

TRANSCRIPT : James C. Goodale – Annual Silha Lecture, October 16, 2013
Silha Center for the Study of Media Ethics and Law
University of Minnesota Law School

3:30 **Kirtley:** ... Tonight Jim will share his experience and observations about one of the most important cases ever decided by the United States Supreme Court, the *New York Times v. United States* (informally known as the Pentagon Papers case): what are the lessons of that case and what do they mean to us today. Jim will be sharing his observations on that with us. I welcome him, Jim Goodale.

3:44 **Goodale:** Well, Jane says the fun part for her is to introduce me. I don't know why that will be so much fun, but I will tell you the real fun part for me is to give this lecture tonight, because here I wrote this book about something that happened a thousand years ago and all of a sudden in the last six months all the issues in that case, in that general sense, have come to life and have been part of the news cycle. So, it makes it very relevant, it makes the case very relevant and I am pleased to be here and I want to thank the Silha family particularly for having me.

I want to talk tonight about, briefly, I am not going to spend a lot of time on the Pentagon Papers, it happened so long ago, what the lessons of that case are and whether President Obama has learned them. Now, the Pentagon Papers, what were they? Forty-seven volume history of the United States relations with Vietnam, went back to the 1940s, it was a plain old history that Secretary of Defense, then Secretary of Defense Robert McNamara, put together with the aid of PhD scholars. Presumably he never told everybody so he could learn from the history and avoid the mistakes that were made. It was given to the Rand Corporation. Rand Corporation was an advisor to the United States Government and still is. And at The Rand Corporation there was Mr. Ellsberg, Daniel Ellsberg. Now, we may have forgotten about the Pentagon Papers but somehow Daniel Ellsberg is probably known to all of you. He's still around and still talking and he

looked at a copy of the, I don't know which one he looked at, it's forty-seven volumes, something like that, but he looked at it and he really got angry when he saw that the history was a series of lies, and so forth and so on since the very beginning, and that the Vietnam war had been built on a tissue of lies. Now, the important part of the Pentagon Papers for you and for the courts was that the Pentagon Papers were classified papers and, they were classified, not that they were secret, but top secret, sensitive.

[6:20] As I point out in my book, the classification was a mistake, but nonetheless they were classified. He effectively gave those volumes to Neil Sheehan, a New York Times reporter, and Neil Sheehan did a series of articles and the United States Government came in and stopped the publication of those articles and so Mr. Ellsberg, not deterred by that event, gave it to the Washington Post and so they published a couple of articles, and sure enough they were stopped. And undeterred by that he, Mr. Ellsberg ran all over the United States and there were a whole bunch of newspapers that published it, but only two were involved in the case called the Pentagon Papers and that was The New York Times and The Washington Post. The New York Times got stopped in New York as I said, and then in the lower court they won, but in the, what we call the upper court, which would be the Court of Appeals, the next court up the chain, they lost. And the Washington Post on the other hand won below, lets say the trial court, and won on the Appellate level so the two cases came out differently and that was wonderful for the Supreme Court. The Supreme Court loves to take cases where the two courts differ, so the Supreme Court took the case and came out with this decision called the Pentagon Papers case. [7:55] Now, what are the lessons of the Pentagon Papers case. I would say that there are a couple that we can think of. Ignore the First Amendment at your peril and don't buy hook, line and sinker claims of National Security made with respect to any documents that the government has, including and most particularly, the Pentagon Papers case. The First Amendment issue in the case was for some reason, when you go back and look at the government papers, not mentioned, I don't think I have seen it once in the government papers, Pentagon Papers, the First Amendment mentioned. We know what

the First Amendment does, don't we: Congress, we don't talk like that, it's like talking to students. It gives you the right to speak. First Amendment, Congress is not supposed to stop it. That's what the First Amendment is all about ... it does not appear in any of the government papers, and instead, what appears is something called the Espionage Act. Now, the Espionage Act was meant for, guess what, espionage. That is to say, I am in the government, and I give information with the intent to harm the United States, or I give it to a foreign power, that's espionage. But espionage is not a leak from somebody in the government to a newspaper with the intent to benefit the public through that leak, and the Espionage Act therefore is a peculiar piece of law to pick for this situation where you're trying to stop newspapers from publishing, because there wasn't any espionage.

