

A Modern-Day Pentagon Paper in a Post-*Pentagon Papers* World: A Case Study of Negotiations Between *The Washington Post* and the U.S. Government Regarding Publication of the 2009 Afghanistan Assessment

Jonathan G. Odom*

Following the U.S. Supreme Court's landmark decision in the Pentagon Papers case, the U.S. Government has been disempowered from restraining private news organizations in advance of their publication of classified information. Following that judicial ruling, news organizations that have come into the possession of information that the Government has classified for national security reasons contact the appropriate Government officials and discuss their intent to publish the information. At that point, the parties begin a process of negotiation.

This Article spotlights and analyzes a noteworthy example of such a negotiation from 2009, when The Washington Post came into possession of a classified U.S. Government assessment regarding ongoing military operations in Afghanistan, which the Post intended to publish, either in whole or in part. First, this Article reviews the facts and adjudication of the original Pentagon Papers case, as it set the stage for similar negotiations in the future. Second, this Article summarizes the details of the Afghanistan Assessment Negotiation. Third, it discusses why this particular case is worth studying through the lens of negotiation methodology. Fourth, this Article analyzes the case based on

* A.B. *with Distinction*, Duke University; J.D., Wake Forest University; LL.M. *with Distinction*, Georgetown University. The author is a judge advocate (i.e., licensed attorney) in the U.S. Navy, having served on active duty for more than twenty years in the United States and around the world in various roles, including as an international negotiator. Currently, he serves as a Military Professor of Law at the U.S. Asia-Pacific Center for Security Studies, located in Honolulu, Hawaii. The views expressed are his own and do not necessarily reflect the positions of the U.S. Department of Defense or any of its components. He may be contacted at jonathan.odom@usa.com.

principles of negotiation developed in negotiation literature. Fifth, it assesses the overall success of the negotiation and its significance as an example of adherence to interest-based principles in negotiations between the Government and news media in a post-Pentagon Papers context. This analysis aims to provide a valuable example of negotiations between the news media and the Government for further consideration and discussion by lawyers, news editors and reporters, and negotiators alike.

This Article is based partially upon general research on the subject, but is derived primarily from resources specific to this particular negotiation. Much of the analysis in this Article was drawn directly from the author’s personal interviews with the two key participants involved in this negotiation: Washington Post Investigative Journalist Bob Woodward and former Deputy Assistant Secretary of Defense for Public Affairs Geoff Morrell.

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I. INTRODUCTION

What happens when a private news organization in the United States comes into the possession of information that has been classified by the U.S. Government (“Government”) for national security reasons and the news organization wants to publish it? The U.S. Supreme Court answered that question in a landmark decision in *N.Y.*

Times Co. v. U.S. (“*Pentagon Papers* case”).¹ Although that judicial ruling tipped the scales of justice heavily in favor of private news organizations,² several questions remain: How can a private news organization decide whether and to what extent it should publish such classified documents or information? Should the Government have an opportunity to express its concerns to the news organization about publication? If so, what is the proper forum for doing so? What is the best way to protect the interests of both parties in such situations?

In the forty-seven years since the Supreme Court’s ruling in the *Pentagon Papers* case, situations have arisen in which private news organizations have come into the possession of documents or other information that the Government has classified for national security reasons. In those situations, responsible news organizations contact the appropriate Government officials and discuss their intent to publish the information.³ At that point, the parties begin negotiations regarding what should be published and when.⁴

These situations involving the news media’s publication of classified information are worth analyzing for several reasons. They capture the friction that can arise between constitutional freedoms and national security. Additionally, they display the power dynamics between the Government and private news organizations. They usually involve two parties who genuinely want to behave responsibly. They also arise in a context in which a relationship between the parties

1. 403 U.S. 713 (1971). While this landmark case includes only *The New York Times* within its official case name, the Supreme Court issued a consolidated ruling in this case for two separate legal actions brought by the U.S. Government to prevent publication of the *Pentagon Papers*, one against *The New York Times* and the other against *The Washington Post*. See U.S. v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971); U.S. v. Wash. Post Co., 446 F.2d 1322, 1323 (D.C. Cir. 1971).

2. See Interview by Jonathan Odom with Bob Woodward, Investigative Journalist, *The Washington Post*, in Washington, D.C. (Apr. 8, 2014) [hereinafter Interview with Bob Woodward]; Telephone Interview by Jonathan Odom with Geoff Morrell, former Deputy Assistant Secretary of Defense for Public Affairs (May 7, 2014) (noting that the Government “can’t compel the news organizations All you can do is explain the risks and dangers of publication.”) [hereinafter Telephone Interview with Geoff Morrell].

3. See Allan M. Siegal, *Secrets about Secrets: The Backstage Conversations Between Press and Government* 8–10 (John F. Kennedy School of Gov., Harv. Univ., Working Paper, Mar. 2007), https://shorensteincenter.org/wp-content/uploads/2012/03/2007_02_siegal.pdf?x78124.

4. These discussions may not always be viewed as formal negotiations by the parties, but they fit the common definition of negotiations as “back-and-forth communication[s] designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.” Bruce Patton, *Negotiation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 279 (Michael L. Moffitt & Robert C. Bordone eds., 2007).

must be sustained. Lastly, they involve direct interactions between two parties, without the assistance of a judge or other neutral third-party.

This Article will spotlight and analyze a noteworthy example of a negotiation that arose in 2009 (“Assessment Negotiation”), when *The Washington Post* (“Post”) came into possession of a classified report on the U.S. military effort in Afghanistan. First, this Article reviews the facts and adjudication of the original *Pentagon Papers* case, which set the stage for negotiations between the Government and news organizations in similar situations in the future. Second, this Article outlines the facts of the “modern *Pentagon Papers* case” between the *Post* and the Government, introducing the parties and individuals involved and summarizing the details of the negotiation. Third, this Article attempts to show why this agreement between the Government and the *Post* regarding the Afghanistan report is a case worth studying through the lens of negotiation methodology. Fourth, this Article analyzes the *Assessment Negotiation* through the lens of the principle-based negotiation approach developed in the seminal book *Getting to Yes*,⁵ and further developed in Professor Bruce Patton’s piece, *Negotiation*.⁶ Finally, this Article assesses the overall success of the negotiation and its significance as an example of adherence to interest-based principles of negotiation in a post-*Pentagon Papers* context.

Sources relied upon for this Article include *Post* reporter Bob Woodward’s book, *Obama’s Wars*,⁷ the autobiography of former Secretary of Defense Robert Gates,⁸ and several news stories published soon after the negotiation. The analysis in this Article was also drawn directly from the author’s personal interviews with the two key participants involved in the *Assessment Negotiation*: Bob Woodward of the *Post* and former Deputy Assistant Secretary of Defense for Public Affairs Geoff Morrell. Mr. Morrell described his role in the *Assessment Negotiation* as being the primary “conduit” between the

5. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 13 (2d ed. 1991) [hereinafter *GETTING TO YES*].

6. See Patton, *supra* note 4. Together with Professor Fisher and Dr. Ury, Professor Patton founded the Harvard Negotiation Project. See Bruce Patton, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL, <https://www.pon.harvard.edu/faculty/bruce-patton/> (last visited Mar. 24, 2018). Professor Patton’s *Negotiation* chapter outlines the “seven-elements framework for understanding and analyzing negotiation,” which serves as a framework applied in this Article. Patton, *supra* note 4, at 280.

7. See BOB WOODWARD, *OBAMA’S WARS* (2010) [hereinafter *OBAMA’S WARS*].

8. See ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* (2014).

Pentagon and the news media.⁹ These two interviews by the author provided a wealth of information and personal insights that were not disclosed in Woodward's book or related news articles.

II. HOW THE *PENTAGON PAPERS* CASE SET THE STAGE FOR FUTURE NEGOTIATIONS

A discussion of the dispute between the *Post* and the Government in the *Pentagon Papers* case can help inform this Article's analysis of the *Assessment* Negotiation between the same two parties in the "modern *Pentagon Papers* case." The *Pentagon Papers* case famously resulted in a landmark decision by U.S. Supreme Court, but that ruling was a *per curiam* opinion which consisted of only approximately 200 words and summarily affirmed the District Court's ruling on the matter.¹⁰ Thus, it is helpful to focus on the District Court's opinion in the case for a recitation of the facts and detailed legal analysis. Additionally, it is worth exploring the background facts about the individual who leaked the Pentagon Papers, his decision to do so, the concerns of two private news organizations who came into possession of those classified documents, and the attempts by the Government to prevent those news organizations from publishing them.

In 1967, U.S. Secretary of Defense Robert McNamara commissioned the Pentagon to undertake a study on the U.S. Government's involvement in Vietnam.¹¹ This historical study was to be compiled and produced by "a group of historians, including certain persons on contract with the Government."¹² They worked on it from 1967 to 1968.¹³ Once completed, the study was entitled *History of the United States Decision Making Process on Vietnam Policy* ("*History*");¹⁴ it is now colloquially referred to as the Pentagon Papers.¹⁵ The *History* was forty-seven volumes in length,¹⁶ covered the time period of 1945-1967,¹⁷ and contained material that the Government had classified as "Top Secret" or "Secret."¹⁸

9. Telephone Interview with Geoff Morrell, *supra* note 2.

10. See *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 714 (1971).

11. See *U.S. v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

12. *Id.* at 327.

13. *Id.* at 325.

14. *Id.*

15. See *Pentagon Papers*, THE NATIONAL ARCHIVES, <https://www.archives.gov/research/pentagon-papers> (last reviewed Apr. 16, 2018).

16. *N.Y. Times Co.*, 328 F. Supp. at 325.

17. *Id.*

18. *Id.* at 326.

The Department of Defense's International Security Affairs ("ISA") directorate, Leslie Gelb, was tasked with leading the effort to produce the *History* study in 1967.¹⁹ As Gelb assembled a team of experts to write the *History*, he sought to recruit individuals who had analytical skills, had actually served in Vietnam, or had taken part in Washington's decision-making process on U.S. policy towards Vietnam.²⁰ One person who met all three of those criteria was Dr. Daniel Ellsberg. Previously, Ellsberg had served on active duty in the U.S. Marine Corps, as a strategy analyst at the defense-focused RAND Corporation, as a policy advisor in ISA, and as a State Department advisor in Vietnam.²¹ Upon completion of his assignment in Vietnam, Ellsberg returned to Washington in 1967.²² That summer, he accepted Gelb's invitation to become part of the team assigned to draft the *History*.²³

Prior to joining Gelb's team, Ellsberg had already grown disillusioned with U.S. policy decisions regarding Vietnam.²⁴ While having direct experience with Vietnam policy-making in the mid-1960s, he deliberately chose to work on producing the volume of the *History* focused on President Kennedy's policy on Vietnam.²⁵ Ellsberg was troubled by what he saw as the clear disparity between what the Kennedy Administration discussed in private and what senior Administration officials told the public about Vietnam.²⁶

While continuing to work on the *History* for the Pentagon, Ellsberg approached journalist Neil Sheehan in March 1968.²⁷ At the time, Sheehan was a reporter assigned to cover the Pentagon for *The New York Times* ("*Times*"). In this first encounter, Ellsberg gave Sheehan "Secret" and "Top Secret" documents that had been available to the team of *History* authors—"the first time [he went] to a newspaper office with classified reports and cables to give to a journalist."²⁸ Soon thereafter, in late March, while Ellsberg continued to work on preparing the *History*, Sheehan reported several stories in the *Times* based upon Ellsberg's leaks of classified information.²⁹

19. See DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 186 (2002).

20. *Id.*

21. *Id.* at 186, 211, 264.

22. *Id.* at 186.

23. *Id.*

24. *Id.* at 187–88.

25. *Id.* at 186–87.

26. *Id.* at 189–96.

27. *Id.* at 206.

28. *Id.*

29. *Id.* at 207–08.

Once the *History* was completed, the ISA leadership made a collateral decision that two complete sets of the classified study would be archived at the RAND Corporation's office in Washington.³⁰ They wanted to ensure that a copy of the *History* "survived" any efforts to "hunt down all copies and destroy them."³¹ Once the project was completed, Ellsberg departed the Pentagon and returned to RAND.³²

Growing increasingly opposed to the U.S. conflict in Vietnam and believing that President Nixon would not extricate the nation from Vietnam, Ellsberg decided to take actions that he thought would force the new Administration to change U.S. policy.³³ On the evening of October 1, 1969, he removed volumes of the classified *History* from his office safe at RAND,³⁴ transported them to a former RAND colleague's office elsewhere in Washington, made two full photocopies, and returned them to his office.³⁵ In late 1969 and throughout 1970, Ellsberg approached members of Congress and their staffs repeatedly, attempting to persuade them to publicize portions of the *History* on the Senate floor.³⁶ In February 1971, losing hope that anyone in Congress would publicize the *History*, Ellsberg contemplated leaking the *History* to the *Times*.³⁷ Ellsberg contacted Sheehan again on March 2, 1971.³⁸ At Sheehan's home, Ellsberg told Sheehan about the *History*.³⁹ Sheehan was interested in the study and said he believed the *Times* would publish it.⁴⁰ On March 12, 1971, Ellsberg showed Sheehan a copy of the *History* and the two discussed the possibility of providing a copy of the *History* to the *Times* in exchange for the newspaper's commitment to publish it.⁴¹

After receiving a copy of the *History*, the *Times*' executive leadership considered the legal risks of publication. Then-publisher of the *Times*, Arthur Sulzberger, asked A.M. Rosenthal, the *Times*' Executive Editor, and James L. Greenfield, the *Times*' Project Editor, to

30. *Id.* at 243.

31. *Id.*

32. *Id.* at 244.

33. *Id.* at 293.

34. *Id.* at 299.

35. *Id.* at 301–09.

36. *Id.* at 323–29, 356–64.

37. *Id.* at 365 ("Among newspapers, the *Times* was the obvious choice. It was the only journal of record, the only paper that printed long accounts, such as speeches and press conferences, in their entirety. No other paper would do that. Only the *Times* might publish the entire study, and it had the prestige to carry it through.")

