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EAVESDROPPING ON THE PRESIDENT: A RECONSIDERATION OF THE NIXON ADMINISTRATION'S DECISIONS CONCERNING THE LEAK OF THE PENTAGON PAPERS

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Introduction

Secrecy has been a traditional aspect of governmental operations; for instance, it can be used to protect both the nation's diplomatic and national security interests. However, in a democratic society, the government's need for secrecy inevitably comes into conflict with the public's right to know the truth. Perhaps one of the clearest manifestations of this tension was the conflict ignited by the leak of the Pentagon Papers.

In 1971, as the United States remained bogged down in a seemingly endless war in Vietnam, disillusionment with the war rose dramatically among some Americans. In the midst of this escalating discontent, on June 13, 1971, the *New York Times* published the first installment of the Pentagon Papers, a top-secret study that the Defense Department commissioned soon after the Vietnam War began. By exposing the secret back-story of the war, the Papers revealed that a series of presidential administrations

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had deceived the American public about the U.S.'s policies in Vietnam. The Nixon administration, claiming that the unauthorized disclosures of top-secret information would result in irreparable damages to the nation's diplomatic and national security interests, took the unprecedented step of seeking an injunction against the press to suppress the leak.

Although the leak of the Pentagon Papers is perhaps best known for its importance as a First Amendment case, it must also be acknowledged for the significant impact it had upon the Nixon administration. The American public was well aware of how President Richard Nixon publicly handled the leak, yet the administration's private decisions remained out of sight. Historians have previously debated and speculated about what happened internally within the administration during the few days when the momentous decision to seek an injunction against the *Times* was made. How did President Nixon ultimately come to this decision? What were the administration's primary motives for suppressing the leak? How legitimate were the alleged diplomatic concerns? The answers to these questions not only shed light upon the reverberations that the leak eventually left within the Nixon administration, but they also help to explain the role that diplomacy and national security have in the debate over government secrecy.

Historiography

Even though many historians have previously interpreted the Nixon administration's decision to suppress the leak, it must be reassessed due to the declassification of formerly unavailable evidence, namely, transcripts of previously secret Nixon White House conversations. Nixon recorded all of the telephone calls and meetings that took place in the Oval Office from February 16, 1971, to July 13, 1973, resulting in more than 2,600 hours of recorded conversation.[1] Although Nixon was certainly not alone in using secret recordings (five other Presidents before him had used them as well), the Nixon tapes outnumber all of the others

combined. Thus, despite Nixon's attempts to preserve his secrecy, these tapes have ironically made his administration exceptionally transparent. This contemporary evidence finally provides many answers to many of the enigmas concerning the leak that have puzzled historians for years. These enigmas, as well as the previous interpretations of this topic, will be described in further detail later in this essay.

Abstract

This essay will make use of contemporary evidence to reinterpret the actions that the Nixon administration took in response to the leak of the Pentagon Papers. It will reassess the motives behind the administration's decisions, focusing upon the complex dynamics that caused the administration to seek an injunction against the press. Furthermore, it will compare what historians have previously believed to what the transcripts now show. Based on the transcripts, this essay will conclude that although the administration used diplomatic and national security concerns to justify its legal offensive, the act of suppressing the leak reflected the administration's desire to preserve the prestige and image of the executive branch more than it reflected overriding diplomatic issues. The essay will then examine the implications that this revelation had for the debate surrounding government secrecy; it will also analyze the consequences that Nixon's reaction to the leak had for both his own administration and the American public as a whole. Lastly, this paper will illustrate how the reanalysis of the Nixon administration's handling of the Pentagon Papers is still relevant to the modern period.

Contextual Information about the Pentagon Papers

In 1961, President John F. Kennedy appointed Robert McNamara the U.S. Secretary of Defense. During the Kennedy and Johnson eras, McNamara was a tireless advocate for American efforts in the Vietnam War. He personified the "can-do" attitude that seemed to promise the nation ultimate success in Vietnam; many even referred to the war as "McNamara's War."[2] However, McNamara's private skepticism eventually emerged beneath his public confidence. By December of 1965, less than six months after the first major increments of U.S. forces had been sent to Vietnam, McNamara had already realized that the war could not be won.[3] Attempting to understand how the country had gotten caught in a seemingly endless conflict, McNamara ordered the creation of the "History of U.S. Decision-Making Process on Vietnam Policy" study, which would later be infamously known as the Pentagon Papers.[4]

Although Secretary McNamara had requested an "encyclopedic" analysis of U.S. policy in Vietnam, he could not have predicted the size of the finished product, which consisted of more than 47 volumes and 7,000 pages.[5] The study, which traced the escalation of American involvement in Vietnam, was classified as sensitive and top-secret. The team that compiled the Pentagon Papers placed the document in the RAND (Research and Development) Corporation, a private think tank that was closely associated with the Department of Defense.

