Is the Pentagon Papers Case Relevant in the Age of WikiLeaks?

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LEAKS BY EDWARD SNOWDEN, THE CONVICTION by a military court of Bradley Manning, and the increased number of prosecutions of alleged leakers by the Barack Obama administration provide good reason to reconsider the significance of the Pentagon Papers case.[1] Although that ruling "is often said to be a high-water mark in the annals of press freedom," Adam Liptak has written that, "like the Manning verdict, the decision represented a shift in the understanding of the First Amendment."[2]

Soon after WikiLeaks released the documents obtained by Manning, Daniel Ellsberg told the *Washington Post* that "the parallels are very strong" between the Pentagon Papers that he gave to the *New York Times* in 1971 and the secret material released by WikiLeaks. Several months later at a London press conference with WikiLeaks founder Julian Assange, Ellsberg compared the threats to prosecute Assange with the efforts used against him by the Richard M. Nixon administration.[3] James Goodale, general counsel for the *New York Times* during the Pentagon Papers case, decided that this was the time to publish a memoir about his involvement

[1] *The New York Times v. United States*, 403 U.S. 713 (1971).
[2] Adam Liptak, "Court Rulings Blur the Line between a Spy and a Leaker," *The New York Times*, 2 August 2013.
[3] Paul Fahri and Ellen Nakashima, "Is WikiLeaks the Pentagon Papers, Part 2? Parallels, and Differences, Exist," *The Washington Post*, 27 July 2010; and John F. Burns and Ravi Somaiya, "Leaker of Pentagon Papers Joins WikiLeaks Founder in Rebuking U.S.," *The New York Times*, 24 October 2010.

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in the case because "[t]he WikiLeaks matter has made the Pentagon Papers case more relevant than ever before."[4] So many others made similar comparisons that one author dubbed the WikiLeaks documents "The Pentagon Papers of Our Time."[5] Such analogies make the U.S. Supreme Court's decision in *New York Times v. United States* worth revisiting to see how relevant it remains today. In order to do that, we must first understand what led to the Defense Department's classified study of the Vietnam War.

THE ROAD TO THE SUPREME COURT

Although he had been one of the primary architects of the Vietnam War, by 1967, Defense Secretary Robert McNamara had developed serious doubts. In June of that year, he commissioned a study to determine how the United States had gotten into its current state of involvement in Vietnam. According to the study's director, Leslie Gelb, the authors were granted "total access to the files of the Office of the Secretary of Defense," State Department historical files, materials on request from the Central Intelligence Agency, and memos from the National Security Council staff, but no records of White House meetings or internal memoranda from the American Embassy in Saigon. Nor were they permitted any interviews.[6] Work continued even when McNamara was replaced by Clark Clifford, ending shortly after the beginning of the Nixon administration. Of the 15 copies of the study, five remained in the Defense Department, one went to National Security Adviser Henry Kissinger, one each to the Lyndon B. Johnson and John F. Kennedy presidential libraries, and seven to former Johnson aides.[7] According to the executive order establishing the classification system, "top secret," the classification given to the Papers, applied to material whose disclosure "could result in exceptionally grave damage to the Nation."

The study, officially titled "History of U.S. Decision-Making Process on Vietnam Policy" but now universally referred to as the Pentagon Papers,

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[4]James C. Goodale, *Fighting for the Press: The Inside Story of the Pentagon Papers and Other Battles* (New York: CUNY Journalism Press, 2013), xii.

[5]Meenal Vamburkar, "WikiLeaks vs. Pentagon Papers: What's the Comparison?," Mediaite.com, 26 July 2010, accessed at http://www.mediaite.com/online/wikileaks-vs-pentagon-papers-whats-the-comparison/, 1 July 2013.

[6]Leslie Gelb, "The Pentagon Papers and *The Vantage Point*," *Foreign Policy* 6 (Spring 1972): 25–41, at 27–28; and Sanford J. Ungar, *The Papers and the Papers: An Account of the Legal and Political Battle over the Pentagon Papers* (New York: E.P. Dutton, 1972), 29. State Department documents were supplied by Undersecretary Nicholas Katzenbach, who did not inform Secretary of State Dean Rusk.

[7]David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case* (Berkeley: University of California Press, 1996), 31. This book and Ungar's are the most thorough accounts of the events of this case, and much of this article relies on them.

seemed destined to do little more than gather dust. Although Johnson used parts of it in writing his memoirs, McNamara himself did not read them, nor did Nixon's defense secretary, Melvin Laird.[8] What was to make the Papers the center of national attention was the obsession of Ellsberg, who had been one of the study's authors. Ellsberg had been a strong supporter of the war, but after spending two years working alongside the military in Vietnam, he had a reversal of belief. In the fall of 1969, he began a campaign to make the Papers public as "an act of resistance, but of a particular sort, aimed at a broader and ultimately better understanding of the war process."[9] He hoped that if the public learned how they had been deceived by their leaders, they would turn against the war. As an author of the study, he was able to slip parts of the papers out of the office during the evening, make copies, and then return the originals the next morning.[10]

Nevertheless, his efforts to gain release of the Papers proved frustrating. A November 1969 meeting with Senate Foreign Relations Committee chair J.W. Fulbright resulted only in a request to Laird to release the Papers that was turned down. During the following year, Ellsberg offered the Papers to a variety of elected officials opposed to the Vietnam War without success.[11] In desperation, he turned a copy over to Neil Sheehan of the *New York Times* in March 1971, holding back four volumes concerning negotiations in order not to interfere with ongoing efforts. He also blacked out footnotes that included important names, places, and dates.[12]

An examination to determine whether the material was genuine was followed by a fierce internal debate over whether to publish. Although all the involved reporters and editors strongly supported publication, a number of other editors and executives did not. Among attorneys, Goodale favored going ahead despite strong opposition from the *Times*'s outside law firm, Lord Day & Lord, which considered publication not only unpatriotic but also a violation of espionage laws. The firm's lead attorney, former Dwight D. Eisenhower administration Attorney General Herbert Brownell, even refused to read the Papers out of fear that doing so could be considered a criminal act.[13] Ultimately, the *Times* decided to publish the papers as a nine-part series. Despite finding little in the Papers relating to

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[8]Ungar, *The Papers and the Papers,* 41.
[9]Daniel Ellsberg, *Papers on the War* (New York: Simon & Schuster, 1972), 12.
[10]John Giuffo, "High Drama at the Supreme Court," *Columbia Journalism Review* 40 (November/December 2001): 70–71.
[11]Ungar, *The Papers and the Papers,* 60–71, 83–84.
[12]Erwin Griswold, "No Harm Was Done," *The New York Times*, 30 June 1991.
[13]A.M. Rosenthal, "The Pentagon Papers," *The New York Times*, 11 June 1991; and Rudenstine, *The Day the Presses Stopped,* 57–63.