[9:48] And, lo and behold, as the case went up the courts, everyone realized the truth of that statement and the Espionage Act dropped out of the case. What we were left with was the First Amendment and the decision in that case is a famous decision and I say in my book it's a case for the ages because it concluded that unless you can show directly, immediately and irreparably that publication, damages national security, then you lose, and the government lost because it could not make that showing. It is a case I do not think will ever be overruled. Now you might be able to meet that test. It's a hard test to meet but the case has taken on a mythic quality. [10:48] I hate to compare it to Dred Scott, but it's like cases you've heard about before with that famous name. Now, President Nixon ignored, I would suggest, at his peril, all the implications of what I have just said, particularly, the First Amendment implications and I would imagine I bet he wished he never have brought the case because what happened was, when the government tried to try Daniel Ellsberg for leaking, and they tried him on the Espionage Act, the group that Nixon had put together called the plumbers, the plumbers broke into Ellsberg's psychiatrist office and when the judge who was trying him heard about it, he said government's got dirty hands, case over. So, why is that so significant? Because those plumbers did not stop breaking in with Ellsberg, they continued and broke into Watergate, and we all know that Watergate was the end of the Nixon presidency. So,

think of the Pentagon Papers as a case that had the First Amendment in it. Nixon never thought about it. He created a unit that brought him down. Had we not had the Pentagon Papers case as an argument he never would have had to resign the presidency. Don't ignore the First Amendment. If you do at your peril.

[12:25] A second lesson. Do not buy claims of national security made by the government hook, line and sinker. The reason for that is the government is notorious for over classification. That is to say, they classify anything in sight with a stamp. In fact, I used to do this when I was ... I was in intelligence reserve six months, a weekend warrior, and I used to this. I had a stamp "classified". Do you know what I was classifying all the time? Copies of The New York Times. It's a true story, and when I got the Pentagon Papers wheeled into my office on, with those supermarket things. Its forty-seven volumes, six thousand pages, and I opened the first one and I started reading it with the footnotes in the back because it was a scholarly document, what do I find there, New York Times. So that's what sort of led me to conclude that, hey, this has got to be a bunch of balony. The government can't come in and put us in jail, or stop us from publishing something we're already publishing.

[13:40] Obama, we will get to Obama in a few minutes. But Obama a couple years ago classified over seventy million documents. Seventy million documents classified. Can you believe it? And four million people were given access to those seventy plus documents. I would just think with so many people, with so much access to classified material, every time those four million people open their mouth, classified stuff comes out. So, how can we have a system that is built this way. It makes no sense whatsoever. And it is run by the intelligence establishment. I don't have much respect for the intelligence establishment because it is a unitary group which does not subject itself to criticism from people like yourself and they get their own way and I don't like the way they get their own way because they get their own way through misdeeds and lying. [14:56] I am sorry to tell you that so, but that is a central theme, probably the central theme of my book, to describe the misdeeds, in the first instance, that the

government used to get the courts to come to their side of the case. They would say, if you publish a telegram from Lewellen Thompson, who is the Russian ambassador, you will destroy our relationships with Russia. Not true. If you publish a national intelligence of North Vietnam six years old, it's going to be the end of the world. If you say that Australian troops are in Laos, that's going to be very embarrassing and destroy our relationships with Australia. But you know, the government just sort of says this, it is like putting a stamp on it and never tells you why. But when they tell the courts, it scares the hell out of the courts because the courts don't know whether the government is telling the truth or not. And frankly, it scares the hell out of us not because we believe what they were saying, we had no chance to respond. Let me give you an example. At the Supreme Court, at eight o'clock at night, before the argument the next day [16:22] at ten o'clock, the government delivered forty-six such claims like the three or four I have just told you about and said you've got to tell us why these don't damage national security by ten o'clock tomorrow morning. How do you answer that? I mean, we don't, they don't have to prove that it will damage national security. All they have to say is it damages national security and what we have to say is, it doesn't. The only way you can deal with this is that you take a bunch of books and try to find the stuff that has been published before and that sort of gives a lie, which leads me to the last point with respect to why we shouldn't buy government claims hook, line and sinker, and that is, they lie. Now let me tell you what the biggest lie in the Pentagon Papers case is, and we have people here from the law school and I am going to talk about one of the great deans of law schooldom, Irwin Griswold, who is the Dean of Harvard Law School, who became a solicitor general of the United States and was given this case. The government claimed that The New York Times and others by publishing the Pentagon Papers would disclose the fact that the government had broken the North Vietnamese code. Now you're not all intelligence and analysts, but that's a serious claim. If the government could show that was true and could prove it, they might have won the case because that is really big time stuff. Now let me tell you what they did. They took a piece of paper that had a message from the North Vietnamese and the message, according to the government, showed because we