Daniel Ellsberg was a former Marine officer and defense analyst who had initially been an unwavering supporter of the U.S.'s policies in Vietnam. However, as the war dragged on, he became increasingly disillusioned with the nation's efforts. Ellsberg was particularly alarmed by the discrepancies between the government's public statements and its private decisions; as a government insider, he had witnessed recurring episodes of government officials lying to the media.[6]

Working as a defense analyst at RAND Corporation, Ellsberg was one of the few people who had full access to the highly classified Pentagon Papers. The Papers confirmed his suspicions: the war had been waged by deception.[7] The study revealed how the Johnson administration, seeking to intensify the conflict in Vietnam, had used alleged incidents concerning the Tonkin Gulf in order to obtain increased powers from Congress.[8] The documents divulged how the U.S. had undermined the Geneva Accords that ended the First Indochina War in 1954.[9] Moreover, the Papers exposed the extent to which the Truman administration had supported the French effort to quell the Vietminh insurgency, a reality that was only vaguely known before.[10] The study illustrated how the Kennedy administration had turned a still-limited commitment into a vital interest and how the Johnson administration had continuously concealed its Vietnam policies from the American public.[11] Seeing that a series of American presidents had consistently used optimistic reports to deceive the public, Ellsberg observed that no President was willing to accept defeat in Vietnam during his administration.[12]

Furthermore, the war had become a source of personal torment for Ellsberg; he became greatly troubled by the role that he had previously played in lying to the public while working for the Defense Department.[13] He decided to take the top-secret study and expose it to the public, hoping that the revelations would cause widespread outrage among Americans and intensify pressure upon the new Nixon administration to terminate the war.[14] In the fall of 1969, with the help of his children, he began to make copies of the top-secret study at night.[15]

After several failed attempts to draw the attention to the papers within the government, Ellsberg decided to take more extreme measures. In February 1971, he gave a copy of the secret study to Neil Sheehan, a correspondent for the *New York Times.* The Pentagon Papers created a substantial amount of conflict among the staff of the newspaper. Reporters and editors argued endlessly over journalistic ethics, disputing the risks that publication could potentially have.[16] Moreover, they debated whether the press had

the right to print sensitive documents that concerned a current, ongoing war.[17] After months of arguing, advocates for publication ultimately prevailed.

From Ellsberg's point of view, the disclosure of the study could not have been timelier.[18] The U.S. had been bogged down in a seemingly endless war for six years; by the summer of 1971, there was still little evidence that the war was actually approaching a conclusion.[19] Polls demonstrated that public frustration with the war had grown. Moreover, domestic protest, which had calmed considerably during Nixon's first year in office, had also intensified.[20] In this atmosphere, on Sunday, June 13, 1971, the front page of the *Times* bore the headline, "Vietnam Archive: Pentagon Study Traces Three Decades of Growing U.S. Involvement."[21]

The Dispute over the Legitimacy of the Nixon Administration's Claims

After the *Times* began publishing installments of the Pentagon Papers, the Nixon administration sought an injunction to suppress further disclosures, citing potential diplomatic ramifications as justification for its legal offensive.

In the courts, representatives of the Nixon administration, including solicitor General Erwin Griswold, asserted that continued publication would result in "great and irreparable harm to the security of the United States."[22] Furthermore, these representatives warned that important diplomatic channels of communication had already dried up and that further disclosures would sabotage the secret efforts of foreign allies to secure the release of the American prisoners of war.[23] Vice Admiral Francis Blouin, Deputy Chief of Naval Operations and one of the government's key witnesses, also explained that foreign intelligence agencies would be able to exploit the sensitive materials contained in the Pentagon documents.[24]

On the other hand, Alexander Bickel, representing the *Times*, disputed these allegations and maintained that the Nixon administration had exaggerated the potential diplomatic ramifications. Bickel stressed that a prior restraint would result in an "irremediable loss" for the public's right to know and that the administration's claims were "utterly devoid of any credible evidence."[25]

Many news reports also argued that government officials were merely trying to steamroll their way to a legal victory by making grave warnings about the ramifications that would occur if they lost.[26] The administration did not provide specific references to the Pentagon Papers to support its allegations, and thus, many Americans responded to their government's allegations with skepticism.[27] Some even thought that officials were naturally trying to suppress information that would weaken support for their war policies.[28] Moreover, the Supreme Court's 6 to 3 decision in favor of the *Times* on June 30, 1971, seemed to reaffirm the notion that the leak had not truly endangered the U.S.'s military and diplomatic interests.[29]

However, a number of historians later reached a different conclusion; they reanalyzed the Pentagon Papers affair and decided that there was legitimacy to the Nixon administration's claims after all. These scholars include David Rudenstine, a professor at Benjamin N. Cardozo Law school, and George Herring, retired professor of the University of Kentucky. Dr. Rudenstine is widely regarded as the historian who has written the most detailed analysis of the Pentagon Papers incident. Other scholars studying the leak of the Pentagon documents frequently cite his book, *The Day The Presses Stopped: A History of the Pentagon Papers Case,* which is described as the most "comprehensive account of the Pentagon Papers controversy."[30] After nearly a decade of reconsideration of the leak, Rudenstine argued that the administration's legal offensive was not merely "part of the administration's general campaign to intimidate the press;" rather, he argued that national security officials and Justice Department lawyers recognized that

the *Times*' series "potentially threatened important national security interests."[31]

Writing in 1997, Rudenstine did not have access to White House telephone conversations from the time of the leak. Thus, he primarily relied upon the notes and memoirs of various officials from the Nixon White House, including those of the White House domestic counselor John D. Ehrlichman, Chief of Staff H.R. "Bob" Haldeman, political operative Charles Colson, and National Security Adviser Henry Kissinger.[32] Until the White House tapes from this period were released, many historians considered these notes to be the most direct, primary source into the Nixon administration's decisions.[33]

