
Reproduced with permission granted to Indian River State College by the author, Stanley E. Flink (February 2014).
SENTINEL UNDER SIEGE
The Triumphs and Troubles of America's Free Press

STANLEY E. FLINK
jected even *that* encroachment on freedom of expression. He believed that "there should be no libel or defamation law in the United States under the United States Government, just absolutely none."  

The question of how much privilege would be given to statements that were not true now became a problem for the plaintiff. Sullivan would have to prove falsity *and* malice, and the courts (through the judges) would have to review all the evidence to determine its validity before allowing a trial. The finding of malice is not, therefore, easily or deceptively made, but blatanfalsestly expressed, in contradiction of known truth, would not escape the charge of malice. What is more, there are certain kinds of speech and publication—presumably carefully defined—the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words.

As noted earlier, Wechsler emphasized that "libel can claim no talismanic immunity from constitutional limitation," and the assumption might be made that obscenity, or provocatively insulting "fighting words," should have no fewer limitations. Defining obscenity or insult will never be a slide-rule calculation. Here the debate continues, but the place reserved for political speech, for citizen criticism, has been surveyed and mapped clearly by *New York Times v. Sullivan*. It can still be asserted that a member of Congress has greater speech privileges than a citizen-critic-ruler. The people's representatives may say what they please on the floor of Congress, with or without malice, and suffer no constitutional retribution. The citizen who speaks or writes with equal (and deliberate) malice can be punished. It is possible, Kalven theorizes, that the difference in protection grew out of an awareness of multiplicity. There are few officials, but many, many citizen critics. Are the outnumbered officials more vulnerable than the masses of citizenry?

It was not unlikely, in the view of many scholars, that reasonable protection for the press and the citizen-critic, the demonstrator and the petitioner, would expand inexorably to matters of public policy and public domain—such as art. When the arts were making political statements, would the First Amendment welcome them? Kalven thought Meiklejohn's thesis on this point regarding free expression was a prelude to that expansion. When Professor Kalven asked Professor Meiklejohn how he felt about the *Sullivan* decision, the latter did not hesitate: "It is an occasion for dancing in the streets." That was a long way from the dancing on the head of a metaphorical pin, which is where this discussion began. He might have danced more enthusiastically had a few more loose ends been tied up. The political discourse rule was his muse: If it deals with public issues, it has constitutional protection. Shall we dance? If not, it is business unrelated to the Constitution.

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**POMP AND PROVENANCE**

The Bill of Rights wouldn't pass, if they voted today. We started talking about the *Pentagon Papers*. That was *not* a very good First Amendment opinion by the Court. In the first place, there were nine opinions and one of the justices, White, was begging the government to prosecute all of us for criminal violation, even though he never read the Papers. None of them had read the Papers. The prosecutor didn't read them. Griswold says he didn't read them. But, you know, if you're confident enough about your country to take a really long view, the First Amendment is such a superb document that you have to think that even if the pendulum swings a little bit, it will be back.

—Ben Bradlee, former editor of the *Washington Post*

Despite the triumph made over seditious libel, the press as a sentinel was never in greater danger constitutionally than in the late 1960s and early 1970s. The federal government was the protagonist this time, and the press, represented by its most prestigious practitioners, contemplated its options and chose, finally, to fight. The issue was, as it may well be again in the years ahead, national security. The next battle will have to confront the vast dispersal of information resources and the phenomenon of “real time” reporting, the “first draft of history” happening live on camera and witnessed by millions of viewers. One aspect of national security, however, that is unlikely to change, whatever else may change, is the secrecy surrounding policy decisions, which will always be in play so long as there is a free press. No story embodies the contest between public information rights and official secrecy more dramatically than that attempt to write a second, contextual “draft of history” called the *Pentagon Papers*.

In the literal sense, it was a history of the Vietnam involvement, but it was, as its appointed organizer, Leslie Gelb, described it, "Not so much a documentary history as a history based solely on documents—checked and rechecked with ant-like diligence. . . . We could not get into the minds of the decision makers, we were not present at the decisions, and we often
could not tell whether something happened because someone decided against it, or most likely, because it unfolded from the situation."  

The "ants" were all members of the Vietnam History Task Force. Their work was launched by Secretary of Defense Robert McNamara on June 17, 1967. He later said that his purpose was "to bequeath to scholars the raw material from which they could re-examine the events of the time. If historians are to make a careful examination, they need the raw materials. I simply asked that these be brought together, and I have no regrets for having done so."  

Ernest May, Harvard historian, joined the task force early on, but he regarded the finished report as less than distinguished. He thought it had the shortfalls of a hurriedly turned out product. There were, unsurprisingly, a variety of views on the value and reliability of the Papers—some suspecting the dovish bias of task force members, others ruefully acknowledging that the overall impression made things look better than they were. Such speculations were heatedly made at times, but however the substance of the Papers was ultimately judged, the exercise seemed inconsequential in the light of the larger story that overtook it: the right of the press to publish materials concerning national security matters possibly stolen or leaked from the government. Freedom of the press became the overriding issue, more so than the contents of the Pentagon Papers, which the press acquired and published. The government does not own the contents of its documents, cannot copyright anything, and cannot (in theory) restrain publication. In making these points, Yale professor Alexander Bickel, who represented the New York Times, emphasized that the government does have the power to protect security at the source. What it wants to keep secret, it can keep, barring leaks. Bickel said,

The power to arrange security at its source, looked at in itself, is great, and if it were nowhere countervailed, it would be quite frightening—is anyway, perhaps—since the law in no wise guarantees its prudent exercise or even effectively guards against its abuse. But there is countervailing power. The press, by which is meant anybody, not only the institutionalized press and electronic press, can be prevented from publishing only in extreme and quite dire circumstances. The rule of the Pentagon Papers case calls for evidence of immediate harm of the gravest sort (typically loss of life or catastrophic injury to the national interest) flowing directly from publication before a restraint will be allowed. (emphasis added)

In June 1969, a full two years before the New York Times published excerpts, there were fifteen sets of the Pentagon Papers ready for distribution. Leslie Gelb classified each copy as top secret in what he called "an absolutely routine decision"—the Defense Department regulations having dictated that any compendium of documents bear the highest classification of any one part of the collection. If there was one top secret document, everything would be top secret. Of the fifteen sets, two went to the National Archives to be reserved for the Kennedy and Johnson libraries; two went to the State Department for Nicholas Katzenbach and William Bundy; one went to the office of Clark Clifford, former secretary of defense; one went to Robert McNamara (the set marked #1) at the office of the Bank for International Reconstruction and Development; and two went to the Rand Corporation in Santa Monica, California, where important research and analysis of defense matters was conducted. The remaining seven stayed in the office of the Secretary of Defense and were designated for use by such officials as Cyrus Vance, Paul Nitze, and Paul Warnke. Robert McNamara did not read the Pentagon Papers. "He couldn't bear to read them," said a close friend. That remains the case even though McNamara has written, at seventy-eight, a memoir on the war: In Retrospect: The Tragedy and Lessons of Vietnam.

