

War, Wisdom, and Freedom of the Press

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The president delivered his speech to hundreds of media executives assembled in the grand ballroom of New York's Waldorf-Astoria Hotel.

"In time of war," the president explained, "the government and the press have customarily joined in an effort, based largely on self-discipline, to prevent unauthorized disclosures to the enemy. In time of 'clear and present danger,' the courts have held that even the privileged rights of the First Amendment must yield to the public's need for national security."

The president found himself with an unprecedented foreign and military crisis on his hands in the first year of his presidency. He told the audience in New York that our very "way of life is under attack" by a shadow enemy whose "preparations are concealed, not published." America was confronting a brutal network whose "mistakes are buried, not headlined. Its dissenters are silenced, not praised. . . . [N]o rumor is printed, no secret is revealed."

This would be a long and costly war, and the president asked the media to cooperate with the administration during the difficult times ahead. He called on "every publisher, every editor, and every newsman in the nation to reexamine his own standards and to recognize the nature of our country's peril . . . which knows no precedent in history."

Is It in the National Interest?

Significantly, he called upon the nation's media executives to ask themselves one important question when formulating their news judgment:

"Every newspaper now asks itself, with respect to every story: 'Is it news?' All that I suggest is that you add the question: 'Is it in the national interest?'"¹

The president: John F. Kennedy; the year: 1961; the speech: delivered less than 100 days after his famous inaugu-

ral address when the trumpet of the New Frontier had summoned us "to bear the burden of a long twilight struggle" and to "defend . . . freedom in its hour of maximum danger."

Kennedy's speech to the American Newspaper Publishers Association on April 27, 1961, did not play well with the press. Some publishers resented the president's telling them how to run their businesses. As the *New York Times* noted, in times of clear and present danger, "it is more essential than ever that people be fully informed of the problems and the perils." The *New York Herald Tribune* echoed the theme: "In days of peril especially, the country needs more facts, not fewer."²

President Kennedy spoke at the height of the Cold War, only a few days after the bungled Bay of Pigs invasion and in the wake of grim news of communist victories in Southeast Asia. But he understood the newspaper business better than most politicians. Kennedy had served as a working journalist and numbered among his closest friends several Washington reporters, including Ben Bradlee, who went on to challenge claims of "national security" a decade later by publishing the Pentagon Papers in the *Washington Post*.³

Forty years have passed since President Kennedy called upon the press to engage in a certain measure of self-censorship to protect the national interest. America's foe in that long twilight struggle, the Soviet Union and its specter of international communism, collapsed a decade ago. As events of the 1960s, 1970s and 1980s attest, America's emergence as the world's premier superpower in the 1990s did not happen as a result of a timid press. Indeed, the United States survived the crisis years of the Cold War not by imitating its adversary's closed society but by serving as a beacon of freedom for all the world.

Yet today America finds itself facing a new shadow enemy whose destructive force became only too apparent in the flames of the World Trade Center and the Pentagon on September

11, 2001. In the immediate aftermath of the attacks, Secretary of State Colin Powell announced that the United States was "at war" against terrorism. President George W. Bush, without exercising much self-censorship, went so far as to say that we had embarked on "a crusade against evil."

Kennedy's suggestion that the media consider whether a story is in the national interest merits careful consideration as our country embarks on a worldwide search to uproot evil. It is a question that should be asked before newsgathering begins and before publication or broadcast commences. It is a question whose answer may vary from story to story, and where the consequences of miscalculation—a failure to report, or reporting too much—could be catastrophic.

A Delicate Balance

Whether this be "war," a state of "emergency," or simply a new and less innocent phase of globalization, the time is ripe for an assessment of the media's ability to adapt to the demands of the government's campaign against international terrorism. One aspect of that adaptation is the special imperative of self-censorship in times of actual emergency. Another is the need for journalistic vigilance—aggressive investigative reporting—during these same hours of maximum peril. To be sure, these are paradoxical times for the press as for all of American society. They call for an abundance of wisdom and courage and for the recognition that democracy's triumph in the years to come depends not on absolutism—whether in matters of First Amendment law or otherwise—but on striking a delicate balance in our lives between freedom and security.

