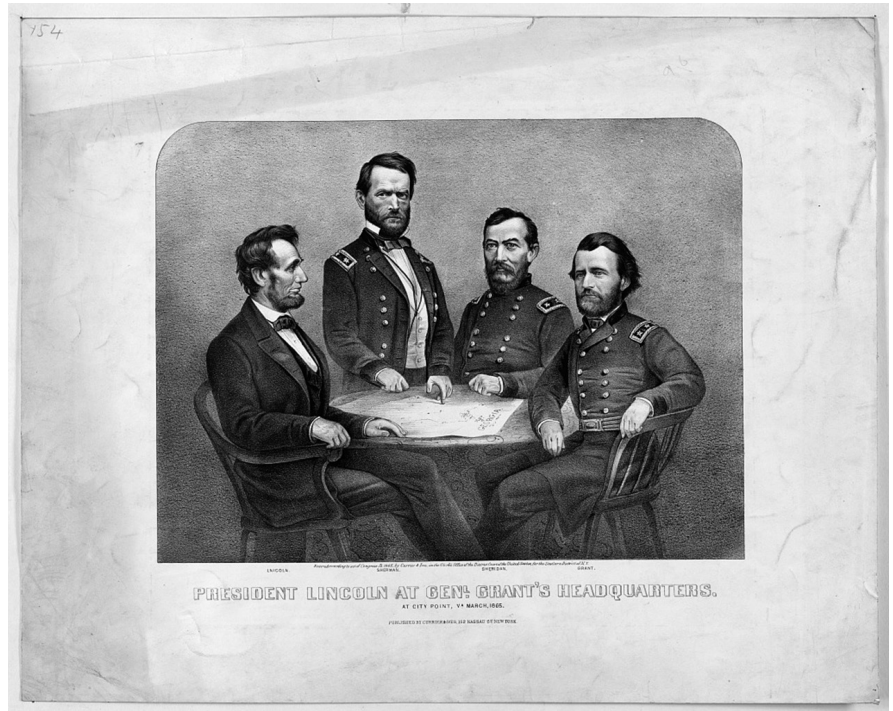


## The Unresolved Tension between Warriors and Journalists during the Civil War

Randy D. Ferryman

***At stake was the definition of the right balance between the competing constitutional principles of protecting lives and safeguarding individual liberty.***



This Currier and Ives lithograph depicts President Abraham Lincoln meeting with (l to r) Union Generals W.T. Sherman, P.M. Sheridan, and U.S. Grant in 1865. This and other images in this article are from the Library of Congress, Prints and Photographs Division.

By 18 February 1863, Union Maj. Gen. William Tecumseh Sherman was fed up with unauthorized press disclosures of his operations, writing in a letter to his brother, US Senator John Sherman, that “with the press, unfettered as now, we are defeated until the end of time.”<sup>21</sup> General Sherman wanted enforcement of federal instructions to newspapers not to disclose sensitive military information, which the press firmly believed was in its interest and the nation’s to print. From the beginning of the war until its conclusion, the US government and the northern press were unable to resolve several disputes over press disclosures and news controls. At stake was the definition of the right balance between the competing constitutional principles of protecting lives while safeguarding individual liberty.

All statements of fact, opinion, or analysis expressed in this article are those of the author. Nothing in the article should be construed as asserting or implying US government endorsement of its factual statements and interpretations.

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***Throughout the Civil War, the northern press, which fiercely opposed censorship, was responsible for several serious disclosures.***

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From the outset, the booming American newspaper industry expansively covered Civil War political, societal, and military developments, in the process providing a sweeping and unprecedented survey of a nation at war. With unparalleled capabilities, the press dispatched more correspondents to the field than during any other American war. Utilizing the largest railroad system in the world and 50,000 miles of telegraph lines, newspapers would cast a wide net for war-related news, wherever it was emerging, and quickly circulate it across the country, often within just hours after an event unfolded.<sup>2</sup> Even during the war, broadsheets were commonly exchanged across north-south boundaries, and contraband or intelligence delivery networks were used if normal channels were closed.