Aside from Gelb, the only person who, within days of receiving them, read every page of the Papers was Daniel Ellsberg, who had worked on the task force and was continuing his research at the Rand Corporation. He had moved to California in 1959 with his wife and two children to join Rand, where he concentrated at first on the Soviet nuclear capability and the so-called missile gap.

Ellsberg, as a leading player in the Pentagon Papers pageant, brought impressive credentials. He was born in Chicago during the depression. His father, an engineer, moved his family to Detroit in search of work. Ellsberg was bright and self-assured as a boy, learned to play the piano and basketball and took up alpine climbing, skydiving, and debating. At Cranbrook School for Boys he was voted "most likely to make a contribution to human progress" and won a scholarship to Harvard, where he graduated in 1952. He seemed to move from strength to strength at the university, becoming president of the literary magazine, the Advocate, and a member of the editorial board of the Crimson, Harvard's daily newspaper. His senior thesis was on economic game theory, and it received the highest grade possible. It also won him a Woodrow Wilson fellowship to study economics at Cambridge, in England. When he returned a year later, he completed a master's at Harvard—again with the highest honors—and could have become a member of Harvard's prestigious Society of Fellows while he went on to get his doctorate. Ellsberg chose, instead, to join the Marine Corps for two years. In his junior year he had married a Radcliffe girl, Carol Cummings, the daughter of a marine colonel. The wedding was small, attended mostly by college friends, and took place in an Episcopal church. Ellsberg and his father-in-law, a widower, were close. The colonel on occasion went skiing with his daughter, Ellsberg, and her friends. The relationship influenced Ellsberg's interest in the marines, and the Suez problem in 1956 persuaded
him to extend his military service. It also gave him his first top-secret security clearance, when his outfit went to sea in the Middle East.

He returned to Harvard after that adventure with a strong interest in the military, and while studying as a junior fellow, he became a part-time consultant for the Rand Corporation. With his doctorate almost completed, he finally moved to Rand full time. Rand sent him off to Washington frequently to work with the State and Defense Departments. For a while he served on the staff of Assistant Defense Secretary John McNaughton. He took the job because, as a consultant to the Kennedy administration, he had become increasingly involved in the Vietnam strategy. After a year of reading intelligence reports, he was convinced that too little was known about the reality on the ground.

Ellsberg’s marriage had dissolved, and his curiosity about Vietnam had intensified. He asked for an assignment that would take him to the scene of action, and he got it. Periodically, Ellsberg would write articles for Harvard publications or open letters to his classmates “to communicate honestly some of the complexities and my own uncertainties.” Before he went out to Southeast Asia he spent some time, in 1965, lobbying for Johnson’s policies on Capitol Hill and visiting campus gatherings. He was not a resolute hawk, but he thought America’s basic policies in Vietnam were probably correct, and he defended them articulately.

In mid-1965, he traveled to Vietnam as an “apprentice” to Major General Edward Lansdale, who was going to work on what was called the pacification program.” In this role, Ellsberg developed a number of friends who would be significant in the following years as the story of the Pentagon Papers unfolded. One of them was a political scientist named Anthony Russo, who was doing research for Rand on the morale of the Viet Cong. Ellsberg also met and enjoyed being with several of the top reporters working in Saigon. He helped them whenever possible, and he listened to their views. Among them was Neil Sheehan, who was working for UPI but was later hired by the New York Times.

Lansdale admired his young aide from Harvard but worried about his sense of self-preservation. Ellsberg had become a crack marksman while in the marines and learned to fire a pistol very accurately with either hand. When he went on patrols in the Mekong Delta, he agreed to carry a gun. “If you didn’t carry a weapon,” he explained, “other people had to take care of you.” He was frequently involved in ground actions, came under fire, and fired back. As his doubts about America’s Vietnam presence grew, he began to be uncomfortable about his own participation in combat exchanges. He also began to question the effectiveness of “pacification.” The villages were not truly secure, and villagers cared little about who won the war. They wanted all foreigners to go, and they wanted to get on with their lives.

In 1967 Ellsberg was hit by a different enemy—hepatitis. Were it not for that serious illness, he believed he would have stayed on in Vietnam indefi-
decide now to end its participation in the Vietnam War, completing the
total withdrawal of our forces within one year. The most.” One of
the signers was Daniel Ellsberg. The wheel had turned. The letter took strong
positions on the hopelessness of military actions, and need to let the Saigon
government rise or fall on its own, and the exaggerated nature of claims
that the future of Vietnam was vital to American interests. The letter stated
that the cost in lives and property “far outweighs any prospective benefits”
of continuing intervention.2

Eellsberg attributed his shifting convictions to the reading of the Pentagon
Papers, and he decided to go public with his conclusions. He was, as his
colleagues recall, acting like a man with a mission. The hawk had clearly
become a dove—an impassioned and eloquent, if controversial, dove. By
1970, he was eased out of Rand. There were several other organizations he
could have gone to, but he chose the Massachusetts Institute of Technol-
gy’s Center for International Studies. He moved to MIT at the same time
that William Bundy, assistant secretary of state in Nixon’s administration,
arrived. The director of international studies, Ever Hagen, had wanted
to create some diversity at his center by welcoming a full range of views.
Bundy and Ellsberg would bring opposing positions on many matters, not
least the Vietnam nightmare.

In August 1970, Ellsberg married Patricia Ma, daughter of an active
Republican manufacturer of toys. Cambridge became Ellsberg’s new home.
He and his wife, who shared his feelings about Southeast Asian policies,
were about to share another struggle of their own making. During his last
months at Rand, Ellsberg had immersed himself in the Pentagon Papers,
and the records indicated that he had access to forty-seven volumes—and
exclusive custody of twenty-seven of them. Ellsberg’s study of the doc-
ments, he told all who would listen, convinced him that America had been
wrong from 1954 onward. He said that the idea in North Vietnam aggres-
sion against the South was clearly contradicted by the Papers. He believed
it was “our aggression, entirely, our intervention, that is the Foreign
intervention in that situation. The other intervention, from the Chinese and
the Russians, is just negligible by comparison.”9

Eellsberg had become concerned about his own contributions, his “per-
sonal responsibility.” He was convinced that he had to help end the war,
and making the Pentagon Papers available to a wide audience would achieve
that end or at least hurry it along. Anthony Russo had been fired by
Rand in early 1969. He thought it was because he had written reports criti-
cal of the South Vietnamese government. Some of his colleagues thought he
was embittered about his dismissal, but whatever the reason, he persuaded
a girlfriend who ran a small, unsuccessful ad agency, to rent her Xerox ma-
chine at night to Ellsberg. With the help of his two children, Robert and
Mary, and Russo, Ellsberg copied thousands of pages of the Papers, mask-
ing the “Top Secret” or other classifications. Some of the pages were from
drafts, some from originals, and some from the final Pentagon Papers. Not
all were copied at the ad agency, but every page was returned to the Rand
files. Most of this work took place toward the end of September 1969.