ongoing military operations or negotiations, the *Times* took precautions to protect national security such as deleting time groups from full texts of documents to prevent them from being used to break codes.[14]

When the first installment appeared on Sunday, 13 June, President Nixon's immediate reaction was, according to top aide H.R. Haldeman, "muted" because the material was entirely about previous administrations.[15] Why did he suddenly change his mind, authorizing not only the legal action this article will analyze but also a variety of other attacks on both the newspapers involved and Ellsberg, including the establishment of a secret antileak "plumbers" unit that would break into the office of Ellsberg's psychiatrist? The predominant view is that Kissinger pushed him into action. Historian Stephen Ambrose emphasizes a 17 June meeting at which Kissinger told the president that if he failed to act against the *Times,* "it shows you're a weakling." Ambrose concludes "that line propelled Nixon into action on numerous fronts. The Justice Department sought an injunction against the publication of any more of the Pentagon Papers." Jonathan Aitken agrees, citing Haldeman's statement that Kissinger "went completely into orbit" at that meeting.[16] Whatever accuracy this may have concerning later actions, it can hardly explain the lawsuit that Nixon had approved three days earlier and filed in court on 15 June. In fact, by the morning after the first installment was published, Nixon was angry enough to suggest cutting off all *Times* access to the administration.[17] In 2001, Anthony Lewis pointed to a newly declassified transcript of a phone conversation on the afternoon of publication in which Kissinger told Nixon, "It's treasonable, there's no question . . . I'm absolutely certain that this violates all sorts of security laws" as helping galvanize the president into action. However, the transcript shows that before Kissinger's remark, it was Nixon who said "this is treasonable action on the part of the bastards that put it out."[18] Certainly Kissinger was unhappy about the leak, fearing it could damage secret negotiations for Nixon's upcoming trip to China, but, as Stanley Kutler has written, because Nixon regarded unauthorized leaks "as a personal affront to his notions of presidential authority

[14]Giuffo, "High Drama at the Supreme Court"; and Ungar, *The Papers and the Papers,* 97.
[15]H.R. Haldeman, *The Ends of Power* (New York: Times Books, 1978), 110.
[16]Stephen E. Ambrose, *Nixon: The Triumph of a Politician 1962–1972* (New York: Simon & Schuster, 1989), 447; and Johnathan Aitken, *Nixon: A Life* (Washington, DC: Regnery, 1993), 420.
[17]Rudenstine, *The Day the Presses Stopped,* 74–76.
[18]Anthony Lewis, "When Truth Is 'Treason,'" *Chicago Daily Law Bulletin* 147 (11 June 2001): 6; and White House Tape WHT-5, cassette 825, conversation 5-59, Nixon Library Materials at National Archives, College Park, MD. The quotation is taken from a National Security Archive transcription by Eddie Meadows, accessed at https://nsarchive.files.wordpress.com/2010/12/nixon-pentagon-leak.pdf, p. 10, 11 June 2015.

. . . he did not need others to prod him into lashing out at his 'enemies.'"[19] Presidents since Nixon also seem to have taken leaks as challenges to presidential power, which may help explain the actions taken by Barack Obama that are analyzed later in this article.

Assistant Attorney General William Rehnquist was assigned to evaluate the possibility of going to court to seek an injunction against publication of the remaining installments. Because it is generally agreed that such prior restraints against publication are almost completely barred by the First Amendment, there were few Supreme Court precedents to guide him. Most commonly quoted was Chief Justice Charles Evans Hughes's statement in *Near v. Minnesota* [20]that among the few exceptions was "the publication of the sailing dates of transports or the number and location of troops." Lacking access to the Papers, Rehnquist simply concluded that if the administration could show harm to national security comparable to the examples given by Hughes, an injunction might be granted.

On the afternoon of Monday, 14 June, Nixon approved the lawsuit. At 7:00 p.m., Attorney General John Mitchell sent the *Times* a telegram demanding a halt to further publication and return of the Papers to the government to prevent "irreparable injury to the defense interests of the United States." Two hours later, the *Times* replied that it would "respectfully decline." Late that night, Brownell informed the *Times* that Lord Day & Lord would not represent the newspaper in court the next day.

The *Times* quickly hired law professor Alexander Bickel, assisted by Floyd Abrams, to argue the case. Bickel urged his new clients not to take the absolutist position that the First Amendment prohibited all prior restraints, as only Hugo Black and William O. Douglas would likely support such a view when the case inevitably would be heard by the Supreme Court. Even if William M. Brennan, Jr., and Thurgood Marshall could be convinced to agree, the necessary fifth vote would have to come from either Byron White or Potter Stewart, who would respond negatively to absolutist arguments. With some reluctance, the newspaper agreed to concede the possibility of a prior restraint while limiting its application to rare situations in which potential harm to the country was far greater than in this case.[21]

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[19]Stanley I. Kutler, *Abuse of Power: The New Nixon Tapes* (New York: Free Press, 1997), 6. For Kissinger's account, see Henry Kissinger, *White House Years* (Boston, MA: Little, Brown, 1979), 729–730.

[20]283 U.S. 697 [1931]

[21]Rudenstine, *The Day the Presses Stopped,* 105–6. The *Washington Post* would also avoid the absolutist position because, according to its attorney, that "surely would have offended, if not turned off, Justices Stewart and White." See William R. Glendon, "The Pentagon Papers—Victory for a Free Press," *Cardozo Law Review* 19 (March 1998): 1295–1310, at 1303.

On the government side, strategic disagreement was far greater. Because Assistant Attorney General Robert Mardian believed that publication could be stopped for anything classified as top secret, at first he refused to tell even the government's attorneys which documents presented risks to national security or why, let alone have government witnesses provide justification. U.S. Attorney Whitney North Seymour, Jr., who would represent the government in court, believed this to be a legally untenable position. Although he was eventually allowed to use some material, the delay hampered his preparation.[22] The contradictions between these two positions would continue to plague the government throughout the case.

U.S. District Court Judge Murray Gurfein issued a temporary restraining order (TRO), preventing publication until an 18 June hearing to decide whether to issue a permanent injunction. However, he refused the government's request to order the seizure of the Papers.