Similarly, Dr. Herring explained that Nixon and Kissinger "both saw great consequences" if they did not stop publication.[34] Herring noted that there was alarm within the government over the possible exposure of the National Security Agency's top-secret codes.[35] He also observed that government officials were particularly worried about the potential harm that the leak could have for Kissinger's secret initiative to the People's Republic of China, an initiative that Herring called "the key to the administration's 'Grand Design' for a new world order."[36]

Memoirs

Later in their memoirs, officials from the Nixon White House, including the President himself, wrote about their diplomatic concerns and their decision-making process in the days following the leak. However, whether these memoirs accurately reflect the events that took place has also been a topic of much dispute; some historians, such as John Prados and Margaret Porter of the National Security Archives, have viewed these historical records with uncertainty.[37]

In his 1979 memoir, *White House Years,* Kissinger described the administration's fears regarding the potential diplomatic ramifications:

> Our nightmare at that moment was that Peking might conclude our government was too unsteady, too harassed, and too insecure to be a useful partner. The massive hemorrhage of state secrets was bound to raise doubts about our reliability in the minds of other governments, friend and foe, and indeed about the stability of our political system. We had secret talks going on at the same time with the North Vietnamese, which we believed—incorrectly, as it turns out—were close to a breakthrough. We were at an important point in the sensitive SALT talks. And we were in the final stages of delicate Berlin negotiations, which also depended on secrecy.[38]

Furthermore, although the leak was primarily damaging to John F. Kennedy and Lyndon B. Johnson, two of Nixon's Democratic predecessors and political opponents, Kissinger recalled that he and the President did not intend to utilize the leak as a political weapon. He wrote: "Indeed, there was some sentiment among White House political operatives to exploit [the disclosures] as an illustration of the machinations of our predecessors and the difficulties we inherited. But such an attitude seemed to me against the public interest."[39] Additionally, Kissinger noted that he did not introduce the idea of seeking an injunction against the press, although he also did not discourage the President from pursuing it.[40]

Nixon's 1990 memoir, *RN: The Memoirs of Richard Nixon,* also discussed the administration's decision to act against the *Times.* Nixon recalled, "On consideration, we had only two choices. We could do nothing, or we could move for an injunction that would prevent the *New York Times* from continuing publication. Policy argued for moving against the *Times*; politics argued against it."[41]

Kissinger's second memoir, *Years of Upheaval,* was published in 2000. In it, he further elaborated on the statesmanship of the President's approach:

> …But from the beginning Nixon thought it improper to place the blame for the Vietnam War on his predecessors…Thus when the Pentagon Papers became public, Nixon was consistent. He rejected a partisan response. He took the view that the failure to resist such massive, and illegal, disclosures of classified information would open the floodgates, undermining the processes of government and the confidence of other nations.[42]

Contemporary evidence can now help to clarify whether these memoirs accurately reflect the events that occurred within the Nixon administration at the time.

The Evolution of Nixon's Reaction to the Leak

Given that Nixon felt a certain amount of resentment toward the press, one would have expected him to become angry as he read the *Times* on Sunday, June 13 and learned of one of the most massive leaks in history.[43] However, the telephone transcripts show that initially, Nixon appeared to be relatively indifferent towards the unauthorized disclosures. In fact, in the tape of the President's first telephone conversation on June 13 at 12:18 p.m. with Deputy National Security Adviser Alexander M. Haig, Nixon said that he did not even read the article about the Pentagon Papers.[44] Furthermore, although Haig described the leak as being "very significant" and called it the "Goddamn *New York Times* exposé of the most highly classified documents of the war," Nixon responded by saying "Oh, that," in a relatively nonchalant manner.[45] Haig continued to emphasize the significance of the leak, calling it "a devastating security breach…of the greatest magnitude of anything I've ever seen" and maintaining that he was "sure it was stolen," but Nixon's response was still uncharacteristically calm.[46]

Nixon's composed attitude carried over into a second telephone call that day, which was a conversation with Secretary of State William P. Rogers at 1:28 p.m. In this conversation, the unauthorized disclosures did not appear to be the first, or even the second, most pressing item on the President's mind. Instead, Nixon appeared to be more preoccupied with discussing the recent casualty figures in Vietnam and his daughter's wedding from the previous day.[47] The President's relaxed reaction to the leak makes sense under the circumstances; in the 47 volumes of the Pentagon Papers, there was not a single word about the Nixon administration.[48]

Yet the President's unfazed attitude toward the disclosures turned out to be only short-lived; Nixon's stance on the leak had completely altered by the next evening.[49] By then, the administration had already put the *Times* on notice and sent the newspaper a telegram, demanding that it discontinue publication and threatening prosecution. What had happened during that brief time period that transformed Nixon's view so dramatically? Who was primarily responsible for causing the President to assume a much more hostile position against the *Times*? These questions are particularly significant because many historians have agreed that the decision to prosecute the *Times* was a critical factor in this sequence of events that eventually led to the Watergate scandal.

