# Chapter 43 - Restraints on Publication of National Security Information

## Introduction to the Pentagon Papers

### Reflect on whether this long term secrecy, including secret wars in Laos and Cambodia is possible in the modern, connected world.

#### This is a piece of the larger picture of secrecy and governmental abuse that shaped the authors and my own views of the government.

#### Is this different from the WMD debates over the 2nd Iraq war?

##### How long was the government able to hide the absence of WMDs?

#### If the world has changed to make long term secrecy and to limit even short term secrecy, does this make our concerns with privacy and limitations on government powers out of date?

### What did the Pentagon Papers show?

### Why was this critical to undermining the support for the Vietnam War?

#### How McGovern lost anyway, in a landslide, is the story of the first modern campaign. See Fear and Loathing on the Campaign Trail in 1972.

### How much do you think this was an essential predicate to the impact of Watergate?

### What did CJ Burger say the NYT should have done when they were given the papers?

### What did the NYT’s lawyers eventually advise?

### Did they even read the papers?

### Why?

### You have read the espionage laws – were the lawyers correct at the time?

#### What did the AG threaten?

#### Does the opinion change this analysis?

#### What do you think was driving the Times analysis of the risk of publishing?

#### Was it really a legal decision?

### What was Justice Stewart’s view of the Constitutional status of the press?

### Is this view universally accepted?

### What did the Times say in their filing in the case about interdependence of the press and the government and the use of secret information?

#### This is echoed in Rosen.

### What did Kennedy say about the Times suppressing their story about the Cuban invasion that became the Bay of Pigs?

### Did the Times publish all of the Pentagon Papers?

### Should the media self-censor stories?

#### Can they work with the government in making these decisions?

#### What is the risk of trying to work with the government before publication?

### After the publication of the first installment, the government moved for an injunction – what law did they base this initial request on?

### Did the judge grant the injunction?

### What might have influenced him?

### How long did the government get to brief the case?

### What did Ellsworth do when the second installment was not published?

### What authority did the government cite in the brief?

### What did the government rely on *In re Debs*, 158 U.S. 564, 586 (1895) for?

### What did the government argue that the court must presume about classified information?

### What factual issue killed the government’s case?

### The government immediately moved to enjoin the Post on Friday afternoon. What judge did it draw and what did he rule?

### Was this his first case?

### What did the appeals panel rule at AM Sat?

### What did Gesell rule on Monday?

### How did the government amend the record?

### Should this have been allowed?

### Was the retraining order continued pending Supreme Court appeal?

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

### What did Douglass say about problems with the government claiming that the publication would impede its fighting of the war?

### What did Burger say in his dissent that he thought the Times should have done before publishing?

### What did Harlan say were the two proper inquires by the court?

### Did he support the specific factual inquiry that the district courts required, i.e., their inquiry into which parts of the papers really affected national security?

### How would he resolve the factual questions?

### What warning did Blackmum give the papers?

## Notes

### What did Bickel say had been lost?

### Bartnicki v. Vopper, 532 U.S. 514 (2001) concerned the broadcasting of a illegally obtained phone conversation.

#### What did the court rule about the right of the broadcaster?

#### How might this have changed if the broadcaster had made the illegal recording?

#### Does this really tell us anything about national security?

### What had Ellsberg withheld from the papers?

### Given the way the war ended, Ellsberg regretted withholding the documents.

### How would you answer this question:

#### Let us assume that when the members of the Court go back and open up this sealed record we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense had been that they were 19 years old and had low draft numbers. What should we do?