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# New York Times v. U.S.: Implications and Relevance in the 21st Century

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# New York Times v. U.S.: Implications and Relevance in the 21st Century

## Abstract

In 1971, the *New York Times* released the first installment in a series later referred to as the Pentagon Papers that would eventually have significant political, social, and historical impacts that are felt even in the 21st Century. Following the first release, President Nixon's administration sought an injunction against the publication of the remaining contents of the classified study, ultimately becoming an extensive legal process that culminated in the Supreme Court. In a per curiam opinion, the Court ruled that in accordance with *Organization for a Better Austin v. Keefe* and *Near v. Minnesota* that the federal government did not meet the burden of proof required for prior restraint. The individual Justices' opinions were divergent on several fronts and provide unique insight into the complexity of the issue. This decision was the driving force behind the formation of the White House Plumbers, the group that orchestrated one of the most infamous political scandals and the eventual implosion of Nixon's career. It also effectively changed the tide of the Vietnam War, contributed to the credibility gap, and forever modified the relationship between the press and the federal government. The Pentagon Papers case has also served as one of the most famous freedom of the press cases and established a de facto precedent. The aftermath of its outcome is still felt today with the increasing prevalence of government whistle-blowers, such as WikiLeaks, PFC. Manning, and Edward Snowden.

## Keywords

Pentagon Papers, New York Times v. U.S., government whistle-blowing, New York Times, NYT, Vietnam War, Robert McNamara, Henry Kissinger, Washington Post, Richard Nixon, Espionage Act of 1917, political scandal, freedom of the press

## Disciplines

American Politics | Constitutional Law | Defense and Security Studies | History | Journalism Studies | Law and Politics | Legal Studies | Military and Veterans Studies | Military, War, and Peace | Political History | Political Science | President/Executive Department | Public Affairs | Public Affairs, Public Policy and Public Administration | Social Influence and Political Communication | United States History

## Comments

Recipient of the 2014 Samuel P. Weaver Prize

# *New York Times v. U.S.:* Implications and Relevance in the 21<sup>st</sup> Century

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## **Introduction**

### **The Vietnam War**

Since its inception, ambition and altruism has shaped and altered the course of United States history. As a fledgling nation, America pursued expansionist and idealistic goals, seeking to build power and influence, usually at the expense of weaker international states. The American self-perception was that it was the country's responsibility to spread their democratic ideals with the rest of the world (Anderson and Ernst 2007, 16). This mission, coupled with a sense of survival of the fittest, led to an assertive, yet ambiguous, national role in international relations (Anderson and Ernst 2007, 16). This perspective is evident throughout the course of American history, from World War II to the current War on Terror. However, the United States has not always been successful in its international endeavors, as evidenced in the Vietnam War where the nation experienced the very limits of its power and righteousness (Anderson and Ernst 2007, 16).

The official rationale for America's intervention in the affairs of Vietnam was the significance Vietnam held in regards to the global Cold War that pitted the United States' interests and ideology against that of the Soviet Union (Anderson and Ernst 2007, 16). Due to numerous factors—including the increasingly dangerous Cold War in Europe, the successes of the Chinese Communist Party, and attacks on U.S. naval destroyers by North Vietnam—Washington was led to direct involvement in the Indochina conflict with the 1964 Gulf of Tonkin Resolution (Anderson and Ernst 2007, 17; Berinsky 2009, 18). In the early 1960s and the beginning of warfare in Vietnam, the general consensus of American citizens was that it was the duty of the United States to contain Communist political power wherever it materialized (Anderson and Ernst 2007, 17). However, as the years wore on, public opinion began to decline

as the nation became further embroiled in the conflict (Berinsky 2009, 18). This steady trend downward was punctuated by three key turning points; prominent amongst them was the year 1971 (Berinsky 2009, 20). The year 1971 is significant because on June 13, the *New York Times* released the first installment in a series later referred to as the Pentagon Papers that would eventually change the course of United States history (U.S. National Archives and Records Administration, 2011).

