.C. June 18, 1971) (complaint).

138 S. UNGAR, *supra* note 9, at 130-47.

139 Just a brief word about the record as I have it. I have documents filed in the Court that were submitted in the prior proceedings, but they are not consecutively numbered, as they

The administration claimed that further publication by the newspapers would jeopardize the "Vietnamization process" and the current rate of withdrawal of United States troops from Vietnam.[140] It argued that the United States had been withdrawing its military forces for the previous eighteen months "at the fastest rate possible consistent with capabilities of the South Vietnamese armed forces in taking over the combat role and consistent with the retention of adequate military security for the United States forces remaining."[141] According to the government, the Vietnamization program was premised on the assumption that the "planned support which we expect from our allies and from the Republic of Vietnam will continue without major change,"[142] and that this military balance was a "delicate"[143] one that had "a high risk of being upset."[144] The government charged that further publication "will jeopardize the military support we are receiving from foreign forces,"[145] and if the level of military strength fell "below prudent risk, an adverse snowballing affect could not be ruled out"[146] especially if the North Vietnamese and the Viet Cong forces achieved a "major localized or tactical victory over the South Vietnamese forces."[147]

The administration illustrated its claim that further publication threatened the Vietnamization process in several ways. It asserted that the public disclosure of some of the documents in the study would have an impact on "Thai political attitudes, both within country and without,"[148] and that the ability of the United States to use air bases within Thailand might be threatened as a result.[149] The administration claimed that the United States tactical air units and B-52's

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would be in a bound record. Apparently the papers were presented to the Court in a manner that was more informal than usual because of the great haste of the appeal. Also, several pages of former Solicitor General Erwin Griswold's sealed brief are missing and about three pages remain sealed. I have not been able to obtain a copy of the *New York Times* sealed brief. Floyd Abrams has stated that he does not have it and government officials have stated that they cannot locate it.

140 Brief for the United States (Secret Portion) at 5, New York Times v. United States, 403 U.S. 713 (1971) (No. 71 1873) [hereinafter Griswold Secret Brief].

141 Special Appendix Relating to *In Camera* Proceedings and Sealed Exhibits at 6, United States v. New York Times (2d Cir. June 21, 1971) (No. 71-1617) [hereinafter Special Appendix].

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 6-7.

147 *Id.* at 7.

148 Affidavit of Melvin Zais at 6, United States v. The Washington Post, No. 71 Civ. 1235 (D.D.C. June 19, 1971) [hereinafter Zais Affidavit].

149 *Id.* at 6-7.

stationed at Thailand bases were "essential to the safety and well-being of the United States forces now deployed in Southeast Asia,"[150] to the success of the Vietnamization program, and to the "interdiction program against the enemy supply routes in South Vietnam."[151] The government maintained that without "continued support from the Republic of Thailand, these air support missions would be substantially reduced, permitting the North Vietnamese to build major supply bases in preparation for mounting sizeable force attacks . . . ."[152]

The government argued that

> there is much material in these volumes which might give offense to South Korea, to Thailand, and to South Vietnam, just as serious offense has already been given to Australia and Canada. . . .
>
> [Because] [t]he 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 . . . [the withdrawal rate] will be diminished.[153]

Most specifically, the government claimed that further publication might cause the Government of Korea to withdraw its 49,000 troops in Vietnam "faster than is currently envisioned."[154]

The administration asserted that additional publication "could have some affect [sic] upon the internal political processes" of the South Vietnamese Government.[155] It claimed that the publication would stimulate "instability"[156] in the South Vietnamese high command and might cause it

> to terminate their cross-border operations and return their participating forces to bolster the security of the homeland. Particularly in the case of Cambodia, withdrawal of these forces would allow the North Vietnamese and the Viet Cong forces to reestablish the series of base areas along the Cambodian-South Vietnamese border from which they could mount increased military activity throughout South Vietnam.[157]

One consequence of the withdrawal of South Vietnamese military forces from Cambodia, a government witness concluded, would be to force "United States forces . . . to disrupt supply efforts."[158]

The administration claimed that the Pentagon Papers contained

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150 *Id.* at 6.
151 *Id.*
152 *Id.* at 7.
153 Griswold Secret Brief, *supra* note 140, at 5.
154 Special Appendix, *supra* note 141, at 8.
155 Zais Affidavit, *supra* note 148, at 8; *see also* Special Appendix, *supra* note 141, at 8.
156 Zais Affidavit, *supra* note 148, at 8; *see also* Special Appendix, *supra* note 141, at 8.
157 Zais Affidavit, *supra* note 148, at 9; *see also* Special Appendix, *supra* note 141, at 9.
158 Zais Affidavit, *supra* note 148, at 9.

information that might prompt another change in the deployment of South Vietnamese troops. As one government official stated, the classified documents contained

> detailed information . . . [that] carefully documented scenario of the overthrow of President Diem by Generals Duong Van Minh, Tran Van Don, Le Van Kim, and others. These same individuals are now deeply involved in preparation for the forthcoming elections in South Vietnam in October 1971. General Minh, who is expected to be the leading opposition candidate to President Thieu in these elections could claim that disclosure of the above specifics by the United States at this time was designed to discredit General Minh and thereby assure the election of "a puppet regime of President Thieu."[159]

Another example focused on documents "concerning the period of the *coup d'etat* against President Ngo Dinh Diem in November 1963 and United States relations with the successor regimes."[160] The administration claimed that these documents revealed "the degree of direct United States pressures and influence on the Government of Vietnam some years ago, [and that they also contain] a brutally frank lecture to Vietnamese generals by the American Ambassador."[161] The administration claimed that publication of this information would "diminish the stature of present Vietnamese political figures,"[162] including then President Thieu and Vice President Ky.

The administration maintained that further publication would endanger the safety of U.S. forces by revealing in "great detail the processes involved in US decision making."[163] It claimed that future publication might disclose plans for bombing North Vietnam,[164] the capacity of the United States to assess enemy forces,[165] the process for making United States military decisions and reaction times,[166] current war planning for Southeast Asia and China,[167] and "deployment times for major US units."[168] Therefore, it claimed that the publication of this information would provide "a substantial advantage to the enemy"[169] and "tip the scales of victory in his favor,"[170] both on the

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159 Affidavit of Dennis J. Doolin at 2, United States v. The Washington Post, No. 71 Civ. 1235 (D.D.C. June 20, 1971) [hereinafter Doolin Affidavit].

