

WHAT IF DANIEL ELLSBERG HADN'T BOTHERED?

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INTRODUCTION

In his book, *Secrets: A Memoir of Vietnam and the Pentagon Papers*, Daniel Ellsberg recounts the aftermath of a 1969 *New York Times* story regarding Ellsberg and five of his colleagues at the RAND Corporation.¹ The six had sent a letter to the *Times* calling for complete withdrawal of U.S. forces from Vietnam. The result was a story headlined “six RAND experts support pullout: back unilateral step within one year in Vietnam.”² The response within RAND to the letter’s signatories was almost entirely negative. In a series of inter-office memos, RAND employees lamented that the letter could jeopardize RAND’s longstanding “contractual and confidential relationship with the Defense Department.”³ One wrote to the signatories: “while you may feel strongly enough to lay your own jobs on the line, you do not have the right to lay mine there as well.”⁴ Another wrote that the signatories had “unleash[ed] a torpedo so unerringly as to strike at least glancing blows on your largest and most faithful clients, your employer, and your fellow researchers simultaneously.”⁵ While Ellsberg resigned from RAND before going on to leak the Pentagon Papers (“Pentagon Papers” or “Papers”), the other signatories had intended to stay on. However, due to blowback from the letter, one signatory was told to find another position while the others reportedly hung ““on to [their] jobs by [their] fingernails.””⁶

Of course, the professional and personal risks that the signatories took paled in comparison to those that Ellsberg went on to take in secretly photocopying and leaking—first to members of Congress and then to the *New York Times* and other members of the press—the Pentagon Papers, a classified history of the Vietnam War that the Defense Department had commissioned. Ellsberg has said that he believed that he was likely to be incarcerated for the rest of his life for leaking the Papers.⁷ He was indicted and tried, although the case was eventually

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1. See generally DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* (2002).

2. *Id.* at 314 (emphasis omitted).

3. *Id.* at 318.

4. *Id.*

5. *Id.*

6. *Id.* at 320.

7. *Id.* at 303-05.

dismissed due to a string of government misconduct.⁸ The government had suppressed evidence, burglarized the office of Ellsberg's psychiatrist, illegally wiretapped Ellsberg's conversations, and held secret discussions with the judge trying Ellsberg's case about the judge's possible appointment as FBI Director.⁹ Apart from the potential for prosecution and imprisonment, Ellsberg put at risk his future income, potentially impacting not only himself but also his two children and his ex-wife to whom he provided child support and alimony payments.¹⁰ He also put at risk the status and access that came with being a respected former Pentagon and State Department analyst who had spent two years in Vietnam and had advised Former Defense Secretary Robert McNamara and National Security Advisor Henry Kissinger.¹¹

I recount these risks to highlight how much easier it would have been for Ellsberg simply not to bother. How many of us, in Ellsberg's shoes, would have said to ourselves "I just can't." But Ellsberg did bother. While still at RAND, as one of a handful of people with authorized access to the full, roughly 7000-page contents of the Pentagon Papers,¹² Ellsberg and his former RAND colleague Anthony Russo, spent nights and weekends copying the Papers on the (agonizingly slow by modern standards) photocopy machine at a business owned by Russo's friend.¹³ Ellsberg then contacted several members of Congress, hoping to find one who would hold hearings on the Papers, or enter them into the *Congressional Record*. When these efforts failed, Ellsberg leaked the papers to Neil Sheehan of the *New York Times*. Ellsberg also saw to it, when the government sought to enjoin the *Times*, that the Papers were made available to other publications in order to frustrate attempts to restrain publication.¹⁴

So Ellsberg bothered, as did Russo, who was tried along with Ellsberg and whose case was dismissed on the same basis as Ellsberg's. But what difference, if any, did the leak and subsequent publication of the Pentagon Papers make? In exploring that question, this Essay takes some liberty with the topic—"constitutional counterfactuals"—of this symposium. Despite this author's vast enjoyment of several classic movies and television episodes featuring parallel worlds,¹⁵ this Essay does not build a counterfactual universe in

8. *See id.* at 455-56.

9. *See, e.g., id.* at 444-56; INSIDE THE PENTAGON PAPERS 201 (John Prados & Margaret Pratt Porter eds., 2004); SANFORD J. UNGAR, THE PAPERS & THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS 8-10 (1989).

10. *See, e.g.,* ELLSBERG, *supra* note 1, at 308-09.

11. *See, e.g., id.* at 227-41, 343-51; INSIDE THE PENTAGON PAPERS, *supra* note 9, at 4-6. Indeed, President Nixon's White House chief of staff H.R. Haldeman recounted that "Ellsberg had been one of [Kissinger's] 'boys.'" MARK FELDSTEIN, POISONING THE PRESS: RICHARD NIXON, JACK ANDERSON, AND THE RISE OF WASHINGTON'S SCANDAL CULTURE 150, 152 (2010).

12. *See* ELLSBERG, *supra* note 1, at 244-45, 289, 304; *see also* Hedrick Smith, *Vast Review of War Took a Year*, N.Y. TIMES, June 13, 1971, at 1.

13. ELLSBERG, *supra* note 1, at 290-91, 295, 299-302.

14. *See id.* at 326-28, 331-33, 357-75, 384-406.

15. *See, e.g.,* IT'S A WONDERFUL LIFE (Liberty Films 1946), available at <http://www.imdb>.

which Daniel Ellsberg never leaked the Pentagon Papers. It hints at such a world indirectly, however, by considering the difference that Ellsberg's leak made in the universe that we do occupy.

This Essay considers the impact of the Pentagon Papers leak on public and judicial attitudes toward secrecy-based assertions by the executive branch. I use the term "secrecy-based assertions" to cover two types of claims: claims that information must be kept secret to protect national security, and claims that the public would understand and bless the government's actions if only the public could see the information that they are not permitted to see. This Essay argues that the Pentagon Papers leak and its aftermath helped set in motion a process of social learning—albeit a non-linear one with plenty of limits and setbacks—that continues to this day on the dangers of excessive deference to secrecy-based assertions by the government.

With respect to assertions that the public would bless the government's actions if only it knew what they know, the Pentagon Papers were widely viewed as giving lie to such claims as they related to the Vietnam War. The Papers' revelations impacted Americans' willingness to take on faith the honesty and competence of their government. Nor was this impact lost on the Nixon Administration, whose paranoia skyrocketed in the wake of the leak, contributing to a chain of nefarious activities that led to Nixon's resignation and further catalyzed public distrust in government. This state of affairs led, among other things, to an influx of newly elected congresspersons championing restraints on the executive branch. Yet these events also gave rise to an influential and continuing backlash against restraints on presidential power, one that became most evident during the administration of George W. Bush and continues in the Obama Administration. As the backlash and the ongoing influence of its attendant constitutional claims illustrate, the impact of the Pentagon Papers leak on public, political, and judicial deference to executive power is hardly straightforward. Nonetheless, a key impact of the leak—indeed, the reason that it gave rise to so strong and continuing a backlash—is that it serves as a permanent, high-profile reminder that lies, mistakes, and incompetence may well lurk behind a government admonishment to "trust the President because only he [He?] knows the facts."¹⁶

Closely related to wariness toward government claims of expertise based on secret knowledge is another type of skepticism fostered by the Papers' leak: Skepticism toward government claims that information must be kept secret in the name of national security in the first place. The impact of the latter, like that of the former, is hardly unmitigated. For example, case law is littered with instances before, after, and even during the period of the leaks and ensuing scandals in which courts defer heavily to national-security based pleas to keep

com/title/tt0038650/; *Star Trek, The Next Generation: Parallels* (television broadcast Nov. 27, 1993), available at <http://www.imdb.com/title/tt0708752/>; *The Twilight Zone: The Parallel* (television broadcast Mar. 14, 1963), available at <http://www.imdb.com/title/tt0734670/>.

16. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 331 (1973) (deeming this statement to reflect the mindset of the American people in the 1950s and 1960s).

information secret. Furthermore, even as the Supreme Court refused to grant a prior injunction to prevent the Papers' publication, a number of Justices suggested, in concurring and dissenting opinions, that post-publication punishment might be constitutional if authorized by statute. Nonetheless, the leak of the Papers constitutes a moment of social learning embedded in our national psyche, counseling us to suspect overreaching when the government invokes national security to justify secret-keeping. Indeed, there is good reason, on which I elaborate below, to believe that the federal government would be less restrained than it currently is in punishing leaks of classified information were it not for the Pentagon Papers experience.

Part I of this Essay summarizes the theory of social learning and criticisms of the same. Part I also provides an overview of the ongoing social learning effects, and limits thereupon, of the Pentagon Papers leak. Part II elaborates on the social learning effects of the leak as they generally relate to "presidentialist" arguments, including those based on the President's access to secret information. Part III elaborates on the social learning effects of the leak as they relate to a more specific set of presidentialist claims—those to the effect that only the executive can be trusted to know when particular information is too dangerous to release.

I. SOCIAL LEARNING AND THE PENTAGON PAPERS: AN OVERVIEW

Mark Tushnet describes a process of "social learning" whereby government responses to perceived national security threats grow more reasonable over time as Americans learn from and regret past excesses.¹⁷ Tushnet explains:

Knowing that government officials in the past have in fact exaggerated threats to national security or have taken actions that were ineffective with respect to the threats that actually were present, we have become increasingly skeptical about contemporary claims regarding those threats, with the effect that the scope of proposed government responses to threats has decreased.¹⁸

This view is not without its detractors. David Cole suggests that changes over time tend to be superficial, designed to enable the government to distance itself from notorious past episodes.¹⁹ "All we have learned from history," says Cole, "is how to mask the repetition, not how to avoid the mistakes."²⁰ Other scholars challenge the assumption that government typically overreaches when

17. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283.

18. *Id.* at 283-84.

19. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3-4 (2003).

20. *Id.*; see also Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1412, 1418 (2003) (describing this approach as the "adaptive-learning model").

it addresses a new type of threat or that courts defer to such overreaching.²¹ And Tushnet himself disclaims any notion that history invariably reflects social learning or that social learning takes place, when it does, along an unbroken trajectory.²²

This Essay's goals in a sense are narrower, and in a sense are broader, than those of the works just cited. They are narrower in that the Essay considers the impact of one particular set of events—the leak of the Pentagon Papers and its aftermath, including the government's reaction to the leak—over the past several decades, rather than looking at government's relationship to civil liberties in times of war or crisis generally, or even in a class of cases, over longer periods of time. Yet they are broader in that this Essay is interested not solely in the leak's impact on subsequent government actions and judicial outcomes. Rather, it seeks to understand the leak's intellectual impact on the public as well as on elites in the three branches of government. This impact manifests itself partly, though by no means entirely, in decisions made in the executive and judicial branches.

Despite the differences in our respective inquiries, both Tushnet's and Cole's views²³ are helpful framing devices for explaining the impact of the Pentagon Papers leak on the national psyche. On the one hand, the leak has had undeniable social learning effects. To this day, it is invoked in judicial opinions and in public debates alike for the proposition that it is dangerous to defer heavily to executive branch judgments, including executive claims that certain information is too dangerous to release. It is highly plausible that this social learning effect imposes practical constraints on the executive's ability to take legal action against classified information leaks and publications. At minimum, the executive in any given case must be prepared to argue—to the press and the public, if not to the courts—that the leak or publication is distinguishable from the Pentagon Papers. Indeed, some of the public debate about classified information disclosures by the organization called WikiLeaks centers on whether WikiLeaks follows in the tradition of Daniel Ellsberg and the Pentagon Papers (and thus by

21. See, e.g., Lee Epstein et al., 80 N.Y.U. L. REV. 1, 8-9 (2005) (finding that while courts defer more heavily to the executive during wartime in cases unrelated to the war, courts do not defer more heavily in cases that relate directly to the war); Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226 (2009) (arguing that assumptions of a judicial “national security exceptionalism” find[] no empirical support in at least one important class of post-9/11 cases: challenges to emergency detention policies”); Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1457-60 (2010) (explaining that presidential success in courts during times of war or crisis varies based on factors, including the stage and perceived level of threat and the President's popularity).