had decrypted it that we know how to decrypt the North Vietnamese code and therefore it was published and that would tell the North Vietnamese and they would change their code, and so forth and so on.

[18:30] The trial judge in The Washington Post case, the judge did not pay much attention, the case is going so fast neither was anyone else, went up to Court of Appeals, same thing happened. Then, this is the sort of thing the government was doing in the case. And this, by the way, all driven by the National Security Agency (NSA). We know about the NSA. I am going to come back to the NSA because I am going to tell you what they are doing today just what they did then. They are lying today too. And so they said, my goodness, let's call up the chief judge and we will have a private hearing even though they've been through appellate process, probably more impressive with lawyers than with non-lawyers. But, you're supposed to go through trial court, appellate court, Supreme Court, but they said, no, we're not going to follow that procedure, we are going to have our own. We are going to see the chief judge, so they go see the chief judge whose name was Bazelon and they bring him to a what was pretty much what was like a birthday cake box with big ribbon around it. They took off the first ribbon and they opened the box. Inside was a smaller box with a ribbon, they took off the ribbon of that and inside there was another box with another ribbon on it, and they took off that and inside they pulled out this piece of paper. They said: look your honor, this shows that the North Vietnamese code has been broken. The lawyer for the Washington Post was disturbed. He had thoughtfully brought George Wilson, a reporter from the Washington Post with him and George Wilson had brought with him a duffle bag full of reference material, and so the lawyer hands it to George, and he says George you better, this one looks bad, and then I talked to George Wilson about a couple years ago. He had an epiphany. Suddenly in front of his eyes he knew he'd seen that document some place before and not only that he knew what the page number was. So he went into his duffle bag and he pulled out, guess what, the Congressional Record. This is a secret document, remember. It's in the Congressional Record. He pulls it out and he gives it to the judge and says, the

Congressional Record. The Judge says, the Congressional Record, case closed. This is ridiculous. Well, that's not the end of it. The NSA later with the case before the Supreme Court goes and sees the aforementioned Griswold. Griswold said what do you think is really bad here and they hand him this same piece of paper and they said, give this piece of paper to the Supreme Court because it will tell the Supreme Court that the code has been broken. [21:23]

Now I think that Griswold knew what Bazelon did. I'm not sure I can totally prove that, but I think he knowingly lied when he gave this piece of paper to the Supreme Court. In any event, the NSA caused Griswold to lie and so what Griswold did was he gave this piece of paper to the Supreme Court – when did he give it. The argument at the Supreme Court was at 10:00 o'clock, he gave the piece of paper to them at quarter of ten and gave a copy to us. What could we do about it? So the paper went in there and the Supreme Court was told effectively, that the code had been broken – a total lie. So therefore, don't buy this stuff from our intelligence corps hook line and sinker – push back. You're going to find out if you push back, it's probably not going to be true and it might even be an intentional lie.

OK, now we've got Obama. Let's apply these two concepts to Obama. Let's do the First Amendment concept first. Don't ignore the First Amendment or ignore it at your peril.

