

## Rethinking the Pentagon Papers

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PRESIDENT OBAMA came into office having pledged to run the most transparent administration in American history. Contending that the Bush administration's approach had betrayed America's principles and ultimately harmed America's safety, he promised to end what he described as a culture of excessive national-security secrecy. But power has its own imperatives. And as the Obama administration has begun to see, the need to operate in secret while defending the nation is often one of them.

The new administration has also learned that keeping secrets is not an easy task, because Washington leaks like a sieve. The Bush administration was bedeviled by leaks to the press, including disclosures of its most sensitive counterterrorism programs—from the National Security Agency's surveillance of al-Qaeda communications, to the joint CIA-Treasury Department monitoring of terrorist finances. The Obama administration has already encountered the same problem: In the midst of White House deliberations about the way forward in Afghanistan, Pentagon plans were leaked to the *Washington Post*, putting heavy pressure on the president to decide in favor of the counterinsurgency campaign that eventually became his war strategy.

In the face of this and similar episodes, President Obama has begun to straddle the secrecy divide. On one hand, his administration has moved to keep his promise of maximum transparency: It has disclosed some of the nation's most sensitive security documents, including those outlining the interrogation techniques used on high-ranking al-Qaeda prisoners. On the other hand, in prominent lawsuits, Obama's Department of Justice has invoked the same (often criticized)

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state-secrets privilege claimed by the Bush administration to block the disclosure of classified intelligence in court; it is now also prosecuting a senior NSA official for leaking secret documents to the press. Most dramatically, it has issued a subpoena against *New York Times* reporter James Risen, ordering him to disgorge the identity of a confidential source who provided him information about a CIA operation directed against Iran's nuclear program. For his pains, President Obama — just like President Bush — has come under assault by the American Civil Liberties Union and other open-government advocacy groups.

Clearly, secrecy remains a vexing subject in Washington. And on both the left and the right, views about the issue — especially about its implications for the relationship between the press and the government — continue to be shaped by an event that occurred almost four decades ago: the Pentagon Papers leak. By turning over a trove of classified documents to the *New York Times* in 1971, Daniel Ellsberg set in motion a political and legal battle of epic proportions. No other episode in American history has had greater influence on our conflicted politics of national-security secrecy.

The Pentagon Papers case has given rise to two opposing narratives that reflect the deep polarization of American society since Vietnam. To one side, Ellsberg is a disloyal official who betrayed his country and escaped punishment thanks only to Richard Nixon's own illegal behavior. To the other side, he is a lone hero who risked his freedom to halt needless bloodshed — a man whose actions were vindicated both by history and by the courts. Indeed, the decision in the Supreme Court case provoked by Ellsberg's leak is seen as having marked a decisive victory for the First Amendment — one that henceforth left newspapers free to publish whatever they wished, regardless of the harm to national security.

But the fact is that both portraits of Ellsberg are caricatures, as is any interpretation of the Pentagon Papers incident that reads it as a vindication of the *New York Times's* decision to publish the secret documents. The truth of the case, and its real legal consequences and moral meaning, are far more complex — and more interesting.

#### A REPENTANT HAWK

Daniel Ellsberg was born in 1931 and raised in a suburb of Detroit; he went to college at Harvard, where he returned, after a spell, to earn a Ph.D. in economics. A self-described “Cold War Democrat,” Ellsberg had been

confirmed in his anti-communist convictions by the horrors inflicted on Eastern Europe by Joseph Stalin. In 1964, he took a job at the Pentagon as a special assistant to John McNaughton, one of Defense Secretary Robert McNamara's key point men. Ellsberg's portfolio was Vietnam: Laboring 70 hours a week in the E-ring of the Pentagon, the cockpit of the war effort, Ellsberg found himself poring over huge stacks of classified documents bearing top-secret stamps. He soon formed as complete a picture of developments in Vietnam as anyone in government.

Eventually, Ellsberg decided to seek an assignment in Vietnam, which he obtained in 1965. Serving there in a number of civilian advisory positions over the next two years, he became immersed in a very different way — up close and personal — in the intricacies of the war. Together with the legendary counterinsurgency expert John Paul Vann, Ellsberg risked his life touring every province of the south — gaining full exposure to the myriad problems of America's increasingly troubled southeast Asian venture.

Ellsberg left Vietnam in 1967 and returned to work at the RAND Corporation, the military-funded think tank in Santa Monica, California. There he expected to put down on paper everything he had learned about the war. His pessimistic assessment of the “irrevocability of stalemate” led him to conclude that the United States had no choice but to exit the conflict. Yet even as Ellsberg was growing increasingly opposed to a continued American presence in Vietnam, President Lyndon Johnson was moving in the opposite direction: To salvage the war effort, a top-secret Pentagon plan proposed adding 206,000 troops to the 500,000 already in country. The administration was poised to intensify the conflict dramatically.