38. *Id.* at 368.

39. *Id.*

40. *Id.*

41. *Id.* at 372–75.

discuss the matter with attorneys from the *Times*' law firm, Lord Day & Lord ("Lord Day").⁴² When the *Times*' editorial leaders informed the newspaper's retained counsel that the entire *History* was classified, their attorneys advised them not to publish the documents.⁴³ Internally within the law firm, the attorneys debated whether to notify the U.S. Department of Justice of the *Times*' plan to publish the *History*, but ultimately chose not to take that mitigation measure.⁴⁴ When the *Times*' editorial leaders decided to proceed with publication, Lord Day declined to further represent the *Times* in the matter.⁴⁵

From June 13-15, 1971, the *Times* published a series of news stories that summarized the *History* and printed textual excerpts from two of the documents contained in the *History*.⁴⁶ On the eve of the *Times*' publication of the third installment in the article series, the U.S. Department of Justice communicated with the *Times*' executive leadership in an attempt to cease publication.⁴⁷ Two hours before June 15's print edition was scheduled to go to press, Assistant Attorney General Robert C. Mardian spoke on the telephone with *Times* Executive Vice-President Harding F. Bancroft.⁴⁸ One hour later, U.S. Attorney General John Mitchell sent a telegram to the *Times*, which stated the following:

I have been advised by the Secretary of Defense that the material published in *The New York Times* on June 13, 14, 1971, captioned 'Key Texts From Pentagon's Vietnam Study' contains information relating to the national defense of the United States and bears a top secret classification. As such, publication of this

42. See James L. Greenfield, *Foreword*, in *THE PENTAGON PAPERS: THE SECRET HISTORY OF THE VIETNAM WAR* ii (Neil Sheehan et al. eds., 2017).

43. *Id.*

44. *Id.*

45. *Id.*

46. See Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES (June 13, 1971), <https://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html>; Neil Sheehan, *Vietnam Archive: A Consensus to Bomb Developed Before '64 Election, Study Says*, N.Y. TIMES (June 14, 1971), <https://www.nytimes.com/1971/06/14/archives/vietnam-archive-a-consensus-to-bomb-developed-before-64-election.html>; Neil Sheehan, *Vietnam Archive: Study Tells How Johnson Secretly Opened Way to Ground Combat*, N.Y. TIMES (June 15, 1971), <https://www.nytimes.com/1971/06/15/archives/vietnam-archive-study-tells-how-johnson-secretly-opened-way-to.html>.

47. See Hedrick Smith, *Mitchell Seeks to Halt Series on Vietnam, but Times Refuses*, N.Y. TIMES (June 15, 1971), <http://www.nytimes.com/books/97/04/13/reviews/papers-mitchell.html>.

48. *Id.*

information is directly prohibited by the provisions of the Espionage Law, Title 18, United States Code, Section 793. Moreover, further publication of information of this character will cause irreparable injury to the defense interests of the United States. Accordingly, I respectfully request that you publish no further information of this character and advise me that you have made arrangements for the return of these documents to the Department of Defense.⁴⁹

Similarly, Pentagon Spokesman Jerry W. Friedheim issued a statement to the news media suggesting that the *Times*' publication of the *History* might constitute a legal violation, which stated in part:

The Department of Defense must be and is concerned about the disclosure of publication of highly classified information affecting national security. The material remains classified and sensitive despite the fact that it covers a period that ended in 1968. It is our responsibility to call this violation of security to the attention of the Justice Department. We have done so. The Government has the responsibility to determine what individual or individuals, if any, violated the laws relating to national security information by unauthorized disclosure of classified material.⁵⁰

The *Times* reported that this Pentagon statement was the result of a day-long consultation between Attorney General Mitchell, Secretary of Defense Melvin Laird, unidentified White House officials, Department of Defense attorneys, and Department of Justice attorneys.⁵¹ These direct communications and press statements notwithstanding, the *Times* declined the Government's request, releasing its own public statement that included the following:

We have received the telegram from the Attorney General asking The Times to cease further publication of the Pentagon's Vietnam study. The Times must respectfully decline the request of the Attorney General, believing that it is in the interest of the people of this country to be informed of the material contained in this series of articles. We have also been informed of the Attorney General's intention to seek an injunction against further publication. We believe that it is properly a matter for the courts to decide. The Times will oppose any request for an injunction for the same reason that led us to publish the articles in the first place. We will of course abide by the final decision of the court.⁵²

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

With the two parties issuing diametrically opposed statements, the situation was at an impasse.

It appears that neither Neil Sheehan nor anyone else representing the *Times* contacted the Government in advance of publishing this series of news articles on the *History*. In each of Sheehan's first three articles on the *History*, he recounted only vaguely how the *Times* came into possession of the documents—explaining, for example, that the documents “[had] been obtained by” the *Times*.⁵³ But none of his articles indicated that the *Times* had contacted the Government in advance of publishing the articles. In fact, a separate *Times* article published on the same day as Sheehan's third article included a quote by then-White House Spokesman Ronald L. Ziegler that the *Times* “did not at any time check with us” about its plan to publish the *History*.⁵⁴ That same article reported, “[t]he Justice Department's request conveyed by Mr. Mardian was *the first direct contact* between the Government and The Times about the publication of the Pentagon papers.”⁵⁵ While members of both the Government and the *Times* participated in internal consultations, minimal pre-litigation interaction occurred between the two parties.

With the dispute unresolved, the Government then brought a legal action in federal court against the *Times*, seeking a temporary restraining order and an injunction to prevent the *Times* from “further dissemination, disclosure or divulgence” of the *History*'s contents.⁵⁶ The U.S. District Court for the Southern District of New York granted a temporary restraining order while it considered the merits of the Government's request for an injunction.⁵⁷

After the District Court restrained the *Times* temporarily from further publication, Ellsberg became concerned that the American people would never be able to see additional portions of the *History*.⁵⁸ He immediately contacted Ben Bagdikian, a former RAND colleague

53. Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES (June 13, 1971), <https://www.nytimes.com/1971/06/13/archives/vietnam-archive-pentagon-study-traces-3-decades-of-growing-u-s.html>. See also Neil Sheehan, *Vietnam Archive: A Consensus to Bomb Developed Before '64 Election, Study Says*, N.Y. TIMES (June 14, 1971), <https://www.nytimes.com/1971/06/14/archives/vietnam-archive-a-consensus-to-bomb-developed-before-64-election.html>; Neil Sheehan, *Vietnam Archive: Study Tells How Johnson Secretly Opened Way to Ground Combat*, N.Y. TIMES (June 15, 1971), <https://www.nytimes.com/1971/06/15/archives/vietnam-archive-study-tells-how-johnson-secretly-opened-way-to.html>.

54. Smith, *supra* note 47.

55. *Id.* (emphasis added).

56. U.S. v. N.Y. Times Co., 328 F. Supp. 324, 326 (S.D.N.Y. 1971).

57. *Id.* at 325.

58. See ELLSBERG, *supra* note 19, at 389.

who was working as an editor at the *Post*.⁵⁹ Bagdikian told Ellsberg that the *Post* would be interested in publishing more of the *History*; he then confirmed the *Post*'s desire to publish the additional portions with the *Post*'s managing editor, Ben Bradlee.⁶⁰ On June 15, Bagdikian flew to Boston, Ellsberg provided him with a copy of the *History*, and the *Post* editor returned with it to Washington.⁶¹ On June 18, the *Post* began publishing its own series of articles based upon the copy of the *History* that Ellsberg leaked to the newspaper.⁶²

As part of the legal action against the *Times*, the Government requested that the District Court require the *Times* to "deliver to the Court certain documents and other tangible evidence," which would be held by the Court pending final determination.⁶³ Arguing before the District Court, the Government stated that further publication of the *History* would irreparably harm the security interests of the United States.⁶⁴ The *Times*, on the other hand, argued that the *History* was precisely that: historical.⁶⁵ During the proceedings, U.S. District Court Judge Murray Gurfien held *in camera* proceedings in which he heard testimony from representatives of the U.S. Department of State, the U.S. Department of Defense, and the Joint Chiefs of Staff about whether further publication of the *History* could damage the national security interests of the United States.⁶⁶

Weighing the evidence on both sides, Judge Gurfien denied the Government's application for an injunction against the *Times*.⁶⁷ Citing the Supreme Court's precedent of *Near v. Minn. ex rel. Olson*,⁶⁸ the District Court stated its default position: "As a general matter we start with the proposition that prior restraint [of news organizations in advance of publication] . . . is unconstitutional."⁶⁹ The court elaborated on that default, explaining that one of the fundamental roles of a free press in the U.S. system of government includes "the free flow

59. *Id.*

60. *Id.* at 391–92.

61. *Id.* at 392–393.

62. See Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/pentagon-papers-post.html>.

63. *U.S. v. N.Y. Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

64. *Id.* at 327.

65. *Id.*

66. *Id.* at 330.

67. *Id.* at 331.

68. 283 U.S. 697 (1931).

69. *N.Y. Times Co.*, 328 F. Supp. at 330.

of information so that the public will be informed about the Government and its action."⁷⁰ Judge Gurfein also acknowledged the unprecedented nature of the dispute that was before the court:

This case is one of first impression. In the researches of both counsel and of the Court nobody has been able to find a case remotely resembling this one—where a claim is made that national security permits a prior restraint on the publication of a newspaper.⁷¹

To support this point, the *Times* presented evidence to the District Court about a number of previous situations in which "classified information had been 'leaked' to the press without adverse governmental or judicial action."⁷²

At the same time, however, the District Court in the *Pentagon Papers* case recognized that the Freedom of the Press Clause in the First Amendment "is not absolute."⁷³ Again quoting the Supreme Court's ruling in *Near*, the District Court stated, "[N]o one would question that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."⁷⁴ Judge Gurfein asserted that those three specific examples mentioned in the *Near* decision highlight the limits of "the field of security protection in the context of the compelling force of First Amendment right."⁷⁵ The District Court noted that merely unflattering information is not sufficient to warrant prior restraint.⁷⁶ Ultimately, the District Court concluded that the *Times'* publishing of the *History* was not a case "involving an intent to communicate vital secrets for the benefit of a foreign government or to the detriment of the United States."⁷⁷

When the Government's attempts to restrain the *Times* and the *Post* were appealed to the U.S. Supreme Court, the Court sided with the two newspapers' constitutional freedom to publish the *History*.⁷⁸ In the Court's only discussion of law in the three-paragraph ruling, it

70. *Id.* at 331.

71. *Id.* at 326.

72. *Id.*

73. *Id.* at 331.

74. *Id.* (quoting *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931)).

75. *Id.*

76. *Id.* ("If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach, we must learn to live with it.")

77. *Id.*

78. *See* *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 714 (1971).

emphasized the following: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government ‘thus carries a heavy burden of showing justification for the imposition of such a restraint.’”⁷⁹ Determining that the Government had not met this heavy burden, the Court opened the door for the *Times* and the *Post* to proceed with further publication of the *History*.⁸⁰

Key implications of the *Pentagon Papers* case include:

- Individuals who have access to classified information and intend to leak that information can have different motivations for doing so, but those interests are not necessarily the same as those of the private news organization receiving that information.
- Private news organizations that come into the possession of classified information via leaks do not thoughtlessly publish that information, but the decisions of news organizations on whether to publish such information involve input from reporters, managing editors, business leaders of the organization, and the organization’s legal counsel.
- Private news organizations have a business interest in ensuring their competitors do not “scoop” their publication, so the available time for decisions is limited.
- When the Government expresses generalized “national security” concerns about publishing leaked information without providing greater specificity, private news organizations and courts are less likely to take seriously requests by the Government to restrict publication.
- A process for balancing the freedom of the press with national security interests, if taken seriously, should involve a review of the classified document’s information, element by element, in a closed-door setting between the parties.
- Some categories of information might warrant judicial protection against public disclosure, such as details of ongoing or future military operations.
- Information that merely embarrasses the Government does not warrant judicial protection.
- When weighing freedom of the press against the Government’s interest in restricting the release of information for

79. *Id.* (citations omitted).

80. *Id.*

national security reasons, federal courts have a tendency to side with the constitutional freedom.

- This tendency of the courts has given private news organizations in possession of classified information greater power in negotiations regarding publication.

These lessons from the *Pentagon Papers* case help to contextualize the *Assessment* Negotiation between the Government and the *Post*. In particular, the pre-litigation interaction between the Government and the private news organization provides a baseline against which to analyze the *Assessment* Negotiation through the lens of negotiation methodology. One negotiation approach considered in analyzing this agreement is the traditional method of negotiation referred to as “positional bargaining.”⁸¹ In this approach, each party to the negotiation “takes a position, argues for it, and makes concessions to reach a compromise.”⁸² Under this methodology, a position is defined as “a proposed outcome that represents merely one way among many that issues might be resolved and interests met.”⁸³ In the dispute underlying the *Pentagon Papers* case, the Government argued that the *Times* and the *Post* should not publish the *History*, while the newspapers took the position that they should publish it. Each side of the dispute engaged in internal consultations, but communicated to a limited extent with the other side. Those communications appeared to be argumentative and ultimatum-like in nature, rather than genuine attempts to reach a compromise that might have accommodated the interests of both sides. This resembles a classic case of positional bargaining. The net result was that the parties did not reach an agreement and instead turned to litigation to resolve the dispute.

For purposes of this Article, perhaps the most significant implication of the *Pentagon Papers* case was how the federal courts signaled to the Government that litigation would generally not be the preferred forum for resolving these disputes over the publication of classified information. In some ways, the *Pentagon Papers* case was

81. GETTING TO YES, *supra* note 5, at 3–7.

82. *Id.* at 7; *see also* Patton, *supra* note 4, at 288 (“The simplest and most common approach is haggling, or positional bargaining. One party stakes out a high (or low) opening position (demand or offer) and the other a correspondingly low (or high) one. Then a series of (usually reciprocal) concessions are made until an agreement is reached somewhere in the middle of the opening positions, or no agreement is reached and the parties walk away to pursue their respective BATNAs.”) (citation omitted).

