Pentagon Papers lawyer James Goodale on DNC lawsuit: “The Democrats are establishing possibly a precedent that diminishes First Amendment freedoms”

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The World Socialist Web Site *interviewed veteran attorney James C. Goodale about the Democratic National Committee lawsuit naming WikiLeaks and Julian Assange as conspirators with the Russian government and the Trump election campaign. Goodale served as in-house counsel for the* New York Times *during the 1971 Pentagon Papers case, which upheld the right of journalists to publish information leaked by a government source. He is also credited with creating the “reporter’s privilege” in the 1972 Supreme Court case Branzburg v. Hayes, a decision that allowed reporters not to disclose names of contacts in the Black Panther Party to government investigators.*

Goodale founded the Committee to Protect Journalists and serves on the organization’s Board of Directors. He maintains a law practice in New York City.

Ed Hightower: What are the First Amendment implications of the DNC’s lawsuit, which includes WikiLeaks as a defendant? Can you give a general legal overview of the suit?

James Goodale: The overview is that the leaker, you’re dealing with a leaker and a leakee, and the leaker in the DNC case is, say, the Russian government, which leaks to Wikileaks. Wikileaks is the leakee—they publish the leaked material. The way the law works out as a consequence of the Pentagon Papers case is that the leaker is thought in the United States to be subject to criminal penalties under the Espionage Act. The leakee has what is known as the *New York Times* defense, and has no criminal liability.

EH: That refers to the case in which you were lead counsel?

JG: That’s right, *New York Times Co. v. US*, which came out in 1971. What the DNC has done in its infinite wisdom is undermine the *New York Times* defense by saying that WikiLeaks, the leakee, has conspired with the person who is subject to the Espionage Act, namely, the leaker. So the bottom line is that the DNC, with that theory, made the leakee subject to Espionage Act criminal liability.

EH: How long has the *New York Times* defense been available under US law?

JG: Well, you could argue, number one, that it’s always been available under the First Amendment, forever. Number two, the phrase came out of the 1971 case. The case didn’t say that, but it’s just a simple way of saying what happened to the *New York Times* in that case, the Pentagon Papers case.

EH: Your view is that the *New York Times* line of cases simply describes things that are already inherent in the First Amendment?

JG: Yes, and in that sense the notion [of the *New York Times* defense] is old and had never been tested until 1971. Since 1971, generally speaking, people have accepted the fact that applying the notion to a particular situation, namely the Pentagon Papers, was an appropriate application. There was a Minnesota case in which the judge mused that if someone were about to report on troop movements in war time this might warrant an injunction. But as lawyers say, that’s not the law, it’s just a judge’s dictum [*obiter dictum*—something said in a legal ruling that does not pertain to the case at hand and therefore creates no judicial precedent].

EH: I read the DNC complaint, and one of the things they assert that struck me as very odd was that trade secrets were a part of their claim. So they are saying that

"you are violating our trade secrets, you can't say this stuff and we can claim money damages against you." What is your assessment of that assertion?

JG: Well, I have two comments—well, three comments. One, the complaint is nonsense. Two, the complaint should never have been brought. And three, with respect to some of the particulars, namely, for example, trade secrets, it's nonsense.

EH: Is there any basis for a civil suit based on these criminal statutes, like RICO [Racketeering Influenced and Corrupt Organizations Act]?

JG: I don't think so. I mean, I think that you just throw in RICO when you don't have anything else to say.

EH: They try to clearly lump WikiLeaks, as you said, the leakee, with a conspiracy to steal data and so on. But they allege only things that confirm that WikiLeaks was there sort of "after the fact" in a way that appears lawful and protected. Do you know of any facts that they allege or intend to prove that show a conspiratorial action on the part of WikiLeaks?

JG: Well, they could say that there's an agreement with the Russians to do this and that, perhaps, that includes the [Trump] campaign. I think that, in effect, is what they're saying, that there's an agreement amongst the three entities [WikiLeaks, Russia and the Trump campaign] to do this and that. So whether that assertion makes any sense or not is up to the court. But that's more or less what they're saying.

EH: If I make an agreement to publish something, and someone else is supposed to steal the things I will publish, and if we talk about that *before* the stealing happens, that is not protected by the First Amendment and the *Times* cases. Is that correct?

JG: Yeah, I think that's right. If you and I agree that we're going to go arrange for the theft of materials that are in the NSA, for example, that's not protected. That's different because, you see, the leakee and leaker are agreeing to have a leak caused.

EH: Whereas if I come to you and say, "I have these documents, will you publish them?" That is the opposite case.

JG: Well, that's the paradigm case. That's the scenario in the Pentagon Papers case.

EH: Is it your view that those who prepared the DNC complaint just sort of threw caution to the wind or that they simply don't care?

JG: They didn't know what they were doing and it's an outrage that the Democrats, who are probably looked at as being a leader in First Amendment defenses, more so, I would have thought, than the Republican Party, are establishing possibly a precedent here that diminishes the First Amendment freedoms.

EH: You were critical of the Obama administration and its treatment of, say, [Fox News Washington correspondent] James Rosen, isn't that fair to say?

JG: That's fair to say.

EH: To me, when I followed the Rosen case, it seems to me that [Attorney General] Eric Holder or someone from the Obama administration signed a warrant that said there was probable cause that Rosen was a co-conspirator in a criminal undertaking when he was likewise reporting leaked information. Wasn't that warrant application signed in bad faith?

JG: I think that one doesn't know why and one way to think about it was that he never thought about it and when he thought about it, he regretted it. His action is probably no different than the action taken by the DNC [in filing the WikiLeaks suit], which is that they are not First Amendment-sensitive lawyers and they screwed up. And although I have been critical of Obama, I tend to think that the Democrats are more First Amendment-sensitive than the Republicans, but you can't prove it by this case, and you can't prove it by Rosen's case, and you can't prove it by Obama's view, so that's all against me. But I'd rather have Democrats when dealing with the First Amendment than Republicans.

EH: So the DNC case could create unfavorable constitutional implications…

JG: It could be very bad for the future of leaks if, in fact, the case, by a motion made or in the case in chief, accepts that there is an actual conspiracy. That would be very bad for the First Amendment and very bad for the press because it would permit subsequent entities, governments and so on, to say effectively, "Look, it happened before, so let's apply it here." And as a consequence, leakees get less and less protection.