As this plan was moving forward, a wrench was tossed into the administration's deliberations by a leak to the *New York Times*; the release disclosed the 206,000 figure, as well as details about the debate surrounding it within the military and the administration. The story generated intense opposition in Congress to the Pentagon's proposal, and if the *Times* story did not forestall Johnson's war plans, it did complicate their public presentation immensely.

Ellsberg was not responsible for that leak. But the effects of the *New York Times* story on Johnson's decision-making planted a seed in his mind. It led, in Ellsberg's telling, to an epiphany: Up to this point, he wrote in his 2002 memoir, he “had never questioned the assumption of many students of presidential power that secrecy is vital to preserve a

president's range of options," and "had instinctively accepted the ethos of [his] profession, the idea that leaking was always inherently bad, treacherous, or at best an unhelpful thing to do." But now, in the aftermath of the leak, Ellsberg came to conclude that he had been wrong and that "leaking could be a patriotic and constructive act."

With the security clearance he possessed from his defense-contracting work at RAND, Ellsberg soon embarked on a plan to funnel out "a leak a day of a closely held secret." His aim was less to inform the public than to rattle the administration. "I hoped to convey to readers in the White House that the *Times's* reporters were working directly from a high-level document they had acquired from a source within the administration," Ellsberg later recalled. And in March 1968, a series of top-secret documents Ellsberg had passed to Neil Sheehan—a reporter for the *New York Times*—wound up on the paper's front page.

As Ellsberg watched the consequences of his continued covert campaign unfold, he moved steadily toward the counterculture and away from the war-fighting culture of the Pentagon. He came eventually to conclude that he should do everything in his power to end the war, even if it meant going to prison. Ellsberg did mentally begin to prepare for incarceration—possibly a life sentence—but did not resign from his position at RAND. Instead, retaining his security clearance and his access to top-secret information about developments in the war, he sought to use his unique position to maximum effect.

Around this time, Ellsberg had begun reading the top-secret *History of U.S. Decision Making Process on Vietnam Policy*. This remarkable study had been commissioned by McNamara in 1967 to generate a complete record, through analyses that were "encyclopedic and objective," of the steps and missteps—including his own—that had led the United States into what he himself had recognized as a quagmire. A Pentagon team, directed by policy-planning and arms-control official Leslie Gelb—who later joined the *Times* as a reporter, editor, and columnist—produced 3,000 pages of highly classified analysis of key decisions in the war. These studies were accompanied by 4,000 pages of documents, all of them also highly classified. The entire collection weighed 60 pounds, and was bound together in 47 volumes.

Given its size and complexity, the collection defies easy summary. But it did show, among other things, that officials throughout the 1960s presented the public a much rosier picture of events in Vietnam

than was justified by the intelligence policymakers were receiving. The papers demonstrated, for instance, that President Johnson had every intention of beginning a bombing campaign against North Vietnam before the 1964 election, even though he strenuously denied it during the election season. They showed that American intelligence officials told the Johnson administration in advance of its 1965 escalation of the war effort that the move was not likely to succeed. And they documented how the internal justification for the war shifted over time from the containment of communism to the protection of America's own prestige abroad.

Ellsberg had contributed to one portion of the study, and what he encountered in the rest of the enormous trove of secrets only reinforced his views. It was evidence, as he saw it, of a massive deception of the American people by their government. He grew determined to put the entire study on the record, with the expectation that it would open the public's eyes to the evil of the war and thus help bring it to an end.

Setting out to find the best way to publicize the classified collection, Ellsberg approached Arkansas senator William Fulbright, chairman of the Foreign Relations Committee. After prolonged discussions, however, the foray came to naught. An approach to South Dakota senator George McGovern—who was sympathetic, but fearful of jeopardizing his presidential aspirations—likewise went nowhere; so did an overture to senator and Vietnam skeptic Charles Mathias of Maryland. Finally, after months of frustration, Ellsberg made his fateful decision to turn the documents over to Neil Sheehan of the *Times*.

“Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement” read the headline that appeared over the lead story in the *New York Times* on Sunday, June 13, 1971. It was followed by six pages of related articles, along with excerpts from the Pentagon Papers themselves. Thus began the first installment in a planned series that, day by day, would lay out everything of importance in the McNamara study for the public to digest. American journalism had arrived at a watershed: In the middle of a war, the nation's premier newspaper had begun publishing top-secret documents obtained through an unprecedented breach of security.

