


FIGHTING FOR THE PRESS

THE INSIDE STORY OF THE
PENTAGON PAPERS
AND OTHER BATTLES

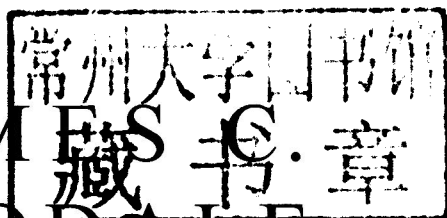


JAMES C.
GOODALE

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIRST AMENDMENT, UNITED STATES CONSTITUTION

To my wife Toni, Ashley, C.J., Tim, Clay and Ricki and the next generation: Will, Lizzy, Paloma and Celeste.

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PREFACE

I have been saving the inside story of the Pentagon Papers for the right time. That time has come. The WikiLeaks matter has made the Pentagon Papers case more relevant than ever before.

When the *New York Times* published the Pentagon Papers, it was accused of treason, damaging national security, and violating the Espionage Act. All these claims are being made against WikiLeaks and other whistleblowers and leakers today. The First Amendment was under attack then, and it is under attack today. The principles underlying the great First Amendment victory the *Times* won for the press in the case of the Pentagon Papers should protect reporters and the news media today.

But to understand what the Pentagon Papers were all about, it is important to know what actually happened inside that story and inside the *New York Times*.

That case came in the middle of Nixon's war against the press—a war that began before Nixon was elected and continued through his presidency. His vice president called the establishment press “nattering nabobs of negativism.” His attorney general tried to jail *New York Times* reporter Earl Caldwell. And that was before the Pentagon Papers. But the pressure on the press did not end when Nixon resigned. Reporters went to jail for decades after. And succeeding presidents have tried to use the Espionage Act to stifle free expression.

The Pentagon Papers case was especially sensitive because it came in the middle of the Vietnam War. On its front page of June 13, 1971, the *New York Times* published a series of Defense Department documents and other information that was classified top secret, which outlined U.S. government policy on the war in Vietnam. These documents (the “Pentagon Papers”) had been leaked by Daniel Ellsberg, a researcher who had access to the Pentagon Papers at the Rand Corporation, a think tank serving as a consultant to the Defense Department. Ellsberg passed the documents to reporters at the *Times*.

There followed a period of intense debate, carried out in the board rooms of the newspaper, the offices of its legal counsel, and ultimately the law courts of the nation. The questions were clearly defined: whether publishing these documents

would be in the country's interest, and whether their publication was protected by the First Amendment. On June 30, 1971, the Supreme Court decided the First Amendment protected their publication. This decision was the first of its kind by the Supreme Court, and put new weight behind freedom of the press.

This is the story of those weeks in June when the press's freedom of speech came under its most sustained assault since the Second World War. It is also the story of efforts by the government to silence the press since that time, and the response of the press to those efforts.

Beyond the inside story of the Pentagon Papers, this book will look at the freedom of the press today. In many respects, President Obama is no better than Nixon. Obama has used the Espionage Act to indict more leakers than any other president in the history of this country. His Justice Department is threatening to indict Julian Assange. Obama is ignoring the Pentagon Papers case at his peril—and the nation's peril. It is a case for the ages and matters as much, or more, today.

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CHAPTER I

THE OTHER STORY THAT SUNDAY MORNING

On Sunday June 13, 1971, a story was published on the front page of the *New York Times* under a three-column headline: "Vietnam Archive: Study Traces 3 Decades of Growing U.S. Involvement."¹ I thought it was the most boring headline I had ever read; no one would read this article.

It was the first installment of the series of articles that became known as the Pentagon Papers. When we published it, my colleagues at the *Times* and I had been expecting all hell to break loose. It was the first article in a planned series based on leaked Defense Department documents showing decades of deception and duplicity: how the American people had been misled about our involvement in Vietnam. But with this boring headline, I wondered if all our expectations of a huge explosion following publication would be wrong. All that day, I kept waiting for the other shoe to drop, but it didn't.

Indeed, the nation's press on that Sunday was more interested in Tricia Nixon's wedding the previous evening. I had watched excerpts of it on TV. I noted with interest some of the high-placed dignitaries who were there, and wondered how they would react to the bombshell story right there on the front page the next morning, next to coverage of the wedding.

I took a radio with me out to my dock on the lake next to my house and turned it to the news stations to see what sort of commotion the publication had created. None to speak of. The news broadcasts were all about Tricia's wedding, with a word or two about the *Times'* publication of a Vietnam archive.

