

# New York Law Journal

## Fighting for the Press: Inside Story of the Pentagon Papers and Other Battles

Reviewed by James D. Zirin

New York Law Journal

04-29-2013

**Published by CUNY Journalism Press, New York, N.Y. 310 pages**

Nixon notoriously conducted a war against the press. He sought to indict The New York Times. He issued subpoenas to reporters seeking disclosure of their sources and notes. He tried to enjoin the press from publishing the relatively innocuous Pentagon Papers. The verdict of history is that he was the archetypical enemy of press freedoms.

"President Obama is no better than Nixon. He has used the [1917] Espionage Act to indict more leakers than any other president in the history of this country," forcefully argues First Amendment lawyer James C. Goodale in his arresting new book, *Fighting for the Press*. Underscoring Goodale's point, former Times executive editor Bill Keller asserted in a March op-ed that Obama "has a particular, chilling intolerance for those who leak."

Summing up his view of Obama's approach to classified information and press freedom, Goodale has not minced words. "Antediluvian, conservative, backwards. Worse than Nixon. He thinks that anyone who leaks is a spy! I mean, it's cuckoo."

Goodale renders a riveting blow-by-blow account of the Pentagon Papers case, from the *nisi prius* proceedings before Judge Murray Gurfein in the Southern District, to the appeal leading to reversal before the Second Circuit en banc, to the victory for the press in the U.S. Supreme Court, *New York Times Co. v. United States* (403 U.S. 713), in which he played a central role as general counsel to the Times. He also takes us into the hallowed corridors of the Times offices, where executives debated the pros and cons of standing up

to Nixon, and the lawyers elaborated the strategy. The author pulls no punches in drawing conclusions applicable to today's digital age, where Julian Assange, proprietor of the WikiLeaks online "dump," may find himself indicted for conspiracy to publish cables leaked by Pfc. Bradley Manning. "Obama is ignoring the Pentagon Papers case at his peril—and the nation's peril," warns Goodale, "It is a case for the ages and matters as much, or more, today."

Unlike England, the United States has no "Official Secrets Act." In England, the mere possession of official secrets is a criminal offense. Our 1917 Espionage Act makes criminal the "communication" of state secrets with intent to injure the United States. The legislative history indicates that Congress did not intend to criminalize the "publication" of state secrets. To criminalize publication would chill the legitimate activities of a free press.

Goodale's book sees publication shortly after the 40th anniversary of Pentagon Papers. The case stands for the proposition that a federal court will not enjoin a newspaper from publishing state secrets, unless the government makes an overwhelming showing that the publication will endanger national security. To enjoin publication is to issue a "prior restraint," which would run afoul of First Amendment values. No federal court in history had enjoined a newspaper from publishing. Every court that has considered the matter has come down on the side of press freedoms.

But the specter of reporters or publishers jailed for investigating, writing or, Heaven forbid, publishing has a chilling effect on news gathering and dissemination of information. Journalism is a dangerous field. Reporters are from time to time jailed or, even worse, killed in the line of duty.

The value of the Pentagon Papers decision surely applies to the new media on the Internet. The New York Times published much of the material originally published by WikiLeaks. It is a stretch, perhaps, to compare a dump site like Wiki-Leaks with the august New York Times, but for First Amendment purposes they are close enough for me to buy Goodale's argument. After all, the First Amendment is all about getting information out to the people, and in today's digital world where so many of us get most of our information from a screen, WikiLeaks fits the First Amendment bill quite nicely.

An important aspect of Goodale's book is an examination of what information is properly labeled "classified." In the Pentagon Papers case, we all learned that the government has a pronounced tendency to overclassify documents that are not secret at all, such as news reports long in the public domain. To prove his point, Goodale draws upon his own military service, where he saw classified "universal source" documents that were well known to the literate public. Often, information marked "classified," is not threatening to national security at all. The truth of the matter is that it is classified, because it is embarrassing to the government.

The New York Times and the Washington Post published the Pentagon Papers, which documented that the government repeatedly lied to the American people about the Vietnam War. The material deposited on the public record was voluminous, largely boring and largely inconsequential. The republic managed to survive. Similarly, the Manning leaks of State Department cables, published by WikiLeaks, proved embarrassing to the government, but fell far short of shaking the foundations. A free press and an informed public are far more central to democracy than protection of purported government secrets. Yes, the government is entitled to its secrets; and the media, if it comes across them, is entitled to publish.

As Goodale contends, Pentagon Papers is indeed a "case for the ages." "Fighting for the Press" is a clarion call to journalists, lawyers and the public that our basic freedoms will not be destroyed with a stroke of a pen, but may be seriously eroded by a cumulation of instances, where there is insensitivity to the importance of the values enshrined in the First Amendment, and the exceptions eventually swallow the rule.

In ruling for the press, the powerful words that survive "for the ages" come not from the Supreme Court, but from Judge Gurfein, who wrote that:

"The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know.

"These are troubled times. There is no greater safety valve for discontent and cynicism about the affairs of the government than freedom of expression in any form."

"Fighting for the Press" packs a real wallop. Sometimes we need to be reminded of basic principles. The book is a legal thriller-diller that does the job exceedingly well.

*James D. Zirin is the host of the cable television program "Digital Age."*