Striking that balance two decades ago, Justice William Brennan applied the test of "logic and experience" to open the doors of government and protect the First Amendment right of the press and public to attend criminal trials.⁴ While this test has proven to be a steady guide, never before have logic and experience seemed so ill-equipped

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to battle the agents of global terrorism, armed with suicide bombers and weapons of mass destruction.

The events of September 11, 2001, place the tensions between war and free speech in sharp relief. As Floyd Abrams, the renowned First Amendment lawyer, has recently written: "My primary concern at this moment is terrorism. I am more concerned that we will fail to take terrorism seriously enough than that we will fail to protect our liberties diligently enough."⁶

The story of television's adventures in self-censorship in the wake of September 11 is well known. Within a month of the attacks, the White House called upon the five major television news organizations to exercise more restraint in their coverage of the enemy. After the five aired an unedited taped message from Osama bin Laden, National Security Adviser Condoleezza Rice held a conference call with top executives of ABC News, CBS News, NBC News and its subsidiary MSNBC; the Cable News Network; and the Fox News Channel.

According to Ari Fleischer, the White House spokesman, Rice was primarily concerned that bin Laden could be using the broadcasts to send coded messages to other terrorists. She also expressed concern that the tapes would enable bin Laden to disseminate propaganda intended to stir hatred and possibly result in the deaths of more Americans. In the first weeks of this new administration's efforts at crisis management, not unlike President Kennedy after the Bay of Pigs invasion, Fleischer warned reporters to "be careful what you say."

Bin Laden Tape Decision

On October 10, 2001, all five major television news organizations chose to not air unedited videotaped statements from bin Laden or his lieutenants and to remove language that the administration considered inflammatory—or so it was reported on October 11. Speaking a month later at the annual dinner of the Libel Defense Resource Center, Walter Isaacson, chairman and CEO of the CNN News Group, emphasized that the five TV news organizations had *not* reached an "agreement" about publishing such statements. Rather, they simply decided "to seriously consider whether to run such material."⁷

Isaacson's description of the October

10 decision seems perfectly in keeping with President Kennedy's call for including "national security" among the many factors that go into the exercise of news judgment. Indeed, given the genuine risks to military and civilian lives in times of war, journalists should elevate the national interest to the top of their list of considerations when deciding whether to gather or publish the news.

From story to story, reasonable minds will differ on whether concerns about national security militate in favor of censorship. For example, after the network news executives reached their decision to "treat with care" stories that the White House considers risky, CNN and Fox News Channel broadcast only brief segments of a twenty-minute videotape of bin Laden speaking about conflicts that he identified as predominantly Muslim versus Christian. In that statement, bin Laden added Chechnya, Bosnia, and other locales to his list of international hotspots. Yet news anchors merely read quotations from bin Laden or paraphrased versions of his remarks that editors regarded as newsworthy. Meanwhile, Al Jazeera, an Arab satellite channel, broadcast the entire tape, as well as a fifteen-minute response in fluent Arabic from Christopher Ross, former American ambassador to Syria and Algeria, who denied bin Laden's accusations.

TV News Flubs First Test

To many minds, America's television news leaders had not performed well in this first major test of the network's "treat with care" policy. "[T]he people of the Arab world received a more complete picture of the charge and the response than did most anyone in our country, the citadel of a free press and free speech," wrote Robert H. Giles, curator of the Nieman Foundation for Journalism at Harvard University, in the *New York Times*.⁸ Of bin Laden's taped performance, Giles asked: "Was he acting? Were the attacks having an effect? Was he succeeding in the propaganda war?"

Answers to these questions would have to wait or else come from Al Jazeera viewers who had already seen the tape. Had American broadcasters overreacted to the national security adviser's call for self-censorship? One can only assume that the networks' decision to edit the tape was premised on candid conversations with the White House

about the national security implications of the tape's broadcast. In fairness, one can only conclude that the decision to withhold large portions of the tape from public view reflected the best judgment of patriotic editors who, when they asked "Is it news?," placed the national interest at the top of their list of considerations.

Of course, two months after the attacks on New York and Washington, the Bush administration took a markedly different view of the impact of broadcasting a tape of bin Laden. This time, the administration itself released an incriminating tape of bin Laden, a sycophantic sheik, and other Al Qaeda faithful describing the attacks of September 11 with evident self-satisfaction.