160 Special Appendix, *supra* note 141, at 19.

161 *Id.*

162 *Id.*

163 *Id.* at 14.

164 *Id.* at 10.

165 *Id.*

166 *Id.* at 3.

167 *Id.* at 10-11.

168 *Id.* at 11.

169 *Id.* at 14.

battle field and in the political area. The disclosure of this information, according to the administration, "could have a decided detrimental impact upon the present Vietnamization program and US redeployment objectives."[171]

The administration also contended that further disclosure would "slow the U.S. program of shifting military responsibility in Vietnam to South Vietnamese forces."[172] It asserted that the publication of certain information contained in the classified study would "endanger"[173] the Government of Vietnam's interest in and support of the pacification program by subjecting the South Vietnam Government and key officials to ridicule and by causing the Pacification Program to be considered a United States program rather than a Vietnamese one. This might result in the diversion of South Vietnam's attention to less critical programs.

The administration also contended that the classified study contained pages that disclosed the planning for and the past conduct of certain covert operations in North Vietnam.[174] It asserted that the publication of this information would reveal how these operations are mounted through United States intelligence activities and that publication of this material could foreclose the future conduct of such operations.[175] The administration warned that the loss of this capability would eliminate a "military option . . . where the survival of withdrawing forces under attack requires such an option as a decisive factor in military success or failure . . . ."[176]

The administration also asserted that further publication would seriously compromise other military interests. It claimed that the classified documents contained military operational plans that were to be used to meet "military offensive moves against the United States by the armed forces of the People's Republic of China."[177] The government conceded that these two 1964 and 1965 plans were no longer in use, but it insisted that the plans would "reveal possible total force commitments and planned areas of operation which appear valid for future operations. Such information, if disclosed to an enemy planner, presumably would, if combined with other intelligence generally held by the intelligence communities of foreign countries, seriously

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170 *Id.*
171 *Id.*
172 *Id.* at 12.
173 *Id.*
174 Zais Affidavit, *supra* note 148, at 3.
175 *Id.* at 3-4.
176 *Id.* at 4.
177 Special Appendix, *supra* note 141, 10-11.

compromise current war planning for Southeast Asia."[178]

The government claimed that a prior restraint was required to guard important intelligence matters.[179] In his sealed brief to the Supreme Court, Solicitor Erwin Griswold stated that the classified document contained "specific references to the names and activities of CIA agents still active in Southeast Asia."[180] He also asserted that the documents contained "references to the activities of the National Security Agency," although he did not identify the activities.[181] The administration also claimed that the direct quoting from Saigon Embassy messages "would assist [the] enemy in analyzing and possibly breaking codes employed at that time and thereby all traffic of that period."[182] It also argued that further publication might disclose the extent of the American military capacity to interpret coded messages of other countries.[183]

The administration claimed that further disclosures would seriously harm several important diplomatic interests.[184] It maintained

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178 *Id.* at 11.

179 Whether the government claimed that the publication of the Pentagon Papers threatened intelligence interests during the litigation has itself been a confused issue in the secondary literature. Both Wise and Salisbury state the government either never made the claim or conceded that there was no threat after the issue was raised. For example, Salisbury has stated that at one point during the proceedings before District Judge Gurfein, a *Times* attorney asked U.S. Attorney Whitney North Seymour, Jr., whether "codes were going to be involved in the case" and that Seymour answered "No . . . [n]ot at all." H. SALISBURY, *supra* note 41, at 298. Wise recounts a moment during the in camera hearing when a government witness reassured Judge Gurfein that codes then in use could not be broken merely by providing a verbatim transcript of a message the way they could have been at an earlier time. Wise colorfully stated that the *Times* officials were so pleased with the witness's statement that they could have "kissed" him. D. WISE, *supra* note 25, at 161.

Wise is correct in asserting that a government witness did reassure Gurfein that a verbatim transcript would not help break a code. But in other respects, Salisbury and Wise are incorrect on this point.

In papers filed in the *Times* case in the Second Circuit, Seymour maintained that further publication would injure intelligence interests. The Nixon Administration also alleged that further publication by the *Washington Post* would injure intelligence matters. Furthermore, the administration presented these claims to the Supreme Court.

180 Griswold Secret Brief, *supra* note 140, at 5.

181 *Id.*

182 Special Appendix, *supra* note 141, at 12.

183 S. UNGER, *supra* note 9, at 204. Unger cites an affidavit signed by Noel Gayler, director of the National Security Agency at the time, in the *Washington Post* case. The affidavit was sealed during the litigation and remains one of the few documents still under seal. Nevertheless, there is independent support for Unger's claim that it dealt with codes, apart from the obvious inference that can be drawn from Gayler's position and that the affidavit remains sealed. During the hearing in the *Post* case before District Judge Gesell, the judge referred to the affidavit and mentioned that it concerned codes.

184 Griswold Secret Brief, *supra* note 140, at 4-5; *see also* Special Appendix, *supra* note 141, at 15-20; Affidavit of William B. Macomber, United States v. The Washington Post, No.71 Civ. 1478 (D.D.C. June 20, 1971) [hereinafter Macomber Affidavit].

that the United States "has received the cooperation of a number of third countries in carrying out delicate diplomatic missions on sensitive and vital issues."[185] The administration claimed that it had approached, and that it continued to approach, other countries, "some of them not friendly to the United States,"[186] for assistance in negotiating an end to the fighting and the release of POWs.[187] It claimed that further publication would surely embarrass these governments and foreign officials, making it unlikely that they or others would act as go-betweens at the behest of the United States. The overall result would be to "seriously undermine our efforts to make such arrangements."[188]

The classified documents did not merely identify third-party countries or foreign officials who wanted their roles kept confidential, they also contained criticisms of the same foreign governments and officials who had acted as intermediaries.[189] For example, the administration claimed that some documents included "numerous disparaging references to Poland and Polish officials,"[190] and that they "cast the Poles in an unfavorable light and make it unlikely that they would act in any future peace negotiations."[191] Other documents "imply criticism"[192] of the Italian government, which had also assisted the United States in its diplomatic efforts.

The administration also asserted that, as a result of the harm to the diplomatic process caused by disclosures, "more of our men may die in North Vietnamese prisons."[193] It pointed out that the conditions of their confinement and their eventual release depended upon the diplomatic process, and that to the extent that disclosure harmed the diplomatic effort, the result would eventually be the loss of life for the United States prisoners of war.[194]

The administration cited two top secret cables dated February 19, 1967, and March 1, 1968, from Ambassador Llewellyn Thompson in Moscow to the State Department that were contained in the Pentagon study.[195] The first summarized a "highly confidential conversa-

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185 Special Appendix, *supra* note 141, at 15.