To ensure continued public release, Ellsberg then offered the Papers to the three television networks, each of which declined, possibly fearing loss of licenses for the stations they owned. The *Washington Post* accepted, although, unlike the *Times,* it declined to include the text of classified documents. Mardian chose to sue the *Post* in Washington, DC, where he drew a less favorable district court judge, Gerhard Gesell. The government argued that the fact of classification was enough to justify a TRO until it could present evidence of harm. Gesell denied the TRO, citing a lack of specifics from the government. As the *Post* began publishing its second installment, the government appealed. Early the next morning, a majority of a three-judge panel reversed Gesell's decision, ordering him to hold an evidentiary hearing the following Monday on the grounds that the possible damage from publication far exceeded any harm from such a brief delay.[23]

Back in New York, Gurfein held hearings to determine whether to grant an injunction. The next day, he ruled against the government while allowing the TRO to remain in place long enough for an appeal to the Second Circuit. The president, he believed, only had the inherent power to obtain an injunction if the material involved was "absolutely vital to national security." In this case, "no cogent reasons were advanced as to why these documents, except in the general framework of embarrassment . . . , would vitally affect the nation."[24]

Chastened by the decision, Seymour's superiors granted his request to add a secret appendix specifying the most damaging sections of the Papers

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[22]Rudenstine, *The Day the Presses Stopped,* 116–117.
[23]*United States v. The Washington Post Co.,* 446 F. 2d 1322 (D.C. Cir. 1971).
[24]*United States v. The New York Times Co.,* 328 F. Supp. 324 (S.D.N.Y. 1971).

to his appellate brief. By a 5–3 vote, the court of appeals continued the stay, ordering Gurfein to hold additional hearings to determine whether disclosure would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."[25]

At the 21 June hearing, the *Post* added a new twist by pointing out that an injunction would now be ineffective because parts of the Papers were in circulation among members of Congress, the authors of a forthcoming book, and soon even as "extensive, verbatim quotations" in Johnson's forthcoming memoirs.[26] Lacking time for a written opinion because of the 5:00 p.m. deadline imposed by the court of appeals, Gesell orally denied the injunction based on the government's failure to demonstrate "an immediate and grave threat to the national security."[27] The court of appeals quickly extended its TRO, scheduling arguments for the next afternoon, 22 June, the same day the government's appeal of the *Times* case was heard in New York.

Meanwhile, Ellsberg provided 1,700 pages of the Papers to the *Boston Globe,* whose series began on June 22. When the government sued, U.S. District Court Judge Anthony Julian issued a TRO pending a 25 June hearing. Quickly, other newspapers obtained fragments of the Papers from a variety of sources, then began their own series.

On Tuesday morning, Mitchell assigned Solicitor General Erwin Griswold to take over the appeal for the 2:00 p.m. hearing that day. Without time even to read the briefs, Griswold faced the paradox of arguing that only proper classification was necessary for an injunction while meeting the court's demands for specific evidence of harm. Late Wednesday afternoon, the appellate court, by a 7–2 vote, upheld Gesell in an unsigned opinion, simply citing the heavy burden against prior restraint and the likely ineffectiveness of any injunctive remedy in light of the multiple publications by other newspapers.[28]

On Thursday, the *Times* and the government appealed the conflicting appellate court decisions to the U.S. Supreme Court. Facing the prospect of 10 more days before the end of the district court hearing added to the nine that had already passed, the *Times* sought an immediate appeal. The government was satisfied to wait until the Supreme Court returned for

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[25]*United States v. The New York Times Co.*, 444 F. 2d 544 (2d Cir. 1971).
[26]Rudenstine, *The Day the Presses Stopped,* 194, 202, 205; and William R. Glendon, "Fifteen Days in June That Shook the First Amendment: A First-Person Account of the Pentagon Papers Case," *New York State Bar Journal* 65 (November 1993): 24–26, 50, at 25.
[27]Don Pember, "The Pentagon Papers' Decision: More Questions than Answers," *Journalism Quarterly* 48 (Autumn 1971): 403–411, at 405.
[28]*United States v. The Washington Post Co.*, 446 F. 2d 1327 (D.C. Cir. 1971).

its October term as long as the TROs remained in effect. Justices Warren Burger, Harry Blackmun, John M. Harlan II, and White lined up with the government, while Black, Douglas, Brennan, and Marshall favored immediate dissolution of both injunctions. This left the decision in the hands of Stewart, who informed the first group that if they did not agree to an immediate hearing, he, too, would vote to overturn the injunctions. The Court quickly agreed to schedule arguments for an unusual Saturday hearing while continuing the TROs against publication until then.[29]

Security was so tight at the 26 June hearing that government agents confiscated all secret briefs from the *Times*'s and *Post*'s attorneys, even their own, at the end of oral arguments. During the open hearing, Griswold criticized Gesell's standard of "immediate harm" as too limiting, suggesting instead "great and irreparable harm to the security of the United States" because "in the whole diplomatic arena the things don't happen at 8:15 tomorrow morning. It may be weeks or months."[30] The public brief preferred the Second Circuit's standard of "grave and irreparable harm," adding that the inevitability of harm required by Gesell should be replaced by its "real likelihood." It claimed the president could sue based on his broad foreign affairs power to conduct diplomacy and responsibility as Commander in Chief to preserve military secrets.

In contrast, Bickel agreed with Gesell's standard for a prior restraint. He also reiterated his earlier view that the president lacks any inherent power to obtain an injunction in this situation. The *Post* concentrated on First Amendment arguments to the exclusion of separation of powers.

In his secret brief, Griswold presented a number of allegedly harmful items, including the four volumes on secret negotiations (which, as the *Times* mentioned in its first installment, Ellsberg had removed), references to still active intelligence agents, the disclosure of Southeast Asia Treaty Organization contingency plans, a 1967 intelligence estimate of Soviet reaction to the Vietnam War, and National Security Agency (NSA) successes in breaking codes.[31] However, few specifics and little evidence of harm were provided to support these items. The *Post* suggested that rather than demonstrating serious harm, there was only "a deep seated—if not

[29]Rudenstine, *The Day the Presses Stopped,* 263; and Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 1979), 142–143.

[30]An edited transcript and tape of the oral arguments can be found in Peter Irons and Stephanie Guitton, *May It Please the Court: The Most Significant Oral Arguments Made before the Supreme Court since 1955* (New York: New Press, 1993).

[31]The brief can be found in John Cary Sims, "Triangulating the Boundaries of the Pentagon Papers," *William and Mary Bill of Rights Journal* 2 (Winter 1993): 341–453. It is discussed in that article and in Rudenstine, *The Day the Presses Stopped,* 267–272.

reflex—commitment by many high Government officials to maintaining continued secrecy."[32]

THE SUPREME COURT DECIDES

The need for an immediate decision left too little time to develop a consensus behind a single majority opinion. Instead, the six-justice majority simply agreed on a brief per curiam opinion stating that the government had not met the "heavy burden" against prior restraints without providing any guidance about how that burden could be met. The existing TROs were dissolved, and the newspapers were allowed to publish. Each of the six members of the majority wrote a separate opinion, with some endorsing one of the others but none commanding more than two votes.