An already large American readership expanded during the war as readers thirsted for news about the war and their loved ones fighting it. Most publishers quenched this thirst, but too often they lured readers by deliberately printing sensitive military information that national leaders and military commanders believed compromised military operations and added to casualty lists that were already too long.

Union commanders, such as Maj. Gen. George B. McClellan and Sherman, bitterly complained to the Lincoln administration about the improper or unauthorized release of sensitive military matters by the northern press. Confederate leaders and commanders felt similarly betrayed by the southern press and worked to stop the practice, but reve-

lations declined markedly as invading Union armies and war destruction in the south crippled or shut down most southern news bureaus.

Despite its continuous and often successful efforts, the US government never cobbled together a reliable apparatus to prevent northern newspapers from publishing sensitive military information or barring their sources from collecting sensitive information and relaying it to their editors. Like today, during the Civil War the First Amendment firmly protected the freedom of the press, and federal prosecutors had few legal options. No US statute existed that explicitly prohibited the press from publishing sensitive national security information or punished it for doing so. The Lincoln administration also recognized, as have subsequent administrations, that to gain voter support for policies, building and sustaining cooperative relationships with the press are necessary to receive fair, albeit not always objective, coverage.

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***Major Military Operations and Campaigns Exposed***

Throughout the Civil War, the northern press, which fiercely opposed censorship and had among its core more than 100 bureaus printing stories expressing strong opposition to the war, was responsible for several serious disclosures.<sup>3</sup> In late May 1862, not long before the opening of the Seven Days Campaign of late June and early July, the Union commander of the Army of the Potomac, General McClellan, believed he had

been victimized by press disclosures of sensitive military information after his forces had come within a few miles of Richmond.<sup>4</sup> He wrote Secretary of War Edwin M. Stanton to complain about

*frequently published letters from their [newspaper] correspondents with the army, giving important information concerning our movements, positions of troops, etc., in violation of your orders.*<sup>5</sup>

McClellan subsequently wrote to Stanton:

*My order of the 25th May [1862], directing the order of march from the Chickahominy [river] and the disposition to be made of the trains and baggage, is published in full in the Baltimore American of the 2nd instant. If any statement could afford more important information to the enemy I am unable to perceive it.*<sup>6</sup>

Maj. Gen. Joseph Hooker similarly was beset by disclosures during his rocky five-month stint from February to June 1863 as one of McClellan's successors. As he was about to contest Robert E. Lee's Gettysburg campaign—which the *Richmond Examiner* had hinted at if not exposed on 10 June—Hooker on the 18th sent a confidential letter to editors asking them to exercise discretion in preparing their reports. But he was too late. On that same day, the *New York Herald* revealed the location of Hooker's entire army—its seven corps and cavalry units, about 90,000 men altogether.<sup>7</sup>

Union commanders in the western theater, generally defined as west of

the Appalachian Mountains, were similarly cursed by unauthorized disclosures. While Sherman was operating in Georgia during the fall of 1864, the *Indianapolis Journal* revealed his troop disposition and intentions by reporting that Sherman had returned to Atlanta on a specified date with five corps of his army and that he had dispatched two of his corps to watch Gen. John Bell Hood’s Confederate army.<sup>8</sup>

### “Specials” Flock to the Field...

During the war, the major American newspapers sent 500 reporters to the field: about 350 “specials,” as they were commonly called for northern newspapers, and 150 specials for southern papers. Many of them were in their late 20s. They fed news that regularly landed on the front pages of an estimated 2,500 to 3,750 newspapers across America that published daily, weekly, bi-weekly, or tri-weekly.<sup>9</sup>

Fierce competition among major newspapers in big cities, particularly in New York, drove editors to press for the latest “scoop” from their specials, who typically responded aggressively to “smoke out” highly cherished news from the front. *Harp-er’s New Monthly Magazine* captured this contest in an article titled, “The Army Correspondent.”