186 *Id.*

187 *Id.*

188 *Id.*

189 Griswold Secret Brief, *supra* note 140, at 4-5.

190 Special Appendix, *supra* note 141, at 20.

191 Macomber Affidavit, *supra* note 184, at 20.

192 *Id.*

193 Doolin Affidavit, *supra* note 159, at 3.

194 *Id.*; *see also* Special Appendix, *supra* note 141, at 15.

195 Special Appendix, *supra* note 141, at 17-19; Griswold Secret Brief, *supra* note 140, at 7-8.

tion with Soviet Prime Minister Kosygin on Vietnam and China,"[196] and the administration claimed that its disclosure that a "top Soviet leader may have been accommodating to United States interests places him in a vulnerable position with respect to his colleagues and thus far less likely to be accommodating in the future."[197] The second cable was marked "LITERALLY EYES ONLY," and contained Thompson's "careful and detailed assessment of probable Soviet attitudes toward various possible United States military actions with respect to North Vietnam and possible Soviet countermoves."[198] The administration claimed that the disclosure of this later cable could provide the Soviets with valuable intelligence[199] since Thompson was widely known as a senior authoritative official adviser on Soviet Affairs.[200]

The administration identified a 1965 memorandum by Maxwell Taylor to President Johnson that listed six concessions sought by the North Vietnamese from the United States and five concessions the United States sought from the North Vietnamese.[201] It claimed that the North Vietnamese would gain "a major advantage in any negotiations"[202] if they had access to this information. It also claimed that the North Vietnamese had complained in the past about unauthorized leaks disclosing negotiations between it and the United States, and insisted that serious negotiations with the North Vietnamese must be confidential.[203]

The administration made the general point that "the diplomatic process simply cannot function if governments do not have confidence in one another's ability to protect information given to them in confidence and classified accordingly."[204] As one affiant emphatically stated:

> Let me make myself clear. I am not referring here to such relatively minor problems as embarrassment or inconvenience. I am referring to specific and serious damage to United States foreign policy and security interests. I refer to the mortal damage such disclosures constitute to the diplomatic process itself. Without confidence by nations that they can in fact speak to the United

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196 Special Appendix, *supra* note 141, at 18.

197 *Id.*

198 *Id.* at 17.

199 Griswold Secret Brief, *supra* note 140, at 7.

200 *Id.*

201 Doolin Affidavit, *supra* note 159, at 1.

202 *Id.*

203 *Id.*; United States v. The Washington Post, 71 Civ. 1235 (D.D.C. June 21, 1971) (unpublished evidentiary hearing transcript of Dennis J. Doolin at 105(B)-(E)).

204 Macomber Affidavit, *supra* note 184, at 3.

> States on a confidential basis, there will be no meaningful American diplomatic process. And without a functioning diplomatic process, the United States has lost an essential part of its national security effort and its principal instrument for resolving disputes by peaceful means and seeking a just and enduring peace.[205]

This official, Deputy Under-Secretary for Administration in the Department of State, William Butts Macomber, also claimed that a prior restraint was needed so that United States officials would feel sufficient confidence to provide candid assessments of foreign diplomatic relations.[206] As an example, he cited Ambassador Llewellyn Thompson's detailed cables which summarized his views about the Soviet Union.[207]

Macomber also asserted that the administration needed a prior restraint to preserve the flexibility of the diplomatic process. He asserted that criminal remedies were not adequate and that unless the administration secured a prior restraint it would be forced to institute "security precautions so cumbersome and stringent that the Department of State . . . would not be able to function with even a modicum of efficiency."[208] Macomber wrote that the "stakes are too high to permit such a result,"[209] and he concluded: "If, as is generally conceded, the publication of the departure of a single troop ship can properly be enjoined, where no more than a few hundred lives are involved, there should be no question but that disclosures can be enjoined which pose incomparably greater perils."[210]

B. *Assessing the Allegations*

The administration's claim for a prior restraint has been discounted because of the general assumption that the administration's allegations of harm were general and not supported by specific reference to the classified documents in dispute. It turns out that both assumptions are false. As reviewed above, the government made many concrete allegations and it provided numerous references to the top secret study in support of them.[211]

The sufficiency of the government's allegations in the case are

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205 *Id.* at 3-4.
206 *Id.* at 17-18.
207 *Id.* at 18-19.
208 *Id.* at 4.
209 *Id.*
210 *Id.*
211 The number of references the government made to the Pentagon Papers to support its allegations increased substantially as the case was appealed. As I have counted the references in the documents available to me, the number of citations were as follows:

best put into perspective by focusing upon two factors. The first is the nature of the threatened harm. The injury in Chief Justice Hughes's famed troop ship hypothetical[212] was loss of life. None of the government's allegations in the Pentagon Papers Case involved a troop ship and sailing dates, but they did involve loss of life. The government

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District Courts	
New York Times case	6
Washington Post case	17
Court of Appeals	
New York Times case	21
Supreme Court	
Both cases	65

I am unable to provide a count of the citations in the D.C. Circuit because I do not have the documents submitted to the D.C. Circuit in the *Washington Post* case that were sealed.

Three points should be made about these references and the pattern they disclose. First, a reference might have been to just one page, but it is more likely that it was to several pages or to a whole volume or more, as in the case of the four volumes tracing the diplomatic history of the war from 1964-1968.

Second, the fact that so few references to the study provided to Judge Gurfein in the *Times* case was caused by the refusal of the government's witnesses to disclose why they believed that further publication of the Pentagon Papers would injure national security, at least so long as the *Times* lawyers and officials were in the courtroom. Because of obvious constitutional protections, Judge Gurfein refused to hear the evidence privately. Moreover, as U.S. Attorney Whitney North Seymour, Jr., has recounted, the government witnesses even refused to disclose the reasons why further publication would harm national security and supporting references to the government lawyers. *See* W. SEYMOUR, *supra* note 115, at 198-204.