### **The Pentagon Papers**

The atmosphere of the nation during the late 1960s and early 1970s was fraught with the intensity of combat in Vietnam, such as fighting in the demilitarized zone that separated North and South Vietnam, bombing raids in northern Laos, as well as the increasing revelation of shady governmental misconduct, such as the exposure of secret CIA bases (Prados and Porter 2004, 1-2). By 1968, citizens were clamoring for the nation to pull out of Vietnam, and yet three years later, the United States was still as deeply entrenched as before (Prados and Porter 2004, 3). The country witnessed President Nixon's power become absolute through the widespread manipulation of information to the point where it was unclear where the lies ended and reality began (Prados and Porter 2004, 2). Driven by these fears and vocal protests from the public, legislative leaders attempted to halt the reach of the Executive Branch by voting to repeal the Gulf of Tonkin resolution and offering bills, riders, and amendments with the aim of restricting Nixon's power. However, despite these efforts, Nixon still vowed that he would continue military efforts in Vietnam. The nation was in an uproar and it was during this immense controversy that the Pentagon Papers were "dropped like a huge stink bomb," (Prados and Porter 2004, 2).

On June 13, 1971, the front page of the *New York Times* read “Vietnam Archive: Pentagon Study Traces Three Decades of Growing U.S. Involvement,” the first installment of what was to become a major series based upon a massive, top-secret study compiled by the Pentagon (Prados and Porter 2004, 1). It catalogued the innermost thoughts of Presidential administrations during crucial points of the war, from Harry S. Truman to Lyndon Johnson, and provided an inside account of the government’s choices on the Vietnam War. Over 7,000 pages long, the study investigated political-military involvement in Vietnam from 1945-1967 with the use of documents the government had considered classified (Prados and Porter 2004, 51). Suddenly the hidden intentions of American policymakers were revealed to the general public and a stark contrast emerged between what Americans had been told regarding the war and what was actually occurring (Prados and Porter 2004, 3). The Pentagon Papers demonstrated a consistent, systematic deception by the American government (Prados and Porter 2004, 54). The study also revealed that the United States had secretly expanded the war in Indochina with the bombings of Cambodia and Laos, Marine Corps attacks, and coastal raids on North Vietnam, none of which had been reported on by the mainstream media (Prados and Porter 2004, 52).

The Secretary of Defense, Robert McNamara, had originally commissioned the Vietnam Study Task Force on June 17, 1967 with the intent of compiling an in-depth history of America’s every action in the Vietnam War, the study the *New York Times* would later use (Prados and Porter 2004, 12). Thirty-six analysts worked on the project under direction from Assistant Secretary of Defense John McNaughton and then Leslie Gelb, a Defense Department official, following the death of McNaughton (Prados and Porter 2004, 14-20). One such analyst was Daniel Ellsberg, who was later responsible for the publishing of the study (Prados and Porter 2004, 51). Appalled by the government’s systematic public lies about the war, Ellsberg originally

appealed to National Security Adviser Henry A. Kissinger about the study and Kissinger's ability to learn from the findings in order to better lead the country (Prados and Porter 2004, 51).

Kissinger refused to listen to Ellsberg, and believing that he had no other recourse available to him to help the American people, Ellsberg turned to the media (Prados and Porter 2004, 51).

Ellsberg leaked the secret documents to the *New York Times* and the *Washington Post* who then labored for several months to pare the material down to a manageable amount to be released (Prados and Porter 2004, 60). Nixon originally was not too concerned with the publication because the findings mostly embarrassed the Johnson and Kennedy administrations (Prados and Porter 2004, 78). However, Kissinger convinced the president that it would be remiss not to oppose the publication because it would establish a negative precedent for future state secrets and urged Nixon to prosecute Ellsberg under the Espionage Act of 1917 (Prados and Porter 2004, 79). Kissinger also persuaded Nixon to implore to the *New York Times* and *Washington Post* to voluntarily cease publication of the series (Prados and Porter 2004, 78). When the newspapers refused to comply, the federal government initiated legal action that would later become one of the most important First Amendment decisions in American legal history.