*The energy, enterprise, and lavish expenditure of money by the representatives of the press with the army, for the furtherance*

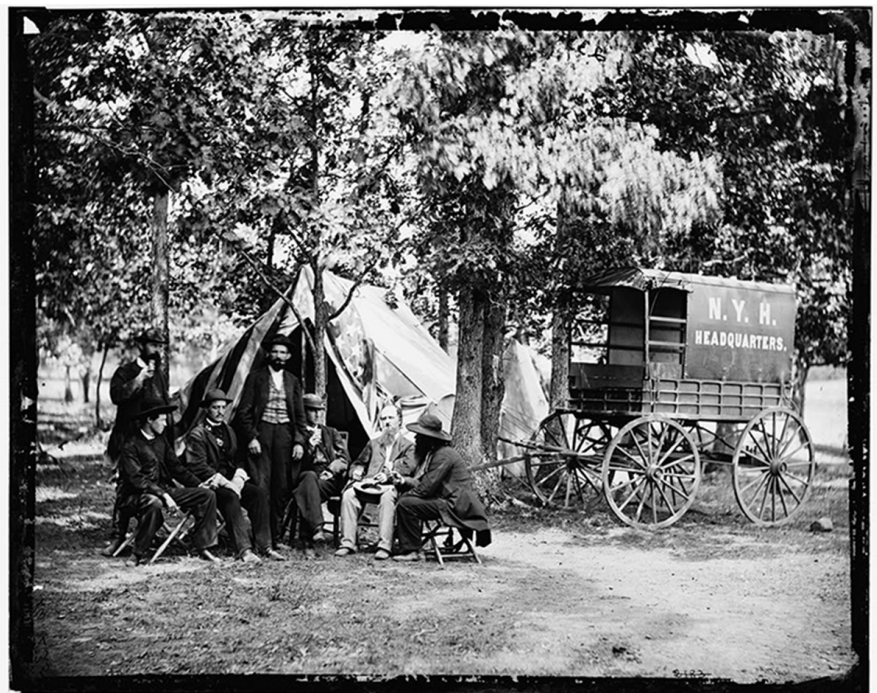
*of the single object of getting news, and getting it first, too, would astonish people, were even only the half truth told. Probably in no business in existence is the competition so hard as between the leading newspapers of New York and their representatives in the field.*<sup>10</sup> (emphasis in original)

Reporters witnessed most major Civil War battles, often showing a great deal of courage, if not recklessness, to get a first hand look at the fighting. Several were wounded, captured, and a few, killed. Fifty specials attempted to cover the first major battle of the war near Manassas, Virginia, along Bull Run Creek in July of 1861.<sup>11</sup>

The effort of George Smalley, the chief war correspondence of the *New*

*York Tribune*, during the September 1862 Antietam campaign in Maryland is one of the most remarkable. Although correspondents were barred from covering the campaign, Smalley was invited to be a volunteer aide-de-camp to Union division commander Maj. Gen. John Sedgwick. During heavy fighting on the 17th, Smalley was under fire in the battle zone, riding ahead of then I Corps commander Joseph Hooker and his staff. Hooker would say about Smalley after the battle:

*In all the experience which I have had of war, I never saw the most experienced and veteran soldier exhibit more tranquil fortitude and unshaken valor than was exhibited by that young man.*<sup>12</sup>



Correspondents of the *New York Herald* photographed at Bealeton, Virginia, in August 1863. They were traveling with the forces of Gen. George Meade who was in pursuit of Robert E. Lee’s army after the Battle of Gettysburg. Photo by Timothy H. O’Sullivan.

a. The range in the estimate is probably due to different interpretations of what constituted a newspaper.

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***Specials relentlessly pursued stories for their papers, using spying techniques when necessary to gain access to information and to get their copy to editors.***

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But Smalley wasn't only getting information for a story. During the deadly fighting at the “Cornfield” on the morning of the main battle, Hooker employed him as a staff officer to carry orders to his troops. According to Smalley's “Chapters in Journalism,” he became so embedded in operations that one of McClellan's staff officers asked Smalley to carry a message to an injured Hooker, asking him to “unseat” McClellan, who some officers perceived as mismanaging the battle. Smalley met with Hooker about his health but did not relay the staff officer's message.<sup>13</sup>

***Deploying tools of espionage...***

Specials relentlessly pursued stories for their papers, using spying techniques when necessary to gain access to information and to get their copy to editors. When prohibited from covering campaigns or camp operations, specials masqueraded as soldiers, medical aides, or some other military functionary. Some used coded language to deceive censors, while others placed reports into dead drops for couriers who would retrieve and forward them to editors.