83. Patton, *supra* note 4, at 280.

not only a case of “first impression” as District Judge Gurfien observed; the definitive nature of the Court’s ruling also arguably made it a case of last impression. The ruling of the *Pentagon Papers* case set the stage for the Government and private news organizations to handle similar situations in the future differently, with alternative approaches.

III. A MODERN-DAY PENTAGON PAPERS CASE

Occasionally, the American people will read, view, or hear news reporting by private news organizations based upon classified documents or other information that Government employees have leaked to them without proper authorization. Sometimes, this information is of such a significant nature that it can have a serious impact on U.S. national security policy.⁸⁴ In those instances, news reporting might refer briefly to the pre-publication communications between the news organization and the Government.⁸⁵ But rarely, if ever, will the American people hear the full “story behind the story”—that is, the

84. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (reporting on the existence of a covert “black sites” prison system set up and utilized by the Central Intelligence Agency overseas in the years following the September 11 attacks); David E. Sanger, *Obama Orders Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html> (reporting that the U.S. Government and Israel were behind the highly-classified “Olympic Games” and “Stuxnet” cyberattacks on Iranian nuclear centrifuges).

85. See Priest, *supra* note 85 (“The Washington Post is not publishing the names of the Eastern European countries involved in the covert program, at the request of senior U.S. officials. They argued that the disclosure might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation.”); see also Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS 60 MINUTES (Apr. 27, 2004), <https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/> (“Two weeks ago, 60 Minutes II received an appeal from the Defense Department, and eventually from the Chairman of the Joint Chiefs of Staff, Gen. Richard Myers, to delay this broadcast—given the danger and tension on the ground in Iraq. 60 Minutes II decided to honor that request, while pressing for the Defense Department to add its perspective to the incidents at Abu Ghraib prison. This week, with the photos beginning to circulate elsewhere, and with other journalists about to publish their versions of the story, the Defense Department agreed to cooperate in our report.”); *Are there MORE underpants bombs out there? US officials fear fresh wave of plane attacks after terror plot is foiled*, DAILY MAIL (May 8, 2012), <https://www.dailymail.co.uk/news/article-2140972/Al-Qaeda-planned-use-updated-underwear-bomb-bring-U-S-bound-plane-anniversary-bin-Ladens-death.html> (“The Associated Press learned about the thwarted plot last but agreed to White House and CIA requests not to publish it immediately because the sensitive intelligence operation was still under way.”).

detailed sequence of events and interactions between when the organization's reporter receives the leaked information and the organization publishes its news reporting based upon that leak. Below is the story of the negotiation of the 2009 publication of a "modern Pentagon Paper" assessing the U.S. military effort in Afghanistan.

On June 15, 2009, U.S. Army General Stanley A. McChrystal assumed command as the senior U.S. military officer for operations in Afghanistan.⁸⁶ He served as both the Commander of U.S. Forces–Afghanistan ("USFOR-A") and the Commander of the North Atlantic Treaty Organization ("NATO") International Security Assistance Force ("COMISAF").⁸⁷ Before McChrystal departed Washington to assume command, then-U.S. Secretary of Defense Robert Gates verbally directed McChrystal on June 8 to conduct a candid review and assessment of how U.S. and coalition operations were proceeding in Afghanistan.⁸⁸ Gates reportedly told McChrystal to "do a sixty-day review of the situation in Afghanistan, reviewing the personnel we already [have] and might need."⁸⁹ Thereafter, on June 26, 2009, Secretary Gates gave formal written direction to U.S. Army General David Petraeus, who was then serving as the Commander of U.S. Central Command, to "provide a multidisciplinary assessment of the situation in Afghanistan."⁹⁰ One week later, on July 2, General Petraeus directed McChrystal to "complete the overall review."⁹¹ Based on these directions from Secretary Gates and General Petraeus, General McChrystal tasked the ISAF staff and component commands to "conduct a comprehensive review to assess the overall situation, review plans and ongoing efforts, and identify revisions to operational, tactical and strategic guidance."⁹²

Two months later, on August 31, General McChrystal completed his assigned report and submitted it to the chain of command.⁹³ The report was entitled *Commander's Initial Assessment* ("Assessment")

86. See MATTHEW C. BRAND, GENERAL MCCHRISTAL'S STRATEGIC ASSESSMENT: EVALUATING THE OPERATING ENVIRONMENT IN AFGHANISTAN IN THE SUMMER OF 2009 2 (Air Univ. Press, 2001), https://media.defense.gov/2017/Jun/19/2001765050/-1/-1/0/AP_BRAND_MCCHRISTALS_ASSESSMENT.pdf.

87. See GEN. STANLEY MCCHRISTAL, COMMANDER, NATO INTERNATIONAL SECURITY ASSISTANCE FORCE, AFGHANISTAN U.S. FORCES, AFGHANISTAN, INITIAL ASSESSMENT (UNCLASSIFIED) (Aug. 30, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/21/AR2009092100110.html> [hereinafter INITIAL ASSESSMENT].

88. See GATES, *supra* note 8, at 348–349.

89. *Id.*

90. INITIAL ASSESSMENT, *supra* note 87.

91. *Id.*

92. *Id.*

93. *Id.*; GATES, *supra* note 7, at 361.

and was sixty-six pages in length.⁹⁴ McChrystal described his sourcing of the *Assessment*:

The assessment draws on both internal ISAF components, to include Regional Commands, and external agencies such as [the Afghanistan Government's] ministries, International Governmental Organizations and Nongovernmental Organizations. It also draws on existing ISAF and USFOR-A plans and policy guidance, relevant reports and studies, and the consultation of external experts and advisors.⁹⁵

The sources of the information in the *Assessment* led McChrystal to classify the document as “Confidential.”⁹⁶ McChrystal’s *Assessment* provided a candid evaluation of the deteriorating situation and ongoing U.S. military effort on the ground in Afghanistan.⁹⁷

The *Assessment* appeared to contradict the Administration’s public messaging at the time about how the military effort was progressing. In late August 2009, President Obama publicly assured the American people, “Our goal is clear: to disrupt, dismantle, and defeat Al Qaida and their extremist allies. *That goal will be achieved.*”⁹⁸ Around the same time, he also promised in front of a Veterans of Foreign Wars audience:

And that’s why I have made this pledge to our Armed Forces: I will only send you into harm’s way when it is absolutely necessary. And when I do, it will be based on good intelligence and guided by a sound strategy. I will give you a clear mission, defined goals, and the equipment and support you need to get the job done. That’s my commitment to you.⁹⁹

Despite the President’s reassurance, McChrystal’s *Assessment* forecasted that the war effort in Afghanistan would “likely result in failure” if he did not receive additional forces and resources.¹⁰⁰ Immediately after receiving the *Assessment*, Secretary Gates told the

94. See INITIAL ASSESSMENT, *supra* note 87.

95. *Id.*

96. *Id.*

97. See OBAMA’S WARS, *supra* note 7, at 175–176.

98. President Barack Obama, *Remarks on the Presidential and Provincial Elections in Afghanistan and an Exchange With Reporters*, 2 PUB. PAPERS 1327, 1328 (Aug. 21, 2009), <https://www.gpo.gov/fdsys/pkg/PPP-2009-book2/pdf/PPP-2009-book2-Doc-pg1327.pdf> (emphasis added).

99. President Barack Obama, *Remarks at the Veterans of Foreign Wars Convention in Phoenix, Arizona*, 2 PUB. PAPERS 1296, 1297 (Aug. 15, 2009), <https://www.gpo.gov/fdsys/pkg/PPP-2009-book2/pdf/PPP-2009-book2-Doc-pg1296.pdf>.

100. INITIAL ASSESSMENT, *supra* note 87.

American people publicly in a press conference, “I don’t believe that the war is slipping through the administration’s fingers.”¹⁰¹

Secretary Gates provided an advance copy of the *Assessment* to President Obama on September 2 and formally submitted the document to the President via his National Security Advisor, retired Marine Corps General Jim Jones, on September 10.¹⁰² Three weeks after General McChrystal completed his *Assessment*, President Obama spoke publicly about his thoughts on the document. During a joint press conference with the Prime Minister Stephen Harper of Canada on September 16, Obama answered an Associated Press reporter’s question on whether U.S. forces were “winning” the Afghanistan war as follows:

When I came in [as President], I had to make a series of immediate decisions about sending additional troops to ensure that the [Afghanistan] election could take place during the fighting season. But I was crystal clear at the time that post-election, we were going to need to do an additional assessment. General McChrystal has carried out his own assessment on the military strategy, but it’s important that we also do an assessment on the civilian side, the diplomatic side, the development side, that we analyze the results of the election and then make further decisions moving forward.

My determination is to get this right, and that means broad consultation not only inside the U.S. Government but also with our ISAF partners and our NATO allies. And I’m going to take a very deliberate process in making those decisions. And so I just want to be absolutely clear, because there’s a lot—been a lot of discussion in the press about this, that there is no immediate decision pending on resources, because one of the things that I’m absolutely clear about is you have to get the strategy right and then make determinations about resources. You don’t make determinations about resources, and certainly, you don’t make determinations about sending young men and women into battle, without having absolute clarity about what the strategy is going to be. And so we are going to proceed and make sure that we don’t put the cart before the horse.¹⁰³

101. *Afghan War “Is Not Slipping Away”*, BBC NEWS (Sept. 4, 2009), http://news.bbc.co.uk/2/hi/south_asia/8237238.stm (quoting Secretary Gates).

102. See GATES, *supra* note 8, at 361–362, 364.

103. President Barack Obama, *Remarks Following a Meeting With Prime Minister Stephen Harper of Canada and an Exchange With Reporters*, 2 PUB. PAPERS 1405, 1406–07 (Sept. 16, 2009), <https://www.gpo.gov/fdsys/pkg/PPP-2009-book2/pdf/PPP-2009-book2-Doc-pg1404.pdf>.

These remarks by President Obama suggested that McChrystal's *Assessment* was merely one of many elements of his Administration's review of the war effort, that the President's review process was "very deliberate," and that he did not intend to make any near-term decisions on directing additional resources to the fight.

Within days of President Obama making those public remarks about the war effort, an unidentified source with access to the *Assessment* leaked a copy to the long-time *Post* investigative journalist Bob Woodward.¹⁰⁴ In American political history, Mr. Woodward is perhaps best known for his reporting on the Watergate scandal of the Nixon Administration, which was memorialized in the book and subsequent movie *All the President's Men*.¹⁰⁵ But, in the years after Watergate, Woodward has gained further acclaim for authoring a series of revealing books about every U.S. presidency of the modern era, each of which has been based upon his impressive access to political leaders.¹⁰⁶

Realizing the newsworthy value of the *Assessment*, Mr. Woodward followed the *Post's* standard protocols for such situations prior to publication.¹⁰⁷ First, he consulted the executive editor of the *Post*.¹⁰⁸ He then contacted National Security Advisor Jim Jones, informing him that he possessed a copy of the classified *Assessment* and that the *Post* intended to publish it, but that he "wanted to hear from [Jones] and the Pentagon first."¹⁰⁹ Secretary Gates later described the *Post's* actions as "advance warning."¹¹⁰

Later that same day, representatives of the *Post* and senior Government officials held a telephone conference call to discuss whether and to what extent the *Post* should publish the contents of the report.¹¹¹ During the conference call, the *Post* was represented by

104. See GATES, *supra* note 8, at 368.

105. See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); *ALL THE PRESIDENT'S MEN* (Warner Bros. 1976).

106. See Books by Bob Woodward, BOB WOODWARD, <http://bobwoodward.com/full-biography/> (last visited Mar. 31, 2018).

107. See Interview with Bob Woodward, *supra* note 2 (confirming that the *Post* has protocols, by which *Post* reporters who come into the possession of classified information will contact the *Post* editors if they wish to publish it). For a description of the *Post's* protocols in such instances, see Siegal, *supra* note 3, at 8–10.

108. See OBAMA'S WARS, *supra* note 7, at 178; DAVE KINDRED, *MORNING MIRACLE: INSIDE THE WASHINGTON POST: A GREAT NEWSPAPER FIGHTS FOR ITS LIFE* 217 (2010).

109. OBAMA'S WARS, *supra* note 7, at 179.

110. GATES, *supra* note 8, at 368.

111. See Howard Kurtz, *At Pentagon's Request, Post Delayed Story on General's Afghanistan Report*, WASH. POST (Sept. 23, 2009); OBAMA'S WARS, *supra* note 7, at 180.

Woodward, Marcus Brauchli, the *Post's* Executive Editor, and Jim McLaughlin, the *Post's* attorney.¹¹² The Government was represented by Secretary Gates, General Jones, Deputy National Security Advisor Tom Donilon, Vice-Chairman of the Joint Chiefs of Staff General James Cartwright, and an unidentified Government lawyer for foreign affairs.¹¹³ Initially, the Government officials strongly objected to its publication, expressing a concern that “if we publish it as is, it could endanger the lives of troops.”¹¹⁴ Secretary Gates asserted that publication of the *Assessment* would be “quite damaging to our efforts in Afghanistan and put the lives of our soldiers at risk.”¹¹⁵ General Cartwright said that the *Assessment* was “an operational and tactical assessment” and publication of it would enable “the enemy to see where we were going.”¹¹⁶ Mr. Woodward and his *Post* colleagues then scheduled a meeting for the next day, providing the Government with an opportunity overnight to identify, catalog, and substantiate “all their objections” to the *Post* publishing the classified report.¹¹⁷

The following morning, on Sunday, September 20, the parties held a face-to-face meeting at the Pentagon.¹¹⁸ At the meeting, the *Post* was represented by Woodward, Brauchli, and *Post* War Correspondent Rajiv Chandrasekaran.¹¹⁹ Due to a conflicting travel commitment for Secretary Gates, the Government was represented at the face-to-face meeting by Undersecretary of Defense for Policy Michelle Flournoy, Deputy Assistant Secretary of Defense for Public Affairs Geoff Morrell, and General Cartwright.¹²⁰

During this face-to-face meeting at the Pentagon, the Government representatives identified their general interests and specific concerns.¹²¹ Generally, General Cartwright listed three categories of “major objections” to publication of the *Assessment*: (1) the *Assessment's* disclosure of future operations, (2) intelligence gaps, and (3)

112. See OBAMA'S WARS, *supra* note 7, at 180; KINDRED, *supra* note 108, at 219.

113. *Id.*

114. Kurtz, *supra* note 111; OBAMA'S WARS, *supra* note 7, at 180 (quoting Secretary of Defense Robert Gates as saying that publication of the report would be “quite damaging to our effort in Afghanistan and put the lives of our soldiers at risk”).

