1993

Triangulating the Boundaries of the Pentagon Papers

John Cary Sims
Pacific McGeorge School of Law

TRIANGULATING THE BOUNDARIES OF *PENTAGON PAPERS*

John Cary Sims*

I. INTRODUCTION

Through triangulation it is possible to determine quite precisely the distance to a faraway object, or even how far it is to a distant star. The key to the process is taking sightings from two or more vantage points that are a known distance apart.[1]

---

* Professor of Law, McGeorge School of Law, University of the Pacific. I am grateful for the excellent research assistance provided by David I. Bass. David Rudenstine kindly provided several critical documents that were not otherwise accessible, and also offered detailed and very helpful comments on a draft of this article. I also appreciate the critiques and suggestions provided by Floyd Abrams, Nancy S. Drabble, Daniel F. Fitzgerald, Erwin N. Griswold, Morton H. Halperin, Boisfeuillet Jones, Jr., Brian K. Landsberg, Frederic Townsend, and James F. Woodbury. David C. Vladeck and the Public Citizen Litigation Group handled the lawsuit necessary to secure the release of documents under the Freedom of Information Act. The staff of the Gordon D. Schaber Law Library at the McGeorge School of Law assisted in numerous ways, and Louise Roysdon deserves special thanks for her processing of interlibrary loans.

[1] The title of this article is designed to evoke associations with the mathematical process by which two or more sightings or bearings taken from points which are a known distance apart may be used to determine the location of another object. *See, e.g.*, Richard Gillespie, *The Mystery of Amelia Earhart*, LIFE, Apr. 1992, at 68 (describing efforts to determine the location from which Amelia Earhart made her last radio transmissions by triangulating radio bearings taken at various stations in the Pacific Ocean); Eric Nalder & Gordon Lee, *High Noon for Military High Tech—Whiz-Bang Weapons Get First Battleground Test in Deserts of Persian Gulf*, SEATTLE TIMES, Jan. 18, 1991, at A1 (describing the operation of the Global Positioning System which "operates on the geometric principle of triangulation: calculating location by measuring the distance to other known points"); Christoph Hulbe & Robert Rodseth, *How Astronomers Gauge the Distance to a Star*, SACRAMENTO BEE, Nov. 2, 1992, at A11 ("By sighting on a star in, say, January and again in April—measuring the distance that Earth moves between those two months—the baseline becomes a large fraction of the Earth's orbit" and distances may be measured accurately so long as the star is no more than about 70 light years away.). Obviously, the inquiry undertaken in this article cannot triangulate with mathematical precision. However, triangulation also refers, by extension, to the process of using disparate sources of information and attempting to correlate them in a manner that allows reliable conclusions to be drawn about a matter that is not susceptible to direct investigation. *See, e.g.*, HANS ZEISEL, SAY IT WITH FIGURES 252 (6th ed. 1985) (the term triangulation "has come to designate any scientific effort to approach the truth of a

For all the attention that has been lavished on the Supreme Court's decision in the *Pentagon Papers* case,[2] the boundaries of the case remain largely uncharted. That is not because the language of the opinions is particularly obscure. The fact that the case was disposed of through a cryptic per curiam opinion coupled with a separate opinion written by each of the nine Justices does raise an obstacle to determining the true holding of the case; but, since each Justice expressed rather clearly his own view of the proper constitutional standard, there is broad agreement on the circumstances under which *Pentagon Papers* would permit a publication to be enjoined because of its potential for damaging the national security. It seems likely that publication may properly be restrained if disclosure of the information at issue "will surely result in direct, immediate, and irreparable damage to our Nation or its people."[3]

What has been missing in prior efforts to chart the boundaries of *Pentagon Papers* has been a precise understanding of what information the Government was attempting to prevent The New York Times and the The Washington Post from publishing. Without the vantage point provided by knowledge of what the Pentagon Papers contained that the Government was concerned about, efforts to stake out the limits of the Court's holding in the case can be no more successful than would be efforts to analyze *Cohen v. California* without knowing what the offending jacket said,[4] *F.C.C. v. Pacifica Foundation* without knowing the content of George Carlin's monologue,[5] or *United States v. O'Brien* without knowing what the defendant had burned.[6]

The principal impediment to using the Pentagon Papers themselves to gain a better understanding of what *Pentagon Papers* means and how it should be applied has been the sheer magnitude of the materials.[7] It has

---

proposition through more than one independently developed research channel."); Carl Bernstein, *The Idiot Culture: Reflections of Post-Watergate Journalism*, NEW REPUBLIC, June 8, 1992, at 22 ("[T]he FBI and the Justice Department came up with conclusions that were the opposite of our own, choosing not to triangulate key pieces of information."); Edwin M. Yoder, *The Reagan-Iran Hostage Link—Evidence for Link Is Very Compelling*, ATLANTA J. & CONST., Apr. 23, 1991, at A11 ("The evidence is circumstantial but compelling. . . . The stories triangulated."). The triangulation to which this article aspires is of the metaphorical, not the mathematical, variety.

[2] New York Times Co. v. United States, 403 U.S. 713 (1971).

[3] *Id.* at 730 (Stewart, J., with whom White, J., joins, concurring).

[4] 403 U.S. 15 (1971) (jacket bore the words "Fuck the Draft" on its back).

[5] 438 U.S. 726, 751-55 (1978) (providing a transcript of the monologue).

[6] 391 U.S. 367 (1968) (defendant had burned his Selective Service registration certificate).

[7] Detailed assessment of the impact that publication of the Papers had on the nation's policymaking is beyond the scope of this article. At least as digested and made available to the public by the Times and other commentators, the Papers "accused the architects

not been possible to wade through the forty-seven volumes of the study and reach reliable judgments about what material most concerned the Government, how well its fears were supported by the evidence it produced, or in what respects the Justices found the Government's showing to be deficient.[8]

The thesis of this article is that the additional reference point needed to understand *Pentagon Papers* is provided by the Secret Brief filed by Solicitor General Erwin N. Griswold in the Supreme Court. Although sealed at one time, most of the Secret Brief is now public. This document, as supplemented by and explained in the Solicitor General's oral argument before the Court, gives *Pentagon Papers* the context and concreteness that

---

of the war of having ignored sound intelligence advice against the bombing and of having misled the nation about the depth of commitment and the danger of defeat." DEBORAH SHAPLEY, PROMISE AND POWER: THE LIFE AND TIMES OF ROBERT MCNAMARA 488 (1993). Judge James L. Oakes, who as a member of the United States Court of Appeals for the Second Circuit participated in that Court's consideration of the *New York Times* branch of the *Pentagon Papers* litigation, has written that "[c]learly, publication of the Papers played an important role in enlightening the public and bringing the Vietnam conflict to an end some four years later." James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REF. 497, 504 (1982). The Pentagon Papers have also been described as playing a large role in the historiography of the Vietnam War. *See, e.g.*, GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975, at 283-84 (2d ed. 1986) (the Papers are "the basic documentary source" and are "invaluable" to researchers); George M. Kahin, The Pentagon Papers: *A Critical Evaluation*, 69 AM. POL. SCI. REV. 675 (1975) (Pentagon Papers study "provides such a mass of significant data as to ensure its enduring usefulness to anyone with a serious interest in the United States' long involvement in Indochina"). It has also been observed that "the Pentagon Papers incident intensified the adversarial relationship between the Administration and the media," which "led directly to one of the most fateful decisions of the Nixon presidency: the creation of the Plumbers." STANLEY I. KUTLER, THE WARS OF WATERGATE 111 (1990). It was the Plumbers' efforts to plug "leaks" and their other illegal activities that ultimately led to the forced resignation of Richard M. Nixon from the Presidency in 1974.

[8] It should be recognized that any attempt to identify what the Government was most worried about in the *Pentagon Papers* litigation represents an oversimplification of reality. As discussed below, "the Government" was far from unified in its judgment about the risks allegedly posed by the contents of the study, and it appears that the decision to seek an injunction against the The New York Times was made before any detailed evaluation of the Papers could be completed. Despite the initial ignorance on the part of such decisionmakers as President Richard M. Nixon and Attorney General John N. Mitchell about the particular security concerns raised by the Papers, as the litigation proceeded, the Government's lawyers made strenuous efforts to identify particular items within the Vietnam study which were alleged to have the potential to damage national security if they were published. This article proceeds, as the courts hearing *Pentagon Papers* did, by considering the merits of the various national security concerns raised in the litigation by the government attorneys, without regard to whether those concerns actually provided the motivation for the injunction suits against the Times and The Washington Post.

until now have in large measure been lacking. Examination of the Secret Brief not only permits identification of the security concerns raised by the Government, but also allows many of those concerns to be dismissed as plainly inadequate, while a few may be recognized as having substance. More importantly, as to the weightiest of the national security concerns relied on by the Government, examination of the Secret Brief and related materials permits a much more precise identification of those characteristics of the claims which, according to the Justices, made a further restraint on publication inappropriate. This more complete understanding of *Pentagon Papers* will, in turn, shed light on the proper application of this influential precedent in future prior restraint cases.

II. THE SIGNIFICANCE OF THE GOVERNMENT'S SECRET BRIEF IN *PENTAGON PAPERS*

More than twenty years after it was handed down, the *Pentagon Papers* decision[9] continues to fascinate and puzzle students of the First Amendment. Three different versions of the Papers were published in 1971,[10] and

---

[9] New York Times Co. v. United States, 403 U.S. 713 (1971). The documents at issue in the litigation were referred to by the *The New York Times* as the "Pentagon papers" when the newspaper published the first of its articles based on the monumental Department of Defense study of United States involvement in the Vietnam War. Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at 1, 38. As with so many other aspects of this untidy controversy, there was substantial confusion even as to the official title of the report that came to be known as the Pentagon Papers. In its complaint filed in the United States District Court for the Southern District of New York, the Government stated that the study was titled "History of U.S. Decision-Making Process on Vietnam Policy." Complaint, United States v. New York Times Co., No. 71 Civ. 2662 (S.D.N.Y. June 15, 1971), at 8-9, *reprinted in* 1 THE NEW YORK TIMES COMPANY V. UNITED STATES: A DOCUMENTARY HISTORY 8-9 (James C. Goodale ed., 1971) [hereinafter GOODALE COMPILATION]. That was the title used by the Government in its principal brief to the Supreme Court, Brief for the United States, New York Times Co. v. United States, 403 U.S. 713 (1971), at 3, *reprinted in* 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 117-46 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS], and by the Court itself in its per curiam opinion. 403 U.S. at 714. However, when most of the 47-volume study was declassified by the Department of Defense and published by the Government Printing Office in September 1971, the actual title was revealed to be "United States-Vietnam Relations—1945-1967". UNITED STATES-VIETNAM RELATIONS—1945-1967: STUDY PREPARED BY THE DEPARTMENT OF DEFENSE (1971) [hereinafter G.P.O. EDITION]. The sealed Secret Brief filed by Solicitor General Erwin N. Griswold in the Supreme Court had identified the study by its correct title. Brief for the United States (Secret Portion), New York Times Co. v. United States, 403 U.S. 713 (1971), at 2 [hereinafter Secret Brief].

[10] The first edition appeared in July 1971, shortly after the Supreme Court permitted the newspapers to resume publishing the Papers. NEIL SHEEHAN ET AL., THE PENTAGON

a book devoted to the case appeared soon after.[11] The case receives extended treatment in almost every basic constitutional law casebook,[12] as well as in more specialized casebooks[13] and the standard constitutional law

---

PAPERS AS PUBLISHED BY THE NEW YORK TIMES (1971). This one-volume work reproduced the *Times*'s articles and the documents that accompanied them, and also provided some additional commentary. It contains no index, and therefore is very difficult to use. In August, Beacon Press published a more extensive four-volume compilation of the Pentagon Papers made public by Senator Mike Gravel. THE SENATOR GRAVEL EDITION—THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (1971) [hereinafter GRAVEL EDITION]. The next year, Beacon Press added a fifth volume that includes a number of critical essays on the Papers, as well as indices and tables to facilitate use of the four original volumes. 5 THE SENATOR GRAVEL EDITION—THE PENTAGON PAPERS (Noam Chomsky & Howard Zinn eds., 1972). The Government's own version of the Papers was published in 1971 at the behest of the Chairman F. Edward Hébert of the House Committee on Armed Services. G.P.O. EDITION, *supra* note 9. The G.P.O. Edition consists of twelve volumes, and in general is much more comprehensive than either the New York Times Edition or the Gravel Edition. Many portions of the Papers are available only in the G.P.O. Edition. The G.P.O. Edition, however, deleted material that was considered to merit continued classification. Much of the deleted material may be found in the Gravel Edition, which also attempts to chart the respective coverages of the Gravel and G.P.O. Editions. 5 GRAVEL EDITION, *supra*, at 314-19. The G.P.O. Edition contains no index. Two useful guides to the different editions are George M. Kahin, The Pentagon Papers: *A Critical Evaluation*, 69 AM. POL. SCI. REV. 675 (1975), and H. Bradford Westerfield, *What Use Are Three Versions of the Pentagon Papers?*, 69 AM. POL. SCI. REV. 685 (1975). In addition to the three published versions of the Papers, some additional portions of the Vietnam study were made available during the criminal proceedings against Daniel Ellsberg and Anthony Russo.

[11] SANFORD J. UNGAR, THE PAPERS & THE PAPERS (1972). There is also a detailed examination of the Pentagon Papers controversy that focuses on the Government's effort to prosecute Daniel Ellsberg, who made the Pentagon Papers available to The New York Times and other newspapers. PETER SCHRAG, TEST OF LOYALTY: DANIEL ELLSBERG AND THE RITUALS OF SECRET GOVERNMENT (1974). Much helpful material may also be found in HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR: AN UNCOMPROMISING LOOK AT *THE NEW YORK TIMES* 3-24, 231-350 (1980).

[12] *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1107-17 (2d ed. 1991); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 504-13 (3d ed. 1992); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1549-55 (9th ed. 1993); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 887-94 (7th ed. 1991); GERALD GUNTHER, CONSTITUTIONAL LAW 1459-67 (12th ed. 1991); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 737-46 (4th ed. 1993). *But see* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 706-07 (1993).

[13] *See, e.g.*, WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 111-21 (1991); STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 336-46 (1991); STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 633-63 (1990); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW:

treatises.[14] Not only have a number of distinguished law professors[15] and judges[16] been inspired to discuss the case, and a raft of former Government officials moved to describe their roles in it,[17] but many of the attorneys involved have told their own versions of the controversy as well.[18]

Despite the tall stack of material that discusses *Pentagon Papers*, until very recently a number of the critical aspects of the litigation remained largely ignored. Due to the Government's objections to the disclosure of classified material, portions of the proceedings in the district courts and on appeal were conducted in camera and the transcripts were sealed. Similar precautions were taken with a number of the affidavits, briefs, and other

---

CASES, MATERIALS AND SIMULATIONS 1065-87 (2d ed. 1993); OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 217-42 (2d ed. 1984).

[14] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1045-54 (2d ed. 1988); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 973-78 (4th ed. 1991).

[15] *See, e.g.*, Harry Kalven, Jr., *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War—*, 85 HARV. L. REV. 3, 25-36 (1971); Philip B. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 285-90; Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971); Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

[16] *See, e.g.*, Oakes, *supra* note 7; Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171 (1981).

[17] *See, e.g.*, RICHARD M. NIXON, RN: THE MEMOIRS OF RICHARD NIXON 508-15 (1978); HENRY KISSINGER, WHITE HOUSE YEARS 729-30, 736-37, 1021 (1979); H.R. HALDEMAN, THE ENDS OF POWER 110-18 (1978); JOHN EHRLICHMAN, WITNESS TO POWER 300-02 (1982).

[18] *See, e.g.*, ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 296-313 (1992) [hereinafter GRISWOLD MEMOIRS]; Erwin N. Griswold, *'No Harm Was Done'*, N.Y. TIMES, June 30, 1991, at § 4, 15; Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25; Erwin N. Griswold, *Teaching Alone Is Not Enough*, 25 J. LEGAL EDUC. 251 (1973); WHITNEY NORTH SEYMOUR, JR., UNITED STATES ATTORNEY 190-210 (1975); Floyd Abrams, *The Pentagon Papers a Decade Later*, N.Y. TIMES MAG., June 7, 1981, at 22; Floyd Abrams, *The Press* Is *Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979); James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L.Q. 29; Stanley Godofsky & Howard M. Rogatnick, *Prior Restraints: The Pentagon Papers Case Revisited*, 18 CUMB. L. REV. 527 (1988). Griswold was Solicitor General and argued *Pentagon Papers* for the United States in the United States Court of Appeals for the District of Columbia Circuit and in the Supreme Court. Seymour was the United States Attorney for the Southern District of New York, the district in which the action against The New York Times was filed, and he appeared for the Government in both the district court and on appeal. Abrams was an attorney for The New York Times; Godofsky was an attorney for The Washington Post. The lead counsel for The New York Times also analyzed the significance of the case, though in a manner that focused on the doctrinal issues presented rather than on his personal experiences or on the procedural details of the litigation. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 60-62, 79-88, 114-16 (1975).

documents. Most significantly, the Solicitor General filed two briefs for the United States when *Pentagon Papers* reached the Supreme Court. One was filed in the usual manner. A second brief, however, was filed under seal, and it was this document that detailed the Government's objections to publication of the Pentagon Papers and attempted to justify continuing injunctions against The New York Times and The Washington Post.

Much of the sealed material was released as long ago as 1976, but it has received little attention until very recently.[19] It is very difficult, and perhaps impossible, to determine the real significance of *Pentagon Papers* without careful scrutiny of the once-secret documents, and particularly the Secret Brief filed by Solicitor General Erwin N. Griswold on behalf of the United States. When he argued the case for the Government in the Supreme Court on Saturday, June 26, 1971, the Solicitor General himself emphasized the degree to which the Government's case would stand or fall based on the Court's assessment of the Secret Brief:

---

[19] On July 28, 1976, the United States Department of Justice released 232 pages of documents that had previously been sealed. These included the transcript of the in camera proceedings conducted before Judge Gerhard A. Gesell in the action brought by the Government against The Washington Post in the United States District Court for the District of Columbia, the affidavits of three government officials filed in that action, the sealed brief filed by the Solicitor General in the Supreme Court (along with supporting documents), and the sealed brief filed by The Washington Post in the Supreme Court. This development, which was prompted by a Freedom of Information Act request by *New York Times* writer Anthony Lewis, went largely unnoticed, with the exception of a very brief article in the *Times*. *U.S. Releases 200 Pages of Pentagon Papers Data*, N.Y. TIMES, July 29, 1976, at 6. Some of the documents were redacted to withhold information still deemed by the Government to be classified. Two limited disclosures of information previously deleted from one affidavit were approved by Judge Gesell on December 30, 1980. United States v. Washington Post Co., Civil Action No. 1235-71 (D.D.C. Dec. 30, 1980). Later, Professor David Rudenstine secured the release of much of the sealed material pertaining to the *New York Times* litigation in the Southern District of New York and the United States Court of Appeals for the Second Circuit. David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1871 & n.11 (1991). The most significant items obtained by Rudenstine are the Special Appendix Relating to In Camera Proceedings and Sealed Exhibits that the Government filed in the Second Circuit, the sealed portion of the transcript of oral argument before the Second Circuit sitting en banc, and the transcript of the in camera testimony taken before United States District Judge Murray I. Gurfein in New York. On July 27, 1989 and August 8, 1989, I submitted requests under the Freedom of Information Act seeking disclosure of the portions of the sealed briefs in *Pentagon Papers* that had not been made public. Some of the material sought was released to me on March 19, 1993, but the Department of Justice continues to withhold portions of the secret briefs of the Government and The Washington Post. An FOIA suit has been filed to secure release of the remainder of the briefs and related documents. John Cary Sims v. United States Dep't of Justice, Civil Action No. 92-2180 (D.D.C. filed Sept. 23, 1992).

MR. GRISWOLD:

What I tried to do in my closed brief was I spent all yesterday afternoon in constant, successive conversation, with the individuals from the State Department, the Defense Department, the National Security Agency. And I said, "Look tell me what are the worst. Tell me what are the things that really make trouble." And they told me—and I made longhand notes of what they told me—and from that I prepared the closed brief.

[JUSTICE WHITE:]

Well, Mr. Solicitor General, if we disagreed with you on those that you have covered, the remainder of the items needn't be looked at?

MR. GRISWOLD:

Mr. Justice, I think that the odds are strong that that is an accurate statement. I must say that I have not examined every one of the remainder of the items.[20]

The outcome of the whirlwind litigation in *Pentagon Papers* turned on two critical issues. First, what constitutional standard did the Government need to meet in order to secure continuation of its injunction against publication of the Pentagon Papers, if *any* injunction against publication could be reconciled with the First Amendment?[21] Second, did any of the eleven items discussed in the Government's Secret Brief meet whatever constitutional standard was adopted by the Supreme Court?[22] The first

---

[20] 71 LANDMARK BRIEFS, *supra* note 9, at 219 (transcript of oral argument in *Pentagon Papers*) [hereinafter ORAL ARGUMENT TRANSCRIPT]. Transcripts of arguments before the Supreme Court generally do not identify the Justice asking a question, but the transcript as published by *The New York Times* the day after argument does provide that information in most instances for *Pentagon Papers. Transcript of Oral Argument in Times and Post Cases Before the Supreme Court*, N.Y. TIMES, June 27, 1971, at 24-26. In this article, all references are to the transcript printed in LANDMARK BRIEFS, but, where possible, identification of the questioner has been made by consulting the *Times*'s version of the transcript.

[21] Justices Black and Douglas took the position that no injunction against publication could be constitutional. New York Times Co. v. United States, 403 U.S. at 713, 715 (Black, J., concurring) ("[I]t is unfortunate that some of my Brethren are apparently willing to hold that the publication of news can sometimes be enjoined."); *id.* at 720 (Douglas, J., concurring) (the First Amendment "leaves . . . no room for governmental restraint of the press").

[22] In his argument before the Supreme Court in *Pentagon Papers*, the Solicitor General said there were ten items discussed in the Secret Brief. ORAL ARGUMENT TRANSCRIPT,

question was addressed by a flurry of ten separate opinions, and under the test applied, whatever it was, the second question was answered "no," and the newspapers were authorized to proceed immediately with their publication of the disputed documents.

The Secret Brief is crucial to understanding the Supreme Court's resolution of both of these questions. Although hints are dropped in some of the opinions issued by the members of the Court who participated in *Pentagon Papers*, only the Secret Brief offers a precise statement of the matters on which the Government ultimately relied in attempting to establish the propriety of an injunction. In addition, the constitutional standards announced by the Justices are couched in language that is very difficult or impossible to decipher fully without examining the Secret Brief. Thus, if one accepts the thesis that the holding of *Pentagon Papers* is that an injunction is proper only if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people,"[23]

---

supra note 20, at 218, 220. In fact, the brief included 11 separate items. Secret Brief, *supra* note 9, at 4-10. Due to the fact that certiorari had been granted only the day before oral argument was held, the Supreme Court did not require that either the open or the secret briefs be printed. The open briefs of the parties and the briefs of the amici were later printed. 71 LANDMARK BRIEFS, *supra* note 9, at 17-212.

[23] This was the standard applied by Justice Stewart in an opinion in which Justice White joined. *New York Times Co.*, 403 U.S. at 727, 730. Many commentators have pointed to this formulation as the one most likely to have had the support of a majority of the Court. *See, e.g.*, Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 373 (1976) (*Pentagon Papers* opinions "converge" on the proposition stated by Justice Stewart); Floyd Abrams, *The Pentagon Papers a Decade Later*, *supra* note 18, at 77 (the "Stewart-White opinion is generally cited as establishing the legal test of the Pentagon Papers case"). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)) (opinion of Stewart, Powell, and Stevens, JJ.). The Stewart-White formulation is plainly narrower than the positions stated by Justices Black, Douglas, and Brennan; and Justice Marshall's opinion diverged from all the other concurring opinions in the degree to which he relied upon the fact that Congress had "refused to pass" statutes that would have made it a crime for the Times and the Post to publish classified documents of the sort included in the Pentagon Papers. *See New York Times Co.*, 403 U.S. at 747 (Marshall, J., concurring). Justices Black and Douglas, and perhaps Justice Brennan as well, would have refused to enjoin publication even if the Government had met the test stated by Justice Stewart, but it appears that if the Government had met Justice Stewart's standard there would have been a majority (the three dissenters plus Justices Stewart and White) in favor of continuing to enjoin publication. *See, e.g.*, Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 7 (1980) ("[I]t seems unlikely that the Court would now refuse an injunction when the government submitted

it is almost impossible to say in the abstract how the holding should be applied to actual controversies. Thus, for example, Professor David Currie labeled *Pentagon Papers* the "most celebrated first amendment controversy of the Burger years," but he concluded that it "added nothing of doctrinal interest," precisely because none of the opinions revealed what the study contained.[24]

By examining the Government's Secret Brief, however, it is possible to interpret the articulated standard more confidently, since we know that the justifications for a continuing restraint on publication that were stated in the Secret Brief were found to be *inadequate*. The Secret Brief cannot establish what justifications will be sufficient under *Pentagon Papers*, but it can and does demonstrate what types of allegations of expected harm to national security should be rejected.[25]

This article will first review the events leading up to the *Pentagon Papers* litigation and the procedural maneuvering that took the case on its wild ride from complaint to Supreme Court decision in just over two weeks.[26]

---

proof adequate to satisfy the necessarily somewhat vague test stated by Justices Stewart and White.").

[24] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888—1986 507 (1990) ("Neither the brief unsigned order nor the individual opinions filed by each of the nine Justices revealed what the study contained; the decision showed only that the Court meant what it had said about the difficulty of justifying prior restraints."). Contrary to Professor Currie's statement that *Pentagon Papers* "added nothing of doctrinal interest," it would appear that the case, at a minimum, provides solid support for the proposition that a prior restraint is *possible* in a national security case upon a proper showing by the Government. On this issue, *Pentagon Papers* seems to add substantial gravity to the off-hand statement in Near v. Minnesota, 283 U.S. 697, 716 (1931), that such an injunction could be constitutional under some circumstances. *Pentagon Papers* also sheds considerable light on the showing which the Government would need to make in order to justify such an injunction.

[25] This discussion is based on the assumption that the holding of *Pentagon Papers* remains good law despite the passage of over 20 years and substantial turnover in the membership of the Court. That assumption, while it merits critical evaluation, is an appropriate starting point for a discussion of *Pentagon Papers*. First, the Supreme Court has never directly undercut *Pentagon Papers* or raised questions as to its continuing authority. Second, even if some Justices were inclined to reconsider *Pentagon Papers*, or even to modify or overrule it, discussion of such possible pronouncements should be undertaken, if an appropriate case presented itself, only upon the foundation provided by a secure understanding of what was decided in *Pentagon Papers*. For example, consideration by the Supreme Court of arguments that the abortion ruling in Roe v. Wade, 410 U.S. 113 (1973), should be overruled almost invariably includes precise analysis of what *Roe* itself held. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2804 (1992) (opinion of Justices O'Connor, Kennedy, and Souter) (restating the "essential holding" of *Roe v. Wade*).

[26] The New York Times was sued by the United States on June 15, 1971. After consideration by the district courts and courts of appeals in New York and Washington,

Since this has already been done well by others,[27] there is no need to recite at length every detail of the proceedings. I would like to focus, however, on the procedures followed in the case to the extent that they cast light on the question of whether the Government had a fair opportunity to prove the case in support of the injunctions it was seeking. This issue seems especially important and interesting in light of former Solicitor General Griswold's recent assertions that the courts proceeded too quickly in the case. In essence, while conceding that "we now know that there was probably not adequate ground for an injunction" in the case,[28] Griswold argues that "because of the pell mell way in which the courts proceeded" there was no adequate opportunity for the Government to ascertain with adequate precision exactly what documents the Times and the Post had, and what security risks, if any, they posed if published.[29] For Griswold, "the whole Pentagon Papers episode" was nothing more than "a tempest in a teapot,"[30] or even "a sort of phantom decision,"[31] because the newspapers did not even possess the information about which the Government was most concerned. Therefore, in his view, the Supreme Court should have followed the path urged by the three dissenters, who objected to the speed of the adjudication. Griswold argues that "if the parties had had an opportunity to explore their separate versions of the Pentagon Papers more carefully, they might have discovered that the papers which Ellsberg made available to the newspaper in fact contained no dangerous materials, and the Government's case might have been withdrawn."[32]

Former Solicitor General Griswold, in continuing to raise vigorous objections to the manner in which the *Pentagon Papers* litigation was conducted,[33] finds an unlikely ally in Professor David Rudenstine. Rudenstine applauds *Pentagon Papers* as "one of the most extraordinary affirmations of free press values,"[34] but asserts that "free press values not only triumphed over national security considerations in this case, but over

---

D.C., certiorari was granted in both the *Times* and the *Washington Post* cases on June 25, and oral argument was held the next day. The Supreme Court's three-paragraph per curiam opinion and the nine opinions written by the individual Justices were filed on June 30, 1971.

[27] *See, e.g.*, Rudenstine, *supra* note 19, at 1872-91.

