

**War &
Press
Freedom**

*The Problem of
Prerogative Power*

Jeffery A. Smith

War and Press Freedom

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Loss of Allegiance to U.S.!

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WHAT TO
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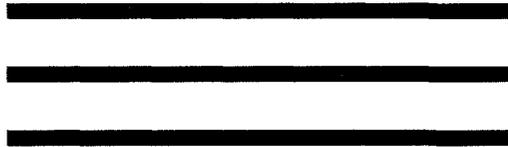
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For Geneviève Prévot Smith

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Preface

The theory of democracy suggests that if citizens and their lawmakers are well informed and able to debate issues, they will make better decisions. Yet, often in war, the most serious test of reasoning and sacrifice any society faces, freedom of expression contracts while uncritical acceptance of government decisions expands. Authorities provide their own versions of events, frequently without an adequate opportunity for independent verification. Official and unofficial attempts are made to restrict the flow of information and to rouse public emotions. Dissenting views are condemned and may be punished. For reasons ranging from panic to self-interest, politicians, military officers, and others seek to limit public discourse and to direct public opinion.

This book ponders the extent to which such largely closed systems of communication have been attempted in United States history and have gone beyond justifiable wartime security needs and invited the abuses long associated with autocratic, secretive government. I had originally planned to write a general history of the gradual demise of the country's founding principles of press freedom, but, realizing how many instances of the "death of a thousand cuts" had come from war, I decided to focus on how broad notions of "self-preservation" and "national security" have weakened the most important liberty in the Bill of Rights. I contend that suppressive policies in times of armed conflict usually have been unconstitutional, unjust, and impractical. Part One (chapters 1, 2, and 3) examines the friction between the absolute press clause of the First Amendment and the prerogatives assumed by the executive and legislative branches to restrict statements of fact and opinion about war. Part Two (chapters 4, 5, 6, and 7) considers the impact of wartime politics and paranoia on freedom of expression from the ratification of the First Amendment in 1791 through the Gulf War in 1991. Part Three (chapter 8 and the conclusion) analyzes the roles played by the media in wartime and discusses the risks that propaganda and secrecy create for a democratic system.

The following chapters offer evidence that the government, by withholding information, policing thought, and spreading propaganda, frequently acts as if it is necessary to destroy democracy in order to save it. Truth has been said to be the first casualty in war, but perhaps it is more precise to say that the First Amendment has been the first casualty, followed closely by the marketplace of ideas where truths, or at least better understandings, are more likely to emerge than in a system of authoritarian control. Benjamin Franklin may have been exaggerating when he remarked

that “there never was a good War, or a bad Peace,”¹ but, in hindsight, no war in America’s past has been so sensible or so lacking in any serious regrets that some further thought would not have been beneficial. The mass media themselves, unfortunately, have contributed to the kind of hysterical saber-rattling and paroxysms of patriotic self-righteousness that brought the United States into an undeclared war with France in 1798, into a declared war with Spain in 1898, and, more recently, into the stockpiling of redundant nuclear weapons during the Cold War. Although free and open debate at each stage of a conflict cannot prevent all the blunders the country will make, it could help eliminate many mistakes.

Contrary to a prevalent perception, the combination of wartime policy problems and adversarial journalism did not originate with Vietnam. One aim of this book, therefore, is to provide a historical overview of the altercations that have pitted the press against government power. My central purpose, however, is not to chronicle all of the many episodes of suppression in the nation’s past. Instead, this study is mainly concerned with the legality, dynamics, and rationality of wartime decisions affecting freedom of expression. At the heart of the matter is a fundamental legal issue that has been neglected by scholars. Do presidents and their military subordinates have constitutional authority to impose restrictions on press coverage of armed conflicts? If not, then how have commanders in chief and the armed forces managed to reduce the freedom of the press to report on war? How reasonable has their use of unallocated powers been, and how have they exploited the government’s ability to impose secrecy and, at the same time, influence public opinion? I seek to challenge “common sense” assumptions about security and to provide an analysis of how the nation’s actions have often fallen short of its highly pragmatic ideals, ideals that I have discussed in two previous books, *Printers and Press Freedom: The Ideology of Early American Journalism* and *Franklin and Bache: Envisioning the Enlightened Republic*.