115. OBAMA'S WARS, *supra* note 7, at 180.

116. *Id.*

117. *Id.*

118. *Id.* at 181; KINDRED, *supra* note 108, at 219.

119. See OBAMA'S WARS, *supra* note 7, at 181.

120. *Id.*

121. See GATES, *supra* note 8, at 368 (“[O]ver the weekend Cartwright, Flournoy, and Geoff Morrell negotiated with Woodward and others from the *Post* to remove sensitive numbers, references to intelligence gaps, Special Forces unit designations, and the like.”).

any information “that might compromise McChrystal’s ability to work with the Afghanistan Government or other international partners.”¹²² Overall, the U.S. Government’s representatives raised a total of fourteen specific concerns about the *Post* publishing the report.¹²³ Those concerns included disclosure of the *Assessment*’s dire forecast that McChrystal needed additional forces to carry out the mission in the next twelve months or else the war “[would] likely end in failure.”¹²⁴ Another objection raised by the Government’s representatives was about disclosing the *Assessment*’s conclusion that U.S. and coalition forces were facing problems in countering the insurgency in some parts of Afghanistan due, in part, to “inadequate intelligence” in portions of the country.¹²⁵

During the meeting, the *Post* representatives “realized that [they] would have to listen carefully but be on the alert, ready to separate real claims of national security from bogus ones.”¹²⁶ In response to each of the Government’s fourteen objections, the

122. OBAMA’S WARS, *supra* note 7, at 181.

123. *Id.*

124. *Id.* at 181–82 (“[Under Secretary of Defense for Policy Michele Flournoy] argued that publication of the 12-month time frame would allow ‘the enemy, basically, to kind of hold out’ and ‘redouble’ its efforts for just 12 months because it would be taken as an indication that American resolve was limited. She also said that publication of the 12-month limit ‘if read by the Taliban, could lead to a change in tactics on their part that directly translates into more U.S. casualties.’

“It was a very direct warning.

“McChrystal and his team, she said, had been consulted and ‘They did not want the time frame in there.’

“[Woodward] argued that it was McChrystal’s core argument and [the *Post*] needed to reflect that.

“[*Post* Executive Editor Marcus Brauchli] noted that Gates and others had said the United States had about 12 to 18 months to shift the momentum in the war, so McChrystal’s use of 12 months was hardly surprising. Eventually [Vice Chairman of the Joint Chiefs of Staff James Cartwright] agreed and withdrew their objections . . .”).

125. OBAMA’S WARS, *supra* note 7, at 182 (“[Cartwright] wanted the last three words redacted from this sentence: ‘The insurgents control or contest a significant portion of the country, although it is difficult to assess precisely how much due to lack of ISAF presence AND INADEQUATE INTELLIGENCE.’ To let the Taliban know we had ‘inadequate intelligence’ would only encourage them and allow them freer movement because of the inadequacy. Brauchli agreed, saying ‘I think on the issues of disclosure of intelligence gaps, I think we’ll look favorably on that because I don’t think we need to be pointing that out.’ The three words were removed. [Woodward] thought it was reasonable, but [he] chose to publish them in [his book, OBAMA’S WARS.] because the gaps became increasingly obvious.”).

126. *Id.*

participants on both sides discussed whether the disclosure would actually be harmful to U.S. national security interests. During the Sunday morning meeting, the parties worked through the fourteen specific objections.¹²⁷

Ultimately, the Government and the *Post* reached an agreement.¹²⁸ The *Post* agreed to delay reporting the news story by one day and to “withhold certain operational details” about future military operations.¹²⁹ The *Post* also “agreed to redact certain material” from the *Assessment*.¹³⁰ In return, the Department of Defense agreed to produce a version of the document with the “agreed-upon” redactions, “[complete] a wholesale declassification of 98 percent” of the report, and release it back to the *Post*.¹³¹ But one item that the *Post* refused to redact from the *Assessment* was one of the *Assessment*’s key conclusions: “Failure to provide adequate resources also risks a longer conflict, greater casualties, higher overall costs, and ultimately, a critical loss of political support. Any of these risks, in turn, are likely to result in mission failure.”¹³² Later, Secretary Gates described this unredacted conclusion of McChrystal’s *Assessment* as “the political bombshell the story represented.”¹³³

IV. A CASE WORTH STUDYING THROUGH A NEGOTIATION FRAMEWORK

In the *Assessment* Negotiation, the *Post* and the Government did not enter a written agreement.¹³⁴ Yet the parties engaged in a form

127. See OBAMA’S WARS, *supra* note 7, at 181.

128. See INITIAL ASSESSMENT, *supra* note 87 (“The Department of Defense on Sunday evening released a declassified version of Gen. Stanley A. McChrystal’s assessment of the war in Afghanistan. The *Post* agreed to publish this version, which includes minor deletions of material that officials said could compromise future operations, rather than a copy of the document marked ‘confidential.’”).

129. Kurtz, *supra* note 111. See also Interview by The A.V. Club with Bob Woodward (Oct. 21, 2010), <http://www.avclub.com/article/bob-woodward-46639> (“The part about where they were going to conduct operations in the future, we didn’t publish, of course.”) [hereinafter Interview by The A.V. Club with Bob Woodward].

130. Kurtz, *supra* note 111. See also OBAMA’S WARS, *supra* note 7, at 182.

131. Bob Woodward, *McChrystal: More Forces or “Mission Failure,”* WASH. POST (Sept. 21, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/20/AR2009092002920.html>; see also OBAMA’S WARS, *supra* note 7, at 182; Kurtz, *supra* note 111 (quoting a statement by *Post* spokeswoman Kris Coratti that the *Post* “agreed to redact certain material from the document . . .”).

132. INITIAL ASSESSMENT, *supra* note 87.

133. GATES, *supra* note 8, at 368.

134. See Interview with Bob Woodward, *supra* note 2.

of negotiations to reach a form of common understanding.¹³⁵ Secretary Gates' autobiography recounts how Cartwright, Flournoy, and Morrell "negotiated" with Woodward and the *Post's* editors during that September 2009 weekend.¹³⁶ Likewise, in his interview with the author, Woodward stated, "In my business, there would be a hesitation to call this a 'negotiation.' But it is. I want to be realistic about it."¹³⁷ Based on these statements, the following discussion analyzes the September 2009 meetings through the lens of the negotiation methodology.

A foundational question to ask is: what type of negotiation was the *Assessment* Negotiation? Was the interaction between the Government and the *Post* more akin to "positional bargaining" or a principled negotiation? In a modern history of the *Post*, Dave Kindred provided an account of the *Assessment* Negotiation, based in part upon his interviews with Woodward and other *Post* personnel who participated in the negotiation.¹³⁸ For purposes of this Article, it is worth dividing Kindred's description into two phases.

The first phase of the parties' interaction sounds like positional bargaining. The *Post* contacted the Government, communicating its intention to publish the *Assessment*, and the Government reacted. Kindred describes:

Woodward arrived for the familiar drill that he had done dozens of times with [previous *Post* Executive Editors] Bradlee and Downie. Calls would be made to the involved parties. Woodward would say, This is what we have. The White House would say, No, no, no, you can't print that, it's a national security issue. The Pentagon would say, No, no, revealing operational plans will put the mission and troops at risk.¹³⁹

Woodward's account of the *Assessment* Negotiation corroborates Kindred's description of the first phase. An unidentified Government representative strongly objected to publishing the *Assessment*, expressing a concern to Woodward that "if [the *Post* published] it as is, it could endanger the lives of troops."¹⁴⁰ During the telephone conference call between the Government and the *Post*, Secretary Gates told the group that publication of the *Assessment* would be "quite damaging to our efforts in Afghanistan and put the lives of our

135. See Patton, *supra* note 4, at 279.

136. GATES, *supra* note 8, at 368.

137. Interview with Bob Woodward, *supra* note 2.

138. See KINDRED, *supra* note 108.

139. *Id.* at 219.

140. Kurtz, *supra* note 111.

soldiers at risk.”¹⁴¹ General Cartwright said that publication of the *Assessment* would enable “the enemy to see where we were going.”¹⁴² Each of these initial reactions by senior Government officials implied that the options or potential outcomes were binary: either the *Post* publishes all of the *Assessment* or publishes none of it. Kindred described this routine as a “dance.”¹⁴³ This description resembles the metaphor in the opening pages of *Getting to Yes*, in which positional bargaining in a secondhand store is described as a “negotiating minuet.”¹⁴⁴

If the parties’ interactions ended there, then the likely outcome would have been that each party walked away and pursued some other unilateral option. But what differentiated the outcome of this “modern *Pentagon Papers* case” from the interactions between the *Times*, the *Post*, and the Government in the original *Pentagon Papers* case was the second phase of negotiation. Kindred describes, “At that point in the dance, Woodward and Bradlee or Downie would debate what was a real national security issue and what was driven by simple political considerations. All the parties then would understand what the story would say.”¹⁴⁵ The *Post*’s representatives then wanted to hear the Government’s perspective and its concerns about publishing the *Assessment*.¹⁴⁶

How exactly did the negotiation shift away from positional bargaining? In part, it might have been that the Government recognized that the *Post* could publish the information over its objection.¹⁴⁷ But it also might have been because the *Post*’s representatives, including Woodward, had prior experience in handling similar situations, and therefore knew how to create negotiating space between the parties. Two specific actions of the *Post* in response to the Government’s initial reaction support this proposition. First, the *Post* provided the Government with a reasonable period of time to reflect deliberately on its concerns about publication.¹⁴⁸ This is consistent with the “Ask

141. OBAMA’S WARS, *supra* note 7, at 180.

142. *Id.*

143. KINDRED, *supra* note 108, at 219.

144. GETTING TO YES, *supra* note 5, at 3.

145. KINDRED, *supra* note 108, at 219.

146. See Interview with Bob Woodward, *supra* note 2 (responding, when asked whether it was a foregone conclusion that the *Post* would publish at least some of the report, “You want to listen [to the Government’s concerns]”).

147. See Telephone Interview with Geoff Morrell, *supra* note 2 (stating that the Government’s initial position in these negotiations is that it opposes publication of the classified information, but recognizing that this initial position usually evolves).

148. See KINDRED, *supra* note 108, at 219.

questions and pause” approach in *Getting to Yes*.¹⁴⁹ Second, the *Post* asked the Government to identify specific elements of the *Assessment* that should not be published.¹⁵⁰ This is consistent with the “Be specific” approach in *Getting to Yes*.¹⁵¹ Through those two simple actions, the *Post*’s representatives helped to transition the *Assessment* Negotiation away from one of positional bargaining to something more akin to a principled negotiation. Although this Article has not yet analyzed the *Assessment* Negotiation through the methodology of principled negotiation, it is important to recognize that transition as a contributing factor to the negotiation’s success.

V. ANALYSIS OF THE ASSESSMENT NEGOTIATION AS A PRINCIPLED NEGOTIATION

Taking into account the negative characteristics and inefficiency of positional bargaining, the authors of *Getting to Yes* developed an alternative framework for negotiations known as “principled negotiations” or “negotiations on the merits.”¹⁵² This “collaborative” framework of negotiation has been further developed into seven elements: interests, alternatives, options, standards of legitimacy, commitment, communication and relationship.¹⁵³ For each of these elements, the authors of *Getting to Yes* identified measures of success, which can assist negotiators in assessing whether an agreement reached between two parties in a particular situation meets the overall standard of “a wise outcome reached efficiently and amicably.”¹⁵⁴ This Section examines the *Assessment* Negotiation between the Government and the *Post* in the context of these seven elements, applying the metrics of success for each of those elements.

A. Interests

The first of the seven elements of principled negotiations is to identify each party’s interests.¹⁵⁵ A core tenet of the principled negotiation framework is to “focus on interests, not positions.”¹⁵⁶ *Getting to Yes* defines interests as the “needs, desires, concerns, and fears” that cause a party to decide on its position.¹⁵⁷ In *Negotiation*, Bruce

149. GETTING TO YES, *supra* note 5, at 113–114.

150. See KINDRED, *supra* note 108, at 219–20.

151. GETTING TO YES, *supra* note 5, at 52–53.

152. *Id.* at 10.

153. Patton, *supra* note 4, at 279.

154. GETTING TO YES, *supra* note 5, at 13.

155. See Patton, *supra* note 4, at 280.

156. GETTING TO YES, *supra* note 5, at 10.

157. *Id.* at 40.