[28] GRISWOLD MEMOIRS, *supra* note 18, at 309.

[29] *Id.* at 302.

[30] *Id.* at 312.

[31] Erwin N. Griswold, *'No Harm Was Done,' supra* note 18.

[32] GRISWOLD MEMOIRS, *supra* note 18, at 311.

[33] As Solicitor General, Griswold made the same objections when he argued the *Pentagon Papers* case before the Supreme Court. ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 258-59.

[34] Rudenstine, *supra* note 19, at 1870.

due process concerns as well."[35] For the reasons that will be spelled out in detail below, I disagree. If anything, the full record in the case, including the once-sealed materials, shows that the judges allowed the Government every reasonable opportunity to develop and present its claims of potential threats to national security.

This threshold consideration of the appropriateness of the procedures followed in the *Pentagon Papers* litigation is vital to what follows, because substantial flaws in the manner in which the courts reviewed the Government's national security claims would seriously, and maybe even fatally, undercut the holding of the case. One who concluded that the Government's concerns had not been given a fair hearing in *Pentagon Papers* would be unlikely, in approaching later prior restraint controversies, to ascribe great weight to the Court's conclusion that publication of the Papers could not properly be enjoined.

The second portion of this article will examine in detail the Secret Brief filed by Solicitor General Griswold in the Supreme Court. This brief constituted the heart of the Government's case. Given the speed with which the case went forward, the Government's arguments changed a good deal as the litigation moved from the district courts to the courts of appeals to the Supreme Court, and the formal briefing of the case was hasty at best. Thus, the Secret Brief—as the Government's last written argument to the Court—played a much more significant role in the presentation of the Government's position than would a reply brief in a more typical case.[36]

The third section of this article will focus on the oral argument before the Supreme Court. Solicitor General Griswold's argument relied heavily on his Secret Brief to establish the factual foundation upon which any injunction would depend. Both the Solicitor General and Professor Alexander M. Bickel, the attorney for The New York Times, were put under great pressure by the Justices, who were seeking clarification of each side's formulation of the applicable First Amendment principles.

In the fourth section of this article, I will make an effort to identify the boundaries of *Pentagon Papers*, utilizing the additional guidance that can be found in the Secret Brief and the other newly-available materials, which have not been completely considered in prior discussions of the case. I will

---

[35] *Id.* at 1903.

[36] The newspapers and the Government exchanged their open briefs and their secret briefs simultaneously shortly before oral argument, and there was no opportunity to file reply briefs. In looking for a document in ordinary appellate litigation which might be comparable to the Secret Brief, however, a reply brief would seem to be the best choice, because it would typically be the last written submission before oral argument. In *Pentagon Papers*, the Government's Secret Brief was a seminal document, because the Government plainly had the burden of justifying continuation of the temporary restraints which had prevented the Times and the Post from publishing.

argue that the Secret Brief confirms what the language of the Justices' opinions only suggests—that the type of injunction sought by the Government will encounter a degree of judicial skepticism that has few, if any, equivalents in First Amendment doctrine. The Secret Brief makes it much easier to pinpoint the areas in which the Government failed to prove what the Court required of it, and thus it becomes easier to identify the standard that the United States should encounter when and if it again seeks to enjoin the publication of information alleged to pose a threat to the Nation. This section will also briefly re-examine the *Progressive* case, in which the United States sought to enjoin publication of an article describing the design of a hydrogen bomb.[37] This article's thesis is that courts that are confronted by requests for injunctions against publication of the sort involved in *Pentagon Papers* and the *Progressive* case can go forward with a surer step if they use the Secret Brief and related materials to expose the real meaning of *Pentagon Papers*.[38]

Overall, this article will attempt to sort out the inconsistent, and sometimes wildly extravagant, descriptions attached to the *Pentagon Papers* ruling. Was the case "one of the most extraordinary affirmations of free press values"[39] or "a tempest in a teapot"?[40] Was "the granting of any injunctive relief whatsoever" a serious error that pervaded the litigation from the outset, as Justice Brennan claimed,[41] or was the

---

[37] A temporary restraining order against publication was issued on March 9, 1979, and a preliminary injunction followed on March 26, 1979. United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). A later opinion declining to vacate the injunction was itself filed under seal, although it is now reported at 486 F. Supp. 5 (W.D. Wis. 1979). On September 17, 1979, the government abandoned its efforts to stop publication of the article, because the same or similar information about the hydrogen bomb was being published by others. *The Progressive* then published the disputed article. Howard Morland, *The H-Bomb Secret*, THE PROGRESSIVE 14 (Nov. 1979). The case is discussed in detail in Lucas A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990).

[38] Prior to the publication of Professor Rudenstine's article, *supra* note 19, the only substantial discussion of which I am aware of the Solicitor General's Secret Brief from *Pentagon Papers* was contained in the Joint Brief of Appellants Knoll, Day and Morland in United States v. The Progressive, Inc. (7th Cir. Nos. 79-1428, 79-1664), at 27-28. The Appellants argued that the Secret Brief refuted the Government's argument that *Pentagon Papers* was distinguishable from the *Progressive* case "because the Pentagon Papers were merely an 'historical' record whose publication would, at most, have caused embarrassment." *Id.* at 27. The Apellants cited the Secret Brief in an effort to show that "in 1971 the government characterized the Pentagon papers in a very different way." *Id.*

[39] Rudenstine, *supra* note 19, at 1870.

[40] GRISWOLD MEMOIRS, *supra* note 18, at 312.

[41] New York Times Co. v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring).

Supreme Court "almost irresponsibly feverish"[42] in refusing to extend the temporary injunctions by another few weeks or months to allow the Government to marshal its proof, as Justice Harlan stated in dissent? Professor Harry Kalven, Jr., writing shortly after *Pentagon Papers* was decided, stated that there "is no doubt that it was a great case," and one that constituted "the special gift of the Supreme Court from the 1970 Term" because it offered such a substantial gesture of support for the doctrine that dissent should be tolerated, even during wartime.[43] His colleague Philip B. Kurland, writing at about the same time, suggested that *Pentagon Papers* "is not likely to prove an important one in constitutional jurisprudence" because of its unusual facts and the failure of the newspapers to publish the documents "which the Solicitor General told the Court would be inimical to the security interests of the United States."[44] Anthony Lewis, in a recent book on the First Amendment, dismisses *Pentagon Papers* as "a famous victory for the press" that was shown by later decisions to be "not much of a victory."[45]

Despite these contradictory assessments of the case, it remains worthwhile to concern ourselves with *Pentagon Papers*. The opinions in

---

[42] *Id.* at 753 (Harlan, J., dissenting).

[43] Kalven, *supra* note 15, at 29, 36. *See also id.* at 26 ("[A]t least in matters of the first amendment, great cases can make great contributions to a tradition, to that aura of importance which goes beyond the profile of technical doctrine."). In contrast to the rosy assessment offered by Professor Kalven, Professor Alexander M. Bickel, lead counsel for The New York Times in *Pentagon Papers*, has noted that, even though the Times won the case, there had never before been an attempt by the federal government to obtain a prior restraint against a newspaper. "[T]hat spell was broken, and in a sense freedom was thus diminished." ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975).

[44] Kurland, *supra* note 15, at 286, 289. *See also id.* (suggesting that the case is likely to "prove sterile"); CURRIE, *supra* note 24, at 507 (*Pentagon Papers* "added nothing of doctrinal interest"). Professor Kurland's substantive prediction merits serious consideration even though he was demonstrably wrong in predicting that the case almost uniformly known as the *Pentagon Papers* case was bound to be called *New York Times II*. KURLAND, *supra* note 15, at 289. Nor was the "extraordinary compatibility of views" which he noted to exist between Chief Justice Burger and Justice Blackmun, *id.* at 268, a long-lived phenomenon.

[45] ANTHONY LEWIS, MAKE NO LAW—THE SULLIVAN CASE AND THE FIRST AMENDMENT 241 (1991). Morton H. Halperin's evaluation of *Pentagon Papers* is even harsher: He finds that the decision, "much praised by civil libertarians when it was handed down, was in fact the harbinger of a more deferential attitude toward national security claims. A majority of the justices were clearly willing to contemplate situations in which they would approve a prior restraint on publication of information." Morton H. Halperin, *The National Security State: Never Question the President*, *in* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT, 1969-1986, at 50, 51 (Herman Schwartz ed., 1987). Halperin argues that Justice Harlan's dissent in *Pentagon Papers*, urging a high degree of deference to the Executive Branch in national security matters, came to command the support of a majority of the Burger Court. *Id.* at 52.

that case remain the principal authority governing any effort to obtain an injunction prohibiting the publication of information pertaining to national security.[46] Despite the many ambiguities that will forever surround the ten separate opinions issued in *Pentagon Papers*, careful consideration of the Government's Secret Brief and the related materials have the potential to bring us closer to an understanding of the real meaning of the case.

III. FROM COMPLAINT TO SUPREME COURT DECISION IN FIFTEEN DAYS

The New York Times began publishing the documents we know as the Pentagon Papers on Sunday, June 13, 1971. Two days later, after the first three installments in the Times's series had been published, the United States sought an injunction against publication in the United States District Court for the Southern District of New York. The Washington Post entered the fray on Friday, June 18, when it began publishing its own series of articles based on the Papers, and it was sued by the Government later that day in the District of Columbia. The courts temporarily enjoined publication after three articles had been published by the Times and two by the Post, and a series of injunctions issued by various courts had the effect of preventing further publication through issuance of the Supreme Court's decision on June 30. Only then were the newspapers free to resume publication.

The speed with which the *Pentagon Papers* litigation went forward, and the circumstances under which the Government was obliged to undertake its efforts to establish the propriety of the injunctions it sought, have been described as representing a triumph for free press values over due process concerns.[47] Such a description implies criticism of the procedures utilized, since it seems unlikely that it would be desirable for any competing interest to triumph over due process.[48] This criticism merits

---

[46] For example, the *Progressive* case boiled down to little more than a battle about the proper application of *Pentagon Papers* to the circumstances surrounding Howard Morland's article about the H-bomb. The defendants argued that the *Pentagon Papers* standard had not been met, while the United States emphasized that there was no statute authorizing the government to seek to enjoin the newspapers publishing the Pentagon Papers. In contrast, 42 U.S.C. §§ 2274 and 2280 are aimed specifically at preventing the dissemination of secret information concerning nuclear weapons. *See* Powe, *supra* note 37, at 57-61.

[47] Rudenstine, *supra* note 19, at 1903.

[48] Professor Rudenstine does not explicitly state whether he believes that the procedures followed in *Pentagon Papers* were appropriate for that case, and he does not address the question of whether those procedures should be retained in future prior restraint cases. It seems, however, that the approach that would be called for by flexible modern due process doctrine would be for the courts to satisfy due process concerns by

serious consideration, since in any future controversy involving an effort to restrain the publication of information pertaining to the national defense, *Pentagon Papers* will surely be looked to for guidance as to the procedures to be followed. More importantly, informed judgments about the scope of the holding in *Pentagon Papers*, and about its correctness as a matter of First Amendment analysis, must be sensitive to the highly unusual circumstances under which the case was presented to and decided by the courts. If the Government was prevented from effectively marshalling the evidence that supported its claims, then the significance of the Supreme Court's First Amendment ruling in *Pentagon Papers* would inevitably be diminished—the outcome could be dismissed as a procedural mistake grounded in the unique facts of the case, rather than being looked to as an expression of First Amendment principles to be followed in future cases.[49] However, if the Government was given adequate opportunities to gather and present its evidence, the rejection of the preliminary injunctions is properly seen, not as a product of unusual or improper procedural shackles that disadvantaged the Government, but rather as reflective of a more general First Amendment principle disfavoring prior restraints.

A. *The Action Against The New York Times.*

When The New York Times began publishing its series drawing on the massive forty-seven-volume Defense Department study entitled "United States-Vietnam Relations—1945-1967," few officials in the Executive Branch were even aware that the documents existed.[50] The "Pentagon

---

fashioning "such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). If that were done, both free speech values and due process concerns could be accommodated. If, contrary to Professor Rudenstine's contention, due process concerns were vindicated in *Pentagon Papers* itself, then no modification of the procedures followed would be necessary.

[49] It seems unlikely that a future Supreme Court would read *Pentagon Papers* to stand for the proposition that in a prior restraint case the Government is not entitled to have its claim for an injunction heard under procedures that comply with due process. Rather, the Court would either find that the procedures implemented in *Pentagon Papers* were appropriate and should be followed, or it would find that they were deficient and should be altered. The latter course would in effect represent the rejection of the position taken by the six concurring Justices in *Pentagon Papers* and the acceptance of that argued for by the three dissenters. It is somewhat problematic to discuss "due process" at all in the context of a claim asserted by the Government, since the due process guarantee protects persons against government action. However, such a perspective on due process is less unusual than it at first appears, since under *Mathews v. Eldridge*, 424 U.S. 319 (1976), every decision as to the type of process which is due depends upon a consideration of both governmental and private interests.

[50] *See* Rudenstine, *supra* note 19, at 1875-88.

Papers" had been prepared by the Vietnam Task Force created in the Office of the Secretary of Defense during the Johnson Administration. President Richard M. Nixon was one of those who had never heard of the Papers, and his initial reaction upon learning of the Times's series was tempered by the fact that the focus of the study was Vietnam policy under Presidents John F. Kennedy and Lyndon B. Johnson, and that the period covered by the documents ended before his own Administration took office.[51] Apparently, President Nixon's change of heart, and his ultimate decision to sue the Times, was largely attributable to the influence of National Security Adviser Henry Kissinger, who told Nixon that he would appear to be a "weakling" if he took no action.[52]

There is no doubt that the logistical and administrative burden facing the Government's lawyers was enormous, if evidence was to be successfully gathered to justify an injunction against The New York Times. The Pentagon Papers consisted of forty-seven volumes, totalling 7,000 pages containing 2.5 million words.[53] At the time The New York Times

---

[51] *Id.* at 1875-77.

[52] HALDEMAN, *supra* note 17, at 110; KISSINGER, *supra* note 17, at 730. Professor David Rudenstine has examined in minute detail the deliberations leading up to the Government's decision to sue the Times. Rudenstine, *supra* note 19, at 1872-91. After reviewing the published sources and archival materials and interviewing many of the participants, Rudenstine concluded that the choice of an injunctive proceeding against the Times, rather than some other remedy, originated in the Justice Department with Assistant Attorney General Robert C. Mardian and Attorney General John N. Mitchell. Rudenstine also attributes the Justice Department's recommendation to a sincere judgment that national security was imperiled by publication, since "other, less risky legal remedies were available" if the goal was merely to intimidate the press. *Id.* at 1891. For example, the Justice Department could have initiated grand jury investigations into how the Times had obtained the Papers or into whether the espionage statutes had been violated. *Id.*

[53] The first Pentagon Papers article published by the Times stated that there were 3,000 pages of analysis and 4,000 pages of official documents, totalling 2.5 million words. Sheehan, *supra* note 9. The complaint filed by the Government in the Southern District of New York disclosed that there were 47 volumes in the study. Complaint, *supra* note 9, at 1, 3. In fact, the Times had actually received only 43 of the volumes. Daniel Ellsberg, the former Defense Department official and consultant who made the Pentagon Papers available to the Times and other newspapers, had withheld the four volumes describing various diplomatic efforts to bring about an end to the Vietnam War. Apparently, Ellsberg was concerned that publication of those volumes carried a risk of damaging the peace process. The four "negotiating volumes"—designated VI-C-1, VI-C-2, VI-C-3, and VI-C-4—were not published by the Times or any other newspaper in 1971 and were not included in any of the three published versions of the Pentagon Papers. Those volumes were finally published more than a decade later, with modest deletions of material still considered classified. THE SECRET DIPLOMACY OF THE VIETNAM WAR: THE NEGOTIATING VOLUMES OF THE PENTAGON PAPERS (George C. Herring ed., 1983) [hereinafter NEGOTIATING VOLUMES].

began publishing excerpts from the Papers and its commentary based on the documents, every page of the forty-seven volumes was classified "Top Secret—Sensitive."[54] The ostensible explanation for the border-to-border classification of the study was the practice of assigning to any compilation volume the highest level of classification merited by any item contained within it.[55] A second explanation was given by Solicitor General Griswold in his argument before the Supreme Court in the *Pentagon Papers* case itself: "there has been—has been, as long as I can remember, which is quite a while—massive over classification of material. And there has been

---

[54] *See* Complaint, *supra* note 9, at 3. "Top Secret" is the highest of the three standard levels of classification established by Executive Order, the lowest level being "Confidential" and the middle level being "Secret." There is no official classification category entitled "Top Secret—Sensitive." "The mark 'Sensitive' had no basis either in law or in the administrative classification system," SCHRAG, *supra* note 11, at 36, but it was "often used to designate material that was to be withheld from other government officials (and particularly from the Congress) because its contents were 'bureaucratically and politically embarrassing.' " *Id.* (describing testimony at the Daniel Ellsberg trial by Morton H. Halperin, the Defense Department official responsible for overseeing the Pentagon Papers project).

Contrary to what one might assume, "Top Secret" is not, in effect, the highest level of classification that is possible. The information that is considered to have the greatest potential to injure the national security (such as that pertaining to cryptology, technical systems for collecting intelligence, and the identities of human sources) is assigned one or more "code words," which designate special-access or special-handling categories. Former Director of Central Intelligence Stansfield Turner has observed:

> Code words are not prescribed anywhere. Yet they effectively supersede the President's directive because they impose even more rigorous standards for handling classified materials. An intelligence document that is top secret, but not further restricted by a code word, is considered barely classified. On sensitive documents there were likely to be as many as four or five different code words . . . indicating the particular sensitivity of a document and establishing certain rules for the handling of its contents. The primary rule of all code words is that you cannot discuss the material in a code word document with anyone who has not also been granted access to material with that code word.

STANSFIELD TURNER, SECRECY AND DEMOCRACY: THE CIA IN TRANSITION 254-55 (1985). None of the material included in the Pentagon Papers was restricted by use of code words. SCHRAG, *supra* note 11, at 295 (at the Ellsberg trial, Morton Halperin "demeaned the Papers" because they had been classified "only Top Secret").

The executive order that currently regulates the classification of nation security information authorizes "special access programs to control access, distribution, and protection of particularly sensitive information." Exec. Order No. 12,356, 3 C.F.R. 166 (1986), *reprinted in* 10 U.S.C. § 4.2. These programs include the "code word" system described by Admiral Turner.

[55] *See* Trial Transcript (June 18, 1971), United States v. New York Times Co., at 67, *reprinted in* GOODALE COMPILATION, *supra* note 9, at 513 [hereinafter S.D.N.Y. Transcript] (testimony of Dennis J. Doolin).

much too slow review to provide declassification."[56] More recently, the former Pentagon official under whose supervision the Pentagon Papers were compiled has revealed that the real reason for the sweeping classification was "to keep the information that they were being written" from President Lyndon Johnson, because those involved in the project believed that "if Johnson knew that the Pentagon papers were being written, he would cancel the project."[57]

At the beginning of the litigation, then, it is fair to say that few government officials had any particularized notion of what aspects of the Pentagon Papers could pose a threat to national security. The situation was further complicated by the fact that the United States did not know, and was never able to find out, exactly which parts of the Papers were in the possession of the Times.[58] Moreover, the Times's holdings of classified documents was not limited to the Pentagon Papers study.[59]

---

[56] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 226. Griswold first worked in the Solicitor General's Office as an assistant to Charles Evans Hughes, Jr. He reported on December 2, 1929, and served until 1934. GRISWOLD MEMOIRS, *supra* note 18, at 79, 108-09. He returned to the office as Solicitor General in 1967, having spent the previous 22 years as dean of Harvard Law School. *Id.* at 254-58.

[57] *Government Secrecy After the Cold War: Hearing Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 190 (1992) (statement of Morton H. Halperin).

[58] The Times filed a three-page "inventory list" describing the materials in its possession, but this was cast in terms general enough to leave some uncertainty as to whether the Times possessed the entire Pentagon Papers study. *See* 1 GOODALE COMPILATION, *supra* note 9, at 292-94 (reproducing the list filed by the Times). However, the items on the Times's list correspond quite closely with actual titles of portions of the full study. *See* 1 G.P.O. EDITION, *supra* note 9, at xi-xii (outline of the contents of the official version of the Pentagon Papers as transmitted to the Secretary of Defense). Examination of the list that the Times provided to the Government would have suggested that the newspaper possessed at least portions of each of the 47 volumes in the study, with the exception of the four negotiating volumes. Nothing on the list suggested in any way that the Times had received the negotiating volumes, and the Times's list stated that it had "no other materials in its possession" relating to the Pentagon Papers, other than those listed. 1 GOODALE COMPILATION, *supra* note 9, at 292. Thus, the list strongly pointed towards the conclusion that the newspaper did not have the negotiating volumes, and in fact it did not possess them. An article that accompanied the first installment of the Pentagon Papers published by the Times stated that the paper lacked the section of the study concerning "the secret diplomacy of the Johnson period." Hedrick Smith, *Vast Review of War Took a Year*, N.Y. TIMES, June 13, 1971, at 1. In the peculiar organizational structure of the Pentagon Papers, the "volumes" were not numbered consecutively, but rather were identified by reference to an outline describing the topics covered. The outline is reproduced at 1 G.P.O. EDITION, *supra* note 9, at xi-xii. Section "VI" of the outline addresses "Settlement of the Conflict," and the four negotiating volumes are the four subparts of section VI.C. of the outline, "Histories of Contacts."

[59] For example, the list filed by the Times in the Southern District of New York indicated that it possessed a summary of the command and control study on the Tonkin

The Government, however, was not entirely unprepared to evaluate the potential threat posed by the Pentagon Papers, since Senator J. William Fulbright had requested the declassification of the study more than a year and a half earlier.[60] Thus, even if the Pentagon Papers had originally been classified reflexively rather than thoughtfully, by June of 1971 there had been a substantial opportunity to reassess the "Top Secret" classification at the behest of Senator Fulbright.

After the Government's suit was filed on June 15, the case was assigned to a newly-appointed federal district judge, Murray I. Gurfein.[61] Judge Gurfein had served in the Office of Strategic Services during World War II and later in the prosecution team at the Nuremberg war crimes trials, so he was not unfamiliar with intelligence matters.[62] Judge Gurfein heard oral argument on the Government's motion for a temporary restraining order in the early afternoon of the day the complaint was filed.[63] When he ruled, Judge Gurfein recognized that the questions raised by the case were "serious and fundamental,"[64] and that "the matter is so important and so involved with the history of the relationship between the security of the Government and a free press that a more thorough briefing than the parties have had an opportunity to do is required."[65] Nonetheless, some interim ruling was necessary to decide whether the

---

Gulf incident, a document which was not included in the Pentagon Papers. *See* 1 GOODALE COMPILATION, *supra* note 9, at 292, 294. A review of all the published versions of the Pentagon Papers indicates that, in addition to reproducing documents from the study, the New York Times Edition of the Papers "includes additional important documents from other sources." Kahin, *supra* note 10, at 675.

[60] S.D.N.Y. Transcript, *supra* note 55, at 56-57, 97-98 (testimony of Dennis J. Doolin); Rudenstine, *supra* note 19, at 1881 n.80.

[61] Judge Gurfein had been sworn in on Thursday, June 10, 1971, and, as the junior member of the United States District Court for the Southern District of New York, was responsible for the motions calendar beginning on Monday, June 14. James L. Oakes, *Judge Gurfein and the Pentagon Papers*, 2 CARDOZO L. REV. 5, 5 (1980). When the *Pentagon Papers* case reached him on Tuesday, June 15, for consideration of the Government's motion for a temporary restraining order, "his only prior judicial function had been to preside over the naturalization ceremony for a group of new American citizens." UNGAR, *supra* note 11, at 165. Thus, *Pentagon Papers* "was Judge Gurfein's very first case as a judge." Oakes, *supra*, at 14. As it happened, this extraordinary case was also the first case on which Judge Oakes sat after his appointment to the United States Court of Appeals for the Second Circuit, Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, *supra* note 7, at 500, and the last case in which either Justice Hugo Black or John Marshall Harlan participated. *See infra* note 199.

[62] UNGAR, *supra* note 11, at 165; SALISBURY, *supra* note 11, at 288; Oakes, *Judge Gurfein and the Pentagon Papers*, *supra* note 61, at 5.

[63] UNGAR, *supra* note 11, at 124.

[64] United States v. New York Times Co., 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

[65] *Id.*

Times would be free to continue publishing pending a more deliberate review of the merits by the court, and on that issue Judge Gurfein decided that a temporary restraining order (TRO) was justified:

> I have granted the restraining order because in my opinion any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States Government if it should ultimately prevail. I have intentionally expressed no opinion on the merits, but I believe this matter is brought in good faith by the United States and that on the balancing of interests mentioned, both parties deserve a full consideration of the issues raised.[66]

The TRO granted on Tuesday, June 15, 1971, was to remain in effect until Saturday, June 19, unless the court ordered otherwise.

On Friday, June 18, Judge Gurfein received testimony on the Government's motion for a preliminary injunction. The Government presented a number of witnesses in open court, including the official who had supervised the review of the Pentagon Papers that had been undertaken in response to Senator Fulbright's request for disclosure.[67] Presentation of the Government's case, however, was hampered by the short time available for the witnesses to review the voluminous documents, and also by the refusal of the Department of Justice lawyers supervising the case to authorize disclosure of classified material even to the attorneys from the United States Attorney's office.[68] The district judge did agree "with reluctance"[69] to hear additional testimony from government witnesses in camera, despite objection by attorneys for the Times, because "it seemed that there was no other way to serve the needs of justice."[70]

After a full day of testimony, and closing arguments that began at 9:50 p.m.,[71] Judge Gurfein withdrew to prepare his opinion, which was released

---

[66] *Id.*

[67] S.D.N.Y. Transcript, *supra* note 55, at 56 (testimony of Dennis J. Doolin); UNGAR, *supra* note 11, at 166.

[68] United States Attorney Seymour described the difficulties faced by his office in a section of his memoirs entitled "National Security Paranoia." SEYMOUR, *supra* note 18, at 198-204.

[69] *New York Times Co.*, 328 F. Supp. at 326.

[70] *Id.* Two representatives of the Times, Chief Diplomatic Correspondent Max Frankel and Senior Vice President Harding Bancroft, were permitted to join the attorneys for the Times at the closed hearing. S.D.N.Y. Transcript, *supra* note 55, at 38-40.

[71] S.D.N.Y. Transcript, *supra* note 55, at 159; *see* UNGAR, *supra* note 11, at 166.

at mid-afternoon on Saturday, June 19.[72] The officials of the Department of Defense were "dumbstruck"[73] when Judge Gurfein refused to convert the TRO he had issued into a preliminary injunction. Overnight, the judge had prepared a substantial opinion, in which he flatly rejected the fundamental allegation on which the Government sought to restrain publication:

> I am constrained to find as a fact that the *in camera* proceedings at which representatives of the Department of State, Department of Defense and the Joint Chiefs of Staff testified, did not convince this Court that the publication of these historical documents would seriously breach the national security.[74]

Professor Rudenstine suggests that the speed with which Judge Gurfein scheduled and conducted the hearing, and rendered his decision, represented a defeat for due process concerns.[75] Rudenstine states that the Government had a reasonable basis for requesting "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."[76]

The proceedings before Judge Gurfein represented only the beginning of the *Pentagon Papers* litigation, and by no means the end of the Government's opportunities to prove the facts that would justify an injunction. Moreover, there is little to support the suggestion that the Government's failure to establish potential harm to the national security in the district court litigation was attributable to the heft of the forty-seven-volume study. Judge Gurfein's opinion itself makes it clear that the court was looking for *examples* from the Papers that could be used to illustrate their potential to harm national security, and that the Government failed to identify anything in the documents that was likely to cause serious injury. In light of the judge's willingness to grant a TRO without any attempt to assess the factual strength of the Government's case, and his decision to hear government witnesses in camera, it seems likely that a few, or perhaps even one, concrete example of material that properly could have been enjoined would have sufficed to convince Judge Gurfein that the

---

[72] UNGAR, *supra* note 11, at 168.

[73] SEYMOUR, *supra* note 18, at 200.

[74] *New York Times Co.*, 328 F. Supp. at 330.

[75] Rudenstine, *supra* note 19, at 1903.

[76] *Id.* at 1905. The Government's argument on this point in the Supreme Court was weakened by the fact that it never asked Judge Gurfein to allow additional time for it to present its case. *See* ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 232 (argument of Professor Bickel).

injunction he had issued should continue in force.[77] Instead, the testimony convinced the judge that the Government could not carry its burden of justifying an injunction, even as to selected items within the larger study:

> It is true that the Court has not been able to read through the many volumes of documents in the history of Vietnam, but it did give the Government an opportunity to pinpoint what it believed to be vital breaches to our national security of sufficient impact to controvert the right of a free press. Without revealing the content of the testimony, suffice it to say that no cogent reasons were advanced as to why these documents except in the general framework of embarrassment previously mentioned, would vitally affect the security of the Nation.[78]

Even though he declined to issue the preliminary injunction requested by the Government, Judge Gurfein continued his TRO in effect "until such time during the day as the Government may seek a stay from a Judge of the Court of Appeals for the Second Circuit."[79] When he handed out his opinion to the attorneys in the case, Judge Gurfein informed them that Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit was in the building and available to consider any motion.[80] The Government promptly asked Judge Kaufman for and received an extension of the TRO, through noon on Monday, June 21.[81] The matter was later scheduled for an en banc hearing before the Second Circuit on the following afternoon, June 22.