Only Black and Douglas, as expected, took the absolutist position against any prior restraints. For Black, even the original TROs, like any injunction against publication, were "a flagrant, indefensible, and continuing violation of the First Amendment." Stressing the importance of a free press in a democratic society, he praised the newspapers for acting "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." Furthermore, finding an inherent presidential power "to halt the publication of news by resort to the courts would wipe out the First Amendment."

Douglas, too, believed that the First Amendment leaves "no room for governmental restraints on the press." For him, the Pentagon Papers were part of an important public debate, the kind of debate that is "vital to our national health." Although each joined in the other's opinion, Black's and Douglas's views have never gained the support of any other Supreme Court justice.

Brennan's opinion, however, came close to the absolutist position. For him, prior restraints should only be granted in a single narrow class of cases—during wartime when the government can prove that publication "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Believing that the government had come nowhere near proving this, he expressed the hope that the Court's decision would deter lower courts from granting TROs similar to those in this case in the future.

Unlike the other justices, Marshall considered this primarily a separation of powers case. "The issue is whether this Court or the Congress has the

[32]Rudenstine, *The Day the Presses Stopped,* 277. According to Rudenstine, the government has lost the *Times*'s secret brief.

power to make law." Congress's refusal to authorize prior restraints to protect national security prevented the judiciary from granting such injunctions. He asserted that separation of powers prevents the president and courts from making law "without regard to the action of Congress." Instead, the executive should use the congressionally enacted statutes to protect its secrets through criminal prosecution. Although David O'Brien has called Marshall's opinion "the most instructive for illuminating the constitutional and political issues in the Pentagon Papers. . . . case,"[33] it has not commanded much influence.

The pivotal opinions were those of Stewart and White, each of whom joined the other. For Stewart, the Constitution gives the president "enormous power" in national defense and foreign affairs. Because this power is largely unchecked by the other branches, only a public informed by a free press can effectively limit executive excesses. On the other hand, diplomacy and defense necessitate confidentiality. The solution to this conflict is that "the responsibility must be where the power is," with the executive rather than the judiciary, which leaves the courts merely to apply congressional criminal statutes after prosecution or decide the constitutionality of civil remedies. Without such specific statutes or proof of "direct, immediate, and irreparable damage to our Nation or its people," the courts lack power to prevent publication.

Despite his belief that publication was likely to "do substantial harm to public interests," White did not think that this was enough, in the absence of specific and limiting legislation, to meet the heavy burden against an injunction. Because the material presented to the Court was likely to remain secret, the government's "grave and irreparable danger" standard would provide little guidance to future courts. Instead, the administration should utilize the 1917 Espionage Act, which, while specifically rejecting executive censorship powers, provided a criminal remedy against publishing military secrets. White devoted approximately half of his opinion to explaining how this and similar laws could supply grounds for criminal prosecutions, even on facts that would not justify a prior restraint. He "would have no difficulty in sustaining convictions under these sections."

The three dissenters were most upset by the lack of time devoted to such an important case. For Burger, the conflict between the basic principles of a free press and "the effective functioning of a complex government" made this a difficult decision, exacerbated by a lack of information because of the

[33]David O'Brien, *The Public's Right to Know: The Supreme Court and the First Amendment* (New York: Praeger, 1981), 161.

"unseemly haste" with which the case was heard. During the months the *Times* spent analyzing the Papers, it could have negotiated with the government. Lacking adequate information, Burger would have returned the case to the district court for a full trial.

In his personal notes after hearing the arguments, Blackmun wrote that he believed "the government has proved its case on the diplomatic arena" because lives would be lost as a result of the possible prolongation of the war.[34] Blackmun's dissenting opinion was similar to Burger's in stressing his unhappiness with the rapidity of the decision. He would allow the lower courts to develop standards for balancing the press's broad right to publish against the far narrower government right to prevent such publication. Because the case had been decided the other way, however, he urged the newspapers to "be fully aware of their ultimate responsibilities" to the country when deciding what to print.

Because Burger and Blackmun joined Harlan's opinion, it should be viewed as the main dissent. After noting his displeasure with the speed of the case, Harlan relied on a quote from Representative (later Chief Justice) John Marshall that had been stressed in the 1936 *United States v. Curtiss-Wright Export Corp.* decision, that "the President is the sole organ of the nation in its external relations and its sole representative with foreign nations."[35] If so, the judiciary's review should be limited to determining whether the subject matter is within the president's foreign relations power and whether the decision that publication would irreparably damage national security was made personally by the head of the appropriate cabinet department. One critic of this rule points out the inherent conflict "of effectively delegating the power to restrict public access to information relating to current policies to those who have the greatest interest in maintaining those policies."[36]

With the injunctions lifted, the newspapers completed their series, after which the *Times* published a book version. Although the *Times* called the decision a "ringing victory for freedom," the *Post* expressed reservations about its narrowness as well as White's suggestion that the newspapers be criminally prosecuted.[37] In fact, the immediate impact turned out to be far less than many had hoped or feared. Although the government later unsuccessfully prosecuted Ellsberg, it declined to charge those who had

[34]Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (New York: Times Books, 2005), 70.
[35]299 U.S. 304 (1936).
[36]"The Supreme Court, 1970 Term," *Harvard Law Review* 85 (November 1971): 40–353, at 202.
[37]Giuffo, "High Drama at the Supreme Court," 71.

published the Papers. Despite selling a million copies, the *Times* book failed to generate much additional debate about the Vietnam War. President Nixon's 15 July announcement of his acceptance of China's invitation to visit as a first step toward normalizing relations between the two countries both demonstrated that those negotiations had not been harmed by the Pentagon Papers publication and shoved any remaining discussion of the Papers out of the headlines. When the government published its 12-volume edition of the Papers in late September, only 500 copies were sold.

Years later, those who had argued for the government in court claimed at least a partial victory. According to Seymour, in practice, the government had prevailed because the material that it had claimed would damage national security was not published by the *Times* or *Post*. "In short," he wrote in 1994, "the Government attorneys actually *accomplished the results* they were after—halting the publication of the particular documents that presented a current threat to the nation's welfare."[38] Similarly, Griswold, while conceding that there was no "trace of a threat to national security from the publication," suggested that this was because "with minor exceptions, the newspapers did not print at the time any items about which the Government was concerned."[39] These two advocates failed to point out that this was primarily due to Ellsberg's exclusions rather than the government's lawsuit.