Eellsberg’s first wife, the mother of his children, questioned him about the
danger of indictment, even prison, for his copying activity. In her affidavit
she reported: “My former husband at that time told me that he was very
concerned about the War in Vietnam and that he was going to be actively
working against it and that there were things that had not been disclosed
which should be known. He then said that he would only give it [the copies]
to authorized people like Senators Fulbright and Goodell.”10

In November 1969, Ellsberg met with Senator Fulbright and some of his
staff. The senator was disenchanted with American policy in Vietnam, par-
ticularly with the Gulf of Tonkin Resolution, which he considered a “func-
tional equivalent” of a declaration of war against North Vietnam. Ful-
bright was skeptical about how the Papers would help stop the war, but he
promised Ellsberg he would try to get them released. The excerpts he had
been given were put in the Foreign Relations Committee safe in the new
Senate Office Building, and Fulbright faithfully wrote a letter to Defense
Secretary Melvin Laird. He stated that he had heard of the “history of the
decision-making process on Vietnam policy covering the period from 1940
to April, 1968” and wanted copies made available to his committee for re-
view purposes.11

Laird acknowledged receiving the letter at once but waited a month be-
fore writing a full response, which refused Fulbright’s request. Explaining
his refusal, he stated,

In 1967 Secretary McNamara initiated a detailed history of the evolution of
the present-day situation in Vietnam. It was concised as a compilation of raw
materials to be used at some unspecified, but distant, future date. On the basis
of the understanding that access and use would be restricted, the documents
were designed to contain an accumulation of data of the most delicate sensitiv-
ity, including NSC papers and other Presidential communications which have
always been considered privileged. . . . Many of the contributions to this total
document were provided on the basis of an expressed guarantee of confiden-
tiality.12

Laird went on to insist that access to the Pentagon Papers was extremely
limited and it was in the national interest to keep it that way. Fulbright was
not ready to give up. He wrote Laird again on January 19, 1970, insisting
that the issue involved was one of “Constitutional responsibilities.”13 The
Senate’s constitutional responsibility in regard to foreign policy and collab-
oration with the executive branch required access to background informa-
tion. Fulbright added a reminder to Laird that the Papers had been com-
missioned by a former secretary of defense, not the president, and therefore
the doctrine of executive privilege was not relevant. Laird did not reply.

Ellsberg went on with his pilgrimage. He volunteered to help Senator
Charles Goodell, a moderate Republican from New York who introduced a
resolution calling for U.S. withdrawal from Vietnam by December 1970.
The senator could not find a cosponsor for the resolution, but it was widely
publicized; and Goodell, in his frequent public statements on the subject,
seemed to echo many of Ellsberg's views. Ellsberg did not let Goodell know
that he had a copy of the Pentagon Papers. Instead he delivered 3,000 addi-
tional pages to Fulbright's staff. The senator considered their contents and
understood the effect such records could have on the legislators and on
public opinion. But he wanted them made available officially so that proce-
dural controversy would not distract from the substance. He eventually
tried writing Laird one more time. Silence.

Ellsberg went down every path he could think of, including a possible
"war crimes" trial—authentic or academic. He would be a defendant or a
witness. In either case, the Pentagon Papers might be subpoenaed. He
urged lawyers he knew to initiate civil suits against the conduct of the war.
And he went on writing and talking.

Meanwhile, American troops crossed into Cambodia, and National
Guardsmen shot and killed four students in a demonstration at Kent State
University. There was a mass march on Washington. Antiwar rallies grew
in size and ferocity. Ellsberg had testified before the Foreign Relations
Committee on May 13, 1970, at Fulbright's invitation. With considerable
emotion he urged withdrawal from Vietnam. Fulbright's questions elicited
answers that resonated from the still secret Pentagon Papers. Ellsberg re-
ferred to "the documents of a number of administrations." He described
the influence of domestic politics on decisions made in Vietnam and then
said of the actions ordered by the Nixon administration, "This administra-
tion is no less ready than earlier ones to incur escalating risks and domestic
dissent to avoid or postpone . . . humiliation."14

Humiliation and its constant companion, embarrassment, were soon to
become virtual personae in the Pentagon Papers case—the humiliation of
defeat, the embarrassment of disclosure. But the helicopters were not yet
evacuating frantic figures from the roof of the American embassy in Saigon.
There was still hope in the White House that a peace with some honor
could be negotiated.

Fulbright was probing relentlessly. Speaking of the Papers, he rhetori-
cally commented to Ellsberg at the May 13 hearing, "Here is a study made
at government expense, paid for by the tax payer, and withheld from the
Committee [his committee]. I don’t see any justification for such classifi-
cation." His comment wasn't—except by intonation—precisely a question.
But Ellsberg answered supportively and emphasized the vital nature of the
information compiled in the Papers to the people who were making crucial
decisions. "I would wish," Ellsberg said with a straight face, "first of all,
that President Nixon could have access to the information in that study and
in other studies that were done directly for Mr. McNamara."15

Fulbright found this dialogue with Ellsberg useful. He made the point
that would survive all the shadings of controversy: "I can't subscribe to this
extension of the concept of classification to prevent our knowing about the
past. . . . It doesn't give democracy an opportunity to function at all" (em-
phasis added).16

Laird remained adamant. Even though some Senate staffers had read
parts of the Papers and a left-wing think tank was examining and reading
Ellsberg's copy, there was no significant public disclosure, no indignant
media outcry, no spotlight suddenly piercing the somber discontent. Ful-
bright rose in the Senate three months later to decry against Laird's judg-
ment: "The Executive Branch—in what has become a reflex action—has
slammed the door on Congress. . . . I hope the first enterprising reporter
who obtains a copy of this history will share it with the Committee."17

In late November 1970, Ellsberg wrote a letter to the New York Times
that was endorsed by several MIT faculty members. He attacked the ad-
ministration's Indo-China policy vehemently: "Nixon's clearly announced
and demonstrated strategy entails not only prolonging but vastly expand-
ing this immoral, illegal, and unconstitutional war."18 He continued to use
the Papers as a resource for lectures and articles and at a short meeting
with Henry Kissinger months before the letter to the Times. Kissinger, who
had been involved in the actual planning of the Pentagon Papers project
and had a copy available to him, said he had not read the Papers and, ac-
cording to Ellsberg, gave as his reason that they were not important to the
current situation. Ellsberg rejected that argument and urged him to assign
a staff member to read them carefully. Reportedly, Kissinger then offered
the task of analyzing the papers to Ellsberg himself, who turned it down.
The two men met again at a Boston meeting sponsored by MIT and major busi-
ness leaders to discuss foreign policy. It was late January 1971, and
Kissinger, who was one of the main speakers, claimed that "there are no
good choices left in Vietnam" and that "this administration has been the
best protection of those who most loudly deplore our policy."19 Ellsberg
tried to question the secretary, but the meeting broke up. The next day
South Vietnamese troops entered Laos supported by American airpower.

Ellsberg continued to write heated editorials against the Vietnam actions
taken by the Nixon administration, but he did not spare the president's pre-
decessors. He also persisted in his efforts to get a member of Congress to
reveal the Pentagon Papers because the legal risk would be far less if the
disclosure came from a constitutionally protected legislator. It did not ap-
pear that Fulbright was willing to shelter in that protection, so Ellsberg
turned to Senator George McGovern. McGovern was a candidate for the presidency, and he feared a number of negative possibilities, including the accusation that he might be using the Papers for political purposes. He advised Ellsberg to try the New York Times or the Washington Post. McGovern’s impression of Ellsberg was that “he was a hawk with a bad science.”