Like Judge Gurfein, the eight judges of the Second Circuit conducted a public hearing and then followed it with a closed hearing to permit the Government to present sensitive information.[82] The court of appeals issued

---

[77] The judge was not hostile to the Government's position. Before he began hearing evidence, he stated that "as a matter of simple patriotism" a newspaper "ought to be willing to sit down with the Department of Justice and screen these documents . . . to determine whether the publication of any of them is or is not dangerous to the national security." S.D.N.Y. Transcript, *supra* note 55, at 20.

[78] *New York Times Co.*, 328 F. Supp. at 330. Judge Gurfein had previously observed that "any breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us." *Id.*

[79] *Id.* at 331.

[80] SEYMOUR, *supra* note 18, at 193.

[81] The order entered by Judge Kaufman is reproduced in 2 GOODALE COMPILATION, *supra* note 9, at 675-77.

[82] UNGAR, *supra* note 11, at 197-99. The transcript of the public argument is reproduced in 2 GOODALE COMPILATION, *supra* note 9, at 885-967. Professor David Rudenstine secured the release of the transcript of the in camera argument. *See supra* note 19.

its decision the next day, June 23, ordering by a 5-3 vote that the case be remanded to the district court for further proceedings.[83] The court extended the temporary ban on publication by the Times through June 25, at which time the prohibition would expire, except as to items specifically identified by the Government as "pos[ing] such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."[84] However, as to any items so identified by the United States, either in the sealed Special Appendix that the Government had filed with the Second Circuit or in a supplemental list to be filed by June 25, the injunction would remain in effect until the district court could rule in the case.[85]

The New York Times filed a petition for certiorari on Thursday, June 24, the day after the Second Circuit issued its decision. The Supreme Court acted with unprecedented speed, granting review on Friday, June 25, and setting the case for oral argument the next day.[86] Briefs were to be exchanged by the parties on Saturday morning, and the case would be heard beginning at 11:00 a.m., in conjunction with the Government's case against The Washington Post, which had been decided by the United States Court of Appeals for the District of Columbia Circuit.[87]

The significance of several aspects of this history will be discussed in greater detail below. At this point it is sufficient to note that, following the filing of the Government's lawsuit against the Times on June 15, the newspaper had been continuously enjoined from further publication. The district judge who had issued the original TRO had, after the evidentiary hearings, concluded that the Government had not met its burden of proof as to anything contained in the Papers, and three judges on the court of appeals had agreed that publication should be allowed to resume. The majority on the court of appeals held that the Government should have two more days to identify the specific materials that it claimed should be enjoined, with an injunction against publication of all disputed materials to remain in effect pending disposition on the merits by the district court.

B. *The Action Against The Washington Post*

The Washington Post obtained copies of the Pentagon Papers from Daniel Ellsberg after The New York Times had been restrained from

---

[83] United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971) (en banc).

[84] *Id.*

[85] *Id.* The Special Appendix is described *infra* note 178.

[86] New York Times Co. v. United States, 403 U.S. 942 (1971).

[87] United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971) (en banc).

further publication by Judge Gurfein's TRO.[88] The Post began publishing on Friday, June 18, and followed with a second installment the next day. Although it was now more prepared to take quick action than it had been when the first Times article appeared, the Government still encountered substantial difficulties as it attempted to prevent the second day's article from appearing. In contrast to Judge Gurfein's initial ruling in New York, Judge Gerhard A. Gesell denied the TRO sought by the government and refused to grant even a temporary restraint designed to allow the Government's attorneys to seek relief from the court of appeals.[89] A three-judge panel of the D.C. Circuit heard the case later that evening but did not issue its order restraining publication until the wee hours of Saturday, June 19, too late to affect that day's newspaper, which was already being distributed.[90]

The court of appeals later issued an opinion explaining its reversal of Judge Gesell's denial of the requested TRO, and it ordered the district court to hear evidence the following Monday, June 21, to determine whether a preliminary injunction should be entered.[91] The Post was enjoined pending the district court's decision.

The hearing before Judge Gesell on the Government's motion for a preliminary injunction followed a pattern very similar to that which had developed in New York. Judge Gesell heard testimony all day on Monday, June 21, partly in open court and partly in closed session. Much of the testimony concerned particular items contained within the Papers, with the Post citing prior disclosures and publications in an effort to demonstrate that no harm to the national security would result if the Post were allowed to resume publication of the Papers. In order to meet the 5:00 p.m. Monday deadline set by the D.C. Circuit, Judge Gesell dictated an oral opinion from the bench. He found that "there is no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be a compromise of military or

---

[88] UNGAR, *supra* note 11, at 126-35; CAROL FELSENTHAL, POWER, PRIVILEGE, AND THE POST: THE KATHARINE GRAHAM STORY 299-301 (1993).

[89] UNGAR, *supra* note 11, at 158-59. The Post was sued at 5:15 p.m., *id.* at 154, and at 8:05 p.m. that evening Judge Gesell denied the temporary restraining order sought by the Government. *Id.* at 158. The text of Judge Gesell's unpublished order appears in N.Y. TIMES, June 19, 1971, at 10, and is reprinted in 2 GOODALE COMPILATION, *supra* note 9, at 652.

[90] The order of the United States Court of Appeals for the District of Columbia Circuit reversing Judge Gesell was not issued until 1:20 a.m. on June 19, after thousands of copies of the newspaper for that day had been distributed. UNGAR, *supra* note 11, at 159-60. When informed of this fact, the court of appeals indicated that the injunction applied only to installments after the first two in the Post's series. *Id.* at 160.

[91] United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971). Judge J. Skelly Wright dissented.

defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials."[92] Consistent with the position he had taken on the TRO request, Judge Gesell declined to grant the Government any substantial time in which to seek a continuation of the injunction from the court of appeals.[93] The court of appeals did temporarily prohibit further publication, and it set the case for en banc argument at 2:00 p.m. the next afternoon, Tuesday, June 22.

Once again, the court scheduled a public hearing, to be followed by a closed session in which the parties could discuss more specifically the contents of the Papers. The Government's argument in favor of a preliminary injunction was ultimately unsuccessful, a result that might be explained at least in part by the fact that the United States was represented by Solicitor General Erwin N. Griswold, who was not familiar with the case. Only a few hours before the case was to be heard, Attorney General John Mitchell called Griswold to request that he argue the case for the Government. Even though it is unusual for the Solicitor General to appear in any court other than the Supreme Court of the United States, Griswold agreed. Griswold has described the argument as follows:

> I argued the case, without ever having seen the record, without ever having seen a brief on either side, and without really having very much of an idea of what it was all about. It was a good experience because I found that I could . . . complete the argument and not have to sit down in utter confusion.[94]

At a minimum, the Solicitor General's account would seem to confirm that whatever gaps existed in the development or presentation of the factual side of the Government's case were not remedied during oral argument before the court of appeals.

---

[92] Judge Gesell's oral ruling was transcribed by the court reporter and constitutes pages 266-72 of the trial transcript in the District of Columbia. It is reproduced in 2 GOODALE COMPILATION, *supra* note 9, at 1009-15.

[93] Judge Gesell refused to grant any stay, but since his ruling denying the preliminary injunction was issued at 4:40 p.m. and the TRO was not scheduled to expire until 5:00 p.m., the Government had 20 minutes to seek relief from the court of appeals. *See* 2 GOODALE COMPILATION, *supra* note 9, at 1015 ("You have twenty minutes. I am sure they are waiting for you upstairs.").

[94] Griswold, *Teaching Alone Is Not Enough*, *supra* note 18, at 256. More recently, Griswold described the court of appeals argument as follows: "I argued the case, in a rather feckless way, since I did not know much about it, and still had never seen even the outside of the Pentagon Papers." GRISWOLD MEMOIRS, *supra* note 18, at 302. As the publications cited *supra* note 18 indicate, the former Solicitor General has described his participation in the *Pentagon Papers* litigation with candor and volubility that are very rarely found in an attorney who has lost a case.

The Government did not give up, however. On Wednesday, June 23, an additional hearing was held before Chief Judge David Bazelon to allow the Government to attempt to supplement the proof it had presented before Judge Gesell. One of the affidavits relied on by the Government had been submitted by Vice Admiral Noel Gaylor, the Director of the National Security Agency.[95] The Government argued before Chief Judge Bazelon that publication of the text of a specific radio message intercepted by the United States during the Gulf of Tonkin incident in 1964 could endanger national security. As unusual as it was to have a hearing of this sort in camera before a judge of the court of appeals,[96] the Government ended up with little to show for it when the Post countered the new argument by demonstrating that the exact text had already been published by the Senate Foreign Relations Committee.[97]

The D.C. Circuit issued its opinion on Wednesday, June 23. By a 7-2 vote, the court affirmed Judge Gesell's denial of the preliminary injunction sought by the Government.[98] The majority's per curiam opinion held that the Government's proof was inadequate:

> Specifically, the district court directed the government to present any document from the "History" the disclosure of which in the government's judgment would irreparably harm the United States. The government's affidavits and

---

[95] The National Security Agency (NSA) is the component of the Department of Defense responsible for protecting the security of communications by the United States and for intercepting and decrypting the communications of other nations. *See generally* JAMES BAMFORD, THE PUZZLE PALACE: A REPORT ON AMERICA'S MOST SECRET AGENCY (1982) (describing the activities of NSA).

[96] *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 316 n.56 (1991) (indicating amazement that a trial-type hearing was held in the court of appeals).

[97] UNGAR, *supra* note 11, at 204; SALISBURY, *supra* note 11, at 322-23. Ungar states that the session took place before Chief Judge David Bazelon, while Salisbury indicates that "the judges reconvened." In response to reporter George Wilson's dramatic revelation that the cable had already been published, the Government narrowed its argument to focus on the fact that the published version of the message had not included the "time group," which allegedly would reveal the speed with which the United States had decrypted the message. However, the Post had not included the time groups on any of the messages it had quoted from the Pentagon Papers. UNGAR, *supra* note 11, at 204. The cable referred to had been published in *The Gulf of Tonkin, The 1964 Incidents: Hearing Before the Committee on Foreign Relations, United States Senate*, 90th Cong., 2d Sess. 34 (1968). The same cable, including its date and time, appears at 5 GRAVEL EDITION, *supra* note 10, at 325. The text of the cable was also reproduced in the Post's Secret Brief filed in the Supreme Court. In Camera Analysis of the Evidence 9 [hereinafter Post's Secret Brief].

[98] United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971) (en banc).

> testimony, presented largely *in camera*, discussed several of the documents. The district court found either that disclosure of those specific documents would not be harmful or that any harm resulting from disclosure would be insufficient to override First Amendment interests. Having examined the record made before the district court we agree with its conclusion.[99]

The dissenting opinion of Judge Malcolm Wilkey pointed out that the Government did not know which documents the Post possessed, and that under these circumstances, "the Government necessarily relied on affidavits couched in general terms, two dated before and one on the day of the hearing."[100] Judge Wilkey favored a remand to allow the Government to identify the particular documents for which it continued to seek an injunction and to pinpoint the basis for its objections. Judge Wilkey expressed the view that if the Government used the correct standard, "the great bulk" of the documents would be released for publication.[101]

The Government sought rehearing before the court of appeals on the ground that neither Judge Gesell nor the court of appeals had examined the Pentagon Papers themselves, and that "there should be an opportunity for an appropriate adversary hearing in court."[102] In denying the petition—by the same 7-2 margin as in the previous day's opinion[103]—the court detailed the history of the proceedings and rejected the assertion that the Government had not had sufficient time to gather the information necessary to support its claims.[104] The court also emphasized that, during the in camera hearing in the district court, the Government had been directed to focus on specific documents that would prejudice the nation's defense interests. While the Government had discussed several documents, the court concluded that it had not justified an injunction as to any of them.[105] The majority concluded that the Government "had appropriate opportunity to make the kind of showing appropriate to justify a prior restraint on the nation's historic free press."[106]

---

[99] *Id.* at 1328.

[100] *Id.* at 1330.

[101] *Id.* at 1331.

[102] *Id.*

[103] *Id.* at 1331-32.

[104] The court noted that one of the witnesses in the district court was Dennis J. Doolin of the Department of Defense, who had been studying the Pentagon Papers since Senator J. William Fulbright of the Senate Committee on Foreign Relations requested their release in November 1969. *Id.*

[105] *Id.*

[106] *Id.* at 1332.

Even though the court of appeals rejected the Government's appeal and the subsequent rehearing motion, it extended the injunction that prohibited the Post from resuming publication. The Government was given until 6:00 p.m. on Friday, June 25, to obtain a further stay from the Supreme Court of the United States.[107]

C. *The Finale in the Supreme Court*

The fast-paced lawsuits in New York and Washington had reached their conclusions at about the same time, as the courts had intended.[108] The New York Times sought certiorari on Thursday, June 24,[109] and later that day the United States sought an extension of the stay that was preventing publication by the Post, but which was due to expire at 6:00 p.m. the next day.[110] Solicitor General Griswold has written that it was "not decent" for the Post to be free to publish while the Times, which had first published the Papers, was enjoined, and that therefore the Government sought an injunction against the Post until the two cases could be heard together.[111] No doubt the Solicitor General was also concerned that further revelations by the Post might make it impossible for any injunctive relief to be effective, an issue already raised by the D.C. Circuit in referring to articles being published by newspapers other than the Post and the

---

[107] *Id.*

[108] UNGAR, *supra* note 11, at 205. Although the Times was appealing a loss in New York while the Post was attempting to defend a victory in the District of Columbia, the divergence in outcome between the two cases in the two different courts of appeals was less dramatic than it might at first appear. The D.C. Circuit affirmed the district court's rejection of the Government's proof. The Second Circuit, by a narrow vote of 5-3, decided to allow the Government one more opportunity to bolster the proof that Judge Gurfein had found wanting. Both courts, including even the dissenting Judge Wilkey in the D.C. Circuit, apparently agreed that much or even most of the Papers would have to be cleared by the Government for publication almost immediately. Both courts had allowed the Government to argue its case in camera, as had the respective district courts, and in each circuit a series of injunctions had been combined to restrain publication continuously from soon after the commencement of the actions through the Supreme Court's consideration of the matter. Procedurally, the two matters which reached the Supreme Court in the *Pentagon Papers* case each involved an appeal from the district judge's denial of the Government's motion for a preliminary injunction. Unlike TROs, which are strictly limited in duration to 10 days plus a possible renewal for 10 more days, unless the defendant consents to a longer restraint, there is no fixed limit to the effectiveness of a preliminary injunction. FED. R. CIV. P. 65.

[109] The petition for certiorari is reprinted in LANDMARK BRIEFS, *supra* note 9, at 3-15.

[110] GRISWOLD MEMOIRS, *supra* note 18, at 303.

[111] *Id.* The text of the Government's application may be found in N.Y. TIMES, June 25, 1971, at 13, *reprinted in* 2 GOODALE COMPILATION, *supra* note 9, at 1049.

Times.[112] In filing the Government's stay application, the Solicitor General indicated that it could be considered a petition for certiorari.[113] On Friday, June 25, the Supreme Court granted certiorari in both the *Times* case[114] and

---

[112] United States v. Washington Post Co., 446 F.2d 1322, 1332 (D.C. Cir. 1971) (en banc). Daniel Ellsberg had made portions of the Pentagon Papers available to almost 20 other newspapers. Abrams, *The Pentagon Papers a Decade Later*, *supra* note 18, at 78. The Solicitor General stated that to his knowledge the material published by the other newspapers did not encompass any information not already published by the Times, the Post, or the Boston Globe (the third newspaper that had been sued by the Government to enjoin publication), but he conceded that there was a "possibility" that "anybody" had access to undisclosed portions of the Papers. ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 222-23. Professor Bernard Schwartz has characterized this as the most important exchange that took place during the argument, since at about 2:30 p.m. on June 26, while the Justices were still in conference on the *Pentagon Papers* case, one of the law clerks heard on the radio that the Government had obtained a TRO against the St. Louis Post-Dispatch. BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 160-61 (1990). Schwartz states:

> This news was the catalyst for the final decision. The new restraining order had been issued while the Solicitor General was stating that, as far as he knew, no further orders would be necessary. Griswold clearly did not know what other papers had what materials. The likelihood that any injunction would be futile had become very real. White and Stewart quickly announced that they would vote for the Brennan-drafted per curiam, which now had a six-man Court behind it. The opinion was sent to the printer late that afternoon and announced on the afternoon of June 30.

Id. at 161. Schwartz goes so far as to speculate that the Government's effort to obtain a continuing injunction against publication of the Pentagon Papers "might well have succeeded if one of the Justices' law clerks had not happened to turn on his radio one summer afternoon." *Id.* at 158. While none of the opinions filed in the case directly supports Schwartz's contention that *Pentagon Papers* ultimately turned on the issue of the potential futility of an injunction, in light of his proven access to reliable information on the internal deliberations of the Supreme Court, *see, e.g.*, BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT (1988), it would be rash to dismiss his theory out of hand. Professor Powe has argued that, in light of current technology, any injunction designed to preserve the secrecy of information is likely to be futile, particularly if national security matters are involved. POWE, *supra* note 96, at 156-58. He observes that, in *Pentagon Papers*, Judge Roger Robb of the Court of Appeals for the District of Columbia Circuit had compared the task of containing the Papers, at least portions of which were by then in the hands of many newspapers, to "riding herd on a swarm of bees." *Id.* at 156 (quoting SALISBURY, *supra* note 11, at 322).

[113] 2 GOODALE COMPILATION, *supra* note 9, at 1049 ("[T]he Court may deem it appropriate to treat this application as a petition for a writ of certiorari.").

[114] New York Times Co. v. United States, 403 U.S. 942 (1971).

the *Post* case[115] and set oral argument for the next day, with briefs to be exchanged in the courtroom.[116]

Presentation of the Government's case in *Pentagon Papers* had been plagued by lack of coordination all along. Officials from the Justice Department and the Department of Defense had meddled in the efforts of the United States Attorney to handle the *Times* case in New York, and Solicitor General Griswold was drafted to argue the *Post* case in the D.C. Circuit with almost no time to prepare. Now, finally, the two cases had been consolidated, were scheduled for a very prompt hearing in the Supreme Court, and were firmly under the control of a single advocate: the highly-experienced Solicitor General and former dean of Harvard Law School, Erwin N. Griswold.

Griswold's deputy, Daniel M. Friedman, prepared a traditional brief to be filed with the Court. Meanwhile, the Solicitor General himself prepared to write a brief intended to be filed under seal.[117] Griswold met with three high-ranking officials who had borne much of the burden of supporting the Government's case by testimony, affidavit, or both. They were Vice Admiral Noel Gaylor, Director of the National Security Agency, William B. Macomber, Jr., Deputy Under Secretary of State for Administration, and Lieutenant General Melvin Zais, Director of Operations for the Joint Chiefs of Staff.[118] After pressing these officials to describe what they considered to be the most dangerous items contained in the Papers, Griswold compiled a list of forty-one specific items and began to investigate each in detail.

After meeting with these officials, Griswold felt "that there were only a few [items] that had any chance of finding favor before the Supreme Court."[119] Griswold finally reduced these to eleven items, which were discussed in the Secret Brief.[120] After working much of the night to finish the

---

[115] United States v. Washington Post Co., 403 U.S. 943 (1971). The case is known as *New York Times Co. v. United States* rather than as *United States v. Washington Post Co.* because the Times's petition for certiorari was filed earlier in the day than the Government's stay application in the *Post* case. Accordingly, the *Times* case was assigned the lower docket number and thus was listed above the *Post* case in the opinions of the Court.

[116] GRISWOLD MEMOIRS, *supra* note 18, at 303. *See New York Times Co.*, 403 U.S. at 942; *Washington Post Co.*, 403 U.S. at 943.

[117] GRISWOLD MEMOIRS, *supra* note 18, at 303-04. The orders granting certiorari indicated that any portions of the argument "relating to matters claimed to affect national security may be filed in sealed form." *Washington Post Co.*, 403 U.S. at 943.

[118] Griswold Memoirs, *supra* note 18, at 303-04.

[119] *Id.* at 304.

[120] As indicated in note 19, *supra*, most of the text of the Secret Brief has been unsealed, although two paragraphs have been deleted from the bottom of page 9 of the brief. Nonetheless, the Secret Brief is not easily accessible to those interested in examining it. The Secret Brief is not included in LANDMARK BRIEFS, *supra* note 9, and

brief, and getting a few hours sleep, Griswold concluded that the Government's "only chance of success was to waive objection to the printing of the great bulk of the material, but to seek an injunction as to the eleven items on which I had specifically relied."[121] Because this represented "a great change in the position of the Government",[122] Griswold sought the approval of Attorney General Mitchell, and he ultimately obtained authorization to proceed in the manner that he contemplated.[123]

The change in the Government's position between the commencement of the *Pentagon Papers* litigation and the final shaping of its case before the Supreme Court is almost impossible to overstate. At first the Government contended that the mere fact that all 7,000 pages of the Papers were classified "Top Secret—Sensitive" was sufficient to warrant an injunction preventing publication. As the litigation went forward before two district judges who demanded proof of the alleged threat to national security, and on to the courts of appeals, the Government pointed to specific items in the Papers.[124] However, whenever it attempted to demonstrate that any particular item was dangerous enough to warrant a restraint on publication, its proof was found to be inadequate. Now, in the Supreme Court of the United States, the dispute over the 2.5 million words in forty-seven volumes containing 7,000 pages had been boiled down to eleven[125]

---

is not on file in the Library of the United States Supreme Court. In fact, my inquiries have failed to locate any copy of the Secret Brief at the Supreme Court, either sealed or publicly available. Accordingly, the Secret Brief is attached to this article as an Appendix. The brief has been retyped in an effort to improve its legibility, but the material has been kept in the same lines, paragraphs, and pages as in the original brief so that citations will be unaffected by the retyping. The sealed brief of The Washington Post is also appended, though some material is still being withheld on security grounds. My efforts to locate a copy of the sealed brief filed on behalf of The New York Times have not been successful.

[121] GRISWOLD MEMOIRS, *supra* note 18, at 305. Although Griswold's memoirs accurately report the essence of the concession that he made in his oral argument before the Supreme Court, he was not quite as categorical as he remembers. He told the Supreme Court that the items listed in the closed brief were "the ones on which we most rely" and that "the odds are strong" that no other portions of the Papers would need to be considered by the Court if they found the listed items inadequate. ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 219, 220. However, Griswold never said in so many words that the Government was seeking an injunction only as to the listed items.

[122] GRISWOLD MEMOIRS, *supra* note 18, at 305.

[123] *Id.* at 305-06. Griswold reports that he told Mitchell that "[I]t is my view that the only ground we have to stand on where there is a chance of success is with respect to these eleven items." *Id.* at 306. Mitchell initially indicated that he could not approve such a concession and was not even familiar with the contents of the Papers, but in the end he deferred to Griswold's judgment because Griswold was in charge of the case. *Id.*

[124] Rudenstine, *supra* note 19, at 1899-900 and n.211.

[125] It turns out that, in Solicitor General Griswold's view, there were not even eleven items that merited continuation of the restraints on the Times and the Post. In a speech given the year after the litigation, Griswold admitted that he "would have claimed rather

specific items identified by the Solicitor General as meriting an indefinite restraint on publication.

D. *The Adequacy of the Government's Opportunities To Prove Its Case*

As described at the outset of this article, Professor Rudenstine has argued that the *Pentagon Papers* litigation represents the triumph of free press values over due process concerns.[126] Solicitor General Griswold has similarly criticized the "pell mell way in which the courts proceeded."[127] These recent criticisms echo, of course, the strident objections offered at the time of the *Pentagon Papers* decision itself, when Justice Harlan stated that the Supreme Court had acted in an "almost irresponsibly feverish" manner,[128] Chief Justice Burger decried the "unseemly haste,"[129] and Justice Blackmun suggested that the litigation had been heard in an atmosphere of "pressure and panic and sensationalism."[130]

The procedures that were followed and the repeated opportunities that were given to the Government to shore up its case, however, demonstrate that these criticisms of the fact-finding process in *Pentagon Papers* are not justified. Judge Gurfein and Judge Gesell, like the judges on the courts of appeals, were willing to continue the injunctions in force as to any items on which the Government could present adequate proof. In addition, there were numerous indications that if the Government had produced adequate proof as to even a small number of items, it would have been given more time to muster its evidence in support of an injunction against the rest of the material. It is no doubt true that, if the Solicitor General's office had been given a few more days to consult with the Government's trial attorneys and with officials from the State Department and the Department of Defense, the Secret Brief filed in the Supreme Court could have been based on a more complete understanding of the underlying facts. But to focus exclusively on the handling of the appeal by Solicitor General Griswold obscures the nature of the Government's difficulty. The United States, acting through its attorneys and upon the sworn testimony of its

---

less than eleven," but that he "had to take into account the wishes of other people in the Department." Griswold, *Teaching Alone Is Not Enough*, *supra* note 18, at 257 (speech given at the convention of the Association of American Law Schools, December 29, 1972). Since it was the Solicitor General himself who had interviewed the experts from the Department of Defense and the State Department, there is no reason to believe that his assessment of the risks raised by publication was less well-grounded than that of the unnamed "other people" to whom he deferred.

[126] Rudenstine, *supra* note 19, at 1903.

[127] GRISWOLD MEMOIRS, *supra* note 18, at 302.

[128] *New York Times Co.*, 403 U.S. at 753 (Harlan, J., dissenting).

[129] *Id.* at 748 (Burger, C.J., dissenting).

[130] *Id.* at 762 (Blackmun, J., dissenting).

officers, sought a prior restraint against publication of the Pentagon Papers. The Supreme Court ultimately held that no injunction—or at least no injunction extending beyond the TROs entered in *Pentagon Papers*—was proper without a stronger evidentiary showing than that which the Government made. Since no official was able to provide the facts needed to support the Government's claims of risk to national security, the injunctions were removed.

Subsequent events strongly suggest that it was not any lack of opportunity to gather and present evidence, but rather the *absence* of evidence to support the allegations being made, which explains the Government's lack of success in *Pentagon Papers*. Although the civil litigation against the newspapers was ended by the Supreme Court's decision on June 30, 1971, the Justice Department went ahead with a criminal prosecution against Daniel Ellsberg and Anthony Russo. Thus, long after the injunctions were lifted the Justice Department continued to gather evidence intended to prove that the publication of the Papers had damaged national security. Such evidence was not produced within a few days, or even a few weeks. In fact, a full five months after the Supreme Court had ruled, Assistant Attorney General Robert C. Mardian of the Internal Security Division belittled the Defense Department's most recent damage assessment as "totally inadequate."[131] Even though he continues to object to the procedures followed, former Solicitor General Griswold has written that he has "never seen any trace of a threat to the national security from the publication" of the *Pentagon Papers*, and that the lesson of the case is that "there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past."[132] Faced with enormous time pressures and

---

[131] "Defense Department Damage Assessment," memorandum from Assistant Attorney General Robert C. Mardian, Internal Security Division, to Attorney General John N. Mitchell, December 2, 1971 (released to author pursuant to the Freedom of Information Act). Mardian was voicing extreme dissatisfaction with a Defense Department memorandum entitled "Impact of Unauthorized Disclosure of Study 'United States-Vietnam Relations, 1945-1967' and Associated Documents," which was dated November 26, 1971 and was received by Mardian on November 29. Mardian noted that in the civil litigation Defense and State Department officials had provided the district courts "with specific examples of the harm that could result, including the compromise of communications intelligence data. Based on these representations, the Solicitor General informed the Supreme Court that publication of certain parts of the study 'could have the effect of causing immediate and irreparable harm to the security of the United States.' " Mardian found that the damage assessment prepared by the Department of Defense did not substantiate the earlier predictions about the harm that would flow from publication, and he expressed the fear that the absence of an adequate damage assessment would jeopardize the Ellsberg prosecution.

[132] Griswold, *Secrets Not Worth Keeping*, *supra* note 18. When this article was published in *The Washington Post*, the *Post* somehow misidentified Griswold as a former

the awesome prospect of authorizing publications that the Government stoutly maintained would cost lives and prolong the Vietnam War, the courts proceeded quickly but in a manner respectful of the Government's claims. Thus, if the *Pentagon Papers* decision is to be criticized, it should be on the basis of its holding or on account of an alleged failure to properly apply First Amendment principles to the facts of the case—the procedures followed in no way deprived the Government of appropriate occasions to make its case.