22:39 Now Obama has said some strange things about the Espionage Act. He has said, and I've got it in my book, that the Espionage – any one who leaks, violates the Espionage Act. Now how can someone who is a former constitutional law professor say something that's so stupid. You know, Ellsberg wasn't committing espionage when he leaks the Pentagon Papers and all the other people who have leaked are not committing espionage. They are giving information as whistleblowers, whether you agree with them or not, to the press to publish it. So anyway, that's where he's starting from, and where he has ended up as you have probably heard at the time I wrote the book he had indicted

six leakers – a world’s record. He has now indicted the seventh leaker, and that’s Snowden. Now we are going to come to Snowden in a few minutes (23:42).

In the whole history of the United States before Obama, there have only been three people who have been indicted for leaking. Obama has gone crazy with this and it has created an atmosphere of fear in Washington which makes it very difficult for the press to gather and write their stories. I didn’t make that up, that was the conclusion of the former editor of the Washington Post released last week with the Committee to Protect Journalists’ report saying Obama is very bad on the First Amendment. (24:23) and Len Downie who wrote the report said he certainly is worse than Bush II when he has come right up against Nixon.

(24:38) – Now what else has Obama done? He has pursued James Risen. Who is James Risen? Go read your paper today, he’s in the paper today. I’ll tell you about that in a minute. Risen was given information (24:51) by one of the six people or seven who had leaked about Iran’s nuclear program and he published that information in a book. The government wanted to know who the source of the leak was. The government already knew, and frankly, they wanted Risen to say so. To make a long story short, today, in today’s paper, actually it happened yesterday, after three courts have looked at it, the case, the Fourth Circuit, that’s the Circuit in Virginia said, Mr. Risen you are going to have to fork it over and we agree effectively with a lower court that says any time someone speaks to you, Mr. Risen, you have witnessed a crime. So, just go back to those seventy million documents and the four million people any time [25:54] they talk to anybody the person to whom they talk is committing a crime – makes no sense at all -- but that’s where it stands. Now, Risen has said he will go to jail when push comes to shove so we are going to have a situation where President Obama I think is going to be in the driver’s seat and he is going to be putting in jail a reporter who reported on information with respect to the Iranian nuclear program and I would think it stands a good chance of being one big hullabaloo. And, by the way, Risen is not any old reporter. Risen is the one who first broke the NSA story. Now, we think of Snowden as

the person who broke the NSA story but Risen told us all in 2007 about what the government was doing and he won a Pulitzer prize for it. So, think of Obama who is going to be prosecuting the person who first told us about NSA – not a good position for Obama to be in.

The other thing that, two other things [27:15] on the First Amendment front that went on at the time – I'd have to go back to the time when I published the book which is April 1st – which were as follows:

Reporters want to have their sources protected by a shield law it's called and Obama was a big supporter of reporters who wanted to have their sources protected and supported a very good shield law, but when he became President of the United States he said I am only for the shield law if it doesn't apply to people who have national security information. I am only for the shield law if it doesn't apply to James Risen, a huge hole in it and he did that because he thought national security was more important than the First Amendment rights of say, a James Risen.

[28:10] The fourth think he did, and for me, is the most important. I've got sort of two purposes of writing the book to tell you don't believe the intelligence establishment because they like and mislead and I show it and I want people to be part of that conversation. The second reason I wrote the book is to issue a clarion call to all of you and to reporters that Obama is going to cause a lot of trouble if he prosecutes Julian Assange. Now Julian Assange is not the most popular person in the world and he's sort of been out of the news, but not for long. Friday his movie comes out, right. So Julian Assange is back in the news, but where has he been? He's been in the Ecuadorian Embassy, you may remember, holed up for over a year and the British Government is right outside the Embassy. It's costing millions of dollars or pounds for the British Government to maintain a guard around the Ecuadorian Embassy. As soon as Assange steps out they are going to grab him and he's supposed to go to Sweden and everyone says that that's just a short stop. First stop Sweden, back to the United States. Okay, so

