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SMU DEDMAN SCHOOL OF LAW
ROY R. RAY LECTURE
FREEDOM OF THE PRESS IN
TIME OF WAR

*Geoffrey R. Stone**

OUR subject is the freedom of the press in wartime. This is an issue that should be of considerable interest at the moment, if for no other reason than that the Bush administration has suggested a possible criminal prosecution of the *New York Times* for publishing information relating to the National Security Agency (“NSA”) surveillance program. Should that come to pass, it would be the first time in American history that a newspaper has been prosecuted by the federal government for publishing confidential government information.

I begin with history, because it is important to understand the context in which issues like the NSA surveillance controversy arise. As members of the legal profession, you have a special responsibility to protect our nation’s liberties. To meet that responsibility, you must master the lessons of the past. By understanding the past, you can at least hope to avoid repeating the errors of your predecessors. Our nation’s experience with freedom of the press in wartime has been uneven, at best.

I will briefly address five episodes in American history, and then turn to the present. The first of these episodes was scarred by the Sedition Act of 1798. In the closing years of the eighteenth century, less than a decade after the United States adopted the First Amendment, which prohibits Congress from making any law “abridging the freedom of speech, or of the press,” Congress enacted the Sedition Act of 1798, which effectively made it a crime for any person to utter or publish any criticism of the president, the Congress, or the government of the United States, with the intent to bring them into contempt or disrepute. It is difficult to imagine a law that would seem more clearly to abridge “the freedom of speech, or of the press.” How did this happen?

Although the framers of the Constitution did not anticipate the growth of political parties, they were very concerned about the risk of faction.

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Both the separation of powers and the guarantees of individual liberties in the Bill of Rights were designed to minimize the danger that one political group or faction would be able to impose its will on the nation. But political parties began to arise as early as Washington's first term, as competing interest groups—rural v. urban, North v. South, mercantile v. agrarian—coalesced into two sharply divergent parties. It is important to remember that although we today take the stability of our democracy largely for granted, in the early years of the nation there was no such confidence. Many, perhaps most, citizens believed that the experiment of the United States was just that—an experiment. The Federalist Party, led by Hamilton and Adams, and the Republican Party, led by Jefferson and Madison, had very different visions of the nation and its future. They viewed each other with suspicion and animosity, and in the presidential election of 1796, the Federalist candidate, John Adams, defeated the Republican candidate, Thomas Jefferson, by a scant three electoral votes. The distrust and hostility between the parties threatened to split the nation.

While all this was simmering, a war raged in Europe between France and England. The Federalists identified with England, the Republicans with France. The United States tried to maintain a position of neutrality, but by 1798 the nation had effectively aligned itself with England. The Federalists, who controlled the White House, the Congress, and the judiciary, warned that war with France was imminent. Claiming that the nation needed to prepare for war, President Adams asked Congress to expand the army and navy, abrogate existing treaties with France, and enact the Sedition Act of 1798. The Republicans argued that the proposed Act violated the First Amendment. The Federalists responded that whatever might be the case in peacetime, in time of war the nation had to be united. Criticism of the nation's leaders would undermine confidence and threaten our ability to fight effectively. War was no time to allow division and distrust. The Federalists had the votes, and the Sedition Act of 1798 was quickly enacted and signed into law by President Adams.

Federalist prosecutors and judges aggressively used the Act to silence the Republicans. Every prosecution under the Sedition Act targeted members and supporters of the Republican Party, and a particular target of these prosecutions was the Republican press. The press of this era was quite different from the mainstream media of today. Newspapers were highly partisan, and often existed principally to advance the interests of a particular political party. The government prosecuted the editors of the leading Republican newspapers, and succeeded in jailing many Republican editors and closing at least temporarily many Republican newspapers. Such statements as Adams has caused the nation to have "to borrow money at eight per cent" or that he had contrived "a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism" landed Republican editors in prison. The goal of these prosecutions had little to

do with the danger of war with France and everything to do with the prospects of the Federalist Party in the election of 1800. The Federalists used the threat of war as a pretext to enact legislation that could then be used to perpetuate themselves in power.

The effort failed. The American people were so furious about the Sedition Act that they voted the Federalists and Adams out of office and elected the Republicans and Jefferson. This was one of the few times in American history when the American people saw through the manipulation of a wartime atmosphere in order to protect their own liberties. As it turned out, by the way, no war with France ever materialized. A critical lesson of this early experience is the need to be skeptical about government efforts to suppress freedom of the press in order to protect the national security. It is quite natural for a nation's leaders, intentionally or unintentionally, to confuse the national security with partisan self-interest. Sadly, this pattern has repeated over and over again since 1798.