IV. THE SOLICITOR GENERAL'S SECRET BRIEF

After careful investigation, the Solicitor General decided that the Government had no choice but to drastically pare down the national security claims that it had presented to the lower courts. Even though his own judgment would have cut the list even further, the Solicitor General's Secret Brief identified the eleven items that were "the worst"—those upon which the Government's case should rightly stand or fall.[133]

This Secret Brief is extraordinarily helpful in attempting to interpret the ten opinions filed in *Pentagon Papers*. For example, Justice Stewart's opinion indicates that he was "convinced that the Executive is correct with respect to some of the documents involved," although he could not "say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people."[134] The Secret Brief sheds considerable light on what Justice Stewart was probably talking about. Likewise, Justice White's opinion stated that, even though he considered an injunction unjustified, he was "confident" that publication of the Papers would "do substantial damage to public interests."[135] The Secret Brief details the damage to public interests that the Government identified as likely to occur. Justice Blackmun, in dissent, worried that publication of the Papers would result in "the death of soldiers, the destruction of alliances," and the "prolongation of the war" and further delay in the release of prisoners.[136] The Secret Brief reveals the Government's specific allegations as to how such disasters were likely to come about.

The Secret Brief filed by Solicitor General Griswold on behalf of the United States in *Pentagon Papers* is a typewritten document consisting of

---

dean of Yale Law School. The *Post* issued a correction the next day acknowledging its "monumental error" and reporting that Griswold "was, of course, for many years dean of the *Harvard* Law School." WASH. POST, Feb. 16, 1989, at A23.

[133] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 219-20; *see supra* note 125.

[134] *New York Times Co.*, 403 U.S. at 730 (concurring opinion of Justice Stewart).

[135] *Id.* at 731 (concurring opinion of Justice White).

[136] *Id.* at 763 (Blackmun, J., dissenting).

a cover followed by thirteen legal-sized pages of text.[137] The brief begins by identifying the forty-seven-volume Defense Department study that was the subject of the litigation, and noting the difficulties faced by the Government due to its lack of complete information on what documents actually were held by the newspapers and thus might possibly be published by them.[138] Accordingly, the brief notes the assumption explicitly made by Judge Gesell in the District of Columbia that the Post possessed the entire *Pentagon Papers* study.[139] The brief also notes that the full forty-seven volumes were available to both Judge Gesell and Judge Gurfein, that the Government had in the course of the litigation designated specific portions of the volumes that should not be allowed to be published, and that the latest round of designations had been made by 5:00 p.m. on June 25, the day before oral argument was to be held in the Supreme Court of the United States.[140] The Secret Brief then identifies the vital purpose which it was designed to serve:

---

[137] *See supra* note 120 and the Appendix to this article.

[138] Secret Brief, *supra* note 9, at 1-2.

[139] *Id.* at 2.

[140] *Id.* at 2-3. In the *Times* case, the United States Court of Appeals for the Second Circuit had enjoined the newspaper, pending disposition of the remand proceedings ordered to be held in the district court, from publishing any of the items identified in the Government's Special Appendix, and permitted the Government to designate additional items by June 25, 1971. In its order granting certiorari the Supreme Court continued the injunction against publication of both categories of items (that is, those in the Special Appendix and those to be listed no later than 5:00 p.m. on June 25). Although the United States Court of Appeals for the District of Columbia Circuit had ruled against the Government, it had continued the interim injunction against the Post until 6:00 p.m. on Friday, June 25. The Supreme Court's order granting certiorari in the *Post* case continued the injunction against further publication by the Post, limited to the items specified by the Government in the Special Appendix filed in the Second Circuit and those added by the Government by 5:00 p.m. on June 25. The Government did file a number of additional designations on June 25, although Solicitor General Griswold described them at oral argument as being "much too broad." ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 219. In addition to listing many specific items from the Pentagon Papers, the Government also claimed a continuing need to suppress publication of "any information" relating to 13 broad categories, including "assessments of enemy force structures," "confidential information relating to peace negotiations, assets or tactics," and "direct quotations from secret cables and similar communications to the Department of State or Defense or to intelligence agencies." Supplemental List of Special Items, Department of State Appendix, at 3. While the terms of the continuing injunction entered by the Supreme Court on June 25 theoretically would have permitted the newspapers to publish any portions of the Papers that had not been designated by the Government, the sweeping nature of the designations made it impossible to confidently identify any aspect of the Papers as being cleared for publication. Therefore, neither newspaper printed any more material from the Pentagon Papers before the Supreme Court issued its decision on June 30.

> The purpose of this portion of the Brief for the United States is to refer to a selected few of these items and to endeavor to show that the publication of these items could have the effect of causing immediate and irreparable harm to the security of the United States.[141]

Thus, as reflected in the Secret Brief itself, and as confirmed by Solicitor General Griswold during argument, the Government's entire effort to keep in place the injunctions that barred the Times and the Post from publishing additional material turned on the persuasiveness of the eleven "worst" security problems culled by Griswold from the 7,000 pages making up the Pentagon Papers. If no convincing example or examples could be produced in which the appropriate constitutional standard—presumably one to be announced by the Supreme Court in *Pentagon Papers* itself—permitted a continuing restraint, it was inevitable that the Supreme Court would permit publication of all of the materials.[142]

As the Solicitor General worked late into the night on June 25 and into the early morning hours of June 26, and as he stood before the Supreme Court that morning, he did his best to implement the only strategy that realistically lay open to him. The Supreme Court plainly could not and would not examine the forty-seven volumes of the Pentagon Papers in any detail, and even if it did so, the Justices could not be expected to undertake an independent analysis of the security consequences that would flow from publication.[143] Moreover, the Government's proof before Judge Gurfein and Judge Gesell had focused on what were considered to be the items as to which the strongest case could be made, and yet in each action the district judge had ruled against the Government across the board.

---

[141] Secret Brief, *supra* note 9, at 3.

[142] Judge J. Skelly Wright of the D.C. Circuit would have affirmed Judge Gesell's initial denial to the Government of a temporary restraining order because of what he considered to be the Government's failure to identify any specific portion of the Pentagon Papers which could properly be enjoined:

> Of course, the Government may not know precisely which documents the *Post* has. But it has identified the 47-volume report from which the documents are taken. The Government could suggest and support at least *one* specific harm that would result from publication of *anything* in the 47 volumes. It has not even done that.

United States v. Washington Post Co., 446 F. 2d 1322, 1326 (1971) (dissenting opinion) (emphasis in original).

[143] In fact, there was substantial tension between the two flaws that the Government asked the Supreme Court to find in the proceedings below. The repeated demand that the judges conduct a thorough examination of the 47 volumes of the study is difficult to reconcile with the Government's assertion that the judges were obliged to defer almost completely to the Executive Branch's assessment of the risks to national security which the documents might raise.

The Government's position had eroded to the point that at oral argument Griswold strenuously promoted the Government's offer to complete a thorough declassification review of the Papers within forty-five days, if publication were enjoined during the interim.[144] Yet such a proposal—to give the Government more time to sort out the real security problems that might lie buried somewhere in the thousands of pages of innocuous material contained in the Papers—could not succeed unless the Government could show that at least some items within the documents could justify an injunction.

A. *The Eleven "Worst" Items*

Of the eleven "worst" items on which the Solicitor General depended, ten can now be examined in their entirety. The other item, which relates to the activities of the National Security Agency, has been deleted in part from the version of the Secret Brief that has been made public so far. Even though it would be useful to be able to examine the full text of the deleted item, the portions of the Secret Brief that have been made public leave no doubt as to the fundamental weaknesses in the Government's case, while also identifying its strongest elements.[145] Most of the items on which the Government placed its principal reliance have

---

[144] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 224-26. Griswold had made a similar request for 45 days in which to conduct a declassification review when he argued the *Post* case before the D.C. Circuit. James M. Naughton, *Washington Appeals Court Continues Ban on The Post's Series on Vietnam*, N.Y. TIMES, June 23, 1971, at 23.

[145] The discussion which follows reaches the conclusion that the Secret Brief filed on behalf of the United States did not establish that any of the documents included in the Pentagon Papers would, if published, cause "direct, immediate, and irreparable damage to our Nation or its people." *See* New York Times Co. v. United States, 403 U.S. 713, 730 (concurring opinion of Justice Stewart, stating the standard under which he and Justice White would uphold a prior restraint on publication.) Since Solicitor General Griswold prepared the Secret Brief and argued the case for the United States, the inference might be drawn that the Secret Brief was poorly done or the case poorly argued; however, the careful review of the factual record undertaken here does not support any suggestion that the failure of the Government's case was due to ineffective advocacy in the Supreme Court. The Solicitor General forcefully presented the strongest arguments that were supported by the records made below in New York and in the District of Columbia, and he gave focus to the Government's case by winnowing out the weaker claims asserted below. Either the facts did not justify a prior restraint, or the facts that could have justified such an injunction were not developed before the cases were filed, at trial, or on appeal in the Second Circuit or in the D.C. Circuit. Griswold could discard weak claims, and did so, but there was no opportunity, between the time that certiorari was granted on June 25 and when the case was briefed and argued on June 26, to fashion or substantiate national security claims that had not already been prepared by the State Department, the Defense Department, and other agencies.

already been made public, and it appears that the material that remains classified is of secondary significance. The Secret Brief's eleven "worst" national security problems raised by the Pentagon Papers were these:

1. *The Four Negotiating Volumes*

The first item listed by Griswold in the Secret Brief was not a page or a section of one of the forty-seven volumes, but rather four entire volumes describing efforts to achieve a diplomatic settlement of the Vietnam War. The Secret Brief informed the Court that negotiations had been "carried on through third parties, both governments and individuals," including "the Canadian, Polish, Italian, Rumanian, and Norwegian governments."[146]

There is every indication that these four volumes—often referred to as the "negotiating volumes" of the Pentagon Papers—provided the major motivation for the Government's efforts to suppress publication of the Papers. In fact, Daniel Ellsberg himself was sufficiently concerned about the damage these volumes might do if published that he did not give them to the Times or to the other newspapers to whom he made available other portions of the Papers.[147] As a result, the negotiating volumes were not published by any of the newspapers, were not included in any of the three published compilations of the Papers, and were not generally available to the public until 1983, and even then they were published with deletions.[148]

---

[146] Secret Brief, *supra* note 9, at 4.

[147] DANIEL ELLSBERG, PAPERS ON THE WAR 44 (1972) (indicating that Ellsberg provided the negotiating volumes only to the Senate Committee on Foreign Relations, and suggesting that this limited disclosure was intended to protect continuing negotiations); UNGAR, *supra* note 11, at 83-84 (quoting Ellsberg as saying that he held back the volumes because he "didn't want to get in the way of the diplomacy"); NEGOTIATING VOLUMES, *supra* note 53, at x-xi (editor's introduction) (questioning whether disclosure of the volumes would in fact have damaged the Paris peace talks, which had long been hopelessly deadlocked, but concluding that there seems to be no reason to question Ellsberg's sincerity; Ellsberg may also have felt that disclosure of the volumes, because of their special sensitivity, would make him appear irresponsible); GRISWOLD MEMOIRS, *supra* note 18, at 310 n.37 (indicating that on April 2, 1991, at a conference at Harvard's Kennedy School of Government, Ellsberg stated that he had not delivered the negotiating volumes to the newspapers); *see supra* note 58.

[148] During the prosecution of Daniel Ellsberg and Anthony Russo for leaking the Pentagon Papers, considerable attention was directed to the negotiating volumes, since they were the materials which most strongly supported the prosecution's contention that the leaks were likely to damage the national security interests of the United States. NEGOTIATING VOLUMES, *supra* note 53, at xviii (editor's introduction). Surprisingly, in light of the security claims being made, the negotiating volumes were available for inspection during the Ellsberg-Russo trial in Los Angeles. *Id.* at xvii; SEYMOUR M. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 321 n. * (1983);

Given the fact that these volumes formed the very core of the Government's case, and that responsible government officials presumably believed that their publication would seriously damage the national security of the United States, the Secret Brief provides surprisingly meager factual support for the concerns that were raised. The Solicitor General devoted only two paragraphs of the Secret Brief to describing the damage that publication of the negotiating volumes might do:

> These negotiations, or negotiations of this sort, are being continued. It is obvious that the hope of the termination of the war turns to a large extent on the success of negotiations of this sort. One never knows where the break may come and it is of crucial importance to keep open every possible line of communication. Reference may be made to recent developments with respect to China as an instance of a line of communication among many which turned out to be fruitful.
>
> The materials in these four volumes include derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to nations or governments. The publication of this material is likely to close up channels of communication which might otherwise have some opportunity of facilitating the closing of the Vietnam war.[149]

Especially in light of the fact that the four negotiating volumes "were generally conceded to contain the most sensitive information" in the forty-seven volumes,[150] it is revealing that Griswold was unable to state objections to publication that were more specific than the observation that

---

Sanford J. Ungar, *The Pentagon Papers Trial*, ATLANTIC, Aug. 1973, at 6, 12. Columnist Jack Anderson obtained the negotiating volumes, and he both wrote about their contents and made them available to The New York Times, The Washington Post, and other newspapers. *See, e.g.*, NEIL SHEEHAN, A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM 802 (1988) (stating that Sheehan acquired the negotiating volumes "after they were obtained and made public by Jack Anderson"). Later, a request under the federal Freedom of Information Act by Morton H. Halperin eventually led to the official release of most of the documents, although the Government continued to insist that some deletions be made for security reasons. The volumes were then published, along with an introduction by Professor George C. Herring describing their eventful history.

[149] Secret Brief, *supra* note 9, at 4-5. The discussion of China is probably a reference to the "Ping-Pong diplomacy" of April 1971, which both represented and promoted a warming of relations between the United States and the People's Republic of China. *See* KISSINGER, *supra* note 17, at 708-10.

[150] NEGOTIATING VOLUMES, *supra* note 53, at xviii (editor's introduction).

"[o]ne never knows where the break may come" and the description of the volumes as containing "derogatory comments" about some participants.[151] Certainly, without at least an example or two of the types of negotiations that were ongoing or the derogatory comments that were feared to be capable of disrupting them, the Supreme Court would find it very difficult to determine whether the fears articulated by the Government could justify an injunction.

2. *Derogatory Comments About Allies*

The second item discussed by the Solicitor General in the Secret Brief is "the fact 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."[152] Once again, the discussion supporting this allegation is very thin:

> For the past many months, we have been steadily withdrawing troops from Vietnam. The rate at which we can continue this withdrawal depends upon the extent to which we can continue to rely on the support of other nations, notably South Vietnam, Korea, Thailand, and Australia. If the publication of this material gives offense to these countries, and some of them are notably sensitive, the rate at which our own troops can be withdrawn will be diminished. This would be an immediate military impact, having direct bearing on the security of the United States and its citizens.[153]

---

[151] Secret Brief, *supra* note 9, at 4. It must be assumed that the Solicitor General would have directed the Court to any specific portions of the Papers that had been convincingly shown by record evidence to raise a serious risk of upsetting negotiations. Moreover, even the last-minute *identification* of particular items alleged to be damaging, coupled with a proffer of evidence to be provided on remand, might have carried the day. After all, that was essentially the tactic that the Government had used successfully in the Second Circuit, where it sought and received permission to file a Special Appendix going well beyond the evidence that it had presented to the district court. The fact that Griswold did not identify any specific negotiations that might be put at risk by publication provides convincing evidence that the government officials whom he consulted had not been able to provide such specifics.

[152] Secret Brief, *supra* note 9, at 5. It appears that the Secret Brief is alleging that offense had been given to Australia and Canada by the portions of the Pentagon Papers that had already been published. *See* Affidavit of William B. Macomber, United States v. Washington Post Co., No. 71-1478 (D.D.C.), at 5-6 (Canada), 7-8 (Australia).

[153] Secret Brief, *supra* note 9, at 5.

No effort was made to call the attention of the Court to any specific statements contained in the Pentagon Papers that were thought likely to damage our relations with the countries named.

3. *CIA and NSA*

The entire discussion devoted to the third item listed by the Solicitor General is the following:

> There are specific references to the names and activities of CIA agents still active in Southeast Asia. There are references to the activities of the National Security Agency.
>
> The items designated are specific references to persons or activities which are currently continuing. No designation has been made of any general references to CIA activities.
>
> This may not be exactly equivalent to the disclosure of troop movements, but it is very close to it.

Once again, it is striking that the Secret Brief offers no example to illustrate the nature of the harm that is feared. Not only are no details given to support the allegations being made, but the Secret Brief does not even allege that publication would impair the interests of the United States. The Supreme Court was apparently left to fill in for itself the dire consequences that might flow from references to CIA and NSA activities. The Secret Brief does not even contend that the names and activities referred to in the Pentagon Papers had previously been kept secret.

4. *SEATO Plans*

The fourth item discussed in the Secret Brief concerns "SEATO Contingency Plan 5 dealing with communist armed aggression in Laos. This discloses what the military plans are. The SEATO plans are continuing plans. This involves not only the disclosure of military plans, but a breach of faith with other friendly nations."[154] A similar problem is described with respect to SEATO Operations Plans 4 and 6 dealing with "military dispositions with respect to Laos, Cambodia, Thailand and Pakistan." The Secret Brief alleges that publication would disclose the plans to possible enemies and increase the risk of losing the support of friendly nations, but no details are given.[155] Most notably, any harm

---

[154] *Id.* at 6.

[155] It appears that much of the material identified in Item Four was not published in either the G.P.O. Edition or the Gravel Edition of the Pentagon Papers. However, the

expected to flow from disclosure of the plans to potential enemies is unspecified.

5. *U.S. Estimate of Soviet Reaction to Vietnam War*

The entire discussion of the fifth item reads as follows:

> Volume IV-C-6(b), page 129, sets forth the United States intelligence community's estimate of the Soviet reaction to the Vietnam War. This was made in 1967, but is in large part still applicable. The disclosure of this information will give Soviet intelligence insights into the capacity of our intelligence operations, and may strengthen them both by giving them better understanding of us, and by leading them to correct matters on their side.[156]

This may well be one of the items that Solicitor General Griswold put into the Secret Brief at the behest of others and against his better judgment.[157] Not only is there no description of what the assessment by U.S. intelligence was, so that the Justices could determine whether it added anything to the widespread public discussion of Soviet attitudes, but the Secret Brief makes no effort at all to establish that harm is either likely to occur (saying only that it "may" happen) or, if it does, is likely to be serious.

The weakness of the Secret Brief's claim on Item Five becomes even more apparent upon examination of the actual material at issue.[158] The

---

G.P.O Edition does provide a more detailed description of the document about which the Government was concerned:

> The JCS sends the Secretary of Defense a draft memorandum for the President on military intervention in Laos. The JCS suggests that if the President decides that U.S. forces should be employed in Laos, that [SEATO Plan 5] is the proper basic vehicle for the contemplated action. The political objective of the intervention is to confront the Sino-Soviet Bloc with a military force of Asian and Western Powers capable of stopping the communist advance. JCS Memorandum for Secretary of Defense, JCSM 661-61, 20 September, 1961.

11 G.P.O. EDITION, vol. V-B-4(b), at vi. The words "SEATO Plan 5" are contained in the document describing the contents of Volume V-B-4(b), while those words are deleted when the same document is reproduced at the beginning of Volume V-B-4(a). "JCS" refers to the Joint Chiefs of Staff.

[156] Secret Brief, *supra* note 9, at 6.

[157] *See* Erwin N. Griswold, *Teaching Alone Is Not Enough*, *supra* note 18, at 257 (indicating that he "would have claimed rather less than the eleven" items).

[158] As described *supra* note 9, almost all of the Pentagon Papers study was declassified by the Department of Defense and published by the Government Printing Office in September 1971. The four negotiating volumes and some portions of the other volumes

estimate predicted the following possible reactions if increases in U.S. forces and intensified bombing continued:

> The Soviets might take certain actions designed to bolster North Vietnam and possibly to warn the United States such as the provision of limited numbers of volunteers or crews for defense equipment or possibly aircraft. They might also break off negotiations with the United States on various subjects and suspend certain agreements now in effect. The mining or the blockade of the North Vietnamese coast would be most likely to provoke these responses, since this would constitute a direct challenge to the Soviets and there would be little they could do on the scene.[159]

This bland summary of nonspecific responses with which the Soviets "might" respond to escalation by the United States could not have justified, under any conceivable legal standard, an injunction against publication.

6. *U.S. Estimate of Soviet Supply Capacity*

The three-sentence discussion of this item discloses only that the material involved—Volume IV-C-6(b), page 157—is closely related to Item Five and consists of an estimate of Soviet capacity to provide weapons to North Vietnam; and that there "is much about it that is current, and its disclosure to the Soviet Union would give them information which could lead to serious consequences for the United States."[160] Once again, no effort is made to identify the "serious consequences" faced by the United States or to establish how likely it is that they will occur. All that the document revealed about the Soviet capacity to provide weapons is that the Soviets would be at "as great a military disadvantage as we were when they blocked the corridor to Berlin in 1961" and that Moscow "should be expected . . . to provide some new

---

were withheld. Since the government was under no compulsion to publish *any* of the Papers, it is unlikely that anything published in the G.P.O. Edition of the Papers raised even a colorable security concern, at least as of September 1971 when the G.P.O. Edition was published. In fact, the G.P.O. Edition deleted some material even though it had already been published in the private editions of the Papers. For detailed comparisons of the three versions of the Papers, see 5 GRAVEL EDITION 314-19, and the Kahin and Westerfield articles, all of which are cited *supra* note 10.

[159] 4 GRAVEL EDITION, *supra* note 10, at 469.

[160] Secret Brief, *supra* note 9, at 7.

and better weapons and equipment."[161] No matter what legal standard was applied, disclosure of this fragment could not properly be enjoined.

7. *Memorandum of Joint Chiefs of Staff*

The one paragraph of the Secret Brief devoted to this item identifies it as an internal memorandum of the Joint Chiefs of Staff, dated May 27, 1967, containing a recommendation "that a nuclear response might be required in the event of a Chinese attack on Thailand."[162] The entire discussion of the potential harm to national security that could flow from publication of the memorandum is as follows:

> Although such a recommendation was never formally made, the disclosure that this was considered as a possibility, though in an internal memorandum, could have very serious consequences to the security of the United States.[163]

It is not surprising that the Government preferred not to allow the publication of *any* document discussing the possible use of nuclear weapons in response to Chinese intervention in the war in Southeast Asia. However, since it must have been obvious to everyone—especially the Chinese—that the United States would at least consider the use of such weapons if China became involved in the conflict by introducing major combat forces, publication of a recommendation on that subject, especially one that was not adopted, could not justify an injunction.[164]

8. *Telegram from Ambassador Thompson*

The eighth item described in the Secret Brief was the text of a telegram written by Llewellyn Thompson in 1968, when he was the United States Ambassador to the Soviet Union. The telegram is described as containing Thompson's assessment of Soviet reaction to the course of action in Vietnam, and the expected damage from publication is described in the following manner:

> The publication of this telegram would provide valuable intelligence information for the Russians. It is important to

---

[161] 4 GRAVEL EDITION, *supra* note 10, at 485.

[162] Secret Brief, *supra* note 9, at 7.

[163] *Id.*

[164] Although the portion of the Pentagon Papers that concerned the Government was published in full in 1971, 4 GRAVEL EDITION, *supra* note 10, at 492, the corresponding discussion from the Secret Brief was not declassified until March 1993.

> them to know what we think about them. Moreover, we cannot have an effective ambassador abroad if he is not able to report candidly and in confidence to the Secretary of State and the President.
>
> The publication of this telegram would impair Mr. Llewellyn's [sic] continuing effectiveness. He is now an important and valuable member of our SALT talks delegation dealing with strategic arms limitation, which surely directly affects the security of the United States.

The full text of the Thompson telegram appears in the Gravel Edition of the Papers.[165] The telegram discusses a wide range of possible Soviet responses to various possible moves the United States might take to escalate its involvement in the Vietnam War, but it had been written more than three years earlier by the then-Ambassador, who admitted that his "crystal ball" was "very cloudy." The Government's concern seemed to be based primarily on a generalized need for confidentiality in communications by ambassadors.

The specific diplomatic concerns raised in Item Eight ultimately amount to nothing more than the suggestion that after publication it would not be possible for former Ambassador Thompson to continue to serve effectively as a member of the U.S. delegation to the SALT talks. Given the very measured tone of the telegram, it is not at all clear that there was any reason to expect a hostile response by the Soviets. In any event, the Secret Brief's concerns that publication of the Papers might prevent Ambassador Thompson from assisting in the SALT negotiations seem highly exaggerated, given the fact that poor health had already forced Thompson to withdraw from the talks held in the spring of 1971.[166]

9. *Discussions Between South Vietnam and Laos*

The Secret Brief's entire discussion of the ninth item consists of the following:

> Volume IV-C-9(b), page 52, contains reference to extremely confidential discussions which took place between the military staffs of South Vietnam and Laos, given to us in confidence, relating to possible South

---

[165] 4 GRAVEL EDITION, *supra* note 10, at 246-47.

[166] Thompson was too ill to attend the SALT IV talks, which were held in Vienna between March 15, 1971 and May 28, 1971; he was replaced by Ambassador J. Graham Parsons. JOHN NEWHOUSE, COLD DAWN: THE STORY OF SALT 205, 211, 219 (1989 reprint ed.) (originally published 1973).

> Vietnamese military action in Laos with the consent of Laos military authorities. The publication of this not only involves a breach of confidence, but also involves grave risk of reactions from the other nations involved.[167]

The concerns raised by Item Nine are similar to those raised in Item One with regard to the negotiating volumes of the Pentagon Papers. Absent once again are details that might have enabled the Supreme Court to assess the seriousness of the Government's allegations. Labeling a disclosure a "breach of confidence" does not establish that the conditions for an injunction against publication have been met, and the Secret Brief made no effort to establish what consequences would likely flow from disclosure.

The Gravel Edition again discloses the material in question:

> In May, talks started between Lao and GVN military staffs. . . . In July, it was discovered that GVN was using Chinat agents, disguised so as to appear to be South Vietnamese with Nung ancestry, on covert operations. JCS disapproved of the effort despite appeal from COMUSMACV. The Chinats appeared to be the result of a secret bilateral agreement concluded during 1966.[168]

This seems to be material capable of causing embarrassment to the United States, but only because the public would become aware of tensions between the United States and the South Vietnamese government that were already well known to the governments themselves.

10. *Activities of the National Security Agency*

Item Ten pertains to the work of the National Security Agency (NSA), which is responsible for the government's code-breaking and code-making activities. The Solicitor General informed the Supreme Court that its claim was "not a matter of United States codes," since those were "regarded as not destructible, or sufficiently nondestructible to be practically effective."[169] Rather, the potential threat to national security involved the

---

[167] Secret Brief, *supra* note 9, at 8.

[168] 2 GRAVEL EDITION, *supra* note 10, at 401-02. GVN refers to the government of South Vietnam. Chinats are Chinese Nationalists. COMUSMACV refers to the Commander, U.S. Military Assistance Command, Vietnam.

[169] Secret Brief, *supra* note 9, at 8. Solicitor General Griswold reports as follows concerning his meeting with Admiral Gaylor: "I had in the back of my mind the thought that the publication of the plain text of any coded telegram would be serious, since it

codes and ciphers of other countries, particularly unfriendly nations. The Secret Brief asserted that "various items" had been specified in the Papers that would make the enemy aware of significant U.S. intelligence successes.[170] That, in turn, would permit an enemy country "to minimize our chance of successful interception," with adverse consequences for current U.S. military operations.[171]

Unfortunately, the final two paragraphs of page nine of the Government's Secret Brief, which concern the activities of NSA, are still classified. This deletion calls for the exercise of some additional caution in assessing the Secret Brief, since it is at least theoretically possible that the deleted paragraphs are radically different in nature from the ten items that have been released in full and from the portion of Item Ten that has been released. However, all the available evidence points to the conclusion

---

would provide information for breaking the code. Admiral [Gaylor] laughed at this, and said: 'That has not been true since about 1935.' " GRISWOLD MEMOIRS, *supra* note 18, at 304 (Griswold incorrectly refers to the individual he spoke to as Admiral "Naylor"). Judge Gurfein originally operated under the same misconception as Griswold, until Vice Admiral Francis J. Blouin, a government witness during the district court proceedings and the Deputy Chief of Naval Operations, confirmed that the security of U.S. codes was not at issue. BAMFORD, *supra* note 95, at 282-84. *See also* David Kahn, *American Codes and the Pentagon Papers*, NEWSDAY, June 25, 1971, *reprinted in* DAVID KAHN, KAHN ON CODES 167, 168 (1983):

> The reason that American cryptography sustained no injury is simply that today's cipher machines are designed to withstand precisely this sort of exposure. The safety factor is built in. . . .
>
> The public state of the cryptographic art can thus produce ciphers that can withstand massive disclosures and that are, in all practical senses, unbreakable. The National Security Agency stays far, far ahead of the public art.