Also used were bribes meant to skirt government news controls. Henry Villard, the chief field correspondent for the *Tribune* after Smalley, breached the army-imposed news blackout about the federal defeat at Fredericksburg, Virginia, on 13 December 1863 by essentially bribing his way the next day onto a boat on the Potomac River. When Villard reached the vessel, which was steaming for Washington, he was confronted by the skipper, who was

under orders not to transport anyone who did not display a proper pass. Villard displayed a general pass and insisted that he would help the skipper avoid trouble for allowing him to board. He gave the skipper \$50, a large sum of money at the time, as he disembarked in Washington that evening. Not long after his arrival, Villard was summoned to the White House to present the first in-depth account of the defeat to be received by the president.<sup>14</sup>

***...to produce uneven results***

The quality of newspaper reporting and publishing varied dramatically, leaving readers then just as likely to peruse poor-quality copy of war developments as they were to find exceptional journalism. No reporting standards of objectivity existed in the industry. Military commanders, already infuriated by disclosures, were further enraged by press accounts that frequently misrepresented their actions and battle outcomes.

In April 1862 at the Battle of Shiloh, near the Mississippi-Tennessee border, several members of the press corps fabricated news of the battle on a large scale.<sup>a</sup> Many specials who filed reports never witnessed the fighting, with some being as far away as Cairo, Illinois, more than 150 miles away.<sup>15</sup> Several northern press reports of the Seven Days Campaign were marred by numerous errors. The *Boston Journal* released a correction to its report that the Union suffered only 300 casualties during two days

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a. The battle produced more than 23,000 casualties, a number that shocked Americans.

of fighting after learning that McClellan's official report stated that there had been 5,737 casualties.<sup>16</sup>

Front-page space was crowded with editorials as well as news because editors, looking to advance their political agendas and press their attacks against political parties, government entities, and public figures, routinely reshaped news and facts from the battlefield to toss poisonous editorial darts at important individuals or lavish praise on them.

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***US Government Unprepared to Prevent Disclosures***

When the war started, neither the Lincoln administration nor the US military had a blueprint for controlling news. The task fell to them because the US Congress, during the antebellum or war period, did not play a major role in managing or controlling secret government information. No federal statute existed, nor would Congress pass one, during the war to expressly bar publishers from printing sensitive information or to punish them for doing so. An unwillingness to abridge the First Amendment of the Bill of Rights protecting freedom of the press was a key factor, but Congress also seemed willing to defer to the president's wartime powers.<sup>17</sup> After decades with few disputes over controlling secret government information, Congress was willing to let the executive branch take the lead.<sup>18</sup>

Congress did act to strengthen the president's power to prevent sensitive information from reaching publishers by passing legislation on 2 February 1862 that gave Lincoln the authority

to take control of the railroad and telegraph networks when necessary to ensure public safety. Railroad and telegraph companies would continue to operate their networks but Congress warned them that company officials faced penalties—even the death penalty—for failing to cooperate.<sup>19</sup>

The Supreme Court was essentially silent on issues related to protecting sensitive information and freedom of the press during the war and like Congress, deferred to the administration by not interfering with Lincoln’s interpretation of his war powers.<sup>20</sup> Without statutes making it illegal for publishers to print sensitive military information, federal authorities could do little to prosecute publishers and newsmen for disclosures. On 17 July 1862, Congress passed the “Treason Act,” which aimed to deter individuals from aiding the enemy, but it appears that no editor or reporter was ever convicted under this statute, or even brought to trial.<sup>21</sup> The same held true for prosecutions under the Articles of War, article 57, which Congress approved in 1806 to punish an individual for giving intelligence to the enemy.<sup>22</sup>