Patton describes interests as “a party’s basic needs, wants, and motivations.”¹⁵⁸ As a practical matter, a good technique for identifying a party’s interests is to examine the party’s position and ask, “Why?”¹⁵⁹ Each party in a negotiation can have multiple interests at stake.¹⁶⁰ Additionally, it is important to recognize that the interests of two parties are not always conflicting or differing, but can sometimes be shared.¹⁶¹

In the *Assessment* Negotiation, the *Post* had a desire to publish the classified information and the Government had concerns and fears about its publication. The next question to ask is: why? The interests of the two parties are detailed below:

The *Post* had the following interests:

- (1) to preserve the constitutional freedom of expression;¹⁶²
- (2) to fulfill its assumed responsibility of informing the public regarding the activities of its Government, for the purpose of ensuring proper governance;¹⁶³
- (3) to promote its business and stature in the news industry;¹⁶⁴

158. Patton, *supra* note 4, at 280.

159. GETTING TO YES, *supra* note 5, at 44.

160. See Patton, *supra* note 4, at 281.

161. *Id.*

162. See OBAMA’S WARS, *supra* note 7, at 179 (“[T]he government could not legally stop us from publishing the McChrystal assessment . . .”); see also *N.Y. Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

163. See Interview with Bob Woodward, *supra* note 2 (“A lot of these things need to be known, and get public discussion going in a very serious way. And I think that is what happened with [the *Post* publishing] the McChrystal *Assessment*.”). At another moment in the interview, Woodward expressed different thoughts on whether this interest was at stake in the *Assessment* Negotiation. *Id.* (claiming that “ensur[ing] proper governance” is not the *Post*’s job). See also *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring) (“In the absence of the governmental 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. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people.”); Code of Ethics, Society of Professional Journalists (1996), <https://www.spj.org/pdf/ethicscode.pdf> (“[P]ublic enlightenment is the forerunner of justice and the foundation of democracy . . .”); KATHARINE GRAHAM, PERSONAL HISTORY 457 (1997) (“The material in the Pentagon Papers was just the kind of information the public needed in order to form its opinions and make choices more wisely.”).

164. See Interview with Bob Woodward, *supra* note 2. In the author’s interview with Mr. Woodward, he initially said, “We are not really trying to promote [the *Post*’s] business or economic well-being, quite frankly. We’re in the news business. That doesn’t really come up. And, for what it’s worth, I remember [then-*Post* Publisher] Katharine Graham telling me, ‘All the Watergate coverage didn’t help the economic

(4) to eliminate or otherwise reduce the risk of the *Post* and/or its individual reporters from being criminally prosecuted for the publication of classified information;¹⁶⁵ and

position of the *Post*.’ They didn’t sell more copies because of the stories. It may enhance the reputation as a credible news organization. And that is one of the reasons you want to talk to the Government.” *Id.* But at another point in the interview, he agreed that the competitive nature of the industry is an interest. *Id.* (responding, when asked why it is important for the *Post* to be first in reporting the news story, “Because that is our job. We are in a competition with other news organizations.”). When asked whether the “scoop” reflects a business interest, Mr. Woodward responded, “Yes, to be first and authoritative.” *Id.* He added, “It’s the culture. It’s a competitive environment.” *Id.* See also GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 39 (2011); GRAHAM, *supra* note 163, at 445 (“[*Post* Executive Editor] Ben Bradlee anguished over being scooped [by *The New York Times*].”).

165. Mr. Woodward appeared to be somewhat conflicted over the risk of being prosecuted. See Interview with Bob Woodward, *supra* note 2. When asked whether the risk of prosecution goes into the calculation of the news organization or its reporters, Mr. Woodward responded, “Not really.” *Id.* When asked whether there is a risk of being prosecuted after the fact for publishing classified information, he responded, “Sure. That is the risk. But you reduce that risk by having a discussion with the Government.” *Id.* While reviewing the draft paper during the author’s interview and the *Post*’s purported interest to reduce risk of prosecution, he responded, “Yeah, that’s part of it You reduce [the risk of prosecution]. If this became a test case in court, you’d be able to make a very strong argument of good faith that ‘We went to [the Government], we asked, and this is where we accommodated them.’ *Id.* Geoff Morrell stated that he did not think the fear of prosecution was a “real interest” of the news organizations, noting that he had never witnessed the Government attempt to prosecute a journalist for reporting classified information. Telephone Interview with Geoff Morrell, *supra* note 2. Despite this assertion, Justice White in the *Pentagon Papers* case acknowledged that news reporters might still face some risk of criminal prosecution. See *N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring) (“[B]ecause the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose to never public the more sensitive materials.”) Justice White proceeded to cite several criminal offenses in the U.S. Code that might apply to the news media in special circumstances for publishing sensitive information, but only after the information had been published. *Id.* at 733–37 (citing 18 U.S.C. § 793–94, 797–98). In those situations, Justice White concluded that Congress was “satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.” *Id.* at 740. Whether a newspaper would be held criminally liable “must await resolution in the context of a criminal proceeding if one is instituted by the United States.” *Id.* In short, what Justice White, as a Justice of the highest Court in the land, identified for the decision-making calculus of news organizations is the risk that the Government might elect to prosecute the news media and individual reporters, and the risk in such a prosecution that a jury might find sufficient evidence to convict them for those offenses. One of the *Post*’s attorneys “worried that [the *Post*] could be in trouble under the Espionage Act. He thought the government would be most likely to prosecute the corporation or the company; and if the corporation acquired the status of felon, we would be stripped of our licenses to own and operate our television stations, adding a huge financial issue to the already high stakes.” KATHERINE GRAHAM, PERSONAL HISTORY 448 (1997). For a

(5) to avoid harming the security of the nation.¹⁶⁶

The Government had the following interests:¹⁶⁷

(1) to protect the security of the nation,¹⁶⁸

(2) to ensure the citizenry is informed about the Government's activities;¹⁶⁹

(3) to preserve the freedoms provided in the Constitution;¹⁷⁰ and

legal scholar's analysis about whether the Freedom of the Press shields news reporters from prosecution for reporting classified information, see Derigan A. Silver, *National Security And The Press: The Government's Ability To Prosecute Journalists For The Possession Or Publication Of National Security Information*, 13 COMM. L. & POL'Y 447, 452 (2008).

166. See Interview with Bob Woodward, *supra* note 2 ("You want to be aggressive and tough, and independent when looking at these things, but you don't want to declare war on the Government . . . You want to be open to asking [Government officials] 'What gives you gas pain [if it is published]? Why? Will it harm the national security in publishing it? The last thing you want to do as a reporter is you don't want to get someone killed. You don't want to blow an operation that is in the national security of the country.'). In the interview, Mr. Woodward added, "The question becomes: will it harm the national security?" *Id.* He elaborated, asserting, "It is not our job to protect national security, that's too broad . . . But if the operations are not legitimate or lawful, you want to expose it." See also Katharine Graham, *Safeguarding Our Freedoms As We Cover Terrorist Acts*, WASH. POST (Apr. 19, 1986), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/08/AR2005080800667_pf.html ("I want to emphasize that the media are willing to—and do—withhold information that is likely to endanger human life or jeopardize national security . . . We want to do nothing that would endanger human life or national security."); Kurtz, *supra* note 111 (quoting Woodward as saying that withholding the operational details of the report "made it easier" for the *Post* to publish the report "without risking criticism for disclosing classified information").

167. See Telephone Interview with Geoff Morrell, *supra* note 2.

168. For differing judicial perspectives on this Government's security interest, compare *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring) with *N.Y. Times Co.*, 403 U.S. at 719 (Black, J., concurring). For a legal scholar's discussion of this Government interest, see Ross, *supra* note 164, at 82 (identifying six distinct categories of potential harm to the national security interest: (1) damage to sources and methods; (2) potential loss of life; (3) impact to foreign policy; (4) effect on international alliances; (5) financial costs; and (6) the decrease in public knowledge resulting from disclosures of incomplete or inaccurate information).

169. See, e.g., Executive Order 12,356, 47 Fed. Reg. 14,874 (Apr. 2, 1982); Memorandum on the Freedom of Information Act (Jan. 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting> ("A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, 'sunlight is said to be the best of disinfectants.'"); Memorandum on Transparency and Open Government (Jan. 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government> ("Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset.").

170. See, e.g., President Barack Obama, *Joint Press Conference by President Obama and Prime Minister Erdogan of Turkey* (May 16, 2013), <https://obamawhite>

(4) to portray the President and his Administration in a positive light politically to others (e.g., the American people, allies, potential enemies) and to avoid political embarrassment.¹⁷¹

Looking solely at the positions of the *Post* and the Government, the two parties appear to have mostly conflicting perspectives. Yet, viewed a different way, the parties' interests do not conflict at all. The two parties do have some shared interests, including protecting the security of the nation, informing the citizenry about its Government's activities, and preserving constitutional freedoms. While the Government and the *Post* may value or prioritize some of those shared interests, such as national security and informing the citizenry, differently,¹⁷² they share them nonetheless. That the *Post* shares these interests with the Government is perhaps among the reasons why the *Post* is considered a "responsible" news organization, composed of U.S. citizens and ethical professionals who have a stake in maintaining the nation's democratic system of government,¹⁷³ and who recognize that the harm to the United States could jeopardize

house.archives.gov/the-press-office/2013/05/16/joint-press-conference-president-obama-and-prime-minister-erdogan-turkey ("[W]e . . . live in a democracy where a free press, free expression, and the open flow of information helps hold me accountable, helps hold our government accountable, and helps our democracy function.")

171. See Interview with Bob Woodward, *supra* note 2 ("The Government has a political interest—particularly, the President—[in] showing that he is leading well and managing a war well And, as Commander in Chief, [that he is] making the decisions. There is a political component in every presidential statement or maneuver. It is political. So he and his aides are very interested in a situation like this, where the President comes out appearing to be strong, decisive, open-minded, wise, interested in winning the war And the reality is that [this fourth interest] drives these decisions a lot."). Later in the interview, Mr. Woodward confirmed that this political interest is not only to be perceived as bold, but also not to be embarrassed. *Id.* See also Telephone Interview with Geoff Morrell, *supra* note 2 (acknowledging that it surely is a "reality" that Government press spokesmen "want to protect their bosses" from political embarrassment).

172. See Interview by The A.V. Club with Bob Woodward, *supra* note 129.

173. See Telephone Interview with Geoff Morrell, *supra* note 2 ("Reporters of mainstream press are patriotic Americans first, and reporters second. They are reasonable to work with, and more often can come to a fair compromise that works for both sides."); Interview with Bob Woodward, *supra* note 2 ("The last thing you want to do as a reporter is . . . to get someone killed. You don't want to blow an operation that is in the national security of the country.").

the constitutional and business interests of their newspaper.¹⁷⁴ Contrast that with actors such as Julian Assange's WikiLeaks organization,¹⁷⁵ which appears willing to publish any classified information derived from the U.S. Government, since it does not share the United States' interest in maintaining the U.S. democratic system of government or its international stature, and might actually wish to undermine U.S. interests.¹⁷⁶

A measure of success for a particular agreement is whether the agreement adequately meets the parties' *interests*, rather than their *positions*.¹⁷⁷ In the agreement between the *Post* and the Government, both parties were able to satisfy some of their interests. The *Post* was able to retain its freedom of expression by publishing ninety-eight percent of the report that had come into its possession.¹⁷⁸ The *Post* was able to inform the public and serve as a check on the Government's handling of the military effort in Afghanistan. The *Post* was able to promote its business interests by publishing its "scoop" in a

174. See, e.g., Graham, *supra* note 166 ("In covering terrorism . . . we must also recognize that we face very real and exceedingly complex challenges. There are limits to what the media can and should do . . .").

175. See Letter from Harold Koh, Legal Adviser, U.S. Dep't of State, to Jennifer Robinson, Attorney for Julian Assange (Nov. 27, 2010), <http://documents.nytimes.com/letters-between-wikileaks-and-gov> ("Despite your stated desire to protect those lives, you have done the opposite and endangered the lives of countless individuals. You have undermined your stated objective by disseminating this material widely, without redaction, and without regard to the security and sanctity of the lives your actions endanger. We will not engage in a negotiation regarding the further release or dissemination of illegally obtained U.S. Government classified materials."); see also Mary E. O'Leary, *At Yale, Bob Woodward Blasts Wikileaks Over Release Of War Reports*, NEW HAVEN REG. (Nov. 19, 2010), <http://www.nhregister.com/general-news/20101119/at-yale-bob-woodward-blasts-wikileaks-over-release-of-war-reports> ("Author and Washington Post reporter Bob Woodward told an audience at Yale Law School the dumping of 400,000 documents by WikiLeaks 'willy-nilly' into the public purview 'is just madness.'").

176. For assessments that Julian Assange and WikiLeaks have colluded with the Government of Russia to undermine the U.S. democratic system of government, see U.S. Dep't Of Homeland Sec. and Office of the U.S. Director of Nat'l Intelligence on Election Security, Joint Statement (Oct. 7, 2016), <https://www.dhs.gov/news/2016/10/07/joint-statement-department-homeland-security-and-office-director-national>. See also OFFICE OF THE U.S. DIR. OF NAT'L INTELLIGENCE, BACKGROUND TO "ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS": THE ANALYTIC PROCESS AND CYBER INCIDENT ATTRIBUTION (Jan. 6, 2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf; Jonathan Foreman, *The WikiLeaks War on America*, COMMENTARY (Jan. 1, 2011), <https://www.commentarymagazine.com/articles/the-wikileaks-war-on-america/> (arguing that Assange and WikiLeaks selectively publish information harmful to the U.S. national security interests, cataloging instances where Assange and WikiLeaks released leaks of classified U.S. information that "had little or no justification on the grounds of transparency in the public interest").