[170] Secret Brief, *supra* note 9, at 8. The concerns expressed about a possible threat to NSA's interception efforts were potentially substantial, since it is possible that, to the extent that other nations become aware that the United States is reading their cables, they may be motivated to increase the security of their communications, making NSA's work more difficult in the future. *See* BAMFORD, *supra* note 95, at 287 (describing a meeting between Milton Zaslow—a high-ranking NSA official—and Senior Vice President Harding Bancroft of the Times, in which Zaslow described NSA's concerns about publication of "anything that might alert foreign governments to the fact that their communications systems had been penetrated"; Bancroft gave assurances that the Times would not publish any such material); SALISBURY, *supra* note 11, at 317-18 (describing the same meeting); United States v. Morison, 844 F.2d 1057, 1081-82 (4th Cir. 1988) (Wilkinson, J., concurring), *cert. denied*, 488 U.S. 908 (1988) (when the United States' capabilities for electronic surveillance are revealed, "countermeasures can be taken to circumvent" the surveillance).

[171] Secret Brief, *supra* note 9, at 8-9. "Signal intelligence now gives direct support to our troops today, and saves many lives. It also helps, directly in the recovery of downed pilots." *Id.* at 9.

that analysis of the *Pentagon Papers* litigation would not be significantly altered by examination of the deleted paragraphs.

The importance that the Government placed on protecting NSA, relative to its concerns about the negotiating volumes and the other items addressed in the Secret Brief, may be ascertained in a number of ways. In the District of Columbia litigation, the Government presented an affidavit by Vice Admiral Noel Gaylor, the Director of NSA. At first, the Government requested that Judge Gesell consider the affidavit ex parte, without it being available to counsel for the Post.[172] Judge Gesell refused to accept the affidavit on those terms.[173] Later, the Government agreed to allow the Post's attorneys and experts to review the affidavit, and the discussion between the court and counsel confirmed that the affidavit dealt with codes.[174] Toward the end of the hearing, the affidavit was discussed once more, with the references again confirming that it dealt with codes.[175]

Despite the Government's efforts to raise concerns that publication of the Pentagon Papers would interfere with NSA's activities, Judge Gesell's oral opinion denying the preliminary injunction sought by the Government stated that there was no proof that publication would result in "a compromise of scientific and technological materials."[176] The codes issue remained in the case, however, with the Government even attempting to present additional material on the issue to the Chief Judge of the court of

---

[172] Transcript of In Camera Proceedings (June 21, 1971), United States v. Washington Post Co., No. 1235-71 (D.D.C.), at 90 [hereinafter D.C. Transcript]. Admiral Gaylor's affidavit was marked as Government Exhibit 8 for identification. The transcript of the in camera proceedings before Judge Gesell was originally sealed, but was released in 1976. *See supra* note 19.

[173] In denying the Government's request, Judge Gesell stated: "That is so foreign to my make-up that I just can't do it." D.C. Transcript, *supra* note 172, at 90.

[174] *Id.* at 172-73.

[175] Judge Gesell stated that the "security aspect in the Admiral's affidavit . . . isn't as pressing as it may appear on the papers, the Court having been advised that the Post does not intend and is not going to publish precise times of messages." *Id.* at 216. William R. Glendon, counsel for the Post, then stated that the Post did not have one message about which Admiral Gaylor was particularly concerned. *Id.* at 217. Judge Gesell understood Admiral Gaylor's affidavit to allege that the message in question possibly had "some special significance in terms of compromising the Signals intelligence system." *Id.* at 216. As discussed *supra* note 97 and text accompanying notes 95-97, one cable particularly relied upon by the Government had already been published in congressional hearings. It appears that these matters concerning codes were what Judge George MacKinnon was referring to in his dissenting opinion in the D.C. Circuit, when he stated that "by agreement of the parties some of the documents will be protected." United States v. Washington Post Co., 446 F.2d 1327, 1329 (D.C. Cir. 1971) (en banc).

[176] D.C. Transcript, *supra* note 172, at 269.

appeals after argument had been held before the full court.[177] In addition, the Director of NSA was one of the three government experts with whom Solicitor General Griswold met on June 25 to discuss what security problems should be addressed in the Secret Brief to be filed the next day in the Supreme Court.

The precursor of the Secret Brief was the Special Appendix that the Government filed in the Second Circuit.[178] That document has been released in its entirety,[179] and contains two brief references to matters concerning codes. The Special Appendix identifies diplomatic messages between the State Department and U.S. embassies, and notes that the Pentagon Papers quote the messages. The complete description of the risks posed by publication of the text of one set of messages is as follows: "Presumably would assist enemy in analyzing and possibly breaking codes employed at that time and thereby all traffic of that period."[180] For the second set of messages, the analysis is no less sparse: "Presumably would assist in breaking codes in use during period. Many similar examples are interspread [sic] throughout this volume."[181]

The use of the word "presumably" in each statement seems poorly calculated to convince a court that an injunction against publication was

---

[177] The unusual hearing before Chief Judge Bazelon is discussed *supra* note 97 and text accompanying notes 95-97.

[178] Special Appendix Relating to In Camera Proceedings and Sealed Exhibits Submitted by Appellant United States, United States v. New York Times Co., No. 71-1617 (2d Cir. 1971) (filed under seal on June 21, 1971) [hereinafter Special Appendix]. The United States Attorney for the Southern District of New York sought permission to file the Special Appendix on June 21, 1971, when counsel for the parties appeared before a panel of the United States Court of Appeals for the Second Circuit and were informed that the court had scheduled an en banc argument for the next day. Transcript of Proceedings, United States v. New York Times Co. (June 21, 1971), at 3, 6-7, *reprinted in* 2 GOODALE COMPILATION, *supra* note 9, at 869-80. United States Attorney Seymour proposed to file a document that would "call the Court's attention to particular portions of this very voluminous top secret study." *Id.* at 6. Since the Government's proposed submissions took the form of affidavits, Professor Bickel, counsel for The New York Times, objected that this would give the Government "a second bite of the apple." *Id.* at 7. In response, Seymour conceded that "the fellows who prepared these affidavits, these officials, have explained why they point to these pages, so that technically it is an affidavit and could be construed as testimony." *Id.* at 8. Chief Judge Henry J. Friendly stated that the court "would view any additional characterizations as improper," but that a brief that said "please look at X, Y or Z" could be of great assistance to the court. *Id.* at 9. As filed, the Special Appendix consisted of a five-page summary of the testimony in the in camera proceedings before Judge Gurfein, followed by a fifteen-page "analysis of the significant portions of the Top Secret study on Vietnam, the publication of which would seriously damage the national security of the United States." Special Appendix at 1.

[179] *See supra* note 19.

[180] Special Appendix, *supra* note 178, at 12.

[181] *Id.* The volume referred to is VI-C-4, the last of the four negotiating volumes.

warranted. If the National Security Agency is not willing to say that publication "will" or at least "is likely to" make U.S. communications vulnerable to decryption, it is hard to see how a court could properly authorize an injunction. It appears that the elliptical phrasing in the Special Appendix was not inadvertent, since there could be no serious claim that quotations from cable traffic would actually give any advantage to those nations seeking to read the cables without authorization. Former Solicitor General Griswold has disclosed that the Director of the National Security Agency told him that there was no risk because "there was a separate code for each message, that printing a plain text of a telegram would help to break the code for that message, and that, of course, was of no importance, since the plain text of the message was already available."[182] The Solicitor General communicated this concession to the Supreme Court in unmistakable terms when he filed the Secret Brief, and perhaps he felt a need to do so since the portions of the Special Appendix quoted above had suggested that U.S. codes might indeed be at risk.[183]

---

[182] GRISWOLD MEMOIRS, *supra* note 18, at 303-04. The fact that publication of the messages would not in any way jeopardize U.S. codes is further confirmed by the fact that three of the four messages referred to in the Special Appendix were later released by the Government and published. *See* NEGOTIATING VOLUMES, *supra* note 53, at 601 (Saigon Embassy message 10856); 602-03 (Saigon Embassy message 12247); 629-32 (Department of State message 213389 to Oslo). The fourth message was deleted by the Government when it released the negotiating volumes. *Id.* at 628-29 (Oslo message 4531 to Secretary of State).

[183] The affidavits and testimony presented by the Government were much more detailed in the District of Columbia litigation than in the *Times* case in the Southern District of New York. The explanation for the disparity is to be found in the tight shackles placed on the government witnesses and trial attorneys in New York by officials from the Department of Defense and the Department of State. The United States Attorney for the Southern District of New York has stated that, "Impossible as it may be to believe, the Defense and State Department representatives simply would not explain to the government lawyers which of the documents in the forty-seven volumes of the Pentagon Papers presented specific risks to national security, although they were absolutely positive that such documents existed." SEYMOUR, *supra* note 18, at 199. The Special Appendix filed in the Second Circuit represented an effort by the Government to shore up the relatively weak showing it had made before Judge Gurfein, though on the matter of NSA's activities the Special Appendix was itself contradicted by the Secret Brief. Sanford Ungar has offered another explanation for the fatal gaps which existed in the Government's evidence:

> One reporter close to the case suggested later that the military experts had refrained from telling what they were genuinely most worried about as a potential security threat in the Papers. "The spooks didn't trust even the government lawyers," he said. "The generals probably could have come up with some devastating stuff in the Pentagon Papers if they tried harder and trusted the people they had to tell."

UNGAR, *supra* note 11, at 222; *see* SCHRAG, *supra* note 11, at 223. *But see* SALISBURY, *supra* note 11, at 327 ("Lack of trust in the government lawyers seems to have existed;

The newly-released material from pages eight and nine of the Secret Brief indicates that the National Security Agency was concerned that its interception activities would be harmed by publication of the Pentagon Papers. If NSA provided any specification, however, it must be contained in the two paragraphs that remain classified.[184]

It is unfortunate that Item Ten is not available for review in its entirety. However, it appears doubtful that the argument pertaining to Item Ten would substantially alter the analysis offered here. Both district judges who heard all the evidence rejected the Government's allegations that NSA's activities would be threatened by publication. In addition, Item Ten is given tenth place on a list of eleven items, while the four negotiating volumes, which by consensus are considered to have contained the most sensitive material, were listed first. Perhaps any concerns about code-breaking were subordinated to those relating to the negotiating volumes and other alleged security problems because, even if accepted by the Supreme Court, they would have justified an injunction against a very small portion of the forty-seven volumes.[185] In any event, whatever the precise nature of the additional arguments presented by the Solicitor General in the two paragraphs deleted at the end of Item Ten, the Supreme

---

that genuine security items were concealed in the Papers seemed less and less likely with the passage of years and extensive scrutiny of the Papers.").

[184] According to James Bamford, NSA's real concern was that publication of the Papers might cripple a highly successful U.S. effort at intercepting Soviet communications:

> Code-named Gamma Gupy, the operation involved eavesdropping on Soviet government leaders by intercepting their scrambled radio-telephone conversations as they traveled around Moscow in their limousines. . . . What started teeth rattling at NSA was that some of Brezhnev's conversations had been referred to, without their origin being identified, in one of the volumes that was reported to have been given to the Soviet embassy but was never printed in the *Times*.
>
> The fears seemed to be confirmed when, immediately after the Papers were reported to be in Russian hands, the intercepts became much more mundane.

BAMFORD, *supra* note 95, at 283. Bamford further states that The New York Times assured NSA that it would not reveal details from the Papers (such as the time of intercepted communications) that would alert foreign governments to the fact that their communications systems had been penetrated. *Id.* at 287.

[185] As discussed in note 175 *supra*, the proceedings before Judge Gesell referred particularly to one message alleged to pose a threat to the electronic interceptions conducted by the United States, and there were allegations that the publication of the "time groups" of messages could be harmful, but the Post disclaimed any intention to publish that information. *See supra* note 175. Judge James L. Oakes, who participated in the *Pentagon Papers* litigation as a judge on the United States Court of Appeals for the Second Circuit, has revealed that, while voting to deny the injunction sought by the Government, he "had some doubts about one cable proposed for publication." Oakes, *supra* note 7, at 503. Judge Oakes did not state whether his concerns related to NSA activities or to some other matter.

Court found them insufficient to warrant any further injunction against the newspapers.[186]

The Supreme Court's refusal to approve an injunction against publication of Item Ten is easily understood if one reviews pages eight through ten of the secret brief filed by The Washington Post in the Supreme Court. While this brief was filed simultaneously with the Solicitor General's brief, and thus could not answer it directly, the brief presents a devastating rebuttal to the affidavit filed in the D.C. litigation by Admiral Gaylor, the Director of NSA.[187] Apparently, Admiral Gaylor attempted to identify only three passages that were alleged to have the potential to expose U.S. code-breaking successes: one passage was a report of a division-sized troop movement; the other two involved quotations from the summary of the command and control study of the Gulf of Tonkin

---

[186] An additional reason for doubting that sensitive code-related information was contained in the Papers is the fact that none of the material carried any designation beyond "Top Secret." A document containing information derived from electronic intercepts or pertaining to codes is precisely the sort of material that is safeguarded by the assignment of code words if disclosure would put at risk the NSA's electronic interception programs. The intelligence produced from the NSA's intercepts is labeled "HANDLE VIA COMINT CHANNELS ONLY" (with "COMINT" referring to communications intelligence, which is within the broader category of information known as "SIGINT"—signals intelligence). BAMFORD, *supra* note 95, at 119. "Once a document is so marked, it is automatically elevated to a status higher than top secret; it is restricted to those few holding a final top secret special intelligence clearance and indoctrinated into the tight-lipped world of SIGINT." *Id.* at 119-20. Access to such documents is further limited by the assignment of such code words as "TOP SECRET UMBRA" and "SECRET SPOKE". *Id.* at 120; JEFFREY RICHELSON, THE U.S. INTELLIGENCE COMMUNITY 316-17 (1985).

> Essentially, each code word is a separate, highly specialized entity. . . . Each requires separate briefings, indoctrination, and oaths. Often a document contains references to a number of operations and sources and carries a stupefying classification like TOP SECRET UMBRA GAMMA GANT HOLYSTONE DESKTOP. In such a case the reader would have to be cleared and certified for each category.

BAMFORD, *supra* note 95, at 120-21. This is precisely the system described in more general terms by former CIA Director Stansfield Turner in the material quoted above in note 54.

What is striking is the fact that nothing in the Pentagon Papers was classified beyond Top Secret or assigned any code word indicating that signals intelligence was involved. The absence of such precautions strongly suggests that, contrary to the Government's assertions, the Pentagon Papers presented no risk to the activities of NSA. One other explanation cannot be completely excluded, though it seems highly unlikely. Perhaps information which should have been classified beyond Top Secret was not so classified only because of errors. There is no reason to believe that underclassification mistakes of this sort could become so pervasive that nothing in the 47 volumes of documents would be assigned a code word, if indeed signals intelligence product was reproduced in the Papers.

[187] Post's Secret Brief, *supra* note 97, at 8-10.

incident.[188] The Post pointed out that intelligence concerning movement of a division might well come from sources other than electronic intercepts, and that the intercepts that had occurred in the Gulf of Tonkin were already well known.[189] The only other matters as to which Admiral Gaylor raised any objection concerned descriptions of U.S. cooperation with the South Vietnamese on interception activities. To show how innocuous the disputed passages were, the Post's lawyers reproduced them all on less than one page of their sealed brief.[190]

11. *Prisoners of War*

The entire discussion of Item Eleven in the Secret Brief reads as follows:

> Finally, reference should be made to prisoners of war. We are currently engaged in discussions on the prisoner of war issue, in some cases with governments which are not wholly friendly, such as Sweden and Russia. It is obvious that these conversations are conducted on the understanding that they will be confidential, and they are not very likely to be fruitful if that confidence is broken. This is covered by the oral testimony of Mr. Doolin in both cases.
>
> There is one of these in particular which it is very likely that we will not be able to proceed further with as a result of the publication of the papers which has already been made by the New York Times and the Washington Post. The longer prisoners are held, the more will die.[191]

The concerns raised in Item Eleven seem similar to those stated in Item One. Each item relates to ongoing negotiations that could greatly benefit the United States if successfully concluded, and in both cases the negotiations allegedly were threatened by publication of descriptions of earlier stages of the negotiations or of earlier negotiations similar to the ongoing efforts.[192] The discussion of Item Eleven, however, like the earlier treatment of Item One, never identified particular negotiations that were

---

[188] *Id.* at 8-9.

[189] *See supra* notes 97, 175.

[190] Post's Secret Brief, *supra* note 97, at 10. Although the Post's brief reproduced these passages in full, deletions have been made by the Government in the version of the brief that is available for public review.

[191] Secret Brief, *supra* note 9, at 10.

[192] *Id.* at 4-5, 10.

jeopardized or established any direct, immediate link between the intended publication and the feared consequences.[193]

B. *Additional Arguments by the Solicitor General*

Although the Secret Brief discusses only eleven items contained in the Pentagon Papers, several additional arguments are presented at the end of the brief. First, the brief argues that, despite the extensive powers available to the President to protect the confidentiality of information that, if disclosed, has the capacity to threaten national security, "there will inevitably be weak spots in any system."[194] The Secret Brief argues that when such weak spots occur, "the Presidency is powerless to provide the required protection except with the aid of the courts."[195] The second concluding argument refers to messages received by the United States from Iran and Great Britain, in which each nation expressed concern over the publication of information pertaining to confidential diplomatic exchanges.[196] Finally, the Secret Brief concludes with a rhetorical flourish:

> This is a great and free country. It must remain a great and free country. . . . The Constitution should be construed in such a way as genuinely to preserve a free press, while likewise leaving to the Presidency the protection which it requires for the free flow of information from foreign

---

[193] The Secret Brief refers to the testimony of Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs, but that testimony, which was not summarized for the Supreme Court in the Secret Brief, did not establish that failure of ongoing negotiations concerning prisoners of war would be directly caused by publication of the Pentagon Papers. Doolin had filed an affidavit in the District of Columbia litigation alleging that countries which "have helped us with Hanoi on behalf of our men" would be embarrassed by revelation of their past involvement, and that they might well refuse to help in the future. Affidavit of Dennis J. Doolin at 3, United States v. Washington Post Co. (D.D.C.), at 3. In his testimony before Judge Gesell, Doolin stated that there was a "possibility" that some of the countries that had acted as intermediaries in the past would be embarrassed if their involvement were to be disclosed. D.C. Transcript, *supra* note 172, at 116.

[194] Secret Brief, *supra* note 9, at 11.

[195] *Id.* The Secret Brief coyly observes that the "Federal Judiciary has been referred to as 'the least dangerous branch.' " *Id.* at 10. There is no citation, but the Solicitor General plainly intended to refer to the book written by counsel for the Times. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[196] The Secret Brief quotes a telegram sent by the American ambassador to "a friendly country." Secret Brief, *supra* note 9, at 11-12. While the brief does not identify the country involved, the State Department has released the full text of the telegram, which indicates that the country was Iran. Telegram from U.S. Ambassador Douglas MacArthur 2d, Tehran, to the U.S. Department of State, Washington, D.C., June 25, 1971.

nations and for the free development of thought and ideas between the President and his immediate advisers.[197]

V. THE ORAL ARGUMENT IN *PENTAGON PAPERS*

Few of the oral arguments before the United States Supreme Court can match the drama of the argument that took place when the *Pentagon Papers* case was called on the morning of Saturday, June 26, 1971.[198] Not only had the controversy been front-page news at every stage of the litigation, but the proceedings in the district courts and the courts of appeals had moved at such a brisk pace, and in such a cloud of uncertainty as to the scope of the matters in dispute and the evidence bearing on them, that oral argument offered the parties the opportunity finally to clarify their positions. The drama was further heightened by the Government's last-

---

[197] Secret Brief, *supra* note 9, at 12-13.

[198] Professor Charles Alan Wright has described *Pentagon Papers* as the most dramatic case that Erwin Griswold argued as Solicitor General. Charles Alan Wright, *"A Man May Live Greatly in the Law"*, 70 TEX. L. REV. 505, 512 (1991) (book review of Griswold's memoirs). Griswold himself has said it was his toughest argument, Saundra Torry, *Erwin N. Griswold Is the Dean of Supreme Court Observers*, WASH. POST, July 15, 1991, at F5, and that it was "the most spectacular case" in which he appeared. GRISWOLD MEMOIRS, *supra* note 18, at 296. Griswold has argued 127 Supreme Court cases, more than any other living lawyer. *Id.* At least part of the electricity of the occasion is accessible to those who take the opportunity to listen to the audio recording of the argument, as Griswold does every four or five years. *Id.* at 307.

Even the *tape* of the *Pentagon Papers* argument has been the subject of controversy. The Supreme Court began making audio recordings of the arguments before the Court in 1955. The tapes are used to prepare the official transcript of argument and are then sent to the National Archives. On June 30, 1981, CBS News broadcast a portion of the tape of the *Pentagon Papers* argument in a story commemorating the 10th anniversary of the Supreme Court's decision in the case. Fred Graham, *The Background of the Court's 'Secret Tapes'*, NAT'L L.J., October 28, 1985, at 12 (letter). The correspondent who made the broadcast stated that this "was the first (and only, to my knowledge) time that the actual voices of the Justices and counsel in oral arguments had been broadcast on the air." *Id.; see* FRED GRAHAM, HAPPY TALK: CONFESSIONS OF A TV NEWSMAN 94-98 (1990). Although the Archives makes the tapes available for educational use, Chief Justice Burger apparently objected to the use of a tape in a television broadcast and halted the transfers of tapes from the Supreme Court to the Archives. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 153 (2d ed. 1990). When other Justices learned in 1986 of the Chief Justice's action, they forced a discussion of the matter in conference, and the deliveries were resumed. *Id.* Portions of the oral argument tape in *Pentagon Papers* have recently been made conveniently available in conjunction with the publication of edited transcripts of 23 oral arguments before the Supreme Court. MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955 (Peter Irons ed., 1993). Unfortunately, the tape has been severely edited, with many telling exchanges omitted.

minute request that at least part of the argument be conducted in camera, a request that was denied when the Court took the bench.[199]

Finally, the drama of the occasion was significantly enhanced by the identities and the performances of the advocates. For the Government, Solicitor General Erwin Griswold was a force to be reckoned with by virtue of his many appearances before the Court, his long service as dean of Harvard Law School, and his reputation for independence.[200] The New York Times countered with Alexander M. Bickel, Professor of Law at Yale and one of the country's leading experts on constitutional law and the Supreme Court.[201] In the clash of these advocates in a momentous case, and in the close questioning of them by the Justices, are to be found many of the final clues necessary to piece together the real meaning of *Pentagon Papers*.[202] Several important themes emerge from the wide-ranging

---

[199] Although it was not known at the time, the *Pentagon Papers* argument also had the distinction of being the last one heard by Justices Hugo Black and John M. Harlan. Both Justices fell sick during the summer and were forced to resign before the Court began its 1971 Term.

[200] At times, Griswold would maintain his independent course even while arguing a case before the Supreme Court. A Supreme Court Justice has been quoted as saying that "He's like the U.S.S. Griswold. Questions from us just bounce off him harmlessly as he cruises through his speech." LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 33 (1987). John P. Frank has described the Griswold style as "American Gothic snowplow." Wright, *supra* note 195, at 506. Even the author of a book quite critical of Harvard Law School and of Griswold's long tenure as its dean labeled him "a giant of legal history, rightfully ranked with Christopher Columbus Langdell, Roscoe Pound, and James Landis in the small circle of men who most powerfully left a mark on Harvard Law School and, indirectly, on all American law schools." JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL vii (1978).

[201] Perhaps as a bit of psychological warfare against the Government, the Times had provided its readers with the following description of the TRO proceeding before Judge Gurfein:

> The arguments pitted a 30-year-old staff member of the United States Attorney's office, Michael D. Hess, against Prof. Alexander M. Bickel of the Yale Law School, a 46-year-old constitutional authority who has been mentioned as a possible Supreme Court nominee. Prof. Bickel represented The Times and its personnel.

Fred P. Graham, *Judge, at Request of U.S., Halts Times Vietnam Series Four Days Pending Hearing on Injunction*, N.Y. TIMES, June 16, 1971, at 1.

[202] The Washington Post was represented at oral argument by William R. Glendon of the firm of Royall, Koegel & Wells. Glendon was not as experienced as Griswold and Bickel in constitutional law matters, and his exchanges with the Justices did not match the intensity of those the Justices had with Griswold and Bickel. Perhaps the Post would have been better able to hold its own in the argument if Edward Bennett Williams had been able to argue the case, as he was asked to do by Post Executive Editor Benjamin Bradlee. EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS—ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER 266 (1992). Williams was in the middle of a trial in Chicago and did not feel that he could obtain an adjournment without damaging his client's case.

exchanges between the Solicitor General and the Justices.[203] First, the Solicitor General placed great emphasis on the Secret Brief as presenting the Government's strongest claims for an injunction.[204] Griswold conceded that the designation of sensitive items that the Government had filed the previous day was "much too broad."[205] While not willing to abandon all of the additional items listed in the Special Appendix that the Government had filed in the Second Circuit, Griswold made it clear that he had personally selected the eleven[206] items discussed in the Secret Brief and that he had not had an opportunity to look at all of the items listed in the Special Appendix:

> [MR. GRISWOLD:]
>
> To the best of my knowledge, based on what was told me yesterday afternoon by the concerned persons, the ten items in my closed brief are the ones on which we most rely. But I have not seen a great many of the other items in the special appendix for sheer lack of time.[207]

The second theme developed by Solicitor General Griswold was the great difficulty that the Government was facing because of its lack of precise knowledge of what documents the newspapers possessed and because of the pace of the litigation.[208] Griswold emphasized that the hearings below had been directed merely to the question of the propriety of preliminary injunctions and did not constitute full trials on the merits.[209] He further argued that there "simply was not time to prepare a comprehensive listing, or a comprehensive array, of expert witnesses."[210] He also stated that the Government had been relying on the fact that the

---

Id. Soon after, the Post hired the Williams firm to represent it in place of Royall, Koegel & Wells. *Id.* at 268; FELSENTHAL, *supra* note 88, at 305.

[203] The Court allowed two hours for argument. Griswold argued first, followed by Bickel and then Glendon. Griswold then presented a rebuttal.

[204] *See supra* text accompanying note 20.

[205] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 218-19.

[206] During argument, the Solicitor General incorrectly referred to the number of items in the Secret Brief as "ten." *Id.* at 220.

[207] *Id.* at 220. Many of the items listed in the Special Appendix that were not included in the Secret Brief were later published in either the Gravel Edition or the G.P.O. Edition of the Papers, or both. *See supra* note 158.

[208] As Griswold put it at one point, "We don't know now—never have known—what the papers have." ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 218.

[209] *Id.* at 258.

[210] *Id.*

district judge would examine the study itself, which he stated the judge in the *Times* case had refused to do.[211]

The third major topic developed by Griswold was the standard that he asserted should govern the case and how he perceived that standard to depart from that propounded by the newspapers. Griswold noted that his opponents had not argued that no injunction against disclosure could ever be permitted by the First Amendment. Rather, he said, the newspapers agreed that "an injunction would be permissible in this case if the disclosure of this material would in fact pose a grave and immediate danger to the security of the United States."[212] Although Griswold, in response to a question from the bench, conceded that his case depended on the claim "that the disclosure of this information would result in an 'immediate grave threat to the security of the United States of America,' "[213] as the argument developed it became clear that the burden of proving "immediacy" was not one that the Government would willingly shoulder, or one that it was confident it could meet:

> [T]he materials specified in my closed brief will, as I have tried to argue there, materially affect the security of the United States. It will affect lives. It will affect the process of the termination of the war. It will affect the process of recovering prisoners of war. I cannot say that the termination of the war, or recovering prisoners of war, is something which has an "immediate" effect on the security of the United States. I say that it has such an effect on the security of the United States that it ought to be the basis of an injunction in this case.[214]

---

[211] At oral argument, Justice Stewart questioned the Solicitor General on this point, pointing out that the judge being referred to, Judge Gurfein in the Southern District of New York, "didn't 'refuse' to. He failed to. He didn't have time to" review all the volumes. *Id.*

[212] *Id.* at 217.

[213] *Id.* at 222.

[214] *Id.* at 228. The open brief filed by the Government was similarly ambivalent on the question of the immediacy of harm. The brief argued that an injunction would be proper to enjoin "[a]rticles [t]hat [p]ose a [g]rave and [i]mmediate [d]anger to the [s]ecurity of the United States," Brief for the United States at 7, *reprinted in* LANDMARK BRIEFS, *supra* note 9, at 117, and then suggested that "immediate" should be construed to mean "irreparable" in matters related to diplomacy:

> The standard adopted by the Second Circuit is that of "grave and immediate" danger to national security. Since the effect of particular action upon diplomatic relations may be extremely severe in the long run even though its immediate impact is not clear or great, we believe that, insofar as this standard involves the conduct of foreign affairs, the word "immediate" should be construed to mean "ir-

In concluding his argument, Solicitor General Griswold objected to the "immediacy" requirement as applied by Judge Gesell:

> [I]n the modern world, the standard that Judge Gesell applied is just too narrow. And, as I have said, that the standard should be "great and irreparable harm to the security of the United States."
>
> In the whole diplomatic area the things don't happen at 8:15 tomorrow morning. It may be weeks, or months.[215]

The last important component of the Solicitor General's argument was an attempt to apply his proposed standard of "great and irreparable harm" to the facts of the case as set out in his Secret Brief. Again and again, Griswold suggested that diplomatic matters were at the top of the Government's list of sensitive materials. Although Griswold could not be more specific in open court, he was undoubtedly referring to Item One in the Secret Brief when he told the Court that there were four related volumes dealing with one subject, "the broaching of which to the entire world at this time would be of extraordinary seriousness to the security of the United States."[216] The Solicitor General made a number of other specific references to diplomatic concerns, almost to the exclusion of any other alleged danger to national security.[217] And, when he wrapped up his rebuttal and prepared to sit down, he returned to the assertion that the foreign relations of the United States would be seriously damaged by publication:

---

reparable." Indeed, in the delicate area of foreign relations frequently it is impossible to show that something would pose an "immediate" danger to national security, even though the long-run effect upon such security would be grave and irreparable.