### ***War Department and the Military Patch Together Protections***

President Lincoln, recognizing the constitutional protections afforded to the press and that he needed favorable headlines to help him sustain public support for the war, maintained good relations with the media throughout the war, as did Gen. Ulysses S. Grant when he became the Union army’s overall commander. Despite being occasionally angered by unauthorized press disclosures,

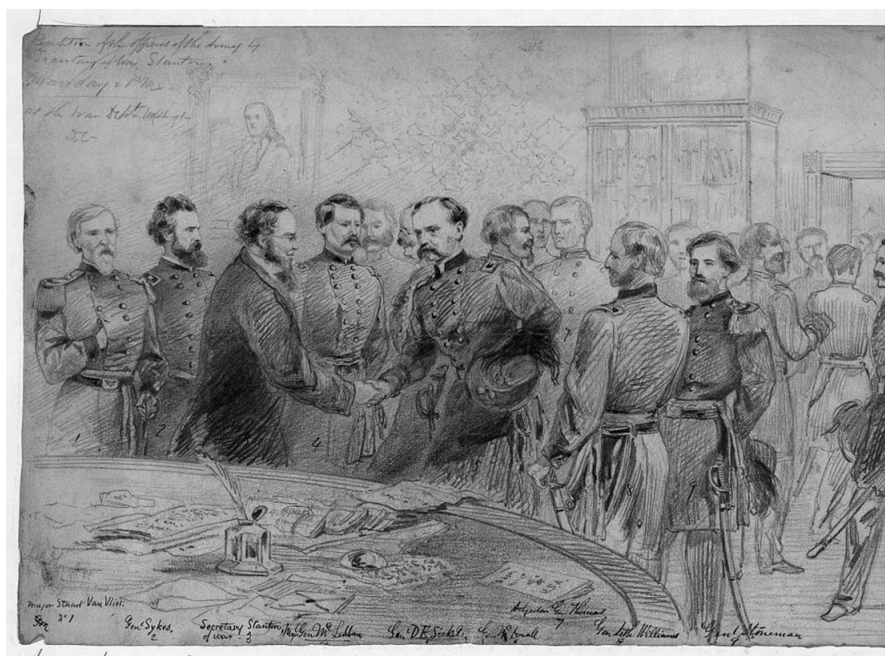
neither Lincoln nor Grant ordered a crackdown on press operations, even though Grant early in the war nearly resigned when the press backed claims against him submitted by his rivals.<sup>23</sup>

Lincoln did occasionally bend the Constitution his way to manage the emergency, for example, by suspending the writ of habeas corpus, but overall there was only limited and mostly unsystematic government interference with the freedom of expression in America during the war. Lincoln strove to root his actions in the Constitution, insisting that the Constitution mattered, and at no time did he suspend it.<sup>24</sup> He did not want the political and potential legal troubles that arresting editors could spark and did not want his military commanders to interfere with the free expression of newspapers unless such

expression would result in palpable injury to the military.<sup>25</sup>

With Lincoln and Grant pursuing a tolerant approach, guardianship of sensitive military information by the administration fell to Secretary of War Edwin M. Stanton, who embraced the role. A tough, intelligent attorney by trade, Stanton moved aggressively with the few advantages that he had and focused his effort on suppressing the operations of field correspondents.

In February 1862, after Congress had given Lincoln powers to control the rail and telegraph networks, Stanton’s War Department quickly established the US Military Telegraph Corps with the hub for traffic at the War Department.<sup>26</sup> Telegraph operations deployed with the armies in the field or located in nearby towns were also under corps direction.<sup>27</sup>



Secretary of War Stanton in the foreground greeting General McClellan at a reception at the War Department on 20 January 1862. This drawing by Arthur Lumley appeared in the *New York Illustrated News* on 8 February 1862.