#### ***New York Times CO. v. United States (1971)***

On April 8, 1736, Benjamin Franklin wrote, "Freedom of speech is a principal pillar of a free government; when this support is taken away the constitution of a free society is dissolved, and tyranny is erected on its ruins." This statement is significant in that it demonstrates how highly the Founding Fathers valued the press as a safeguard of democracy and integral to combating tyranny. In the case of the Pentagon Papers, the government sought an injunction against the publication by the *New York Times* and the *Washington Post* of the remaining contents of the classified study that exposed presidential misconduct and in so doing, violated the

very nature of Franklin’s principle (*New York Times v. U.S.* 1971). President Nixon argued that governmental restriction on speech or publication before its actual expression, otherwise known as prior restraint, was legal in this case to protect national security and continuing war efforts (Garner 2009, 1314). However, the lower courts did not see the issue as such. Each District Court denied injunctive relief on this basis and the Court of Appeals for the District of Columbia affirmed the judgment while the Second Circuit remanded the case back to the District Court in New York for further hearings. The Supreme Court granted certiorari almost immediately due to the case’s high-profile nature and implications for the Executive Branch. The Supreme Court addressed the issues at hand in a *per curiam* opinion. Directly translated as “by the court,”<sup>1</sup> the *per curiam* opinion in *New York Times v. U.S.* examined the role of the executive branch and its power (or lack thereof) in limiting the freedom of the press, an issue that has plagued the government since its inception.

The First Amendment of the Constitution stipulates:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (Emphasis added).

Traditionally the Court has ruled in favor of the press on issues of prior restraints of expression. As *Bantam Books, Inc. v. Sullivan* (1963) held, “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” Another key Supreme Court case focusing on this First Amendment issue was *Organization for a Better Austin v. Keefe* (1971) in which the Court said that the government “thus carries a heavy burden of showing justification for the imposition of such a restraint.” Relying on these two major

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<sup>1</sup> *Per curiam* opinions concurrently grants certiorari and disposes of the virtues while discussing both the issues and the facts involved without identifying the individual judge who penned the decision (Garner 2009, 1201).



precedents, as well as *Near v. Minnesota* (1931), in a six to three decision, the Court found that in the case of the *New York Times v. U.S.*, the federal government did not meet the burden of proof required for prior restraint and therefore could not censor the *New York Times* or the *Washington Post*. As such, they affirmed the ruling of Court of Appeals for the District of Columbia Circuit and reversed the order of the Court of Appeals for the Second Circuit and remanded it with the instructions to enter a judgment affirming that of the Southern District Court of New York. To accompany this decision, six Justices penned concurring decisions and three wrote dissenting ones.

Justice Black, joined by Justice Douglas, authored the first concurring opinion. Black argues that as stated under the First Amendment, the press must be left free to publish news—regardless the source—without censorship, injunctions, or prior restraints. He believes that the guarding of diplomatic and military secrets at the expense of informed representative government is not justified and asserts that to hold any other way would “make a shambles of the First Amendment.” Justice Black argues that this is the “first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says,” and is pressured to succumb to the will of the federal government. To act in such a manner, Black believes, would be to eradicate the “essential purpose and history of the First Amendment” and “destroy the fundamental liberty and security of the very people the government hopes to make secure.” He believes that “security” should not be used to “abrogate the fundamental law embodied in the First Amendment.” Black relies heavily on the writings of the Founding Fathers, asserting that the only way to effectively expose deception in the government and sustain democracy is through a free and unrestrained press. In Black’s opinion,

the *New York Times* and the *Washington Post* should be commended for their valor rather than vilified.

Justice Douglas, with whom Justice Black joins, wrote the second concurrence. Douglas stated that the First Amendment leaves no room for governmental restraint on the press and it was created with the dominant purpose to prohibit the governmental suppression of embarrassing information. Douglas also asserts that there is no statute enacted by Congress that would bar the publication of the Pentagon Papers by the press. He addresses the government's argument that the newspapers' actions were barred under the Espionage Act of 1917 18 U.S.C. § 793(e) in saying that Congress was capable of distinguishing between the publication of material and communication of that same information and the fact that they did not include it is a clear indication that their argument is invalid and therefore the *New York Times* and *Washington Post* are not liable. Relying on *Near v. Minnesota*, Douglas also repudiates the government's argument that its inherent powers allows them to go to court and obtain an injunction to protect the national interest. He deems this as unsound because *Near* prohibited it "in no uncertain terms." Notably, Douglas states, "secrecy in government is fundamentally anti-democratic."

Justice Brennan, the third Justice to concur, held that the First Amendment stood as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented in *New York Times v. U.S.* He reasoned that since the publication of the materials would not cause a direct, inevitable, and immediate event that would jeopardize the safety of Americans, prior restraint was not applicable.

