

WHEN WAR COMES, WHITHER THE FIRST AMENDMENT?

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It happened forty-five years ago in Yunnan Province in western China, and it was one of the more profound experiences of my four-and-a-half years as a master sergeant in the Signal Corps of the United States Army. I was an enlisted man/correspondent for the "CBI Roundup," and on August 23, 1945, I was in the city of Chinkiang to cover the Japanese surrender. The actual surrender took place on August 25th, but the incident that continues to resonate happened on the 23rd.

On that day, I ventured up to the house where the Japanese commanding general for all of western China was under Chinese and United States guard. I presented my official press card to Major General Takeo Imai's guards, announcing that sergeant Friendly would like to interview the defeated general. The Chinese officers had some problem understanding my intentions; not so the American officers who understood them too well. They arrested me, and in a matter of hours, I was standing before the American general in the area, Major General Haydon L. Boatner. General Boatner was outraged: what was an unauthorized GI doing "snooping around the Japanese general's headquarters?" I explained that my assignment was to represent a half-million fellow soldiers in CBI India and their "right to know," although I am certain that such a lofty term of constitutional law was not yet in my vocabulary — and it certainly was not in the general's. Boatner was a hard-nosed, tough officer in the Patton tradition. He saw me only as a nuisance, getting in the way of a smooth surrender ceremony.

The General ordered me to consider myself under house arrest. For two days I sweated in the enlisted mens' barracks, wondering where my court-martial would take place and what kind of legal defense would plead my cause. Boatner impressed me as one much more interested in his second amendment right to bear arms than in a sergeant's first amendment right to freedom of the press.

In the end, on the 24th of August, I was summarily dismissed from confinement with no more ceremony than accompanied my house arrest. I was again a free man — just in time to cover General Takeo Imai's surrender to the Chinese — who had accepted this tall, awkward American for what he said he was. I witnessed the official surrender, wrote an 800-word report and

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dutifully submitted it to a censor who deleted one harmless sentence and then stamped it, "Capt. Carl R. Hammons, Cleared for publication — 8/25/45." Captain Hammons' only legitimate reason for clearing my dispatch was to make certain that I was not providing any secret information on troop movements or size, or violating any military security information that would give comfort to the enemy. In late August, 1945, after the dropping of the atomic bombs on Hiroshima and Nagasaki, and with the Japanese surrender virtually in hand, it seemed that there was no longer any enemy there who could profit by any information I might have. But like thousands of other reporters in many theatres of war, I went along with the censoring process because it had been with us since Pearl Harbor in 1941 and even before.

Ed Murrow, in London, had lived with and accepted censorship since 1939, when he stood on the BBC rooftop with a script in hand and a military censor beside him. The censor wore earphones and had a switch that could take Ed off the air to America if he deviated from his prepared script.

There were times when Murrow and other working journalists bridled and were offended when censorship was more concerned with military postures of famous generals and politicians than with military secrets. Whether it was the great secret of the Normandy invasion in 1944, or troop movements in Sicily or North Africa, or those first daring B-29 flights over Japan, we, that is, all journalists, went along with the censor's stamp because World War II was "the good war." Ever since FDR's Pearl Harbor "day of infamy" speech, virtually every correspondent was anxious to pitch in and write nothing, even by accident, that could hurt our national war effort against Hitler and the Japanese emperor.

General Eisenhower left no doubt that he saw war correspondents to be loyal members of the armed forces under his command. Supreme Commander Eisenhower once told a convention of United States editors, "Public opinion wins wars. I have always considered correspondents as quasi-staff officers, accredited to my headquarters." Reporters wore battle dress although they carried no weapons other than a portable typewriter that Ike considered to be part of his arsenal.

General MacArthur had strict rules about what journalists in his theatre of war could and could not do. He ruled that any reporter who interviewed any officer under his command without official permission would be banned from combat zones and that the "offensive" soldier would be court-martialed.

I filed a story in 1945 just as the war in Europe was ending. The date-line was Linz, Austria, and the event was a lavish ceremony when General Patton's Third Army met Marshal Talbukhin's Red Army troops near the Danube. In my lengthy report, I happened to mention that among the guests at the party, held in a castle, with vodka and caviar abounding, was a handsome American woman in correspondent's garb. When I asked her name, which I thought relevant because she was the toast of the Soviet commander, she replied, "I'm Doris Duke." The next morning, a United States military censor in Linz suggested that I might want to delete Miss Duke's name. When I asked (I like to think demanded) that he explain what military damage her presence would do to our war efforts, all requests seemed to vanish. But there was no doubt that the censor's only reason could have been that Doris

Duke's presence in a theatre of war might have embarrassed some generals or perhaps *the* general who had invited her to the victory celebration in Austria via his P-38 fighter plane.