177. See Patton, *supra* note 4, at 280.

178. See Woodward, *supra* note 131.

timely fashion.¹⁷⁹ The *Post* was able to eliminate or reduce the risk of prosecution of the newspaper or its reporters by publishing a version of the report that the Government had declassified.¹⁸⁰ And the *Post* was able to mitigate its concern that the publication would damage the nation's security, based upon the subject matter expertise of the Department of Defense. The Government was able to prevent—or, at a minimum, substantially reduce—the risk that a disclosure of information in the report would cause damage to national security. The Government was also able to ensure that the public was informed about the activities of its representatives. And the Government was able to respect a private news organization's freedom of expression. Perhaps the only Government interest that might not have been fully accommodated was preventing the embarrassment of the Administration. Yet that interest is arguably less one of the Government's generally and more one of individual leaders holding governmental positions. The agreement between the *Post* and the Government in the *Assessment* Negotiation appears to have adequately met both of the parties' interests.¹⁸¹

B. *Alternatives*

The second of the seven elements of principled negotiations is the analysis of alternatives.¹⁸² An alternative is defined as “what a party can do away from the table, without the consent of the parties.”¹⁸³ This requires us to ask what the Best Alternative to a Negotiated Agreement (BATNA) is for each of the parties.¹⁸⁴ The *Getting to Yes* framework describes the BATNA of each party as “the standard against which any proposed agreement should be measured.”¹⁸⁵ Knowing one's BATNA allows a party to compare it with a proposal “to see whether it better satisfies” the party's interests.¹⁸⁶ The *Getting to Yes* framework suggests that the process for developing a party's BATNA involves three steps: (1) inventing a list of actions the

179. Interview with Bob Woodward, *supra* note 2 (confirming that preserving the *Post*'s “scoop” of the story preserved in the *Assessment* Negotiation).

180. *Id.* (“In essence, [the Government] took us off the hook [from the risk of prosecution]. It wasn't just a green light, it was a string of green lights.”)

181. *Id.*

182. See Patton, *supra* note 4, at 280.

183. *Id.* at 282.

184. *Id.* at 283.

185. GETTING TO YES, *supra* note 5, at 100.

186. *Id.* at 100.

party might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical alternatives; and (3) selecting, tentatively, the one alternative that seems best.¹⁸⁷

In the *Assessment* Negotiation, the *Post*'s BATNA was to selectively publish most of the classified report that Mr. Woodward received from his source, with a hope that the publication of the selected information did not damage the national security of the United States and a hope that the Government would not prosecute the newspaper or Mr. Woodward for reporting the classified information in the newspaper.

The Government's BATNA was to take action after the *Post* published the news story. Potential courses of action included: attempting to prosecute the *Post* and Mr. Woodward, publicly shaming the *Post*, restricting the Government's public affairs relationship with the *Post*, "freezing out" the news organization in future news cycles and provide special access to competitor news organizations, and attempting to identify and hold to account the government employee(s) who disclosed the classified information to Mr. Woodward.¹⁸⁸

In the *Assessment* Negotiation, neither party had an ideal BATNA, but a comparison of the BATNAs of the two parties reveals that the *Post* had relatively greater bargaining power than the Government. On this point, *Getting to Yes* states, "The better your BATNA, the greater your ability to improve the terms of any negotiated agreement."¹⁸⁹ Standing alone, the *Post*'s BATNA is not ideal, as its dependence upon hope—including hope not to damage national security and hope to avoid criminal prosecution—brings to mind the aphorism that "[h]ope is not a strategy."¹⁹⁰ Notwithstanding this partial dependence upon hope, the *Post* seemed to have a more favorable BATNA. In the *Assessment* Negotiation, the *Post* was already in possession of the document,¹⁹¹ and the Supreme Court had ruled in its favor in the *Pentagon Papers* case.¹⁹²

187. *Id.* at 103; Patton, *supra* note 4, at 283.

188. Telephone Interview with Geoff Morrell, *supra* note 2.

189. *GETTING TO YES*, *supra* note 5, at 104.

190. Rudolph Giuliani, Address at the Republican National Convention (Sept. 3, 2008), http://elections.nytimes.com/2008/president/conventions/videos/transcripts/20080903_GIULIANI_SPEECH.html.

191. See Interview with Bob Woodward, *supra* note 2.

192. See *OBAMA'S WARS*, *supra* note 7, at 179. See also Telephone Interview with Geoff Morrell, *supra* note 2 (agreeing that the Government usually has less bargaining power in these situations). More bluntly, Mr. Morrell said that these situations were "out of [the government's] control." *Id.* In particular, he noted that there is "no

The Government's BATNA was also more speculative than the *Post's*. The outcome of any attempt to prosecute the *Post* and Mr. Woodward would be uncertain and, even if successful, may be viewed unfavorably by many Americans. The tactic of shaming or discrediting the *Post* would have limited effectiveness and might be perceived by the American public as an attempt to undermine constitutional liberties. Any effort to identify the Government employee(s) who leaked the information to Mr. Woodward would also likely be futile.¹⁹³ None of these were prudent options for the Government.¹⁹⁴

What this power disparity reveals is that the Government needed to find a way to make it worthwhile for the *Post* to negotiate prior to publication. Otherwise, the Government would be confined by Supreme Court precedent and left merely to minimize damage to its interests when reacting to the *Post's* unilateral publication of the report. As *Getting to Yes* suggests, when one party is more powerful and "seems to hold all the cards," how the other party negotiates can make a big difference.¹⁹⁵

A measure of success of a particular agreement is whether the agreement is better than the parties' BATNAs. The *Assessment* Negotiation appeared to satisfy that metric. The *Post* was able to publish almost the entire report. While it did not publish the report in its entirety, assurances from the Government accompanied the information it did publish. After negotiations, publication was less likely to damage national security. The *Post* could also be confident that neither it nor Mr. Woodward would be prosecuted for the disclosure of classified information because the Government declassified the report. The Government was able to avoid unnecessary expenditures of time and resources in an attempt to prosecute the *Post* or Mr. Woodward for a case that might not have resulted in a criminal conviction. The Government was also able to avoid the precarious position of shaming a newspaper, which the American public might view as a heavy-handed attempt to intimidate the exercise of a constitutional liberty.

Overall, the agreement in the *Assessment* Negotiation appears to have been better than the parties' BATNAs.

prior restraint of the press," "you can't compel the news organizations," and "all you can do is explain the risks and dangers of publication." *Id.*

193. See Telephone Interview with Geoff Morrell, *supra* note 2 (stating that the "only real course of action" is to "go after the leaker," which is "usually impossible" to do).

194. *Id.* (stating that "those are your options, but none of them are great options").

195. *GETTING TO YES*, *supra* note 5, at 177.

C. Options

The third of the seven elements of principled negotiations examines the options parties have to meet their interests.¹⁹⁶ Options are defined as “possible agreements or pieces of a potential agreement upon which negotiators might possibly agree.”¹⁹⁷ Options can address a wide range of substantive and procedural matters that address the parties’ interests.¹⁹⁸

In the *Assessment* Negotiation, neither the *Post* nor the Government made any effort to identify, consider, or prioritize a list of options.¹⁹⁹ Nonetheless, there is a spectrum of potential options that the parties could have considered in the negotiation. The list of options below begins with options most favorable to the *Post* and ends with ones most favorable to the Government:

- The *Post* could have published the complete report.
- The *Post* could have selectively published portions of the report, based upon a risk assessment conducted internally by its editorial staff.
- The *Post* could have chosen an independent third party, such as a mediator, to review the report and make recommendations on which portions of the report not to publish.
- The *Post* could have chosen an independent third party, such as a judge or arbitrator, to review the report and make a binding determination on which portions of the report to publish and which portions not to publish.
- The *Post* could have submitted the report to the Government and invited the Government to make recommendations on which portions of the report not to publish.
- The *Post* could have submitted the report to the Government and honored a Government determination on which portions of the report not to publish.
- The *Post* could have chosen not to publish any of the report.

196. See Patton, *supra* note 4, at 283.

197. *Id.*

198. *Id.* at 282–283.

199. See Interview with Bob Woodward, *supra* note 2.

One measure of success of a particular agreement is whether it was based upon the best of many options considered.²⁰⁰ In this situation, any of the above options could theoretically have been considered by the parties. Yet few of them would have been effective at satisfying both parties' interests. The most favorable options for the *Post* would have ensured maximum editorial discretion and constitutional liberty, but could have jeopardized national security or risked criminal prosecution. On the other hand, the Government's best options would have protected national security, but might have sacrificed the interests of informing the citizenry and protecting the constitutional freedom of expression. While submitting the report to an independent third party might have provided enhanced objectivity on the review, that review would likely have taken more time to conduct and would not necessarily have been conducted by a subject matter expert who knew best about what information was truly critical to national security.²⁰¹ For these reasons, the *Assessment* Negotiation's method of direct consultation between the parties was better suited to accommodate both parties' interests than most of options detailed above, since direct consultation enabled the parties to consider additional, more mutually beneficial options.

D. *Standards of Legitimacy*

The fourth of the seven elements of principled negotiations is legitimacy.²⁰² Legitimacy is "one of the most powerful of human motivations, and thus constitutes a special category of interests."²⁰³ Many negotiations result in no agreement when one or both of the parties view the options as unfair.²⁰⁴ Hence, *Getting to Yes* recognizes,

200. See Eric Berger, Adjunct Professor, Georgetown University Law Center, "Seven Element Framework," Lecture at Georgetown University Law Center (Jan. 31, 2014).

201. See Interview with Bob Woodward, *supra* note 2. When reviewing the list of options in a draft of this Article, Mr. Woodward opined on the option of submitting the classified report to a third-party: "That is an interesting option. We would not abdicate that responsibility, but that's a plausible option. You could pick somebody." *Id.* When asked why the *Post* would not consider a third-party review option, Mr. Woodward stated, "We think we can make that judgment . . . [T]here is a sort of culture that the editor makes these kinds of decisions and even the publisher could say no. But even [former *Post* publisher] Don Graham would say, 'These are the decisions the editor will make.' So you wouldn't abdicate it to a third party." *Id.*

202. See Patton, *supra* note 4, at 280.

203. *Id.* at 280–81.

204. *Id.*

“There is power in using external standards of legitimacy.”²⁰⁵ Specifically, “a negotiator can enhance his or her negotiating power by finding precedents, principles, and other external criteria of fairness.”²⁰⁶ Identifying objective criteria or standards can help parties evaluate options more fairly.

In the *Assessment* Negotiation, just as the parties did not attempt to identify a list of potential options, they also did not attempt to formally identify objective criteria to evaluate options.²⁰⁷ The parties may have informally identified some criteria of what would and would not be published.²⁰⁸ In any case, objective criteria of legitimacy that could have been implicitly used by the parties to evaluate options in this negotiation include reserving editorial discretion,²⁰⁹ ensuring timeliness of any determinations,²¹⁰ affording an adequate opportunity to be heard, maximizing dissemination of information, reducing the risk of harming national security, and requiring specificity and justification for any concerns about publication.

A measure of success of a particular agreement is whether the agreement is based on objective criteria so that “no one feels taken advantage of.”²¹¹ Perhaps explicitly identifying some or all of the objective criteria above would have helped guide the parties through the negotiation process. In particular, identifying criteria would have been helpful for the parties in determining what might reduce the risk of harming national security. Depending on the specific concerns of the two parties in the negotiation,²¹² those criteria could have included loss of lives of U.S. military personnel, the extent of disclosure of intelligence sources or details of future U.S. military operations, and the potential for publication to compromise U.S. intelligence collection methods. Whether the parties considered objective criteria explicitly or implicitly, the parties came to an objectively and mutually

205. GETTING TO YES, *supra* note 5, at 183.

206. *Id.*

207. See Interview with Bob Woodward, *supra* note 2; Telephone Interview with Geoff Morrell, *supra* note 2.

208. See Interview with Bob Woodward, *supra* note 2 (confirming that, at the start of the meeting between the *Post* and the Government, the *Post* said it would not publish any portions of the McChrystal *Assessment* that discussed future U.S. military operations).

209. *Id.*

210. *Id.*

211. Patton, *supra* note 4, at 285.

212. See Telephone Interview with Geoff Morrell, *supra* note 2 (stating that these situations involving the negotiations over the publication of classified information are “all unique,” “based on a particular moment in time, in time,” and are “an art, not a science”).

agreeable solution in this negotiation. To the author's knowledge, there is no public record of either party complaining after the fact about the final agreement. The agreement appears to satisfy the ideals of legitimacy.

E. *Commitment*

The fifth of the seven elements of principled negotiations is commitment by the parties.²¹³ A commitment is defined as "an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement."²¹⁴ This element includes the oral or written commitments about what each party will or will not do.²¹⁵ An agreement entered between the parties is only as good as the likelihood that each party will, in fact, do what they promised to do and refrain from doing what they promised not to do. A measure of success of a particular agreement is whether the agreement is based on commitments that are clear, realistic, and better than the parties' BATNAs.²¹⁶

In the *Assessment* Negotiation, the commitment between the parties was clear. Once the Government and the *Post* reached a consensus on which portions of the classified report would not be published, the *Post* redacted those portions of the report. That version of the report, with its agreed-upon redactions, was submitted to the Department of Defense. Then the appropriate classification authority within the Department declassified that redacted version of the report. Finally, the *Post* published only the redacted version of the declassified report. Those terms made up the agreement.²¹⁷

The commitment between the parties was also realistic. The Government, through the Department of Defense, had the legal authority to declassify the report under the applicable policy.²¹⁸ The declassifications and redactions were based upon an in-depth discussion between senior representatives of the two parties who were authorized

213. See Patton, *supra* note 4, at 284.

214. *Id.*

215. See Berger, *supra* note 200.

216. *Id.*

217. See Interview with Bob Woodward, *supra* note 2.

218. See U.S. DEP'T OF DEF. MANUAL 5200.01, VOL. 1, ENCLOSURE 5 53 (Feb. 21, 2012), http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520001_vol1.pdf. Under U.S. Department of Defense policy, a classified report may also be declassified by the Original Classification Authority (OCA) or any "supervisory officials" of the OCA. *Id.*

to speak on behalf of their organizations.²¹⁹ The *Post* was best served by publishing only that version of the report that had been declassified, to avoid any risk of prosecution for an unauthorized disclosure of classified information.²²⁰ Each of these circumstances helped to ensure that the parties had the authority and the political will to uphold their respective ends of the bargain.²²¹

The commitment between the parties was purely verbal and not memorialized in writing.²²² Neither side in these types of negotiations typically sees the need to reduce common understandings to writing.²²³ Both parties view these negotiations as arising within the context of the journalism industry, in which both sides need to rely upon trust, credibility, and respect. There was a consensus between the parties involved in this negotiation such that lawyers did not get involved in negotiating text of the news.²²⁴ Contributing to this informality generally is journalists' need to maintain mutual trust with the government officials they cover.²²⁵

F. *Communication*

The sixth of the seven elements of principled negotiations involves communication between the parties.²²⁶ Agreements should be

219. See *OBAMA'S WARS*, *supra* note 7, at 180. In fact, the *Post* Executive Editor "wanted to make sure [he and Woodward] could meet with someone who would have the authority to speak for not just the Pentagon but the White House and the intelligence agencies." *Id.*

220. See Interview with Bob Woodward, *supra* note 2 (confirming it was in the *Post's* interest to publish only the redacted version of the *Assessment*).