The next episode is the Civil War. The Civil War presented the greatest challenge the United States has ever faced. The often desperate situation of the Union led President Lincoln and his military commanders to take a number of desperate measures, including suspensions of the writ of habeas corpus, enactment of the nation's first conscription law, and issuance of the Emancipation Proclamation. There was sharp disagreement, even within the Union, about the merits of the war, about whether the North should just let the South go in peace, about whether preserving the Union was worth the staggering cost in human lives, about whether the Emancipation Proclamation was constitutional, about the administration's often brutal efforts to enforce the draft, and about Lincoln's suspensions of the writ of habeas corpus. At various times, Lincoln himself was accused in the press of being a "despot," a "liar," a "usurper," a "thief," a "monster," a "perjurer," an "ignoramus," a "swindler," a "tyrant," a "fiend," a "butcher," and a "pirate," among other things. Indeed, he was the most vilified President in history.

During the Civil War more than 300 opposition newspapers in the North were shut down by the government and many editors were jailed for publishing "disloyal" speech. These actions were taken not by the courts in ordinary criminal prosecutions, but by military commanders acting pursuant to either martial law or under Lincoln's suspensions of the writ of habeas corpus. The most dramatic example involved former congressman Clement Vallandigham, a national leader of the Peace Democrats, who was arrested in Ohio by General Ambrose Burnside for delivering a public speech criticizing Lincoln and his administration. A military tribunal found that Vallandigham had engaged in a "disloyal act" and ordered him imprisoned for the remainder of the war. Vallandigham's arrest triggered major protests throughout the North, leading Lincoln to cancel Vallandigham's imprisonment, instead ordering him exiled to the Confederacy.

During World War I, President Wilson had a problem. A large part of the American public was not enthusiastic about our entry into the war. Unlike World War II, the United States had not been attacked before World War I. Moreover, Woodrow had won reelection in 1916 on the campaign slogan, "He kept us out of war." Nonetheless, within a year he had decided that it was necessary for the United States to enter the war. The trigger for that decision was Wilson's frustration with Germany's use of submarine warfare to sink American merchant ships that were bringing supplies to England and France. Wilson had warned Germany that if it continued these attacks the United States would protect its interests under international law. Many Americans thought the better course was for the United States to stop trading with the belligerents and avoid getting embroiled in the war. As some people put it, this was not a war "to make the world safe for democracy," as Wilson described it, but a war "to make the world safe for the munitions manufacturers and arms dealers."

Facing a skeptical and often hostile public, Wilson needed both to generate a sense of enthusiasm for the war and to silence those who criticized it. To achieve the former, he created the Committee on Public Information, a propaganda agency operating directly out of the White House. Wilson directed the CPI to produce a flood of pamphlets, movies, posters, editorials, and lectures to promote a hatred of all things German and to foster suspicion of any person not fully committed to the war effort. (This is a bit like what the Bush administration has done in Iraq by arranging for Iraqi newspapers and radio and television stations to report stories actually written by American public relations firms in order to influence Iraqi public opinion—without disclosing the source of the stories.) The CPI spewed government propaganda into the American political system, with devastating effect.

But all the efforts of the CPI would be futile if critics could continue to challenge the government's case for the war. Wilson needed to stifle those who opposed his policies. To this end, he proposed the enactment of the Espionage Act of 1917 and the Sedition Act of 1918. In effect, these two laws made it unlawful for any person to write or publish any statement that criticized the President, the Congress, the government, the Constitution, the war, the draft, the military, or the uniform of the military of the United States. In effect, the government reenacted the Sedition Act of 1798. But whereas the 1798 act had a maximum penalty of two years in prison, the World War I statutes carried penalties ranging up to twenty years in prison. Most people convicted under these acts were sentenced to terms ranging from ten to twenty years in prison. During World War I, some 2000 individuals were prosecuted under these laws, including not only individual speakers, but publishers of newspapers and magazines.