Justice Stewart was the fourth Justice to file a concurring opinion and Justice White joined him. Stewart argues that as constructed in the Constitution, the Executive branch is endowed with enormous power in regards to national defense and international relations and as

such, has the largely unshared duty to determine and preserve “the degree of internal security necessary to exercise that power successfully.” However, he stipulates that in order to regulate this unchecked executive power, it is crucial to have an enlightened citizenry, which is ultimately dependent on a free press. Justice Stewart reasons that in order to maintain wisdom, it would make the most sense to insist upon the avoidance of secrecy since “when everything is classified, then nothing is classified, and the system becomes one to be disregarded...or manipulated...” Stewart also maintains that although the Executive Branch is at the forefront of international relations, Congress and the Judicial branch have input by creating the laws and then applying them. As such, he finds that disclosure of the documents will not result in direct, immediate, or irreparable damage to America and therefore there is no standing for prior restraint.

Justice White concurs<sup>2</sup> in a similar vein as Stewart, acknowledging the Executive’s role in international affairs but also addressing the fact that because of precedent, the burden of proof is extremely heavy on the government in prior restraint cases. He sustains that although the government is right in arguing that some of the documents will be detrimental to national security if released, some have already been published, subsequently setting this potential destruction in motion. White believes that had the government instead prosecuted the case under the Espionage Act, it is quite reasonable to imagine that they would have been successful in accruing criminal charges and the Court would then have no difficulty in justifying the imposition of a prior restraint. But White perceived that as the case stood currently, the injunction was not relevant based on the government’s arguments.

Justice Marshall penned the last of the concurring decisions regarding *New York Times v. U.S.* In it he wrote that unlike the previous Supreme Court Justices, he believed that the issue at

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<sup>2</sup> Stewart also joined White’s concurrence.

hand was not of First Amendment nature, but instead the separation of powers doctrine in that it begged the question as to whether the Supreme Court has the power to make such a law prohibiting the publishing of certain material. Marshall believes that in asking for the Court to provide an injunction, it would require the Court to violate the powers given to each branch of the government in the Constitution. He cites two previous occasions when Congress has considered passing legislation that would criminalize the actions of the *New York Times* and *Washington Post* and ultimately decided against it. Marshall states that by asking the Court to rule on (and effectively bring into law) something that Congress has refused to do so, violates the powers given to each of the three branches. In order to prove this theory wrong, Marshall argues that the government would have to demonstrate that there was no applicable statute under criminal law, therefore justifying their demands of the Court. However, Marshall asserts that there is a multitude of statutes in this area that is relevant to the case, including mainly the Espionage Act, invalidating the government's claims.

Three notable Justices—Justice Harlan, Chief Justice Burger, and Justice Blackmun—each filed separate dissents, however, Harlan authored one that was joined by both of the other dissenters.<sup>3</sup> Harlan adheres to Justice Holmes' dissent in *Northern Securities Co. v. United States* (1904) in which he says, “great cases like hard cases make bad law” in that the Court was “irresponsibly feverish” in dealing with *New York Times v. U.S.* Harlan argues that due to the incredible intricacies and difficult factors present in the case, the Court should have addressed a multitude of questions that were not even raised to properly rule in this case. He argues that impacts of *New York Times v. U.S.* will be enormous and therefore it is the responsibility of the courts to be diligent and not succumb to the torrent of publicity and sensationalism.

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<sup>3</sup> Both Chief Justice Burger and Justice Blackmun's dissent are extremely similar to that of Justice Harlan's and respectively represent two separate parts of Harlan's argument.

Overall, Harlan disagrees with the majority as to the fundamental issue at stake. He perceives, similar to Marshall, that instead of a First Amendment issue, the case addresses the role of separation of powers. However unlike Marshall, Harlan asserts that the Executive Branch's power in the realm of international affairs is unparalleled and that according to Chief Justice Marshall during his time as a Representative in Congress, "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations," and should be respected as such by the Court. However, Harlan does recognize the role the Judicial branch plays in insulating the Executive's ultimate power,<sup>4</sup> and allows that the judiciary may insist that the determination that the disclosure of certain materials would impair national security be evaluated by the head of that Executive Department concerned, after personal consideration by that officer. Harlan sees this as a required safeguard in the grey area of executive claims on privileged secrets of the state. Beyond that, though, Harlan believes that the Judiciary cannot go farther and "redetermine for itself the probable impact of disclosure on the national security."

