Columbia Journalism Review.

Will the Press Fight Like Tigers Against Trump?

From criminal subpoenas to the Espionage Act, the next administration is likely to crack down on journalists. How we respond depends on the courage of media owners.

JANUARY 17, 2025
By **JAMES C. GOODALE**

Pexabay / AP Photo / Illustration by Katie Kosma

The last time an administration declared war against the press was when Richard M. Nixon was president. The press won that war because it fought like tigers. Will it do it again this time against President-elect Donald J. Trump?

The phrase "fighting like tigers" comes from a speech that Judge Harold R. Medina of the US Court of Appeals for the Second Circuit gave in 1975 at a meeting in the ballroom of the Waldorf Astoria that I organized. That was some time ago, but history has a way of repeating itself.

It was an easy sell to those lawyers then. In a short period of time, the *New York Times* had won landmark cases on libel and prior restraint and carved out a reporter's privilege of sorts. Now Trump has indicated a desire to overturn some or all of these cases. Does the will to resist exist?

A recent settlement by ABC News and its parent, the Walt Disney Company, in a libel case brought by Trump in the amount of a $15 million donation to Trump's presidential library, plus an additional $1 million for legal expenses, would seem to suggest the contrary. Admittedly it is very difficult for an outsider to be critical of a settlement of a libel case because an outsider can never know precisely what motivated the settlement. But an educated guess is that ABC News folded.

In that case, George Stephanopoulos repeatedly stated that Trump had been "found liable for rape" during an on-air segment of his show *The Week*, relying in part on a *Washington Post* story about the civil libel suit against Trump brought by E. Jean Carroll. In fact, the newspaper reported that Trump was found to have penetrated her digitally rather than to have committed the crime of "rape" as defined under New York law, which requires vaginal penetration. And so Trump, in the common-law (old-

fashioned) sense of libel, was "defamed" because Stephanopoulos did not speak precisely.

But the definition of libel as applied to public officials changed sixty years ago, when the Supreme Court took up the 1964 case of *New York Times v. Sullivan*. Public officials now had to prove that the defendant "knew" the statement in question was false before they could be found responsible for libel. Since the Supreme Court held that the Alabama courts in *Sullivan* had not found this to be so, their ruling was overturned, saving the *Times* from legal responsibility. The case was later dismissed.

To prove that a newspaper "knew" its statement was false and defamatory, it had to be shown that someone at the newspaper "entertained serious doubt" about the alleged offending statement. In this case, Stephanopoulos's statement that Carroll was raped was based in part on reporting from one of the nation's leading newspapers. It is hard for me to believe that anyone would think Stephanopoulos entertained serious doubt about the truth of his statement, however imprecisely he described the details.

But then again we do not know everything that ABC knew about the state of mind of Stephanopoulos when he made the statement. It may be that Stephanopoulos expressed reservations, and it may have been feared by ABC News that his statement

would become public. I do not believe this is so, but it's not inconceivable.

In any event, we will never know what Stephanopoulos knew, because ABC News decided to settle the case before he could testify in pretrial proceedings. ABC News tried to dismiss the case with no help from Stephanopoulos's deposition, which ABC News effectively decided to forgo before moving to dismiss the case early.

This tactic (trying to dismiss a case early) is frowned on by some libel lawyers (but used by many of them) because it can get rid of a libel case at minimal expense. It is less useful, however, if you lose—which ABC News did. In that event the case continues on, costs mount, and you come off as a loser.

ABC News must have figured that the cost of the deposition, the cost of a trial, and the "cost" of having Trump in its hair was worth the $15 million-plus it paid to settle. It may have figured that there was a risk Trump would retaliate by trying to revoke local ABC News stations' licenses (which at a minimum would mean more legal expenses).

ABC News also said in a statement that it was concerned Trump might appeal the case, if he lost, to the Supreme Court, where there are at least two justices—Clarence Thomas and Neil M. Gorsuch—who have indicated a wish to overturn the *Sullivan* precedent. Indeed the conservative movement as a whole has indicated that a reversal of the case would be in order, however unlikely that may be.

In any event, running these kinds of risks and assuming the cost of legal defense is part of the

press's obligation under the First Amendment. Defending it should not be measured by dollars and cents. It creates a scenario in which all Trump has to do is threaten a libel suit to kill off a story. Before Trump became president, he used this tactic with growing frequency in New York State courts (I was once on the receiving end of such a suit). It is hard, however, to recall any victories for Trump using this tactic—because the press fought like tigers.

After Nixon came into office, in 1969, his initial volley against the press involved an effort to subpoena journalists to disclose their sources. His first opponent was Earl Caldwell, a *New York Times* reporter (one of only a few African Americans at the time) who was then covering the Black Panthers. I was the lawyer for Caldwell and the *Times* in this case. The Supreme Court split on this case by a vote of 4–4–1, the one being Justice Lewis F. Powell. Powell's opinion permitted protection of sources in some circumstances: if, for example, the press could show harassment by a subpoenaing party, that subpoena could be dismissed. Under that precedent, if Trump were to harass the press and subpoena a reporter as part of such harassment, the harassment defense could be available—that is, if the press decides to resist rather than comply.