what [29:31] faces Assange back in the United States? There has been a grand jury convened to look into Assange and what he did for the longest time and it's still alive. I think there's a fifty percent chance that Assange has already been indicted. Okay, you may say, so what? He should be indicted, WikiLeaks leaks is too much of a bad thing and hardly anything of a good thing. What is WikiLeaks? It's a website that's run by Julian Assange. How did it become prominent? Because Private First Class Manning who was the leaker leaked to Assange a whole bunch of documents that Manning had access to. Please note, Manning the leaker, Assange the leakee. Assange is not a leaker, he is the leakee. What did Assange do? He, with advice of counsel probably, I would suggest, he took everything he had and gave it to The New York Times, Spanish paper, El Pais – I don't pronounce that correctly – The Guardian, La Figaro and a German paper, which name now escapes me. What they did was they edited it and published it. They published – people forget – all those papers published before Assange did. Then what did Assange do? He published what they published. Thereafter, Assange published and he published some more, and thereafter he let out everything that he was holding within because someone stole his password and they were dribbling it out. So he said hell and so he left everything out. But now, as lawyers say, *ab initio*, that is “at the beginning” Latin., at the beginning the Assange website was very much the same, identical to The New York Times, so therefore if the President prosecutes Assange, it's the same as prosecuting The New York Times, [31:44] and therefore, if he wins his suit against Assange then that means all publishers everywhere, and by the way, it probably includes all of you, many of you, because we are all publishers because many of us have websites. The government can go after people such as The New York Times or others and criminally prosecute them. That has never happened before in the history of this country. What happened after the Pentagon Papers case was that Nixon tried to prosecute The New York Times. People have forgotten about that. I have, I think, an informative chapter in my book that describes that ancient history but he gave up on it after eighteen months because it was such a mess. A couple of the people he went after went to the Supreme Court, it went on and on. He gave up. I actually tried to figure out why he gave

up and I called one of the lawyers and said, “Why did you give up?” He slammed the phone down in my face. So we don’t know why Nixon gave up, except the important thing is he gave up. Okay, so if Obama succeeds in his prosecution, he will succeed where Nixon has failed and therefore I would argue he is worse than Nixon. Now, when some of the major press read that statement – O they loved it, particularly Fox News – and I ended up, if I could brag a little bit, with over fifty interviews on either radio or TV because of that statement. I must say I am so impressed with the Twin Cities because I have had such great interviews here, but it all started back then so that’s – I think that’s bad enough but after I wrote the book it got worse. What happened was [33:46] a story broke about Associated Press and a subpoena that had been issued to Associated Press behind the back of Associated Press. The guidelines that are in place before with the government, which say if you are going to subpoena the press you get sources, let them know in advance so they have a chance to argue about it. No, Obama’s Justice Department went right behind everyone’s back and got the information they wanted by going to a telephone company provider and getting all the sources of AP. That was bad enough. Then it turned out they had done something nefarious with respect to a Fox News reporter whose name was Rosen, and Rosen had been talking to a Korean about a Korean source about North Korea’s atomic program and the government wanted the source of Rosen’s information and they said to the Court, listen we can get what we want about Rosen because he is a co-conspirator. Now, wait a minute. Rosen is a criminal? And this is after I said in the book that look, what does Obama want to do, he wants to criminalize the press, so Fox News got very excited about this and everyone else did too that Obama wants to criminalize the press and so that was bad enough. But guess what. It’s not going to get any better in my humble opinion. One, because I think there is a good chance that Risen’s case is going to be out there before Obama ends his presidency. I have told you about how that is going to break, but there is also sitting out there another case involving a New York Times’ reporter named David Sanger. David Sanger has information about another Iranian program. His source apparently is someone named James Cartwright. James Cartwright has been told he is the subject of a grand jury

investigation so I would think there is a good chance that Cartwright is going to get indicted and then they're going to start chasing Sanger so I don't see any end in this First Amendment fracas that Obama stirred up and I would suggest that he has probably ignored, therefore, the First Amendment at his peril.

[36:29] Now, how about the NSA. Let's talk about Snowden. Okay, let me give you my position on Snowden. I think that Snowden has done a public service because, thank you, you know it's very interesting, I have given my Snowden views to other group and there has never been a time when I didn't get some applause. I am somewhat surprised about that and gratified, because I think it's worthy of applause that he has created a debate that Obama asked for. If we did not have Snowden, we would not have the debate. On the other hand, he is a civil dissident and a civil dissident has to accept the risks of disobeying the law which is to face the punishment. I think that Snowden made a big mistake in going to Russia, because if he is a whistleblower we don't want our whistleblowers protected by Russia. That is just bad, and he should come back and face the music.