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**General Sherman, motivated in part by newspaper coverage that persistently alleged he suffered from insanity, bitterly opposed newspaper intrusions into his operations.**

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The orders to the corps were clear: “All telegraphic dispatches from Washington intended for publication that related to the civil or military operations of the government, were henceforth prohibited.”<sup>28</sup> For newspapers, the government’s intent was equally clear: newspapers that published unauthorized military information, however obtained, and by whatever medium received, were to be cut off from the telegraph and forbidden to ship their product by railroad.<sup>29</sup> By the end of March 1862, the Post Office Department joined the censorship ranks when Postmaster Montgomery Blair instructed postmasters:

*You will, therefore, notify publishers not to publish any fact which has been excluded from the telegraph, and that a disregard of this order will subject the paper to be excluded from the mails.*<sup>30</sup>

The heaviest burden for preventing disclosures fell to Union field commanders, who typically sought to protect their operations by restricting the access of specials in areas under their control and by insisting on approving reports by correspondents before reports were sent to their editors. Commanders used their martial law authorities to deter reporters from breaking a commander’s rules of engagement or to prosecute reporters if they did.

Following an unauthorized disclosure by the *Philadelphia Inquirer* during the early stages of the Peninsula Campaign, the War Department,

with Stanton’s approval, on 12 April temporarily replaced local telegraph censorship with a “parole” system. In effect, the parole required each special wanting authorized access and reporting privileges to cover the campaign to sign a large document containing terms that would strictly curb their reporting and establish grounds for legal actions against violators.<sup>31</sup>

Sherman, motivated in part by newspaper coverage that persistently alleged he suffered from insanity, bitterly opposed newspaper intrusions into his operations. Early in the Vicksburg campaign, on 18 December 1862, Sherman issued General Order 8, forbidding reporters from accompanying his troops in the field:

*The expedition now fitting out is purely of a military character...no citizen, male or female, will be allowed to accompany it unless employed as part of a crew or as servants to the transports...any person whatever, whether in the service of the United States, or transports, found making reports for publication, which might reach the enemy, giving them information, aid, and comfort, will be arrested, and treated as spies.*<sup>32</sup>

Due in part to General Order 8, in February 1863, a furious Sherman, exercised his authority under martial law to try by court martial the *New York Herald’s* Tom Knox as a spy. Knox had traveled with Sherman’s army aboard a transport—with Grant’s permission—and his account

of the fighting at Chickasaw Bayou in Mississippi in late December, which appeared in the *Herald* a month later slammed Sherman for losing the battle. After fighting off several counts, Knox was still found guilty of violating transport restrictions, but he was merely barred from covering the Union Army of the Tennessee.<sup>33</sup>

Few reporters during the war were found guilty in court martial trials for disobeying executive or military orders against disclosing military information. Some were arrested, but usually quickly released. Apparently neither the War Department nor the military brought charges against government or military officials who were leaking sensitive information to the press. There is no known case of a leaker being tried for revealing sensitive military information to the press.

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***A Resilient Press Cannot Be Suppressed***

Despite multiple and often determined efforts to control the news, the Lincoln administration struggled to prevent the press from disclosing sensitive military information. With freedom of the press protections holding firm, a critical administration need for favorable press coverage, an ineffective news-control regime, and American’s craving for war news, Lincoln’s lieutenants never reached their goal of suppressing unauthorized disclosures to a level that they had hoped.

Newspaper owners and editors firmly believed they were obligated—and afforded protections guaranteed by the Constitution—to reveal

government mismanagement and excesses and to inform the public and shape their views. Moreover, major newspapers had grown profitable and powerful enough by 1861 to withstand government pressure to suppress them. After federal censorship of news led to his paper’s errant headline of a Union victory at First Manassas on 21 July 1861, the *New York Times* editor railed that citizens had the right to know the truth and that under no circumstances did the federal government have the right to deliberately suppress what it knows to be true.<sup>34</sup> Editors rejected prior restraints or filtering out sensitive information coming from the field, spitefully claiming censorship removed their responsibility to further screen the information.<sup>35</sup>