The question mark now dangling over the *New York Times* was how the government would respond. There was little doubt at the paper that the reaction would be both swift and draconian. In this, they were mostly right.

## STUMBLING INTO COURT

At first, however, the reaction of the Nixon administration was actually almost indifferent. Attorney General John Mitchell read the *Times* the morning the initial story ran, but did not bother summoning his internal security deputy, Robert Mardian, back from a trip to California. When Nixon picked up the paper, the item that caught his attention was the front-page, left-hand-column photograph of his daughter Tricia's wedding in the Rose Garden; the story on the right by Neil Sheehan seemed to escape his attention. White House audio tapes from that day indicate that Nixon had either not read the story or had failed to appreciate its importance.

Nixon's attitude changed only that afternoon, when the subject came up in a phone conversation with deputy national security advisor Alexander Haig. Reviewing Vietnam casualty figures, Nixon prodded his aide with a revealing question: "Nothing else of interest in the world today?" Haig then proceeded to tell Nixon about the leak, calling it "a devastating—uh, security breach, of—of the greatest magnitude of anything I've seen." But an hour later, talking with Secretary of State William Rogers, Nixon preferred to talk about Tricia's wedding before bringing up the leak, noting that the disclosed documents, from what he could tell, were likely to be far more embarrassing to his predecessors than they were to him. "And it's—uh, it's ver—it's hard on Johnson; it's hard on Kennedy; it's hard on [former U.S. ambassador to South Vietnam Henry Cabot] Lodge," Nixon was recorded as saying. Later in the afternoon, in a telephone conversation, national security advisor Henry Kissinger suggested to Nixon that the impact of the leak would, at least in some respects, be benign or perhaps even beneficial: "In public opinion, it actually, if anything, will help us a little bit, because this is a gold mine of showing how the previous administration got us in there," and "it just shows massive mismanagement of how we got there, and it [unclear] pins it all on Kennedy and Johnson . . . they have nothing from our administration, so actually—I've read this stuff—we come out pretty well in it."

But if the breach was not deemed politically damaging, both Kissinger and Nixon did express alarm about its foreign-policy ramifications. "It hurts us with Hanoi," said Kissinger, "because it just shows how far our demoralization has gone." Contemplating this point, Nixon grew

livid, declaring: “It’s — it’s treasonable, there’s no question — it’s actionable, I’m absolutely certain that this violates all sorts of security laws.” Still, at least initially, Nixon was opposed to taking action against the newspaper. The following evening, he told his chief domestic advisor, John Ehrlichman: “Hell, I wouldn’t prosecute the *Times*. My view is to prosecute the goddamn pricks that gave it to ‘em.”

But a mere six minutes later, in a fateful telephone conversation with Attorney General Mitchell, Nixon reversed course. “On consideration, we had only two choices,” Nixon would later write in his memoirs. “We could do nothing, or we could move for an injunction that would prevent the *New York Times* from continuing publication. Policy argued for moving against the *Times*; politics argued against it.” In his own memoirs, Henry Kissinger likewise emphasized the statesmanship of the president’s approach, writing that Nixon had “rejected a partisan response. He took the view that the failure to resist such massive, and illegal, disclosures of classified information would open the floodgates, undermining the processes of government and the confidence of other nations.” This was not, Kissinger adds, an abstract notion: “We were at that very moment on the eve of my secret trip to Beijing.” China would inevitably have regarded the breach as a mark of American untrustworthiness.

These summaries are an accurate reflection of how the denizens of the White House eventually came to justify their course of action against the *Times*. But as descriptions of how the momentous decision to move against the paper was actually made, they are wholly deficient. The audio tape of Nixon’s critical conversation with Mitchell reveals not statesmanlike “consideration” of “choices,” but a cloud of incoherence, with Mitchell taking the lead:

Mitchell: Hello, Mr. President.

Nixon: What is your advice on that — uh, *Times* thing John?

Uh — you w — you would like to do it?

Mitchell: Uh — I would believe so Mr. President, otherwise we will look a little foolish in not following through on our — uh, legal obligations, and — uh.

Nixon: Has this ever been done before?

Mitchell: Uh — publication like this, or.

Nixon: No [stammering] has the government ever done this to a paper before?

Mitchell: Oh yes — advising them of their — yes, we’ve done this before.

Nixon: Have we — alright.

Mitchell: Yes sir. Uh, I would think that.

Nixon: How — how do you go about it — you do it sort of low key?