In attempting to locate the source of Nixon's change in attitude, scholars have previously concluded that it was a 13-minute telephone conversation on the afternoon of June 13 with Kissinger.[50] In fact, this has become a widely accepted notion.[51] Many historians have concluded that Kissinger taunted the President, transforming Nixon's initial indifference toward the leak into punitive anger, and thus, prompting the administration to take aggressive action against the press.[52] Without access to the Nixon tapes, these historians have relied heavily upon the memoirs of Nixon's former aides, White House domestic counselor John Ehrlichman and former White House Chief of Staff H.R. Haldeman.[53]

In his 1978 memoir, *The Ends of Power*, Haldeman claimed that Kissinger goaded the president into retaliating against the press by stressing that the leak challenged the authority of the executive branch.[54] Haldeman maintained that Kissinger "really knew how to get to Nixon" and that "the Pentagon Papers affair, so often regarded by the press as a classic example of Nixon's paranoia, was really Kissinger's premier performance."[55] He even quoted Kissinger as telling the President in their critical June 13 conversation that Nixon's decision to do nothing "shows you're a weakling, Mr. President."[56] Ehrlichman further elaborated on Haldeman's viewpoint. In his 1982 memoir, *Witness to Power,* he also blamed Kissinger, saying that the National Security Adviser "fanned Richard Nixon's flame white-hot."[57] He even wrote, "With-

out Henry's stimulus, the President and the rest of us might have concluded that the Papers were Lyndon Johnson's problems, not ours."[58]

Rudenstine came to the same conclusion. Although at the time when he was writing, he noted that "neither Nixon nor Kissinger has publicly disclosed the details of [their critical June 13 call]," he still concluded that Kissinger's pressure during the phone conversation was the "single strongest catalyst" that made the "major difference" in causing Nixon to pursue an injunction.[59]

The Nixon-Kissinger Phone Call From June 13

However, now that the tape of the June 13 call has been released, it contradicts much of what Ehrlichman and Haldeman claimed in their memoirs. It also reveals that there is a much more nuanced history than previously understood by historians: Kissinger did not aggressively goad Nixon into retaliating against the press, nor was the National Security Adviser's June 13 phone call ultimately responsible for making the "major difference" in the President's decision.

In their telephone call, both Nixon and Kissinger denounced the leak as an "unconscionable damn thing."[60] However, an important portion of their discussion focused on the damage that the disclosures would have upon Nixon's Democratic predecessors and political opponents:

> President Nixon: Fortunately, it didn't come out in our administration.
>
> …
>
> Kissinger: In public opinion, it actually, if anything, will help us a little bit, because this is a goldmine of showing how the previous administration got us in there.
>
> President Nixon: I didn't read the thing. Tell—give me your view on that in a word.
>
> Kissinger: Oh, well, it just shows massive mismanagement of how we got there. And it pins it all on [President John F.] Kennedy and [President Lyndon B.] Johnson.

President Nixon: [*laughing*] Huh. Yeah!

Kissinger: And McNamara. So from that point of view it helps us.[61]

Although Kissinger later wrote that the administration had no intention of profiting politically from the disclosures, this portion of the conversation tends to undermine those claims. Kissinger called the leak a "goldmine" and emphasized that it would "help" their administration; moreover, Nixon's laughing, and his response ("Huh. Yeah!"), seem to convey a sense of satisfaction.

In addition to evaluating the domestic consequences of the leak, Kissinger went on to discuss the diplomatic repercussions that the unauthorized disclosures would have:

Kissinger: And McNamara. So from that point of view it helps us. From the point of view of the relations with Hanoi, it hurts a little, because it just shows a further weakening of resolve.

President Nixon: Yeah.

Kissinger: And a further big issue.

President Nixon: I suppose the *Times* ran it to try to—try to affect the debate this week or something.

Kissinger: Oh, yes. No question about it.[62]

This portion of the call verifies what Kissinger later wrote about Hanoi; the administration did indeed express alarm over the negotiations with the North Vietnamese. However, it also indicates that the majority of the administration's other diplomatic concerns seem to have been introduced after the fact. In his memoirs, Kissinger wrote that he and Nixon had serious concerns regarding the Chinese government, the SALT talks, and the Berlin negotiations. However, this tape shows that at the time of the leak, they only briefly discussed the impact that the disclosures would have upon Hanoi. Soon, the tone of the conversation changed:

President Nixon: Well, you know… it's—it may not have the effect they intend. They—the thing, though, that Henry, that to me is just unconscionable, this is treasonable action on the part of the bastards that put it out.

Kissinger: Exactly, Mr. President.

President Nixon: Doesn't it involve secure information, a lot of other

> things? What kind of—what kind of people would do such things?
>
> Kissinger: It has the most—it has the highest classification, Mr. President.[63]

Nixon, not Kissinger, was the one who first brought up the idea that the disclosures were "treasonable"; therefore, although Ehrlichman and Haldeman later claimed that Kissinger was primarily responsible for convincing the President that the *Times* had committed a reprehensible offense, this segment of the conversation establishes that Nixon had already been convinced, and thus, did not need Kissinger's persuasion.