One of the most famous cases involved *The Masses*, a revolutionary journal published in the mid-to-late teens that included brilliant artwork and such gifted writers as Sherwood Anderson, John Reed, and Emma

Goldman. Because *The Masses* took a staunchly anti-war stance, Albert Burleson, the postmaster general of the United States excluded the August 1917 issue of *The Masses* from the mails. Thereafter, the publishers and editors of *The Masses* were prosecuted and sentenced to prison for their criticism of the war and the draft. During World War I, Burleson banned more than a hundred newspapers and magazines from the mails. Moreover, among the 2,000 individuals and organizations prosecuted under the Espionage and Sedition Acts were dozens of editors and publishers. Even movie producers were targeted. Robert Goldstein produced "The Spirit of '76," a movie about the American Revolution. "The Spirit of '76" depicted the standard stories about the American Revolution (Washington crossing the Delaware, Valley Forge, etc.). But it also depicted a massacre by British soldiers of women and children. Because of that scene, which accurately depicted the event, Goldstein was prosecuted under the Espionage Act and sentenced to ten years in prison.

It was these prosecutions during World War I that gave the Supreme Court its first opportunity to interpret the First Amendment. The Court consistently upheld these convictions, explaining that at least in wartime the freedom of the press may be sharply restricted. The Court held that the government could constitutionally prohibit the publication of any material that had the tendency to cause readers to turn against the war, because they might then be inclined to refuse induction into the military, be insubordinate, or decline to buy war bonds. The effect was the squelch any criticism of the war or the draft.

In World War II, the major civil liberties issue was the Japanese internment, which did not involve the freedom of the press. Because the United States was directly attacked at Pearl Harbor, for the most part the public and the press rallied to the cause in World War II. There was little dissent. But there was some, and those who dissented during World War II were treated no better than those who had preceded them. The best example was William Dudley Pelley, a self-proclaimed Nazi who described himself as the "American Hitler." In his own way, Pelley was quite an interesting character. He was a screenwriter in Hollywood who had written several award-winning short stories. In the 1930s, he founded the Silver Shirts, the largest and most potent Nazi-like organization in the United States. His newspaper, the *Galilean*, was widely disseminated. After we entered World War II, Pelley published a series of articles in the *Galilean* that were sharply critical of Roosevelt and his "Zionist" advisers. Pelley charged that Roosevelt had led the nation into bankruptcy, manipulated the Japanese into attacking the United States, failed to protect the United States against the attack at Pearl Harbor, and misled the American people about the extent of damage to the United States fleet at Pearl Harbor. Pelley also asserted that many Americans were critical of our involvement in World War II and that the losses suffered by the English in the South Pacific doomed the Allied cause in the war. President

Roosevelt ordered Attorney General Francis Biddle to prosecute Pelley under the Espionage Act of 1917.

Significantly, though, the United States prosecuted Pelley under the *false statement* provisions of the Act. The defendants in World War I prosecutions had been convicted without regard to whether their statements were true. By the 1940s, however, the government no longer thought it could (or should) convict individuals for criticizing the war unless their criticisms included false statements of fact. This was a major step forward in our First Amendment traditions. Unfortunately, Pelley was convicted even though his statements were clearly statements of opinion, rather than false statements of fact. To prove that Pelley's statements were false, the government went to such lengths as to call a banker to testify that Roosevelt hadn't bankrupted the nation and a traveling salesman to testify that almost no one opposed the war. In the midst of war fever, the jury disregarded the distinction between fact and opinion. Pelley was convicted and sentenced to fifteen years in prison.

Another incident in World War II is worthy of mention. The *Chicago Tribune*, which was very critical of Roosevelt, published information after the Battle of Midway from which one could reasonably infer that the United States had broken Japan's secret code. Understandably, the government was furious with the *Tribune* for this breach of national security and considered prosecuting the *Tribune* for publishing such information. Ultimately, though, the government decided to forego prosecution because the Japanese apparently hadn't noticed the *Tribune* story.

During the Vietnam War, the single most important conflict between the press and the government involved the publication of the Pentagon Papers. Secretary of Defense Robert McNamara had commissioned a 7000 page secret study that traced the history of United States policy toward Vietnam from the end of World War II to 1967. Daniel Ellsberg, a former employee of the Department of Defense, leaked a copy of the Pentagon Papers to the *New York Times*. Because the study included critical information about how the government had deceived the American people about the nation's involvement in Vietnam, the *New York Times* began publishing excerpts from the Pentagon Papers. The Department of Justice promptly sought an injunction against further publication. The case quickly worked its way up to the Supreme Court, which held that the injunction violated the First Amendment, even though the government had claimed that continued publication would seriously threaten the national security. The Court held that even though the danger was real, it was not sufficiently clear, present, and grave to justify the issuance of an injunction against publication. This was a profound victory for the freedom of the press.