I have not served in the military, but I respect its professed ideals of honor and discipline and hope that they can be applied to future relations with the press and public. My friends and relatives who have been in battle will not be remembered for making any famous remarks, such as General Sherman’s observation that war is “hell” or President Eisenhower’s warning about the “military-industrial complex.”² They did, however, see how war is an education in the best and the worst of human behavior. Wars are, indeed, tests of cultural values. They indicate how power can be used in a society and where it actually resides. At crucial points in American history, citizens, courts, and Congress have yielded effective control over the nation’s peace and prosperity to a presidential-military protectorate shielded by secrecy and suppression. This book is therefore a history of how concepts of freedom can wither and how arguments can be constructed to promote the erosion of rights. Those who are oblivious to wars being conducted in unconstitutional, unaccountable, and often unthinking ways are neither sufficiently aware of the follies that result nor adequately prepared to participate in humanity’s continuing race between civilized life and self-destruction.

J.A.S.

Iowa City
June 1998

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Some of the ideas offered here were presented in an entirely different way in “Prior Restraint: Original Intentions and Modern Interpretations,” an article that appeared in the Spring 1987 issue of *William & Mary Law Review*. Other tasks and projects made it impossible for me to return to this topic until now. Some portions of chapter 1 appeared in an earlier form in the Summer–Fall 1993 issue of *American Journalism*; I appreciate having the editor’s permission to use them here. I have been very dependent on the University of Iowa Libraries. I thank the State Historical Society of Wisconsin for permission to quote from the Byron Price papers.

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Part One: Intentions and Interpretations

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1

War, Autocracy, and the Constitution

Nothing was more central to the Enlightenment reasoning that produced the United States Constitution than an aversion to the unwanted effects of human aggressiveness. Zeal and ambition, said the *Federalist* papers, rendered people “much more disposed to vex and oppress each other, than to co-operate for their common good.”¹ In the eighteenth century, self-interested, hostile actions were regarded as having led not only to disreputable party politics and destructive wars but also to the downfall of past republics. The United States Constitution was an attempt to construct a means of securing all of the ends listed in its preamble: a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty. The French physiocrats, Adam Smith, and the Jeffersonian Republicans advanced credible and often-admired ideas for achieving peaceful, harmonious human relations within and among societies through the political economy. Thomas Paine was thus one of a number of writers who suggested that world commerce could be “a pacific system, operating to unite mankind by rendering nations, as well as individuals, useful to each other.”² Yet various Enlightenment proposals for preventing wars—plans that involved dispute resolution by international representative bodies—were either ignored or ridiculed as utopian. Although he formulated his own concept of a universal federation to avert war, Immanuel Kant admitted that “such proposals have always been ridiculed by great statesmen, and even more by heads of state, as pedantic, childish and academic ideas.”³

Historian Peter Gay has noted that Enlightenment libertarian thought regarded warfare as “the most devastating of disasters, which only irresponsible kings can initiate, fanatical priests can encourage, cruel soldiers can love, and the foolish rabble can admire”;⁴ but philosophers generally did not expect armed conflict to be eliminated, at least as long as the people who paid in lives and taxes were not in control of governments. “The spirit of monarchy is war and expansion,” Montesquieu wrote in *The Spirit of Laws*; “the spirit of republics is peace and moderation.” Montesquieu, like many Enlightenment theorists, recognized a right of self-defense, but did not think blood should be shed for arbitrary principles of glory, propriety, or utility. “Above all, let one not speak of the prince’s glory,” he warned, “his glory is his arrogance; it is a passion and not a legitimate right.”⁵ Kant observed that a head of state could decide on war without significant reasons and at no risk to “his banquets, hunts, pleasure palaces and court festivals.” A republican constitution, however, required the consent of the people, Kant noted, and they would naturally hesitate to

embark on an enterprise of death, devastation, and “the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself.”⁶