Indeed, the most significant aspect of Kissinger's influence occurred when he suggested that the administration investigate the possible legal options:

> Kissinger: It's treasonable. There's no question it's actionable. I'm absolutely certain that this violates all sorts of security laws.
>
> President Nixon: What—what do we do about it? Don't we ask for an—
>
> Kissinger: I think I—I should talk to [Attorney General John] Mitchell.[64]

Kissinger later wrote in his memoirs that the idea of pursuing legal action was not his.[65] However, the transcript shows that he was actually the first to introduce the idea to the President, and thus, did play a role in steering the administration toward seeking an injunction. Yet in the context of Nixon's other conversations regarding the leak, Kissinger's influence cannot be considered responsible for being the "strongest catalyst" that made the "major difference" in the President's decision; in fact, even after his conversation with Kissinger, Nixon was still reluctant about pursuing a legal offensive. This became evident the next night on June 14. During a 7:13 p.m. phone call with Ehrlichman, Nixon said "Hell, I wouldn't prosecute the *Times.* My view is to prosecute the goddamn pricks who gave it to them."[66]

The Main Factor

If Kissinger's June 13 telephone call was not the main factor that resulted in the President's decision to prosecute the *Times*, then what was? The transcripts reveal that the critical moment actually happened during a brief, two-minute phone conversation between Nixon and Ehrlichman.[67] During this call, Ehrlichman informed the President that they had immediately to put the *Times* on notice; if the Justice Department did not act right then, it would forfeit the opportunity to take the press to court:

> Ehrlichman:—the Attorney General has called a couple times about these *New York Times* stories, and he's advised by his people that unless he puts the *Times* on notice—
>
> President Nixon: Yeah.
>
> Ehrlichman:—he's probably going to waive any right of prosecution against the newspaper. And he's calling now to see if you would approve his putting them on notice before their first edition for tomorrow comes out.[68]

Nixon was then forced to make a decision. He would ask John Mitchell if the Justice Department could wait before taking action:

> President Nixon: Well, could [the Attorney General] wait one more day? They have one more day after that. I don't know. I don't know.
>
> Ehrlichman: He apparently feels under some pressure to either decide to do it or not do it.
>
> President Nixon: Hmm. Does he have a judgment himself as to whether he wants to or not?
>
> Ehrlichman: Yeah, I think he wants to. You might want to give him a call and talk with him about it directly, as I'm not very well posted on this whole thing.[69]

This conversation led directly to a telephone call between the President and Attorney General John Mitchell a few minutes later at 7:19 p.m. This call only lasted three minutes; without access to the tape of this conversation, historians (including Rudenstine) have previously believed this conversation to be insignificant.[70] However, the transcript now reveals that this was the crucial conversation in which Nixon made the decision to send a telegram

to the *Times*; this telegram immediately resulted in an injunction the next day.[71]

Nixon started out by asking for Mitchell's advice:

> President Nixon: What is your advice on that *Times* thing, John? You would like to do it?
>
> Mitchell: I would believe so, Mr. President. Otherwise, we will look a little foolish in not—
>
> President Nixon: Mm-hmm.
>
> Mitchell:—following through on our legal obligations and—[72]

Nixon cut in, asking whether previous administrations had ever made similar attempts to restrict publication:

> President Nixon: Has this ever been done before?
>
> Mitchell: A publication like this, or—
>
> President Nixon: No, no, no. Have you—has the government ever done this to a paper before?
>
> Mitchell: Oh, yes, advising them of their—
>
> President Nixon: Oh.
>
> Mitchell: Yes, we've done this before.
>
> President Nixon: Have we? All right.[73]

Attorney General Mitchell was mistaken when he told the President that the government had "done this before."[74] In the past, no U.S. presidential administration had ever sought an injunction to suppress the publication of information.[75] Nixon then inquired about the additional details associated with putting the *Times* on notice:

> President Nixon: How do you go about it? You do it sort of low-key?
>
> Mitchell: Low key. You call them and then send a telegram to confirm it.
>
> President Nixon: Mm-hmm. And say that we're just—we're examining the situation, and we just simply are putting you on notice.
>
> Mitchell: Well, we are putting them on notice that they're violating a statute because—
>
> President Nixon: Yeah.
>
> …
>
> Mitchell: Mel [Laird] had a pretty good go up there before the committee today on it. And it's all over town, and all over everything, and

> I think we'd look a little silly if we just didn't take this low-key action of advising them about the publication.[76]

In the telegram that was sent to the *Times*, Mitchell threatened prosecution, saying that publication of information from the Pentagon documents was "directly prohibited by the provisions of the Espionage law, Title 18, United States Code, Section 793."[77] He also asserted, "…further publication of information of this character will cause irreparable injury to the defense interests of the United States."[78] Thus, although Nixon thought that the telegram was going to be merely a "low-key" request, Mitchell's telegram was not low-key at all.

After Mitchell reassured Nixon that the telegraph would be low-key, Nixon finally decided to seek an injunction:

> President Nixon: Well look, look, as far as the *Times* is concerned, hell, they're our enemies. I think we just ought to do it.[79]

In their memoirs, White House officials depicted their decision-making as a careful and well-thought-out process; however, the tape of Nixon's critical conversation with Mitchell reveals that the decision was actually made in relative confusion. Nixon based his unprecedented decision on a telephone conversation that lasted approximately three minutes, resentment toward the press, and incorrect information from Mitchell.[80] Admittedly, this decision was not entirely the President's fault; in his haste to act immediately, the Attorney General made miscommunications and failed to verify the information that he gave to the President. Thus, the tape shows that the administration decided to embark on an unprecedented course of legal action in a relatively impromptu manner.