In the end, the Pentagon Papers ruling turned out to be more important as a symbolic rebuff to claims of presidential power than for its substance. Because the newspapers, more concerned with winning the case than establishing constitutional doctrine, had conceded the government's right to prevent the publication of material extremely and immediately damaging to national security, the question before the Court was the factual one of whether the Papers presented such a danger. The Court's failure to unite behind any more than its brief per curiam opinion, meant, as Louis Henkin wrote soon afterward, that "a majority is obtained for the judgment only on the narrowest grounds, and the result is explained and justified only in a most cryptic opinion."[40] Without explaining just what was required to meet the "heavy burden" against prior restraint, the Supreme Court provided little guidance for future courts to follow. Nor, except for Marshall, did any of the justices seriously address the question of whether the

[38]Whitney North Seymour, Jr., "Press Paranoia—Delusions of Persecution in the Pentagon Papers Case," *New York State Bar Journal* 66 (February 1994): 10–12, 49.
[39]Erwin Griswold, "Secrets Not Worth Keeping: The Courts and Classified Information," *The Washington Post*, 15 February 1989; and Griswold, "No Harm Was Done," 15.
[40]Louis Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," *University of Pennsylvania Law Review* 120 (1971): 271–280, at 271.

president has the inherent power to seek injunctions against publication from the courts.

Has the Internet made this decision even less consequential? In 1971, a court order preventing publication or broadcast of classified documents was potentially effective because of the difficulty of disseminating the information to the public. Because television and radio refused to consider broadcasting the documents, Ellsberg's only method of distribution was through print. The sheer volume of the documents limited his ability to make multiple copies, as this could only be done on office computers after closing time lest a concerned citizen notice the large red letters spelling out "TOP SECRET" at the top and bottom of every page. Those few copies had to be personally delivered in boxes to each newspaper that agreed to consider publication. Despite these obstacles, Ellsberg was able to follow each government request for a TRO against a specific newspaper by giving at least part of the Papers to one or more additional publications. During the two weeks between the *New York Times*'s first publication and the Supreme Court's decision, so many sources had already published parts of the Pentagon Papers that the newspapers were able to make a plausible claim that an injunction would be too late to prevent disclosure of the allegedly harmful material.

THE WIKILEAKS REVOLUTION

Patricia Bella argues that the consensus of the opinions in the Pentagon Papers case was that "the disclosure of national security information depends upon the judgment of the publisher—constrained by the possibility of criminal liability, by the market, or by journalistic ethics—and not solely upon the judgment of the leaker."[41] In her view, both that case and the WikiLeaks disclosures present the same basic question: who decides when the public's need to know outweighs potential damage to national security? When the *Times* decided to publish, it spent months analyzing and editing the documents it had been given. The *Post* chose not to include the text of classified documents. Judge Gurfein seems to have shared Bella's view of the responsibility of the press, as, along with his ruling allowing publication, he gave an attorney for the newspaper a list of documents he hoped it would consider not publishing. After careful review, the *Post* found that many were not due to be published while following Gurfein's suggestions for a few others.[42]

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[41]Patricia L. Bella, "WikiLeaks and the Institutional Framework for National Security Disclosures," *Yale Law Journal* 121 (April 2012): 1448–1526, at 1472.
[42]Floyd Abrams, "The Pentagon Papers a Decade Later," *The New York Times*, 7 June 1981.

WikiLeaks began releasing documents in 2006 but came to the attention of a wider public in 2010 with a graphic video of helicopter strikes that killed Iraqi civilians. In addition to the raw video, which received more than two million hits on YouTube, WikiLeaks released an edited version with introductory statements, graphics, and interviews with the families of victims. Charlie Beckett describes it as "a highly partisan but recognizably journalistic documentary film."[43] Although it has servers in countries such as Sweden and Germany, WikiLeaks has no geographic headquarters. Instead, it consists largely of networks of supporters and mirrored sites in cyberspace. The organization invites anonymous leaks from around the world. Producing the "Collateral Murder" video converted WikiLeaks into a mix of leaker and alternative news organization but used up nearly all of the organization's resources. Disappointed by the worldwide response, Assange looked for bigger stories for his organization.[44]

That larger story came courtesy of PFC Bradley Manning, who had access to classified material through a network called SIPRNET. Manning brought a music CD to work and then, while pretending to listen to it, replaced the songs with classified documents that he passed on to WikiLeaks. Because this cache was too large for WikiLeaks' shoestring operation, Assange worked out an agreement with *Guardian* reporter Nick Davies to grant his newspaper advance access on the condition that it not publish until WikiLeaks' own release of the 77,000 documents, which occurred on 25 July 2010. Fearing that the United Kingdom's Official Secrets Act could prevent publication, Assange made similar arrangements with the *New York Times* and *Der Spiegel.*[45]

On the day the *Times* articles appeared, an explanation of how the newspaper had decided what to publish was included.[46] Stressing that WikiLeaks had no role other than providing the documents, the newspaper noted that it had spent a month going over the data, verifying it with other sources, determining which material should be excluded as damaging national security, and preparing the final articles. Despite their reluctance to publish classified material, the editors believed that the importance of this information for understanding the war in Afghanistan outweighed any potential harm, especially because most of the material was marked "secret," "a relatively low level of classification" compared to "top secret"

[43]Charlie Beckett with James Hall, *WikiLeaks: News in the Networked Era* (Cambridge: Polity Press, 2012), 7.
[44]Beckett, *WikiLeaks,* 43–45.
[45]Ibid., 49–52.
[46]"Piecing Together the Reports and Deciding What to Publish," *The New York Times*, 25 July 2010.

and other higher categories. The *Times* discussed these documents with government officials, accepting some of their suggestions for redactions. According to Goodale, the newspaper was able to initiate these discussions only because the Pentagon Papers ruling had effectively removed any fear of a prior restraint.[47]

WikiLeaks employed similar agreements with mainstream media organizations for 400,000 Iraq War documents made available in June of 2010 and published in October. On 26 November, Assange asked the American ambassador to the United Kingdom which of more than 250,000 cables that he had made the government aware of six months earlier "would put individual persons at significant risk of harm" if named.[48] There were redactions, largely those recommended by WikiLeaks' partner organizations. Assange explained the motivation for them as "for political reasons. It was not a moral question. It was done to prevent journalistic opportunists and the U.S. government from trying to distract from the main game."[49]

Like the Pentagon Papers, these three sets of leaked documents provoked sharp denunciations when published, yet ultimately, they seem, aside from embarrassment, to have done little damage to national security. Even Secretary of Defense Robert Gates concluded late in 2010, "Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest."[50]