James Madison summarized the sentiments of America’s Enlightenment republicanism in a 1792 *National Gazette* essay dismissing a world peace plan advocated by Rousseau. Instead of trying to avert war and revolution by setting up international arbitration, Madison stated, Rousseau should have traced “the past frequency of wars to a will in the government independent of the will of the people” and to “the practice by each generation of taxing the principal of its debts on future generations.” The disease of warfare was hereditary to hereditary rulers who did not suffer personal consequences, Madison wrote, and would continue even in republics in the absence of “permanent and constitutional maxims of conduct, which may prevail over occasional impressions, and inconsiderate pursuits.” Reason and an honest calculation of the expenses of avarice and ambition—rather than reckless borrowing for military expenditures—would help to prevent “wars of folly” and to preserve unwasted resources for “wars of necessity and defence.” War, he told the readers of the *Gazette*, should only be declared “by the authority of the people, whose toil and treasure are to support its burdens.”⁷

An enduring republican solution to autocratic misrule, Madison and others in the founding generation believed, would require limited government and unlimited citizen debate. The Constitution they wrote and ratified specifically (in the First Amendment) denied Congress, which was given the sole power to legislate (Article I), any authority to abridge freedom of the press and did not place the president, who was to enforce the laws, above the law. In contrast to later theories of government that would seek safety in legislative and presidential-military suppression in times of war or other crisis, security was associated with a guaranteed right to analyze and evaluate the performance of the citizens’ servants in government. Eighteenth-century Americans experienced and sought to preserve a press that could expose the kind of reckless leadership that could occur in war or peace, leadership that could needlessly impoverish and endanger lives. Consequently, the press clause of the First Amendment can be understood as a manifestation of the Enlightenment’s emphasis on improving the general condition of humanity and as a carefully considered refusal to recognize any authority of presidents or other government officials over expression that could reveal their faults and failures. No exigency of the nation, not even war, can rewrite the First Amendment and its absolute ban on prior restraint and on subsequent penalties for news coverage and commentary.

I.

By linking wars and the resulting human misery to royalty, Enlightenment philosophers and journalists undermined the traditional theory that a king was an unselfish, unifying force responsible for the people’s safety and the common good.⁸ Wars, said one Philadelphia newspaper, “however successful, and however advantageous to individuals, are always a losing business to the people.”⁹ In *The Rights of Man*, Thomas Paine traced the origins of monarchy to the leaders of roving bandits and to plunderers who divided the world into their dominions. “From such beginning of governments,

what could be expected, but a continual system of war and extortion?" he asked. War is the gambling table of governments, Paine said, and meant only taxes to the farmers and manufacturers who found their economic outcome the same whether the military conquered or was defeated. "There does not exist within such government sufficient stamina whereon to ingraft reformation," he argued, "and the shortest, easiest, and most effectual remedy, is to begin anew."¹⁰ Those who were proud of living in a benign Age of Reason thus could also see the necessity of being a bellicose Age of Revolution. One fundamental justification for rebellion against royalty was the belief that peace would be more likely where the people themselves ruled.

Both the recognition that people suffered in war and the idea that public opinion was the best guide in the matter were given extensive discussion in early America—especially in the press, where it was possible to convey reactions to events in a relatively timely and convenient way. Journalists saw themselves as participating in the propagation of Enlightenment thought and spoke frequently of their ambitions to impart libertarian wisdom and useful information to the public. To a great extent, original writings in periodicals and pamphlets were responsible for advancing the ideological debates of a nation in the act of creating itself. Books and European philosophers seem to have played less of a direct role in this process than is often assumed. The press allowed large numbers of Americans to contemplate issues simultaneously and to respond to each other rapidly.¹¹

