

# *The Pentagon Papers*

Federal Trials and Great Debates  
in United States History

## **Case Summary:**

- Between 1967 and 1969, a Pentagon task force created a history of U.S. involvement in Vietnam.
- Although the study was classified top secret, a former Defense Department employee named Daniel Ellsberg copied the documents and turned them over to *The New York Times* in 1971.
- The *Times* began to publish excerpts of and articles about the documents, which showed that the U.S. government had misled the American public about the Vietnam War. Soon after, *The Washington Post* followed suit.
- The U.S. Department of Justice asked the federal courts to impose a prior restraint on further publication of the documents by the *Times* and the *Post*.
- The case went to the Supreme Court, which voted 6-3 to allow publication to continue.

## **History of the Case:**

In June 1971, *The New York Times* shocked Americans by publishing a series of articles based on a secret study the U.S. Department of Defense had produced regarding American involvement in Vietnam between 1945 and 1967. The “Pentagon Papers,” as the leaked study came to be called, showed that every presidential administration from Harry Truman’s to Lyndon Johnson’s had misled the American public about what the United States was doing in Vietnam and the likelihood of military success there. Most significantly, the papers called into doubt the government’s version of events regarding the alleged 1964 North Vietnamese attack on U.S. Navy ships in the Gulf of Tonkin. The congressional resolution resulting from the incident had given President Johnson greatly expanded power to conduct military operations in Vietnam and eventually led to full-fledged American participation in the war.

When the Pentagon Papers came to light, American opposition to the Vietnam War, which had been widespread since 1967, had recently reached its apex. Protestors argued that the war was both immoral and unwinnable. They asserted that the United States did not have the right to dictate the fate of a foreign country, that the American government had supported a repressive and corrupt regime in South Vietnam, and that mounting numbers of Americans and Vietnamese were dying for no valid reason. In addition to the unpopular war, growing concern about excessive secrecy helped to further diminish faith in government. The system of classifying government records that had emerged after World War II grew in scope during the Cold War as part of an effort to conceal American military technology from Soviet spies. Many people believed that the government abused its classification power. Journalists worried that the suppression of vital information was endangering the freedom of the press that was necessary for a well-functioning democracy.

The disclosure of the Pentagon Papers exacerbated the public’s mistrust of the government, and of the executive branch in particular. The papers seemed to confirm the most pessimistic suspicions about the missteps that had led to a massive military commitment. Articles on the study contributed to the perception that the government had not been honest with the American people, particularly with respect to policymakers’ doubts that the Vietnam War was winnable.

The White House was caught by surprise by the publication of the Pentagon Papers, as very few people in the government had known of the study’s existence. At first, President Richard Nixon, while considering the leak to be “treasonable,” was not upset about the revelations themselves, which cast a negative light on his Democratic predecessors. After consulting his advisors, however, Nixon decided that in addition to finding and prosecuting the leaker, the Department of Justice should seek a federal court order halting further publication of the Pentagon Papers. Stopping the newspapers, he came to believe, was necessary to protect the inviolability of classified information.

By asking a federal court to issue a prior restraint, the government was seeking an unprecedented remedy. Never in the nation's history had the civilian federal government halted a publication before the fact rather than seeking criminal prosecution of unlawful speech. Since the adoption of the Bill of Rights in 1791, both state and federal judges had understood freedom from prior restraint to be at the very core of the rights protected by the First Amendment. The Supreme Court made clear in its 1931 opinion in *Near v. Minnesota* that a prior restraint could be permissible only in the most extreme circumstances.

The government proceeded against the *Times* and *The Washington Post*—which had obtained a copy of the Pentagon Papers and begun running its own articles—in federal courts in New York City and the District of Columbia. U.S. District Judge Murray Gurfein granted a temporary restraining order against the *Times*, forcing it to halt its series for several days until a hearing could be held on a preliminary injunction, which if granted would extend the restraint further. Judge Gerhard Gesell of the district court in Washington refused to issue a similar order against the *Post*, but the U.S. Court of Appeals for the District of Columbia Circuit reversed his decision. After holding hearings at which the government attempted to prove that further publication would harm national security, both Gurfein and Gesell refused to issue preliminary injunctions. The cases then went to the U.S. courts of appeals, which reached different results. The Second Circuit in New York ruled that Judge Gurfein should hold another hearing at which the government could present additional evidence, while the D.C. Circuit agreed with Judge Gesell that no injunction was warranted. The Supreme Court of the United States then accepted the case.

After hearing oral argument from Solicitor General Erwin Griswold and lawyers for the newspapers, the Supreme Court on June 30, 1971, ruled 6-3 against the issuance of a prior restraint, allowing the *Times* and the *Post* to continue publishing their articles on the Pentagon Papers. Each of the nine justices issued a concurring or dissenting opinion to explain their vote, with the concurrences focusing on the importance of the freedom of the press and the strongly disfavored notion of prior restraint, and the dissents arguing that the government should have had more time to make its case that further publication would harm national security.

In January 1973, Daniel Ellsberg, a former Defense Department official who had worked on the Pentagon Papers and later became disillusioned about the war, went on trial for stealing and leaking the study. After several months of trial, however, Judge Matthew Byrne of the U.S. District Court for the Central District of California dismissed the charges based on evidence of government misconduct. Members of a White House unit nicknamed the “Plumbers” had conducted illegal surveillance of Ellsberg and burglarized his psychiatrist's office in the hope of finding damaging material on him. Following their activities against Ellsberg, the Plumbers burglarized the Democratic Party headquarters at the Watergate complex, planting the seeds of the scandal that ultimately resulted in Nixon's resignation from office.

### **Legal Issues:**

- Should the federal courts have temporarily restrained the newspapers from publishing information about the Pentagon Papers until hearings on the matter could be held?
- After hearing evidence, should the federal courts have issued preliminary injunctions against publication based on the potential threat to national security?
- Did the newspapers violate federal law by publicizing the content of the Pentagon Papers?

### **Questions for Discussion:**

- In what other times of war or national crisis has the federal government attempted to restrict speech?
- How should First Amendment freedoms be balanced against public safety and national security?
- Are prior restraints of publication ever justifiable? If so, under what circumstances?
- Do you think the federal government keeps too much information from the public?