22. See Tushnet, *supra* note 17, at 284 n.38 (acknowledging that “the common use of a few episodes might be misleading”); *id.* at 292 (explaining that social learning helps us to avoid repeating old mistakes, not “making new and different” ones); *id.* at 298 (noting that social learning may lead us to narrow the reach of incursions to make them increasingly discriminatory against groups perceived as “[o]ther”).

23. See *supra* notes 17-19 and accompanying text.

implication is good) or whether it is “no Pentagon Papers” (and thus by implication is bad).²⁴

At the same time, the social learning effect is limited in important ways, including through adaptations like those described by Cole. For one thing, while no administration has repeated the Nixon Administration’s widely criticized decision to seek a prior restraint against the press, recent administrations have attempted through other means to discourage the publication of leaks that they deem unacceptable, in one case by prosecuting but more generally by threatening to prosecute such publications after the fact. More commonly, the government has focused on prosecuting not publications but leakers themselves, a technique that has been stepped up dramatically in the Obama Administration. Additionally, supporters of these tactics sometimes engage in a direct rhetorical adaptation noted above. That is, they argue that prosecution in a given case is warranted even if it was not warranted in the case of Daniel Ellsberg and the Pentagon Papers, as the newly leaked material is “no Pentagon Papers.”²⁵

Beyond adaptation, there have been more fundamental challenges to the effects of post-Pentagon Papers social learning. These challenges take the form of increasingly influential constitutional arguments against restrictions on executive power, including executive secret-keeping. The counter-movement that helped to develop such arguments arose in response to restrictions on presidential power issued in the wake of the Pentagon Papers leak and its aftermath.²⁶

A backlash and adaptive behavior were almost certainly inevitable in response to the very serious challenge to executive power embodied in the Pentagon Papers leak. In the balance lay public and inter-branch acquiescence to an imperial presidency that had arisen by the mid-twentieth century, fueled by the Cold War, a growing secrecy system, and expanded government. The leak marked a dramatic challenge to this state of affairs, and to the promise of public and inter-branch acquiescence on which it depended. H.R. Haldeman, President Nixon’s Chief of Staff, aptly described the danger that the leak posed to the imperial presidency when he told Nixon:

[O]ut of the gobbledygook [of the Papers], comes a very clear thing: . . . you can’t trust the government; you can’t believe what they say; and you can’t rely on their judgment; and the—the implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this, because it shows that people do things the president wants to do even though it’s wrong, and the president can be wrong.²⁷

24. See discussion *infra* Part III.

25. See discussion *infra* Parts III.A, III.B.3.

26. See discussion *infra* Part II.D.

27. Audio tape: Nixon Oval Office Meeting with Bob Haldeman, Nixon Presidential Materials Project, Oval-519-1, Cassette 747 (June 14, 1971) (transcribed by Eddie Meadows, National Security Archive, George Washington University), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/nixon.html>.

II. SOCIAL LEARNING, SKEPTICISM, AND PRESIDENTIAL POWER (OR HOW AMERICANS CAME TO SUSPECT THAT THE IMPERIAL PRESIDENT HAS NO CLOTHES)²⁸

A. *Backdrop: The Imperial Presidency After World War II*

Much has been written about the twentieth century rise of what Arthur Schlesinger, Jr. called “the imperial [p]residency.”²⁹ While there were and are many components and causes of this phenomenon,³⁰ two are of special note for our purposes. The first is a cultural shift that accompanied the rise of a permanent “national security state” in the wake of World War II and at the onset of the Cold War.³¹ As Richard Barnet wrote in 1985:

The “engineering of consent” is crucial to the national security state. Edward L. Bernays’s definition of public relations accurately describes the process by which the consensus on national security is maintained. Most Americans are inhibited from having or expressing personal convictions on matters relating to national security for a number of reasons. First, the topic is amorphous and seemingly complex. The masses of numbers about weapons, budgets, “kill ratios” and other bits of jargon make it seem almost hopeless to follow the “debate.” Second, the great emphasis put by government on the creation of classified information and the highly publicized, though not always successful, effort to protect secret information, cause most citizens to believe that they do not know sufficient “facts” to challenge official truth. Third, the threat to the survival of the nation is invoked in support of every new weapons system.³²

28. This parenthetical is, of course, a reference to the classic children’s story, *The Emperor’s New Clothes*, by Hans Christian Andersen.

29. See generally SCHLESINGER, *supra* note 16.

30. For recent explorations of this topic, see, for example, CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 17-22, 38-84, 308-30 (2007); GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1-4, 45-53 (2010).

31. See Richard J. Barnet, *The Ideology of the National Security State*, 26 MASS. REV. 483, 488-94 (1985).

32. *Id.* at 495. For critiques of the resulting narrowness of mainstream discourse about national security, see, e.g., ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 14-15, 18, 90 (2005); WILLS, *supra* note 30, at 161-66, 238-40; Glenn Greenwald, *The NYT’s View of “Journalistic Objectivity,”* SALON, Dec. 23, 2009, http://www.salon.com/opinion/greenwald/2009/12/23/objectivity_2/. For a more supportive view of the early national security state’s impact on journalistic norms during and after World War II, see GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW 145-53, 158-62 (2010).

Closely related to this cultural shift was the creation of a vast infrastructure for secret-keeping, centered on the classification system. The modern classification system began in 1951, when President Harry Truman issued an executive order extending what had been a purely military secrecy system “to non-military agencies, [by] authorizing any executive department or agency to classify information when it seemed ‘necessary in the interest of national security.’”³³ Until that time, official secrets were designated only within and by the military.³⁴ Even the military classification system was not recognized by presidential order until 1940.³⁵ From the system’s beginnings, the criteria for classification have been determined predominantly through executive order.³⁶ By the 1970s, millions of documents were classified yearly³⁷ and estimates on the number of persons with some form of classification authority ranged from several thousand to more than one million.³⁸ Today, roughly sixteen million new official secrets are created yearly,³⁹ and several million persons in the United States have some form of classification authority.⁴⁰

The secrecy system is deeply entwined with the phenomenon of deference to the executive, as Barnett notes in the passage quoted above. That the President and his advisors have access to so much information not seen by Congress or the courts, let alone the public, contributes to the presidency’s mystique and to a sense among those outside of the President’s inner circle that they are

33. SCHLESINGER, *supra* note 16, at 340 (emphasis omitted), *quoted in* Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 890 [hereinafter Kitrosser, *Classified Information*].

34. *See* HAROLD C. RELYEA, *SECURITY CLASSIFIED AND CONTROLLED INFORMATION* 2 (2008).

35. *See id.*; SCHLESINGER, *supra* note 16, at 339.

36. *See, e.g.*, DANIEL PATRICK MOYNIHAN ET AL., *REPORT OF THE COMMISSION ON PROTECTING AND REDUCING GOVERNMENT SECRECY*, at XXXVIII, 5, 11-13, 15, 23-24 (1997); RELYEA, *supra* note 34, at 1-5; SCHLESINGER, *supra* note 16, at 338-41. A few discrete categories of information are classified by statute. *See, e.g.*, NATHAN BROOKS, *CONG. RESEARCH SERV.*, RS21900, *THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK* 2 n.7 (2004).

37. *See* INFO. SEC. OVERSIGHT OFFICE, *ANNUAL REPORT TO THE PRESIDENT* 35-41 (1979) [hereinafter 1979 REPORT TO THE PRESIDENT]; COMPTROLLER GEN., *REPORT TO THE CONGRESS OF THE UNITED STATES: IMPROVED EXECUTIVE BRANCH OVERSIGHT NEEDED FOR THE GOVERNMENT’S NATIONAL SECURITY INFORMATION CLASSIFICATION PROGRAM*, at ii, 6-7 (1979).

38. *See* 1979 REPORT TO THE PRESIDENT, *supra* 37, at 27-33; COMPTROLLER GEN., *supra* note 37, at 16-18, 30-31; SCHLESINGER, *supra* note 16, at 341.

39. INFO. SEC. OVERSIGHT OFFICE, *REPORT TO THE PRESIDENT* 9 (2010) (noting that combined original and derivative classification decisions *averaged* 16.1 million each year from fiscal year 1996 through fiscal year 2009).

40. *See* Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 ST. THOMAS J.L. & PUB. POL’Y 62, 100-01 nn.171-77 and accompanying text (2010) [hereinafter Kitrosser, *Supremely Opaque?*] (discussing the relevant statistics and the distinction between original and derivative classification authority).

unequipped to challenge his decisions on national security.⁴¹ Attempts to diminish this information monopoly themselves are frequently blocked by claims that only the President and certain subordinates know when information is too dangerous to be disclosed.⁴²

These phenomena—a culture of deference to the President, massive executive branch secrecy, and the mutually reinforcing relationship of the two—are hardly relics of the past. They are alive and well and in some respects more robust than they were during the Cold War. Yet these phenomena, if now stronger and more adaptive in some respects than in the past, also bear the scars and vulnerabilities of past skirmishes. If Congress, courts, and the people remain too quick today to defer to executive branch assertions and secrecy, and I believe that they do,⁴³ they also confront a large stock of historical examples that challenge the wisdom and suggest the heavy costs of such deference.

In contrast to today's Americans—wizened in experience if not always in deed—chroniclers of the pre-1970s Cold War years portray a relatively unsullied credulousness on the parts of the public and the press toward government assertions about national security and foreign affairs. Journalism professor Mark Feldstein refers to this period as one in which “deference to authority characterized American journalism and politics alike.”⁴⁴ Political scientist Gabriel Schoenfeld writes of the formal relationships between government and press in the 1950s and early 1960s: “Top reporters and columnists, and approximately twenty-five news-gathering organizations, including the *New York Times*, Time Inc. and CBS, . . . secretly cooperat[ed] with the CIA in all sorts of ways”⁴⁵ He cites Carl Bernstein's findings that reporters were employed

41. See, e.g., SCHLESINGER, *supra* note 16, at ix-x, 354-56, 361, 372-73; WILLS, *supra* note 30, at 98-99, 138-39, 161-67.

42. Such claims are epitomized, but by no means exhausted by, the “mosaic theory.” Under this theory, the executive branch argues that courts are not equipped to recognize when “‘apparently harmless pieces of information’” could, if “‘assembled together,’” damage national security. David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005) (quoting 32 C.F.R. § 701.31 (2005)). Thus, courts should defer to the executive branch's judgment as to when information cannot safely be disclosed. See, e.g., *id.* at 630-32; Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 135 (2006); Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845, 846-48 (2006).

43. See generally, e.g., Kitrosser, *Supremely Opaque?*, *supra* note 40 (exploring supremacist arguments in relation to accountability and transparency).

44. FELDSTEIN, *supra* note 11, at 5; see also Interview by Pub. Broad. Serv. with Mark Feldstein, Professor, George Washington Univ. (Jan. 8, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/feldstein.html> (describing journalists' extreme deference to government after World War II, including instances of secret journalistic collaboration with the CIA and law enforcement officials). See generally, e.g., James Aronson, *Mediations*, 31 ANTIOCH REV. 267, 274-76 (1971) (discussing journalistic deference and complacency throughout the Cold War).

45. SCHOENFELD, *supra* note 32, at 161.

“to help recruit and handle foreigners as agents; to acquire and evaluate information, and to plant false information with officials of foreign governments. Many signed secrecy agreements, pledging never to divulge anything about their dealings with the Agency.”⁴⁶ And as Arthur Schlesinger, Jr. observed, the Congress of this time had much in common with the press when it came to deference.⁴⁷ In the decade after the Korean War, Congress, “[m]esmerized by the supposed need for instant response to constant crisis, overawed by . . . ‘the cult of executive expertise,’ confused in its own mind as to what wise policy should be, delighted to relinquish responsibility, . . . readily capitulated to . . . ‘high-flying’ theses of presidential prerogative.”⁴⁸ Academics, too, (including Schlesinger himself, as he concedes) and the press also bought deeply into “the presidential mystique” in those years.⁴⁹

B. *The Leak and Early Reactions to It*

Even before the leak of the Pentagon Papers, there were cracks in the Cold War consensus. This was due in no small part to the Vietnam War. Reflecting on the Papers and the Vietnam War in 1971, Hannah Arendt wrote that “[u]nder normal circumstances the liar is defeated by reality, for which there is no substitute; no matter how large the tissue of falsehood that an experienced liar has to offer, it will never be large enough . . . to cover the immensity of factuality.”⁵⁰ The hard facts of Vietnam began to trickle out and to intrude on official versions of reality even before the Papers were leaked. In 1969, the *New York Times* revealed that the U.S. was secretly bombing Cambodia.⁵¹ Jack Anderson, who wrote the popular syndicated column “The Washington Merry-Go-Round,” began a series, based on whistleblower leaks, of “eighteen columns exposing the military’s covert operations in Vietnam” a few months before the *New York Times* began to publish the Pentagon Papers in 1971.⁵² Furthermore, anti-war protests and teach-ins had been underway for years prior to the Papers’ publication.⁵³

46. *Id.* (quoting investigative reporter Carl Bernstein).