This perspective is in alignment that the "very nature of executive decisions as to foreign policy is political, not judicial,<sup>5</sup>" and should be determined by the two branches that are political in nature. With this in mind, Harlan recommends that the judgment of the Court of Appeals for the District of Columbia Circuit Court be vacated and remanded for further proceedings to the District Court, while diligently ensuring that the Government is given enough time to present their case. Harlan also advocates for affirming the judgment of the Court of Appeals for the Second Circuit.

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<sup>4</sup> It was found in the case of *United States v. Reynolds* that the Constitution forbids the "complete abandonment of judicial control" in such First Amendment cases.

<sup>5</sup> *Chicago & Southern Air Lines v. Waterman Steamship Corp.* (1948) 333 U.S. 103.

The key factual dispute in the Pentagon Papers case was whether or not the government had demonstrated that the release of the study, or even a small amount, would threaten sufficient harm to justify a prior restraint on its release (Bellia 2012). In holding that it did not, the Supreme Court left the responsibility of weighing the public interest in disclosure against the projected harm in the hands of the publishers (Bellia 2012). However, it is clear through the separate opinions that there are divergent views about the constraint on the role of press in publicly disclosing national security information leaked by another (Bellia 2012).

At one extreme, Justices Black and Douglas left no room for judicial or executive assessment of national security harm in cases involving leaks (Bellia 2012). On the other end of the spectrum, Justice Harlan advocated for judicial deference to the executive's assessment of the harm the leaked information would cause, effectively foreclosing the possibility that publishers would have the exclusive say (Bellia 2012). Between these polar opposites, a number of Justices presumed that the risk of criminal liability and obligations of responsible journalism would affect the publishers' approach (Bellia 2012). Despite the differences amongst the separate opinions, there is one monumental area of common ground: the differing opinions allowed that the disclosure of national security information depends upon the judgment of the publisher, the market, journalistic ethics, or by the possibility of criminal liability, and not solely upon the judgment of the leaker (Bellia 2012).

### **Significance of *New York Times v. U.S.***

The legacy of *New York Times v. U.S.* is one of utmost importance. Instead of serving solely as a win for the American Press, this monumental decision impacted American society in ways that the government could never have predicted at its onset. Indeed, its impacts were experienced across the spectrum of American culture, from politics to culturally, and even

historically as well. Had the Court decided differently, the whole course of American history would be different.

### **Political Impact**

In essence, *New York Times v. U.S.* was a politically motivated case; it was borne from corrupt government machinations and was controversial because the government tried to censor it. As such, it would be foolish to imagine that the holding would not have a great significance on American politics. Indeed, it could be argued that this case was a catalyst for events that were much larger than the case itself. This is demonstrated by its immediate impact on foreign relations as well as the eventual implosion of Nixon's career.

The expressed fears of Nixon and Kissinger (and the supposed basis for prior restraint) that the study would negatively impact and disrupt diplomatic negotiations with Hanoi, Beijing, and Moscow never actually came to fruition (Prados and Porter 2004, 183). Instead, the documents had very little effect on the Executive's relations with foreign countries. Kissinger left as planned for China the day following the Supreme Court decision and the only echoes of the Pentagon Papers affair was within his own entourage (Prados and Porter 2004, 183). Kissinger himself even admitted, "I do not believe now that publication of the Pentagon Papers made the final difference in Hanoi's decision to conclude an agreement in 1971," (Prados and Porter 2004, 183). It could even be argued that the study's publication shortened the American War in Vietnam, according to Cyrus R. Vance, Secretary of State in the Carter administration (Prados and Porter 2004, 183). This revelation of the shady dealings on behalf of the American government in the Indochina conflict caused an increase in the antiwar movement and pressured the government to behave in a way that pleased the citizens (Prados and Porter 2004, 184).

Despite the high level of controversy surrounding the Pentagon Papers, Nixon managed to emerge from the direct fallout relatively unscathed. Nixon was then up for reelection in 1972, the year directly following the publishing of the study and won in a landslide victory, rivaling the greatest of American political history (Broder 1972). However, Nixon's luck was short-lived, and facing certain impeachment, Nixon resigned on August 8, 1974 (*History.com*). Although many attribute Nixon's downfall to the Watergate scandal, its seminal cause was in fact the Pentagon Papers (Krogh 2007).