Although the administration took its time deciding whether to release the tape, it ultimately concluded that the benefit of disclosure outweighed the risks. Rightly, the media did not hesitate to air the video in December 2001. Writers were free to illustrate Hannah Arendt's "banality of evil" with pictures of bin Laden casually calculating the number of "enemy" casualties as he enjoyed a meal and adjusted his turban for the camera.⁹

To be sure, trust is an essential ingredient in the relationship between government and the media, especially in times of war. As a general rule, trust is established by more communication, not less. It follows therefore that the leaders of America's top television news organizations should be free to communicate with the White House as candidly as necessary to foster trust between the executive branch and the fourth estate. During wartime, there is precious little room for abuse of that trust on either side.

Loose Lips Sink Ships

Government officials should be every bit as circumspect as the media about what they say during times of war. As historian Michael Howard has argued recently, by declaring the United States "at war" with terrorism, our leaders have made a "terrible and irrevocable error."¹⁰ We have accorded terrorists a status and dignity that they seek but do not deserve. Put otherwise, we have conferred upon them the legitimacy of wartime belligerents when they should be regarded as mere criminals whose conduct gives rise to a state of "emergency."

As a First Amendment matter, there

may be precious little difference between war and emergency. Both terms suggest a tipping of the scales in favor of executive action and imply the sort of compelling need that justifies official secrecy, at least for the duration. But as Professor Howard implies, there is an inherent tension between "a serious campaign against terrorists" and the public's "right to know":

The qualities needed in a serious campaign against terrorists—secrecy, intelligence, political sagacity, quiet ruthlessness, covert actions that remain covert, above all infinite patience—all these are forgotten or overridden in a media-stoked frenzy for immediate results, and nagging complaints if they do not get them.¹¹

Nevertheless, Howard concludes by saying that a protracted war is likely to be "disastrous." Even more disastrous would be the war's extension "in a long march through 'rogue states,' beginning with Iraq, in order to eradicate terrorism for good so that the world can live at peace. No policy is more likely not just to indefinitely prolong the war but to ensure that it can never be won."¹²

Doubtless President Kennedy's reference to judicial decisions requiring First Amendment rights to yield to national security interests took into account one important *dictum* found in *Near v. Minnesota*,¹³ the classic case on prior restraint. The case stands for the general proposition that prior restraints on publication (as opposed to subsequent punishment of the press for what it has already written) are presumptively unconstitutional. But *Near* is frequently cited for its hypothesized exception to the general rule against prior restraints: "No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."¹⁴ Indeed, the law is replete with support for the proposition that our civil liberties can be curtailed in times of war.¹⁵

War Poses First Amendment Dangers

There are two aspects of America's war on terrorism that pose special dangers to First Amendment rights: (1) its indeterminate duration, and (2) its limitless scope. As President Bush has warned the American people, this war will not be quick, and it will not be easy. Despite the defeat of the Taliban within ninety days of September 11, the Pentagon has said that the war is far from over. According to the president,

the stamina necessary to defeat "the evil one" and all those who harbor terrorists will be equal to the country's forty-year commitment to contain and conquer communism. As this war is currently formulated, we run the risk of an habitual state of emergency that can be neither effective in combating terrorists nor conducive to civil liberty. Until the administration clarifies the duration and scope of this military or police action, here and abroad, it is difficult to call on the press to stop asking another question in the exercise of its news judgment, namely, is the government's policy in the national interest?