The most recently leaked documents, revealed in June 2013, concern secret NSA surveillance and data-gathering programs, one of which, named Prism, collected six years of information from major Internet companies. Without revealing his identity, NSA contract employee Edward Snowden contacted documentary filmmaker Laura Poitras and Brazil-based *Guardian* columnist Glenn Greenwald about a possible story concerning the NSA. Poitras then asked *Washington Post* reporter Barton Gellman whether the source seemed legitimate. Snowden soon sent a sample of 20 documents about Prism, leading to the larger disclosures.[51] The *Guardian* and *Post* published articles disclosing how the NSA had obtained access to the servers of the largest American Internet companies, including Facebook and Google, through Prism, as well as a top-secret

[47]Goodale, *Fighting for the Press,* 218.
[48]Bella, "WikiLeaks and the Institutional Framework for National Security Disclosures," 1477.
[49]Clint Hendler, "The WikiLeaks Equation: Secrets, Free Speech and the Law," *Columbia Journalism Review*, 28 December 2010, accessed at http://www.cjr.org/behind_the_news/the_wikileaks_equation.php?page=all, 15 August 2013.
[50]Hendler, "The WikiLeaks Equation."
[51]Charlie Savage and Mark Mazzetti, "Cryptic Overtures and a Clandestine Meeting Gave Birth to a Blockbuster Story," *The New York Times*, 11 June 2013. Poitras subsequently made a film, *Citizenfour* (2014), about her experience with Snowden.

court order requiring Verizon to give the government millions of customer phone records.[52]

When Snowden publicly revealed himself as the source of the leaks, congressional leaders of both parties denounced him in the harshest terms. Republican House Speaker John Boehner declared that "he's a traitor," while Democratic senator Dianne Feinstein labeled what he did as "an act of treason." Snowden countered by explaining that "my sole motive is to inform the public as to that which is done in their name and that which is done against them."[53] As evidence of the extent of government surveillance programs has grown, there has been increasing sympathy for Snowden's role in opening up the debate on the legitimacy of these programs. The *New York Times,* arguing that even though he may have committed a crime, "he has done the country a great service," suggested in an editorial that Snowden should receive either clemency or a plea bargain that would substantially reduce his potential punishment.[54]

LEAKS AND THE LAW: WHERE DO WE STAND?

If the Pentagon Papers case made prior restraints to prevent the publication of classified material nearly impossible, the Internet has delivered them a fatal blow. Nevertheless, that court precedent suggested two limits on what is published: the editorial judgment of the media and the real possibility of criminal prosecution.

Bella's argument that the Pentagon Papers ruling placed decision-making power in the hands of media constrained by the market and journalistic ethics may seem far-fetched in an age when the Internet has undermined the mainstream media while empowering almost anyone with an opinion to express it. In fact, some critics of WikiLeaks have dismissed it as merely an organization that dumps data. According to Anne Applebaum, "the leaks offer nothing more than raw data." John Yoo wrote that "WikiLeaks is not the *New York Times* or the *Wall Street Journal* and it does not have First Amendment rights."[55]

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[52]Glenn Greenwald and Ewen MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others," *The Guardian*, 6 June 2013; and Barton Gellman and Laura Poitras, "U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program," *The Washington Post,* 7 June 2013, accessed at http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html, 1 June 2015.

[53]Editorial Board, "Surveillance: Snowden Doesn't Rise to Traitor," *The New York Times*, 11 June 2013.

[54]"Edward Snowden, Whistle-Blower," *The New York Times*, 2 January 2014.

[55]Anne Applebaum, "Dross Check," Slate, 28 July 2010, accessed at http://www.slate.com/articles/news_and_politics/foreigners/2010/07/dross_check.html, 5 August 2013; and John Yoo, "The Manning Verdict Is a Mistake," *National Review,* 30 July 2013, accessed at http://www.nationalreview.com/corner/354766/manning-verdict-mistake-john-yoo, 5 August 2013.

While WikiLeaks is certainly far from the model of the mainstream media, it quickly learned that simply dumping data without editorial judgment would not accomplish its goals. After its first efforts drew far less attention than hoped, it presented the Collateral Murder video not only in a raw but also in a shorter edited version with captions, commentary, and interviews added. When even this limited effort strained resources nearly to the breaking point without attracting the hoped-for publicity, WikiLeaks realized that at least some traditional media organizations would have to be brought in. The stories on the Afghan and Iraq War logs and the embassy cables published by major news organizations omitted identifying material that could injure individuals and accepted suggestions from the government about harmful material. At the suggestion of its partners, WikiLeaks redacted some of this material from the documents presented on its Web site. It was only when the password was inadvertently revealed that the raw data were exposed.

Is it possible that at some future time, WikiLeaks or a similar group could develop a financial model that would provide adequate resources to enable it to act on its own rather than partner with established media? Even the largest social media companies such as Facebook and Twitter have only recently begun to turn a profit through advertising or selling information about their users (something WikiLeaks is unlikely to do), while mainstream media companies are also finding it difficult to monetize their Web sites. Unable to rely on these sources of funding, WikiLeaks would have to depend on crowdsourcing of some sort. The American government made even this difficult by pressuring credit card and other companies to terminate their relationships with WikiLeaks. In contrast, as Jack Balkin has pointed out, "had they publicly encouraged Visa, MasterCard, and Amazon to stop doing business with the *New York Times,* this would have seemed like a gross interference with freedom of the press and a new form of digital McCarthyism."[56] By late 2011, WikiLeaks' monthly contributions had been reduced to less than 7,000 euros from an average of 100,000 the previous year.[57] Although the blockade was later lifted, one recent estimate suggests that the organization lost $50 million because of it. In 2012, donations totaled just 69,000 euros compared to expenditures of 400,000, according to the annual report of its managing foundation,

[56]Jack M. Balkin, "Old-School/New-School Speech Regulation," *Harvard Law Review* 127 (June 2014), 2296–2342, at 2327–2328.

[57]Raphael G. Satter, "Julian Assange: WikiLeaks Could Shut Down over Financial Woes," Huffington Post, 25 October 2011, accessed at http://www.huffingtonpost.com/2011/10/24/julian-assange-wikileaks-shut-down_n_1028197.html, 23 January 2014.

Wau Holland. Its spokesman lamented that even a temporary surge of contributions after the Snowden revelations failed to bring WikiLeaks anywhere near the break-even point.[58] For the foreseeable future, a crowd-sourcing model is unlikely to provide adequate financing for WikiLeaks to operate without partners.