Further Discrepancies

Secretary of State William Rogers held a press conference on June 15, two days after the *Times* published its initial installment of the Papers. During this conference, Rogers emphasized that the leak of the Pentagon documents represented a serious security breach. He said, "It's going to cause a great deal of difficulty with

governments outside the U.S.…. Already we have had démarches here…asking us about it."[81] However, Rogers did not mention that the administration had actually sent out cables to all U.S. embassies asking for responses that expressed concern over the U.S.'s diplomatic communications.[82] Moreover, Rogers' contention is also undermined by the fact that the diplomatic volumes of the Pentagon documents had never actually been included in the leak.[83]

Regarding the consequences that the unauthorized disclosures would have for U.S. negotiations with the North Vietnamese government, Rogers said, "I don't believe that it will have any effect on Hanoi's attitude toward peace negotiations."[84] However, a few days earlier on June 13, Kissinger had expressed that the negotiations with Hanoi where his prime diplomatic concern.[85] Because Rogers' statement directly contradicts what Kissinger had previously told Nixon, it demonstrates that the administration was not in consensus about what the potential diplomatic ramifications were.[86]

Evidence from the next day, June 16, further undercuts the administration's claims. In court, the Justice Department was arguing about the consequences that the unauthorized disclosures of sensitive information would have for the nation's security; however, a three-minute telephone conversation between Nixon and Ehrlichman at 8:22 p.m. reveals that in private, the administration no longer cared about whether the newspapers published anymore classified information. According to the transcript, although Ehrlichman and Nixon were worried about receiving an unfavorable court ruling, it was not because such a ruling would allow for the continued publication of sensitive information, but because they feared that an unfavorable decision could damage their ability to get a grand jury to indict Ellsberg.

In this conversation, Nixon inquired about the consequences that an adverse ruling would have:

> President Nixon:—what does it really get down to? If you delay it, does that mean the *Times* goes ahead and—the temporary restraining order apparently applies for four days only, is that right?

> Ehrlichman: It expires by its terms Saturday at noon—or at one o'clock.
>
> President Nixon: So they'd go ahead and print.
>
> Ehrlichman: They'd print the Sunday edition anyway, regardless of what the grand jury did.
>
> President Nixon: Yeah.…I'm not too concerned about what they print now.…The point is you don't want to have an adverse—
>
> Ehrlichman: I don't want to appear to be calling off a grand jury in midflight.
>
> President Nixon: Right. Right. That makes a lot of sense.[87]

This portion of the conversation suggests that privately, the administration was primarily concerned with indicting Ellsberg, not with the potential ramifications that could result from further publication of the sensitive materials.

The contention that the prosecution of the *Times* was about protecting the secrecy of the classified information is further weakend by Nixon's attempts, during the same period as the Pentagon Papers affair, to obtain a broad range of historically secret material other than the Pentagon documents to disclose to the public.[88] Nixon expressed a particular interest for releasing classified information that pertained to the Kennedy administration and its involvement in the 1961 Bay of Pigs incident.[89] This led directly to an executive order that he issued in early 1972, an order that substantially liberalized the application of the Freedom of Information Act (FOIA).[90] Congress had initially enacted FOIA in 1966 to give the public more access to the federal government's records, but until Nixon's executive order, it had mostly remained a dead letter.[91] Nixon's attempts for a further declassification policy imply that the administration was not as concerned with the protection of classified information as it had claimed in court.

Ultimately, analysis of the Nixon administration's decision-making process is inadequate at establishing that the administration had overriding diplomatic concerns to justify its legal offensive against the *Times*.[92] Although officials later asserted that they had grave, well thought-out concerns pertaining to the U.S.'s diplomatic interests, the evidence from Nixon's White House tapes indicates that the administration officials were unable to reach

a consensus about what the potential diplomatic ramifications actually were.[93] Furthermore, although officials later described their decision-making process as a careful consideration of options, the telephone transcripts reveal that the administration's unprecedented decision to pursue an injunction was actually made in a relatively informal manner. The evidence also indicates that the administration appeared to be more concerned with indicting the leaker, whose actions they deem to be "unconscionable" and "treasonable," than they were with the information that was being disclosed through the leak.[94] Thus, the contemporary evidence suggests that the majority of the administration's alleged diplomatic concerns were not actually anticipated at the time of the leak.

Implications for the Debate over Secrecy

These revelations have implications for both sides of the conflict surrounding government secrecy. This essay does not attempt to argue in favor of one side of the debate; rather, it seeks to illustrate the conflict between both perspectives. On the one hand, proponents of the public's right to know may argue that the Nixon administration's handling of the leak demonstrates that national security issues can be exaggerated and that alleged diplomatic concerns are not always legitimate.[95] Claimed security issues can be used to conceal any information that the government does not want to make public; thus, to some, this incident may show that merely uttering the words "national security" or "diplomatic ramifications" does not in itself justify the use of secrecy.[96]

On the other hand, those in favor of government secrecy maintained that confidentiality, like openness, remains a necessary prerequisite of self governance.[97] Indeed, confidentiality can be necessary for furthering both the foreign and defense interests of the nation; moreover, it is the executive branch that has the unique ability and position to protect those interests throughout the world.[98] Thus, proponents of secrecy may argue that this one

instance of exaggerated diplomatic allegations cannot be used to generalize that secrecy in all government operations is harmful, nor can it indicate that the government's alleged diplomatic concerns are never legitimate.[99]

Ultimately, the Nixon administration's handling of the leak has left a mixed, even a conflicting, legacy. Due to the polarization in American society about the ever-contentious dilemma over government secrecy, Americans may have differing perceptions of the implications that can be drawn from this historical incident. These polarizations have continued to shape the modern perceptions of government secrecy, which will be discussed later in this essay.