Newspapers and magazines, in particular, were in a position to create a shared political culture that extended even into remote rural areas.¹² Their penetration and periodicity allowed them to speak to many people at the same time, shaping first impressions of the news and reinforcing views through repetition. Readers could feel they were connected to governmental affairs and had the information necessary to make assessments of those in authority. Saying that he lived some distance from the city, but had "benefit of the news prints, which I peruse at leisure hours," the author of a 1793 letter to a Boston editor said, "I esteem it a great privilege, and it affords me a secret satisfaction to sit at home and be informed of the affairs of this great and happy country, from one end to the other." "Rusticus," however, added that he was nevertheless sad at seeing so much journalistic abuse of President Washington after he issued a proclamation of neutrality in the war that had erupted between England and the French republic.¹³ Specific decisions on war and peace were, of course, always controversial, but the existence of an unfettered periodical press allowed the public an expanded opportunity to examine the work of political and military leaders.

Attention to the brutality of war was evident in the earliest days of American journalism. In the only issue of the first newspaper to be attempted in the colonies, *Publick Occurrences, Both Forreign and Domestick*, Benjamin Harris in 1690 mentioned the upheavals facing Louis XIV and depicted England's Indian allies in a campaign against Canada as "miserable Salvages, in whom we have too much confided." Stating that he wanted to provide accurate news in a time of confusion and promising to correct any mistakes, Harris published accounts of atrocities on all sides, including one in which a Captain Mason "cut the faces, and ript the bellies of two *Indians*, and threw a third over board in sight of the *French*, who informing the other *Indians* of it, they have in revenge barbarously Butcher'd forty Captives of ours that were in their hands." Before another issue could be printed, the governor and council of Massa-

chusetts, noting the strong nature of the pieces, ordered the suppression of the unlicensed newspaper.¹⁴ Harris had not only published without submitting to censorship but also dared to question behavior in the most emotional of all public matters—war.

Prior restraint soon ended in England and America, however, and accounts of armed conflict became a staple of newspapers. In *The Wealth of Nations*, Adam Smith complained about how comfortably people in a great empire could be informed about distant military actions. Seemingly not inconvenienced at all because their government borrowed funds rather than raised the taxes necessary to pay for the war, they had “the amusement of reading in the newspapers the exploits of their own fleets and armies,” Smith wrote, and were disappointed when peace ended the entertainment as well as “a thousand visionary hopes of conquest and national glory, from a longer continuance of the war.”¹⁵ In situations with more immediate danger, of course, the realities were difficult to ignore. Many of the cases brought by government against eighteenth-century American journalists were responses to critical writings on delicate defense-related matters, from the jailing of James Franklin in 1722 for a snide comment on officials’ failure to pursue coastal pirates to the prosecutions under the Sedition Act of 1798, which were, in large part, the result of hostilities with a much more powerful nation, France. These cases, however, were sporadic and typically unpopular as well as ineffectual.¹⁶

For Americans, war was less a diversion carried out by professional mercenaries and more an actual experience on the frontier and, during the Revolution, throughout the region. Not only soldiers like George Washington, but also Enlightenment sages such as Benjamin Franklin and Thomas Jefferson knew the sufferings of war at close range. Benjamin Franklin’s *A Narrative of the Late Massacres*, a fervent pamphlet condemning the Paxton Boys’ revenge killings of peaceful Indian men, women, and children, stated that the victims’ only crime seemed to be having red skin and black hair. “What had little Boys and Girls done; what could Children of a Year old, Babes at the Breast, what could they do, that they too must be shot and hatcheted?” he asked.¹⁷ Franklin, who often spoke of the waste and sufferings of war, conveyed bitter wisdom when, among his almanac’s aphorisms, he wrote, “Wars bring scars.” Other Poor Richard sayings—including “Mad Kings and mad Bulls, are not to be held by treaties and packthread” and “The greatest monarch on the proudest throne, is oblig’d to sit upon his own arse”—do not suggest reverence for royalty. Monarchy itself, Americans were concluding, was at the root of the problem, despite all pretenses of grandeur and protection. Old and corrupt European institutions, it appeared, were destroying peace and prosperity—even in North America. “Kings have long Arms, but Misfortune longer,” Poor Richard remarked.¹⁸