After Judge Gurfein dissolved the temporary restraining order, the government's witnesses were shocked and agreed to confide their concerns to the government lawyers and to permit the lawyers to make a full presentation to the appeals court. As a result, the number of citations provided to the Second Circuit increased substantially. This had a direct spill-over affect onto the action against the *Washington Post* for, although it was begun on Friday, June 18, the day Judge Gurfein presided over an evidentiary hearing, Judge Gesell did not hold an evidentiary hearing until Monday, June 21. That explains why the number of citations provided Gesell was much larger than the number given to Gurfein, although I cannot explain why the number given Gesell was not the same as that provided the Second Circuit.

Third, most of these references to the study were not explicated by government witnesses during the evidentiary hearings. This was certainly true for the references not provided at the trial level. But it was also true in the main for the references that were provided. The witnesses limited their testimony to explaining the allegations and did not explain how the references to the classified documents supported them. There were at least two reasons for this. First the time available to government witnesses during the in camera hearings was limited. Second the government lawyers had the impression that the trial judges were going to review the passages the witnesses referred to. There is always the possibility that the witnesses did not explain the citations because the witnesses believed that they did not support the allegations. But I do not think that. I believe that the government was mainly concerned with explaining the allegations and convincing the judges that the allegations were legally sufficient.

One last point, some of the material referred to remains classified to this day. *See supra* notes 131-41, 179 & 183 and accompanying text.

212 Near v. Minnesota, 283 U.S. 697, 716 (1931); *see also supra* note 67 and accompanying text.

argued that further disclosures would slow up the rate of Vietnamization, thereby decreasing the withdrawal rate of United States combat troops and increasing the risk of harm or death to United States soldiers for a longer time. It argued that further disclosures would undercut negotiations through third party governments and foreign officials, which in turn would undermine the possibilities for a negotiated end to the fighting and the release of the POWs, both of which could result in death or injury. It maintained that future disclosures could threaten intelligence interests, and could undermine military plans still in effect, thus forcing the United States to rely upon inferior plans that put the lives of United States soldiers in greater danger.

The second factor is the probability that injury will result from publication. The government's claim for a prior restraint is enhanced as the probability of injury increases. This would seem to be the point of the troop ship example. But in the end, one cannot escape conjecture. That is also the lesson of the troop ship example. If a newspaper publishes the sailing time and course of a troop ship, a commanding officer might delay departure or change course, or the enemy might refrain from attacking or be repelled if it did. So merely characterizing the administration's claims in the Pentagon Papers case as conjectural is not legally fatal. What is required is an evaluation of the probability that injury will result from publication. In the troop ship hypothetical, it must be assumed that the probability of harm is very high, accepting that a more precise evaluation is impossible.

But what was the probability that harm would result from publication in the Pentagon Papers Case? Apart from Solicitor General Griswold's claim that the classified documents contained the names of CIA agents, no one said that these disclosures would lead to the direct and immediate death of United States soldiers as might the disclosure of troop locations to an enemy during a war. Certainly no one stated that injury to United States soldiers would *inevitably* result from publication, as Justice Brennan stated that he would require before he granted a prior restraint.[213]

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[213] New York Times v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

"Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindered to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.*

Justice Brennan's use of the word "inevitably" is odd, suggesting, as it does, that the requirements for securing a prior restraint are impossible to satisfy. And yet, in the same sentence, he concedes the theoretical availability of a prior restraint. In a recent interview, I called Justice Brennan's attention to the inherent tension in the legal standard he defined. He explained that his opinion was written on the assumption that the government could secure a prior restraint in some very narrowly defined circumstances, but that he did not wish to use a

At the same time, the administration's allegations were certainly serious—they implicated life, intelligence matters, and important diplomatic potential—and they were sufficiently plausible that they could not be dismissed as farfetched or incredible. Indeed, they were not only plausible, but entirely possible, if not likely to occur. Certainly it would be impossible to conclude otherwise without a careful review of all the evidence in the case, which did not occur. Moreover, while one might not be able to identify a particular claim and persuasively argue that its occurrence would be immediate and direct, it was entirely conceivable that at least one or more of the dozens of government allegations would result in immediate and direct harm of some serious gravity.

Nevertheless, the administration did lose. And although the positions of Justices Black,[214] Douglas[215] and Marshall[216] would have denied the administration a prior restraint regardless of the substance of the administration's claim, that was not true for Justices Brennan,[217] Stewart[218] and White.[219] For them it would appear that as strong as the government's claim was, it was not strong enough to satisfy the requirement of immediate and direct irreparable harm. Thus, for these three Justices whose votes decided the outcome,[220] the administration's strong allegations and proof were nevertheless legally insufficient to warrant a prior restraint.[221]

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word any less demanding than inevitably in order to convey his belief that it should not be granted unless the government's evidence satisfied the heaviest of burdens. Interview with Justice Brennan, former Associate Justice of the United States Supreme Court, in Washington, D.C. (Mar. 11, 1988) [hereinafter Brennan Interview].

214 *See New York Times*, 403 U.S. at 714-20 (Black, J., concurring).

215 *See id.* at 720-24 (Douglas, J., concurring).

216 *See id.* at 740-48 (Marshall, J., concurring).

217 *See id.* at 724-27 (Brennan, J., concurring).

218 *See id.* at 727-030 (Stewart, J., concurring).

219 *See id.* at 730-40 (White, J., concurring).

220 Because there were three dissents, any two vote changes would have altered the outcome.

221 Former Solicitor General Erwin Griswold has maintained that although the administration did not secure a prior restraint, the material he identified in his sealed brief to the Supreme Court as threatening national security was not published by the press. Interview with Erwin Griswold, former Soliciter General, in Washington, D.C. (Jan. 22, 1988).

Briefly it is worth noting how developments within the *Times* leading to its publication of the Pentagon Papers series lends circumstantial support to the government's claim that the Pentagon Papers contained information that would seriously harm national security if published.

A debate within the *Times* over whether or not to publish the series began as soon as the newspaper's officials learned that Neil Sheehan had acquired the classified study and continued until the evening of June 14, 1971, when the Nixon Administration sent the *Times* a telegram requesting that it cease publication of the series. The debate—quarrel might be a more accurate description—involved the reporters working on the story, the newspaper's senior editors,

III. The Haste of the Litigation

The haste of this litigation severely diminished the ability of the government, which had the burden of going forward, to present its best case, and the capacity of the judges, who had to make the decision, to study the relevant materials and to deliberate over legal and factual issues central to the judgment. Thus, free press values not only triumphed over national security considerations in this case, but over due process concerns as well. An appreciation of this claim requires a brief tour through this massive litigation.