The Consequences of the Leak and the Aftermath of the Administration's Decision to Seek an Injunction

Although it remains difficult to assess the extent of the leak's consequences even after several decades, the general consensus has been that ultimately, the disclosures did not result in injury to the U.S.'s diplomatic interests.[100] Secretary of State Rogers was accurate when he predicted that the revelations would have minimal foreign influence.[101] After the Supreme Court ruled in favor of the *Times* on June 30, 1971, and the press was free to publish further information from the Papers, the administration never attempted to establish that any damage had been done.[102] Kissinger himself later wrote, "I do not believe now that publication of the Pentagon Papers made the final difference in Hanoi's decision not to conclude an agreement."[103]

Yet domestically, the leak did generate an enormous storm of attention. Although the disclosures did not directly impact the course of the war, they did cause a significant increase in the public's distrust of the executive branch. Scholars have characterized the American public of the pre-1970s Cold War era as being relatively trustful toward governmental assertions about national security; journalism professor Mark Feldstein of the University

of Maryland even referred to this period as one in which "deference to authority characterized American journalism and politics alike."[104] The leak of the Pentagon Papers significantly contributed to bringing this atmosphere to an end.[105] By amplifying the public's skepticism, it broke a "spell" that had long existed in the U.S., a notion that the people and the government would always agree upon major issues.[106] This distrust of the government has intensified over the years and must now be taken seriously by any president who wishes to govern successfully.[107]

Although in their telephone conversations, Nixon and his aides believed that seeking an injunction would allow the administration to suppress the leak, the President's attempts to prosecute the *Times* actually ended up maximizing the attention that the disclosures received.[108] Indeed, this amplified publicity was a significant reason why the leak was able to increase the public's distrust toward the government to such a significant degree.[109] Ellsberg had hoped that the disclosures would attract as much attention as possible; thus, by launching an immense and highly publicized court battle, Nixon helped to grant Ellsberg his wish.[110] In that sense, the administration's decision to pursue a legal offensive had rather ironic results.

The Ramifications For the Nixon Administration

The decisions that Nixon made in the wake of the disclosures also left unintended reverberations within his own presidency; these choices became an important part of the sequence of events that eventually led to the Watergate scandal and Nixon's subsequent resignation on August 8, 1974. Thus, although Nixon had predicted in his telephone conversations that his Democratic predecessors were the ones who would suffer most from the disclosures, in another ironic twist, the opposite occurred.

Because so many different decisions culminated in the Watergate break-in, one cannot know for certain the extent of the leak's impact.[111] Yet although the Pentagon Papers incident was only

one component of a much more complicated whole, it was still a critical element.[112] The administration's failure in court to suppress further disclosures acted as a trigger, helping to elicit many of the decisions that eventually led to the Watergate incident.[113] In fact, within a week of the Supreme Court's refusal to enjoin the *Times*, the administration had already hired the men who would later participate in the illegal White House activities.[114] Dismayed that the court's ruling was allowing Ellsberg, along with others who were involved in a supposed conspiracy against the administration, to get away, Nixon decided to undertake another course of action.[115] On the morning of June 30, 1971, the day that the administration received the Supreme Court's unfavorable ruling, Nixon held a discussion in the Oval Office with various White House aides. In the tape of this conversation, Nixon declared: "We're through with this sort of court case…They're using any means. We are going to use any means."[116] As journalists Harrison Salisbury later wrote of this conversation, "The 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'…"[117] Angered by the leak and worried that information pertaining to his own administration was in danger of being exposed as well, Nixon arranged for the creation of a covert anti-leak unit.[118] An administration official by the name of Egil Krogh was placed in charge of overseeing this Special Investigations Unit, which is better known to the public as "the Plumbers." The Plumbers became the most direct link between the leak of the Papers and the Nixon's administration's collapse; had Ellsberg never leaked the Pentagon documents, the Plumbers might not have been formed.[119] Without this key organization in place, the subsequent events of Nixon's administration could have been very different.

On September 3, 1971, two members of the unit, Howard Hunt and G. Gordon Liddy, hoping to find information with which to discredit Ellsberg, broke into the Los Angeles office of Ellsberg's psychiatrist. The break-in marked a turning point in the evolution of the Plumbers. Krogh, who was later imprisoned for

his involvement in the Watergate scandal, explained, "Hardened by their first action, the Plumbers [now] knew that the rules of engagement had been changed and the conventional respect for laws set aside."[120] The establishment of the Plumbers and the break-in at Ellsberg's psychiatrist's office later helped to form the basis of two of the three impeachment articles against Nixon; thus, the Pentagon Papers affair became a "seminal Watergate episode" that helped lead to the first presidential resignation in U.S. history.[121]

The administration's failure to obtain an injunction was the trigger that ultimately brought forth the Plumbers; thus, in the days after the leak initially began, the pivotal telephone conversations and decisions that led Nixon to seek an injunction against the *Times* can be considered the beginning of the end of the Nixon presidency.