The White House had no reaction. President Richard Nixon had not even read the article. Attorney General John Mitchell hadn't read it either. The headline, apparently, had put everyone off.²

General Alexander Haig, the president's deputy national security adviser, *had* read it, however. He reached Nixon in the afternoon to discuss the progress of the Vietnam War. Nixon asked him, "Is there anything else going on in the world today?" to which Haig replied, "Yes sir—very significant—this, uh, goddamn *New York Times* exposé of the most highly classified documents of the war."

In his phone call with Nixon, Haig called it, “a devastating...security breach of the greatest magnitude of anything I’ve ever seen.”³ Nixon was much more worried about the leak than the story. He suggested an easy solution: he would just start firing people at the Department of Defense—whoever could be held responsible.⁴

Secretary of State William Rogers was next to call Nixon. Their conversation was mostly about the coverage of Tricia Nixon’s wedding.⁵ Admitting that he hadn’t read the story yet—wedding coverage was a higher priority—Nixon brushed it off as a story about the former administration of President Lyndon B. Johnson, not his. A few minutes later, Henry Kissinger, Nixon’s national security advisor, called the White House. Perhaps Nixon had read the story by this time. He agreed with Kissinger that printing the Pentagon Papers was an unconscionable thing for a newspaper to do. “It’s treasonable, there’s no question—it’s actionable, I’m absolutely certain that this violates all sorts of security laws,” Kissinger said.⁶ He told Nixon not to ignore the story: “It shows you are a weakling, Mr. President.”⁷ Nixon told Kissinger to call Attorney General John Mitchell to discuss what to do.

I was the chief counsel for the *New York Times*. As the newspaper’s top lawyer for all its business, including journalism, I had been closely involved in our internal discussions with editors, reporters, and the publisher about whether we could or should publish the Pentagon Papers. I had told the *Times* that in my view there was a high probability that Secretary of Defense Melvin Laird would call for Mitchell or Nixon to take action against the *Times*.

But on Sunday, Laird called neither Mitchell nor Nixon. He did, however, prepare for a TV appearance on *Meet the Press*, assuming the program would be entirely devoted to the Pentagon Papers. He did not receive one question on the story. It may have been because the producers of that show hadn’t read the story, either. Laird did, however, call Mitchell the next day. That call set off a chain of events that led to one of the most important Supreme Court cases ever.

Let’s go back to the beginning. My first inkling that there was trouble brewing had come several weeks earlier, on March 13, 1971, at the annual Gridiron Club dinner. There was hardly a more important dinner for politicians and journalists in Washington, D.C. than the Gridiron Club. The greats of the political and journalistic world attended in tails. The President of the United States was usually the main speaker, expected to create hilarity at both his own and the media’s expense.

On this particular evening, however, Nixon was with his pal Bebe Rebozo in Florida. Vice President Spiro Agnew stood in for him. Most of the members of Nixon’s cabinet were there, as well as governors, senators, publishers, Supreme Court justices, and the like. I was thirty-seven, one of the younger men in attendance, and one of the few without a national reputation in government or media. I was there because I was vice president and general counsel of the New York Times Co. It was an impressive title, but among the glitterati at the Gridiron, it counted for little.

There were only limited invitations to the event held at the Statler Hilton Hotel. The Gridiron had only fifty members then; all were male. My wife, Toni, had

come with me to Washington, but not to the dinner. Women were barred. In fact, thirty-five women, including the *Washington Post* writer Sally Quinn, picketed the dinner.⁸ Limousines for Spiro Agnew, Henry Kissinger, Chief Justice Warren Burger, and Teddy Kennedy rolled through the picket line.⁹

With limited invitations, the *Times* parsed them out to those it wished to impress. Sharing this prized invitation in-house was unusual, so I was surprised when I was invited by Arthur Ochs “Punch” Sulzberger, the publisher of the *Times*.

I had two theories about why I was there. First, I was being thanked for several successful years. I had been leading the press’s fight against Nixon’s attempts to subpoena reporters and it had been my idea to take the New York Times Co. public while retaining the control of the *Times* in the Sulzberger family.

I had conceived of a corporate structure of Class A and Class B voting stock, which many media companies subsequently copied word-for-word. I had also led a large acquisition of Cowles Communications designed to solve the company’s financial problems.¹⁰ With a huge asset base, the New York Times Co. could negotiate with the unions and protect the financial integrity of the *Times* newspaper. This led to the prosperity the overall company and the newspaper enjoyed in the 1980s and 90s.

The second theory I had for my invitation was that Punch Sulzberger had decided to introduce me to the greats of the world. That was, of course, pure fantasy. While I had the respect of journalists and others in New York, I was not part of the New York power scene and certainly didn’t know any congressmen or senators. More to the point, Punch had no interest in making me part of that scene.