If we are now at war against terrorism—a war that might continue in perpetuity, or at least until Al Qaeda and radical fundamentalism go the way of the former U.S.S.R.—then it stands to reason that our government will view itself as operating within the bounds of *Near*'s wartime exceptions whenever it is politically expedient to do so. The government will not hesitate to seek injunctions against the press or to limit access to information as it prosecutes a war on terrorism. On November 4, 2000, then-President Clinton vetoed a bill that would have made it a crime to divulge almost any form of classified information. One can expect President Bush to renew the call for such legislation in the days ahead. One can also imagine Attorney General John Ashcroft being "quite comfortable" subpoenaing journalists in the course of an investigation.¹⁶

Need to Retool for Wartime

So long as the Bush administration limits its attempts to the encouragement of media self-censorship, the cause for alarm is more theoretical, and certainly less "legal," than real. Moreover, after spending the better part of a decade exploring Bill Clinton's extramarital dalliances, the media would be hard pressed to claim that its experience with serious sustained wartime coverage is anything but historic. The need to retool itself from a domestic focus, in which sex and dot.com market profits drove the news, to an industry that sees itself as part of a national wartime effort is real. Equally profound is the need to

pick and choose its First Amendment battles carefully, for media representatives can ill afford to squander the trust that both sides require to defeat terrorism in our time.

As David Halberstam has observed, America's appetite for foreign policy disappeared and the media's commitment to foreign coverage waned during two decades leading up to September 11. "As the worst of the confrontations with the Soviets slipped into the past," Halberstam noted, "the American people no longer felt threatened or scared."¹⁷ News in the 1990s became essentially isolationist, mirroring the country's self-absorption. Warnings of the terrorist threat were ignored. Indeed, the print and electronic press failed to cover three reports issued between September 1999 and January 2001 by former Senators Gary Hart and Warren Rudman, co-chairs of the U.S. Commission on National Security. On January 31, 2001, the final report predicted the use of weapons of mass destruction by terrorists and the deaths of Americans on American soil, possibly in large numbers. Yet, as Harold Evans has recently complained, "the report passed under the radar."¹⁸

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Given this historic backdrop, members of the national security establishment have been heard to ask whether the media has cultivated a sufficient sense of self-restraint in recent years to refrain from publishing information that might truly jeopardize the national interest. At the same time, respected journalists are asking whether the media will dedicate the resources over time to pursue the story on our present, yet protracted, international "emergency" wherever it might lead. The paradox is profound. Will the press permit itself to cover the war on terrorism in a manner that might be viewed as unpatriotic? Will it cover the foreign policy premises of an ongoing and expanded war aggressively so citizens can make in-

formed judgments about the wisdom of their leaders and their policies?

In the immediate aftermath of the September 11 attacks, the country was willing to wage an ambitious war against terrorism. In the days that followed, we learned that the operation in Afghanistan was only the first phase. As former Ambassador L. Paul Bremer III, chairman of the National Commission on Terrorism, has suggested, Bush's war on terrorism requires America to deprive the terrorists of the "real estate" from which they conduct their activities. After Afghanistan, Bremer has suggested possible military operations in Sudan, Yemen, Libya, Iran, and Iraq, if diplomatic pressures do not succeed.¹⁹

Will the press commit the resources necessary to gather facts about the premises and consequences of an expanded war on terrorism? Will it cover these issues thoughtfully and responsibly—with wisdom and courage? At the same time, will the media resist the temptation to sensationalize the news? Failure to resist such temptations, or to understand the complexities of the engagement, runs the risk of transforming the media into the terrorists' most potent weapon. While television stood tall in the days and weeks following the attacks of September 11, it also served as a powerful instrument of terrorism during those same dark hours, for it was the media in all its luminous forms that left the images of buildings in flames, and airplanes and office buildings as charnel houses, seared in our memories. The repeated televised images of the collapsing World Trade Center helped to cripple the airline industry, stall an already slow economy, and make the command to resume "business as usual" more challenging than most Americans could bear.

When Kennedy assumed the reigns of power in 1961, he spoke not only of a "twilight struggle" against the forces of darkness. He also pledged that a new generation of Americans would be "unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."

The Price of National Security

As the media endeavors to balance its First Amendment rights against the interests of national security, there is nothing shameful about treating nation-

al security seriously and exercising a measure of self-restraint. The press can afford to be thoughtful about what it publishes, painstaking in its care to get the story right, and prudent in the legal challenges that it brings during times of war. At the same time, our leaders must be careful about their choice of words and must take pains not to devalue the national security by habitually invoking it. Neither government officials nor media leaders can afford to breach the trust necessary to bring terrorists to justice without sacrificing our freedoms in the process. To be sure, the days of our leaders intoning "national security" simply as a means of avoiding embarrassment, or as pretext for extralegal activities, must be but a distant memory if this government hopes to preserve the trust necessary for a democracy to wage war successfully.