47. *See* SCHLESINGER, *supra* note 16, at 169.

48. *Id.* (internal citation omitted).

49. *Id.* at ix, 169.

50. Hannah Arendt, *Lying in Politics: Reflections on the Pentagon Papers*, N.Y. REV., Nov. 18, 1971, at 30.

51. *See* FELDSTEIN, *supra* note 11, at 142. As Feldstein notes, the “secret” bombing of Cambodia was never a secret to Cambodians; “[o]nly the American people remained unaware of the destruction unleashed in their name” prior to the *New York Times* story. *Id.* *See also* WILLS, *supra* note 30, at 152 (“The double use of secrecy—kept from one’s own but revealed to the foe—is perfectly illustrated by President Nixon’s bombing of Cambodia . . .”).

52. FELDSTEIN, *supra* note 11, at 143-44.

53. *See, e.g., id.* at 142-43 (discussing protests in 1970 and President Nixon’s reaction to them); ELLSBERG, *supra* note 1, at 262-73, 336-37, 376-81 (describing anti-war protests and conferences, including some in which Ellsberg participated); Jules Witcover, *Where Washington*

Among journalists, there were mounting expressions of regret for having erred on the side of secrecy throughout the Cold War. The *New York Times*'s decision to water down a story prior to the Bay of Pigs Invasion—removing references to the CIA's involvement and to the invasion's imminence—was held up repeatedly as an example of an unfortunate and unnecessary compromise of journalistic integrity.⁵⁴ The incident's high profile as a cautionary tale—whether warranted by the facts or, as some have argued, overblown⁵⁵—was fueled partly by President “Kennedy's hindsight remark to *Times* executive editor Turner Catledge: ‘If you had printed more about the [Bay of Pigs] operation, you would have saved us from a colossal mistake.’”⁵⁶ James Greenfield, foreign editor of the *New York Times* from 1969-1977, cited another incident—the *Times*'s honoring of a “Washington-ordained news embargo that accompanied the South Vietnamese invasion of Laos”—as having made the paper warier of government secrecy requests.⁵⁷ Reflecting on press credulousness about Vietnam generally, a *Los Angeles Times* reporter wrote in the *Columbia Journalism Review* in 1970, “the Washington press corps, like the officialdom it reported on, was comprised largely of men and women in whose lives and political thinking the Cold War had been a reality.”⁵⁸

Still, the release of the Pentagon Papers sent shockwaves through the nation's collective psyche like no previous challenge to the Cold War consensus had done. The Papers' impact can be credited partly to the groundwork laid by those earlier challenges. Indeed, one criticism of the Papers was that they offered few revelations that one could not have gathered from carefully following the news.⁵⁹ Yet what made the Papers stand out were the sources from which they sprang and the form that they took. For one thing, it would have been difficult for officials to dismiss revelations published in the *New York Times* as unserious,

Reporting Failed, COLUM. JOURNALISM REV., Winter 1970-71, at 7, 11-12 (discussing 1960s protests and teach-ins and press responses to the same).

54. See, e.g., MAX FRANKEL, THE TIMES OF MY LIFE AND MY LIFE WITH THE *TIMES* 209-11 (1999); Aronson, *supra* note 44, at 273-74; Passing Comment, *Views of the Editors: An Old Issue Anew*, COLUM. JOURNALISM REV., Summer 1966, at 2-3; see also W. JOSEPH CAMPBELL, GETTING IT WRONG 69 (2010) (acknowledging and criticizing the widespread view that the *New York Times*'s treatment of the story “offers . . . timeless lessons about the perils of self-censorship . . . and about the hazards of journalists surrendering to the government's agenda”).

55. See, e.g., CAMPBELL, *supra* note 54, at 68-84 (arguing that the conventional wisdom about the *New York Times*'s coverage of the invasion is inaccurate and overblown); R.W. Apple, Jr., *James Reston, A Journalist Nonpareil, Dies at 86*, N.Y. TIMES, Dec. 7, 1995, at A1, B19 (quoting Reston's statement that “[i]t is ridiculous to think that publishing the fact that the invasion was imminent would have avoided this disaster”).

56. Aronson, *supra* note 44, at 274 (alteration in original) (quoting Crocker Snow, Jr.).

57. *Id.* at 276.

58. Witcover, *supra* note 53, at 9.

59. See, e.g., Arendt, *supra* note 50, at 38 (citing “the fact, much commented on . . . that the Pentagon Papers revealed little significant news that was not available to the average reader of dailies and weeklies”).

although such reactions had greeted earlier leaks on Vietnam published by Jack Anderson who, despite many groundbreaking stories, was never viewed as part of the establishment.⁶⁰ Nor could the authors of the Papers themselves be written off as unserious or uninformed. To the contrary, the Papers were commissioned by Defense Secretary Robert McNamara and written by a group of insider experts, of whom Ellsberg was one.⁶¹ And the form that the Papers took—that of a historical narrative directed toward understanding the U.S. involvement in Vietnam—enabled readers easily to contrast the Papers’ candid assessments with the very different pronouncements that had been offered for public consumption.⁶²

The Papers thus erupted along pre-existing fault lines within a culture of deference and trust toward the executive. The eruption was fueled by feelings of shock and betrayal among readers. Jonathan Schell gave voice to these feelings in a *New Yorker* issue published just after the *Times* began to excerpt the Papers.⁶³ He wrote:

Almost none of us, it turns out, were cynical enough or ungenerous enough in judging the policymakers, and almost all of us were living in a dream world furnished by official lies and by our own innocent, or complacent, desire to trust our government. Unlearning the misinformation we lived by for years is going to be as different and painful as reversing the effects of a brainwashing.⁶⁴

Speaking as Class Day orator at Harvard College on June 16, 1971—three days after the first excerpts were published—journalist Jimmy Breslin sounded a similar note.⁶⁵ He told the graduating students: “This week we all found out that [soldiers have] died to keep alive the lies of some people who thought they were important.”⁶⁶ And in summing up much of the public sentiment, journalist James Aronson wrote in 1971: “[T]he strong public reaction to the publication of the documents stemmed not so much from an understanding of the issues involved in the American presence in Indochina as from a realization that the public was being lied to by the government.”⁶⁷

The Papers thus helped to disrupt the momentum of the national security state and the imperial presidency. It forced a crisis in the culture of deference and trust on which these phenomena relied. Author and intelligence expert Thomas

60. See FELDSTEIN, *supra* note 11, at 148-49.

61. See INSIDE THE PENTAGON PAPERS, *supra* note 9, at 12-23.

62. See, e.g., *id.* at 183 (“The revelations confirmed what protesters had been saying from impeccably authoritative sources.”).

63. See Jonathan Schell, *The Talk of the Town: Notes and Comment*, NEW YORKER, June 26, 1971, at 29.

64. *Id.*

65. See Aronson, *supra* note 44, at 267.

66. *Id.* at 267-68 (alteration in original) (quoting Jimmy Breslin).

67. *Id.* at 271; see also Arendt, *supra* note 50, at 30 (writing in fall 1971 that “most readers have by now agreed that the basic issue raised by the Papers is deception”).

Powers, who was born in 1940, wrote in 2004 that after the Papers' release,

no one could really say, in the government, we know things that if you knew, would change your mind and make you realize the necessity and importance of us pressing this war forward. . . . Once . . . you see the vast gap that separates claims for the nature of what was going on from the reality of the nature of what was going on, you are likely to be skeptical in the future. I think we live, as a result, in a much more skeptical country than the one I went to high school in.⁶⁸

C. The Road to Watergate and Beyond

1. *Paranoia, the Plumbers, and Watergate.*—No one can accuse the Nixon Administration of having failed to notice the leak. Indeed, as discussed below in Part III, the administration sought a prior restraint in federal court to stop the Papers' publication and criminally prosecuted Ellsberg and Russo.⁶⁹ Apart from litigation, the Nixon Administration reacted through a chain of secretive actions that culminated in the Watergate scandal and the President's resignation. So many actions and decisions led to Watergate that one cannot know for certain if the leak served as a but-for cause. At minimum, the leak was an important contributing factor. It ratcheted up President Nixon's already high paranoia level, leading to a chain of reactive schemes that included the break-in at the Watergate complex and the subsequent cover-up. When discovered, these events would further erode public trust in the executive branch and throw another stumbling block in the path of the imperial presidency.

Fuming over the leak and worried that there were more to come, President Nixon arranged for a secretive anti-leak unit to be formed.⁷⁰ The resulting group, the Special Investigations Unit, is best known to history as "the Plumbers."⁷¹ The Plumbers' first major act took place on September 3, 1971, when two of them—G. Gordon Liddy and Howard Hunt—broke into the Los Angeles office of Daniel Ellsberg's psychiatrist, Dr. Lewis Fielding.⁷² They had hoped to find information in Fielding's office with which to discredit Ellsberg.⁷³ They also sought to discern if Ellsberg planned to leak more information.⁷⁴ While the break-in turned up no information on Ellsberg,⁷⁵ it was just the start for the

68. INSIDE THE PENTAGON PAPERS, *supra* note 9, at 191.

69. *See infra* Part III.

70. *See* INSIDE THE PENTAGON PAPERS, *supra* note 9, at 87; *see also* EGIL "BUD" KROGH & MATTHEW KROGH, INTEGRITY: GOOD PEOPLE, BAD CHOICES, AND LIFE LESSONS FROM THE WHITE HOUSE 1 (2007).

71. *See* INSIDE THE PENTAGON PAPERS, *supra* note 9, at 87; *see also* KROGH & KROGH, *supra* note 70, at 1.

72. KROGH & KROGH, *supra* note 70, at 65-73.

73. *See id.*

74. *Id.*

75. *Id.* at 73.

Plumbers.

Soon, the Plumbers were recruited to break into and bug the Democratic Headquarters at the Watergate Hotel.⁷⁶ In the second of their two Watergate break-ins, the burglars (those who physically conducted the break-in) were caught and arrested.⁷⁷ From this sprung the infamous cover-up that was “worse than the crime,”⁷⁸ as President Nixon and his inner-circle raced to hide the burglars’ ties to the White House and to the earlier break-in at Dr. Fielding’s office. Toward this end, they pressured prosecutors, ordered FBI Director L. Patrick Gray to destroy evidence, received secret information from Assistant Attorney General Henry Peterson, and paid the burglars to keep silent about the larger Plumbers operation and its connection to the White House.⁷⁹ The cover-up began to unravel when one of the burglars broke his silence to avoid a lengthy prison sentence, implicating White House Counsel John Dean and presidential aide Jeb Stuart Magruder.⁸⁰ These revelations prompted the Senate committee investigating Watergate to subpoena members of the President’s inner-circle.⁸¹ Appearing before the committee, former presidential aide Alexander Butterfield inadvertently revealed that President Nixon had installed a taping system in the Oval Office.⁸² Butterfield’s disclosure led to subpoenas for the tapes themselves.⁸³ Ultimately, the Supreme Court ordered the tapes released in a landmark opinion rejecting President Nixon’s claim that the tapes were shielded by executive privilege.⁸⁴ The released tapes included a “‘smoking gun’ . . . that proved beyond doubt Nixon’s personal involvement in obstructing the Watergate investigation. The President’s position became untenable. As Congress prepared to vote on three articles of impeachment, Nixon resigned from office on August 9, 1974.”⁸⁵

The Plumbers constitute the most direct link between the Pentagon Papers leak and President Nixon’s downfall. Had Ellsberg never leaked the Papers, the

76. See *id.* at 121; see also, e.g., Anthony J. Gaughan, *Watergate, Judge Sirica, and the Rule of Law*, 42 MCGEORGE L. REV. 343, 347-49 (2011); David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1910-11 (1991).

