

# Insider view of Pentagon Papers battle describes First Amendment in the making

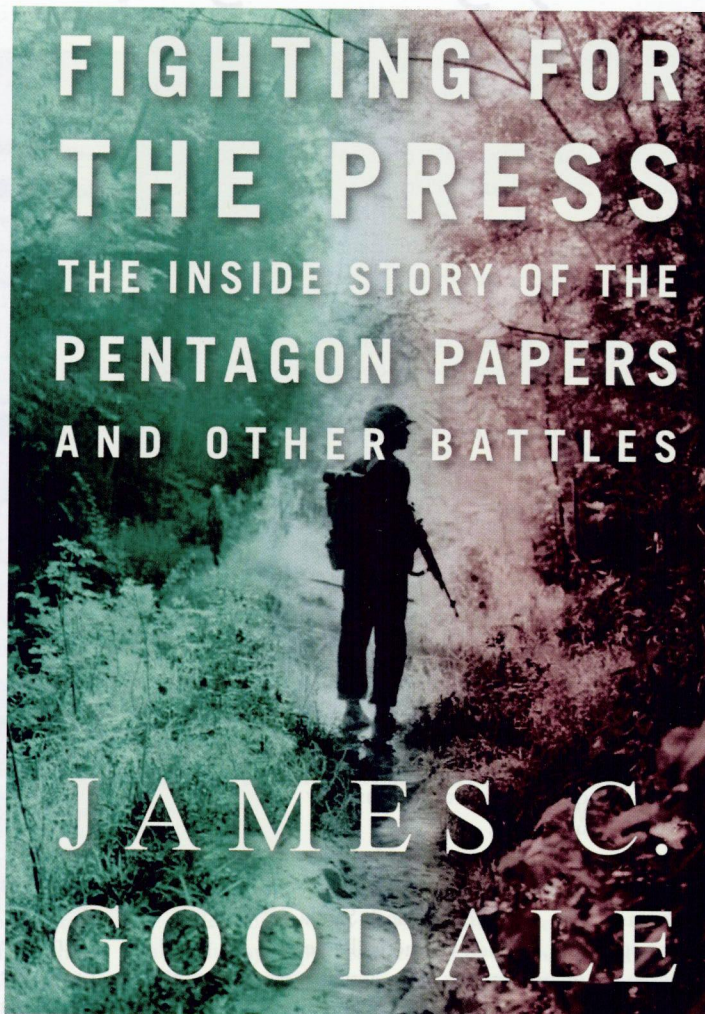
by Mark Sableman

Jim Goodale could have titled his book, “Present at the Creation of Modern First Amendment Law.” As in-house counsel for the New York Times, he led that paper’s litigation of two tide-turning media cases of the late 1960s.

Goodale provides a fascinating blow-by-blow insider’s description of the Pentagon Papers case – and, to a lesser extent, the contemporaneous reporters’ privilege case that he, a New Yorker and Times loyalist to the core, insists on calling *United States v. Caldwell* (because that was the Times case in the trilogy that the Supreme Court decided under the *Branzburg v. Hayes* name).

The reporters’ privilege fight – itself a big issue with few precedents – was under way when the Times received, and began to write about, the Pentagon Papers. Knowing the Nixon administration’s hatred for the Times, and its love of secrecy, Goodale feared legal action. The potential claims were hard to divine. Espionage Act? But that wasn’t meant for newspapers. Executive order? But that applied only to government employees. The defense was obvious – no prior restraint – but Goodale wasn’t confident about the few precedents and how they would be applied under the political pressure of the late ’60s.

The case truly resembled a “battle” as suggested in the title, “Fighting for the Press: the Inside Story of the Pentagon Papers and Other Battles.” The Times’ long-standing law firm refused to help. Goodale pieced together a litigation team on the fly, including a law professor who had never tried a case or argued an appeal (Alexander Bickel) and a young law firm part-



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ner (Floyd Abrams) then practically unknown in the media law field. The case proceeded in a crazy manner in the early summer of 1969 – trial with two days’ notice; appeal with one day’s notice; surprise evidence; partially closed hearings. But it ended gloriously, with a 6-3 Supreme Court decision that set a landmark of extra-strong protection against any prior restraint of publication.

A story more than a legal analysis, the book includes price-

less vignettes:

- Goodale as a young in-house lawyer, realizing the scope of the case, ordering his publisher, Punch Sulzberger, back from Europe to stand up to the government.

- The Times’ overnight-before-trial examination of a special last-minute government submission – and the team’s joy when a reporter finds that some of the supposedly most super-secret documents had previously been pub-

lished in a Congressional report.

- The lawyers’ difficult grappling under pressure for standards to propose for unprecedented situations, and the heady success of having their proposal, or something very close, adopted by the Supreme Court as constitutional law.

Ultimately, of course, a reader scrutinizes these pages closely for answers for today’s Pentagon Papers counterparts: the WikiLeaks and Snowden disclosures. Goodale sees Julian Assange of Wikileaks as akin to the Times editors, and his book’s publication deadline apparently predated Snowden’s revelations to the Guardian – and, indirectly, the Times.

Goodale warns of government obsession with secrecy. He’s alarmed at post-9/11 actions by Bush – and, even more so, Obama. The prior restraint freedom he won could be eviscerated if criminal leak prosecutions, of officials and recipients, chill reporting on abuses and mistakes made in the name of national security.

Goodale was present at a remarkable creation for U.S. press freedoms. Today, as the Internet, WikiLeaks, and Snowden are showing us, we encounter a different media world. The media that reach us are worldwide, and far more diverse, including many non-institutional, even anarchic, participants such as Snowden and Assange. Yet law remains national, meaning that U.S. constitutional protections end at our border and hardly control the new global media.

Wherever and whenever the decisive battles are fought over the creation of a new global legal order for new media, we can hope that the participants act with the same level of courage and creativity as did Goodale and his colleagues in 1969. And that they keep good notes, for those inevitable fascinating memoirs. ■