The press encouraged such observations by squarely placing the blame for the horrors of war on kings. In 1746, for instance, a Boston magazine provided a graphic description of the aftermath of a battle in Italy with commentary on the senseless slaughter of soldiers who only hours before had been alive and animated. “These reflections may be equally applied to many other occasions, wherein men have been blindly sacrificed by the thousands to the folly or ambition of monarchs,” the editor concluded.¹⁹ After news reports arriving early in 1771 indicated that England might be considering war with Spain, Purdie and Dixon’s *Virginia Gazette* offered readers Swiftian accounts from London of kings going to battle over a bit of land or an

argument about the color of a woman's eyebrows. Accompanying remarks said that centuries of war in Europe had produced little more than misery and that for each great ruler, there were a thousand who disgraced humanity. A letter to the paper signed "D. R." said that the thirst to add to wealth and the desire to distract a country from domestic unrest were the causes of war. War, the correspondent reminded those who were excited at the prospect, meant "the Reign of Violence; the License of Robbery and Murder, the Fatigues, the Dangers, the Sickness, the Wounds, the Death of Thousands, the Desolation of Provinces; the Waste of the human Species; the Mourning of Parents; the Cries and Tears of Widows and Orphans."²⁰

America's prerevolutionary press presented loathsome images of the depravity and designs of enemy royalty. After the Duke of Cumberland routed France's Jacobite invaders in Scotland in 1746 and ruthlessly killed the survivors, colonists were given a feast of patriotic propaganda. Readers of the *South-Carolina Gazette* were told, for example, that Charles Edward Stuart, the Young Pretender, who led the invasion, had left behind a model of the Bastille, instructions for sodomy "after the *Italian Manner*," and a "Bundle of Rods, to whip the Nakedness of pretty Maids, with *Spanish Padlocks* for private Uses."²¹ During the French and Indian War, colonial writers contrasted French absolutism and cunning with Anglo-American love of liberty and justice. "The King of France has an arbitrary Authority to do what he pleases," said an essay by "Virginia Centinel," "though his Intellects do not enable him, nor his Heart incline him, to do much Good."²² Ironically, when the alliance was formed with France during the Revolutionary War, patriot journalists, some of whom received pay from the French minister, found themselves in the position of glorifying Louis XVI while loyalist newspapers said that the French had sinister plans for imposing the authority of their king and the pope on the United States.²³

To denounce a Louis was, of course, only to condemn the evils of an authoritarian adversary rather than all monarchs. British and colonial American libertarians ritualistically congratulated themselves in the press and elsewhere for having a "mixed" political system that balanced the three classic forms of government—monarchy, aristocracy, and democracy—in the king, Lords, and Commons. In theory, the nation would thus have the advantages of the three forms and expect each to prevent excesses in the others. The monarch could provide leadership without sliding into despotism, the nobility could supply wisdom without fomenting factions, and the people could protect liberty without creating anarchy. At the time of the French and Indian War, the colonial press may have dispensed blistering criticism of official policies and behavior;²⁴ but even the caustic "Virginia Centinel," whose depiction of "Vice and Debauchery" in the Virginia regiment brought Colonel George Washington and fellow officers close to resignation, hailed mixed government where each part "may be a proper Check on the other, on any Appearance of Deviation from the public Good."²⁵

Praised by Montesquieu and others as having successfully combined stability, sense, and freedom, the British constitution was a source of enormous pride for Americans. "How must it swell the Breast of every BRITON with Transport!" William Livingston wrote in his *Independent Reflector* in 1752, "while he surveys the despicable Slaves of *unlimited* Princes, to reflect, that his Person and Property are guarded by Laws, which the Sovereign himself cannot infringe." Livingston, a journalist and law-