In retrospect, many public figures, including McGovern, agreed that had a member of Congress, earlier on, taken a copy of the Pentagon Papers to the floor and gone public with its contents—or some provocative part of them—the people would have been better served. As it was, Ellsberg had reached the end of his patience. He knew that Neil Sheehan, his friend from Vietnam, was now working for the New York Times in Washington. On March 28, 1971, the Times book-review section produced a piece by Sheehan reviewing a large number of antiwar books recently published. Sheehan’s title was “Should We Have War Crimes Trials?” He suggested the possibility that if the law were seriously applied to American military conduct in Vietnam, “the leaders of the United States for the past six years at least . . . may well be guilty of war crimes.”

In a sense, that speculation was the end of act one of the Pentagon Papers drama. The opening of act two took place in Cambridge, Massachusetts. Neil Sheehan and his wife, Susan, a New Yorker writer, journeyed to Cambridge about the same time that Sheehan’s piece appeared in the Times. They stayed in a motel and returned to Washington shortly thereafter with a large package of documents that would become widely known several weeks thereafter as the Pentagon Papers. Ellsberg had not given Sheehan all the material. He excluded the four “diplomatic volumes” because he did not want to jeopardize any American negotiations. “I wanted,” he said some time later, “to get in the way of the bombing and the killing.”

Act two was not as slow moving as act one, but its momentum was impeded by skepticism and lawyers. For the collectors of little-known facts, it should be noted that the first clue to the existence of the McNamara history project appeared in Parade, a Sunday supplement magazine that frequently printed advance fragments of newsworthy mosaics. The Pentagon Papers fragment was published in October 1970. In March 1971, Thomas Oliphant bylined a front-page story in the Boston Globe that carried the headline: “Only 3 Have Read Secret Indo-China Report: All Urge Pull Out.” One of the three was, of course, Ellsberg, who told Oliphant that by assisting in the Vietnam policy, “I was participating in a criminal conspiracy to wage aggressive war.” Inexplicably, the Oliphant piece caused no fuss; nor was it picked up by other publications.

At the Times an obstacle course had to be navigated by those who wanted to move ahead swiftly. Sheehan was no sprinter. He moved more deliberately and thoughtfully than some editors thought necessary. Others considered his “war crimes” piece as too strident. Not all Times men were that keen on antiwar stories. David Halberstam had resigned in 1967 to write independently and, subsequently, chided the Times for not having probed with greater initiative the decisions to escalate in Vietnam. But Sheehan had the Washington bureau chief, Max Frankel, on his side. Frankel wanted to step up the pace before the Washington Post or the Los Angeles Times could publish the story. There was a long history of leaked, classified materials in New York Times stories. No news organization of any size could stay the course without leaks. The process was a second-guessing game: When is a leak a trial balloon or a political ploy or an act of vengeance? James Reston, the much-honored Washington reporter and columnist for the Times, had used leaks from the Eisenhower administration about the Yalta Papers, and he had also agreed to suppress leaks about the Bay of Pigs invasion of Cuba at Jack Kennedy’s request. The former furthered Reston’s career, and the latter came to be a decision even President Kennedy regretted. Kennedy, after the fact, speculated that had the full story been told in advance, he might have called it off and spared the nation a costly fiasco.

Reston, who later became a Times vice president, advocated publication of the Pentagon Papers. If the Times ducked he threatened to run the material in his own newly acquired Vineyard Gazette, which was published on Martha’s Vineyard, an island off the coast of Massachusetts populated in the summer by more movers and shakers from Washington per square foot than any other confined area on the planet. Frankel and Sheehan examined the materials and agreed that they were a “gold mine.” The New York hierarchy was briefed, including Jim Greenfield, who had been in Kennedy’s State Department and actually sat in on many of the meetings described in the Papers. He decided to bring Sheehan and Frankel to New York. Abe Rosenthal, the managing editor, and Greenfield claimed to have read forty-two relevant books written by former government officials, including Arthur Schlesinger Jr., Ted Sorensen, and Roger Hilsman. Times staff members went through ten years of Times clippings on Vietnam. The books and the clippings confirmed that very few—if any—of the classified Pentagon Papers had not been publicly reported, discussed, even debated. Greenfield said finally that the “principle” of protecting classified information, specifically with regard to Vietnam “had become almost academic.”

Rosenthal asked his assistant, Peter Millones, to set up a secure workstation outside the office. A three-room suite was rented at the New York Hilton, and Times security guards were assigned to keep it off limits. Desks and equipment were shipped in, and Heddle Smith delayed his departure for Moscow to join the team, along with Fox Butterfield (a reporter who had worked in both North and South Vietnam) and Ned Kenworthy from the Washington Bureau. They would all avoid the Times building and labor
exclusively at the Hilton. They worked more than twelve hours a day and decided to focus on what was newsworthily in the Papers rather than follow a chronological order. Sheehan would do the first article, and it would be about the Johnson years, the covert warfare, and the bombing of North Vietnam.

Meanwhile, the internal debate ran on. Harding Bancroft, who had once served in the State Department, was publisher Arthur Sulzberger’s second in command on the administrative side. He was impressed by the advice of Herbert Brownell, who represented the Times’s outside law firm, Lord, Day and Lord. Brownell and Louis Loeb, another Lord, Day and Lord partner and a former general counsel of the Times, urged their client not to publish the Pentagon Papers in any part. They warned that the government would take legal action and most probably succeed. This view was not shared by a young in-house lawyer named James Goodale, who ran the legal department and became a vice-president of the Times company. Goodale identified with the editorial staff and knew many of the reporters. He had worked on strategic intelligence while in the army reserve and was familiar with the practice of using New York Times stories as footnote in government reports, then classifying all the material involved. He said, “If, in fact, there was New York Times material in there [the Pentagon Papers], how could the government prohibit you from publishing what you had already published?”

This was to be the case not only in regard to Times stories but similarly those eventually published in the Washington Post and other newspapers. Goodale put his arguments into a memorandum and lobbied hard, but he feared that Lord, Day and Lord would prevail. James Reston, Rosenthal, Frankel, and other editors were not ready to accept the fate predicted by Brownell and Loeb. The argument turned to procedure. Should the Papers be revealed in a series of substantial stories combining explication and actual documents? Should there be reporting only about the documents? Should there be one very large presentation—all of one issue of the Sunday magazine, for instance? Each approach had its advocates, but overwhelmingly the reporters and editors who wanted to publish preferred a series—and, for the fullest possible exposure of the facts, the inclusion of actual documents.

Then it became a matter of size and length. The Sheehan team wanted ten to twelve pages a day for about ten days. Publisher Sulzberger settled on six pages a day—perhaps to contain costs, perhaps to avoid overkill. He was about to depart with his family for England. On June 11, he met with his top people and agreed on six pages each day for ten days, documents to be included. The editors had already determined that they would avoid any sensational headlines. As a final precaution, Sulzberger insisted that Bancroft should be given a last look at all stories and have the authority to suggest changes. Presumably, if the suggestions were unacceptable to the editors, they would call Sulzberger in London.