Mitchell: Low key — you call them, and then — uh, send a telegram to confirm it.

Nixon: Uh-huh, uh-huh — say that we’re just — uh, we’re examining the situation, and we just simply are putting you on notice.

Mitchell: [Unclear] we’re putting them on notice that they’re violating a statute, because we have a communication from [Secretary of Defense] Mel Laird as to the nature of the documents, and they fall within a statute. Now, I don’t know whether you’ve — you’ve been — noticed it, but this thing was — uh, Mel is working.

Nixon: Henry [Kissinger] — Henry’s on the other — I just — he just walked in — I’ll put him on the other line — go ahead.

Mitchell: Uh, Mel — uh, had a pretty good go up there before the committee today on [the leak], and it’s all over town, and all over everything, and I think we’d look a little silly if we just didn’t take this low-key action of advising them about the publication.

Nixon: Did Mel — did Mel take a fairly — uh, hard line on it?

Mitchell: Uh, yes, he — hahaha — gave a legal opinion, and it was a violation of the law, which uh, of course puts us at where we have to get to.

Nixon: Well look — look — as far as the *Times* is concerned, hell they’re our enemies — I think we just oughta do it.

The “low-key action” that Nixon was asking Mitchell to take against his “enemies” at the *Times* was of course not low key at all. Nor was it, as Mitchell incorrectly told Nixon, something that the federal government had done before. Indeed, it is unclear from the transcripts of this and other conversations whether Nixon even grasped that his attorney general would, as a consequence of this discussion, be asking for an injunction

in the courts to halt the presses. Thus did the Nixon administration in impromptu fashion embark upon an unprecedented course—launching an epic court battle that pitted the imperative of national security against the principle of a free press. If Ellsberg was seeking maximum publicity for his revelations, Nixon granted him his wish, and much more.

#### PRIOR RESTRAINT

On the evening of Monday, June 14, the Justice Department duly notified the *Times* of the administration's position by telephone, and a telegram to publisher Arthur Ochs Sulzberger was sent over Mitchell's signature demanding that publication cease and that the secret materials be returned. But Tuesday's papers had already hit the presses, and they carried the third installment of the series. That same day, Alexander Bickel, the Yale constitutional scholar representing the *Times*, argued against the injunction in a Manhattan federal court. Judge Murray Gurfein, a Nixon appointee hearing his very first case as a judge, granted the government the temporary restraining order it was seeking. On Wednesday, the paper ceased publishing the documents, reporting on its front page that it had been blocked by the government. Other newspapers, beginning with the *Washington Post*—which had obtained portions of the secret papers on its own from Ellsberg—stepped in and began publishing, leading to parallel court proceedings in other jurisdictions.

With newspapers frozen by court injunctions for the first time in American history, the matter rapidly moved up the rungs of the judicial system. The Supreme Court heard oral argument on June 26; on June 30, it issued its landmark ruling in *The New York Times Co. v. United States*. In a 6-3 decision that produced nine separate opinions and a brief order, the Court removed the stays on publication and permitted the presses to roll once again.

The Court's ruling was greeted with euphoria in newsrooms across the country. At the *Times*, a brief moment of "silent disbelief" was followed by "a great deal of hugging, handclapping and jumping up and down," one reporter recorded. "It's a glorious day. We won it. We've all won it. We've won the right to print," said A. M. Rosenthal, the paper's managing editor. "We are extremely gratified," announced Katharine Graham, publisher of the *Washington Post*, "not only from the point of view of newspapers . . . but gratified from the point of view of government, good government, and the public's right to know."

Lost amid the celebrations, however, was the fact that the Court's ruling had hardly issued the press a permit to publish leaked classified national-defense information at its own discretion. Quite the contrary.

The issue before the Court in the *New York Times* case was “prior restraint”—government action to prevent publication before the fact. Such a remedy, the majority held, is available only under extraordinary circumstances in which the government can demonstrate “grave and irreparable danger” to the public interest. In his concurring opinion rejecting the government's request for prior restraint, Justice William Brennan emphatically stated that any situation failing to meet that standard was insufficient to justify silencing the press. “The First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result,” Brennan wrote. The consequences had to be definite—the kind of near-certain calamity that would meet the threshold the Court had established four decades earlier in *Near v. Minnesota*, when it ruled that “no one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” But the material in the Pentagon Papers, however sensitive, was not of this acutely dangerous nature (or at least the government had failed to prove that it was). And there was no statute on the books indicating that Congress ever intended to enjoin publication of this less damaging sort.