The *New York Times* began to publish the Pentagon Papers on June 13.[222] The administration initiated suit against it on June 15.[223] The Supreme Court made public its judgment in the *Times* and the *Post* cases on June 30.[224] In between these dates, there were evidentiary hearings in two district courts,[225] two court of appeals arguments,[226] and full briefing for an unusual Saturday morning oral argument in the Supreme Court.[227]

Although some officials within the Pentagon began to evaluate the national security consequences of the *Times*'s publication on Sunday, June 13,[228] it was not until the next day that the administration began a systematic evaluation of the publication under the direction

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the publisher and his top assistants, the newspaper's in-house general counsel, and the *Times*'s outside attorneys at the New York law firm Lord Day & Lord.

The *Times* people were concerned about whether the papers were authentic and whether they warranted the resources it would take to publish a series based upon them. But they were also concerned about the national security implications of publication and the possibility of criminal liability of publishing them.

Harrison Salisbury recounts in *Without Fear or Favor* that many *Times* officials met on April 20, 1971, to consider whether or not to go ahead with the project. H. SALISBURY, *supra* note 9, at 118-24. At the end of the meeting, Salisbury wrote that James Goodale, in-house counsel for the *New York Times*, "white faced, warned, '[e]veryone has to remember, Be Quiet! Because everyone in this room may have participated in a felony.' " *Id.* at 123. Goodale was not alone in making this warning. On two occasions the attorneys from Lord Day & Lord warned top *Times* officials that publication of the classified material would violate the espionage laws. *Id.* at 171. These warnings were taken seriously by some at the *Times*, especially by Abe Rosenthal, the managing editor, and Arthur Sulzberger, the *Times* publisher, who took the unusual step of retaining approval over the series until shortly before publication. *Id.* at 202.

222 Sheeham, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. Times, June 13, 1971, at A1, col. 5.

223 *See supra* note 4.

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

225 *See supra* note 5.

226 *See supra* note 7.

227 Graham, *Supreme Court Weighs Issues On Vietnam Series After Pleas; Rejects a U.S. Secrecy Request*, N.Y. Times, June 27, 1971, at A1, col. 5.

228 Friedheim Interview, *supra* note 97.

of Assistant Attorney General Robert Mardian.[229] At that time Mardian could identify only one person within the Nixon Administration as being familiar with the forty-seven volume study.[230] Others, who eventually became witnesses in the case, were not asked to prepare to become witnesses until Wednesday, less than two days before the Friday evidentiary hearing.[231] Moreover, these witnesses did not meet the lawyers who would take their direct testimony and be their guardians during cross examination until Friday morning, just before the public adjudication of the government's prior restraint claim began.[232] Because the administration's attorneys were divided as to what the government's legal theory should be,[233] and because the witnesses were chosen by Washington officials,[234] the courtroom lawyers were further handicapped by the fact that the witnesses refused not only to disclose the most sensitive material that would have strengthened the government's claim for the relief it sought in a courtroom, but they flatly refused to discuss it even with the government lawyers.[235]

The government lawyers made some of its difficulties known to

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229 *See supra* notes 62-122 and accompanying text.

230 That individual was Dennis J. Doolin, Deputy Assistant Secretary of Defense for International Security Affairs. *See supra* note 80.

231 Two witnesses, Francis J. Blouin and William Butz Macomber, did not begin to prepare their testimony until Wednesday, June 16. United States v. New York Times, 71 Civ. 2662 at 104, 114 (S.D.N.Y. June 18, 1971) (transcript of unpublished evidentiary hearing).

232 Interview with Michael D. Hess, former Assistant U.S. Attorney, in New York, N.Y. (Nov. 23, 1987 and Mar. 30, 1989) [hereinafter Hess Interview].

233 Assistant Attorney General Robert Mardian and Defense Department's General Counsel, Fred Buzhardt, insisted that the administration argue that the government was entitled to a preliminary injunction if it could prove that the disputed documents were classified and that their classification was proper and that the newspapers were not authorized to disclose classified material. United States Attorney Whitney North Seymour, Jr., and Solicitor General Erwin Griswold were not unwilling to press this theory, but they wanted to respond to the newspapers claim that the first amendment barred a prior restraint absent a direct and immediate grave threat to national security. Because Mardian and Buzhardt selected the government witnesses and supervised their preparation, the witnesses were totally unprepared for the scope of examination that the newspapers' attorneys and the trail judges insisted upon.

234 *See* Mardian Interview, *supra* note 64; Hess Interview, *supra* note 232.

235 W. SEYMOUR, *supra* note 115, at 198-204. Seymour's description of his frustration is worthy of quotation.

> During the preparation of the witnesses to testify at the first hearing before District Judge Gurfein in New York—all of them senior representatives of the Defense and State Departments—the prospective witnesses were asked to identify the specific documents contained in the study which would jeopardize national security. The reply from the Defense Department counsel, J. Fred Buzhardt, was classic. "They cannot tell you," he said. "The information is classified."

Id. at 199. Seymour recounts the witnesses' shock when Gurfein dissolved the temporary restraining order and states that it was only then—after the government had lost the hearing—that the witnesses discussed the national security matters freely with the government lawyers.

the appeals court.[236] In fact, the Second Circuit seems to have reversed Judge Gurfein's decision vacating the temporary restraining order because of the government's claim that it needed more time to pinpoint references to the top secret report that would support the administration's claim.[237] The appeals court directed Gurfein to hold a second evidentiary hearing and set forth a time table that gave the government an additional ten days.[238] The importance the Court placed on free press values in this case cannot be fully appreciated without acknowledging that the press's right to publish free of a prior restraint came at the government's reasonable request that it needed a few more days to prepare for an evidentiary hearing, since the study in question consisted of 2.5 million words and was prepared by a Democratic administration no longer in power.

The haste of litigation also took its toll on the ability of the Justices to study the briefs, record, and top secret documents in the case. It is quite clear that the two district court judges, who presided over the evidentiary hearings, did not review the 7,000 page study. It was not introduced into evidence before Judge Gurfein until midday Friday.[239] Gurfein left the bench after 10:00 PM that evening, and according to his law clerk, the judge left the courthouse immediately.[240] The next morning Gurfein returned to his chambers early and began to dictate his opinion, without studying the classified material.[241] The opinion was made public at about 2:00 PM that day.[242]

Judge Gesell was similarly rushed in reaching a decision. The District of Columbia Circuit Court had ordered him to hold an evidentiary hearing on the government's claim and to render a judgment by 5:00 PM Monday, June 21.[243] The Pentagon Papers were not intro-

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236 United States v. New York Times, No. 71-1617 (2d Cir. June 22, 1971) (unpublished transcript of oral argument).