Rosenthal had taken an empty office on the ninth floor of the Times building, stripped all of all niceties, covered the walls with masonite, and moved in a page-proof press along with automatic typesetting perforators, a galley-proof press, makeup tables, and a paper shredder. Caution against any premature revelations was intensely enforced. The printers began typesetting before Sulzberger gave the green light. The dummy for the June 13, 1971, Sunday edition was prepared on Saturday afternoon, June 12. Sanford Ungar’s account refers to “a gaping blank, four columns wide and five inches deep . . . on the front page, marked only with the word ‘Neil.”’

The six inside pages agreed upon were positioned late on Saturday, and Neil Sheehan’s low-key story about the Pentagon Papers as a whole was dropped into the empty space at the last minute. Rosenthal, still uneasy about the company’s commitment and wondering what would happen if the government demanded that the Times cease any further publication, sought to reassure his boss in Europe. On Monday, two Times editors called friends at another newspaper to ask if they would send Sulzberger a congratulatory cable. They did.

How many different renderings this vignette might have if each of the principals put his recollections on a word processor would make an interesting footnote, but it is the consequences of publication that have endured. What happened on that Sunday when nearly a million copies of the New York Times were delivered to newsstands and private homes? Initially, very little. Neither Sheehan nor the top editors received any phone calls regarding his story that Sunday. Salisbury saw a great many people at lunch and dinner but heard not one word on the Pentagon Papers. On Thursday, June 10, 1971, Robert Mardian, assistant attorney general serving John Mitchell as head of Internal Security, gave a speech in Los Angeles. His topic covered “lawlessness and the indifference to the obligations of citizenship.” He accused the American news media of contributing to this trend. It was not until Monday morning, when he returned to Washington, that Mardian saw a copy of the New York Times. The Monday issue contained a second installment of the series on the Pentagon Papers, dealing with the decision to bomb the North Vietnamese. He phoned John Mitchell, who had known about the Times series for a day, but took no action. Secretary of Defense Laird had phoned Mitchell on Sunday and phoned him again on Monday because he was about to appear before Fulbright’s committee and expected questions on the Papers. Mitchell told him to merely say the matter was under consideration at the Justice Department. Mitchell also requested of Laird a memorandum explaining what the Pentagon Papers were and how they had been prepared. No one at Justice knew anything about the Papers and no one at Defense had read them. Laird’s memo, which was instantly stamped top secret, could describe only general suspicions about harm to national security.
In due course Republican politicians communicated their views. Senator Dole advised against going to court. He saw the attractive possibilities of great embarrassment for the Democrats. The Papers were apparently focused on Lyndon Johnson's administration, and it was known they concluded with documents pertaining to 1968. President Nixon therefore would be untouched, the Republicans assumed. On Tuesday morning, at a White House meeting with Republican leaders, Nixon also leaned toward the strategy of keeping hands off. Kissinger's office disagreed. The Pakistani government was just then helping to arrange a visit to the American president. Kissinger was also secretly negotiating with the North Vietnamese government at meetings held in Paris. Both of these critical initiatives could be threatened if the governments involved did not believe America could protect confidentiality. It was Kissinger's view that an injunction must be conceived and delivered. It would, of course, seek to stop publication and would be, by definition, a prior restraint. The long history of opposition to any prior restraint had only a month earlier been reaffirmed by Chief Justice Burger—not an admirer of the press—on May 17 in a decision on the distribution of leaflets in Chicago charging a local real estate broker with antiminority blockbusting. Burger, in his opinion, reiterated the "heavy presumption" against the "Constitutional validity" of any prior restraint on expression.

Nixon's administration had since 1968 been actively attacking the press—particularly the "Eastern establishment press." Vice President Spiro Agnew, who subsequently left office in disgrace, was the point man. He had shrewdly used Montgomery, Alabama—still smarting from Sullivan's defeat—as one location for a denunciation of the Washington Post and all its tributaries. He accused the New York Times of suppressing favorable news about the Nixon administration. Agnew used antiwar sentiment as a symbol of moral decay and media treachery. Meanwhile, Attorney General Mitchell issued 122 subpoenas for film or testimony from CBS and NBC reporters, achieving little more than costly annoyance. But he did not investigate the Kent State killings and rejected reports—including evidence developed by the FBI—concerning an "advance agreement among the Guardsmen" to fire on the student protesters.27

The meetings held on Monday, June 14, to discuss possible actions against the New York Times did not include Solicitor General Erwin Griswold, who would soon find himself representing the government's view on the Pentagon Papers before the Supreme Court. Ultimately, Mitchell and Mardian sent a telegram to the Times asking that all further publication cease and that the Papers be returned to the Department of Defense. The telegram stated that "publication of this information is directly prohibited by the provisions of the Espionage Act, Title 18, United States Code, Section 793."28

Nixon had called Mitchell at his Watergate apartment, where the telegram was being composed, and had the message read to him. He cleared it and Mitchell sent it to the FBI for transmittal to the Times. The first delivery went to a fish company in Brooklyn, but on a second effort it reached the newspaper. Mardian, as it turned out, had phoned the Times and read the telegram to Bancroft, who said he would get back to him in an hour. It was early Tuesday morning and the Times would go to press in about two hours. Louis Loeb, speaking for Lord, Day and Lord, vigorously recommended compliance. James Goodale, who had rushed into the office from his New York apartment, insisted, "We won't stop publication." Rosenthal demanded that they call Sulzberger at his London hotel. After the publisher had heard both sides, he decided to go ahead and publish. The Tuesday edition rolled, and Goodale knew this meant a legal fight. When he asked Loeb to prepare the defense, Loeb turned him over to Herbert Brownell, who had been Eisenhower's attorney general. Brownell was astonished that the editors would consider defying Mitchell, and he declined to represent the newspaper. This was, in effect, the end of the relationship between Lord, Day and Lord and the New York Times.29

A response to the government's telegram had been hammered out. It was phoned to James Reston in Washington for his comments. As fortune would have it, Reston was sharing a meal with Robert McNamara. There was a phrase in the Times' reply saying the newspaper would abide by "decisions of the courts." That phrase was repeated to McNamara, who suggested dryly, "not the courts—the highest court." The Times apparently split the difference and settled for "We will abide by the decision of the court." The reply began by "respectfully" refusing the request of the attorney general and explained that "it is in the interest of the people of this country to be informed of the material contained in the series of articles."30

On June 15, the Times ran Sheehan's third article, but the major story on the front page was about the refusal of Mitchell's request that the Pentagon Papers be returned and publication cease. Goodale had seen Yale law professor Alexander Bickel the day before because Bickel, a constitutional scholar, was preparing an amicus curiae brief for a number of news organizations in regard to a reporter's right to confidentiality. The case involved Times reporter Earl Caldwell and would be in all likelihood on its way to the Supreme Court in the near future. The Pentagon Papers were also discussed, and Bickel had commended the Times for their decision to publish. He had indicated that the newspaper had the right to do so under the First Amendment. Bickel might well be the man to take up the argument Lord, Day and Lord had ducked.