77. See Gaughan, *supra* note 76, at 349; see also *The Watergate Trial: Timeline*, GERALD R. FORD LIBR. & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=1&page=d (last visited July 20, 2011) [hereinafter *Watergate Trial Timeline*].

78. See David Johnston, *Coverup: Watergate’s Toughest Lesson*, N.Y. TIMES, Feb. 15, 1998, at wk5 (“Watergate bequeathed many things to history, including this famous cliché: The cover-up is worse than the crime.”).

79. See Gaughan, *supra* note 76, at 349-50, 353, 357, 367-68.

80. See *id.* at 372, 378; *Watergate Trial Timeline*, *supra* note 77.

81. Gaughan, *supra* note 76, at 379.

82. See *Senate Hearings: Timeline*, GERALD R. FORD LIBR. & MUSEUM, http://www.fordlibrarymuseum.gov/museum/exhibits/watergate_files/content.php?section=2&page=d (last visited July 20, 2011).

83. See *id.*

84. See generally *United States v. Nixon*, 418 U.S. 683 (1974).

85. Gaughan, *supra* note 76, at 380.

Plumbers might not have been formed. Without this key organization in place, it is quite possible that neither Watergate nor the President's resignation would have occurred.

A somewhat more diffused link between the leak and Watergate is the former's impact on President Nixon's paranoia level and his willingness to pull out all stops in fighting perceived enemies. Journalist Harrison Salisbury points to a discussion between Nixon and Kissinger a few days after the *New York Times* began to publish the Papers, in which the two plotted strategy to retaliate against Ellsberg, the *New York Times*, and other perceived antagonists. Salisbury writes:

[T]he embryo of almost all that was later to follow was present in that discussion—the institutionalization of paranoia, the creation of extralegal subversive units (the Plumbers), the organization of massive secret reprisals . . . a campaign for the “discipline of leaks,” which would be carried forward (and already had been) by criminal means; the groundwork for an elaborate conspiracy against liberals, intellectuals, and antiwar forces with Ellsberg as its focus; the stirrings of a political scheme to smear the Johnson-Kennedy administrations as architects of failure⁸⁶

Reflecting the atmosphere that Salisbury describes, Egil “Bud” Krogh, who was initially placed in charge of the Plumbers, recounts being told by John Ehrlichman that “the president was certain that a conspiracy was involved in the release of the Pentagon Papers” and that Ehrlichman had never seen the President angrier about anything else.⁸⁷ Krogh cites a discussion, caught on the Oval Office tapes, between Nixon and several aides on the morning that the Supreme Court refused the White House request to enjoin the Papers' publication.⁸⁸ In it, Nixon vows: “‘We're through with this sort of court case,’ ‘They're using any means. We are going to use any means.’”⁸⁹ Absent the leak, President Nixon might not have been pushed to the mental brink that generated an atmosphere so conducive to Watergate and its cover-up.

Krogh also views the Fielding break-in as an event that was pivotal for the Plumbers themselves and that made their next steps inevitable.⁹⁰ After that episode, Liddy and Hunt—who would soon mastermind Watergate—“knew that under certain circumstances the White House staff would tolerate an illegal act to obtain information.”⁹¹ Krogh elaborates: “[H]ardened by their first action, the

86. HARRISON E. SALISBURY, *WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES* 272 (1980). For a similar assessment of the leak's connection to Watergate, see Rudenstine, *supra* note 76, at 1909-11.

87. KROGH & KROGH, *supra* note 70, at 17.

88. *See id.* at 27-28.

89. *Id.* (quoting President Nixon).

90. *See id.* at 1-2.

91. *Id.* at 2; *see also* Gaughan, *supra* note 76, at 351 (referring to Liddy and Hunt as the “ringleaders” of the break-in).

Plumbers [now] knew that the rules of engagement had been changed and the conventional respect for laws set aside.”⁹² The Fielding operation “was the first irreversible step by which a presidency ran out of control.”⁹³

2. *The Imperial Presidency in Watergate’s Aftermath.*—While Vietnam and the Pentagon Papers themselves threatened the culture of deference underlying the imperial presidency, the Watergate crisis turned up the heat considerably. Perhaps the clearest reflections of this were the 1974 congressional elections and the legislative and oversight activities of the mid to late 1970s.

Beginning in 1974, a large group of “freshmen Democrats known as the ‘Watergate babies’” was swept into office amid national perceptions of out-of-control presidential power.⁹⁴ As a *New York Times* reporter put it at the time:

What we are beginning to see here are the reactions to the misuse of Presidential power in Vietnam and Watergate. The Congress is determined to try to regain some of the power it lost or abandoned to the President in the postwar generation, to limit the scope of executive privilege, to limit the President's power to make war without the consent of the Congress, and to insist, if possible, that the President spend all funds appropriated by the Congress.⁹⁵

Landmark hearings were held in both houses of the post-Watergate Congress, examining in some detail intelligence and national security related abuses of the preceding several decades.⁹⁶

The hearings led to the creation of the congressional intelligence committees to improve national security oversight and the Foreign Intelligence Surveillance Act to regulate national security surveillance.⁹⁷ The post-Watergate Congress also passed, over a veto by President Ford, amendments to strengthen the Freedom of Information Act by limiting the scope of its national security exception.⁹⁸

92. KROGH & KROGH, *supra* note 70, at 77.

93. *Id.*

94. Steven V. Roberts, *House G.O.P. Freshmen Are Speaking Up on Party Issues*, N.Y. TIMES, Oct. 29, 1979, at A16; *see also* James Reston, *The Class of 1974*, N.Y. TIMES, Dec. 18, 1974, at 45. The text and citations accompanying this footnote, as well as those accompanying *infra* notes 95-96 are taken from: Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMM. 483, 496 (2010) [hereinafter Kitrosser, *National Security*].

95. Reston, *supra* note 94, at 45.

96. *See generally, e.g.*, KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI (1996).

97. *See, e.g.*, Heidi Kitrosser, “Macro-Transparency” as Structural Directive: A Look at the NSA Surveillance Controversy, 91 MINN. L. REV. 1163, 1181-82, 1188-92 (2007).

98. *See Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT’L SECURITY ARCHIVE (Nov. 23, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm>.

D. Limits on, and a Backlash Against, the Period's Impact

The Pentagon Papers leak and the events that followed marked important moments of social learning about the dangers of excessive deference to the executive branch. Yet even as the events unfolded, there were limits on the reach of these lessons. For example, even as the Supreme Court unanimously rejected President Nixon's claim that the White House tapes were absolutely shielded by executive privilege, they recognized for the first time a presumptive, constitutional privilege for presidential communications.⁹⁹ The Court also suggested that a much stronger level of judicial deference would be called for were the President to claim that "military or diplomatic secrets" were at stake.¹⁰⁰ On another front, while Congress did hold landmark hearings in the mid-1970s on executive branch excesses in the name of national security, both the hearings and related legislation encountered impediments grounded in pro-executive power based objections.¹⁰¹

More significant still is the ongoing backlash engendered by post-Watergate restraints on the presidency. By the 1970s, conservatives increasingly embraced presidential power in the belief that Republicans would have more luck in taking the presidency than the Congress.¹⁰² Within the national security state, too, a strong presidency had hawkish implications consistent with conservatives' self-depictions as cold war hardliners.¹⁰³ To conservatives inside the beltway, then, the fall and disgrace of a Republican president, combined with a wave of congressional assertiveness, constituted a major crisis.¹⁰⁴ Over time, this sense was developed into a series of constitutional arguments supporting robust, unilateral presidential powers. Among other things, these arguments encompass the notion that Congress may not, under many circumstances, constitutionally restrict the President's power to take steps—such as wiretapping without

99. *United States v. Nixon*, 418 U.S. 683, 706-13 (1974).

100. *Id.* at 710; *see also id.* at 706.

101. *See* OLMSTED, *supra* note 96, at 2-9, 103-12, 121-43, 147-51, 154-89.

102. *See, e.g.*, Jeffrey Hart, *The Presidency: Shifting Conservative Perspectives?*, NAT'L REV., Nov. 22, 1974, at 1351; Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2096-2100 (2009); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499, 500 (2008).

103. *See, e.g.*, DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST*, at xvii-xviii (1992) (discussing Republican tendencies, after World War II, to paint Democrats as soft on communism); Zelizer, *supra* note 102, at 502-03 (discussing more recent ties between hawkishness and presidentialism); JULIAN E. ZELIZER, *ARSENAL OF DEMOCRACY* 262 (2010) (referring to the "post-1960s generation of hawkish Republicans who . . . began to champion presidential power on national security policy").

104. *See, e.g.*, Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1410-11 (2010) (citing examples of fettered presidency narrative); Kitrosser, *Supremely Opaque?*, *supra* note 40, at 72 (discussing narrative of a post-Vietnam fettered presidency).

warrants or using torture in interrogations—that he deems necessary for national security.¹⁰⁵

Such “presidentialist” arguments have gained increasing traction over the past few decades. They had a coming out of sorts in “the well known report of a minority of congresspersons (hereinafter ‘Minority Report’) who dissented from the Report of the Congressional Committees Investigating the Iran-Contra Affair in 1987.”¹⁰⁶ “The Minority Report was joined by Senators James McClure and Orrin Hatch and by Representatives Dick Cheney, William S. Broomfield, Henry J. Hyde, Jim Courter, Bill McCollum, and Michael DeWine.”¹⁰⁷ “Years later, as Vice President, Dick Cheney would point to the Minority Report—written partly by David Addington, then a committee staff member and later chief of staff to Vice President Cheney—as embodying his views on presidential power.”¹⁰⁸ “The Minority Report argues that some of the statutory directives that President Reagan and his subordinates were said to have violated in the Iran-Contra [A]ffair were unconstitutional infringements [on presidential power] that the President was free to ignore.”¹⁰⁹

True, presidentialist arguments were widely criticized when they were made during the George W. Bush Administration, partly because of the aggressive manner in which they were pursued and the scandals with which they became associated.¹¹⁰ But the arguments continue to have currency when pursued with more subtlety. For example, I have detailed elsewhere the important impact that exclusivist arguments have had in generating doubt as to whether warrantless wiretapping in the Bush Administration, though contrary to statute, was illegal.¹¹¹ This doubt has helped to stymie calls to investigate the wiretapping program and to hold telecommunications companies responsible for partaking in it.¹¹²

105. See Kitrosser, *Supremely Opaque?*, *supra* note 40, at 69-74 (summarizing key components of such arguments).

106. *Id.* at 73.

107. *Id.* at 73-74; see also *Minority Report*, in REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 431 (1987).

108. See Kitrosser, *Supremely Opaque?*, *supra* note 40, at 74; see also FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 154-55, 159-60, 200 (2007).

109. Kitrosser, *Supremely Opaque?*, *supra* note 40, at 74 (elaborating on this aspect of the Minority Report); see also, e.g., Mariah Zeisberg, *Legislative Investigations as Security Power* 11-12 (book chapter draft, Mar. 2011) (on file with author) (discussing Oliver North’s introduction of presidentialism to the Iran-Contra hearings, foreshadowing its prominence in the Minority Report).

110. See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 210-13 (2007) (describing the Bush Administration’s “open chest-thumping about the importance of maintaining and expanding executive power” and widespread negative reactions to this approach).

111. See Kitrosser, *National Security*, *supra* note 94, at 509-20.

112. *Id.*

E. Assessment: The Leaks as Disruption in the Imperial Presidency's Climb

The imperial presidency had been on a steady upward trajectory since the end of World War II. By the late 1960s, a number of forces began to push against that trend. These forces cast doubts on longstanding assumptions that executive expertise lay just beyond curtains of national security secrecy, and that the curtains themselves belonged in place. By leaking the Pentagon Papers, Daniel Ellsberg exacerbated and cemented those doubts for many. The leak and publication of the Papers thus helped to disrupt the imperial presidency's upward climb. When one factors in the connections between the leak and Watergate, the disruptive effect was greater still.