The rise of the journalism business was a major development in US society. Prior to the Civil War, few reporters had covered wars in Europe or the Americas, and news bureaus passively collected war news from a few official reports, letters, or observations collected in major towns closest to battlefronts.<sup>36</sup>

President Lincoln and lawmakers, having ties at one time or another with the newspapers or having been endorsed by them, recognized this new power center and realized there would be negative consequences if they overregulated it. Newspapers were positioned to heavily influence voter turnout and ballots at every level and to vault or savage careers and reputations. According to the 1860 census, 80 percent of all American newspapers, including the 373 dailies, were classified as decidedly “political” in content, and many newspapers were essentially funded by political office holders

or seekers, or subsidized by a local government.<sup>37</sup>

In balancing his responsibilities to protect press freedoms and government secrets, Lincoln at times would be at odds with Stanton and send the wrong message to his commanders. By occasionally waiving restrictions on reporters or extending them assistance when he sought from them the latest battlefront news, Lincoln set a tone of tolerance that some in his officer corps probably emulated. Anxious for an update on the Battle of the Wilderness in early May 1862, Lincoln sought information from a *New York Tribune* reporter, Henry E. Wing, who had been at the battle and was just 20 miles from Washington. Stanton had just ordered Wing shot as a spy, but Lincoln intervened, wanting Wing in Washington to inform him and his cabinet. Within hours a special train brought Wing to Washington, and the president rewarded

him for his report by ordering up a special train with a protective escort so Wing could retrieve his horse in Warrenton, Virginia.<sup>38</sup>

Even the chief protector of military secrets, Stanton, was not immune to pressure from the press. Stanton’s task was plagued not only because he did not have the full support of political leaders and commanders, but also because most newspapermen despised him and stubbornly resisted his attempts to restrict them.<sup>39</sup> In late April 1862, a furious Stanton shut down publication of the *Harper’s Weekly* after it published a drawing of General McClellan’s headquarters, which was shelled by Confederates two days after the edition became available in the area. He soon lifted the prohibition after he met with owner Fletcher Harper, who reminded Stanton of his paper’s overwhelming and unabashed



*Harper’s Weekly* covered the war extensively, with many dramatic images like the one above, showing Sherman’s army’s march through Atlanta, Georgia, in November 1864. The wood engraving appeared in the journal in January 1865.

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support for the Union war effort and the Lincoln administration.<sup>40</sup>

Political connections of officers also put brakes on news controls. In the Knox case (page 6), Sherman pursued the source of the leak and demanded to know from one of his commanders, Gen. Francis Preston Blair Jr., if he was the guilty party. Blair confessed that against Sherman’s orders he had allowed Knox aboard his vessel and had informed him about military operations, but he had not given him the information Knox had submitted to the *Herald*. Sherman’s accusatory tone insulted Blair, who was the brother of Montgomery Blair, a Lincoln cabinet member, and son of Francis Preston Blair, an important Lincoln adviser. General Blair, who had just completed a second term in the House of Representatives, shot back at Sherman:

*I confess myself greatly mortified and annoyed in being called on to answer such interrogations under such circumstances.... I hope to receive no more letters of the same character from you and shall not answer them if I do.*<sup>41</sup>

Generals and their officers understood the press could enhance or tarnish reputations, and this prompted many officers at all levels to frequently ignore restrictions on reporters and tolerate their activities. Senior officers were keenly aware that victories on the battlefield could launch a successful political career, with Generals George Washington, Andrew Jackson, and Zachary Taylor

before them having become commanders-in-chief. Indeed, after the Civil War, the next four presidents elected to office—Grant (twice), Rutherford B. Hayes, and James A. Garfield—had been Union generals.