Goodale phoned Floyd Abrams, who would become one of the leading First Amendment advocates in America over the next twenty years. Abrams had been a student of Bickel's at Yale, and he suggested that he and his col-
leagues at Cahill, Gordon would join the battle if Bickel agreed to lead it. The Times newsroom tracked Bickel to his mother’s apartment on Riverside Drive in Manhattan, but it was after midnight before they made contact. He gave his consent and managed to reach the Cahill, Gordon office by the early hours of the morning. He and Abrams worked without a break to prepare a ten-page brief for a meeting with U.S. Attorney Whitney North Seymour.

The Pentagon Papers litigation took a notably brief period of fifteen days. The process began in New York before U.S. District Judge Murray Gurfein. All that Seymour knew about the Papers he had read in the Times. Because the wrong part of the Espionage Act was cited, Judge Gurfein delayed until after lunch that day his response to the government’s request for a temporary order restraining the Times from further publication. The judge had been very recently appointed to the bench by President Nixon and this was, by chance, his first case. The government insisted that further publication be prevented because of potentially serious damage to American diplomatic efforts and to the national defense. There were, however, no specific examples given. Professor Bickel pointed out that no American court had ever successfully enjoined the publication of a newspaper. He asked the judge if he wanted to be the first to do such a thing—especially in view of the government’s generalized suppositions and lack of hard evidence. Judge Gurfein, appealing to patriotism, suggested the Times suspend further publication of the Papers voluntarily until the case could be more fully heard. Bickel rejected the request and stated that “a newspaper exists to publish, not to submit its publishing schedule to the United States government.”

Judge Gurfein issued a temporary restraining order, all the same, until the hearing he set for Friday—three days later. He did not, however, order the Times to return its copies of the documents. During the delay period the Washington Post, much disturbed by its inability to compete with the Times on a story that appeared to be the largest security leak since Stalin learned about the making of the atom bomb, finally put the pieces of the puzzle together.

The Post had hired Ben Bagdikian, a one-time media critic of great distinction who had known Ellsberg when both men were at the Rand Corporation. Bagdikian was at Rand for a short interlude, writing a book about mass communications. At the Post he became an assistant managing editor for national affairs. On Wednesday, June 16, he tried to reach Ellsberg, leaving messages wherever possible. The process took awhile but eventually paid off. The Times had that day not published any Pentagon Papers materials. The editors were able to shift gears and report on the philosophical and legal conflict between press and government. It was an issue that engaged more of the nation’s press organizations than the first three installments of the Papers.

Not so the television news organizations. The electronic press had the FCC to reckon with, and the commission was now chaired by a Republican, Dean Burch, who had, many critics believed, intimidated the networks ever since he was appointed. Whatever the source of their timidity, the networks moved very slowly, if at all, on the Pentagon Papers story. The first major break in their ranks occurred when Walter Cronkite managed an interview with Ellsberg at a secret location. The interview gave the Papers, and their dissemination, greater notoriety but produced no revelations of substance.

Bagdikian finally spoke to Ellsberg from a pay phone in Washington’s Statler Hilton Hotel. There was widespread suspicion that the Washington Post telephones were bugged by the government, and Ellsberg had insisted on the outside communication. Bagdikian flew to Boston not long thereafter and endured a number of maneuvers designed to elude the possibility of surveillance by the authorities. He finally received a massive number of papers and packed them into a large cardboard box. Ellsberg was clearly upset by the Times acquiescence to Judge Gurfein’s order. He wanted the publicity to keep its momentum—on television or in print. The Post, he later maintained, had promised “that they would give it a number of pages per day.”

There had been, for twelve days, no trace of Ellsberg and he had not yet been identified publicly as the source of the leaked Papers. By Wednesday, June 16, Newsweek had published an interview with Ellsberg, and the FBI was reportedly telling foreign journalists that Ellsberg was, indeed, the culprit. The St. Louis Post-Dispatch confirmed the Ellsberg role in its Thursday edition, the same day that Bagdikian arrived back in Washington with his cumbersome box held together by a piece of rope that had been used to restrain a dog. He had phoned Ben Bradlee from Boston, and it was agreed that he and the Papers would go to Bradlee’s home rather than to the office. Bradlee gathered a band of editors, lawyers, and secretaries at his Georgetown house. He reckoned that he had two days at the most to cull the 4,400 pages Ellsberg had given Bagdikian. There would be a tense discussion in the living room and in the library between executives and editors. The Post was part of a large media company—magazines, television stations, news service, interests in a newsprint company and warehouses—and above all, a public offering of common stock had gone to the market on June 15. The Post’s lawyers, for reasons not dissimilar to those given by the former Times lawyers, Lord, Day and Lord, advised against publication. Among other points made, there was the charge that to publish the first story the next day—or at most the day after—was irresponsibly swift. After all, the Times had taken nearly three months to check out every possible danger to national security in the materials it had selected. Bagdikian argued vehemently against delay. They were not bound, he said, by the government’s action against the Times. Furthermore, they should not cave in because it would appear “as though they were not supporting the Times.” Sounding much like Alexander Bickel in his response to Judge Gurfein, Bagdikian declared, “The only way to assert the right to publish is to publish.”
Top reporters threatened to take early retirement or quit their jobs if the Post didn’t publish something at once on the Papers, and many accused the Post management and attorneys of cowardice. Finally, Bradlee and editorial page editor Philip Geyelin called Katherine Graham. She listened and paused and then said, “Go ahead.” The proprietors of both important newspapers, the Times and the Post, had decided to stand by their journalists. There was a last-minute delay at the Post based on a legal technicality, and Mrs. Graham had to decide a second time. She did not waver. Shortly after midnight the presses rolled and the morning edition featured a four-column headline: “Documents Reveal U.S. Effort in ’54 to Delay Viet Election.” The byline belonged to Chalmers Roberts, a veteran reporter who was an authority on the 1954 Geneva conference.

The government was taken by surprise when, on Friday, June 18, the Post entered the scene with its first article. It made Mitchell’s case against the Times more difficult. A proliferating story was not as easily curtailed as an exclusive. Bickel would make the comment that the government had alleged any further publication would gravely endanger national security—yet “the republic stands. And it stood for the first three days.” To some, it might seem naive that great danger could ever appear so quickly, but it was the principle that evolved out of Oliver Wendell Holmes’s original “clear and present danger” concept. The government was forced to act against the Post—in this instance before Judge Gerhard Gesell. In confronting the Times and the Post, the government was hobbled by the fact that no one of any importance had read the documents. But it was possible that such ignorance could be obscured—at least from public knowledge. The first hearing was, as it turned out, in camera.

The problem of ignorance, however, was even greater than expected. The government offered an example of serious, immediate danger by adding a supplement to an affidavit given by Admiral Noel Gayler, director of the National Security Agency. He indicated that a certain document would reveal the NSA could intercept North Vietnamese communications and knew how to break their code. The technical adviser to the Washington Post lawyers was George Wilson, the Post’s defense correspondent. He knew the NSA document well. It had been published on page 34 of the 1968 Senate Foreign Relations Committee hearings on the Tonkin Gulf—an especially annoying buff and Senator Fulbright’s saddle. Wilson had actually brought a copy of the record with him. He read it to the judges and to the government’s attorneys. Their one example of a secret that the Pentagon Papers would expose to alleged devastating effect was already public information. The sound of the government’s case collapsing may not have been audible, but everyone at the in camera hearing was aware of it.