Some have argued that if President Kennedy had allowed a public airing of the CIA's intended invasion of Cuba in early 1961, the Bay of Pigs fiasco could have been avoided. Had news of the plan leaked, Kennedy would not have called it "the worst experience of my life," nor would he have found himself asking the question, "How could I have been so stupid?"²⁰ And yet, in October 1962, only days before he first addressed the nation on the Cuban missile crisis, Kennedy phoned top executives of the *New York Times*, the *Washington Post*, and *Time* magazine and implored them not to "push" stories on whether the administration was preparing to invade Cuba. *Times* reporter James Reston had pieced most of the missile story together, but Kennedy persuaded Orville Dryfoos, publisher of the *Times*, "not to publish any of it."²¹

In remembering his brother's *Profiles in Courage*, Robert Kennedy quoted Bonar Law as saying that "[t]here is no such thing as inevitable war. If war comes it will be from failure of human wisdom."²² That wisdom is as necessary today as it was in the crisis years of the Cold War—and as essential now in the newsrooms of America as it is in the White House. □

Endnotes

1. RICHARD REEVES, PRESIDENT KENNEDY: PROFILES OF POWER 108–09 (1993) (emphasis added); THEODORE C. SORENSEN, KENNEDY 358–59 (1966).

2. Senator Robert Toricelli and Andrew Carroll, IN OUR WORDS: EXTRAORDINARY

SPEECHES OF THE AMERICAN CENTURY 223–24 (Andrew Carroll and Robert Toricelli eds., 1999).

3. REEVES, *supra* note 1, at 109.

4. SORENSEN, *supra* note 1, at 39, 347. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

5. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

6. Floyd Abrams, *Balancing Act: Holding the Line on the First Amendment*, COLUM. J. REV., Nov./Dec. 2001, at 30.

7. Walter Isaacson, Remarks at the Libel Defense Resource Center's 21st Annual Dinner (Nov. 7, 2001). Mr. Isaacson moderated a discussion with Ben Bradlee, Diane Sawyer, and Don Hewitt.

8. Robert H. Giles, *Why Are We Hiding bin Laden?*, N.Y. TIMES, Nov. 11, 2001, at D13.

9. Sarah Boxer, *Ideas & Trends: The Banality of Terror; Dreams of Holy War Over a Quiet Evening*, N.Y. TIMES, Dec. 16, 2001, at D1.

10. Michael Howard, *What's in a Name?: How to Fight Terrorism*, FOREIGN AFF., Jan./Feb. 2002, at 8.

11. *Id.*

12. *Id.*

13. 283 U.S. 697 (1931).

14. *Id.* at 716.

15. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

16. 43 Media L. Rep. (BNA) 43, Nov. 6, 2001 (quoting Jane E. Kirtley).

17. DAVID HALBERSTAM, WAR IN A TIME OF PEACE 161 (2001).

18. Harold Evans, *Warning Given . . . Story Missed*, COLUM. J. REV., Nov./Dec. 2001, at 13. See generally NATIONAL COMMISSION ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM (2000), available at <http://w3.access.gpo.gov/nct>; FINAL REPORT, WHITE HOUSE COMMISSION ON AVIATION SAFETY AND SECURITY (1997), available at <http://www.airportnet.org/depts/regulatory/gorefinal.htm>. In 1997, the author served as a member of the Civil Liberties Advisory Panel to the White House Commission on Aviation Safety and Security.

19. L. Paul Bremer III, Remarks at the Meeting of the Phoenix Committee on Foreign Relations (Dec. 5, 2001).

20. REEVES, *supra* note 1, at 99, 103. Leslie Bennetts, *One Nation, One Mind?*, VANITY FAIR, Dec. 2001, available at <http://www.gvnewsnet.com/html/Corp/press9.html> (quoting Victor Navasky, Columbia University journalism professor and publisher of *The Nation*).

21. REEVES, *supra* note 1, at 391.

22. Robert F. Kennedy, *Foreword to JOHN F. KENNEDY, PROFILES IN COURAGE* (1964 ed.).