I was a young family man with a three-year-old son, Timmy, and a twenty-nine-year-old wife about to give birth to my second child. In fact, while I dealt from time to time with the famous *New York Times* reporters in Washington such as James “Scotty” Reston, Tom Wicker, and Max Frankel, those contacts were few and far between.

I was more friendly with the news people in New York: Abraham “Abe” Rosenthal, the volatile editor of the *Times*, Arthur “Artie” Gelb, the managing editor, Seymour “Top” Topping, the foreign editor and Eugene “Gene” Roberts, the national editor.

It turned out that I was not in Washington for any of the reasons I imagined. I was there to learn a secret that would change my life, and set in motion a chain of events that would ultimately contribute to the resignation of the President of the United States.

I did not know that as I stepped into Punch’s limo to go to the dinner. I was uncomfortable in my first pair of tails. I had checked them out with Punch and his wife Carol in their hotel room, and Carol had given me a barely passing grade. Punch’s limo stopped short of the picket line and we walked across and entered the main ballroom for my first experience at a high celebrity event.

The place buzzed with importance. Punch was immediately mobbed by senators and such. I knew I had to navigate on my own or end up talking to the bartender.

Max Frankel, the *Times*' star foreign reporter, had me at his table, alongside Roger Mudd, the CBS anchorman. Amid the banter and the dining, I really thought I had hit the big time. Before dinner, Max Frankel said, as an aside, "Have you heard about the classified documents we have on Vietnam?" I said I hadn't, placing little significance on his remark. He did not elaborate, and changed the subject.

Agnew rose to speak. He had for the last three years been attacking the press for Nixon, calling them "nattering nabobs of negativism" and worse. He was introduced as "that ferocious, fulminating fireball of the far-flung fairways."¹¹ Agnew sang a song with the line: "Politics is a rough game—when effete snobs rule the airwaves, someone had to set things right."¹² The guests roared. After the dinner, Punch took me to a small party in a room in the Willard Hotel, only about fifty people. The door opened, and there were Senators Ted Kennedy and Hubert Humphrey.

Suppressing my awe, I turned from listening to one conversation to bump into Supreme Court Justice Potter Stewart. What in the world was I going to talk to him about? He was standing there with his Yale classmate, Downey Orrick, a partner of the well-known firm in San Francisco that bore his name.

With a few pops under their belts, they thought it was great fun to encounter a young lawyer who was vice president and general counsel of the *New York Times*. They wanted to know how in the world anyone so young had got such a plum. They kidded me at great length about my good fortune. "You must be related to the Sulzbergers," and so on. Potter Stewart then started talking about the *Sullivan* decision, from the famous *Times* libel case that went to the Supreme Court. In *Sullivan*, the Court applied the First Amendment in a libel case for the first time.¹³ I told him that I had worked on that case at Lord, Day & Lord, the outside counsel for the *New York Times*.

L. B. Sullivan was a County Commissioner in Alabama during the civil rights movement. He had sued the *Times* in Alabama for an ad that untruthfully accused him of mistreating civil rights demonstrators. The Alabama court entered a \$500,000 verdict against the *Times*. There were other similar cases pending which, if successful, would have put the *Times* out of business. The U.S. Supreme overturned the verdict, creating a new rule for libel under the First Amendment. The other cases disappeared. The *Times* was saved.¹⁴

Stewart smiled at me and said, "We won that one for you." I thought to myself, "Gee, is this what goes on in Washington? Supreme Court justices say which side of the press they're on at cocktail parties?" But I said nothing, smiled and changed the subject.

The next day, I went with Punch Sulzberger and our wives for lunch at Max Frankel's home. I discovered that lunches and dinners are the staple of Washington life. Once, when I asked Max how he rated a particular Washington denizen, he said disparagingly, "Oh, he goes to all the wrong dinner parties." For this lunch, Max had invited Israeli Ambassador Yitzhak Rabin to talk with Punch.

Somehow Rabin got separated from Punch and ended up eating by himself in Frankel's living room. Meanwhile, Punch, Carol, Max and I were eating out on Max's terrace enjoying the early spring sunshine. Our terrace luncheon dragged on. By the time we walked back into the living room, Rabin had departed in a huff, insulted by not being invited to the terrace. As I said goodbye to Max, it became clear why I had been invited to the Gridiron dinner. Max and his colleagues had a tranche of classified documents. I was being let in on a secret, and I was to keep it secret. I didn't yet know exactly what the documents were, but I was supposed to figure out how to publish them.

