

A Review Of “Fighting for The Press: The Inside Story of the Pentagon Papers and Other Battles”

By Janyce C. Katz

To some of us, the Vietnam War is a distant historical fact similar to World War II, because it happened before we were born or before we truly understood world events. Others vividly remember the anti-war marches, the pro-war speeches and the news coverage of the Vietnam War through the entire era up until President Nixon resigned on Aug. 9, 1974.

For almost all of us, the word Watergate now connotes the scandal surrounding the White House-orchestrated break in of the National Democratic Party headquarters rather than an expensive condominium complex on the Potomac next to the Kennedy Center.¹

And the words “Pentagon Papers” have come to mean either a fight for a free, responsible press able to publish important information without prior restraint or a wanton display of secrets endangering our security.

What has become known as the Pentagon Papers was a secret history of the Vietnam War commissioned by then Secretary of Defense Robert McNamara and officially titled “Report of the Office of the Secretary of Defense Vietnam Task Force.” The history, completed in 1969, consisted of 47 volumes – 3,000 pages of history and 4,000 pages of documents that had been classified in the archives of the Departments of Defense and State and in the Central Intelligence Agency. Some of these documents and the history itself showed a path to war with Vietnam that differed radically from what had been publicly stated.

New York Times Co. v. United States, 403 U.S. 713 (1971) was one case that emerged during this tumultuous time, based upon Nixon’s use of the Espionage Act to enjoin first The New York Times’s and then The Washington Post’s publication of the Pentagon Papers. Perhaps because the argument of the government changed, as did the standard requested to prohibit publication, six justices in a per curiam opinion held that the government did not overcome the “heavy presumption

against” prior restraint of the press. This case was just one of the major cases that arose out of the Vietnam/Watergate/Nixon era.² In part, the Times case arose because of Nixon’s strong anti-press, especially anti-East Coast press, bias.

While a book containing the part of the Pentagon Papers printed in the newspapers was published in late 1971, the entire 7,000 pages was released to the public on the 40th anniversary of its publication. Now, it is possible to read on the Internet evaluations of some of the material then called classified. The U.S. government’s attorneys introduced some of these documents as new evidence at both the court of appeals and the Supreme Court as factual proof that the newspapers should be enjoined from publishing the Pentagon Papers.³

Even with the era being old history discussed in other books and with almost all the material in the Pentagon Papers being Internet accessible with the swish of a mouse, “Fighting for the Press” should be read. Not only does it give the inside “scoop” of the events leading to the Times case, it also raises issues that are important now.

One such issue is what exactly is considered “classified” by the Departments of State and Defense and at the CIA. Even today, when some in Congress argue certain emails should have been treated as classified but were not, the question “what is stamped classified as opposed to what should be stamped classified” is pertinent.

In the book, Goodale discusses a problem he encountered when researching whether the Espionage Act applied to publishing the part of the Pentagon Papers held by The New York Times. The documentation for the 3,000-page narrative included newspaper articles based upon stories leaked in an attempt to change policies grouped together and stamped “classified.” He also found a memo previously leaked and published several years earlier classified as one of the secret documents in the Pentagon Papers. Later, during the court cases, the government argued that the

publishing of this memo, already in the public arena, would be detrimental to U.S. security.

Goodale raises the issue of where the line should be between the need to protect important secrets to safeguard national security and the need to inform the general public about issues, to allow people to make wise decisions when voting and when supporting governmental policies. He believes not every document should be made public, a la WikiLeaks, but that the standard to bar publication should be extremely high.

James Goodale, formerly the vice chairman and general counsel of The New York Times, had a career many of us can only fantasize. As a young lawyer, he had “enormous responsibility” at Lord, Day & Lord, working on cases like *Sullivan v. New York Times*, 376 U.S. 254 (1964), which established the actual malice standard for liable cases involving a public figure. He was in the right place with an impressive resume when The New York Times wanted to hire a younger chief counsel. He was hired and went on to build up the paper’s legal department.

When The New York Times was given access to the Pentagon Papers, Goodale strategized how the paper could publish the documents by interpreting the wording of the Espionage Act against enjoining the printing of the papers. Not only did he develop a winning strategy, but when Lord, Day & Lord’s most prominent lawyers advised The New York Times to avoid printing the Pentagon Papers, he prevailed over them. Imagine standing up to a firm’s most prestigious partner, who is also the president of the bar, and successfully implementing a strategy you believe in but that the partner argued was totally wrong. Imagine doing that and remaining employed.

After deciding the Times case, the Court’s membership changed. The Court decided another important free press case, *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the 5-4 majority invalidated the use of the First Amendment’s press clause as a defense

for reporters summoned to testify before a grand jury. In his opinion, Justice White recognized the importance of a free press and established a test outside of an absolute protection privilege for deciding whether a reporter can be compelled to testify before a grand jury. To subpoena a reporter's notes or a reporter, the government had to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." One of the three cases combined in this decision involved a reporter for The New York Times, whose early defense Goodale had strategized. After the case, Goodale organized a group of attorneys, publishers, editors and reporters to fight for press freedom.

Goodale's book doesn't stop at the day Nixon waved "bye" from the plane as he left the presidency and flew back to California. He talks about the post Sept. 11 world, a time when he describes a press that had come full circle and President George W. Bush, who began a new war against the press, reviving the use of the Espionage Act in the process. While he found Bush's motives to be different from those of Nixon, he thought the impact on press freedom was the same. As for President Obama, who had argued in favor of shield laws for reporters in his 2008 campaign, Goodale believes once in office, Obama picked up where Bush left off.

Goodale, absolutely charming and highly articulate in person, comes across as extremely self-confident in the book and assumes that the reader not only knows the issues and the players he discusses but also cares about having a strong, free press. For that reason, before picking up "Fighting for the Press," one should have a basic understanding of the history of the Vietnam War period. Then, Goodale's descriptions of the actions of people, the history of the publication of the Pentagon Papers and the strategy to win the court cases read like a novel. His arguments in support of free press are also quite understandable, whether or not the reader agrees with them. I found the book not only an important contribution to the literature of the era but also a fascinating, worth-while read.

¹ In fact, the word "gate" is perhaps too often tacked onto other descriptive

nouns to symbolize a disgraceful event with political undertones.

² Another critical case, *United States v. Nixon*, 418 U.S. 683 (1974), qualified executive privilege and allowed a subpoena of tapes for which Chief Justice Burger, writing for a unified Court, also held that there was sufficient likelihood that conversations on the tapes would be relevant to the charges against the Watergate Seven (several "burglars" and a few top White House staff members. But for the publishing of part of the Pentagon Papers first by The New York Times, then by The Washington Post and when they were enjoined, by other papers, in all probability, White House-connected burglars would not have broken into the office of military analyst Daniel Ellsberg's psychiatrist. The burglars were looking for evidence to use in the trial against Ellsberg, who had worked on the study, for leaking allegedly classified documents. Possibly, but for the publication of these papers, "burglars" would not have been looking for whatever at the Democratic Party headquarters in the Watergate. Or, possibly in a pre-everything available on-the computer

era when campaign funding could arrive as cash stuffed into suitcases, some would have considered such a "burglary" to be part of a normal campaign strategy.

³ See, e.g. <http://www.history.com/topics/vietnam-war/pentagon-papers>; <http://nsarchive.gwu.edu/NSAEBB/NSAEBB48/secretbrief.html>. Last visited July 31, 2015.



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These are a sampling of some of our recent results.

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