He did give us information about two programs. Very simply they were like this. One was a prison program that deals with those who call or have internet communication with foreign sources, and secondly, he disclosed a metadata program. It's this latter program that's caused all this controversy. Metadata is a big word, but all it means is information about when you made a call, to whom you made the call, where the call was made and underlying calls that may relate to all of that. It is thought that the government has metadata on all of you, and that the total amount when you add the underlying calls comes up to three billion pieces of metadata. Now, this program seems to me to be unconstitutional but what did Obama do? [38:40] As soon as the story broke he went on Charlie Rose and he said the program is totally constitutional and no one has abused any of the authority given them. But, when in fact we checked or the press checked with the people who invented the program, one of them whom was James Sensenbrenner, who comes from this part of the country I understand, not Minnesota but Wisconsin. He is a

conservative who sponsored the Patriot Act. He was upset that the government had taken his program and gone ahead and made it so that it applied to everybody in this room and everywhere else. He said that is not what I intended. I want to get this program amended. Now, what did the NSA do? Well, the NSA was reacting to two things when this story broke. First was earlier disclosures by Risen and in this connection the Director of the National Intelligence and Mr. Alexander, who is the head of the NSA, testified before Congress and they were asked, "Do you have a metadata program?" They said, "No, we don't have a metadata program". Later they said they had lied. Alexander said, "Well, it's the least untruthful statement I could think of". Now, you can see that I have a partisan view with respect to what I have said, but there are arguments the other way around. I would like to think that we would all agree that when a public official lies to Congress under oath, he has to face the consequences, but nothing has happened to Alexander or his peer who runs the DNI. And frankly, I think that's outrageous because the culture of lies and deceit which I pointed out to you had existed at the time of the Pentagon Papers, no question about it, has continued [41:19] and becomes part of our culture. We expect our intelligence agencies to lie and deceive to the enemy, but we are not the enemy and how are our children going to grow up, if in fact, they grow up in a culture of lies and deceit. I used to be a youth hockey coach, believe it or not, and every youth hockey coach has that session where you put your knee down, and the kids come in and put their knees down, and you try to give them some sense of values. There is always one kid who is smarter than the others who says, "How about Alexander who lied to the NSA if we are not supposed to?" How do you answer that? I really think that what they've done is a disgrace and I think I am right to get a little bit angry about it. I try not to get angry when I give a talk like this but this part makes me angry. Okay so, what is Obama going to do now? He's got a program which he's defended, which he says there are no abuses in connection with it. How can he say that when he has two of his officials who lied to Congress. Isn't that an abuse.

More to the point, [42:45] another story broke at about the time the disclosure of Snowden, that two courts, they're called FISA courts had NSA lawyers, Department of Justice lawyers, to appear before them and those lawyers lied also. In one case the court said three times and in the second case, two times. Now, nothing has happened to those lawyers, so if you want to add up all the lies that we've got here today, we've got the two that I've talked to you about, plus the five I've just mentioned, there are seven lies by the NSA and nobody is doing anything about it. Can we expect that Obama will do anything about it? I wouldn't think so. What is he going to do? He's got a program as I said he has defended but now it looks like Congress is going to amend it. So, is he going to support that amendment? I mean he's in a sort of an embarrassing spot. Now, what we could expect out of Obama is that he would tone everything down, push everything back, and for example, stop the Risen case from going forward, stop the Assange case from going forward, stop any other cases that he has brought that involved the indictment of leakers, support a shield law that doesn't have a great big gaping hole in it. All of these things Obama could do, and particularly, not to bring the Assange case. But I would like to suggest to you, I don't expect Obama to do that. Every instance that I have given you tonight and every instance I know about, Obama has chosen to favor national security over the First Amendment. But isn't the lesson of the Pentagon Papers case just the reverse, that the First Amendment trumped the national security interest. And so I ask you, "Has Obama learned that lesson or has he been hornswoggled and swallowed hook, line and sinker about a national security?" I would suggest the latter. President Obama has not learned the lessons of the Pentagon Papers case. [45:40]