Two months following the publishing of Pentagon Papers, Nixon gathered together a special group of men, including former C.I.A. and F.B.I. agents and a member of the National Security Council for a top-secret meeting regarding a classified assignment (Krogh 2007). This special team of operatives would come to be called the White House Special Investigations Unit, otherwise nicknamed the White House "Plumbers." President Nixon told the crew, that he viewed the leak as a matter of critical importance to national security and he instructed the specialized team to find out how the leak had happened and prevent it from occurring again in the future (Krogh 2007). The Plumbers decided that they would break into the office of Daniel Ellsberg's psychiatrist to find out information on his mental state and subsequently discredit him (Krogh 2007). When Ellsberg and his coconspirator Anthony Russo, were charged under the Espionage Act of 1917 for their crime in leaking the Pentagon Papers, they faced a maximum sentence of 115 years (Arnold 1974). However, when the break-in of Ellsberg's psychiatrist was revealed, along with the government's illegal wiretapping of Ellsberg's telephone conversations, the judge presiding over the case declared a mistrial (Arnold 1974). He asserted, "the government's action in this case offended a sense of justice," and because of the Plumber's actions on behest of Nixon, the two were allowed to go free (Arnold 1974).



This was the beginning of Nixon's crooked dealings that eventually led to the Watergate Scandal and his eventual impeachment (Krogh 2007). As scholars assert, "The Ellsberg-Russo Pentagon Papers trial is said...to be 66 percent of the reason Nixon fell; Watergate, the other 33 percent—that was stimulated by the Pentagon Papers too," (Prados and Porter 2004, 188). *New York Times v. U.S.* was not only helpful in mobilizing the antiwar movement, but also served as the root of Nixon's professional and personal destruction. These political effects also transferred over to impact the general population, as well as the course of history.

### **Social Implications**

Surprisingly, when the *New York Times* first printed the Pentagon Papers, it took at least a day for the full impact of the study to be felt (Prados and Porter 2004, 12). Since it was a lengthy Sunday edition, most people did not read it at first, including President Nixon (Prados and Porter 2004, 12). But when it started to receive more attention, it was as if a metaphysical bomb had gone off and the American people were experiencing the aftereffects. According to Harvard law professor Charles Nesson, the study's disclosure "lent credibility to and finally crystallized the growing consensus that the Vietnam War was wrong and legitimized the radical critique of the war," (Prados and Porter 2004, 183). It reinforced the growing anti-war movement in the country by acknowledging that they were right in regards to the governments' misconduct and gave them extraordinary standing in the eyes of the rest of the country and the world. The revelation of the Pentagon Papers also shattered a spell that held sway in the country that the people and the government had to always be in agreement on major issues (Prados and Porter 2004, 191). It taught newspapers that they should not take the government blindly on its word in future instances (Prados and Porter 2004, 191).

The release of the Pentagon Papers was also instrumental in widening the credibility gap that existed between the American public and governmental officials. Defined as a situation in which the things that someone says are not trusted because of the discrepancy between what is true and what is said, the first documented use of credibility gap is shown in the year 1966 as a result of the country's entrance into the Indochina conflict (Merriam-Webster 2013). When the public learned of this top-secret study that exposed all the lies the government had told them over the years, it understandably widened this gap further (Prados and Porter 2004, 190). This in turn helped the antiwar movement and raised awareness regarding the government's actions.

The events surrounding the Pentagon Papers were also indicative that times were changing in America. Prior to the controversy, this blatant disregard for the federal government would have been viewed as un-American and antithetical to what the nation was founded on (Prados and Porter 2004, 184). Indeed, Ellsberg would have been seen as a traitor by the whole nation whereas in reality, many treated him as a hero. This signifies a departure from the blind acceptance of government actions to a glorification of those who expose its misconduct for the betterment of the nation (Prados and Porter 2004, 184). This trend is important because it still is prevalent in modern society.

### **Historical Importance**

The magnitude of *New York Times v. U.S.* in a historical context is almost immeasurable. Foremost is the fact that this case serves as a major precedent for First Amendment case law and is relied heavily upon when trying to determine the role of executive authority in regards to a free press. The case is forever memorialized in history for its part in the political destruction of President Nixon and the Watergate scandal, one of the most famous disgraces of the Executive branch of all time.