On Wednesday, June 23, one court of appeals ruled against the Times, and another ruled in favor of the Post. Publication was officially restrained at both newspapers until Friday evening to allow the government a chance to appeal; but the split in the judgments assured a Supreme Court hearing.

The Supreme Court’s so-called year was concluded, or very close to its end. Justice William O. Douglas had been at his summer home on the West Coast for a week. The other justices had a final conference scheduled for Friday, June 25, to push away any loose ends, but now they knew they would have to hear the Pentagon Papers case because they could not leave a newspaper of the stature of the Times in limbo while the Washington Post was free to publish a story the Times had begun. At the Friday conference it was, despite the conditions, a close run thing. The justices voted five to four to hear the two cases. They actually scheduled an unprecedented Saturday morning sitting and allowed twice the normal time for oral argument. Douglas flew back to Washington. He had phoned in his vote, which was not in favor of hearing the cases because he joined with Justices Black, Brennan, and Marshall in preferring that the Post be left in the clear and the Times be released from the restraint put upon it. As it turned out, the full Court convened on Saturday morning. Two briefs were prepared by each side—one to be open, the other confidential.

More than 1,500 people stood in line outside the Supreme Court building that morning—for 174 seats. Solicitor General Griswold had filed a secret motion asking that all arguments be held in camera, but the first announcement Chief Justice Burger made to a very full courtroom was that the government’s request for in camera arguments had been denied by a six-to-three vote. The voting on the “merits” of the cases was to be precisely the same—six to three. After hearing arguments, however, each justice wrote a separate opinion. The first to complete this task was Douglas, who flew west again on Monday. His colleagues were still composing as he left.

At 2:30 P.M., Wednesday, June 30, the Court reconvened, minus Douglas. Justice Brennan had drafted an opinion that was the opener. He emphasized that prior restraint requires convincing proof, and the government had not produced it. The same three justices who had dissented in the rejection of Griswold’s motion for secrecy now dissented from the majority on the merits. Burger referred to the Pentagon Papers as “purloined” documents and caustically asked why the Times wanted immediate relief when they had taken many weeks to study the documents before publishing. Justice Harlan made a similar point about haste, saying the Court had been “almost irresponsibly feverish in dealing with these cases.” Justice Harry Blackmun was convinced that serious harm would be caused by publication—perhaps prolonging the war, perhaps jeopardizing the release of American prisoners. Solicitor General Griswold had argued in the lower court that confidentiality of communication is as essential to the government as confidentiality of sources is to the press.
The classification policy had been set by President Eisenhower in 1953. It designated three categories: top secret, secret, and confidential. Pious statements were issued in both the Eisenhower and Kennedy administrations regarding “unnecessary classification and overclassification,” but bureaucrats at all levels continued to use rubber stamps to deny access to information—some of which had already been published or openly discussed, some which had no bearing on security, and some which the stamper believed would look more important if it were classified. Out of this undisciplined freedom to classify emerged distortions, misuse, and venality. Illogical and harmful limitations were not in the public interest, but there was no clear means of limiting the limitations. Under such a system it was no surprise that Leslie Gelb would be required to brand all the Pentagon Papers top secret because a few of them might reasonably be considered potentially damaging to legitimate American interests or truly vital to national security and therefore required top secret classification.

A memorandum from one of the members of the Joint Chiefs of Staff, complaining that the top-secret classification was becoming excessive, triggered no corrective reform because the memorandum itself was stamped top secret. In point of fact, the Special Task Force on Secrecy, set up by the Pentagon’s Defense Science Board in 1970, noted that “the amount of scientific and technical information which is classified could profitably be decreased by as much as ninety per cent by limiting the amount of information which is classified and the duration of its classification” (emphasis added).36

Against such a shadowy background Solicitor General Griswold, who would have to argue for the government in favor of restraining publication, soon learned that very few people on the government’s side had read the Papers or knew what was in them. When he asked high-ranking officials to give him a short list of critical items, they produced a group of forty-one. He read the documents that were singled out and realized that they might be politically embarrassing, but they were certainly no threat to security. Griswold wrote an op-ed piece for the Washington Post in February 1969 stating that after he had been given a chance to review most of the Papers, he had concluded there was not a single document that could damage or impede America’s security interests. However, he could see a great deal of embarrassing information pertaining to various public officials and to their decisions.

Griswold, returning to the Supreme Court hearing, had cut the list of forty-one items to eleven—one of them being the “diplomatic volumes” that Ellsberg had withheld anyway. Bickel, meanwhile, prepared his case for the Times with great care. He had not appeared before the Supreme Court before, but he had written and lectured on the Court extensively. He was only forty-six at the time, but he had delivered the Holmes lectures at Harvard Law School, and these had been expanded into a book called The Supreme Court and the Idea of Progress—a work that was widely discussed and influential in legal circles. Bickel was a colleague and close friend of Robert Bork, and they shared a view of the Court that opposed attempts to shape public policy or cross the line into areas best left to the political process. For the sake of his client, the Times, Bickel the lawyer (rather than Bickel the professor) plotted his strategy so as to win the support of at least one “swing justice”—Porter Stewart or Byron White. He provided a moderate rather than an absolutist approach. Ironically, Griswold had been one of his professors at Harvard Law School. Neither man was easily labeled in conventional liberal/conservative terms.

Griswold surprised legal experts by mentioning in his brief the dubious means by which the Times came into possession of the Papers and referred to “common law right of literary property” despite the fact that the government, as servant of the people, has no claim of copyright. As to the president’s power to conduct foreign affairs and his role as commander in chief, Griswold declared: “To limit the President’s power in this regard solely to punishment of those who disclose secret information would render the power meaningless: the harm sought to be prevented would have been irreparably accomplished.”37

Bickel articulated the precedents for resisting “prior restraint” and added that any exceptions had to do with “the redress of individual or private wrongs”—that is, libel. The president, Bickel observed, “can discipline, he can discharge, and he can repossess government property”—but there was no legislation authorizing prior restraint as a means of dealing with security leaks. “Only when publication could be held to lead directly and almost unavoidably to a disastrous event,” Bickel said again, can prior restraint be justified. Two district judges and two appellate courts had reviewed the government’s evidence and could not find potential disaster. Delay by limitation becomes censorship, the argument went on, and the Times had been restrained for eleven days, the Post for seven. The Times brief ended with a historical overview:

Press and government have a curious interlocking, both cooperative and adversary, relationship. . . . This has been the case, more or less, in this century since the extension of manhood suffrage and the rise of an independent rather than party-connected or faction-connected press. It is not a tidy relationship. . . . The greater power within it lies with the government. The press wields the countervailing power, conferred upon it by the First Amendment. If there is something near a balance, it is an uneasy one. Any redressing of it at the expense of the press, as this case demonstrated, can come only at the cost of incursions into the First Amendment.38

The Post was represented by William R. Glendon, not in the least professorial and known for his earthiness. He shrewdly attacked the Espionage Act, which Congress had amended in 1950, saying: “Nothing in this Act
shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States.” Glendon ridiculed the notion that the Post could have gotten hold of the Papers by using the Freedom of Information Act. Simply put, the Papers could not be declassified by the authority of the Freedom of Information Act and therefore could not be ascertained. Glendon’s clincher was to assert that the Papers were already so widely distributed that the “government’s efforts to suppress the truth will not prevail. . . . Public revelations of this controversial history will continue apace until it will all become available to the American public.”