221. See Telephone Interview with Geoff Morrell, *supra* note 2 (stating that these agreements "have to be mutually beneficial," where there is "give and take" between the parties).

222. See Telephone Interview with Geoff Morrell, *supra* note 2 (confirming that there was no written agreement between the parties in this negotiation); Interview with Bob Woodward, *supra* note 2 (confirming that the agreement between the parties was "just verbal").

223. See Interview with Bob Woodward, *supra* note 2 (explaining that these negotiations are typically not reduced to writing); Telephone Interview with Geoff Morrell, *supra* note 2 ("There is no need for a written deal [in these situations]. If you don't have credibility in the news business based on trust and your word, then there is a problem for both sides . . . Woodward didn't get this far as a reporter without following the ground rules. If he didn't abide by those ground rules, he wouldn't be successful.").

224. See Interview with Bob Woodward, *supra* note 2.

225. *Id.* ("What is so important about this is that there is an informality. Let me emphasize again, the lawyers weren't involved. I hate it when the lawyers get involved, quite frankly. I think they gum up the works. Because I have seen that happen. A lot of lawyers get in and want to be editors. And they will say, 'Just take this out and it reduces our liability.' But editors should edit, not lawyers.").

226. See Patton, *supra* note 4, at 284.

derived from communication processes in which the parties exchange information, ideas, and feelings.²²⁷ In reality, that communication process is the manner by which parties discuss and deal with the other six elements of the negotiation framework.²²⁸ Assessments of communication in a negotiation include not only what each party says and how they say it, but also how the other party perceives those communications.²²⁹ This element includes factors such as how the parties initiate the dialogue (e.g., whether the initiation is adversarial or in the spirit of partnership); how they approach the problem (e.g., whether they compare commitments or interests); and how they frame the discussion (e.g., advocacy, inquiry, or both).²³⁰ A measure of success of a particular agreement is whether the agreement is based on clear, efficient, and effective communication.²³¹

In the *Assessment* Negotiation, the communication between the parties appears to have been efficient and effective. First, the *Post* communicated its intent to publish the *Assessment*, while offering the Government an opportunity to express any concerns about the intended publication.²³² Second, representatives of each party met as a group face-to-face, a practice which is common in these types of situations,²³³ and which is, in many instances, the best way to communicate.²³⁴ They discussed which contents of the classified report would harm national security if published.²³⁵ The *Post* also provided the Government with one night to identify specific portions of the classified report that they thought would harm national security if published, but insisted that the Government demonstrate publication of those portions would cause actual, versus speculative, harm.²³⁶ In a subsequent interview, Woodward insisted, “I listened very carefully

227. See Berger, *supra* note 200.

228. See Patton, *supra* note 4, at 284.

229. See Berger, *supra* note 200.

230. See Patton, *supra* note 4, at 284.

231. See Berger, *supra* note 200.

232. See OBAMA’S WARS, *supra* note 7, at 180.

233. See Interview with Bob Woodward, *supra* note 2.

234. For a discussion on the general advantages of face-to-face negotiations, see ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 61–62 (2005); Barbara Buell, *Sensitive Negotiations Benefit From Human Interaction Over E-Mail*, STAN. REP. (Sept. 27, 2000), <https://news.stanford.edu/news/2000/september27/negotiation-927.html> (summarizing how several laboratory experiments found that higher levels of rapport produced by nonverbal emotional cues give face-to-face negotiations an advantage over telephone negotiations).

235. See OBAMA’S WARS, *supra* note 7, at 180.

236. *Id.*

to the arguments.”²³⁷ But the *Post* representatives “realized that [they] would have to listen carefully but be on alert, ready to separate real claims of national security from bogus ones.”²³⁸ During the meeting, the *Post*’s Executive Editor pushed back on several of the Government’s objections, which led to the Government’s objections being withdrawn.²³⁹ Although one night was a short period of time for the Government to prepare and justify its objections, this might simply reflect the importance of the *Post* ensuring that it maintained its “scoop” on the story. Overall, the process of communication between the parties in the negotiation appears to have afforded each party a sufficient opportunity to express its interests and pursue a consensus that accommodated those interests.²⁴⁰

G. *Relationship*

The seventh element of principled negotiations involves the relationship between the parties.²⁴¹ This includes the relationship that each party “has or wants” with the other party.²⁴² A trusting relationship can make the negotiation process easier; a hostile relationship can make the process much harder.²⁴³ The presence of a “working relationship” can also influence negotiations.²⁴⁴ In some instances, maintaining that working relationship “may be a much more important interest than the particular substantive issues in dispute.”²⁴⁵ A measure of success of a particular agreement is whether the agreement improves, or at least does not damage, the relationship between the parties.²⁴⁶

237. Interview by The A.V. Club with Bob Woodward, *supra* note 129 (“And I listened very carefully to the arguments. We listened to the arguments on the McChrystal Report, and we even cut out the line about ‘inadequate intelligence.’ Which we now know is, of course, part of the problem chapter and verse, but the Pentagon didn’t want it in there. But we were able to publish 98 percent of that assessment, and tell people what was really going on.”).

238. OBAMA’S WARS, *supra* note 7, at 181.

239. See Kurtz, *supra* note 111 (“During the meeting with Pentagon officials, Woodward said, [*Post* Executive Editor Marcus] Brauchli strongly ‘disagreed with them a couple of times,’ leading the officials to withdraw requests that certain information be held from publication.”).

240. See Interview with Bob Woodward, *supra* note 2 (characterizing the communication in the *Assessment* Negotiation as having gone “very well”); Telephone Interview with Geoff Morrell, *supra* note 2 (concurring with Mr. Woodward).

241. See Patton, *supra* note 4, at 282.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. See Berger, *supra* note 200.

In the *Assessment Negotiation*, the *Post* and the Government had a “working relationship.”²⁴⁷ The *Post* is the preeminent newspaper in the city of Washington, D.C. and one of the leading newspapers in the nation. It prides itself on its news coverage of the Government and the American political system. A professor of urban planning and policy has observed: “Washington has always been a one-industry town: that’s why it has an intrinsically self-absorbed monotonic culture. Everyone there depends on government for their livelihood.”²⁴⁸ News media organizations in Washington have an interest in maintaining working relationships with the Government and individuals who work within that Government.²⁴⁹

The Government, on the other hand, has a responsibility and an interest in maintaining a working relationship with news media organizations. For example, the stated mission of the U.S. Department of State’s Bureau of Public Affairs is to “engage domestic and international media to communicate timely and accurate information with the goal of furthering U.S. foreign policy and national security interests as well as broadening understanding of American values.”²⁵⁰ Similarly, U.S. military doctrine makes it clear that public affairs channels can be critical to accomplishing an overall military mission.²⁵¹ Media outreach, press briefings, and news reporting are invaluable ways for the Government to communicate.²⁵²

247. Interview with Bob Woodward, *supra* note 2.

248. Mitchell L. Moss, *Washington, DC: The Real Winner In This Recession*, NEW GEOGRAPHY (July 13, 2009), <http://www.newgeography.com/content/00902-washington-dc-the-real-winner-recession>.

249. See Interview with Bob Woodward, *supra* note 2 (“People in the Government are my sources on these matters, going back to Nixon and Watergate and what is happening now.”); Telephone Interview with Geoff Morrell, *supra* note 2 (“Woodward didn’t get this far as a reporter without following the ground rules. If he didn’t abide by those ground rules, he wouldn’t be successful.”).

250. Bureau of Pub. Affairs, U.S. DEP’T OF STATE, <http://www.state.gov/r/pa/>.

251. See PUB. AFFAIRS, JOINT PUBL’N 3-61 III-18 (Aug. 25, 2010), https://www.globalsecurity.org/military/library/policy/dod/joint/jp3_61_2010.pdf (“There is a need for continuous dialogue between the joint force and the media who are covering its activities. Open and independent reporting are the principal means of coverage of military operations. Commanders should seek regular opportunities to work with the media. Media coverage of potential future military operations can, to a large extent, shape public perception of the joint force and national security environment.”).

252. See Bureau of Pub. Affairs, U.S. DEP’T OF STATE, *supra* note 250 (“The [Public Affairs] Bureau vigorously advances the State Department’s mission to inform the American people and global audiences through a variety of ways, including: Strategic and tactical communications planning to advance America’s foreign policy interests; Conducting press briefings for domestic and foreign press corps; Pursuing media outreach, enabling Americans everywhere to hear directly from key Department officials through local, regional, and national media interviews . . .”).

The *Assessment* Negotiation improved, or at least did not damage, the relationship between the *Post* and the Government. Mr. Woodward and the *Post* published the declassified, redacted version of the report in the September 21, 2009 edition of the newspaper.²⁵³ Woodward revealed in an interview that, initially after the *Post* published the report, “I had people in the White House who were furious.”²⁵⁴ However, there is no evidence that the Government thereafter retaliated or reduced the *Post*’s access to information based solely upon the publication of the declassified report. In fact, on July 10, 2010—nine months after the *Post* published the declassified report—President Obama sat down for an exclusive, on-the-record interview with Mr. Woodward for Woodward’s book, *Obama’s Wars*.²⁵⁵ Mr. Woodward also interviewed President Obama for his follow-up book about the Obama Administration.²⁵⁶ In June 2010, Mr. Woodward conducted an interview for *Obama’s Wars* with retired General Jim Jones, the same individual whom he had first contacted about the classified report when Jones was the President’s National Security Advisor in September 2009.²⁵⁷ Neither of these individuals were obligated to sit down and be interviewed by Mr. Woodward. The fact that they both did, however, suggests that the relationships between the *Post* and the Government and Woodward and the Administration were not irreparably damaged by their agreement for the *Post* to publish the report.

VI. ASSESSMENT

Based on an understanding of the *Assessment* Negotiation through the lens of negotiation methodology, was this negotiation a success? If it was a success, as the above analysis seems to suggest, then why was it successful? This Section evaluates the *Assessment* Negotiation by attempting to answer those questions.

253. See *OBAMA’S WARS*, *supra* note 7, at 182.

254. Interview by The A.V. Club with Bob Woodward, *supra* note 129 (“That document is very important in the whole narrative here, because when we published it, I had people in the White House who were furious, and then as they got further into the strategic assessment, and the review by Obama was done—a number of them didn’t understand how for McChrystal, it was a cry from the heart: ‘This war is going the wrong way and I don’t have enough troops. If you don’t give me more, we’re going to have mission failure.’ Only getting that into the public forum focused people on what McChrystal was really saying.”).

255. See *OBAMA’S WARS*, *supra* note 7, at xiv.

256. See BOB WOODWARD, *THE PRICE OF POLITICS* xi–xii (2012) (explaining he met with “President Barack Obama for 1 hour and 25 minutes in the Oval Office on July 11, 2012”).

257. See *OBAMA’S WARS*, *supra* note 7, at 401.

Based on the criteria in *Getting to Yes* and *Negotiation*, the *Assessment* Negotiation appears to have been a success. *Getting to Yes* says the benchmark of success for a particular negotiation is when “a wise outcome [is] reached efficiently and amicably.”²⁵⁸ *Negotiation* says the goal of a successful negotiation is to meet each party’s interests and for the agreement to be better than, or at least as good as, each of their respective BATNAs.²⁵⁹ As discussed above, the agreement between the *Post* and the Government met each party’s interests,²⁶⁰ and was better than their respective BATNAs.²⁶¹ The *Assessment* Negotiation also satisfied the specific measures of success identified for each of the other elements of the seven-element framework for principled negotiations. But adherence to the seven principles of *Getting to Yes* cannot account for all of the reasons that the *Assessment* Negotiation was successful. At least three other circumstances are worth considering as factors that contributed to the success of the negotiation.

One circumstance that might have contributed to the success of the *Assessment* Negotiation is that it involved a unique individual: Bob Woodward. Many American journalists are trained to hunt for and report the facts of a news story, regardless of where that hunt might take them or what might be the consequences of their reporting. But some of those same American reporters might be concerned about the potential consequences to their future career in journalism if they proceed with reporting on a highly sensitive or controversial issue. The following constellation of circumstances may strengthen those concerns: (1) a journalist’s role as a “beat” reporter for a particular Government agency on a daily basis, (2) the journalist’s dependence on cooperative access to officials within that agency for day-to-day reporting and need to maintain a relationship with that agency, and (3) the potential for a particular news story by that journalist to embarrass officials within that agency or portray that agency in a highly negative light.²⁶² Some of those reporters might be less inclined to risk being “frozen out” of the information flow of official

258. GETTING TO YES, *supra* note 5, at 13.

259. See Patton, *supra* note 4, at 285.

260. See *supra* Section V.A.

261. See *supra* Section V.B.

262. See generally, e.g., SHARYL ATTKISSON, STONEWALLED: MY FIGHT FOR TRUTH AGAINST THE FORCES OF OBSTRUCTION, INTIMIDATION, AND HARASSMENT IN OBAMA’S WASHINGTON (2014) (describing multiple instances during Attkisson’s journalism career in which Government officials applied political pressure and “pushback,” including implicit threats to “freeze out” reporters from future access to information,

channels that is critical for their reporting about the agency on a daily basis.