The Pentagon Papers case is also historically significant because of its function in ending America's role in the conflict in Vietnam. Had the Court ruled in favor of the government and upheld their argument of prior restraint, certain governmental actions in Indochina would have continued to be shielded from the public (Prados and Porter 2004, 193). Renowned historian John Prados argues that had the government been able to still conceal certain events, the war have continued on with no one the wiser (2004, 193). He cites the air attacks on North Vietnam being carried out under the guise of "protective-reaction strikes," as an example of this phenomenon (Prados and Porter 2004, 193). Prados also asserts that the bombing of Cambodia would have continued without the public's knowledge if the Nixon administration were still able to hide behind Executive authority (Prados and Porter 2004, 193-4). This applies to America's presence in Laos as well (Prados and Porter 2004, 193-4).

*New York Times v. U.S.* made extreme advances in the journalistic field (Prados and Porter 2004, 188). Some of the issues that have stemmed from this sort of investigative journalism demonstrates the danger inherent in complacency and the implications a prior-restraint regime would have (Prados and Porter 2004, 194). It also established a de facto precedent for the public's right to know and enabled the press to fulfill this demand, reinforcing the stature of the press' role in American society (Prados and Porter 2004, 188).

### **The Pentagon Papers in the 21<sup>st</sup> Century**

Although *New York Times v. U.S.* was historically significant in a multitude of ways, it did not lay to rest current and future controversy regarding governmental whistleblowing by any means. Indeed, the United States has experienced a resurgence of this very issue in the recent years, evidenced in the cases of WikiLeaks, Bradley Manning, and Edward Snowden.

On July 25, 2010, WikiLeaks, an international online nonprofit organization, released an avalanche of secret U.S. military intelligence and incident reports from the Afghanistan war (Davidson 2011). Considered one of the largest leaks of classified data in U.S. history, WikiLeaks gave three major publications—London’s *Guardian* newspaper, the *New York Times*, and *Der Spiegel* in Germany—access to the files before circulating them online (Davidson 2011). This came two months after WikiLeaks disseminated a video entitled “Collateral Murder,” which depicted a U.S. air attack that killed twelve civilians in Baghdad, along with hundreds of thousands of additional military and diplomatic documents (including the Iraq War Logs) (Davidson 2011). In keeping with their policy of protecting the anonymity of their sources, WikiLeaks refused to divulge the identity of their informant (Davidson 2011). Despite this, it was not long until the federal government discovered United States Army Soldier Private First Class Bradley Manning, and identified him as the informant (Davidson 2011). Three years later, on August 21, 2013, a military judge sentenced Pfc. Manning to 35 years in prison on counts of violating the Espionage Act, copying and disseminating classified military field reports, State Department cables, and assessments of detainees held at Guantanamo Bay, Cuba (Tate 2013).

Supporters of WikiLeaks and Pfc. Manning are apt to draw parallels between this current controversy and the Pentagon Papers case (Bellia 2012). However, prominent legal analysts often argue that the lessons of the Pentagon Papers case are more complicated than might appear at first glance (Bellia 2012). The Court’s *per curiam* decision masks areas of substantial disagreement and shared assumptions among the Court’s members (Bellia 2012). Specifically, the Pentagon Papers case reflects an institutional framework for “downstream disclosure of leaked national security information, under which publishers within the reach of U.S. law would weigh the potential harms and benefits of disclosure against the backdrop of potential criminal

penalties and recognized journalistic norms,” (Bellia 2012). The WikiLeaks disclosures demonstrate the instability of this framework by exposing new challenges for controlling the downstream disclosure of leaked information and the corresponding likelihood of “unintermediated” disclosure by an insider, as well as the risks of non-media intermediaries attempting to curtail such revelations in response to government pressure or other outside forces (Bellia 2012).