Id. at 9. The Government's open brief is reprinted in 71 LANDMARK BRIEFS, *supra* note 9, at 117-46.

[215] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 231. Despite his resistance to an immediacy requirement, Griswold later argued that "if properly classified materials are improperly acquired, and . . . it can be shown that they do have an immediate, or current impact, on the security of the United States . . . there ought to be an injunction." *Id.* at 257.

[216] *Id.* at 221. Griswold added: "And, as I say, that is covered in my closed brief and I am not free to say more about it." *Id.* If Griswold's motion for a closed argument had been granted he would have been able to inform the Court more directly about the injuries that the Government alleged would result from publication.

[217] *See id.* at 229 ("[I]t is perfectly obvious that the conduct of delicate negotiations now in process, or contemplated for the future has an impact on the security of the United States."); *id.* at 230 (referring to SALT talks).

> I believe, and have sought to show in the closed brief which is filed here, that there are materials in—there are items in this material which will affect the problem of the termination of the war in Vietnam, which will affect negotiations such as the SALT talks, which affect the security of the United States vitally over a long period, and which will affect the problem of return of prisoners of war. And I suggest that, however it is formulated, the standard ought to be one which will make it possible to prevent the publication of materials which will have those consequences.[218]

Oral argument for The New York Times was presented by Alexander Bickel, and Professor Bickel's exchanges with the Justices are nothing short of entrancing. As with the Solicitor General, the Justices felt free to engage in a wide-ranging interrogation with the confidence that they would receive thoughtful responses from an advocate capable of engaging them as an equal on matters of constitutional law.[219] Much of Bickel's argument was based on the fact that in *Pentagon Papers* the Government was acting under a claim of inherent presidential authority, since there was no statute that authorized the Executive to seek a prior restraint on publication.[220]

---

[218] *Id.* at 260.

[219] The respectful reception he received in the Supreme Court might have come as a welcome relief to Professor Bickel, who was treated harshly in his argument before the Second Circuit. Bickel's co-counsel Floyd Abrams has referred to that appearance as Bickel's "most trying and least successful argument of the entire Pentagon Papers case." Abrams, *supra* note 18, at 78. *See also* UNGAR, *supra* note 11, at 197 ("Bickel fumbled and was continually harassed by Chief Judge Henry J. Friendly.").

[220] Professor Bickel placed great emphasis on the argument that a well-drawn statute could provide authority for issuance of an injunction against publication in circumstances where the President could not properly obtain an injunction under his Article II authority alone. *See* ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 236 ("I would demand less of the statute than I would demand of the President."). In *Pentagon Papers*, the only statutes directly relevant were those authorizing criminal prosecution of those committing espionage, *see, e.g.*, 18 U.S.C. § 793(e), which several Justices indicated might be applied to punish publication of the Papers after the fact. *See* Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, *supra* note 15; Edgar & Schmidt, Curtiss-Wright *Comes Home*, *supra* note 23. In *Pentagon Papers*, the Government had initially placed considerable emphasis on the espionage statutes as allegedly providing a basis for enjoining publication of the Papers, but Judge Gurfein found them inapplicable, 328 F. Supp. at 328-30, and the Government did not pursue the issue on appeal. The existence of a statute specifically designed to prevent disclosure of secret information about nuclear weapons was asserted by the Government to be a significant distinction between *Pentagon Papers* and the *Progressive* case. Like *Pentagon Papers*, the *Progressive* case ended without any definitive resolution of the issues revolving around

However, Bickel did take issue directly with the Solicitor General on the question of the standard that the Government would need to meet in order to justify a prior restraint.

Griswold had strenuously, if not entirely consistently, rejected the notion that the Government was obligated to show that serious harm to national interests would flow *immediately* from publication of the disputed documents. Bickel responded by emphasizing that immediacy of harm was built into Chief Justice Hughes' classic example in *Near v. Minnesota*[221] of a troop ship threatened by disclosure of its sailing date.[222] Bickel pointed out that Griswold was resisting the use of the word "immediate,"[223] and Bickel urged the Court to insist that "the link, between the fact of publication and the feared danger—the feared event—be direct, and immediate, and visible."[224] Bickel asserted that all that the Government had ever done to meet its burden was to present fears couched "in terms of effect on diplomatic relations," a category of injury that he argued "does not meet any possible First Amendment standard."[225] Bickel then focused on the critical differences between his proposed formulation of the constitutional standard and that argued for by the Government:

> [The feared effect on diplomatic relations] doesn't meet [the First Amendment's requirements] either in the statement of the seriousness of the event that's feared, or what is more important and more obvious in this case, in the drawing of the link between the act of publication as the cause of that event, and the event that is feared. That link is always, I suggest, speculative, full of surmises, and a chain of causations that after its first one or two links gets involved with other causes operating in the same area. So that what finally causes the ultimate event becomes impossible in saying which the effective cause was. And the standard that I would propose under the First Amendment would not be satisfied by such showing.

---

the presence or absence of specific congressional authorization for prior restraints. *See supra* notes 37, 46. In the Pentagon Papers controversy itself, the Government attempted to utilize the espionage statute against Daniel Ellsberg and Anthony Russo (though not against the newspapers), but the prosecution was dismissed because of government misconduct. *See* SCHRAG, *supra* note 11, at 329-57.

[221] 283 U.S. 697 (1931).

[222] *Id.* at 716.

[223] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 234.

[224] *Id.* at 237.

[225] *Id.* at 238.

[JUSTICE STEWART:]
And your standard is that it has to be an extremely grave event to the Nation; and it has to be directly, proximately caused by the publication?

MR. BICKEL:
That's exactly correct.[226]

A few minutes later, Justice Stewart launched a series of questions that forced Professor Bickel to concede that even an isolated incident of loss of life would be of sufficient gravity to warrant an injunction if publication threatened directly and immediately to bring about such damage:

[JUSTICE STEWART:]
Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of 100 young men whose only offense had been that they were 19 years old, and had low draft numbers. What would we do? . . . I suppose that in a great big global picture this is no—this is not a national threat. . . . There are at least 25 Americans killed in Vietnam every week, these days.

MR. BICKEL:
No, sir, but I meant it's a case in which the chain of causation between the act of publication and the feared event—the death of these 100 young men—is obvious, direct, immediate—

[JUSTICE STEWART:]
That's what I'm assuming in my hypothetical case. . . . You would say the Constitution requires that it be published, and that these men die? Is that it?

MR. BICKEL:
No. No, I'm afraid I'd have—I'm afraid my inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment, in a case of that sort.[227]

---

[226] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 238.

[227] *Id.* at 239-40. The potential significance of Professor Bickel's concession was not lost on the attorneys for the amici who were supporting the newspapers' position. In an

Professor Bickel, upon further questioning by Justice Stewart, confirmed that the feared event did not have to be of a "cosmic nature," and that the troop ship example given in *Near* was comparable to Justice Stewart's example of a threat to 100 men.[228]

VI. THE BOUNDARIES OF *PENTAGON PAPERS*

Using the Secret Brief filed by the Solicitor General, the very pointed exchanges between Griswold and Bickel on the one hand, and the Justices on the other, and the opinions written by the Justices in *Pentagon Papers*, it is now possible to delineate the boundaries of the case with much greater precision than before.

Upon examination of the Secret Brief it becomes clear that prior efforts to consider the nature of the material involved have been conducted without adequate recognition of the widely varying types of security claims that the Government was asserting. For example, Professor Rudenstine has argued that the Government's effort to obtain an injunction in *Pentagon Papers* "has been discounted because of the general assumption that the administration's allegations of harm were general and not supported by specific references to the classified documents in dispute. It turns out that both assumptions are false."[229] In fact, as the discussion of the Secret Brief above illustrates, the eleven items principally relied on by the Solicitor General fit no common profile. Some *were* couched in such general terms as to be inadequate to demonstrate any likelihood of damage to the national security.[230] Others were highly specific, but dealt with

---

extraordinary motion filed later on June 26, after oral argument, they sought to file a memorandum containing an alternative response to the hypothetical. They argued that the hypothetical "must be answered in a totally different manner" and that "the answer is, painfully but simply, that the right of a free people to determine its destiny has been, and should continue to be, paramount to any attempt by the government to impinge upon, erode, or ultimately destroy the right of the people to know." Motion of Amicae Curiae to File Joint Post-Argument Memorandum, along with Proposed Memorandum, filed by Kristin Booth Glen (for the National Emergency Civil Liberties Committee), Norman Dorsen (for the American Civil Liberties Union), and Thomas Emerson (for 27 Congressmen), New York Times Co. v. United States, 403 U.S. 713 (1971). It appears that the motion was not acted upon by the Court. Professor Emerson's classic article on prior restraint appears to have taken a less absolutist position. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 661 (1955) (*Near*'s "war exception rests upon peculiar factors of obvious weight").

[228] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 240.

[229] Rudenstine, *supra* note 19, at 1899.

[230] The Secret Brief's discussion of Item Three, for example, states that the Papers contain references "to the names and activities of CIA agents still active in Southeast Asia" and "to the activities of the National Security Agency." No details are given.

disclosures likely to be dismissed as trivial.[231] A few others, particularly Item One—the four negotiating volumes—did have a substantiality to them that no doubt caused the Justices to evaluate them seriously. Any effort to discuss these highly divergent claims as if they were similar is bound to come up short.

As Professor Rudenstine states, the Government's claims in *Pentagon Papers* have been dismissed as being uniformly flawed by lack of specificity.[232] It turns out that some of the items relied on in the Secret Brief suffered from that infirmity, but others did not. Likewise, some of the items were reasonably well supported by testimony or affidavits, while others were not. Some items were plausible or even convincing in their predictions of harm to the interests of the United States, while others could be dismissed out of hand.

In surveying the boundaries of *Pentagon Papers*, I propose to proceed as the Supreme Court undoubtedly did—by focusing on the *strongest* claims asserted by the Government. To the extent that the claims that publication of a particular item would cause damage to national security may easily be dismissed as too general, trivial, or unsupported, the Supreme Court's denial of an injunction tells us little or nothing about the First Amendment principles being applied by the Court. However, in order to enter the judgment that it did, which lifted all restraints on publication of the information contained in the Pentagon Papers,[233] the Supreme Court must have concluded that even the strongest claims advanced by the United States were insufficient to warrant further restraint on publication. It is in identifying the apparent reasons that those items could not be enjoined that the core of *Pentagon Papers* will be exposed.

---

[231] Item Five, for example, amounted to no more than a few sentences describing possible Soviet responses to U.S. escalation, including: sending of limited numbers of volunteers, breaking off negotiations with the United States, or suspending agreements in effect with the United States. All of these would be obvious possible ways in which the Soviets could manifest opposition to escalation by the United States.

[232] For example, in granting the preliminary injunction requested in the *Progressive* case, the district judge stated that in *Pentagon Papers* "the Supreme Court agreed with the lower court that no cogent reasons were advanced by the Government as to why the article affected national security except that publication might cause some embarrassment to the United States." United States v. The Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis. 1979). Contrary to Judge Warren's assertion, the Government's claims in *Pentagon Papers* were couched in terms of predicted injury to the national defense and foreign relations of the United States, not in terms of possible embarrassment.

[233] The newspapers also possessed materials not included in the Pentagon Papers study. For example, The New York Times had a copy of the summary of the command and control study of the Gulf of Tonkin incidents. 1 GOODALE COMPILATION, supra note 9, at 292, 294.

The scope of the national security claims seriously advanced by the Solicitor General in the Supreme Court was much narrower than has previously been recognized. For all of the talk about the "massive" and "unprecedented" size of the body of classified material contained in the Papers, it was eventually conceded by the Government that most of the documents deserved to be declassified.[234] Thus, even as it was reversing Judge Gurfein and remanding the New York case for further proceedings, the Second Circuit ruled that an injunction against publication would remain in effect only for the documents as to which the Government advanced a specific security claim.[235] Similarly, Judge Wilkey's dissent in the D.C. Circuit argued only that the Government should be allowed another opportunity to prove that portions of the Papers would damage national security if published; he conceded that the bulk of the material could not be suppressed.[236] The suggestions that there were relatively few portions of the Papers that even arguably had the potential to damage national security were confirmed to a significant degree when, after the conclusion of the litigation, the Government Printing Office published most of the forty-seven-volume study, including many of the items identified in the Special Appendix filed in the Second Circuit.[237]

After careful examination of the Secret Brief and related materials, it appears that the Government's strongest claim—and perhaps its *only* serious claim—concerned the possible damage to the foreign relations of the United States that might be caused by publication of Item One, the four negotiating volumes. Item Eleven, concerning the prisoner-of-war issue, may fairly be considered as an adjunct of Item One, since it raised precisely the same concern in the P.O.W. context that Item One raised with regard to the negotiations designed to end the war; in each case, the Government asserted that nations that had served as useful intermediaries between the United States and Hanoi would refuse to provide any further assistance if their roles were revealed.

---

[234] Former President Richard Nixon has termed the Pentagon Papers "the most massive leak of classified documents in American history," while conceding that Secretary of Defense Melvin Laird "felt that over 95 percent of the material could be declassified." NIXON, *supra* note 17, at 508, 509.

[235] United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971) (stay issued by the court of appeals would be vacated on June 25, except as to the items listed in the Special Appendix or any additional items identified by the Government as posing "grave and immediate danger of the security of the United States").

[236] United States v. Washington Post Co., 446 F.2d 1327, 1329 (D.C. Cir. 1971) (Wilkey, J., dissenting) ("I would affirm the action of the trial court in not restraining the publication of the vast majority of these documents."); *id.* at 1331.

[237] By the time the G.P.O. Edition was published, the Gravel Edition had already appeared, rendering moot some of the security claims raised by the Government. *See supra* notes 9, 158.

For purposes of the analysis that follows, Items One and Eleven will be considered to constitute the most serious threat to national security identified by the Government in *Pentagon Papers*, and the other nine items will be put aside. Item Ten was a weak claim so far as the released portions of the Secret Brief go, but since two paragraphs discussing that Item have not yet been released, definitive analysis is not possible.[238] Items Two and Three, while they concerned matters of considerable importance, were presented at such a high level of generality that there was simply no way for the Supreme Court to assess their weight.[239] Items Four through Nine were all identified with great particularity, but involved small amounts of information with little or no apparent potential to damage national security.[240] Unless the Government could prevail on Items One and Eleven, it is inconceivable that any of the snippets of information contained in Items Four through Nine would be considered by the Supreme Court to pose such a grave threat to the Nation's interests as to justify an injunction.

For these reasons, this analysis will follow the priorities set by Solicitor General Griswold, with the negotiating volumes treated as the principal security concern on which the Government relied. The reality of *Pentagon Papers* as it was presented to the Supreme Court may be starkly put: if there was no proper basis for suppressing publication of the negotiating volumes, then the newspapers were entitled to be free of any further restraint on their publication of the Papers.[241]

Under Justice Stewart's formulation, which is generally considered to identify the common ground on which a majority of the Justices agreed, an injunction is proper only if disclosures "will surely result in direct, immediate, and irreparable damage to our Nation or its people."[242] Accordingly, an injunction against publication of national defense information is proper if and only if (1) the threatened injury is of an appropriate nature and expected magnitude; (2) the threatened injury will

---

[238] For the reasons discussed *supra* text accompanying notes 184-90, it is unlikely that the case for enjoining Item Ten was any stronger than that presented with regard to Item One.

[239] *See supra* text accompanying notes 152-54.

[240] As discussed *supra* text accompanying notes 156-68, Items Five through Nine were all published in their entirety in the Gravel Edition of the Papers. Portions of Item Four, which concerned various SEATO contingency plans, were published, but others were not.

[241] Michael D. Hess, the former Assistant United States Attorney who represented the Government in the New York litigation, has stated that "the only real issue" concerned the negotiating volumes. SALISBURY, *supra* note 11, at 319. Likewise, Floyd Abrams, one of the attorneys for the Times, has observed that "the core of the Government's case was based not upon potential military dangers but upon possible diplomatic harm." Abrams, *supra* note 18, at 25.

[242] *New York Times Co.*, 403 U.S. at 730.

"surely" occur; and (3) the threatened injury will follow directly and immediately from publication. By considering each of these elements in turn, using as a reference point the allegations made about the negotiating volumes, the boundaries of *Pentagon Papers* may be traced. In addition, an effort will be made to determine what alterations, if any, need to be made in the analysis of the case to take account of the fact that the negotiating volumes on which the Solicitor General placed such great emphasis were not, it turns out, in the hands of the Times or the Post. Former Solicitor General Griswold has suggested that the nonavailability and the resulting delay in publication of the negotiating volumes greatly diminishes the significance of the *Pentagon Papers* decision. As will be explained below, I disagree.

A. *Nature and Magnitude of Injury*

As recounted above, the newspapers did not dispute that *some* feared consequences could justify an injunction against publication of national defense information. After all, in *Near v. Minnesota*, Chief Justice Hughes had, in dictum, not only stated that a government might prevent the publication of the sailing dates of troop ships, but he asserted that no one would question that proposition.[243]

---

[243] Near v. Minnesota, 283 U.S. 697, 716 (1931). The particular injunction involved in *Near* was declared unconstitutional. Professor Kurland has observed that there "is no basis for suggesting" that in *Pentagon Papers* "the Court moved away from either the holding or the dictum of *Near*." Kurland, *supra* note 15, at 287. While the potent implication of the *Near* dictum for *Pentagon Papers* and all other prior restraint cases is undeniable, Chief Justice Hughes advanced the dictum in a manner that is startlingly off-hand. For the often-quoted proposition that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops," the supporting footnote tersely cites a single authority, "Chafee, Freedom of Speech, p. 10." *See* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 10 (1920). In criticizing the Blackstonian formulation in which speech is seen to be protected against all "previous" restraints, but only against such restraints, Chafee had stated as follows: "In some respects this theory goes altogether too far in restricting state action. The prohibition of previous restraint would not allow the government to prevent a newspaper from publishing the sailing dates of transports." *Id.* at 9-10. Although the analysis adopted by Hughes is not spelled out, it appears that he simply lifted the example given in Chafee's argument against Blackstone. How did the proposition become one that "no one would question" rather than one "suggested by Professor Chafee of Harvard Law School"? That transformation seems to be a reflection of Professor Chafee's position as "a passionate champion of free speech." HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 137 (Jamie Kalven ed., 1988). *See also id.* (Chafee, "through his writings, single-handedly . . . created the field [of free speech] as a law topic"). The unstated argument apparently is that if *even Zechariah Chafee* accepted the notion that it would be

At a minimum, Justice Stewart's formulation requires that the feared harm to the national interests be "irreparable,"[244] and it seems very likely that both the injury feared in the troop ship hypothetical from *Near* and the damage flowing from disruption of the foreign relations of the United States that was feared in *Pentagon Papers* properly qualify as irreparable, at least under most circumstances.[245] And, while Justice Stewart does not specifically articulate the requirement that there be a threat of "grave" or "serious" injury, his formulation plainly demands that the threatened injury be of such a magnitude. The Solicitor General himself had argued for a standard of "grave and irreparable harm to the security of the United States,"[246] and Justice Stewart's colloquy with Professor Bickel proceeded on the assumption that trivial or inconsequential damage to the Nation would not be enough to warrant an injunction, while an injunction could properly be entered to prevent an injury which, while grave or serious, fell short of being of a "cosmic nature."[247]

Given the *Near* dictum and Professor Bickel's concession that, if the other requirements for a prior restraint were met, the loss of 100 lives would be harm of sufficient magnitude to support an injunction,[248] the

---

permissible for the government to prevent the publication of the sailing dates of troop ships, then "no one would question" that it was so. Chafee's credentials as a defender of free speech were certainly in order, since his law review articles and other activities challenging the Government's use of the Espionage Act against those protesting U.S. participation in World War I had been vigorous enough to cause conservative alumni of Harvard Law School to present the University's Board of Overseers with charges against Chafee. Peter H. Irons, *"Fighting Fair": Zechariah Chafee, Jr., the Department of Justice, and the 'Trial at the Harvard Club,"* 94 HARV. L. REV. 1205 (1981). The controversial law review articles were incorporated in FREEDOM OF SPEECH. Many years later, Chafee published a revised edition of the book. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941). The later book discusses *Near* and notes that the case recognizes exceptions to the immunity from previous restraints for "exceptional cases like disclosures of the sailing dates of transports or the location of troops." *Id.* at 379. Chafee makes no mention of the earlier edition of his book as providing the foundation for *Near*'s dictum.

[244] *New York Times Co.*, 403 U.S. at 730.

[245] If the sailing date of a troop ship were published, there would be situations where the date could simply be changed without interfering with the military operations which were underway, but oftentimes a change of plans would be costly or even impossible. Likewise, under some circumstances it might be possible to restore good diplomatic relations promptly following a disruptive development, but often the restoration would take time and require the sacrifice of other national interests.

[246] ORAL ARGUMENT TRANSCRIPT, *supra* note 20, at 228, 231.

[247] *Id.* at 240.

[248] It has been reported that Justice Hugo Black, after hearing Professor Bickel concede that there were circumstances in which publication could properly be enjoined, complained, "Too bad the *New York Times* couldn't find someone who believes in the First Amendment." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 145 (1979).

holding of *Pentagon Papers* sheds little light on the threshold of gravity or seriousness of injury that the Government must meet. Since the Vietnam War was causing U.S. casualties, including deaths, on a daily basis, and large numbers of Americans were being held as prisoners of war, it seems highly likely that *if* publication prolonged the war by disrupting peace negotiations or preventing them from being successful, that would qualify as grave injury to the United States. Thus, the denial of the injunction sought by the Government cannot be attributed to any holding that the nature and magnitude of the harms were constitutionally inadequate to justify a prior restraint.[249]

B. *Likelihood of the Harm Occurring*

Justice Stewart placed on the Government the burden of demonstrating that the feared injury would "surely" flow from publication,[250] while Justice Brennan's concurring opinion indicated that it must be shown that the feared harm would "inevitably" be caused by publication.[251] The requirement of likelihood of injury stated in these opinions is so high that one is tempted to find the critical line drawn in *Pentagon Papers* to be that between serious harms that are certain or inevitable, which justify an injunction, and those that are possible or even probable, which will not support an injunction.[252]

Professor Powe, who was law clerk for Justice Douglas at the time of *Pentagon Papers*, has endorsed the account of the Court's internal deliberations contained in *The Brethren* as "remarkably accurate." POWE, THE FOURTH ESTATE AND THE CONSTITUTION, *supra* note 96, at 316 nn.59, 61. *See also supra* note 227.

[249] Professor Rudenstine agrees on this point, although he seems to be addressing himself to the entire body of national security claims made by the Government, without limiting himself to the negotiating volumes. *See* Rudenstine, *supra* note 19, at 1900-01.

[250] New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (concurring opinion of Justice Stewart).

[251] *Id.* at 726-27 (concurring opinion of Justice Brennan).

[252] Professor Rudenstine, after examining the specific claims made by the Government, seems to conclude that the Government failed because it did not provide sufficient proof of probability of injury. *See* Rudenstine, *supra* note 19, at 1901-02 ("[N]o one said that these disclosures would lead to the direct and immediate death of United States soldiers."). There is some ambiguity to Professor Rudenstine's discussion of this issue, however, since in discussing "the probability that injury will result from publication," he also makes references to the Government's failure to "satisfy the requirement of immediate and direct irreparable harm." *Id.* at 1902. Perhaps he is reading Justices Stewart and Brennan as demanding proof that direct and immediate harm is highly probable. I believe that a more precise analysis of *Pentagon Papers* is possible if the issue of likelihood of injury is distinguished from the question of whether the harm is directly and immediately caused by publication.

Despite the rigor of the demand that the Government prove that the damage it fears will "surely" take place if publication goes forward, closer analysis of the *Pentagon Papers* opinions, in light of the Secret Brief, demonstrates that, at least in the view of Justices Stewart and White, whose votes were critical to the outcome of the case, the Government had met its burden of establishing that serious consequences would flow from publication of the Papers.

Justice Stewart stated that he was "convinced that the Executive is correct with respect to some of the documents involved."[253] Justice White indicated that "[a]fter examining the materials the Government characterizes as the most sensitive and destructive," he could not "deny that revelation of these documents will do substantial damage to public interests."[254] Indeed, he stated that he was "confident that their disclosure will have that result."[255] Justice Stewart and Justice White each joined in the opinion written by the other, which tends to support further the conclusion that neither Justice found the Government's showing on likelihood of injury to be inadequate, even though the standard they articulated demanded that injury be shown to "surely" follow upon publication.

In the abstract, without consideration of the Secret Brief, the portions of the Stewart and White opinions dealing with likelihood of injury have always been somewhat puzzling. Without knowing more about the particulars of the Government's claims, it has been difficult to understand what allegation could lead the Justices both to accept the accuracy of the Government's predictions of harm and to deny an injunction. The Secret Brief clears up much of the mystery, especially once it is understood that the material about which the Government was most concerned was the negotiating history. Presumably, the Justices had no reason to doubt the accuracy of the Government's forceful, earnest, and repeated assertions that the intermediaries would be extremely unhappy about the disclosure of their involvement, and might refuse in the future to play such a helpful role. After all, even Daniel Ellsberg had apparently reached that conclusion and acted on it by withholding the negotiating volumes from the newspapers, even as he distributed the other forty-three volumes widely. Admittedly, the Secret Brief used a broad brush to paint the results that were likely to flow from publication of the negotiating volumes, but both government witnesses and common sense provided strong support for the conclusion that the practice of diplomacy depends to a large degree on secrecy.

---

[253] *New York Times Co.*, 403 U.S. at 730 (concurring opinion of Justice Stewart).

[254] *Id.* at 731 (concurring opinion of Justice White).

[255] *Id.*

One potential source of ambiguity is the tradeoff between the gravity of harm and the likelihood that it will occur. For example, the Government alleged that release of the negotiating volumes would cost lives by prolonging the Vietnam War, since negotiations would be frustrated due to the refusal of other nations to continue to serve as intermediaries between the United States and the North Vietnamese. Anticipated loss of life is a grave injury that could support issuance of an injunction against publication, as Professor Bickel conceded. At the same time, it could fairly be said that publication of the negotiating volumes would "surely" cause disruption of our diplomatic efforts to end the war. The difficult question, on which the entire case can be said to turn, is whether the disruption resulting from publication would actually lead to the feared *loss of life*. While that question could be addressed as one directed to the gravity of injury or to its probability, the formulation provided by Justices Stewart and White quite properly recognizes that the heart of the matter is the question of directness and immediacy. Given predictions of serious harm to the national interest, and having determined that at least some of the Government's predictions were accurate, Justices Stewart and White proceeded to inquire whether the feared consequences would be directly and immediately caused by publication.

C. *"Direct" and "Immediate" Harm*

The harms identified and relied upon by the Government appear to have been of a nature and magnitude to warrant an injunction, and at least the two swing Justices believed it extremely likely that the feared injury would occur. How, then, could the case have turned out as it did? The key issues on which everything turned can once again be identified by utilizing the vantage point provided by the Secret Brief. The Government had not established that serious harm justifying an injunction would be the "direct" and "immediate" result of publication of the negotiating volumes.[256]

---

[256] While directness and immediacy are closely linked in Justice Stewart's articulation of the prior restraint standard, they are distinct concepts, and in some factual situations they would merit independent analysis. The concept of "directness" would focus on the length of the causal chain thought to exist between the precipitating event—publication —and the feared consequence—prolongation of the war through the disruption of diplomatic relations. "Immediacy," on the other hand, would look to the temporal relationship between cause and effect. The opinions in *Pentagon Papers* do not analyze the two issues separately, nor does it seem that such analysis would be worthwhile under the facts presented in *Pentagon Papers*. In the absence of proof to the contrary by the Government, it appeared that the lack of immediacy and the lack of directness were two sides of the same coin—no immediate adverse consequences could be identified precisely because the harm that was feared would come about only if a complex chain of events actually occurred in the manner in which the Government was hypothesizing.

The opinions of Justice White and Justice Stewart are much more easily understood and analyzed once it is recognized that the negotiating volumes were the pivot on which the entire controversy turned. Solicitor General Griswold's reliance on diplomatic concerns was clear even from his oral argument, but the degree to which the negotiating volumes dominated the litigation becomes apparent only upon examination of the Secret Brief.[257] Their importance to the Government's case may be shown directly—the negotiating volumes are the first item listed, and they are described forcefully and at greater length than any other item, with one exception.[258] But there is an indirect confirmation of their status as well. The very weakness of the other items listed in the Secret Brief must have forced the Justices to recognize that, as the Solicitor General all but conceded at oral argument, no injunction could properly be granted as to any of the Papers unless disclosure of the negotiating volumes could be enjoined.