237 United States v. New York Times, No. 71-1617 at 6-12 (2d Cir. June 22, 1971 (unpublished transcript of in camera oral argument).

238 United States v. New York Times, No. 71-1617 at 1 (2d Cir. June 23, 1971) (en banc) (per curiam) (unpublished opinion).

239 United States v. New York Times, 71 Civ. 2662 at 63-65 (S.D.N.Y., June 18, 1971) (transcript of unpublished evidentiary hearing).

240 Interviews with Mel Barkin, former law clerk to United States District Judge Murray Gurfein, in New York, N.Y. (July 13, 1987 and Mar. 7, 1989) [hereinafter Barkin Interview].

241 *Id.*

242 Graham, *Court Denies an U.S. an Injunction to Block Times Vietnam Series; Appeals Judge Continues Stay*, N.Y. Times, June 20, 1971, at A26, col. 8.

243 United States v. Washington Post, 446 F.2d. 1322 (D.C. Cir. 1971); United States v. Washington Post, No. 71-1478 (D.C. Cir. June 18, 1971) (per curiam) (unpublished order directing the district court to conduct an evidentiary hearing and render a judgment by 5:00 PM on June 21, 1971).

duced into evidence until mid-day Monday.[244] The judge did not leave the bench until about 3:00 PM.[245] He rendered his judgement with a supporting opinion by the five o'clock deadline.[246] He did not have time to study the disputed top Secret documents.

It is likely that most of the court of appeals judges who decided the *Times* or the *Post* case did not review the classified documents. The majority of the Second Circuit judges reversed and remanded District Judge Gurfein's order to afford the government more time to present its case without ever reaching the question of whether further disclosures from the classified papers would injure national security.[247] The majority of the District of Columbia judges appear to have limited their review to whether District Judge Gesell's judgment was supported by the record, without making their independent review of the top secret documents themselves.[248]

The Justices on the high Court were in a similarly difficult position. The forty-seven volumes of the Pentagon Papers arrived in the Supreme Court building on Friday, June 25, about 6:00 PM, and were placed in a room under guard.[249] From roughly 7:00 PM to 10:00 PM, Justice Brennan studied the classified documents, and, as he recalled,[250] so did Justice White. Justice Brennan has no memory of any other Justice coming to review the top secret documents during the time he was at the court.[251]

The Justices assembled the next morning at 8:30 AM[252] to consider the government's ex parte motion[253] for an in camera oral argu-

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244 United States v. Washington Post, No. 71 Civ. 1235 (D.D.C. June 21, 1971) (transcript of unpublished evidentiary hearing). At 10:00 AM, the papers were not in the courthouse. *Id.* at 101. But by 2:30 PM, they had already been introduced into evidence. *Id.* at 220. Therefore, it seems likely that the documents did not arrive at the courthouse until midday.

245 *Id.* at 251-52.

246 *Id.* at 266-72.

247 United States v. New York Times, No. 71-1617 (2d Cir. June 23, 1971) (en banc) (per curiam) (unpublished opinion).

248 United States v. Washington Post, 446 F.2d 1327 (D.C. Cir. 1971).

249 Brennan Interview, *supra* note 213.

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.* The government's ex parte motion was denied by a vote of six to three. Chief Justice Burger and Justices Harlan and Blackmun voted to grant the motion, and Justices Black Douglas, Brennan, Stewart, White, and Marshall voted to deny the motion. Justice Douglas's notes on the conference in which the Justices considered the ex parte motion contain the following notation "*HLB* [Hugo L. Black] insisted that no notes be taken in this conference as they would be bound to leak out somewhere!" Handwritten notes of Justice William O. Douglas from the "conference" on cases 1873 and 1885, (June 26, 1971, William O. Douglas Papers, Box 1519, Manuscripts Division Library of Congress) [hereinafter Douglas Notes].

ment. That meeting lasted two hours.[254] It was followed shortly by a two hour oral argument, which in turn was followed by the Justices' conference on the case.[255] During the conference, eight of the Justices indicated how they intended to vote, and the ninth, Justice Stewart, stated only a tentative decision.[256] In other words, by the time the Justices voted in the case, it is likely that only two of them had time to review the documents in dispute. Under these circumstances, Chief Justice Burger's statements seem like an accurate description of one critical aspect of the case: "We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts."[257]

CONCLUDING OBSERVATIONS

The Court's *per curiam* opinion did state that the government must satisfy a heavy burden when it seeks a prior restraint, but that was all it stated. It did not define what it meant by the term "heavy burden," and with the critical portion of the record sealed and beyond the public's reach, it has not been possible until now to assess what the Court may have meant by the term and how the Court evaluated the strength of the government's evidence in the case. But the evidence reviewed in this article permits us for the first time to give meaning to the term heavy burden, at least as Justices Brennan, Stewart and White, who conceded the theoretical availability of prior restraint, probably meant it.[258]

To secure a prior restraint, the government must identify specific documents that the press possesses; it must claim that their disclosure will threaten life. Further, the documents it so identifies must be readily understood by a judge. The government must also establish that there is the highest likelihood that the harm alleged will follow immediately and directly upon publication. Merely establishing that grave harm will possibly result—even if the possibility is highly plausible—is insufficient.

These requirements mean that a judge should not defer to government witnesses when assessing the government's claim for a prior restraint. The government cannot prevail if its witnesses allege serious

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254 *Id.*

255 Graham, *Supreme Court Weighs Issues on Vietnam Series After Pleas; Rejects a U.S. Secrecy Request*, N.Y. Times, June 27, 1971, at A1, col. 6.

256 Douglas Notes, *supra* note 253. Justice Douglas's Conference notes contain the following notation: "*PS* he is close to position of WJB [William J. Brennan] and BW [Byron White] but has not yet voted . . ." *Id.*

257 New York Times v. United States, 403 U.S. 713, 748 (1971) (Burger, C.J., dissenting).

258 *See New York Times*, 403 U.S. at 714; *supra* notes 217-19.

harm, but do not explain the causal connection between publication of the documents in dispute and the threatened harm. The government witness must be able to explain the linkage between publication and injury and a judge must make her own finding that such a legally sufficient causal connection exists.