By the time of the *Pentagon Papers* decision, American law and culture had evolved to the point that the very idea of enjoining the press for publishing such material or criminally prosecuting the press for criticizing the wartime decisions of the government was simply unthinkable. That

view reflects our current conception of the freedom of the press. It is essential to realize, however, that this conception is a very recent development in American history. It is only over the past forty years that the United States has embraced the notion that the press can openly and freely criticize the government in wartime. For the vast majority of our history, that was not the case.

There are at least two important lessons we must learn from this history. First, it is important to know that we as a nation can learn from our mistakes. Looking back, we can see that we have repeatedly overreacted to the dangers of wartime, suppressed public debate on critical issues of public policy, and dangerously censored dissent and disagreement under the guise of protecting the national security. Second, it is important to acknowledge that the progress we have made is fragile. It would not take much to upset the current understanding of the First Amendment. As Justice Holmes warned, we must be eternally vigilant if we are to preserve our freedoms.

The precariousness of our commitment to the freedom of the press is illustrating by the ongoing investigations and threatened prosecutions arising out the publication by the *New York Times* and *Washington Post* of classified government information disclosing to the American people the National Security Agency's secret electronic surveillance program and the CIA's secret prisons. President Bush and others have decried these publications as shameful, investigations are underway to determine the source of the leaks, and the government has threatened to initiate criminal prosecutions of the press for publishing confidential government information for the first time in American history.

Serious issues remain unresolved: (1) Could the United States have criminally prosecuted Daniel Ellsberg for leaking the Pentagon Papers? Although the government initiated such a prosecution, it was dismissed for government misconduct. But the question remains: When, if ever, do public employees have a constitutional right to leak classified information to the press? (2) Could the United States have criminally prosecuted the *New York Times* for publishing the Pentagon Papers? Although the *Pentagon Papers* decision held that the government could not constitutionally enjoin further publication, it did not address the question of a criminal prosecution for knowingly publishing classified information. When, if ever, can the government prosecute the press for publishing classified information? (3) Does the press have a First Amendment right to demand access to information from the government? In an era in which the national government has begun ever more secretive, how are the American people to exercise their rights as self-governors if they are kept in the dark about the policies and decisions of their own representatives? (4) Do reporters have a First Amendment right to protect the identity of their confidential sources? If not, will those who know about government abuses of authority disclose that information to the press?

These are fundamental questions that will shape the balance between national security and freedom of the press. At times, I hear people say that this is the most oppressive period in American history. Those who say that know nothing of American history. But it is also true that all is not well. Although we have secured a much greater right to criticize our government than ever before, we now face the challenge of gaining access to the information that is necessary to make that criticism meaningful. There can be no accountability and no oversight if the government can effectively shield its decisions from public scrutiny. There can be no meaningful debate about such issues as torture, secret prisons, and electronic surveillance if the government hides such practices from the press and the public.

Censorship is one way to stifle and distort public debate. Keeping the public ignorant of the government's actions is another. Consider the government's policy of preventing anyone to photograph the flag-draped coffins of American soldiers killed in Iraq. By denying the press access to such scenes, the government is effectively censoring public discourse in an effort to manipulate public understanding of the consequences of the war in Iraq. First Amendment doctrine has been designed primarily to deal with the issue of censorship. But in the twenty-first century, we increasingly must grapple with the issue of access.

I want to leave you with two concluding observations. First, although we should be proud of the progress we have made in expanding the freedom of the press even in wartime, we cannot afford to be complacent. If we had had two or three or six 9/11s within a month or six months of the attack on the World Trade Center, all of our thinking about these issues would be very different. To some extent, it would be legitimate for our thinking to be different. The degree of danger that confronts the nation is relevant. But it is also essential to keep in mind that our history teaches just how fragile our rights really are. It would not take much to put them seriously at risk.

Finally, I want to emphasize that it is critical to think about these questions before rather than after the fact. If we wait until the crisis is on us, it will be very hard to think clearly. To protect our freedoms in time of crisis, it is imperative that we define those freedoms clearly and definitively when we can think about them calmly. If we wait until the day *after* the next attack to think seriously about these issues, we will surely replicate the errors of the past.

Articles