Still, one could argue that, in the long run, the leak did no lasting damage to the imperial presidency. If anything, the resulting backlash strengthened presidential power. Of course, we will never know how events would have unfolded in a counterfactual universe in which Daniel Ellsberg did not bother to leak the Pentagon Papers. My own sense, however, is that the leak, on balance, weakened the foundations of the imperial presidency. The very reason that the leak and subsequent events sparked so strong a backlash is because they shone so harsh a light on the degree to which the presidency had aggrandized power, hidden tragic mistakes behind curtains of secrecy, and been aided and abetted by a compliant populace. This narrative remains an important tool of social learning on the dangers of excessive deference to, and secrecy within, the executive branch.

III. SKEPTICISM, OFFICIAL SECRETS, AND FREE SPEECH (OR HOW AMERICANS REACT TO RULES AGAINST CONFIRMING OR DENYING WHETHER THE PRESIDENT HAS CLOTHES)

Part II offered a broad take on the contemporaneous and longer term impacts of the leak on Americans' attitudes toward presidential power and secrecy. This Part takes a somewhat finer-grained look at the leak's ongoing impact on attitudes toward executive branch secrecy, particularly toward the relationship between classified information and free speech. Sub-part A summarizes major judicial and prosecutorial developments regarding classified information leaks and free speech since the Pentagon Papers episode. Sub-part B takes a closer look at the impact of the Pentagon Papers on modern political and judicial thinking. After a brief overview in sub-part B.1, sub-part B.2 evaluates the propositions for which federal appellate judges have cited the Pentagon Papers episode over the past two decades. Finally, sub-part B.3 considers how the episode factors into current debates over WikiLeaks.

A. Classified Information Leaks and Free Speech: An Overview of Major Judicial and Prosecutorial Developments Since the Pentagon Papers Leak

Despite the common assumption that it is categorically illegal to leak or publish classified information, the United States has never had an official secrets

act that creates such blanket illegality.¹¹³ Instead, actual and contemplated prosecutions have centered on somewhat more qualified statutory provisions, including the Espionage Act.¹¹⁴ For example, 18 U.S.C. § 793(e) of the Espionage Act prohibits anyone with unauthorized possession of or access to “any document, writing . . . photograph . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation,” from communicating, attempting to communicate, or willfully retaining the same.¹¹⁵ Yet given the breadth and malleability of a § 793(e), it could potentially be used to prosecute almost any possession or transmission of classified information that an administration dislikes for any reason, including political embarrassment.¹¹⁶ More so, Congress at points has considered passing official secrets acts to explicitly make illegal any transmission of classified information.¹¹⁷ As recently as 2000, a majority of each house of Congress approved such an act before it was vetoed by President Clinton.¹¹⁸

Given the potential reach of existing statutes and the possibility that Congress could pass an official secrets act, the core questions regarding the government’s power to punish leaks or publications of classified information are constitutional in nature. Specifically, is the fact that information is classified enough to make its unauthorized dissemination punishable consistent with the First Amendment? If the answer is no, then a closely related question is to what degree courts should defer to the government’s classification decision in deciding whether such punishment is consistent with the First Amendment. No less is at stake in such inquiries than the extent to which Americans are permitted the tools to understand and challenge the actions of their government. As discussed above, an enormous amount of information is classified yearly in the United States, and several million people possess some form of classification authority.¹¹⁹ It also has been long acknowledged across the political spectrum that over-classification

113. See, e.g., Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL’Y REV. 219, 219 (2007).

114. 18 U.S.C. § 793 (2006).

115. *Id.* § 793(e).

116. See, e.g., Vladeck, *supra* note 113, at 223-24, 227, 231-32. Cf. Jane Mayer, *The Secret Sharer: Is Thomas Drake an Enemy of the State?*, NEW YORKER, May 23, 2011, at 57 (quoting Morton Halperin as deeming an ongoing leak prosecution against former government employee Thomas Drake so unwarranted that “[i]f Drake is convicted, it means the Espionage Law is an Official Secrets Act”).

117. See generally, e.g., SUNSHINE IN GOV’T INITIATIVE, BOND LEGISLATION WOULD CREATE AN “OFFICIAL SECRETS ACT” AND SHIELD INFORMATION FROM THE PUBLIC ABOUT ITS GOVERNMENT (2006), available at http://www.sunshineingovernment.org/leaks/SGI_White_Paper_Official_Secrets.pdf (discussing the introduction of legislation “that would criminalize any unauthorized disclosure of classified information”).

118. *Id.* at 2, 4.

119. See *supra* notes 39-40 and accompanying text.

is a rampant problem.¹²⁰ Because so much is classified, leaked information is a journalistic necessity.¹²¹ “Furthermore, it is well known and long acknowledged that much leaking comes from the White House itself and this practice dates back at least to the administration of Theodore Roosevelt. . . . Administrations have long selectively leaked classified information that puts them in a favorable light while guarding less favorable information.”¹²² Where the executive has free reign not only to classify and selectively disclose information, but to prosecute classified information leaks and publications when it sees fit, a skewing effect on public discourse is inescapable.¹²³

What then, is the state of the relevant First Amendment case law and of prosecutions of classified information leaks and transmissions since Daniel Ellsberg leaked the Pentagon Papers? With respect to judicial precedent regarding individuals who, like Ellsberg, leak classified documents to which they had authorized access, the sole federal court opinion on the topic (apart from the district court opinion that it affirmed) remains *United States v. Morison*, decided by the United States Court of Appeals for the Fourth Circuit in 1988.¹²⁴ (Recall that the Nixon Administration’s prosecution of Ellsberg and Russo was dismissed for government misconduct and resulted in no opinion on the merits of the case.) In *United States v. Morison*, Morison, a government employee, was prosecuted for leaking satellite photographs of a Soviet air carrier to a British periodical.¹²⁵ The majority opinion took the view that classification turns information into government property and thus removes it from the purview of the First Amendment when the information is transmitted by a government employee to one not entitled to receive it.¹²⁶ One of the judges on the three-judge panel—Judge Wilkinson—joined that opinion but also concurred separately to suggest the slightly milder view that the case implicates First Amendment rights, but that the court should defer very heavily to the political branches (both to executive judgment as evidenced through classification and that of Congress in passing the Espionage Act) rather than conduct an independent analysis of the facts.¹²⁷ The third judge in the case—Judge Phillips—wrote a separate opinion that largely echoed Judge Wilkinson’s position, though expressed a bit more reticence about extreme judicial deference.¹²⁸

With respect to prosecuting third parties who receive and retain or disseminate classified information from government leakers, the most significant judicial statements on the matter come from a case in which prosecution was not

120. See Kitrosser, *Supremely Opaque?*, *supra* note 40, at 101 nn.178-82 and accompanying text.

121. *See id.* at 108-09.

122. *Id.* at 108 (internal citation omitted).

123. *See id.* at 108-09.

124. *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

125. *Id.* at 1061-62.

126. *Id.* at 1068-70.

127. *Id.* at 1084 (Wilkinson, J., concurring).

128. *See id.* at 1085-86 (Phillips, J., concurring).

sought. That case, *New York Times Co. v. United States*,¹²⁹ occasioned the landmark decision in which the Supreme Court refused to enjoin the publication of the Pentagon Papers.¹³⁰ The Court's short per curiam opinion denying the government's request focused solely on the high First Amendment threshold to obtain a prior restraint.¹³¹ Yet in concurrences and dissents, several Justices suggested that statutes or even executive regulations authorizing post-publication prosecutions might be constitutional.¹³²

Finally, the only case to deal directly with prosecuting third parties for receiving and retaining or disseminating classified information is *United States v. Rosen*.¹³³ *Rosen* involved a prosecution, initiated by the George W. Bush Administration, of two lobbyists for receiving classified information concerning foreign affairs and transmitting it to a journalist and an Israeli diplomat.¹³⁴ The court's reasoning in the case is somewhat mixed. On one hand, in a 2006 opinion issued in response to the defendants' motion to dismiss the indictment on First Amendment grounds, the court sounded rather deferential notes toward the executive, suggesting that classification might effectively be decisive in making speech punishable.¹³⁵ Yet a subsequent opinion softened the potential extremity of the earlier one. Among other things, the second opinion, issued in February 2009, clarified that the jury must independently determine if the Espionage Act's criteria for illegal communications are met.¹³⁶ It explained:

[E]vidence that information is classified is, at most, evidence that the government intended that the designated information be closely held. Yet, evidence that information is classified is not conclusive on this point Further, the government's classification decision is *inadmissible hearsay* on the second prong of the . . . [statutory definition of national defense information,] namely whether unauthorized disclosure might potentially damage the United States or an enemy of the United States.¹³⁷

Still, even the February 2009 opinion marks a far cry from the First Amendment protections ordinarily applied when speech is prosecuted as a threat to national security. Ordinarily—that is, at least where speech does not include classified information—speech can be punished as a threat to national security only when it is intended to cause, and is likely to cause, imminent illegal activity.¹³⁸

As for positions taken within the executive branch, the Nixon Administration obviously took hard lines against Ellsberg and Russo for leaking and conspiring

129. 403 U.S. 713 (1971) (per curiam).

130. *See id.* at 714-20.

131. *See id.* at 714.

132. *See* Kitrosser, *Classified Information*, *supra* note 33, at 897-99.

133. 599 F. Supp. 2d 690 (E.D. Va. 2009).

134. *See id.* at 693-94; *see also* Kitrosser, *Supremely Opaque?*, *supra* note 40, at 101-02.

135. *See* Kitrosser, *Classified Information*, *supra* note 33, at 902-03.

136. *See Rosen*, 599 F. Supp. 2d at 695.

137. *Id.* (emphasis added).

138. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

to leak the Papers and against the *New York Times* for publishing them. About a decade later, the Reagan Administration appears—if one extrapolates from the reasoning of the majority opinion in *Morison*—to have taken the position that a government employee who leaks classified information to which she had authorized access should receive no First Amendment protection.¹³⁹ Similarly, the George W. Bush Administration, in prosecuting Rosen and Weissman, argued that the defendants were unprotected by the First Amendment. The Administration's core argument "was that Rosen and Weissman engaged in punishable conduct, not protected speech."¹⁴⁰ "Specifically, [the defendants had] 'conspire[d] to steal national defense information' and to 'pass on this stolen property to someone not entitled by its owner to have it.'"¹⁴¹

Notably, prosecutions and threatened prosecutions for classified information leaks and publications have been on a sharp upward trajectory for the past several years. *Rosen*, initiated by the Bush Administration, marked the "first Espionage Act case in history brought against private citizens for exchanging information outside of a classic espionage or spying context."¹⁴² The Bush Administration also pursued prosecutions of government employee leaks to the press with vigor. Indeed, "[a] 2007 study by the Reporters Committee for the Freedom of the Press found a five-fold increase since 2001 in subpoenas seeking information on a media outlet's confidential sources."¹⁴³ As for the Obama Administration, observers who expected a departure from the Bush Administration's aggressive pursuit of leaks were in for a shock.¹⁴⁴ By the Obama Administration's two-year anniversary, it had pursued more leak prosecutions than any other administration, including the Bush Administration.¹⁴⁵ Indeed, the Obama Administration has pursued more leak prosecutions than every other administration in history combined.¹⁴⁶

B. *The Pentagon Papers' Impact on Contemporary Reasoning About Government Secrecy*

1. *The Papers as Symbol of Overreaching Secrecy in General.*—Whatever the impact of the Pentagon Papers leak on Americans' wariness toward government secrecy, it clearly did not destroy the political or legal viability of aggressively prosecuting leaks of classified information. Nor can we know for certain if such prosecutions would be more numerous, aggressive, or successful

139. See *supra* note 126 and accompanying text.

140. Kitrosser, *Supremely Opaque?*, *supra* note 40, at 102.

141. *Id.* (internal citation omitted).

142. *Id.* at 105.

143. *Id.* at 106 (quoting Laura Rozen, *Hung Out to Dry: The National-Security Press Dug Up the Dirt, but Congress Wilted*, COLUM. JOURNALISM REV., Jan./Feb. 2009, at 34).