These requirements also mean that the government must be able to satisfy its evidentiary burden almost immediately upon request.[259] For example, Judge Gurfein gave the government only three days to prepare for an evidentiary hearing even though there were 7,000 pages in dispute. Moreover, a judge should not relax this requirement for an immediate evidentiary hearing by making an independent evaluation of the newsworthiness of the information in dispute. In the Pentagon Papers case, newsworthiness remained a matter solely for the press to assess.

Giving meaning to the term "heavy burden" is important, even if the process is inductive and the meaning can be attributed to only three Justices in the majority.[260] The Pentagon Papers case was the first time the government tried to stop the press from publishing information it possessed because of national security considerations.[261] It did so while the nation was at war—the United States still had over 140,000 troops fighting a land war in Southeast Asia,[262] and before the last troops were withdrawn, over 58,000 of them would die.[263] Moreover the government's allegations of harm were serious. The Nixon Administration claimed that the secret Pentagon study contained information that, if disclosed, would threaten lives,[264] disrupt diplomacy intended to save lives,[265] and compromise intelligence intended to protect lives.[266] And yet the administration lost.

The result was an extraordinary triumph for the press. The liti-

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259 In this article I do not address the propriety of the temporary restraining orders that were granted in the *Times* and the *Post* cases.

260 *See supra* notes 217-19.

261 The Court had decided cases that were relevant to the disposition in the Pentagon Papers case, the most well known being Near v. Minnesota, 283 U.S. 697 (1931). But *Near* certainly was not dispositive of the case. *See supra* note 67. In addition, the massive size of the government documents in this case combined with the fact that the nation was at war, were factors that could have been used (but were not) to distinguish this case from the those decided during the previous dozen years favoring first amendment values.

262 S. KARNOW, VIETNAM 685 (1983).

263 G. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM 1950-1975 at 256 (1986). According to Herring, official American estimates placed the number of South Vietnamese battle deaths at 107,504 and North Vietnamese and Vietcong at more than a half million. *Id.*

264 *See supra* notes 137-210 and accompanying text.

265 *See supra* notes 184-210 and accompanying text.

266 *See, e.g., supra* notes 179-83 and accompanying text.

gation tested the strength of a society's commitment to a free press, and the fact that free press values trumped those of national security and due process makes the outcome of exceptional importance in defining the role of the press in the democratic process.

Although my focus has been on its legal significance, it would be an oversight in an article that took a retrospective look at this historic litigation not to comment, even briefly, on its political significance. The impact of this case on the Nixon Administration was overwhelming. The conflict over the Pentagon Papers constituted a major turning point in the Nixon Presidency, for it significantly contributed to a climate within the administration that made possible events that led to Watergate and the cover-up and that ultimately forced Nixon to resign.

The Nixon Administration was surely ripe with paranoia before the *Times* began its famous series.[267] Nixon thought that the national press was unfairly against him,[268] that Democratic holdovers in his administration were subverting his mandate to govern by selectively leaking damaging documents,[269] and that Hoover and the FBI were ineffective in protecting him from his political enemies.[270] But the lawsuit against the *Times* intensified and magnified the White House fox-hole mentality and its we-versus-them view of the world. The systematic leaks of the Pentagon Papers during the litigation convinced Nixon and his aides that a broad conspiracy did exist.[271] The unwill-

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267 *See* H. KLEIN, *supra* note 41, at 345.

268 *Id.*

269 S. HERSH, *supra* note 24, at 86.

270 R. NIXON, *supra* note 125, at 595-99; *see also* R. POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 470, 588 n.79 (1987).

271 J. LUKAS, *supra* note 38, at 70; R. NIXON, *supra* note 125, at 513.

Lukas summarized his findings as follows:

> [O]n July 6 [1971] the President, John Ehrlichman, and John Mitchell met at the White House and, according to Ehrlichman, the attorney general said he believed Ellsberg had "Communist ties and was part of a conspiracy." The concern about a conspiracy was also fed by an FBI report which said that 'a group in Massachusetts' had duplicated the Pentagon Papers in Cambridge. And there was further consternation when Robert Mardian reported that some of the papers had been delivered to the Soviet embassy on June 17 . . . .

J. A. LUKAS, *supra* note 38, at 70.

Nixon wrote in his memoirs

> In early July, John Mitchell reported that the Justice Department had continuing indications that Ellsberg had acted as part of a conspiracy; we received a report that the Soviet Embassy in Washington had received a set of the Pentagon Papers before they had been published in the New York *Times*; I was told that some of the documents provided to the newspapers were not even part of the McNamara study. Once again we were facing the question: what more did Ellsberg have, and what else did he plan to do?

R. NIXON, *supra* note 125, at 513.

ingness of the press to cooperate with the administration strengthened Nixon's conviction that the press was out to destroy his authority.[272] The reactions of the courts to the administration's legal claims[273] and of the F.B.I. to the President's requests for help[274] reinforced Nixon's disposition that he had to take on his enemies by himself.

As a result, the administration took the offensive with a vengeance. Most immediately, it prosecuted Daniel Ellsberg[275] (who was thought to have leaked the top secret document), suspended the security clearance of the RAND Corporation[276] (at which the classified study was stored and from which Ellsberg took the study for photocopying), and investigated Neil Sheehan[277] (the *Times* reporter who broke the story), Senator Gravel[278] (who released a set of the Pentagon Papers), and the Beacon Press[279] (which published the Gravel set).

But those were not the administration's most devastating actions. Nixon decided that he needed an extra-legal investigatory capability that he directly controlled. He authorized the "plumbers unit" and located it in the White House.[280] It was this unit that burglarized Ellsberg's psychiatrist's office[281] and was (of course), later responsible for the break-in of the Democratic Party headquarters at the Watergate in June 1972.[282] Moreover, it was only after the Pentagon Papers Case that the administration began to consider a long list of far-fetched schemes such as fire-bombing the Brookings Institute,[283] which Nixon viewed as an arm of the Democratic Party, a source of anti-administration leaks, and a storeroom for classified government

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272 Haldeman's notes of his meeting with Nixon on June 13, 1971, record Nixon as referring to the *Times* decision to publish excerpts from the Pentagon Papers as traitorous, and his notes of his meeting with the President on the 14th summarize Nixon's orders to cut the *Times* off from news sources within the executive branch. *See* Haldeman Notes, *supra* note 44, and accompanying text.

273 *See, e.g.*, New York Times v. United States, 403 U.S. 713 (1971).