If prior restraint was an extraordinary remedy and inapplicable in this instance, however, the Court made plain that prosecution *after* publication was another matter entirely. On this point, four of the justices—and perhaps five if we add the vague formulation offered by Justice Thurgood Marshall—agreed with Justice Byron White that if a case had been brought against the *New York Times* under statutes forbidding the publication of military secrets, the outcome might have been quite different.

Reviewing the legislative history of the Espionage Act, White noted that Congress “appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type that Congress had itself determined should not be revealed.” White added to this observation a warning to the *New York Times* and the other newspapers in the case that they were far from off the hook. National-defense information, he stated, is protected from disclosure by a variety of statutes; “if any of the material here at issue is of this nature,” White explained, “the newspapers are presumably now

on full notice of the position of the United States, and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections [of the relevant statutes] on facts that would not justify . . . the imposition of a prior restraint.” The presses of the *New York Times* could roll—but the paper’s editors had already opened themselves up to criminal prosecution.

After the opinion was issued, John Mitchell echoed White’s point, pledging to prosecute anyone who had violated the law—precisely, he said, as a majority of the justices of the Supreme Court had deemed appropriate. But the newspapers that published the Pentagon Papers were never indicted. The administration did ask Whitney North Seymour, Jr., the U.S. attorney for the Southern District of New York, to file charges against the *Times*. Seymour, however, demurred, believing a New York jury would never vote to convict.

That demurrals was perhaps the trigger for the Watergate follies that eventually brought down the president. Stymied and dismayed by the fact that Ellsberg (and others in on the supposed conspiracy against the administration) were getting away, Nixon embarked on another course. He established the “special investigations unit”—composed of “plumbers,” as they called themselves—to stanch further leaks. The group’s illegal antics—which included a break-in at the office of Daniel Ellsberg’s psychiatrist that derailed any possible prosecution of Ellsberg himself—were to figure prominently in the scandal that ended in Nixon’s resignation.

Ellsberg, for his part, seemed to have achieved everything he could have hoped for. He would not be going to jail for the 115 years that he had calculated would be his maximum sentence. The Pentagon Papers were out, showing the “murder” and the “lying machine” for what they were. And yet Ellsberg remained deeply disappointed. The storm of controversy he had created revolved not around the secrets he had disclosed, but rather the legal and political issues raised by Nixon’s war against the *Times*. “Mainstream interviewers and other commentators listened to me and treated me with respect,” Ellsberg lamented. “But neither these people nor the public at large could take seriously the warning I was trying to convey.”

#### THE REAL COST

Ellsberg’s disappointment returns us to the central issues raised by his case. To begin with, one reason the actual contents of the Pentagon

Papers did not significantly shape discussion of the war—and would probably have been forgotten had Nixon not attempted to suppress their publication—was that, in contrast to some of the most controversial leaks published by the *New York Times* and other news outlets over the past few years, no current operational secrets were disclosed. Indeed, not one of the 7,000 pages of the McNamara studies that Ellsberg gave to the *Times* in 1971 contained information less than three years old. “It is all history,” noted Justice William Douglas in his concurring opinion in the *Times* case. “None of it is more recent than 1968.” (In fact, significant portions of the Pentagon Papers covered episodes dating back to the administrations of Dwight Eisenhower and Harry Truman.)

Moreover, although Ellsberg leaked with abandon, there were some lines that he declined to cross. Even today, he readily acknowledges that there are certain kinds of materials, “such as diplomatic negotiations, certain intelligence sources and methods, or various time-sensitive military-operational secrets, that warrant . . . strict secrecy.” And the *Times*, for its part, made at least a limited effort to assure itself that the revelations in the Pentagon Papers would not (in themselves) jeopardize national security in any immediate way or put American or South Vietnamese lives directly at risk.

Of course, as we have seen, the Nixon administration had a very different view of the matter. It contended vociferously that “irreparable harm” would follow disclosure of the documents. Yet demonstrating to the courts what exactly the harm would be turned out to be an impossible task.

In Judge Gurfein’s Manhattan courtroom, one of the government’s critical witnesses on the issue of damage was Vice Admiral Francis Blouin, the Pentagon’s deputy chief of naval operations for plans and policy. In cross-examination in open court, Blouin averred that “it would be a disaster to publish all of these other documents, let alone the ones that have already been published,” adding: “[A]ny intelligence organization will derive a great deal of benefit from the articles that have already been published and there is even more juicy material in the other volumes.” To explore the “juicy material,” the court then held a closed session in which the admiral was pressed to elaborate. First Amendment lawyer Floyd Abrams, representing the *Times* along with Alexander Bickel, recounted in a 2005 memoir how “it quickly became clear that [Blouin’s] objections were so far-reaching and would affect so much of what routinely was published

in the press that the government's reliance on his testimony asserting that particular portions of the Pentagon Papers could not be published was all but impossible." Other government witnesses were no less hapless when it came to explaining harm.