Once Justices Stewart and White came to focus on the negotiating volumes, they had to determine what degree of directness and immediacy of injury needed to be established to warrant a prior restraint. The Government recognized that as a practical matter it could not prove immediacy. Therefore, while paying occasional lip service to the contention that the likelihood of immediate injury had been demonstrated, Griswold's principal effort was to convince the Court that no showing of

---

In contrast, consider a hypothetical situation in which a terrorist group has access to a nuclear device and will be enabled, through information soon to be published, to irretrievably trigger an explosion, which would occur several months later. In such an instance, there might not appear to be immediate harm, but the harm, when it occurred months later, would surely be a direct consequence of publication. Even in this hypothetical, the divergence between immediacy and directness is less than it appears to be, since there could be an argument that harm takes place for purposes of the *Pentagon Papers* analysis when nothing further can be done to stop it from occurring. In the hypothetical, the vulnerable aspect of the Government's case would likely be not so much the directness or immediacy requirements, but rather the need to prove what has been assumed for present purposes—that in fact nothing could be done in the time available to prevent the explosion from taking place. This doomsday problem, worthy of Dr. Strangelove, was suggested to me by former Solicitor General Griswold.

[257] It is worth noting that even the Government's arguments against publication of the negotiating volumes were pitched at a fairly high level of generality. For example, neither the discussion of the negotiating volumes nor the discussion of the P.O.W. negotiations in the Secret Brief refers to any specific pages of the volumes, and the Special Appendix filed in the Second Circuit referred to only a few specific items. Unlike the Pentagon Papers at large, however, the negotiating volumes do display a high degree of homogeneity, since they consist almost exclusively of descriptions of the details of unsuccessful negotiating approaches that had been undertaken with the participation of named intermediaries.

[258] Item Ten is given a longer description, but two paragraphs of that portion of the Secret Brief have not yet been released.

directness or immediacy should be required. As Justice Stewart's opinion demonstrates, that effort failed.

The critical issues on which *Pentagon Papers* turns, therefore, are the closely-related questions of the directness and the immediacy of the harm that is alleged to be likely to flow from publication.[259] The Government never contended that the disruption of the relations between the United States and other nations would itself constitute a harm serious enough to justify a restraint on publication. Rather, its argument was that disclosure would embarrass the intermediaries, that the withdrawal of go-betweens would prevent or disrupt the United States' efforts to negotiate with Hanoi, and that as a result the war would be prolonged and the return of prisoners delayed.

The Government never pointed to any ongoing negotiations that it claimed would be disrupted by publication of the negotiating volumes, or even to any specific approaches that were being contemplated. Even if some negotiations had been referred to, serious questions would have remained as to whether any substantial likelihood of success could be predicted and, if so, whether it could be established that success would become less likely or impossible if publication made an intermediary or prospective intermediary unwilling to participate. Even in those situations in which a third country provides useful assistance, it may well not be possible to say with confidence that success could not be achieved in the negotiations without that nation's involvement. And even if there will be diplomatic reversals as a result of publication, it may be many months or years before the effects are felt. Upon close examination of Item One, Solicitor General Griswold's reluctance to accept "immediacy" as part of the constitutional standard is easily understood. Quite simply, if the Government were required to prove that grave injury to the Nation would flow immediately from publication of the disputed materials, it would inevitably lose the case.

The Solicitor General made no serious effort to demonstrate any direct and immediate threat to any negotiations. While he did indicate in a general way that negotiations described in the Pentagon Papers, or

---

[259] Professor Archibald Cox questions whether the immediacy requirement is a sound one. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 229-30 (1987). Except for cases in which the anticipated delay of a feared harm would allow time for public debate leading to a proper resolution of the controversy, Cox urges that "the immediacy of the harm threatened by the publication seems properly to bear only on the degree of probability that the harm will occur." *Id.* at 230. Any dilution of the *Pentagon Papers* standard along this line would seem to invite a multiplication of injunction actions like the *Progressive* case, in which speculative predictions of grave future harm become cloaked with a false credibility because of the possibility that harm will come about at some unspecified time in the distant future.

negotiations that were similar, were continuing, there was no specification at all of what negotiations were underway, what immediate threat was raised by the prospect of disclosure, or what the prospects were for success if the negotiations were to continue unimpeded. To the extent that the Court agreed with Bickel that immediate peril must be shown, it is hard to imagine a claim less likely to be well received than the cavalier assertion that "one never knows where the break may come and it is of crucial importance to keep open every possible line of communication."[260] The farthest that the Solicitor General was willing to go in alleging immediacy was to state, without tying the allegation to any particular countries, that "publication of this material is likely to close up channels of communication which might otherwise have some opportunity of facilitating the closing of the Vietnam war."[261]

D. *The "Missing" Volumes*

A critical issue that remains to be addressed in order to come to an understanding of what the Supreme Court actually decided in *Pentagon Papers* is the fact that the four negotiating volumes were not disclosed to the newspapers by Daniel Ellsberg, and therefore were not included in any of the three published versions of the Papers. The divergence between the government's fears as to what the Times and the Post intended to publish and what they actually published has been given great emphasis in former Solicitor General Griswold's recent efforts to diminish the stature of *Pentagon Papers*.

Griswold himself invigorated the public debate about the broad issues raised by the use of national security concerns to justify withholding information on government activities from the public. In a 1989 commentary for *The Washington Post*, Griswold recounted his role in *Pentagon Papers* and, in the context of the ongoing Iran-Contra investigation, drew the lesson that "there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past."[262] Griswold observed that following the Supreme Court's decision in their favor the newspapers published many of the disputed items in 1971, and that the entire contents

---

[260] Secret Brief, *supra* note 9, at 4.

[261] *Id.* at 5.

[262] Griswold, *Secrets Not Worth Keeping*, *supra* note 18. Two of the Government's witnesses from the litigation have also conceded that the harms they predicted would flow from publication either did not materialize or did not justify an injunction. Abrams, *supra* note 18, at 25, 72 (Vice Admiral Blouin stated that he did not believe that "there was any great loss in substance"; former Deputy Under Secretary of State William B. Macomber indicated that *Pentagon Papers* was "probably decided properly.").

of the Pentagon Papers were soon published in the Gravel Edition of the Papers. Griswold forcefully stated that he "had never seen any trace of a threat to the national security from the publication," that it "quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification," and that "the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another."[263] Coming from the advocate who had represented the United States before the Supreme Court in the Pentagon Papers litigation, this discussion naturally attracted considerable attention.[264]

On June 30, 1991, the twentieth anniversary of the Supreme Court's decision in *Pentagon Papers*, Griswold took up his pen again to discuss the case, this time in *The New York Times*. While the title of the piece—'No Harm Was Done'—reiterated the bottom line presented in the earlier *Washington Post* article, the analysis was radically different. Now Griswold explained that *Pentagon Papers* "resulted in a sort of phantom decision by the Supreme Court" because Ellsberg had held back the negotiating volumes, making it impossible for any injury to occur as a result of the Supreme Court's refusal to impose an injunction on their publication.[265] Griswold explained that he had learned at a seminar in April 1991, in which Daniel Ellsberg participated, that the negotiating volumes, the "most troublesome part" of the Papers, had not been turned over by him to the newspapers.[266] Griswold elaborated a bit on this version of the *Pentagon Papers* legend by concluding that as far as he was aware none of the material that was objectionable from his point of view "was ever published by anyone, including the newspapers, until several years later."[267]

---

[263] Griswold, *Secrets Not Worth Keeping*, *supra* note 18.

[264] The Griswold commentary was itself much commented upon even within the first few days after it appeared on February 15, 1989. *See, e.g.*, Haynes Johnson, *Issues Larger Than Lives*, WASH. POST, February 17, 1989, at A2 (Griswold provided "timely testimony" that "the problem is not security but the use of secrecy to hide information that would be embarrassing or damaging to officials involved."); Eleanor Randolph, *In a Free Press, Truth Emerges Slowly*, WASH. POST, February 16, 1989, at A52 ("Griswold, who tried to keep the nation from reading the Pentagon Papers 17 years ago . . . decided to 'fess up'."); David G. Savage, *Contrary Interests Provoke Thornburgh-Walsh Clash Over North Trial*, L.A. TIMES, February 19, 1989, at part 1, page 28 (Griswold "said he was misled by then-President Richard M. Nixon's aides about the impact of releasing the Pentagon Papers.").

[265] Griswold, '*No Harm Was Done*,' *supra* note 18.

[266] Griswold reported that he had also learned at the seminar that Ellsberg had "blocked out footnotes on pages he delivered, thus withholding important information such as names, places and dates." *Id.*

[267] GRISWOLD MEMOIRS, *supra* note 18, at 310. Griswold states that some comments about the 1989 *Post* article have overstated his position, and he emphasizes that there is

The thrust of former Solicitor General Griswold's most recent descriptions of *Pentagon Papers* is to downplay the significance of the case, so that it becomes no more than "a tempest in a teapot"[268] or even "a sort of a phantom decision."[269] However, the Solicitor General's revisionist look at the case is not persuasive. Griswold emphasizes that it was only in 1991 that he learned that the negotiating volumes had not been given to the newspapers, and he suggests that this is the reason why his 1989 article is susceptible to misinterpretation.

Though he was unaware until recently of what documents had been given to the Times and the Post, that must be because he did not happen to come across the information, even though it was available.[270] On the very day it began publishing the Papers, the Times indicated that it did not have "the volume" concerning negotiations, and during the course of the litigation it never contradicted that statement.[271] Sanford J. Ungar's 1972 book on the *Pentagon Papers* litigation had reported that Ellsberg had not disclosed the negotiating volumes.[272] Professor Philip Kurland had also, in the immediate aftermath of the Supreme Court's decision, called attention to this specific issue:

> The result [of the Supreme Court's ruling] was that the Pentagon Papers were published in various versions in the newspapers and in books. The sky did not fall. But the fact is that none of the papers which the Solicitor General told the Court would be inimical to the security interests of the United States has yet been published. It is not clear whether

---

a difference between "a prospective evaluation when you have no means of foreseeing what the consequences may be" and a retrospective evaluation after publication. *Id.* at 312 n.40. He continues: "I have no regrets about my representation of the United States in the Pentagon Papers case, though I do not think, as things turned out, that any measurable harm actually resulted from the publication by the newspapers of those portions of the Papers which they had." *Id.*

[268] *Id.* at 312.

[269] Griswold, *'No Harm Was Done,' supra* note 18.

[270] In a speech given in 1972, Griswold stated that at most one or two of the eleven items he referred to had been printed by the newspapers, and that others were included in the Gravel Edition of the Papers. Griswold, *Teaching Is Not Enough*, *supra* note 18, at 258. However, Griswold also indicated that "there was one item, probably the most important, that has never been printed anywhere." *Id.* The item being referred to was undoubtedly Item One, the four negotiating volumes, which were not published until 1983. *See* note 53 *supra.*

[271] *See supra* note 58. Although the material concerning negotiations was divided into four "volumes" within the structure of the Pentagon Papers study, after its declassification that material was published by Professor George C. Herring in one volume. *See supra* note 53.

[272] UNGAR, *supra* note 11, at 83-84.

> this is due to self-restraint on the part of the newspapers or whether the newspapers have been denied access to them by their suppliers.[273]

The negotiating volumes also received a great deal of press attention during the espionage prosecution of Daniel Ellsberg and Anthony Russo. Precisely because the material they contained was considered to be more sensitive than that in the rest of the Papers,[274] the Government placed great reliance on them in attempting to prove that there would have been harm to the national security if they had been published in 1969, when Ellsberg had made an unauthorized copy.[275] Even before the Ellsberg trial began in Los Angeles, the negotiating volumes found their way to columnist Jack Anderson, who wrote a series of articles based on them in June of 1972.[276] Then Anderson gave the documents to The Washington Post and The New York Times, who followed up with extensive coverage of their own.[277] For several months, the negotiating volumes were open for inspection in the clerk's office of the federal district court in Los Angeles, along with the other exhibits in the case.[278] The four negotiating volumes were released by the government under the Freedom of Information Act, and they were published in 1983.[279] Thus, whatever significance is to be attributed to the fact that the negotiating volumes were not in the possession of the Times and the Post in 1971, it has long been generally known to those interested in the Papers controversy that those four volumes were considered to contain the most sensitive material and that they were not part of the Papers published in 1971.

More significant than the fact that it has long been known that the negotiating volumes were not published with the other Pentagon Papers is

---

[273] Kurland, *supra* note 15, at 289.

[274] The negotiating volumes were thought to raise special security concerns because they dealt with ongoing and unresolved issues, and therefore only three or four people had access to them while they were being compiled. NEGOTIATING VOLUMES, *supra* note 53, at x (editor's introduction).

[275] *Id.* at xii.

[276] *Id.* at xiii.

[277] *Id.* at xv-xvi.

[278] *Id.* at xvii-xxi. Judge William Matthew Byrne, Jr. dismissed the case on May 11, 1973, based on government misconduct, including a break-in at the office of Ellsberg's psychiatrist by members of the White House Plumbers, who were seeking information to use against Ellsberg. *Id.* at xxi.

[279] NEGOTIATING VOLUMES, *supra* note 53. Griswold acknowledges that the fact that the negotiating volumes had not been turned over to the newspapers by Ellsberg had been reported in Seymour Hersh's biography of Henry Kissinger, but Griswold had not read the reference. GRISWOLD MEMOIRS, *supra* note 18, at 310, *citing* SEYMOUR M. HERSH, THE PRICE OF POWER: KISSINGER IN THE NIXON WHITE HOUSE 321 n. * (1983).

the recognition that, contrary to former Solicitor General Griswold's suggestion, the peculiar tale of the negotiating volumes in no way undercuts or limits the significance of the Supreme Court's decision in *Pentagon Papers*. Griswold's thesis apparently boils down to the contention that, because the newspapers did not actually possess the highly sensitive negotiating volumes, the Supreme Court had no need to rule on the question of whether the First Amendment guaranteed the papers' right to publish them. Griswold criticizes the Supreme Court for not allowing the Government "a reasonable period of time to examine what the newspapers actually had."[280]

If anything, the circumstances surrounding the negotiating volumes support a more expansive reading of *Pentagon Papers*, rather than the very narrow interpretation that Griswold would give to the case. It is absolutely clear that the Supreme Court, when it ruled that the newspapers could resume publication, had no way of knowing that the negotiating volumes would not be published with the other materials. There had been a good deal of maneuvering in the lower courts, as the Government attempted to learn precisely what documents the newspapers possessed, and the matter had never been resolved to the Government's satisfaction. The Times had provided a listing of the documents it had, but there was not enough detail to allow the Government to determine exactly what portions of the Pentagon Papers had been given to the paper. The Post was also successful in resisting a complete cataloging of the documents in its possession, and accordingly Judge Gesell assumed that the paper had the entire study.

As the litigation proceeded, culminating in the filing of the Secret Brief and argument in the Supreme Court, the Government emphasis was placed on the negotiating volumes. The four complete volumes constituted the first item discussed in the Secret Brief, and much of the testimony presented by the Government in the trial courts and the arguments presented on appeal emphasized the damage that could be expected to occur if the negotiations were revealed. Since neither the Times nor the Post ever told the Court that they did not have the negotiating volumes, the Supreme Court plainly had to resolve the case on the assumption that they did possess those volumes. So long as it had not been established that the newspapers did *not* possess the negotiating volumes and that they had not agreed to forgo publishing them,[281] only an injunction could protect the

---

[280] GRISWOLD MEMOIRS, *supra* note 18, at 298.

[281] In the District of Columbia litigation, the attorneys for The Washington Post did provide assurances, with respect to a few items about which the Government was especially concerned, either that the paper did not have the sensitive information or that it would not publish it if it did possess it. *See, e.g.*, D.C. TRANSCRIPT, *supra* note 172, at 217. Similarly, the Post's sealed brief in the Supreme Court indicated that one of the documents singled out by the Government was not held by the Post. Post's Secret Brief, *supra* note 97, at 8.

Government's interests if in fact it was entitled to prevent publication. Even though the Supreme Court had before it the complete set of forty-seven volumes, along with the Government's strenuous argument that extremely serious diplomatic consequences would flow from publication of the negotiating volumes, the Court still concluded that no further restraint could be reconciled with the First Amendment. Thus, because the published versions of the Papers omitted the very materials on which the Government placed its principal reliance, the significance of the Supreme Court's ruling that no injunction was proper has been undervalued to some degree.

The question remains why neither the newspapers nor the Government informed the Supreme Court, or the lower courts for that matter, of the pertinent facts concerning the negotiating volumes. On the Government's side, even though it is now conceded that the negotiating volumes were the material with which the Government was primarily concerned, there was apparently no willingness to limit the injunction request to those volumes. Griswold suggests that if the Government had known that the negotiating volumes were safe, "there might well have been no Pentagon Papers case,"[282] but it is very doubtful that the controversy could have been avoided so easily. Throughout the litigation, and right down to preparation of the Secret Brief and through Griswold's argument in the Supreme Court, the Government failed to focus on the negotiating volumes as its sole concern. In fact, it was only with the filing of Solicitor General Griswold's Secret Brief on the morning of argument that the negotiating volumes in their entirety were identified as the foremost security concern. Portions of those volumes had been relied on all along, but even the Special Appendix filed in the Second Circuit placed no special weight on the negotiating volumes as compared to the other documents contained in the Papers. Thus, while focusing exclusively on the negotiating volumes would undoubtedly have increased the chances that the Government would obtain further injunctive relief as to those volumes, the Government apparently was unwilling to allow the other forty-three volumes to be published in their entirety.

Since so much of the Government's firepower was directed at the negotiating volumes, and the papers knew that they did not possess those volumes, they presumably could have reduced their risks of losing the case by simply telling the courts that they did not have the material and that therefore no injunction would be proper. Perhaps the papers were confident enough of prevailing that they were willing to accept some increase in the risk of losing. More likely, they feared that any additional details that they revealed about the documents in their possession would fuel further efforts

---

[282] GRISWOLD MEMOIRS, *supra* note 18, at 298.

by the Government to force disclosure of all the documents held by the Times and the Post, which might well have enabled the Government to identify Ellsberg as the source. The newspapers had been largely successful in fending off the Government's discovery efforts, and they were no doubt reluctant to reopen the issue.[283] Lastly, the newspapers, if they considered the issue explicitly, must have realized that the Government would not be content to walk away from the litigation, even if it were assured that the negotiating volumes would not be disclosed. For one thing, the Government might still attempt to secure an injunction against disclosure, on the theory that it would do no harm at all if the papers had truthfully denied possessing the documents. From the point of view of the Times and the Post, however, any injunction against publication, even one with no practical effect, would be a catastrophic loss. Moreover, since the Government never did limit its injunction claim to the negotiating volumes, any disclosure by the papers that took that issue out of the case would still leave before the Supreme Court the many other items for which the Government was seeking a continuation of the injunctions.

E. *The Legacy of* Pentagon Papers

From time to time the Pentagon Papers are dismissed as "historical" documents that had no serious potential to damage the national security, and on that basis it is sometimes deemed appropriate to decline to give *Pentagon Papers* full force in controversies involving more contemporary documents. For example, in his decision granting a preliminary injunction against *The Progressive*'s article concerning H-bomb design, the district judge dismissed *Pentagon Papers* on the ground that "the study involved

---

[283] At least for the Times, tactical concerns about the difficulties of fending off renewed discovery efforts by the Government took a back seat to an ideological position. The Times instructed its attorneys to defend the newspaper's right to make the editorial decisions on whether and when material such as that included in the Papers would be published. The Times was opposed to allowing the Government or the courts to participate in such editorial decisions, and therefore it objected to advance identification of the materials it held. The Times realized that in the particular circumstances of the *Pentagon Papers* case the failure to emphasize that it did not have the negotiating volumes might make it more difficult for it to prevail in the litigation, but it was willing to run whatever slight risk was involved. Telephone Interview with Floyd Abrams (Sept. 3, 1993). As discussed *supra* note 58, the inventory list filed by the Times pointedly failed to include the negotiating volumes. Moreover, the front-page article published with the first portion of the Pentagon Papers flatly stated that one "important gap in the copy of the Pentagon study obtained by The New York Times" was that it lacked "the section on the secret diplomacy of the Johnson period." Hedrick Smith, *Vast Review of War Took a Year*, N.Y. TIMES, June 13, 1971 at 1.

in the *New York Times* case contained historical data relating to events that occurred some three to twenty years previously."[284]

Upon examination of Solicitor General Griswold's Secret Brief, it is now indisputable that, at least before the Supreme Court, the Government's efforts to suppress publication of the Papers focused on the potential harm that disclosure would cause in the future.[285] The fact that the classified secrets were contained in a study that was a "history" of our nation's involvement in Vietnam is entirely beside the point. It may be true that a history, in general, is less likely to contain information that, if published, will cause harm to national security than would a current intelligence estimate or a description of a technical system for collecting intelligence, but true secrets do not lose their potential for doing harm simply because they have been incorporated in an analysis of a past event. As to the material about which the Government was most concerned—the negotiating volumes—the potential damage to the nation's interests was alleged to be that a description of past events would embarrass other nations that had acted as go-betweens in the past and might be needed again in the future, but that disclosure would cause them to refuse to participate.

The *Progressive* litigation also provides an opportunity to test the analysis of *Pentagon Papers* offered above.[286] The district judge granted a temporary restraining order against publication of an article purporting to describe the design of the hydrogen bomb; the TRO in that case—unlike *Pentagon Papers*—was followed by a preliminary injunction. The crucial paragraphs of the district court's opinion reasoned as follows:

> The Secretary of State states that publication will increase thermonuclear proliferation and that this would "irreparably impair the national security of the United States." The Secretary of Defense says that dissemination of the Morland paper will mean a substantial increase in the risk of thermonuclear proliferation and lead to use or threats that would "adversely affect the national security of the United States."

---

[284] United States v. The Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis. 1979).

[285] The broader claim originally asserted under the direction of Assistant Attorney General Mardian "was simply that the executive branch had classified these documents as 'top secret' and that ended the matter." SEYMOUR, *supra* note 18, at 202.

[286] In an eerie coincidence, when Professor Bickel argued the *New York Times* case before the Second Circuit, in attempting to give the court an example of circumstances under which a prior restraint might be justified even in the absence of an applicable statute, he referred to "a case where possibly the hydrogen bomb turns up." Oral Argument, United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971) (No. 71-1617) at 44-45 (June 22, 1971), *reprinted in* 2 GOODALE COMPILATION, *supra* note 9, at 929-30.

> . . . .
>
> A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.
>
> . . . .
>
> In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is [analogous] to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.[287]

Now that the Secret Brief can be examined in detail, the parallels between *Pentagon Papers* and *Progressive* are more apparent than was recognized by the district court in *Progressive* when it granted the preliminary injunction. In each case, the ultimate harm projected by the Government was extremely serious and obviously irreparable—continuation of the Vietnam War in one case, nuclear proliferation and possible nuclear destruction in the other. The two cases likewise shared earnest predictions that the feared harm would flow inexorably from publication. While the Government did not go so far as to predict that nuclear war would occur if the Morland article were published, it did assert that nuclear proliferation—which might lead to nuclear war—would result from publication.[288] Lastly, the cases both involved situations in which the request for an injunction should have been resolved on the basis of the lack of proof that the feared harm would be the "direct" and "immediate" consequence of publication. As discussed above, that is apparently the basis upon which *Pentagon Papers* itself was decided, yet the district court in *The Progressive* failed to discuss that aspect of *Pentagon Papers*.[289] Instead, the court parroted the language from the Stewart and White opinions and concluded that the standard stated by those Justices had been met, without making any effort to apply the "direct and immediate injury" requirement to the facts presented.

If the district court in the *Progressive* case had looked for guidance to the Secret Brief and to the analysis presented above, it is difficult to see how it could have concluded that the Government had demonstrated that direct and immediate injury would flow from publication of the H-bomb

---

[287] *The Progressive*, 467 F. Supp. at 995, 996.

[288] *See id.* at 995.

[289] Professor Powe has observed that the district judge "must have understood the lack of immediacy, but he did not respond." Powe, *supra* note 37, at 60. *See* Oakes, *supra* note 7, at 517-18.

article. The court's own analysis made it clear that any harm that might result from publication lay far in the future and would depend on many causative factors other than the controversial article:

> A number of affidavits make quite clear that a *sine qua non* to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians. One does not build a hydrogen bomb in the basement. However, the article could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon. It could provide a ticket to by-pass blind alleys.[290]

The parallels between *Pentagon Papers* and *Progressive* with respect to the question of directness and immediacy of injury are striking. While in each case the Government produced evidence that it was likely that publication would cause harm to the interests of the United States, the feared consequences in each case were over the horizon. Damage to the relationships between the United States and its negotiating intermediaries might eventually prolong the war and delay the return of P.O.W.s, but no such direct and immediate result could be identified. Likewise, the Morland article might undermine efforts by the United States to prevent nuclear proliferation, but even so there would be no direct and immediate injury; at worst, some nation that was already on the road to a thermonuclear capability, but years from its destination, might be able to speed its journey by avoiding dead-ends. For these reasons, it seems very likely that *Pentagon Papers*, carefully analyzed in light of the Secret Brief, calls for rejection of injunction claims like those advanced by the Government in the *Progressive* case. *Pentagon Papers* teaches that even sincere, plausible predictions of serious and irreparable injury to the national interest cannot justify an injunction against publication unless the feared injury will be directly and immediately caused by disclosure of the disputed information.[291]

Thomas S. Martin, the former Department of Justice official who directed the Government's civil litigation in national security matters during the Carter Administration, including the *Progressive* case, reviewed the cases that came after *Pentagon Papers* and concluded that "the courts largely have ignored the formulas" stated in that

---

[290] *The Progressive*, 467 F. Supp. at 993.

[291] Judge Oakes has observed that the Government's proof in the *Progressive* litigation also fell short on the "likelihood" prong of the *Pentagon Papers* standard, since "the testimony suggested only that the article 'could possibly' provide information allowing" the feared proliferation to occur. Oakes, *supra* note 7, at 517.

case.[292] Martin characterizes *Progressive*, *Snepp v. United States*,[293] and *Haig v. Agee*,[294] as reflecting "a changing judicial attitude toward the kind of national security claims that were put forward and almost summarily rejected in the Pentagon Papers case."[295] He further argues that "the inability to predict with certainty no longer seems an insuperable bar to judicial action restraining speech when compelling testimony indicates a reasonable probability of serious national injury."[296]

Martin's assertion that the authority of *Pentagon Papers* has been undercut by subsequent decisions is flawed by his inaccurate description of *Pentagon Papers* itself. The notion that the national security claims advanced by the Government in the *Pentagon Papers* litigation were "almost summarily rejected" is indefensible. Rather, those claims received very serious consideration at each level of the courts. The Government was even permitted to present in camera testimony and argument in the district courts and the courts of appeals. Moreover, the rejection of the Government's claims was not based on any sweeping generalization rooted in hostility to the Government's "inability to predict with certainty." In *Pentagon Papers*, it was the Solicitor General who narrowed the request for relief from a plea for broad suppression of the Pentagon Papers study to the identification of a handful of "worst" cases. And, as to the negotiating volumes that constituted the principal concern among the listed items, Justices Stewart and White appeared ready to find merit in the Government's allegations that publication would irreparably damage important national interests. Rather than representing the discharge of a blunderbuss, *Pentagon Papers*, as illuminated by consideration of the Secret Brief, is properly seen as a bit of judicial sharpshooting by Justices Stewart and White. The Government could not demonstrate that "direct" and "immediate" injury would flow from publication of the negotiating volumes, and came very close to not even trying to allege such injury. While the holding of the case that only direct and immediate injury will support an injunction is highly significant, the application of that principle to the facts presented in *Pentagon Papers* was not at all difficult. Nor, if the narrow scope of this holding is properly understood, do the later cases discussed by Martin represent any dilution of *Pentagon Papers*.[297]

---

[292] Thomas S. Martin, *National Security and the First Amendment: A Change in Perspective*, 68 A.B.A. J. 680, 684 (1982).

[293] 444 U.S. 507 (1980).

[294] 453 U.S. 280 (1981).

[295] Martin, *supra* note 292, at 684. Martin describes *Pentagon Papers* as a "stunning victory for First Amendment values." *Id.* at 681.

[296] *Id.* at 684.

