

# Why the fight goes on

*Alan Rusbridger*

*Fighting for the Press*, by James Goodale  
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In mid-July 2013 the British government decided that there had been “enough” coverage of the issues raised by Edward Snowden and made it plain that if *The Guardian* did not either return or destroy the documents leaked by the former NSA analyst, we could expect to end up in court. The threat was explicit: that the state would go to law to prevent any more disclosures. The stiff name for this is ‘prior restraint’. More straightforwardly, it is censorship.

Such injunctions are less rare than you might think. In recent years *The Guardian* has also been prevented from publishing material relating to tax avoidance by banks and allegations of toxic dumping by multinationals. A phone call to an out-of-hours judge can be all it takes. A newspaper may have to risk huge costs – and face the delay of lengthy hearings and appeals – in order to win the right to publish. Three-and-a-half centuries after John Milton railed against it in *Areopagitica*, we have still not managed to ditch the notion of prior restraint in the UK.

With the Snowden documents in 2013 *The Guardian* had a cheaper and more effective solution to the problem of British censorship: we would transfer all our reporting to the US. There would, I was assured, be no risk

of *The Guardian*’s offices being raided – still less *The New York Times*, where the documents were by then being housed.

Around this time Harry Evans – who fought his own battles over Thalidomide in 1972 – recommended that I should read a book by the *NYT* lawyer who had led that newspaper’s fight to publish the so-called *Pentagon Papers*, a trove of documents leaked in 1971 by a former defense department employee, Daniel Ellsberg. He thought I might see some parallels.

There are many. A whistleblower is shocked by highly classified material he reads in the course of his work. He takes a large quantity of top-secret documents to (more than one) newspaper. The government responds with the threat of prior restraint. The newspaper is accused of treasonous, unpatriotic behaviour and of endangering national security. Politicians are deployed to denounce the editor and reporters. The police are called in.

I would guess almost no one today thinks the *NYT* was wrong to publish the *Pentagon Papers*, which showed a pattern of official deceit about the Vietnam War. But then – as with Snowden – there was an animated debate about the responsibilities of

journalists when handling and publishing secret material. Nixon's chief of staff, Alexander Haig, described the leak as "a devastating... security breach of the greatest magnitude of anything I've ever seen". Nixon did not need much persuading to go after "the bastards" at the *NYT*. They had shown "disloyalty to the country".

And so it was that the Supreme Court had to decide whether publishing the documents was in the country's interest and whether publication was protected by the First Amendment. It was almost certainly the first time in American history that a federal court had been asked to injunct a newspaper. Goodale had been the *NYT*'s chief counsel for eight years and led the defence of the paper's reporting. Such cases can be years in the preparation. Because of the swirling controversy over the case – and the fact that other papers had started to publish the Ellsberg material – Goodale had nine days.

Long story short: the *NYT* won. During the course of the various hearings on the way to the victory a number of judges wrestled with the issue of whether there could ever be circumstances – revealing the movement of troop ships? – where the secrecy of material warranted prior intervention by the courts. "I wanted a standard that came closer to a global disaster that inextricably would result from publication of the secrets of the hydrogen bomb," writes Goodale. "I wanted to set an extraordinarily high standard so that it would be almost

impossible to censor the press. A free press is the backbone of a democracy."

He got his wish, with the court supporting a standard that protected the press unless a proposed story threatened "direct, immediate and irreparable damage to our nation or its people". Two of the Supreme Court judges went further, believing the First Amendment to be absolute. Justice Black wrote: "In revealing the workings of government that led to the Vietnam War, the newspapers did precisely that which the founders hoped and trusted they would do."

The majority 6-3 decision by the Supreme Court echoed some of the language of a judge in an earlier hearing: "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."

Goodale, now 80, tells the story vividly and briskly. Later chapters sketch in the subsequent battles between American administrations and the press, not all of them encouraging from a press point of view. The decision to publish the *Pentagon Papers* was not an easy one – especially given that the *NYT*'s external lawyers warned against it. The reporting, editing and legal fight took some courage, but the case established a crucial principle. "It is a case for the ages," says Goodale. He's surely right.