I don't know how serious my censor was in 1945, but he understood that protecting Miss Duke's identity had no military value. My story prevailed, and I am embarrassed to tell you that although I filed it for "CBI Roundup" in India, the Duke story was the first international news story that ever bore my name.

In 1943, General Eisenhower politely asked the war correspondents in Sicily not to report General Patton's infamous face-slapping incident. Ike's friendly request was accepted and honored as a censorship order, but the story leaked several months later when Drew Pearson heard about it in Washington and wrote of General Patton's indiscretion. There was no holding it after that.

There was no compulsory censorship in Vietnam, only a kind of voluntary code that may have been violated three or four times by accident. Television and radio, which were difficult to control because of the technology of their delivery systems, helped create what Michael Arlen called "the living-room war." You all remember Morley Safer's famous television report from the village of Cam Ne, the furor it caused and the anger it aroused in the military, which still insists we at CBS News should never have cleared that report for broadcast.

Very early on the morning of August 3, 1965, I was awakened by an emergency phone call from the editor of the "CBS World News Round-up." With considerable tension in his voice, the editor explained that Morley Safer, a Canadian journalist working for CBS News in Vietnam, had just recorded a three-minute radio report about an incident in the village of Cam Ne. "Safer describes a marine raid on a small village," said the editor, "including the sounds of the village's destruction and of the burning of thatched huts, set on fire by the Marines, using Zippo lighters."

Sensitive to the problems of reporting what would have the appearance of United States Marines involved in an atrocity, I brushed sleep from my eyes and instructed the editor to query Safer on the accuracy of his startling news story. "Morley is on the cue circuit, if you want to talk to him," the editor replied. The news desk patched me through. Morley "defended" his report, and said "It all happened, Fred. Wait until you see the film."

What we saw at 3:30 that afternoon was startling. Safer's narration was similar to his radio report, but the combination of picture and sound was devastating. He described the village and the Marines' mission and then, with the women and children sobbing, the camera showed Marines, six feet tall, and more, using their Zippo lighters to torch the huts. The mix of screams and crackling bamboo had the ring of war in the jungle. Safer's final line, as I remember it, was "That's what the battle for the hearts and minds of the Vietnamese is all about."

The question before Walter Cronkite, Ernie Leiser, the executive producer, and me was could we, should we, run this film on the seven o'clock

news. Were the American people, many of them probably at dinner, ready to watch so violent a sequence?

Twenty-six years later, I must confess that one compelling thought in everyone's mind concerned the competition. What did NBC News have in their line-up for that night? What about ABC? There was no discreet or professional way to find out, but if they ran the sequence from Cam Ne, and we did not, how could we explain it? However, weren't the realities of the Vietnam war, paid for by the American public in lives and money, something that the citizenry needed to see? Was self-censorship, on the basis that the United States public could not handle such an ugly face of war, a decision that we could defend?

We elected to go with it. That night, Cronkite set the scene, cued in the Safer piece, and the tension rose with the three-minute report. I watched it from my office, aware that phone calls would swamp us. They started at 7:10 and flooded us until midnight. Most of the calls I took, among the thousands that poured in, were hostile. The central tone was, "Don't you fellows ever consider what is good for your country?" President Lyndon Johnson called Frank Stanton, President of CBS, Inc., and asked, "Frank, are you trying to f--- your country?"

In my forty years in television news, the Cam Ne decision, made in the context of the times, was the toughest I ever faced. I run that film clip for my students at Columbia, and ask them what they would have done.

There has always been something called self-censorship. In 1950, during the Korean war, there was an explosive furor at CBS when a report critical of General MacArthur was killed in house by the Chairman of the Board, William S. Paley. Murrow had waited weeks in that hot, southern sector of Korea, watching United States troops die in a futile battle to save perimeters that could not be saved. He believed General MacArthur's strategy to be flawed, and he wrote about it for his 7:45 nightly radio broadcast:

Experienced officers ... called it folly.... This was not a decision that was forced upon us by the enemy. Our high command took it because, in the words of one officer who was in a position to know — "We decided we needed a victory."

And yet correspondents here have received cables from their home offices indicating that air-conditioned sources in Washington think the thing can be wound up this fall. To paraphrase the GIs in Korea — that ain't the way it looks from here.

Murrow's final line, as recorded, was, "Will our reoccupation of that flea-bitten land lessen, or increase, the attraction of communism?"