The Leak's Legacy in the Modern Era

This essay's purpose, to revisit the Nixon administration's handling of the Pentagon Papers, is also for the present. It is for the issues that still remain decades after the massive leak of the Pentagon documents, for the questions that have once again become increasingly relevant in light of contemporary events.[122]

In 2010, a whistle-blowing site called Wikileaks came into the international spotlight after it leaked secret information regarding the U.S.'s diplomatic affairs in countries including Iraq and Afghanistan.[123] Many Americans have been quick to compare Wikileaks to the disclosures of the Pentagon Papers, yet there are underlying dissimilarities that must be acknowledged. For instance, the leaks contained fundamentally different types of materials; the Pentagon Papers was a focused study created by senior government officials whereas the Wikileaks disclosures consisted of scattered topics and raw reports.[124] However, what can be compared, at least to a certain extent, are the public reactions of the Nixon and Obama administrations.

There are important similarities between the Nixon administration's handling of the Pentagon Papers affair and the Obama administration's attempts to suppress the Wikileaks disclosures. Both administrations claimed that the revelations were damaging to the U.S.'s diplomatic interests.[125] The Obama administration also employed the Espionage Act to pursue leak cases, the same law that the Nixon administration attempted to use against the *Times* four decades ago.[126]

Yet the Obama administration has also taken its suppression of leaks one step further than the Nixon administration did. In fact, although Obama entered office with the promise to run the most transparent administration in U.S. history, his administration has embarked upon an unprecedented number of prosecutions against alleged leakers.[127] Since the time that the administration first entered office, it has used the Espionage Act six times, pressing criminal charges against more suspected leakers than any other presidential administration, including the Nixon administration.[128] In fact, the Obama administration has engaged in more leak prosecutions than every other administration in U.S. history combined.[129] Thus, although Nixon has often been labeled as the president with the most aggressive stance toward leaks, the accuracy of this portrayal requires reassessment in light of modern day events.[130]

Admittedly, due to the contemporary nature of the leaks in question, scholars are currently unable to reach definitive conclusions about the Obama administration's handling of these unauthorized disclosures. These events are still unfolding and much of the information, evidence, and secrets in question are not yet available for analysis. Thus, it is not possible to conduct a comprehensive assessment of the Obama administration's response to the disclosures (including analyzing its diplomatic concerns and its decision-making process) as this essay has done with the Nixon administration. Nor is it easy to compare the ways in which the Nixon and Obama administrations have dealt with leaks. However, at a minimum, these contemporary events demonstrate that the U.S. government's approach towards handling disclosures and

secrecy has not made significant alterations over the course of 40 years. Although the Nixon administration's struggle over the Pentagon Papers is now part of history, another administration is grappling with similar types of issues. It is dealing with those challenges through comparable methods and employing similar justifications for its actions. Moreover, several controversies have once again been ignited, such as over whether the current administration is justified in fighting so tenaciously against leaks and whether its diplomatic concerns are legitimate. These debates are further manifestations of the fact that the issues initially raised by the Nixon administration remain unresolved to this day.

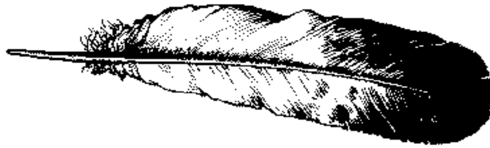
Conclusion

In an attempt to suppress the 1971 leak of the Pentagon Papers, the Nixon administration cited alleged diplomatic and national security concerns to justify its legal offensive against the *Times*. These actions sparked debate over the legitimacy of the administration's claims, and the debate continued even decades after the leak initially occurred. Although various historians have reanalyzed this incident and concluded that there was a sufficient amount of legitimacy to the administration's concerns after all, the contemporary evidence of Nixon's telephone transcripts suggests that in reality, the majority of the administration's alleged diplomatic concerns were not actually anticipated at the time of the leak; this revelation has implications for both sides of the secrecy dilemma. Moreover, the transcripts also reveal that the administration's decision-making process was much more nuanced than previously understood by historians.

At this writing, there is still evidence from the Nixon administration that has not yet been released to the public. In the days following the *Times*' initial installment of the Pentagon Papers, Nixon White House officials began to convene in a steering group to discuss the disclosures.[131] These meetings may shed more light upon the administration's decisions; however, transcriptions from

these sessions have yet to be made public.[132] It will be up to future historians to evaluate this evidence when it is released in order to revise the current understanding of this incident.

Because the controversy over leaks is intensifying in the U.S. today, historically-informed analysis of the questions surrounding secrecy is required now, more than ever. Future historians will have the responsibility of revisiting the Pentagon Papers issue and providing answers to the questions that cannot currently be answered, including the ones pertaining to the Obama administration. Government secrecy is a timeless dilemma that perhaps has no resolution; however, our society can still gain a better understanding of it as contemporary events unfold.



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