However, to Daniel Ellsberg it does not matter that the legal battles facing WikiLeaks might be different from its predecessor *New York Times v. U.S.* (Fantz 2011). Ellsberg, the one responsible for the leaking of the Pentagon Papers, has been extremely active and vocal in his support of Pfc. Manning, even going so far as to say, “I was that young man; I was Bradley Manning,” (Fantz 2011). Ellsberg relates to Manning’s dedication to the truth and justice, acknowledging the fact that both swore that they would go to prison if it meant freeing the public from the government’s deception (Fantz 2011). Indeed, Ellsberg is not the only one to draw comparisons between the two; many view Manning as the modern day version of Ellsberg and are therefore furious at the treatment he is subjected to (Fantz 2011). Despite this, analysts believe that the reason why Manning’s situation is not accruing more media attention is due to the rise of Edward Snowden (Tate 2013).

Snowden was a former CIA staffer who released bombshell revelations about vast National Security Agency (NSA) surveillance because he said, “the public needs to decide whether these programs and policies are right or wrong,” (Cohen 2013). Snowden’s supporters similarly liken him to Ellsberg and brand him as a hero who acted in the interest of the greater good (Cohen 2013). Ellsberg commented that “I think there has not been a more significant or helpful leak or unauthorized disclosure in American history ever...and that definitely includes

the Pentagon Papers,” (Cohen 2013). However, there exists a significant difference between Ellsberg and Snowden (Cohen 2013).

The Pentagon Papers revealed that the government had intensified the war in Vietnam and also lied to Congress and the public, transgressions that are clearly wrong (Cohen 2013). In Snowden’s case though, it is unclear whether the NSA’s spying was actually legal and if Snowden was motivated because he personally objected to how the government defends national security (Cohen 2013). If the surveillance was legal, Snowden could potentially still appear as a conscientious objector by breaking the law because of his own moral imperatives, but he might not look like a whistle-blower anymore, subsequently distinguishing himself from Ellsberg (Cohen 2013). It is also important to note that Ellsberg is widely regarded as a hero today because history moved in his favor (Cohen 2013). Snowden’s whistle-blower status will be reinforced if it appears that what the NSA has been doing is wrong (Cohen 2013). Society’s verdict on Snowden will be dependant on if he got the balance right: “whether it turned out that we were more at risk of becoming a surveillance state than we were of terrorism,” (Cohen 2013).

### **Conclusion**

Arising out of increasing aggravation with the deception of the federal government, *New York Times v. U.S.* rose to encompass society’s frustration with the war and swelled to a magnitude no one could have imagined. When Ellsberg was debating whether or not to leak the classified Pentagon Papers cataloguing the country’s involvement in Vietnam, he was not thinking of striking a victory for the press or even making a name for himself. Instead, he recognized how intrinsic knowledge is in combating tyranny and knew that it was the right of the American people to know of the Executive branch’s lies. When challenged with prior restraint in order to halt publication of the classified information, the *New York Times* and *Washington Post*

fought back all the way to the Supreme Court. Luckily for the American people, the Court ruled in favor of the press in declaring that the government had not demonstrated sufficient burden of proof that releasing the information would debilitate national security. The six to three *per curiam* opinion was short. Instead, six justices—including Black, Douglas, Brennan, Stewart, White, and Marshall—filed concurring decisions, in some cases advocating for complete freedom of the press to more limited roles for that institution. Chief Justice Burger and Justices Harlan and Blackmun filed separate dissents but Burger and Blackmun both joined Harlan’s opinion. Harlan advocated that the case had been handled unwisely and feverishly and declared the need of the Judicial branch to recognize the role of the Executive in the realm of international diplomacy.

Despite serving as a key win for the First Amendment rights of the press, *New York Times v. U.S.* had major implications. The Pentagon Papers were key in constructing the downfall of President Nixon and his subsequent resignation from the Presidency and was the driving force behind the formation of the White House Plumbers, the group that orchestrated one of the most infamous political scandals. It also effectively changed the tide of the Vietnam War by giving support to the anti-war movement, ultimately altering the course of events. Socially, the Pentagon Papers contributed to the credibility gap and modified the relationship between the press and the federal government. The case is historically significant because it is one of the most famous freedom of press cases, ruined the career of one of the most illustrious figures in political history, and established a de facto precedent.

*New York Times v. U.S.* is also extremely relevant in modern society with the increasing prevalence of government whistleblowers, such as WikiLeaks, Pfc. Manning, and Edward Snowden. The Pentagon Papers controversy demonstrates a similar parallel in which to evaluate

these major events, even if the situations are not entirely the same. In understanding the full meaning and implications of the case, it is important to remember Justice Black's quote from the decision:

Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.



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