Since Judge Medina's exhortation, the press and its lawyers have made heroic efforts to prevent reporters from disclosing their sources. At the state level, press lawyers over the years have succeeded in persuading legislatures and courts to adopt a qualified privilege for reporters not to disclose sources. The tally today: forty states have adopted such a privilege through legislative action, while nine of the remaining ten

have adopted it through court decisions. While this is an amazing record, it speaks only of state courts, where Trump has no sway anyway. The Justice Department, and Trump as president, are limited to bringing cases in the federal courts. In these courts, the press has good defenses for defending sources in noncriminal cases (according to the Reporters Committee for Freedom of the Press). But in federal criminal cases, other than proving harassment, the press has fewer tools at its disposal.

It is expected that one of the first actions Trump's Justice Department will take will be to revoke the 2022 departmental guidelines that limit the government's ability to subpoena the press in all cases, including criminal cases. Attorney General Merrick B. Garland adopted these guidelines to protect the press from having to unnecessarily disclose sources in criminal cases. This should provoke a fight with the press to retain at least some of the guidelines. It is possible that at some point during the Trump presidency there will be a repetition of the Judith Miller case, in which a reporter is sent to jail in a criminal case for refusing to disclose their sources. But will the press band together to fight this action?

Will Trump try to overturn the Pentagon Papers case? I don't think so. From what I read of the conservative literature, by and large it indicates that the government's inability to stop publication before it takes place is seen as enshrined in that case.

It is important to distinguish what the government sought to do in the Pentagon Papers case and what

Trump may try to do now. The Pentagon Papers case was a civil case; no juries were involved, just judges who were asked to stop publication, not to penalize it.

What Trump may try to do now is to criminalize the newsgathering process. First he will prosecute leakers, and then leakees (reporters), and finally publishers. All these prosecutions will take place under the Espionage Act.

Julian Assange pleaded guilty to a charge of conspiracy to obtain and use classified information (he did not plead guilty to "publication," although he was indicted for it). This plea is not a binding legal precedent on anyone other than Assange. In a blockbuster article, however, published on October 22 by the *Columbia Journalism Review*, Kyle Paoletta argues that under the theory of the Assange plea, courts might now convict reporters for receiving and using classified information.

The US press only has itself to blame for finding itself in this position because of its lukewarm support of Assange (and, incredibly, actual opposition to Assange by some press freedom groups).

Only two prosecutions under the act have ever been brought against publishers for publishing classified information: a case against the *Chicago Tribune*, which the government lost, during World War II, and the case against Assange. Immediately following the Supreme Court's decision in the Pentagon Papers case, the Nixon administration convened a grand jury to indict the *Times* for such publication but later thought better of it and dismissed the grand jury.

When the Pentagon Papers case got to the Supreme Court, several justices thought the act could be applied criminally to newspapers, but their thoughts never officially became part of the case. Their comments were what lawyers call "dicta" (musings about the law) and not part of the decision in the case.

It is an open question, therefore, whether the Espionage Act can be used criminally against the press for the publication of classified information.

A fight over whether the Espionage Act applies to the press criminally must be won by the press because if it loses, as a practical matter it will overturn the Pentagon Papers case. This is because today, with the speed of the internet, classified information will likely be published before it can be stopped. And so the only option the Justice Department may have will be to prosecute criminally that which has already been published.

One last point—rarely raised by commentators—is that in the Pentagon Papers case a federal trial judge, Murray I. Gurfein, ruled against the government in its effort to apply the Espionage Act to the *Times*. It decided the Espionage Act was not intended to apply to the press. The case thereafter proceeded solely on the basis of the First Amendment and not the Espionage Act. Gurfein's decision that the Espionage Act was inapplicable has never been tested (although a Virginia court in the Fourth Circuit seemed to disagree with it), and so the argument that the act was intended only for espionage and not for publication by the press might still be viable.

Will the press come together to fight all these threats to the First Amendment? A lot, obviously, has changed since the days of Nixon. Back then it was easy to have everyone on the same page, because the *Times* was the only press entity involved.

But today even the extraordinarily talented nonprofits that have sprung up in the wake of the *Sullivan,* Caldwell, and Pentagon Papers cases cannot agree among themselves. For example, in the TikTok case, which is clearly much like the Pentagon Papers case (both involve prior restraint), none of the amicus briefs for the nonprofits use the Pentagon Papers example as the basis for their arguments, and at least one nonprofit doesn't refer to it at all. More to the point, TikTok itself did not use the case to its advantage.

It's going to be hard to take on a unified aggressor (Trump) unless the press and its allies unify. When Judge Medina said "fight like tigers," please note he said "tigers," not "tiger." It won't do for one media

> company to take on Trump by itself and then settle unilaterally, as ABC News did—the press must stick together and fight like tigers.

James C. Goodale is a former vice chairman and general counsel for the *New York Times* who represented the paper in four cases before the US Supreme Court. He is a retired partner at Debevoise & Plimpton and the author of *Fighting for the Press: The Inside Story of the Pentagon Papers and Other Battles* (2013).