Chief Justice Burger made no secret of his skepticism about press behavior, but when he appeared at the American Bar Association convention nearly a month after the Pentagon Papers case had been resolved, he said in a television interview, “We can’t do anything about the media. This is a matter of self-restraint. . . . We have just got to have a pervasive civility in dealing with all our problems.”

Friday night, June 25, a warrant for Daniel Ellsberg’s arrest had been issued. He was charged with illegally copying and possessing government documents. At 10 A.M. on Monday, June 28, Ellsberg arrived by taxi at the post office building in downtown Boston. He told reporters and a crowd of onlookers—many of whom were there to support him—that he had indeed made the Papers available to Senator Fulbright and to the Times. He said he had done so on his own and would take responsibility for all his actions. He was placed under arrest by the FBI. The magistrate asked for his passport and granted a $50,000 personal recognizance bond that he wouldn’t have to pay unless he failed to appear in court. A Los Angeles grand jury indicted him the same day. About forty-eight hours later, Ellsberg’s lawyers could point to six Supreme Court opinions on the Pentagon Papers that in one way or another made the prosecution of Ellsberg seem less urgent.

Justice Potter Stewart had decided that the government’s evidence was unconvincing, although he suspected there were some components of the Papers that would do damage if published. More significantly, he commented on the classification system: “For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self promotion.”

Justice Hugo Black, however, remained a purist. “I believe,” he said, “that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible and continuing violation of the First Amendment.” It was not the first time, or the last, that jurists who favored the closest possible reading of the Constitution, the “strict construc-
Meanwhile, the FBI and the Justice Department continued an almost obsessive search for Ellsberg's collaborators and the evidence to prosecute all concerned on criminal charges. There were intimations, not apparently discouraged by Deputy Attorney General Richard Kleindienst, that the 1972 presidential campaign might not focus on Vietnam or the economy "but [on] whether an arrogant press is free to undermine the security of this country without check." (emphasis added).46

Ellsberg's fate was to be decided before U.S. District Judge William M. (Matt) Byrne Jr., considered to be a civil libertarian. Hearings were scheduled to begin on January 6, 1972, but a grand jury escalated charges against Ellsberg and Russo for stealing, concealing, retaining, and conveying secret documents, among other offenses. A number of political developments in Washington interrupted the trial of Ellsberg and Russo, but it finally resumed on January 17, 1973. By then, the Watergate investigation was making headline news. The trial took place in Los Angeles, far away from the gathering Watergate storm in Washington. Between January and April 1973, testimony was heard regarding alleged threats to national security caused by the Pentagon Papers disclosures. Toward the end of April, the Watergate prosecutors learned that White House "plumbers," including E. Howard Hunt Jr. and G. Gordon Liddy, had conducted, in 1971, a burglary of a psychiatrist's office in Beverly Hills, looking for damaging personal information on Daniel Ellsberg. What they found was not significant, but it was clearly an illegal operation on every level. Judge Byrne resisted a dismissal in the Ellsberg trial until May 11, 1973, and then, reportedly exasperated by emerging wiretapping evidence, he threw out the charges against Ellsberg and Russo in their entirety. There was, however, no formal acquittal, and even twenty years later in a 1994 telephone conversation, Ellsberg explained that he would not discuss some aspects of the case because accusations remained technically on the books. In July 1974, John Erlichman and G. Gordon Liddy were found guilty of a conspiracy to violate the psychiatrist's civil rights. About a month later, President Richard Nixon resigned.

The publication of the Pentagon Papers (absent the "diplomatic volumes") had no significant effect on national public opinion. It didn't stimulate an outcry, a movement, or even that kind of debate and discussion that clearly reshapes political policies. The frantic search for guilty parties in Ellsberg's so-called conspiracy helped to keep the story alive. The Bantam book, made out of the ten Times installments, sold over a million copies, but many editors and publishers gradually became aware of a deeply ironic and sobering reality—they were better off before the Supreme Court opinions were handed down on the Pentagon Papers. Those in government who yearned for some means of restraining the press on security issues, at least while preparing for court hearings, rejoiced that there appeared to be a tacit assurance because publication could be stayed if the evidence supported a high probability of immediate serious damage to American interests. The fact that in the Pentagon Papers cases the government had failed to produce persuasive evidence did not mean that it could not one day, in a future case, convince the courts by using the Pentagon Papers opinions as precedent.

Alexander Bickel commented philosophically on the outcome of the Pentagon Papers cases in his book The Morality of Consent: "Before June 15, 1971, through the troubles of 1798, through one civil and two world wars, and other wars, there had never been an effort by the Federal government to censor a newspaper by attempting to impose a restraint prior to publication, directly or in litigation. The New York Times won its case, over the Pentagon Papers, but that spell was broken, and in a sense, freedom was thus diminished."47

Bickel, who died of cancer at the age of forty-nine, believed that "those freedoms which are neither challenged nor defined are the most secure."48 His friend Judge Robert Bork, in a 1984 opinion that actually expanded First Amendment protection against libel, seemed to take Bickel's apprehension into account when he underscored the difference between "creating new constitutional rights" and trying "to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know."49

The world we know has been conveyed to most of us, however imperfectly, by an unfettered press. The means of conveyance may be proliferating, but finding reliable contexts will be no easier. A nation besotted with fragments of information needs a frequent reminder of context to test alleged truth, to arouse moral reasoning, and to preserve its freedoms.
35. Conversation between Kalven and Meiklejohn during the summer following
The New York Times v. Sullivan. Alexander Meiklejohn was then ninety years old. See

CHAPTER FOUR

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2. Robert McNamara, interview with Francis Cairncross, Observer (London),
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3. Alexander Bickel, The Morality of Consent (New Haven: Yale University Press,
1965), p. 68.
6. Daniel Ellsberg, "Ellsberg Talks," interview with Look magazine, October 5,
1971.
7. Daniel Ellsberg, article in Harvard College Class of 1952, Fifteenth Anniversa
ry Report.
9. Ungar, The Papers and the Papers, pp. 66-68; Salisbury, Without Fear or Favor,
pp. 57-63; 82, 228; Hersh, Price of Power, p. 328; Daniel Ellsberg, telephone con
12. Salisbury, Without Fear or Favor, pp. 327-329; R. Woodward and S. Arm
13. Salisbury, Without Fear or Favor, pp. 57-63.
Papers and the Papers, pp. 74-75.
21. Ibid., pp. 292-294; Ungar, The Papers and the Papers, p. 82; Ellsberg, tele
22. Salisbury, Without Fear or Favor, pp. 121, 126-127; Hersh, The Price of
24. Ibid., pp. 121, 126-127.
26. Salisbury, Without Fear or Favor, pp. 223-228, 235-236; Hersh, Price of
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CHAPTER FIVE

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