144. See *id.*

145. See *id.* at 106-07; see also Mayer, *supra* note 116, at 47.

146. See Kitrosser, *Supremely Opaque?*, *supra* note 40, at 106-07; see also, e.g., Mayer, *supra* note 116, at 47.

had Daniel Ellsberg not bothered to leak the Papers. There is reason to believe, however, that Ellsberg's actions and their aftermath have had, and continue to have, some restraining effect on the executive branch and to induce some skepticism in courts toward executive secrecy-based assertions. These effects stem from the Papers' ongoing symbolic impact. Whatever one thinks of the value and rightness of Ellsberg's actions, the fact is that the Papers today are widely understood to symbolize several related points: classification does not automatically mean that information would be dangerous if disclosed; much information is wrongly classified; and some releases of classified information serve the public interest. Again, this is not to say that there are not strong political and legal counter-forces that push against these lessons, often with great success. It is only to say that the lessons of the Papers, too, remain important tools.

An example of these forces and counter-forces at work was mentioned above—the passage by both houses of Congress and the veto by President Clinton of legislation to make unauthorized transmissions of classified information categorically illegal.¹⁴⁷ On the one hand, the congressional votes reflect the political viability—even popularity—of tough talk about cracking down on classified information leaks in the name of national security. On the other hand, the Clinton veto invokes the caution counseled by the Pentagon Papers episode. While acknowledging that “unauthorized disclosures can be extraordinarily harmful to United States national security interests,” President Clinton warned that “we must never forget that the free flow of information is essential to a democratic society.”¹⁴⁸ He cites Justice Stewart's concurring opinion in *New York Times v. United States*—the Pentagon Papers case—to bolster both of these points.¹⁴⁹ On the latter point, President Clinton quoted Justice Stewart's observation that “the only effective restraint upon executive policy in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”¹⁵⁰

Perhaps most strikingly, Erwin Griswold, the former solicitor general of the United States who argued the Pentagon Papers case on behalf of the Nixon Administration, portrayed the episode, years later, as a cautionary tale about excessive government secrecy.¹⁵¹ Writing in the *Washington Post* in 1989, Griswold acknowledged that “I have never seen any trace of a threat to the national security from the [Papers'] publication. Indeed, I have never seen it even suggested that there was such an actual threat.”¹⁵² He also deemed it “apparent to any person who has considerable experience with classified material that there

147. See *supra* note 118 and accompanying text.

148. 146 CONG. REC. H11,852 (daily ed. Nov. 13, 2000) (statement by President Clinton disapproving H.R. 4392).

149. *Id.*

150. *Id.*

151. See Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

152. *Id.*

is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”¹⁵³

2. *The Papers and Contemporary Judicial Reasoning.*—In the very few judicial opinions involving prosecutions for transmitting classified information, references to the Papers play a somewhat mixed role. While the Papers went unmentioned in the district court opinion in *Morison*,¹⁵⁴ both the majority opinion and Judge Wilkinson’s concurrence on appeal distinguished the facts of *New York Times v. United States* from those of *Morison*’s prosecution.¹⁵⁵ The majority drew the distinction toward a somewhat speech-restrictive end, suggesting that *Morison*’s prosecution simply did not raise the First Amendment concerns at issue in *New York Times*, in part because the former did not involve a prior restraint.¹⁵⁶ Judge Wilkinson drew the distinction, on the other hand, toward a relatively speech-protective end.¹⁵⁷ He suggested that the *Morison* majority’s restrictive approach should have no bearing either on criminal cases brought against the press or on cases seeking prior restraints.¹⁵⁸

As for *Rosen*, while the district court did not discuss the Pentagon Papers episode in its 2009 opinion,¹⁵⁹ it did so in its 2006 opinion. The court observed, in the 2006 opinion, that the concurring and dissenting opinions in *New York Times* could be read to support the view that the government may constitutionally prosecute transmissions of classified information by the press or by ordinary citizens.¹⁶⁰ Yet the *Rosen* court also cited the Pentagon Papers episode to emphasize the importance of judicial skepticism toward government secrecy. Stressing that the prosecution before it “implicate[s] the core values” of the First Amendment, the court quoted Justice Stewart’s observation in *New York Times*:

In the absence of the government checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.¹⁶¹

Because so few cases have involved prosecutions for transmitting classified information, I also sought to discern whether and how the Pentagon Papers episode factors into judicial discussions of government secrecy or executive

153. *Id.*

154. *United States v. Morison*, 604 F. Supp. 655 (D. Md. 1985).

155. *United States v. Morison*, 844 F.2d 1057, 1068, 1085 (4th Cir. 1988).

156. *Id.* at 1068.

157. *See id.* at 1085 (Wilkinson, J., concurring).

158. *Id.*

159. *United States v. Rosen*, 599 F. Supp. 2d 690 (E.D. Va. 2009).

160. *United States v. Rosen*, 445 F. Supp. 2d 602, 638-39 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009)).

161. *Id.* at 633 (citation omitted).

expertise more generally. To do so, I examined cases from the U.S. Supreme Court and courts of appeals from 1990 through March 4, 2011.¹⁶² Within those parameters, I conducted a Westlaw search for any cases that mentioned, anywhere in their text, either *New York Times v. United States* or the Pentagon Papers.¹⁶³ Of the ninety-four cases yielded, I discarded those that addressed only extraneous matters.¹⁶⁴ The final yield was fifty-two cases (eight Supreme Court cases and forty-four appellate court cases) in which at least one opinion (whether majority, concurring, or dissenting) mentioned the Pentagon Papers or *New York Times v. United States*.

As shown in the charts below and with more detail in this Article's appendix, federal judges that cite the Pentagon Papers episode overwhelmingly do so to support points consistent with skepticism toward government secrecy or information suppression.¹⁶⁵ While the concurring and dissenting opinions in *New York Times v. United States* provide fodder for arguments supportive of deference to the executive branch,¹⁶⁶ relatively little of that fodder shows up in the judicial opinions that I studied.

The following two charts list, for Supreme Court and courts of appeals cases respectively, the rough propositions for which the Pentagon Papers episode was cited and the number of opinions (whether majority, concurring, or dissenting) that invoked each proposition from January 1, 1990 through March 4, 2011.¹⁶⁷

162. I considered broadening the time span and widening the circle of courts reviewed to include all federal courts, or federal and state courts. However, the final parameters proved necessary to keep the project manageable. When I ran the inquiry (the inquiry is described in *infra* note 163) in Westlaw with no date restrictions in the "allfeds" and "allstates" databases, it yielded 912 cases. Running the same inquiry only in the "allfeds" database yielded 638 cases. Running the same inquiry in just a subset of "allfeds"—specifically, the "sct" and "cta" databases—yielded 320 cases. Limiting the latter inquiry to cases from 1990 through the date of the search (March 4, 2011) yielded ninety-four cases.

163. Specifically, the Westlaw inquiry was as follows: (te("pentagon papers")) ("new york times" /3 "united states").

164. I discarded those cases that did not talk about the Pentagon Papers episode at all or that cited the case's underlying facts for some reason apart from the free speech or secrecy issues in the case. Additionally, I excluded those cases that dealt solely with the congressional speech and debate clause privilege in relation to a case involving the use of the Pentagon Papers by the staff of Senator Mike Gravel. I also excluded those that cited *New York Times v. United States* or the Pentagon Papers only for one or more of the following reasons: to demonstrate that cases can be filed under seal or otherwise dealt with in a manner that protects confidential information; to reference copyright issues; to illustrate that courts can act speedily; to note that the Bill of Rights originally applied only against the federal government; to exemplify the fact that first amendment issues can arise in many contexts; to explain the definition of a prior restraint; or to demonstrate that corporate speech receives first amendment protection. I also excluded cases that were amended after their initial release, withdrawn and superseded, or unpublished.

165. See *infra* pages 115-16 and app. A & B.

166. See *supra* note 132 and accompanying text.

167. See *supra* note 162.

Each chart lists the propositions in order of the number of opinions in which they appear. An asterisk precedes each proposition that is consistent with skepticism toward government secrecy or toward information suppression. An “N” precedes those propositions that are best described as neutral. An “X” precedes those propositions that are best described as supporting deference to executive branch judgments on national security secrecy or information suppression.

Chart #1: Supreme Court Cases

| Proposition | Number of Opinions Citing |
|--|----------------------------------|
| * Heavy presumption against prior restraints on speech | 5 |
| X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue | 2 |
| * The government has a very high burden to demonstrate that speech should be punished because it threatens national security | 2 |
| * It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information | 1 |

Chart #2: U.S. Courts of Appeals Cases

| Proposition | Number of Opinions Citing |
|---|--|
| * Heavy presumption against prior restraints on speech | 21 (19 cases directly on point, the other 2 make closely related points) |
| * Government secrecy can be abused | 5 |
| * Courts have the power, responsibility and competence to review national security related decisions | 5 |
| * Even a temporary loss of a constitutional right constitutes irreparable injury | 4 |
| * Constitution's founders protected the press so that it could expose government secrets and protect the people | 3 |
| X Executive has primary responsibility for internal security measures | 2 |
| N <i>New York Times v. United States</i> did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information | 1 |
| * Discussions, criticism of military activity of high public concern, and free speech value | 1 |
| * Heavy presumption against content-based speech restrictions | 1 |
| * The fact that information is classified does not necessarily mean that it is secret | 1 |
| * The timely dissemination of political speech is particularly important | 1 |
| * Press' core duty is to publish information, not to guard national security | 1 |
| * Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction | 1 |
| * The press has broad protections for publishing on matters of public concern | 1 |
| * Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience | 1 |
| X Distinguishing the <i>Pentagon Papers</i> case from a case in which a prior injunction is not at issue | 1 |

3. *The Papers and the Public Debate over WikiLeaks*.—I also examined the impact of the Papers on contemporary public discussions regarding classified information leaks and free speech. Specifically, I looked at their impact on discussions involving WikiLeaks. WikiLeaks is an organization that receives anonymous leaks of information from around the world, including classified information from the United States,¹⁶⁸ and that has disseminated—both to established journalists and in many cases on its own website—thousands of

168. See WIKILEAKS, <http://www.wikileaks.org/> (last visited Sept. 1, 2011).

documents since its founding in 2006.¹⁶⁹ WikiLeaks “became the focus of a global debate over its role in the release of thousands of confidential messages about the wars in Iraq and Afghanistan and the conduct of American diplomacy around the world.”¹⁷⁰ In the United States, WikiLeaks has been a major focus of discussions about classified information leaks in the past year or so. Among other things, commentators have debated whether WikiLeaks founder Julian Assange should be prosecuted for classified information disclosures and whether the arrest and subsequent treatment of alleged WikiLeaks source Bradley Manning, a former U.S. Army private, is justified.¹⁷¹

To examine the role of the Pentagon Papers in public discourse over WikiLeaks, I searched for documents in the LexisNexis “allnews” database—which includes many national and local periodicals and news services as well as a number of blogs—in which either Daniel Ellsberg or the Pentagon Papers was mentioned along with WikiLeaks.¹⁷² Within these parameters, I searched for documents dated between August 10, 2010 and August 31, 2010. Because WikiLeaks had issued a major release—of the “Afghanistan war logs”—on July 25, 2010,¹⁷³ I anticipated that the studied time period would be one in which WikiLeaks was actively discussed but in which most discussion would take the form of commentary, rather than the expository reporting more likely to have occurred immediately after the release.¹⁷⁴ While a search for just “Wikileaks” in this period yielded 1424 results, a search within the narrower parameters noted above—for WikiLeaks along with either Daniel Ellsberg or the Pentagon Papers—yielded sixty results.¹⁷⁵ Of those sixty documents, I discarded duplicate reports,¹⁷⁶ reports that simply introduced or described a linked video, and multi-item documents in which references to WikiLeaks appeared in news items separate from those referencing Ellsberg or the Pentagon Papers. I also

169. *See id.*; *Times Topics: WikiLeaks*, N.Y. TIMES, Aug. 30, 2011, <http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html?scp=1-spot&sq=wikileaks&st=cse>.

170. *Times Topics: WikiLeaks*, *supra* note 169.