[297] Martin notes that despite "all the dramatic antirestraint language in the Pentagon Papers opinion," the preliminary injunction entered by the district court in the *Progressive*

VII. CONCLUSION

Examination of the Solicitor General's Secret Brief in *Pentagon Papers* reveals that the Government's concerns about the publication of the Papers were much more narrowly focused than has been recognized before now. Accordingly, the teaching of the case is less sweeping than is sometimes thought, since neither the magnitude of the injury that was allegedly threatened by disclosure of the negotiating volumes nor the likelihood that such injury would actually result can easily be dismissed as insufficient. The fatal defect in the Government's case—and one that fully justified the decision by Justices Stewart and White to allow the resumption of publication despite their statements that the Government was correct in its allegations about at least some of the documents—was an almost total default by the Government in its efforts to demonstrate that injury would be a direct and immediate result of publication. *That* aspect of *Pentagon Papers*, while somewhat narrower than the proposition for which the case is sometimes cited, is striking precisely because of the seriousness of the Government's claims regarding the negotiating volumes and the unwillingness of Justices Stewart and White to reject those claims as insubstantial. Detailed examination of the Secret Brief filed by the Government in *Pentagon Papers* thus confirms the observation that the case, properly understood, establishes a standard for prior restraints under which "it is most difficult for the government to prevail."[298]

---

case was in effect for months and was eventually dissolved only because the disputed information was published by another author. *Id.* at 682. For the reasons presented above, and especially in light of the fact that the district court decision in *The Progressive* was never reviewed by any appellate court, I would consider the court's departure from the principles of *Pentagon Papers* as nothing other than an error. A district court has no authority to revise Supreme Court precedent even if the district judge understands the dimensions of the prior holding, which District Judge Warren apparently did not in dealing with *Pentagon Papers*. Neither the *Snepp* nor the *Agee* cases discussed by Martin undercuts *Pentagon Papers*, since each involved the asserted First Amendment rights of a former C.I.A. officer, not a newspaper, book publisher, journalist, or member of the public seeking to disclose information alleged to have the potential to injure the national security. In each case, the Supreme Court placed great reliance on the employment relationship that had given the former employee access to classified information. In attempting to equate the issues raised in *Pentagon Papers* with those presented in *Snepp* and *Agee*, Martin commits the error that he warns readers against: attempting "to put all speech in a single category, an approach that invites disaster." *Id.* at 685.

[298] Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring in the judgment).

APPENDIX

The pages that follow contain the sealed *Pentagon Papers* briefs filed by the United States and by The Washington Post in the Supreme Court. The corresponding brief filed by The New York Times has not been located. Because of the poor quality of the copies that are available, the briefs were retyped in the interest of legibility. In order to make citation easier, the briefs were retyped in the same pages, paragraphs, and lines as the original. Typographical and other errors in the originals have been retained. In a few places, which are indicated, material in the briefs is still considered classified by the Government and has been withheld on that basis.

SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES OF AMERICA,)

Petitioner)

)

vs.)

)

THE WASHINGTON POST COMPANY,)

ET AL.,)

Respondents)

IN CAMERA ANALYSIS OF THE EVIDENCE

[Washington Post]

ANALYSIS OF THE IN CAMERA EVIDENCE

The Government presented affidavits from Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs (Pl. Ex. 7); William B. Macomber, Deputy Under Secretary for Administration, Department of State (Pl. Ex. 5); Lt. General Melvin Zais, Director of Operations Directorate of the Joint Staff of the Military Joint Chiefs of Staff (Pl. Ex.6), and Vice Admiral Noel Gayler, Director, National Security Agency (Pl. Ex.8). Messrs. Doolin and Macomber were called by Respondents as adverse witnesses.

As demonstrated by the following analysis, these affidavits, and the limited number of specific documents in the study which they cite, are utterly devoid of any credible evidence of a threat to national security.

Mr. Doolin

Mr. Doolin, who according to his testimony in open court had been reviewing the study since 1969 for security purposes in connection with a request for access thereto by Senator Fulbright, set forth in his affidavit six specific instances of documents which he claimed would, if published, seriously impair national security.

Item 1 in the affidavit lists certain documents that allegedly "describe in great detail" a 1965 memorandum from Maxwell Taylor to President Johnson listing respective negotiating requests of the United States and Hanoi which he described as "blue chips." Mr. Doolin stated that if this document were revealed, "the North Vietnamese would have

a major advantage in any negotiations." (Gov't Ex. 7, p. 1) Judge Gesell, however, read the document and strongly disagreed (Tr. 132):

> "Here are the six blue chips that are revealed by this top secret document, and let's just consider them:
>
> "[Cease] bombing the north; [cease] military operations of the Viet Cong Unit, [stop] increasing our forces in the south; withdraw our forces from the south; give amnesty to the Viet Cong; give economic aid to the north.
>
> "Now I grant you those are perhaps blue chips, but they are the kind of blue chips that I would think today any high school graduate could put down. There is nothing in here of an intimate secrecy about blue chips."

This is the only document from the entire 47-volume series that the Government presented to the trial court for inspection.

Item 2 refers to a 1966 report that the North Vietnamese had complained about leaks to the press with respect to negotiations through third party intermediaries, with specific mention of the "Lapira peace feeler." Upon cross-examination, Mr. Doolin stated that he was unaware of the classification of the report (Tr. 102) and did not even know what the "Lapira peace feeler" was (Tr. 105-E), but that in his judgment the document should nevertheless continue to be secret or top secret because such a disclosure would dry up future channels of communication to Hanoi. (Tr. 102-105E) Mr. Doolin was thus unaware that the "Lapira peace feeler," which involved an Italian contact with Hanoi in 1965, had been a well-publicized matter prior to the litigation and indeed was fully described in a book entitled "The Secret Search for Peace in Vietnam" by Kraslow and Lurie. (Ibid.)

Item 3 cites, for the same proposition, several references to the so-called Seaborn mission which would allegedly show that a

Canadian member of the International Control Commission was "acting as our agent" in discussions with the North Vietnamese. Again, Mr. Doolin was unaware that the Seaborn's mission as an emissary of the United States had previously been widely publicized and is fully set forth in a book entitled "The Last Crusade" written by Chester L. Cooper, a former State Department official. (Tr. 110-111, Post Ex. 2)

Item 4 refers to the scenario of the overthrow of President Diem which had previously been widely known and, in any event, has already been published in newspapers not subject to injunction.

Item 5 objects generally to any revelations as to "negotiations with Hanoi in the mid-1960's via other governments" on the basis that the governments involved could be embarrassed by their past roles and be less willing to help in the future. Mr. Doolin conceded, however, that it was well known that some governments have been attempting to be a channel of communication. In this regard, besides being unaware of the publicity given the Seaborn and Lapira contracts referred to above, Mr. Doolin was also apparently unaware of a recent well-publicized article in LIFE magazine concerning ex-Prime Minister Wilson's version of such activities. (Tr. 113)

Item 6 refers to SEATO operational plan which Mr. Doolin admitted he had not read. He did not know whether the plan was still in effect. (Tr. 120)

Finally, Mr. Doolin had indicated in his prior testimony in open court that some of the subject documents gave information concerning current troop movements. Upon further questioning (Tr. 117)

he retracted and corrected his statement, saying that he was discussing "past troop movements, about the strategy of the buildup and so forth." (Tr. 116)

William B. Macomber

William B. Macomber, Deputy Under Secretary for Administration in the Department of State, filed an affidavit (Ex. 5), in which he set forth purported reactions from American Embassies throughout the world to the publication of the New York Times articles. It developed that these comments had been solicited by the Department of State. (Tr. 146) It also developed that while the cited comments in his affidavit viewed the subject publication with concern, the affidavit had not set forth all the responses received, and that some had given a reaction "that it was too early to tell" or that "We will get along all right." (Tr. 176-177)

Similarly, Mr. Macomber had set forth in his affidavit (at pp. 15-16) a list of contracts made by third parties to North Vietnam on behalf of the United States referred to in the subject documents, and he expressed concern about disclosure of these contacts. His attention was drawn to the fact that the Seaborn mission, one of those in the list, had received wide publicity as noted above. (Tr. 205-207) He sought to parry that disclosure by claiming that the subject documents were more detailed. But he agreed that other contracts listed in his affidavit has been similarly disclosed to the public. (Tr. 209)

Despite the conceded fact that none of the documents here involved, some extending back over 20 years, have ever been declassified,

Mr. Macomber cited with approval the State Department's declassification program. (Tr. 150) Mr. Macomber sought to explain that it would be relatively simple to declassify documents upon application (Tr. 152), but the Court pointed out that there really was no indication that any such procedure was a realistic one. (Tr. 153)

With reference to classification of documents, Mr. Macomber agreed that the initial classification was made by the writer of the document who makes his subjective judgment thereon. (Tr. 179-180) While claiming that there was a routine procedure to declassify documents, Mr. Macomber was unaware as to whether that routine practice had been followed on the subject documents. (Tr. 182) Mr. Macomber was questioned by the Court as to his views respecting how leaks could be prevented under the circumstances here where large volumes of documents were assembled. The Court specifically inquired as to whether Mr. Macomber felt that the remedy was to proceed to court to seek to enjoin the leaks. (Tr. 185) Mr Macomber urged that in the absence of effective security restrictions there must be some remedy and thought that judicial proceedings were the answer. (Tr. 185-186) The Court replying noted the difficulties and problems which would follow from placing the enforcement of the Government's security problems in the hands of the Courts. (Tr. 187)

Mr. Macomber expressed his concern over the dire results that would follow from the publication of the Vietnam study materials. He was asked whether in the eight days since the first New York Times publication there had been any actual incident reflecting his concern. (Tr. 178) He indicated that the Australian Prime Minister had "in a remark made for our ears, stated that he was appalled." (Tr. 179) He cited no other instances.

General Zais

General Zais' affidavit states that he recently reviewed the documents in the study and would not recommend declassification of any of them at this time. He identifies specific documents to support his conclusion, but these are so obviously lacking in substance that he, himself, backs away from them. Thus, he states (p. 4):

> "My unwillingness to accept the responsibility for recommending declassification of any documents at this time is not premised upon these identifications or upon my expectations that upon further study of these documents, additional identifications will be made."

Instead, he says that because we are at war in Vietnam the documents should remain classified unless there is a positive assurance that their disclosure will not weaken the resolve of our allies in that war.

The total incompatibility of this reasoning and the First Amendment standard is clearly demonstrated by the insubstantiality of the examples which he cites. He first refers (pp. 2-3) to contingency plans in 1964 and 1965 for responding to a Chinese offensive. Conceding that "these particular operational plans are no longer in use," he claims that they reveal "possible total force commitments and planned areas of operation which are valid for future operations." In view of the vast changes in U.S. forces levels in Southeast Asia during the past seven years, marked advances in military transportation capabilities in the interim, and the decided change in American foreign policy objectives as announced in the Nixon doctrine, these 1964 and 1965 contingency plans are patently obsolete. Moreover, examination of these documents cited by General Zais reveals that they contain only vague references to the plans

in question and not the plans themselves. No document referred to sets forth possible troop level commitments or areas of deployment. Indeed, one of the documents listed in this regard (IV. C. 5, p. 9) contains nothing more than a the vague generality that:

> "A variety of CINCPAC contingency plans were in existence at the time which addressed the problem and called for various deployments, some of them pre-emptive, to deal with it."

Similarly, the chronologies referred to by General Zais (at p. 3) are very general in nature and appear to deal primarily with the evolution of policy. The lack of specificity is demonstrated by that fact that one chronology (Vol. IV. C. 6 (a), pp. i-xvii) covers the entire period from January 1965 to April 1968 in 17 pages. Neither chronology contains references to troop deployment times as claimed.

The third item is claimed to be a description of planning for, and past conduct of, certain covert operations in North Vietnam which, if disclosed, would allegedly "foreclose the future conduct of such operations." Analysis of the documents cited, however, reveals that they contain only the most generalized discussion of covert operations plans initiated in 1963 and 1964. Indeed, the greatest specificity as to the type of operations proposed is contained in the following passage (IV. C. 2(a), p.2):

> "Instructions forwarded by the JCS on 26 November specifically requested provision for: '(1) harrassment; (2) diversion; (3) political pressure; (4) capture of prisoners; (5) physical destruction; (6) acquisition of intelligence; (7) generation of intelligence; and (8) diversion of DRV resources."

To paraphrase Jude Gesell, supra, p. 2, these are covert tactics that "today any high school graduate could put down. There is nothing in here of an intimate secrecy."

Admiral Gayler

Admiral Gayler, Director of the National Security Agency, warns that publication of the study material might reveal sensitive information on electronic eavesdropping by the United States.

He picks out three passages from the study to document his concern -- one of February 9, 1967 about North Vietnamese troop movements and two others concerning the Gulf of Tonkin incident of August 4, 1964.

The quoted passage on enemy troops movements in much too vague to disclose the source as an electronic intercept. Thus it states (Affidavit pp. 2-3):

[paragraph deleted]

Any number of "intelligence sources" could have detected a division-sized troop movement, i.e., it could have been detected by aerial reconnaissance, electronic sensors, captured prisoners or documents, Special Forces and South Vietnamese patrols monitoring troop movements, North Vietnamese agents, etc. Indeed, the number of qualifying words in the report would tend to indicate the lack of hard facts as to the intentions of the enemy that would be expected if the information came from intercepts of enemy codes.*

* In any event, neither the Post nor the Government believes that a copy of this report is in the possession of the Post.

The two Tonkin Gulf passages are as follows:

> "At 1940 hours. . . 'received information indicating attack by PGM P4 imminent.' Evidently this was based on and (sic) intercepted communications, later identified as an intelligence source,' indicating that North Vietnam naval fources had been ordered to attack the patrol."
>
> * * * *
>
> "In the meantime, . . . the engagement was described for higher headquarters -- largely on the basis of the destroyers' radar and sonar indications and on radio intercept information."

This information is already a matter of official public record and has been widely disseminated. Secretary McNamara first referred to this message from the destroyer Maddox in his statement before Joint Hearing of the Foreign Relations and Armed Services Committees of the Senate on August 6, 1964.* and the full text of the cable was published in the record of the 1968 hearings before the Senate Foreign Relations Committee as follows:

> "In the message sent by CTU72.1. 2 to AIG-181 dated [deleted] the following sentence is included: 'RCVD info indicating attack by PGM/ P-4 imminent. My position 19-10.7 N 107-003 proceeding southeast at best speed.' "**

A detailed chronology showing the dates and times of the cables from the destroyer and the information which it obtained from radio intercepts is set forth in "Truth Is The First Casualty" by Joseph C. Goulden at pp. 256-57. This, it would come as no surprise to a trained intelligence agent familiar with the wide publicity given the Tonkin Gulf incident, that the Maddox was intercepting North Vietnamese communications at the time.

---

* Joint Hearings Before The Committee on Foreign Relations and the Committee on Armed Services, 88th Cong. 2d Sess., p.8 (1964).

** Hearings before the Committee on Foreign Relations. 90th Cong., 2d Sess.. p. 34 (1968).

The only other specific reference in the Gayler affidavit (p. 4) is to information that would "give some detail" on an agreement for collaboration between U.S. and the South Vietnamese with respect to intelligence operations and the implementation thereof. Reference to the source materials cited demonstrates not only that they date back to April, 1961, but also that they are completely innocuous in nature. The full text of the references cited is as follows:

> V.B. 4 Bk. 1, p. 51 (a):
> "Communications Intelligence: Expand the current program of interception and direction finding covering Vietnamese Communist Communications activities in South Vietnam, as well as North Vietnam targets.
>
> **[material deleted]**
>
> "This program should be supplemented by a program duly coordinated, of training additional Vietnamese Army units in intercept and direction finding by U. S. Army Security Agency. Also, U. S. Army Security Agency teams could be sent to Vietnam for direct operations, coordinated in the same manner.
>
> V.B. 4 Bk. 1, p. 53 (last line):
>
> "The US Army Security Agency actions to supplement communications intelligence will require **[deleted]** personnel and **[phrase deleted]** equipment."
>
> B.B. 4 Bk. 1, pg. 84, para 6c:
>
> "Expand the communication intelligence actions by inclusion of **[number deleted]** additional Army Security Agency personnel to train the Vietnamese Army in tactical COMINT operations."

Thus, the Gayier affidavit offers nothing which could possibly impair national security.

Conclusion

Not surprisingly, the Government has failed to identify a single document in this historical study whose publication would present any credible risk to national security. Indeed, its proof reflects a deep-seated -- almost reflex -- commitment by many high Government officials to maintaining continued secrecy with respect to information once classified that has only historical significance.

Finally, it is clear from its "Supplemental List of Special Items" that the Government continues to tilt at windmills. In addition to designating some 100 items, including one entire volume, the Supplemental List would bar publication of all documents that fall in 13 broadly defined categories. These categories include, inter alia:

> "Official communications which criticize present Vietnam officials or efforts by Vietnam Government Agencies or officials affecting vietnamization programs.
>
> * * * *
>
> "Documents relating to the military involvement of any foreign Government in Vietnan (sic) other than U.S. and Vietnamese troops.
>
> * * * *
>
> "Confidential information relating to peace negotiations assets or tactics."

The First Amendment clearly cannot tolerate continued prior restraint of a free press in order to permit the Government to further engage in the futile task of attempting to demonstrate that the disclosure of historical documents of this nature would present a grave and immediate threat to the national security.

Respectfully submitted,

William R. Glendon

Roger A. Clark

Stanley Godofsky

Anthony F. Essaye

NOS. 1873 and 1885

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NEW YORK TIMES COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA,
PETITIONER

v.

THE WASHINGTON POST COMPANY, et al.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT AND THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
(SECRET PORTION)

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

No. 1885

UNITED STATES OF AMERICA,
PETITIONER

v.

THE WASHINGTON POST COMPANY, et al.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT AND THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
(SECRET PORTION)

There have been great difficulties in the presentation of this case. The United States does not know what materials are in the possession of the New York Times or the Washington Post, and neither District Court below was willing to require disclosure of these papers, even in camera, without repre-

sentatives of the United States present. It would appear in evidence that the papers already published by the two newspapers bear some relation to a compilation of 47 volumes entitled "United States-Vietnam Relations—1945-1967," prepared by a Vietnam task force in the Office of the Secretary of Defense. The covers and every page in this compilation are marked "Top Secret—Sensitive."

It was obviously impossible for the United States to prove directly that the publication of the papers held by the two newspapers would involve immediate and irreparable injury to the security of the United States. The only method by which the United States could proceed was to seek to show that there were items in the 47-volume study which would have this consequence.

When it appeared to be impracticable for the Washington Post to produce in camera the papers it had, the District Court said:

> "THE COURT: I think if you feel that way, because of your problems, I can proceed on the assumption that you have all the documents the government is referring to. We will proceed on that basis. If you want to show that there are some documents you don't have, you can prove it. I will proceed on the assumption you do."

Accordingly, the government introduced evidence through witnesses, and through affidavits, which made specific reference to items in the 47-volume compilation. The 47 volumes were available in the courtroom in the District of Columbia, the relevant portions being regarded as incorporated by reference in the testimony and the affidavits considered by the District Court. The 47 volumes are a part of the record in the New York Times case in the Southern District of

New York and have been transmitted to this Court as a part of the record here.

It is to those 47 volumes that references have been made in the "Special Appendix" mentioned in the decision of the United States Court of Appeals for the Second Circuit, and in the orders entered by this Court in these cases on June 25, 1971. This is likewise true of the items included in the "supplemental list" which was filed (in accordance with the decision of the Court of Appeals for the Second Circuit, and with the orders of this Court) by 5:00 p.m. on June 25, 1971.

The purpose of this portion of the Brief for the United States is to refer to a selected few of these items and to endeavor to show that the publication of these items could have the effect of causing immediate and irreparable harm to the security of the United States. A number of these items were considered hastily by Judge Gesell during the hearing before him on Monday, June 21, 1971. No trace of criticism is intended by the observation that Judge Gesell's consideration was hasty. This was inevitable under the circumstances. Nevertheless, the consideration was necessarily hasty, and the presentation with respect to it was inevitably extremely difficult since no one knows yet what documents either of the newspapers actually have. It is true that they have provided "Inventories." However, these are not very helpful, and they do not, in general, identify particular documents. There are various versions of some of these documents, and the inventories do not show which version the papers have. It is also clear that they have some items

which are included in the 47 volumes.

We now turn to a few selected items from the 47 volumes which, we submit, involve a serious risk of immediate and irreparable harm to the United States and its security.

1. There are four volumes in the 47-volume compilation which are designated in their entirety. They are: Volume VI-C-1, VI-C-2, VI-C-3, and VI-C-4. These contain a comprehensive detailed history of the so-called negotiating track. Negotiations were carried on through third parties, both governments and individuals. These included the Canadian, Polish, Italian, Rumanian, and Norwegian governments. They also included individuals, some holding public office, and some private citizens, sometimes with the knowledge of their governments, and sometimes without their government's being informed.

These negotiations, or negotiations of this sort, are being continued. It is obvious that the hope of the termination of the war turns to a large extent on the success of negotiations of this sort. One never knows where the break may come and it is of crucial importance to keep open every possible line of communication. Reference may be made to recent developments with respect to China as an instance of a line of communication among many which turned out to be fruitful.

The materials in these four volumes include derogatory comments about the perfidiousness of specific persons involved, and statements which might be offensive to

nations or governments. The publication of this material is likely to close up channels of communication which might otherwise have some opportunity of facilitating the closing of the Vietnam war.

2. Closely related to this is the fact 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. South Korea, South Vietnam, and Australia have troops in Vietnam, and Thailand allows the use of airfields from which 65% of our sorties are launched.

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

There are further references to these items in the "Special Appendix" filed in the United States Court of Appeals for the Second Circuit in the New York Times case, and in this Court.

3. There are specific references to the names and activities of CIA agents still active in Southeast Asia. There are references to the activities of the National Security Agency.

The items designated are specific references to persons or activities which are currently continuing. No designation has been made of any general references to CIA activities.

This may not be exactly equivalent to the disclosure of troop movements, but it is very close to it.

4. Volume V-B-4(a), pages 249-257, 259-311, contains specific reference to SEATO Contingency Plan 5 dealing with communist armed aggression in Laos. This discloses what the military plans are. The SEATO plans are continuing plans. This involves not only the disclosure of military plans, but a breach of faith with other friendly nations.

Similarly, Volume IV-A-1, pages A26 to A-31, discloses SEATO Operations Plans 4 and 6 dealing with military dispositions with respect to Laos, Cambodia, Thailand and Pakistan. These are continuing military plans made by us jointly in association with the other nations which are parties to SEATO. Such publication not only discloses the plans to possible enemies, but also involves risk of loss of the support of friendly nations.

5. Volume IV-C-6(b), page 129, sets forth the United States intelligence community's estimate of the Soviet reaction to the Vietnam War. This was made in 1967, but is in large part still applicable. The disclosure of this information will give Soviet intelligence insights into the capacity of our intelligence operations, and may strengthen them both by giving them better understanding of us, and by leading them to correct matters on their side.

6. Closely related is Volume IV-C-6(b), page 157. This is a United States intelligence board estimate of Soviet capacity to provide various types of weapons to North Vietnam. There is much about it that is current, and its disclosure to the Soviet Union would give them information which could lead to serious consequences for the United States.

7. Volume IV-C-6(b), page 168, is an internal memorandum of the Joints Chief of Staff on May 27, 1967, containing a recommendation that a nuclear response might be required in the event of a Chinese attack on Thailand. Although such a recommendation was never formally made, the disclosure that this was considered as a possibility, though in an internal memorandum, could have very serious consequences to the security of the United States.

8. Volume IV-C-7(b), pages 161-163, contains the full text of a telegram from Llewellyn Thompson when he was Ambassador to Moscow in 1968. This gives the assessment of one of our most experiences diplomats of Soviet reaction to United States course of action in Vietnam.

The publication of this telegram would provide valuable intelligence information for the Russians. It is important to them to know what we think about them. Moreover, we cannot have an effective ambassador abroad if he is not able to report candidly and in confidence to the Secretary of State and the President.

The publication of this telegram would impair Mr. Llewellyn's continuing effectiveness. He is now an important and valuable member of our SALT talks delegation dealing with strategic arms limitation, which surely directly

affects the security of the United States.

9. Volume IV-C-9(b), page 52, contains reference to extremely confidential discussions which took place between the military staffs of South Vietnam and Laos, given to us in confidence, relating to possible South Vietnamese military action in Laos with the consent of Laos military authorities. The publication of this not only involves a breach of confidence, but also involves grave risk of reactions from the other nations involved.

10. Finally, we come to the important matter of communications intelligence covered by the affidavit of Vice Admiral Gayler, who is Director of the National Security Agency.

This is not a matter of United States codes and cyphers. These are now regarded as not destructible, or sufficiently nondestructible to be practically effective.

The question which is involved is the codes and cyphers of other countries, particularly the codes and ciphers of unfriendly nations.

There are various items in these volumes, among those which have been specified, which will have the following consequences:

(a) They will make the enemy aware of significant intelligence successes.

(b) With this information, the intelligence analyst of an enemy country can estimate our capacity. He can also control methods of dissemination of messages by his own country, in such a way as to minimize our chance of successful interception.

(c) Cutting down successful interception by our communication intelligence will directly affect our current military operations. Signal intelligence now gives direct support to our troops today, and saves many lives. It also helps, directly in the recovery of downed pilots.

An understanding of United States cryptologic capabilities has direct value to present and potential enemies of the United States. It is immediately connected with current combat operations.

[two paragraphs deleted]

11. Finally, reference should be made to prisoners of war. We are currently engaged in discussions on the prisoner of war issue, in some cases with governments which are not wholly friendly, such as Sweden and Russia. It is obvious that these conversations are conducted on the understanding that they will be confidential, and they are not very likely to be fruitful if that confidence is broken. This is covered by the oral testimony of Mr. Doolin in both cases.

There is one of these in particular which it is very likely that we will not be able to proceed further with as a result of the publication of the papers which has already been made by the New York Times and the Washington Post. The longer prisoners are held, the more will die.

There is, finally, the whole question of the institution of the Presidency—the power constitutionally inhering in the President as Chief Executive and as Commander-in-Chief of the Army and Navy to conduct the foreign affairs of the United States in a way which will not be unduly hindered, to protect the lives and safety of men in Vietnam, and to be able to assure his top military aides, the Joint Chiefs of Staff, that the lives and safety of men in Vietnam, for whom they, and the President, and the Nation are responsible, will not be endangered or subjected to unnecessary risk. The Federal Judiciary has been referred to as "the least dangerous branch." The Presidency can go to great lengths to provide for such protection by establishing security classification schemes, and by using great care in the selection of its personnel. But, in a nation as large and complicated

as this one is, there will inevitably be weak spots in any system. When such weak spots occur, the Presidency is powerless to provide the required protection except with the aid of the courts. In a proper allocation of powers, under the separation of powers, each branch should support the other, in appropriate circumstances. Just as the executive has used its power, through United States marshals, and through military force, to enforce the judgments of the courts, the courts should support the Presidency in a narrow and limited area where such protection is needed in the effective meeting of the President's responsibility, and in the safeguarding of American lives. This is not a question of exception to the First Amendment, but of rational interpretation of that provision wholly consistent with its history and purpose.

Since the publication of materials by the Times and Post, a considerable number of communications have been received from foreign governments. Reference will be made to two of these.

On June 25, 1971, there was received from the American Ambassador to a friendly country a telegram stating that the principal minister of that country

> informed me last night (June 24) that [the head of state] had instructed him to express privately and confidentially grave concern over the unauthorized publication of the classified Pentagon documents relating to Viet-Nam. [The minister] indicated that it was not the substance of these documents which upset the [head of state], but rather the principle involved, namely that highly classified confidential documents which might contain information or secret exchanges between the United States government and other governments, might irresponsibly find their way into the press. [The minister] pointed out that in his

> relations with us the [head of state] is completely frank in his discussion of highly sensitive confidential matters. However, he has felt able to be frank with us because he felt that we would tightly guard the substance of confidential discussions and exchanges with him. If we are not able to do this, said [the Minister], it would obviously have a very inhibiting effect on [this nation's] ability to exchange views with us on confidential matters with full frankness.

A formal message has also been addressed to the Secretary of State by the British Ambassador, the Rt. Hon. the Earl of Cromer, in which the Ambassador says:

> I write to express the concern of Her Majesty's Government about the unauthorized publication of confidential exchanges between our two governments. I am instructed to inform you that Her Majesty's Government is concerned about maintaining the general principle rather than about any specific individual items . . . Her Majesty's Government only wishes to preserve the principle that exchanges between governments should be kept confidential in the interest of good relations.

This is a great and free country. It must remain a great and free country. It has a remarkable Constitution, of which the First Amendment is surely an important part. But it is, as Chief Justice Marshall so wisely observed in the formative days of our republic, a Constitution which the court is expounding. It is a Constitution which has worked, and which must continue to work. Long experience has shown that sound constitutional construction is not to be found in absolutist or doctrinaire constructions of any of the provisions of the Constitution. It is not suggested that the First Amendment must yield to any other provision of the Constitution. It is suggested that the First

Amendment must be construed in the light of the fact that it is a part of a constitution, particularly, where foreign affairs are so directly involved, and where, in a very real sense, the workability and the integrity of the institution of the Presidency may be seriously impaired. The Constitution should be construed in such a way as genuinely to preserve a free press, while likewise leaving to the Presidency the protection which it requires for the free flow of information from foreign nations and for the free development of thought and ideas between the President and his immediate advisers.

Respectfully submitted.

Erwin N. Griswold
Solicitor General

June 1971