Although this self-censorship mitigated damage to individuals and national security, it was the unauthorized leaks themselves that the Obama administration wanted to prevent. Several of the justices in the Pentagon Papers case had suggested that rather than seek a prior restraint, the executive could have employed post-publication criminal prosecutions to discourage leakers. Justice White used half of his opinion to present a virtual manual for such criminal actions. However, when the Nixon administration charged Ellsberg, a mistrial was declared, and the charges were dismissed because of government misconduct. When asked about prosecutions of leakers, Obama's answer could easily have been given by Richard Nixon: "anyone who leaks classified information is committing espionage."[59]

Prior to the Obama administration, a total of three indictments had been brought under the 1917 Espionage Act against alleged leakers, including Ellsberg. In contrast, when Snowden was charged, it was the administration's seventh such prosecution. Soon after his 2009 appointment as director of national intelligence, Dennis Blair, disturbed by the fact that none of the 153 leak cases referred to the Justice Department for investigation during the previous four years had resulted in an indictment, joined Attorney General Eric Holder in encouraging the administration to bring charges against leakers if the information resulted in damage to national security. The purpose, according to Blair, is to "make people realize that there are consequences to this and it needed to stop."[60] Although it may seem paradoxical that liberal (and former constitutional law professor) President Obama is bringing more leak prosecutions than his conservative predecessor, that very paradox could provide the explanation. As a conservative, George W. Bush would have faced considerable criticism from liberals for sending leakers to prison, whereas Obama, much

[58]Ben Moshinsky, Saleha Mohsin, and Cornelius Rahn, "WikiLeaks Finds Snowden Cash Bump Elusive," *Bloomberg Businessweek,* 11 July 2013, accessed at http://www.businessweek.com/articles/2013-07-11/wikileaks-finds-snowden-cash-bump-elusive, 23 January 2014.
[59]Goodale, *Fighting for the Press,* 207.
[60]Sharon LaFraniere, "Math behind Leak Crackdown: 153 Cases, 4 Years, 0 Indictments," *The New York Times*, 20 July 2013; and Cora Currier, "Charting Obama's Crackdown on National Security Leaks," 30 July 2013, accessed at http://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks, 22 August 2013.

like Nixon visiting China, is at least partially insulated from such attacks. The prosecutions also make it more difficult for Republicans to label him as soft on national security issues.

This aggressive prosecution strategy has not only failed to stem leaks, it has endangered press freedom. The most significant success was the conviction of Bradley (now Chelsea) Manning in military court. Manning was found guilty of six counts of violating the Espionage Act as well as a number of other charges, resulting in a 35-year sentence. However, the government was rebuffed in its efforts to go farther when Manning was acquitted of the even more serious charge of aiding the enemy. The government's argument was that by revealing these documents to the public, Manning was also making them available to al Qaeda. Had that argument been accepted, it would have made virtually all leaks and possibly even publication of classified information subject to the harshest penalties.

While others involved in the leaks discussed in this article were quickly identified, bringing them to court has proved more difficult, as leaking, which had been a purely American operation in Ellsberg's day, has been globalized. Assange, an Australian citizen, said that WikiLeaks had been warned by American officials that he "could be charged as a co-conspirator to espionage." After the document releases in July of 2010, Attorney General Holder confirmed an investigation, and by the end of the year, the Justice Department had verified that it was considering a variety of charges.[61] In December, Assange was arrested in the United Kingdom in order to extradite him to Sweden for questioning about possible sexual offenses. Claiming that these charges were a pretext to get him removed to the United States, Assange was granted asylum in the Ecuadorean Embassy in London in August 2012. A year later, the Ecuadorean government reasserted its support on the grounds that Assange is "a journalist who feared political persecution."[62]

In June 2013, Snowden was charged under the Espionage Act, and his extradition from Hong Kong was requested. Like Assange, Snowden was able to find refuge, in his case in Russia.

Stalemated, the Obama administration has been considering the prosecution of journalists. Reacting to the embassy cable releases, then-senator Joseph Lieberman, after asserting that WikiLeaks had violated the Espionage Act by its revelations, continued, "but then what about the news

[61]Charlie Savage, "U.S. Prosecutors Study WikiLeaks Prosecution," *The New York Times*, 7 December 2010.
[62]"Ecuador Restates Support for Julian Assange on Asylum Anniversary," *The Guardian*, 16 August 2013, accessed at http://www.theguardian.com/media/2013/aug/16/ecuador-julian-assange-asylum-anniversary, 23 August 2013.

organizations—including the *Times*—that accepted it and distributed it . . . I think that bears a very intensive inquiry by the Justice Department."[63] There is no evidence that the administration is considering going this far, but it has been targeting individual reporters.

The first investigation during the Obama presidency concerned a Fox News report that American intelligence had learned of North Korean plans for a nuclear test, although some information was omitted "to avoid compromising sensitive overseas operations."[64] Investigators not only checked security badge records of reporter James Rosen's visits to the State Department, they also obtained a search warrant for his emails. This evidence pointed to contract analyst Stephen Kim, who in February 2014 pleaded guilty to revealing classified information and was sentenced to 13 months in prison.[65] What makes these events particularly troubling is that the 1980 Privacy Protection Act requires subpoenas, which can be contested in court, rather than search warrants, which cannot, unless the reporter is involved in criminal activity.[66] In its affidavit, the government claimed that Rosen, whom it did not refer to by name, was acting "at the very least, either as an aider, abettor and/or co-conspirator."[67] The Espionage Act (18 USC § 793) is quite broad in listing the material covered, including, among other things, "any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense."

Reacting to criticism over both the Rosen warrant and the seizure of Associated Press phone records in an investigation of another leak, the Justice Department announced new guidelines that would only use the suspect exception to the Privacy Protection Act if the reporter "is the focus of the criminal investigation for conduct going beyond ordinary news gathering activities." Although these guidelines may make it less likely that reporters will be prosecuted for receiving classified material, they do not rule out the possibility. For example, what are "ordinary news gathering activities"? Furthermore, such guidelines could easily be revised or repealed by the current or a future administration.

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[63]Savage, "U.S. Prosecutors Study WikiLeaks Prosecution."
[64]James Rosen, "North Korea Intends to Match U.N. Resolution with New Nuclear Test," Fox News, 11 June 2009, accessed at http://www.foxnews.com/politics/2009/06/11/north-korea-intends-match-resolution-new-nuclear-test/, 23 August 2013.
[65]Ann E. Marrimow, "Ex State Department Adviser Stephen J. Kim Sentenced to 13 Months in Leak Case," *The Washington Post*, 2 April 2014.
[66]42 USC Chapter 21A.
[67]Brian Stelter and Michael B. Shear, "Justice Dept. Investigated Fox Reporter over Leak," *The New York Times*, 20 May 2013.