171. *See id.*

172. Specifically, I ran the following search: wikileaks and (Ellsberg or “pentagon papers”).

173. *See, e.g.*, Nick Davies & David Leigh, *Afghanistan War Logs: Massive Leak of Secret Files Exposes Truth of Occupation*, GUARDIAN, July 25, 2010, at 1, available at <http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-military-leaks>.

174. I did, however, run the search described in *supra* note 172 for both the time period mentioned above (August 10, 2010 through August 31, 2010) and for a longer time period beginning right after the release of the Afghanistan War Logs, from July 26, 2010 through August 31, 2010. The search using the longer time-frame yielded 520 results, while the search using the shorter time-frame yielded sixty results. I also ran a search for just “wikileaks” under each time-frame. Under the broader time-frame, the “wikileaks” search yielded over 3000 results. Under the narrower time-frame, it yielded 1424 results.

175. *See supra* note 174.

176. Specifically, I discarded multiple copies of the same story that were re-issued through syndication services, as well as CNN scripts that simply repeated exact statements made in previous hours’ broadcasts.

decided to discard non-U.S. documents, as my focus was the ongoing influence of the Pentagon Papers on discourse in the United States. The resulting yield was twenty-seven documents.

Each of the twenty-seven documents in some way compares the WikiLeaks releases to Ellsberg's leak or to the subsequent publications of the Pentagon Papers. Of the documents that used the comparison to make some normative point, the vast bulk of them started from the premise that the Pentagon Papers was (or has been widely understood to be) a quintessential "good leak"—one that served the public interest, involved information that should not have remained classified, or both. From this premise, some made points critical of the WikiLeaks disclosures—for example, that the Pentagon Papers did not endanger national security while WikiLeaks does just that. Others made points supportive of WikiLeaks—for example, that the information disclosed by WikiLeaks is as significant as that revealed in the Pentagon Papers or that alleged WikiLeaks source Bradley Manning is a hero in the mold of Daniel Ellsberg.

Regardless of what one thinks about the merits of the underlying views of the Pentagon Papers leak that these documents reflect, their consistency suggests a collective conventional wisdom. Memories of the Pentagon Papers are treated as reminders that the classification system can be abused and that classified information leaks can serve the public interest. These lessons may well heighten the government's burden of justification—politically, if not legally—in pursuing classified information leaks. When the government argues that a classified information leak is dangerous and wrong, it must be prepared to face the question: Is the instant case like that of the Pentagon Papers? In other words, does the current leak serve the public interest by exposing important, wrongly classified information? And is the government over-reaching now, as it did then? Indeed, columnist Glenn Greenwald cites President Obama's efforts to distinguish alleged WikiLeaks source Bradley Manning from Daniel Ellsberg.¹⁷⁷ Greenwald explains that "it has long been vital for Obama officials and the President's loyalists to distinguish Ellsberg from Manning."¹⁷⁸ Ellsberg himself has expressed concern that he is being used "as a foil against Manning. . . . Daniel Ellsberg good, Manning bad."¹⁷⁹

The following chart lists the rough propositions for which Daniel Ellsberg or the Pentagon Papers is cited in the LexisNexis search described above. The propositions are listed in order of the number of documents in which they appear. An asterisk precedes each proposition that either embraces or acknowledges the conventional premise that the Pentagon Papers leak was an acceptable or even a good leak. An "N," for neutral, precedes those propositions that do not take or reference a normative position on the leak of the Papers. An "X" precedes those

177. Glenn Greenwald, *President Obama Speaks on Manning and the Rule of Law*, SALON, Apr. 23, 2011, http://www.salon.com/2011/04/23/manning_10/.

178. *Id.*

179. Anna Mulrine, *WikiLeaks Suspect: Where Army Sees Traitor, Some See Whistleblower*, CHRISTIAN SCI. MONITOR, Mar. 3, 2011, available at www.csmonitor.com/USA/Justice/2011/0303/Wikileaks-suspect-where-Army-sees-traitor-some-see-whistleblower.

propositions that either evince a negative view of the Pentagon Papers leak or emphasize speech-restrictive measures that can be pursued against WikiLeaks consistent with *New York Times v. United States*.

Chart #3: Periodical References

| Proposition | Number of Documents Citing |
|--|----------------------------|
| N Largest classified information disclosure since Pentagon Papers | 9 |
| * There are important similarities between the WikiLeaks episode and that of the Pentagon Papers | 7 |
| * WikiLeaks' disclosures are less significant than those in the Pentagon Papers | 4 |
| * WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers | 4 |
| X Criticizing celebrations of WikiLeaks or of Bradley Manning that include comparisons to Daniel Ellsberg | 2 |
| * The Obama Administration's tactics in response to WikiLeaks are similar to those with which the Nixon Administration responded to the Papers' leak | 1 |
| X <i>New York Times v. United States</i> may leave room for the government to prosecute WikiLeaks | 1 |

CONCLUSION

The Pentagon Papers leak and its aftermath marked important moments of social learning. To this day, they are invoked as evidence that leaking classified information is not always dangerous, that some leaks serve the public interest, and that government can just as easily use secrecy to shield wrongdoing as to protect national security. These lessons, in turn, have helped to fuel challenges against calls for an official secrets act and against particular leak prosecutions.

At present, the meaning, rightness, and application of these lessons is at issue in debates over the Obama Administration's aggressive pursuit of classified information leaks. Some proponents of these pursuits explicitly reject the Papers' lessons. Yet, the more common approach, as we have seen, is for proponents to draw distinctions between the Papers episode and current leaks. To take the example of WikiLeaks, the typical approach is to distinguish Ellsberg from Manning, the *New York Times* from WikiLeaks, and the Pentagon Papers from the documents disseminated to and by WikiLeaks.

For those who champion skepticism toward government secrecy and support whistleblower rights, the very fact that prosecution proponents feel compelled to draw such distinctions is a partial victory. By drawing such distinctions, prosecution proponents implicitly suggest that classification status alone is not enough, and that it is incumbent upon the government to demonstrate that a particular leak is so dangerous and unwarranted as to merit punishment. Still, as we have seen, the executive is perfectly capable of attempting to have it both

ways in the realm of classified information leaks—to assure courts and the public that a given leak is harmful while insisting that its own judgment to that effect must be final, that it would be too dangerous for courts or others to second-guess that judgment. The most direct measure of the Papers’ legacy as it relates to government secrecy and free speech is the extent to which courts and the public accept such calls for deference. As we have seen, the record thus far is both sparse and mixed. The ongoing reactions of courts, the public, and the executive and legislative branches to alleged leakers like Bradley Manning and to information publishers like WikiLeaks will continue to add to this record. How these controversies ultimately play out and impact the Papers’ legacy remains to be seen. For now, one can only guess how a future generation might answer the question: “What if Bradley Manning hadn’t bothered?”

APPENDIX A

Federal Appellate Court References to Pentagon Papers

Chart #1: Supreme Court Cases (from page 115 of Article)

| Proposition | Number of Opinions Citing |
|--|------------------------------|
| * Heavy presumption against prior restraints on speech | 5 |
| X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue | 2 |
| * The government has a very high burden to demonstrate that speech should be punished because it threatens national security | 2 |
| * It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information | 1 |

Elaboration on data:

See *supra* notes 162-67 and accompanying text for information on the search parameters. The following are citations to the opinions referenced for each category in the chart.

Category 1: Heavy presumption against prior restraints on speech:

Bartnicki v. Vopper, 532 U.S. 514, 555 (2001) (Rehnquist, C.J., dissenting); *Avis Rent a Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1143 (2000) (Thomas, J., dissenting from denial of cert.); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994); *CNN, Inc. v. Noriega*, 498 U.S. 976 (1990) (Marshall, J., dissenting from denial of cert.).

Category 2: Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue:

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 n.2 (1994); *Alexander v. United States*, 509 U.S. 544, 550-51 (1993).

Category 3: The government has a very high burden to demonstrate that speech should be punished because it threatens national security:

Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); *Osborne v. Ohio*, 495 U.S. 103, 141 n.16 (1990) (Brennan, J., dissenting).

Category 4: It is not certain that one can ever be punished, consistent with the First Amendment, for publishing truthful information:

Bartnicki v. Vopper, 532 U.S. 514, 527-28 (2001).

Chart #2: U.S. Courts of Appeals Cases (from page 116 of Article)

| Proposition | Number of Opinions Citing |
|---|--|
| * Heavy presumption against prior restraints on speech | 21 (19 cases directly on point, the other 2 making closely related points) |
| * Government secrecy can be abused | 5 |
| * Courts have the power, responsibility and competence to review national security related decisions | 5 |
| * Even a temporary loss of a constitutional right constitutes irreparable injury | 4 |
| * Constitution's founders protected the press so that it could expose government secrets and protect the people | 3 |
| X Executive has primary responsibility for internal security measures | 2 |
| N <i>New York Times v. United States</i> did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information | 1 |
| * Discussions, criticism of military activity of high public concern, and free speech value | 1 |
| * Heavy presumption against content-based speech restrictions | 1 |
| * The fact that information is classified does not necessarily mean that it is secret | 1 |
| * The timely dissemination of political speech is particularly important | 1 |
| * Press' core duty is to publish information, not to guard national security | 1 |
| * Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction | 1 |
| * The press has broad protections for publishing on matters of public concern | 1 |
| * Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience | 1 |
| X Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue | 1 |

Elaboration on data:

See *supra* notes 162-67 and accompanying text for information on the search parameters. The following are citations to the opinions referenced for each category in the chart.

Category 1: Heavy presumption against prior restraints on speech:

Wilson v. Cent. Intelligence Agency, 586 F.3d 171, 183 (2d Cir. 2009); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 487 n.6 (2d Cir. 2007); Cox v. City of Charleston, 416 F.3d 281, 284 (4th Cir. 2005); United States v. Bell, 414 F.3d 474, 478 (3d Cir. 2005); Weinberg v. City of Chi., 310 F.3d 1029, 1045 (7th Cir. 2002); Cnty. Security Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485, 487 (6th Cir. 2002); Schultz v. City of Cumberland, 228 F.3d 831, 851 (7th Cir. 2000); Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1144 n.19 (9th Cir.), *opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); Berger v. Hanlon, 129 F.3d 505, 518 (9th Cir. 1997), *vacated*, 526 U.S. 808 (1999); Proctor & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996); *id.* at 228 (Martin, Jr., J., concurring); Woodall v. Reno, 47 F.3d 656, 658 (4th Cir. 1995); Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 778 (8th Cir. 1994); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993); Family Found. v. Brown, 9 F.3d 1075, 1076 (4th Cir. 1993); Kramer v. Thompson, 947 F.2d 666, 674 (3d Cir. 1991); News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512 (11th Cir. 1991); Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 915 F.2d 59, 64 (2d Cir. 1990); *In re King World Prods., Inc.*, 898 F.2d 56, 59-60 (6th Cir. 1990); *see also* Pfeiffer v. Cent. Intelligence Agency, 60 F.3d 861, 865 (D.C. Cir. 1995) (observing that burden was not met in Pentagon Papers case); Lind v. Grimmer, 30 F.3d 1115, 1122 (9th Cir. 1994) (same).

Category 2: Government secrecy can be abused:

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1094 n.1 (9th Cir. 2010) (en banc) (Hawkins, J., dissenting); Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 959 n.7 (9th Cir. 2009), *reh'g en banc by* 614 F.3d 1070 (9th Cir. 2010); Arar v. Ashcroft, 585 F.3d 559, 614-15 (2d Cir. 2009) (Parker, J., dissenting); Detroit Free Press v. Ashcroft, 303 F.3d 681, 686 (6th Cir. 2002); El Dia, Inc. v. Rossello, 165 F.3d 106, 109 (1st Cir. 1999).

Category 3: Courts have the power, responsibility and competence to review national security related decisions:

Arar v. Ashcroft, 585 F.3d 559, 613 (2d Cir. 2009) (Parker, J., dissenting); N.J. Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 226-27 (3d Cir. 2002) (Scirica, J., dissenting); Detroit Free Press v. Ashcroft, 303 F.3d 681, 692 n.9, 693 (6th Cir. 2002); Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1453 (D.C. Cir. 1996); Giano v. Senkowski, 54 F.3d 1050, 1062, 1062 nn.4-5 (2d Cir. 1995) (Calabresi, J., dissenting).