In his memoirs, Nixon acknowledged that perhaps more than 95% of the material in the Pentagon Papers could have been declassified in 1971 without harming national security, but that "we were all still worried about the other percent—even if it were only 1 percent." Solicitor General Erwin Griswold, who argued the case for the government, pointed in court to 11 specific items—which he explained more fully in a secret legal brief—that would cause "great and irreparable harm to the security of the United States." But writing in the *Washington Post* 15 years later, Griswold conceded: "I have never seen any trace of a threat to the national security from the publication. Indeed, I have never seen it even suggested that there was such an actual threat."

The Pentagon Papers case thus presents a conundrum. The most celebrated leaker in American history revealed secrets whose concealment appears, in retrospect, to have been unnecessary. And yet, in attempting to check the free flow of information, the Nixon administration nonetheless persuaded seven Supreme Court justices that the secrets' dissemination would have caused serious damage to our national security. Justice Harry Blackmun even raised the possibility that their publication would lead to the prolongation of the war and "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of diplomats to negotiate." But none of these dire prospects came to pass.

At first glance, history would seem to confirm the standard narrative in which Ellsberg is a heroic whistle-blower. The *Times*, along with the other newspapers that stepped forward to publish the Pentagon Papers, would seem to come off as heroic as well, bravely carrying out what Justice Hugo Black called the press's paramount duty "to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."

These words from Black's opinion may be stirring, but they are not the last judgment. If hindsight makes clear that the release of the information contained in the Pentagon Papers did not pose a real threat to American security, it does not show that the breach failed to cause any damage at all. The principal harm—not enough to justify the sledgehammer treatment

of prior restraint or prosecution of newspapers after the fact, but significant nonetheless — appears to have been diplomatic embarrassment, as well as a demonstration to America's allies and adversaries that our government was having severe difficulty keeping its secrets safe.

Both forms of damage are ones that an open society, if it is to remain open, must be willing to accept. “The security of the Nation is not at the ramparts alone,” wrote Judge Gurfein as he removed the government's injunction against the *Times*. “Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.”

Yet even if one accepts Gurfein's latitudinarian view of the role of the press, there is still a form of harm caused by Ellsberg's leak that demands attention. It was spelled out by Lyndon Johnson in a communication delivered to Nixon the day after the Pentagon Papers first appeared in the *Times*. As Kissinger is recorded as saying on the White House tapes, “[former national security advisor Walt] Rostow called on behalf of Johnson. And he said that it is Johnson's strong view that this is an attack on the whole integrity of government. That if you — that if whole file cabinets can be stolen and then made available to the press, you can't have orderly government anymore.”

Johnson had obvious, self-serving motives for wanting to keep the Pentagon Papers under wraps: They portrayed his conduct of the war in a deeply unflattering light. Yet whatever concern for his own place in history undergirded the message to Nixon, Johnson pointed to one of the essential questions raised by Ellsberg's conduct. Whatever one thinks of Ellsberg's motives — and however one might appraise the harm his actions inflicted on American foreign policy — the fact is that, at its root, Ellsberg's leak was not just an assault on orderly government. In a polity with an elected president and elected representatives, it was an assault on democratic self-governance itself.

For better or worse, the American people in the Vietnam years had elected Kennedy, Johnson, and Nixon; they had acted at the ballot box to make their leadership and policy preferences clear. Yet here was a mid-level bureaucrat, elected by no one and representing no one, entrusted with secrets he had pledged to the American people to protect, abusing that trust to force his own policy preferences upon a government chosen by the people.

Ellsberg and his defenders maintain that the American people were being lied to by these presidents, and that the leak brought those lies to light. But did the revelations in the Pentagon Papers really alter Americans' perceptions of Vietnam policy? Mel Gurtov, a RAND analyst who had contributed to the Pentagon Papers, testified at Ellsberg's trial on his behalf; he later recalled that the main direction of his testimony was to underscore that "all of the important information was *already* in the public domain." The secret materials, Gurtov continued, "merely lent further credence to what had already been said in the press and in academic studies." Instead of painting a radically new picture, the Pentagon Papers merely added detail to a story that, by 1971, was familiar to Americans: As the war was going badly in the 1960s, Kennedy and Johnson—in their attempts to retain public support for an intervention they deemed critical to American security—had painted it as going well. Ellsberg and his supporters, who came to view the American intervention in Vietnam as a war crime, call this bald lying. But those with a less fevered view of America's tragic effort to prevent South Vietnam from falling under communist rule might just as easily call it leadership—leadership that, in this instance, failed.