274 R. NIXON, *supra* note 125, at 513.

275 For a history of the government's prosecution against Daniel Ellsberg, see P. SCHRAG, *supra* note 9.

276 Smith, *Laird Increases Security On Papers at Rand Corp.*, N.Y. Times, July 3, 1971, at A1, col. 2.

277 P. SCHRAG, *supra* note 9, at 143.

278 N.Y. Times, Sept. 9, 1971, at A16, col. 1; *see also* P. SCHRAG, *supra* note 9, at 143.

279 Raymont, *Publisher Calls Beacon Press Case Threat to Freedom*, N.Y. Times, July 18, 1972, at A13, col. 1; *see also* P. SCHRAG, *supra* note 9, at 143.

280 R. POWERS, *supra* note 270, at 469-70.

281 P. SCHRAG, *supra* note 9, at 108-17.

282 R. POWERS, *supra* note 270, at 470.

283 G. GORDON LIDDY, WILL: THE AUTOBIOGRAPHY OF G. GORDON LIDDY 171-72 (1980).

documents pilfered by Leslie Gelb and Mort Halperin.[284] It was also after the Pentagon Papers case that the administration prepared an "enemies list" that included the names of many members of the press.[285] The administration's experience when it sued the *Times* and the other newspapers tipped Nixon and his advisors toward, to use Mary McCarthy's exquisite phrase, the "politics of irrationality,"[286] made possible the "White House horrors," as former Attorney General John Mitchell characterized them,[287] and prompted Nixon to engage in a cover-up that led to his undoing.[288]

The Pentagon Papers case also provides a critical perspective on one of the central dilemmas of our time. Many former government officials consider the Pentagon Papers Case unique,[289] and in many respects they are correct. The Pentagon Papers study itself was the "pure filet"[290] of government reports, as one government official described it, and its leak was the single largest, unauthorized disclosure of classified documents in the nation's history. The Nixon Administration's suit against the *Times* was the first time that any administration had resorted to the courts to stop the press from publishing material it already possessed.[291]

But emphasis on the case's uniqueness causes one to miss the links between the Pentagon Papers Case and larger trends of national importance. The emergence of the United States as the world's dominating power since the close of World War II has given rise to serious tensions between national security and its demands for secrecy on the one hand, and democracy and its requirement for accountable polit-

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284 *See id.*

285 S. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 104 (1990).

286 M. MCCARTHY, THE MASK OF STATE: WATERGATE PORTRAITS 152 (1974).

287 S. KUTLER, *supra* note 285, at 9.

288 *See generally* S. KUTLER, *supra* note 285.

289 Nixon referred to the leak of the Pentagon Papers as the "most massive leak of classified documents in American history." R. NIXON, *supra* note 125, at 508. Former Secretary of State Henry Kissinger referred to the leak as a "massive hemorrhage of state secrets." H. KISSINGER, *supra* note 48, at 730.

Former Secretary of State Dean Rusk has stated that he knows of no comparable leak of classified documents or of a similar law suit. Interviews with Dean Rusk, former Secretary of State (November 18, 1988 and December 18, 1988). Similar opinions have been expressed by former Deputy Secretary of State Nicholas Katzenbach and former Assistant Secretary of Defense Paul Warnke. Interview with Nicholas Katzenbach, former Deputy Secretary of State (January 3, 1989); Interview with Paul Warnke, former Assistant Secretary of Defense (April 20, 1989).

290 Testimony of Dennis J. Doolin, United States v. New York Times, No. 71 Civ. 2662 (S.D.N.Y. June 18, 1971) (unpublished transcript of in camera evidentiary hearing).

291 *See* New York Times v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring).

ical processes on the other.[292] Placing the Pentagon Papers Case within this context puts it on common ground with innumerable events including the free press cases of the seventies,[293] the recent curtailment of speech within the executive branch,[294] as well as the Iran-Contra affair.[295]

But few, if any, episodes better illuminate this conflict between the claims of security and democracy than the Pentagon Papers Case. Furthermore, in recent years, national security claims have seemed overpowering. In the name of national security, courts suppress speech,[296] a President muzzles government officials,[297] members of the executive branch by-pass congressionally imposed restraints on foreign relations,[298] and the press is unduly deferential to the government.[299]

The Pentagon Papers Case stands in sharp contrast to these contemporary trends. It offers a distinctive perspective to balancing the needs of democracy and security. As District Judge Murray Gurfein wrote in the early morning hours[300] on the day he dissolved the temporary restraining order he had granted barring the *Times* from further publishing its series:

> The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know . . . .
>
> These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form. This has been the genius of our institutions throughout our history. It has been the credo of all our Presidents. It is one of the marked traits of our national life that distinguish [sic] us from other nations under different forms of

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292 *See generally* S. AMBROSE, RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938 (1986); T. FRANCK & E. WEISBAND, SECRECY AND FOREIGN POLICY (1974); M. HALPERIN & D. HOFFMAN, TOP SECRET: NATIONAL SECURITY AND THE RIGHT TO KNOW (1977); S. TURNER, SECRECY AND DEMOCRACY: THE CIA IN TRANSITION (1986).

293 Snepp v. United States, 444 U.S. 507 (1980) (per curiam); United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972); United States v. The Progressive, 467 F. Supp. 990 (W.D. Wis. 1979).

294 *See* D. DEMAC, LIBERTY DENIED 101 (1990).

295 *See* THE TOWER COMMISSION REPORT: THE FULL TEXT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (1987).

296 *See, e.g.*, *Snepp*, 444 U.S. 507; *Marchetti*, 466 F.2d 1309.

297 *See supra* note 294.

298 *Supra* note 295.

299 M. HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY 299 (1989).

300 Barkin Interview, *supra* note 240.

government.[301]

The outcome of the Pentagon Papers Case affirms one set of values in the ideological struggle between democracy and security. It reminds us that courts can reject national security claims without imperiling the nation, that a strong nation requires a free press, and that the power of the state itself depends upon preserving the public trust. It can (and should), if its full meaning is comprehended, also strengthen our collective resolve to trust that the press knows how to report the news, essentially free of governmental censorship, without gravely injuring the nation's security in the bargain. At least that, along with a deep suspicion that government cannot be trusted to discipline its use of power, must be our hope.

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301 United States v. New York Times, No. 71 Civ. 2662 at 668-69 (S.D.N.Y. June 19, 1971) (unpublished opinion).