Category 4: Even a temporary loss of a constitutional right constitutes irreparable injury:

Mills v. District of Columbia, 571 F.3d 1304, 1312 (D.C. Cir. 2009); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1234 (9th

Cir. 2006); Tunick v. Safir, 209 F.3d 67, 95-96 (2d Cir. 2000) (Sack, J., concurring); Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993), *opinion vacated* by 41 F.3d 1421 (11th Cir. 1994), *reh 'g en banc* by 41 F.3d 1422.

Category 5: Constitution's founders protected the press so that it could expose government secrets and protect the people:

Lee v. Dep't of Justice, 428 F.3d 299, 303 (per curiam) (D.C. Cir. 2005); Flynt v. Rumsfeld, 355 F.3d 697, 703 (D.C. Cir. 2004); Detroit Free Press v. Ashcroft, 303 F.3d 681, 683, 710 (6th Cir. 2002).

Category 6: Executive has primary responsibility for internal security measures:

Am. Fed'n of Gov't Emps. v. Dep't of Hous. & Urban Dev., 118 F.3d 786, 794 (D.C. Cir. 1997); Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 296 (D.C. Cir. 1993) (Sentelle, J., concurring).

Category 7: *New York Times v. United States* did not resolve whether the publication of truthful but unlawfully obtained material can be punished where the publisher did not itself act unlawfully to obtain the information:

Boehner v. McDermott, 191 F.3d 463, 472-74 (D.C. Cir. 1999), *judgment vacated* by 532 U.S. 1050 (2001).

Category 8: Discussions, criticism of military activity of high public concern, and free speech value:

CACI Premier Tech., Inc. v. Rhodes, 536 F.3d 280, 294 (4th Cir. 2008).

Category 9: Heavy presumption against content-based speech restrictions:

Dimmitt v. City of Clearwater, 985 F.2d 1565, 1570 (11th Cir. 1993).

Category 10: The fact that information is classified does not necessarily mean that it is secret:

Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943, 959-60 (9th Cir. 2009), *reh 'g en banc* by 614 F.3d 1070 (9th Cir. 2010).

Category 11: The timely dissemination of political speech is particularly important:

Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 300 (D.C. Cir. 2006).

Category 12: Press' core duty is to publish information, not to guard national security:

N.Y. Times Co. v. Gonzales, 459 F.3d 160, 184 (2d Cir. 2006).

Category 13: Threatened or current injuries to First Amendment rights can satisfy the irreparable injury requirement to obtain a preliminary injunction:

Field Day, LLC v. Cnty. of Suffolk, 463 F.3d 167, 181-82 (2d Cir. 2006).

Category 14: The press has broad protections for publishing on matters of public concern:

Cnty. Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 486 (6th Cir. 2002).

Category 15: Even where no profits are lost, First Amendment rights are injured when the press is prevented from communicating to an audience:

Rossignol v. Voorhaar, 316 F.3d 516, 522 (4th Cir. 2003).

Category 16: Distinguishing the Pentagon Papers case from a case in which a prior injunction is not at issue:

Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359, 368 n.5 (2d Cir. 1994), *vacated in part* by 67 F.3d 377 (2d Cir. 1995), *cert. granted*, 516 U.S. 1170 (1996), *aff'd in part and rev'd in part*, 519 U.S. 357 (1997).

APPENDIX B

Periodical References to Wikileaks and the Pentagon Papers

Chart #3 (from page 119 of Article)

| Proposition | Number of Documents Citing |
|--|----------------------------|
| N Largest classified information disclosure since Pentagon Papers | 9 |
| * There are important similarities between the WikiLeaks episode and that of the Pentagon Papers | 7 |
| * WikiLeaks' disclosures are less significant than those in the Pentagon Papers | 4 |
| * WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers | 4 |
| X Criticizing celebrations of WikiLeaks or of Bradley Manning that include comparisons to Daniel Ellsberg | 2 |
| * The Obama Administration's tactics in response to WikiLeaks are similar to those with which the Nixon Administration responded to the Papers' leak | 1 |
| X <i>New York Times v. United States</i> may leave room for the government to prosecute WikiLeaks | 1 |

Elaboration on data:

See *supra* notes 172, 174-76 and accompanying text for information on the search parameters. The following are citations to the articles referenced for each category in the chart, as well as additional information, where appropriate, on the meaning of particular categories.

Category 1: Largest classified information disclosure since Pentagon Papers:

Cathy Burke, *Plugging a Leak—Feds Eye Charges vs. Wiki*, N.Y. POST, Aug. 21, 2010, at 8, available at <http://allbusiness.com/government/government-bodies-offices/15016476-1.html>; *CNN Saturday Morning* (CNN broadcast Aug. 21, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1008/21/cnr.01.html>; Joe Gandelman, *Wikileaks Founder Claims Rape Charges “Dirty Trick” Update: Charges Dropped*, MODERATE VOICE (Aug. 21, 2010), <http://themoderatevoice.com/83534/wikileaks-founder-claims-rape-charges-dirty-trick/>; Interview by Ali Velshi with Chris Lawrence, CNN (Aug. 13, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1008/13/cnr.06.html>; Per Nyberg, *Sweden Drops Rape Accusation Against Founder of Wikileaks*, CNN (Aug. 21, 2010), http://articles.cnn.com/2010-08-21/world/sweden.wikileaks.charge_1_julian_assange-molestation-charge-arrest-warrant?_s=PM:WORLD; *Swedish Pirate Party to Host WikiLeaks Servers*, CNN (Aug. 18, 2010), available at

http://articles.cnn.com/2010-08-18/world/sweden.wikileaks_1_wikileaks-wikileaks-whistle-blower-website?_s=PM:WORLD; Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES, Aug. 9, 2010, at A1, available at <http://www.nytimes.com/2010/08/09/us/09manning.html>; Brian Todd, *Attorney for Wikileaks Suspect Says He's Seen No Evidence on Documents*, CNN (Aug. 31, 2010), http://articles.cnn.com/2010-08-31/us/wikileaks.suspect.attorney_1_bradley-manning-wikileaks-website-leaker?_s=PM:US; *WikiLeaks Founder Says He's Been Targeted by Smear Campaign*, CNN (Aug. 22, 2010), http://articles.cnn.com/2010-08-22/world/sweden.wikileaks.assange_1_arrest-warrant-wikileaks-founder-julian-assange?_s=PM:WORLD.

Category 2: There are important similarities between the WikiLeaks episode and that of the Pentagon Papers (Note: Some of the cited authors make this argument themselves, others reference the argument as made by others. See explanatory parentheticals after citations for more information.):

Michael W. Savage, *Army Analyst Celebrated as Antiwar Hero*, WASH. POST, Aug. 14, 2010, at A2 (citing Bradley Manning supporters who take this view); Mark Schlachtenhaufen, *Marchers Support Alleged WikiLeaks Whistleblower*, EDMOND SUN (Aug. 12, 2010), <http://www.edmondsun.com/local/x960347899/Marchers-support-alleged-wikileaks-whistleblower>; Arthur Silber, *False Criticisms of Wikileaks, and the Rush to Irrelevance and Error*, PAC. FREE PRESS (Aug. 13, 2010), <http://www.pacificfreepress.com/news/1/6817-false-criticisms-of-wikileaks-and-the-rush-to-irrelevance-and-error.html>; Peter Singer, *How Much Transparency Is Too Much?*, PROJECT SYNDICATE, Aug. 18, 2010, <http://www.project-syndicate.org/commentary/singer65/English>; *Supporters of Former Tasker Milward Pupil March in U.S.*, W. TELEGRAPH (Aug. 12, 2010), http://www.westerntelegraph.co.uk/news/county/8325429.US_activists_march_in_support_of_alleged_whistleblower_Bradley_Manning; Kelley B. Vlahos, *Pincus v. Assange: Who Speaks for You?*, ANTIWAR.COM (Aug. 27, 2010), <http://original.antiwar.com/vlahos/2010/08/26/pincus-v-assange-who-speaks-for-you/>; *Wikileaks [sic] a Preamble for the Last Chopper Out of Kabul*, RUPEE NEWS (Aug. 10, 2010), <http://rupeenews.com/?p=31568> (both leaks exposed government dissembling).

Category 3: WikiLeaks' disclosures are less significant than those in the Pentagon Papers (Note: Some of the cited authors make this argument themselves, others reference the argument as made by others. See explanatory parentheticals after citations for more information.):

Chris Floyd, *The Laureate and the Leaker: Swedish Warrant a Salvo in Team Obama's War on Wikileaks*, ATL. FREE PRESS (Aug. 25, 2010), <http://atlanticfreepress.com/news/1/13721-the-laureate-and-the-leaker-swedish-warrant-a-salvo-in-team-obamas-war-on-wikileaks.html> (explaining that he initially made this critique, in keeping with the "media narrative," but concluding that he was wrong); John R. MacArthur, *Of the IRA and the Afghan War*, HUFF. POST (Aug. 18, 2010), <http://www.huffingtonpost.com/john-r-macarthur/of-the-ira-and-the->

afghan_b_688236.html (generally supporting the project of leaking war documents but expressing disappointment with the content of the most recent leaks); *Media Conference Call: Defining Success in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (Aug. 10, 2010), <http://www.cfr.org/afghanistan/media-conference-call-defining-success-afghanistan/p22791>; Arthur Silber, *False Criticisms of Wikileaks, and the Rush to Irrelevance and Error*, PAC. FREE PRESS (Aug. 13, 2010), <http://www.pacificfreepress.com/news/1/6817-false-criticisms-of-wikileaks-and-the-rush-to-irrelevance-and-error.html> (author does not make this argument himself, but he refers at some length to this argument as made by others and critiques the same).

Category 4: WikiLeaks' information disclosures are more dangerous and careless than the release of the Pentagon Papers:

156 CONG. REC. E1574 (daily ed. Aug. 10, 2010) (statement of Hon. Rush D. Holt); Jed Babbin, *Let's Have a WikiLeaks Fire Sale*, AM. SPECTATOR, Aug. 23, 2010, <http://spectator.org/archives/2010/08/23/lets-have-a-wikileaks-fire-sale>; Paul Greenberg, *Blood on Their Hands*, PATRIOT POST (Aug. 16, 2010), <http://patriotpost.us/opinion/paul-greenberg/2010/08/16/blood-on-their-hands/>; Samuel Magaram, *Wikileaks Is No Pentagon Papers*, ATLANTA J.-CONST. (Aug. 19, 2010), <http://www.ajc.com/opinion/wikileaks-is-no-pentagon-595780.html>.

Category 5: Criticizing celebrations of Wikileaks or of Bradley Manning that include comparisons to Daniel Ellsberg (Note: I place these articles in the negative category although neither directly criticizes the Pentagon Papers leak. I err on the side of inferring such critique from each article's larger criticism of the left and of anti-war movements.):

Tim Graham, *WaPo Runs Entire Story of Leftist Praise for Suspected Wiki-Leaker 'Hero'—With No Liberal Labels*, NEWS BUSTERS (Aug. 15, 2010), <http://newsbusters.org/blogs/tim-graham/2010/08/15/wapo-runs-entire-story-leftist-praise-suspected-wiki-leaker-no-liberal-1>; Sister Toldjah, *The Ugly, Pockmarked, Troop-Hating Face of the Anti-War Left*, RIGHTWING NEWS (Aug. 15, 2010), <http://rightwingnews.com/war-on-terrorism/the-ugly-pockmarked-troop-hating-face-of-the-anti-war-left/>.

Category 6: The Obama Administration's tactics in response to Wikileaks are similar to those with which the Nixon Administration responded to the Papers' leak:

Justin Raimondo, *Smearing Bradley Manning*, ANTIWAR.COM (Aug. 11, 2010), <http://original.antiwar.com/justin/2010/08/10/smearing-bradley-manning/>.

Category 7: *New York Times v. United States* may leave room for the government to prosecute WikiLeaks:

Kenneth Anderson, *Can the Wikileaks Founder Be Prosecuted for Espionage by the U.S.?*, VOLOKH CONSPIRACY (Aug. 22, 2010), <http://volokh.com/2010/08/22/can-the-wikileaks-founder-be-prosecuted-for-espionage-by-the-us/>.