Ed Chester, the Director of CBS News in 1950, was alarmed by the mood and focus of the Murrow piece, and the implicit criticism of General MacArthur. He rushed up to the 20th floor to make Paley and Frank Stanton, then president of CBS, Inc., part of the decision-making process. Paley and Stanton quickly decided. When Chester returned to the newsroom, he is reported to have announced, "It's killed." Quoting Paley, he said "Murrow's sources might be unreliable; it was 'unfair' to criticize those quoted as being in

air-conditioned offices. Ed was probably tired, probably wouldn't have even written that piece if he had been home to reflect."

When Murrow heard about the kill, he was furious, and for the first time in his long tenure with CBS, considered resigning. He did not. He never went public with his anger over Paley's decision. Paley insisted that "self-censorship" had been required. It was the first of so many ruptures that were to become the common agenda between these two "once dear" friends.

Murrow used to brood about this case of self-censorship by the Chairman of the Board, who in the normal course of newsroom procedure would never have been asked to clear such copy. Ed Murrow, my friend and teacher, did teach me that censorship for military purposes under declared war conditions might sometimes be countenanced. He would accept the idea of self (professional) in-house editing, but self-censorship by uninvolved corporate management was unacceptable. He abhorred it.

Now it is January, 1991, and forty-one years after the last "censored war," or more literally, the last war in which censorship by the military was the order of the day. The prospects of censorship are as relevant as was last week's debate over war in the Persian Gulf. Indeed, those debates are inexorably linked with enormous constitutional issues. The Pentagon had proposed that during the invasion of Iraq, American war correspondents would not be admitted to combat zones except in "pools" designated by the military. Escorts to pools would clear all dispatches and no information that would give troop strengths or movements to the enemy would be cleared. Rules of engagement would not be reported, nor would coverage of religious services in the Kingdom of Saudi Arabia. The latest rules from the Pentagon would prohibit specifying the type and number of weapons being utilized. They would also limit reports about dead or wounded soldiers until families had been notified.

I understand that reporters applying for correspondent status will be obliged to agree to these comprehensive media ground rules as they are defined by military officers. Many of our major news organizations will object that these conditions of censorship violate our first amendment prohibition against prior restraints. They, we in the news media, revel in what James Madison and Thomas Jefferson intended to be a central pivot of the Bill of Rights. Actually, we may overstate what the first congress had in mind in 1787 when they wrote, "Congress shall make no law ... abridging the freedom of speech, or of the press." The legislative history of the first amendment indicates they were talking about political speech. They were concerned that the radical views of the Tom Paines, the Sam Adams, the Patrick Henrys not ever be shut off regardless of the will of the majority, which might wish to control the penny press or the political dissenters.

The first great press freedom test did not occur until 1931, and was argued 144 years after the adoption of the first amendment. The case was *Near v. Minnesota*,¹ and it involved a reckless, anti-semitic newspaper in Minneapolis and St. Paul. When it was over, a majority of five to four, led by Hughes, Brandeis and Holmes, voted that prior restraints (gag orders) were

1. 283 U.S. 697 (1931).

unconstitutional.² The majority opinion stressed the problem of malfeasance, especially in our big cities where a free and probing press could be a constant watch dog. As the majority opinion phrased it:

Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abusers as may exist is the appropriate remedy, consistent with constitutional privilege.³

But even in this great 1931 opinion there is a dictum that makes *Near v. Minnesota* something less than absolute. Chief Justice Hughes wrote: "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."⁴

And twelve years before *Near v. Minnesota*, Justice Oliver Wendell Holmes, one of the architects of that liberal opinion, wrote: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."⁵ That was the case of *Schenk v. United States*,⁶ and Holmes was talking about speech not press rights, but the principle that the first amendment is absolute was challenged by Hughes and Holmes. Hughes' "troopship sailings in time of war" and Holmes' "[w]hen a nation is at war" exceptions come very close to condoning prior restraints in the form of censorship. "When a nation is at war," as Holmes paraphrased it — "in time of war," as Hughes wrote it. As one who has spent all of his professional life in journalism, those learned constitutional positions upset me, but I accept the wisdom of these two enlightened justices, their positions and that of many of their colleagues on the high court; that war-time military censorship could be the one constitutional exception to our strictures against prior restraint.

The missing element in today's debate about military censorship in time of war is that it omits, glaringly, the term "in time of war." I, like many of you and many in Congress, take the phrase "in time of war" quite literally. Article I of the Constitution says in the most absolute of terms, that "Congress shall have Power ... To declare War."⁷ I remember that on December 8, 1941, the day after Pearl Harbor, President Franklin Roosevelt asked Congress to

2. *Id.* at 722-23.

3. *Id.* at 719-20.

4. *Id.* at 716.