In contrast, Mr. Woodward is an anomaly in the news industry; he has been characterized as a “superhero” of journalism.²⁶³ At the time of the *Assessment* Negotiation, Woodward already had a thirty-eight-year career as a successful journalist with the *Post* and had earned two Pulitzer Prizes.²⁶⁴ He had also published fourteen books on Washington policy-making and politics, many of which were national best-sellers.²⁶⁵ Five years after the *Assessment* Negotiation, then-former Secretary of Defense Gates publicly praised Woodward for his “unique” ability to “get people to talk about stuff they shouldn’t be talking about.”²⁶⁶ Even the key negotiator for the Government in the *Assessment* Negotiation recognized Woodward’s unique status as a journalist in situations where other reporters might face consequences. Morrell acknowledged candidly, “It is hard to freeze out Bob. He is in a class by himself as a reporter. There are not ‘consequences’ for him.”²⁶⁷

A second circumstance that might have contributed to the successful outcome of the negotiation was the quality of the working relationship between the Obama Administration and the *Post*. Every modern Presidential Administration has experienced its own share of friction in its relations with journalists. For example, during the *Pentagon Papers* case era, the Nixon Administration’s relationship with the news media was strained.²⁶⁸ Similarly, at the time of this Article’s publication, the Trump Administration appears to be openly critical of the news media on a daily basis.²⁶⁹ Admittedly, the Obama

against her, other journalists she knew, or their editor-supervisors for investigating and reporting on particular news stories unfavorable to the government).

263. Mark Feeney, *All the President’s Men Is a Superhero Flick for Journalists*, SLATE (June 14, 2017), http://www.slate.com/articles/arts/conspiracy_thrillers/2017/06/all_the_president_s_men_made_woodward_and_bernstein_the_stuff_of_journalistic.html.

264. See Full Biography, BOB WOODWARD, <http://bobwoodward.com/full-biography/> (last visited Mar. 24, 2018).

265. See Books by Bob Woodward, BOB WOODWARD, <http://bobwoodward.com/full-biography/> (last visited Mar. 31, 2018).

266. Hadas Gold, *Gates: I wanted Woodward in CIA*, POLITICO (Jan. 17, 2014), <https://www.politico.com/blogs/media/2014/01/gates-i-wanted-woodward-in-cia-181452>.

267. Telephone Interview with Geoff Morrell, *supra* note 2.

268. See Interview with Bob Woodward, *supra* note 2 (asserting that press relations with the Nixon Administration were “severed”).

269. See, e.g., Donald J. Trump, TWITTER (May 12, 2017, 4:53 AM), <https://twitter.com/realdonaldtrump/status/862999243560288256?lang=en> (“The Fake Media is working overtime today!”).

Administration faced its own challenges with the news media.²⁷⁰ But the Cabinet Secretary directly involved in the *Assessment* Negotiation struck a different tone when he declared, “The press is not the enemy, and to treat it as such is self-defeating.”²⁷¹ This approach by the Government may have increased the likelihood of a successful negotiation.

A third circumstance that might have contributed to the success of the *Assessment* Negotiation was the prior experience of each side’s primary negotiator, particularly the two individuals interviewed for this Article. Recall that *Getting to Yes* advises parties in a negotiation to “put yourself in the shoes” of the other party.²⁷² William Ury’s book, *Getting Past No*, says the “ability to put yourself in the other side’s shoes” is the “single most important skill in negotiation.”²⁷³ In this instance, the key participants did not just do this hypothetically; they each had been in the other party’s shoes previously in their respective careers. Mr. Woodward is famous for his long career as a *Post* reporter. But what is not widely known is that Woodward was a Naval Reserve Officer Training Corps (ROTC) student when he attended Yale University and served for five years on active duty as a Naval Intelligence Officer,²⁷⁴ a role that involved proper handling of classified information. At the time of the negotiations, Mr. Morrell was the public face of the Department of Defense as the Deputy Assistant Secretary of Defense for Public Affairs. But prior to that, he had worked as a journalist for the majority of his career, first with several local television network affiliates and ultimately as a White House correspondent for ABC News.²⁷⁵

Each of these men understood that the other was merely trying to do his job responsibly. Moreover, both of them explained how their understanding of the nature of the journalism business informed the negotiations such that there was no need for lawyers to be involved.²⁷⁶ Mr. Woodward emphasized how the “informality” of the negotiation helped it to succeed.²⁷⁷ Mr. Morrell repeatedly emphasized

270. See, e.g., Alexander Nazaryan, *When Obama Went to War on Fox News*, NEWSWEEK (July 5, 2017), <http://www.newsweek.com/when-obama-went-war-fox-news-632424>.

271. GATES, *supra* note 8, at 91 (quotation omitted).

272. GETTING TO YES, *supra* note 5, at 23.

273. WILLIAM URY, *GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS* 19 (2007).

274. See Interview with Bob Woodward, *supra* note 2.

275. See Telephone Interview with Geoff Morrell, *supra* note 2.

276. See Interview with Bob Woodward, *supra* note 2 (“There was no lawyer in the meeting. And we intentionally didn’t take our lawyer to the meeting.”).

277. *Id.*

the importance of two-way credibility between the Government and the *Post*.²⁷⁸ Perhaps their prior experience of “walking in the other’s shoes” might have been a key factor to building that credibility to achieve a successful outcome in the negotiation. The result was that there was at least one participant on each side of the bargaining table who recognized the legitimacy of the other party—the *Post* recognizing the legitimacy of the military’s effort, and the Government recognizing the legitimacy of the *Post* as a responsible news organization.²⁷⁹

The success of the *Assessment* Negotiation can be attributed, in part, to how the agreement met the seven elements of principle-based negotiations. The negotiation’s success can also be attributed to the unique characteristics of individuals involved, how the relationships between the individuals fostered a cooperative environment, or a combination of these factors.

VII. CONCLUSION

Regardless of what factors or circumstances contributed to the success in the *Assessment* Negotiation, the analysis in this Article leads to one clear conclusion. The litigious approach undertaken by the Government to resolve these types of disputes that failed in the *Pentagon Papers* case has been supplanted in the modern era by an alternative approach, as exhibited in this “modern *Pentagon Papers* case.” To highlight the nature of this alternative approach for modern negotiations, this Section revisits the list of lessons learned about the dispute underlying the *Pentagon Papers* case and refines those points in the context of negotiations in a post-*Pentagon Papers* world.²⁸⁰ It notes six similarities between implications of the *Pentagon Papers* case and the *Assessment* Negotiation. It then notes two key differences.

Some implications of the *Pentagon Papers* case were reaffirmed by the *Assessment* Negotiation. First, responsible news organizations

278. See Telephone Interview with Geoff Morrell, *supra* note 2.

279. See Interview with Bob Woodward, *supra* note 2 (“[The Government] accepted our legitimacy as a news organization with a big circulation and certain credibility. We accepted their legitimacy as the military authority for the country. And so in the [meeting], there is no anger, no ‘How dare you?’ [Post editor Marcus Brauchli] came over and we drove over there. And it was a feeling of ‘We’re going to listen. But let’s work this out.’”).

280. See *supra* Section II.

such as the *Times* and the *Post* that come into the possession of classified information do not thoughtlessly publish that information. Instead, the decisions of those news organizations on whether to publish such information depends upon input from a number of stakeholders within the organization involved, including reporters, editors, executives, and legal counsel. This was true when the *Times* and *Post* weighed the business and legal risks in publishing the *History* prior to the Supreme Court's 1971 landmark ruling. It remained true in the decision-making process of the *Post* in valuing the risk of how to proceed with the publication of the *Assessment* in a post-*Pentagon Papers* case world, as evinced by how the *Assessment* Negotiations involved reporters, editors, and attorneys.²⁸¹ Negotiations are often not only between two parties sitting across the table from one another, but also between the individuals sitting on the same side of the table.²⁸² When multiple stakeholders are seated on each side of the table, each party has multiple interests at stake.

Second, private news organizations have a legitimate business interest of ensuring that their competitors do not "scoop" their publication of classified information, so the available time for resolving differences on what exactly to publish is limited. When the District Court temporarily restrained the *Times* from publishing further articles based on the *History*, Ellsberg pursued the *Times*' competitor, the *Post*, to continue publishing articles on the matter. This competitive rivalry is described by Woodward's account of the *Assessment* Negotiation.²⁸³ In a perfect world, a news organization and the Government could follow a thorough and deliberate process to review the classified information at issue and evaluate the potential damage to national security for publishing it. But in reality, such negotiations involve a compressed time window, where the news organization benefiting from the leaked information must weigh not only the risk to national security, but also the business risk of the leaker contacting a competitor and sharing previously exclusive information.

Third, the Government can express generalized concerns about the impact to "national security" from publishing leaked information. But like in the *Pentagon Papers* case, the Government's failure to

281. A *Post* attorney participated in the September 19 conference call with Government officials. See OBAMA'S WARS, *supra* note 7, at 180.

282. See GETTING TO YES, *supra* note 5, at 47–48 ("In almost every negotiation each side will have many interests, not one A common error in diagnosing a negotiating situation is to assume that each person on the other side has the same interests To understand a negotiator's interests means to understand the variety of somewhat differing interests that they need to take into account.").

283. See OBAMA'S WARS, *supra* note 7, at 183.

identify specific problems or forecast negative effects of such disclosures in negotiations will likely result in those arguments not receiving serious consideration. In the *Pentagon Papers* case, a skeptical judiciary declined to restrain the news media based upon the Government's general national security concerns. In a post-*Pentagon Papers* world, news organizations themselves can be equally suspicious of generalities. Therefore, it is in the Government's best interest to be specific in identifying which elements of information are problematic and explaining how disclosure of those elements would actually damage national security.

Fourth, when resolving the issue of whether to publish classified information, the parties involved should have their discussions behind closed doors. This private forum allows candid discussions between experts without the risk of inadvertent disclosure of damaging information to the public. In the *Pentagon Papers* case, the District Court held portions of the proceedings *in camera*, allowing Government officials to present why particular elements of the information were too sensitive to publish. Likewise, in the *Assessment* Negotiation, senior representatives of the *Post* and senior Government officials held a lengthy closed-door meeting in classified spaces of the Pentagon to discuss the information before it was published. While the information might eventually be published by the news organization, this closed-door venue mitigates the risk of any premature or inadvertent disclosure of information that both sides eventually agree to protect.

Fifth, some categories of information might legitimately warrant protection against public disclosure for national security reasons. The District Court in the *Pentagon Papers* case acknowledged that the Government might have an interest in preventing "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."²⁸⁴ Likewise, in the *Assessment* Negotiation, the *Post's* representatives agreed to redact sensitive numbers, references to intelligence gaps, Special Forces unit designations, and future operations from the *Assessment*. Whether the subject of litigation or negotiations, informational details of ongoing military operations or future operations are legitimate categories of information for private news organizations not to publish.

Sixth, the justifications for protecting information in the interest of national security do not include the fact that disclosure would be

284. U.S. v. N.Y. Times Co., 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

politically embarrassing. The District Court in the *Pentagon Papers* case said as much, ruling it would not restrict a private news organization from publishing classified information based solely upon “some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach”²⁸⁵ Likewise, Woodward described how the *Post’s* representatives during the *Assessment* Negotiation attempted to “separate real claims of national security from bogus ones.”²⁸⁶ Once again, the Government must be prepared to specify how disclosure of information would actually harm the security interest of the nation, rather than merely the political interests of those in public office.

While the above lessons from the *Assessment* Negotiation demonstrate that certain principles from the Supreme Court’s decision in the *Pentagon Papers* case can also be applied to negotiations between news organizations and the Government today, there are at least two significant differences.

One key difference is that private news organizations in possession of classified information are in stronger positions in such negotiations than they would have been without such a favorable legal precedent. The *Pentagon Papers* case signaled at the highest possible level of the American legal system that federal courts have a strong tendency to side with constitutional freedom of the press when weighing a private news organization’s interests against the Government’s interest in restricting the release of information for national security reasons. The participants in the *Assessment* Negotiation were keenly aware of the paradigm shift arising from the *Pentagon Papers* case. On the Government’s side of the negotiation, Geoff Morrell recognized that there is “no prior restraint of the press” and the Government “can’t compel the news organizations.”²⁸⁷ Referring to the publication of the McChrystal *Assessment*, he stated bluntly, “It is out of our control.”²⁸⁸ This shared awareness of a difference in leverage between the parties will continue to shape the behavior of both parties in future negotiations.

Another key difference between the two cases is that, since the question of what is published is answered collectively by the parties involved, as opposed to a court, news organizations and the Government have more flexibility to meet the interests of both parties. When

285. *Id.*

286. OBAMA’S WARS, *supra* note 7, at 182.

287. Telephone Interview with Geoff Morrell, *supra* note 2.

288. *Id.*

recounting the *Post*'s interactions with the Government over publishing the *Assessment*, Woodward reflected on the relationship between the 1971 *Pentagon Papers* Supreme Court ruling and agreements like the one arising out of the *Assessment* Negotiation:

For the *Pentagon Papers*, the *Times* and *Post* did not consult the government in advance. To do so would have alerted the government and likely resulted in a court action to stop publication, which is exactly what the government did in federal court after the initial articles ran. The beauty of the Supreme Court's *Pentagon Papers* ruling—which forbids prior restraint—is that it encourages us to ask the government for specific objections to the publication of classified documents.²⁸⁹

That landmark judicial ruling, Woodward observed, “opened the door for such conversations with the government,”²⁹⁰ even if, to the Government, it may seem as though “all [the Government] can do is explain the risks and dangers of publication” in such conversations.²⁹¹

The constitutional prohibition against prior restraint by the Government has led to a modern practice of prior negotiations between news organizations and the Government before news organizations publish classified information or documents. In a post-*Pentagon Papers* world, principles of negotiation, not rulings of courts, now govern these interactions between the Government and the news media.

289. OBAMA'S WARS, *supra* note 7, at 179.

290. *Id.*

291. Telephone Interview with Geoff Morrell, *supra* note 2.