Is there some way, then, that Ellsberg—in his defiance of our elected leaders—can still be said to have represented the will of the American people? It is indisputable that, over the course of the late 1960s and early '70s, a steadily growing portion of Americans came to believe that our intervention in Vietnam was a mistake. But opinion about how to walk back from that mistake was another matter. As late as 1968, with more than half a million troops in Vietnam, a Gallup poll showed that only 23% of Americans identified themselves as "doves"; 61% called themselves "hawks." In the period between September 1968 and September 1970, sentiment swung sharply against the war: The percentage of Americans favoring withdrawal rose from 19% to 55%. In a May 1971 poll, on the eve of the Pentagon Papers revelations, a solid majority of Americans—68%—favored pulling out of Vietnam by the end of the year.

But there was more to the story. The same respondents in the May 1971 poll, when asked if they would favor an immediate withdrawal "if it threatened the lives or safety of United States POWs held by North Vietnam," changed their minds. Under those conditions, only 11% favored pulling out. In other words, withdrawal of the kind Ellsberg and his compatriots in the anti-war movement were proposing—

a withdrawal that would have meant leaving our captive servicemen to an unnamed fate—was overwhelmingly rejected by the American people. Moreover, the only poll that ultimately counts in a democracy takes place on Election Day. And in 1972, with the American people having had more than a year to absorb whatever lessons were contained in the Pentagon Papers, George McGovern—the candidate favoring immediate withdrawal from Vietnam—was trounced by Nixon in one of the greatest landslides in American history.

#### REVELATIONS AND CONSEQUENCES

Daniel Ellsberg defends his departure from the norms of our democracy by calling it an honorable act of civil disobedience. He says he came to embrace Gandhian principles of non-violence, and fell under the influence of Henry David Thoreau's essay "On the Duty of Civil Disobedience." He came to believe, as Thoreau did, that "obedience to leaders in an unjust cause was itself a choice, a wrong choice," and to regard the Pentagon Papers as "the U.S. equivalent of the Nuremberg war-crimes documents." He maintains that in resisting a war that was "naked of any shred of legitimacy from the beginning," the "best thing that the best young men [could] do with their lives [was] to go to prison."

It was of course every bit Ellsberg's right as a citizen to reach any conclusion he wished about Vietnam. It was also undeniably every bit his right as a human being to follow his conscience and break signed confidentiality agreements, flout laws punishing the disclosure of sensitive national-defense information, and reveal each and every secret that he knew about the war. Such conduct is the essence of civil disobedience. But civil disobedience has its consequences, and these Ellsberg assiduously sought to avoid.

"Under a government which imprisons unjustly," wrote Thoreau, "the true place for a just man is also a prison." But here it is worth noting that Ellsberg was not merely a leaker: He was an *anonymous* leaker. While he often declares in his memoir that he was prepared to risk life in prison in pursuit of his principles, in fact he took numerous steps to avoid going to jail. To halt what he regarded as deception by the government, Ellsberg had engaged in his own extensive deception that included lying on numerous occasions to longtime colleagues and friends. Almost immediately after the Pentagon Papers came out in the *Times*, Ellsberg was flagged as a suspect; he did not waste much time in going "underground"—his

word—dodging the FBI by moving from one location to the next and communicating via randomly chosen phone booths. Only on the way to surrender to the authorities did Ellsberg publicly declare: “I acted of course at my own jeopardy, and I’m ready to answer to all the consequences of my decisions.” But that was a last-minute heroic pose in the face of inevitable arrest; the truth was that he had been dodging the legal consequences of his decisions for years. Despite Ellsberg’s assertions that his leaking was “a patriotic and constructive act,” it was simply civil disobedience without accountability. As such, it was not a contribution to the “sovereign public,” but rather an assault upon it.

Ellsberg can be given some measure of credit for first having approached a number of U.S. senators to ask them to put forward the revelations he believed would bend the river of history. Senators, after all, have authority vested in them by the electorate. Under our Constitution, they can say whatever they wish on the floor of the Senate—even if they disclose sensitive classified information—without the risk of criminal prosecution. But the senators whom Ellsberg importuned all declined to help, and their reasons for doing so are revealing.

In January 1971, when Ellsberg turned to him, George McGovern was embarking on another run for the presidency. However sympathetic he was to Ellsberg’s cause, he recognized that making classified military and intelligence documents public would hardly have helped him attract votes in the political center. By rejecting Ellsberg’s request, McGovern was attempting, as any successful candidate must in a democracy, to reflect and to follow the will of the American public as he perceived it.