As noted earlier, Senator Lieberman had urged the Justice Department to consider the possibility of prosecuting the *Times* for publishing leaked material. He was hardly the first to make such a suggestion. For example, when the *Times* revealed the Bush administration's warrantless wiretapping program, Attorney General Alberto Gonzales told an interviewer that the Justice Department was investigating that very possibility because "we have an obligation to enforce the law and to prosecute those who engage in criminal activity."[68]

In 2000, Congress passed a bill that would have amended the Espionage Act by criminalizing the unauthorized disclosure of information that "is or has been properly classified."[69] President Bill Clinton vetoed this "well-intentioned" bill as "unnecessarily chill[ing] legitimate activities that are at the heart of a democracy."[70] Other proposals to penalize media disclosures of classified material introduced since then in Congress include the SHIELD (Securing Human Intelligence and Enforcing Lawful Dissemination) Act and the Espionage Statutes Modernization Act in the 111th Congress.[71]

Because no administration has ever charged a member of the media for disclosing classified material, the Supreme Court has not addressed the issue. It was not presented to the Court in the Pentagon Papers case. This forces us to look for clues in vaguely related cases. The most relevant is *Bartnicki v. Vopper*.[72] During a contentious negotiation over a teachers' collective bargaining agreement, an unknown person intercepted a conversation between Bartnicki and another union leader. Through an intermediary, a tape was given to Vopper, who played it on his radio program. Bartnicki sued for damages under a law that bars intentionally disclosing illegally obtained electronic communications. Although the government defended the law as protecting privacy, the Supreme Court ruled, 6–3, "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[73] Justice Stephen Breyer's concurrence, however, pointed out that because the plaintiff had a low expectation of privacy compared with the substantial

[68]Walter Pincus, "Prosecution of Journalists Is Possible in NSA Leaks," *The Washington Post*, 22 May 2006.
[69]H.R. 4392 § 304, 106th Congress.
[70]"Message on Returning without Approval to the House of Representatives the Intelligence Authorization Act for Fiscal Year 2001," 36 *Weekly Compilation of Presidential Documents* 278 (4 November 2000).
[71]Jennifer K. Elsea, *Criminal Prohibitions on the Publication of Classified Defense Information* (Washington, DC: Congressional Research Service, 2013), 30.
[72]532 U.S. 514 (2001).
[73]Ibid at 535.

public interest in the issue of the labor dispute, the decision "does not create a 'public interest' exception to privacy protection."[74] In *United States v. Stevens,*[75] the Court, by an 8–1 vote, overturned the conviction of the maker of dog fight videos under a law banning films of animals wounded or killed because the law was overly broad. While both these laws overturned convictions for purveyors of public information, neither carved out a blanket First Amendment exemption for the media. If the complication of national security is added, it remains an open question whether prosecutions of members of the media for publishing or broadcasting public information would violate the First Amendment.

Because of the globalization of leaks, danger to press freedom comes not only from the U.S. government. In August 2013, Greenwald's partner, Brazilian citizen David Miranda, traveled to Berlin to exchange documents stored on encrypted thumb drives with Poitras. On his return flight, he was intercepted during a stop in London by British authorities who questioned him for nine hours, seizing all his electronic devices, under the authorization of the Terrorism Act. The law makes refusal to cooperate with the questioning a criminal offense despite not providing a right to counsel. Although nine hours is the maximum time the law permits, unlike Miranda, 97 percent of those detained are held for less than one hour.[76] A spokeswoman for the British Home Office defended the authorities' actions by arguing that "if the police believe that an individual is in possession of highly sensitive stolen information that would help terrorism, then they should act, and the law provides them a framework to do that."[77]

CONCLUSION: THE LEGACY OF THE PENTAGON PAPERS DECISION

In the short run, the Pentagon Papers case was a symbolic victory for freedom of the press, but its most substantive effect was making prior restraints to prevent publication of classified information nearly impossible. As events of the last few years have demonstrated, however, the development of the Internet and the resulting globalization of leaks eventually would have done that in practice without a court decision.

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[74]Ibid at 539.
[75]559 U.S. 460.
[76]Charlie Savage and Michael Schwirtz, "Britain Detains the Partner of a Reporter Tied to Leaks," *The New York Times*, 18 August 2013; and Guardian Staff, "Glenn Greenwald's Partner Detained at Heathrow Airport for Nine Hours," *The Guardian*, 18 August 2013, accessed at http://www.theguardian.com/world/2013/aug/18/glenn-greenwald-guardian-partner-detained-heathrow, 18 August 2013.
[77]Steven Erlanger, "British Newspaper Has Advantages to Battle with Government over Secrets," *The New York Times*, 20 August 2013.

With responsibility shifted to the mainstream media, there was considerable restraint on their part. For example, when the *New York Times* learned of the Bush administration's warrantless interception of e-mails, rather than publishing this information before the 2004 election, it initiated discussions with the government. In December 2005, with the story still unpublished, President Bush met with representatives of the *Times* in the Oval Office to convince them to make their self-censorship permanent. These efforts failed when it became clear that the newspaper's reporter, James Risen, was ready to reveal the program in a forthcoming book, causing the newspaper finally to print the story. Despite threats of criminal prosecution, the administration did nothing.[78] After reviewing Snowden's material about the secret budget for the U.S. intelligence agencies, the *Washington Post* concluded that "sensitive details are so pervasive in the documents that The Post is publishing only summary tables and charts online."[79]

The emergence of outside groups such as WikiLeaks and independent bloggers and columnists such as Greenwald made the total suppression of stories impossible, but the need to work in partnership with the mainstream media meant that these stories would include redactions and editing to protect against harm to individuals and national security. To a government incensed by the very idea of unauthorized leaks, however, this was not enough. The Obama administration took up the neglected legacy of the Pentagon Papers decision: the possibility of criminal prosecution. The result was a record number of Espionage Act indictments of leakers, but, as the most prominent targets found sanctuary abroad, action began to be taken against the media itself. Although so far, the American government has limited these actions to searches and subpoenas, the Rosen warrant has raised the possibility that those who report on and even those who publish leaked national security information could be prosecuted. Whether naming Rosen as a possible "co-conspirator" was merely an attempt to avoid the inconvenience of an adversarial subpoena proceeding in favor of an ex parte search warrant or the beginning of something more serious remains to be seen, but as theater audiences are well aware, if a loaded weapon appears in the first act, they should be prepared for it to be fired after intermission. Perhaps the ultimate legacy of the Pentagon Papers case is to confirm the old saying, "beware what you wish for; it might come true."

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[78]Goodale, *Fighting for the Press,* 200–201.

[79]Barton Gellman and Greg Miller, "'Black Budget' Summary Details U.S. Spy Network's Successes, Failures and Objectives," *The Washington Post*, 30 August 2013, accessed at http://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html, 1 June 2015.