5. *Schenk v. United States*, 249 U.S. 47, 52 (1919).

6. *Id.*

7. U.S. CONST. art. I, § 8, cl. 11.

declare a state of war. That war declaration passed with only one vote in opposition in the House and no nays in the Senate. That overwhelming vote insured the acceptance of a state of war by almost all Americans. World War II was "the good war" and to those of us fighting or reporting the war against Japan and Hitler's Third Reich, it was universally accepted. When the Commander-in-Chief and his theatre commanders imposed military censorship, it was accepted in World War II. I heard not one voice of dissent against military censorship, not because it was an enactment of Congress or some historical statute; but because it was the will of the people, united by acts of Congress that made military censorship in combat zones acceptable to we, the people and to us in the journalism field.

Now, as war in the Persian Gulf has escalated from possibility to reality, the prospect of military censorship is being proposed by the officers in the Pentagon and resisted aggressively by editors and correspondents in the newsrooms of America. Censorship, other than in war time, is a matter too vital to be left to the generals and the admirals. It is too important to be decided in war rooms or newsrooms. It is a subject for every living-room, and before it is finally decided it may end up in the court room. Until now, the courts, particularly the Supreme Court, have been reluctant to involve themselves in "a zone of twilight",⁸ as Justice Jackson described disputes concerning war powers. Jackson saw the courts at their worst in such disputes. He called war powers "the disaster-potentials in our system" and believed them to be "utterly beyond judicial reach."⁹

Yet in the year in which the nation celebrates the 200th anniversary of the Bill of Rights, the concept of the freedom of the press cannot be separated from the growing debate over the President as Commander-in-Chief waging war. The President, I was always taught, cannot wage war unless Congress first declares it, although ten days ago the Congress granted the President a kind of provisional hunting license. The question is whether the executive, on his own, can declare military censorship without a declaration of war from the Congress.

There is very little legislative history on how a state of censorship comes to exist, and except for the Pentagon Papers Case in 1971,¹⁰ the courts have avoided the subject of national security and the first amendment. I had always believed that the news media's precious rights, which are really the public's rights, could not be nullified without a state of war declaration by the Congress. It is true that there is nothing in the Constitution that indicates when the Executive may impose censorship. In my untutored years, I always associated military censorship in World War II with the declaration that a state of war existed after Pearl Harbor. Now, I suggest that I was wrong in legal fact, but right in spirit. President Roosevelt and the 77th Congress so rallied our nation and its united people to its maximum effort against Hitler and

8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

9. Jackson, *The Supreme Court in the American System of Government*, in THE GODKIN LECTURES ON THE ESSENTIALS OF FREE GOVERNMENT AND THE DUTIES OF CITIZENS 59 (1955).

10. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Japan that censorship was a natural consequence. There were campaigns against loose talk on the home front: "A slip of a lip may sink a ship." Even the most garrulous of us learned that gossip about military matters might be unpatriotic.

From 1941, whether it was Murrow in Europe or Ernie Pyle in the Pacific, the mere idea of resisting censorship would have been unthinkable. There was some griping about individual acts of red-pencilining that seemed more to be orchestrating the home front rather than keeping troop movements and other battle plans from the enemy, but I never heard howls against censorship. The United States public, because of the leadership and the vote in Congress, accepted censorship as they did gas rationing and food stamps as essential parts of the price of war. To have resisted it would have been considered unpatriotic.

In 1991, the resistance to censorship will be quite thinkable. Many journalists have already indicated that uncensored war coverage would indeed be patriotic as a means of maintaining an informed public.

The reason I chose to raise and explore this issue today is that there is very little literature or law review commentary that sheds light on this rapidly approaching conflict between the news media, the Pentagon and the President. I suspect that not all television nor all the print media will abide by the proposed pools assigned by the military and monitored and possibly censored by an officer in uniform.

Ten days ago the President of the United States was given what has been described as a blank check. Does the Commander-in-Chief also hold an unwritten check as to the limits of the first amendment in combat zones in foreign lands? Holmes' opinion in 1924 still echoes in our ears — but who cares, who gives a damn, and how will it be decided? Have our command staffs in the military thought long and hard about the prospects of problems of military censorship? Have they trained a cadre of officers sophisticated in the subtle and not so subtle differences between legitimate censorship of military tactics and strategy and military control of that which may simply embarrass our leadership or reveal battlefield atrocities that might be harmful to morale on the home front? This is the question, and I would have thought the military, so well trained in battlefield operations, would have run courses and seminars on the problems of military censorship and its impact on the very rights we are fighting to preserve.

How about beginning to talk about it here in Arizona at this lecture in memory of Judge Isaac Marks?