Senator Fulbright’s reasons for demurring were explained to Ellsberg by one of the senator’s aides: “If Fulbright leaked the papers or went ahead and distributed or published them, he could be charged with having jeopardized the ability to get classified material from the executive, not only for the [Foreign Relations] committee or himself but for the entire Senate.” Fulbright, then, declined to do Ellsberg’s bidding because he did not want to violate the rules by which a representative body in our democracy properly handles secrets. Nor did he want to live with the consequences of such a violation, which would have been not personal but institutional: a diminution of cooperation among the branches of government, a diminution of Congress’s ability to oversee the executive branch, and a blow to democratic self-government at a moment when it was already under strain.

McGovern and Fulbright chose to remain inside the democratic order. Ellsberg in the end chose to act outside of it. He took the law into his own hands and was prepared to do so again, which is precisely why he deserved to be stopped and punished. “There was nothing paranoid in the suspicion of President Nixon and Henry Kissinger that I might well put out further classified documents that would threaten their Vietnam policy,” Ellsberg later explained in his memoirs. In the face of such an attitude, a democratic society had every right—even an obligation—to prevent Ellsberg from striking again.

Yet if Ellsberg was a lawbreaker and a transgressor of democratic norms, he was by no means the only figure—or even the worst figure—in the rogues’ gallery of those years of crisis. That honor must be reserved for Richard Nixon. One can easily understand the agony Nixon suffered as he attempted to end a war he had not chosen to start, all while being relentlessly hammered by a liberal establishment that, only a few years earlier, had been cheering the intervention. But Nixon’s woes hardly excuse his abdication of his basic responsibility to observe the law. His decision to go after the *Times* for publishing the Pentagon Papers—if “decision” is the right word for his grunted acquiescence to Mitchell’s suggestions—appears, in retrospect, to have been the height of irresponsibility. Draconian action was taken without any deliberation at all.

Nixon’s subsequent actions in response to the leak brought him to naked criminality of a sort that, in its malicious intentions and appalling consequences, dwarfed whatever Ellsberg had done. Indeed, it was neither Ellsberg’s revelations nor the anti-war movement as a whole that fatally undercut the American effort to safeguard South Vietnam. Rather, it was Nixon himself, as he secretly worked the levers of government—from the IRS to the CIA to the “plumbers”—in unlawful ways. His petty calculations in response to the Ellsberg leak—which segued seamlessly into the illegal decisions of the Watergate affair—led to the collapse of presidential authority and paved the way for the fall of South Vietnam and Cambodia to brutal communist regimes, with dire consequences for millions.

If our country has had an especially unhappy history wrestling with secrets over the four decades since—and if leaks of even the most sensitive national-security information have become normalized—Richard Nixon is a major reason why. No other president in American history has given secrecy such a bad name.

A MISLEADING LEGACY

Over the past four decades, the Pentagon Papers controversy has left almost everyone with the wrong conclusions. Some on the right have determined that the Nixon administration was justified in fighting so tenaciously against Ellsberg and seeking a prior restraint against the *New York Times*. They believe that the fundamental problems revealed by the case were those of disloyal mid-level bureaucrats, elite journalists overtly hostile to American war aims, and a legal system that let them all get away with it. These conclusions remain readily apparent today in the attitudes of conservatives (both in and out of public office) toward national-security secrets and the government's relationship with the press.

Many on the left, for their part, have concluded that Ellsberg and the *New York Times* were right to make the highly classified collection of documents public. They hold that the fundamental problems the case revealed were those of an insular and paranoid executive branch that placed itself above the law, and that the conduct of Ellsberg and the *Times* was thoroughly vindicated by the courts. These conclusions continue to define the attitude of many liberals toward the protection of state secrets—an endeavor almost always regarded with suspicion.

Both sides miss the point, but to varying degrees. First and foremost, the Pentagon Papers case serves to underscore the very legitimate protection our legal system affords to national-security secrets. It also highlights the illegitimacy of claims by leakers to speak for the public, even as they usurp the public's right to live in a polity where decisions are made by elected officials. The case affirms the obligations of the press to respect the rule of law—even though today's journalists have clearly not absorbed that lesson. And it confirms the vital importance of having an executive branch that acts with “judgment and wisdom of a high order”—to borrow the words of Justice Potter Stewart in the Pentagon Papers decision—to balance the exigencies of national-security secrecy with the cherished freedoms that make our country worth defending.