Correspondents were often courted by commanders, or operated with fewer restrictions. Union Maj. Gen. William Rosecrans, the Army of the Cumberland commander who maneuvered the major Confederate western army out of Tennessee and captured the vital rail-hub city of Chattanooga by early September 1863, openly courted the press for his personal advancement. According to *New York Tribune* reporter, Henry Villard, he and other reporters would receive a warm reception at army headquarters from Rosecrans and his chief of staff, Gen. James A. Garfield, and listen to repeated claims by Rosecrans that the general was to play a preeminent role in the war:

[Rosecrans] *freely offered his confidence to me...he criticized [overall Union army commander] General Halleck and [Secretary] Stanton with such freedom...that it really embarrassed me to listen...nor did he hesitate to expiate upon his plan for future operations...he evidently believed he was destined to reach the greatest distinction among all Union generals.... I could not help concluding that he was anxious to impress me with his greatness and have that impression reflected in the Tribune.*<sup>42</sup>

Commanders often granted reporters passes to travel freely, the use of government horses and wagons, transportation on vessels, and other assistance. In May 1864, a group of reporters appealed to Grant to have his quartermaster sell forage to them so that they could feed their horses, which they needed to cover his campaign. He agreed to sell them forage until the end of the war at government prices, which were below the market price.<sup>43</sup>

Commanders were also aware that if they excessively punished specials for violating restrictions, reporters would retaliate by writing stories discrediting them or by refusing to cover them. Normally offenders were simply banished from camp, but in May 1864, Army of the Potomac commander General George Meade humiliated Edward Crapsey of the *Philadelphia Inquirer*. Before evicting Crapsey, Meade mounted him, facing backwards on a mule, and hung placards on his front and back labeling him the “Libeler of the Press,” and then had ride among the troops while a band played “Rogue’s March.”<sup>44</sup> Crapsey got his revenge when later in Washington he organized several journalists who were infuriated by his treatment to publish only negative press about Meade and refrain from crediting him with any success, an embargo that lasted about six months.<sup>45</sup>

With senior field commanders pursuing different strategies to control the news through access and report dissemination privileges, the troops implementing controls rarely had standards to guide them, which made it easier for correspondents to evade controls. Correspondents without privileges regularly gained



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access through army lines by slipping past sentries guarding camps, depots, railroad stations, and other lines of communication. Without protocols establishing what information was permitted or prohibited for release, censors in field telegraph posts or telegraph stations performed their duties unevenly, in some cases transmitting complete summary correspondence, in others sending only bits of information, or refusing to transmit any information.

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**The Government-Media Standoff: Then and Today**

The gravest crisis in US history, the Civil War, placed unprecedented pressure on all the major actors to push for a resolution as soon as possible to stop a conflict that would in four years take the lives of approximately 625,000 Americans. The greatest burden for ending the war fell on President Lincoln who, as commander-in-chief, had to balance conflicting constitutional responsibilities to protect freedom of expression and the lives of individuals while he attempted to persuade citizens that war was necessary to reunite the country. Lincoln had to heavily rely on the press to reach voters. Thus, he allowed news bureaus to publish sensitive material and did not seriously punish them for doing so as the price to pay for media access.

Newsmen were motivated to publish for several reasons, with profits topping the list, but not far behind was the desire to express opinions about how the country should move

forward and who should lead it. Protecting liberty, informing the public, and holding government accountable also was central to their aims. Perhaps Samuel Bowles, editor-publisher of the antislavery *Springfield (Massachusetts) Republican* in 1851, best captured the purpose of journalism:

*The brilliant mission of the newspaper is ...to be, the high priest of history, the vitalizer of society, the world’s great informer, the earth’s high censor, the medium of public thought and opinion, and the circulating life blood of the whole human mind. It is the great enemy of tyrants and the right arm of liberty, and is destined, more than any other agency, to melt and mold the jarring and contending nations of the world into ...one great brotherhood.*<sup>46</sup>

In many ways the newspaper industry served the public’s interests capably but several times it did so while damaging the national cause by revealing military secrets that put soldiers in greater danger and cost more lives. The burden would also fall on the public to sift through tainted copy to find the facts and truth about developments so it could make informed judgments about the necessity and course of war for which huge personal sacrifices were being made.

Stronger government news controls to protect sensitive military information did not emerge until the World War I era, culminating in the passage of the Espionage Act in 1917. The provisions of the

act, expanded over time, are now found under 18 U.S. Code, Sections 793–798, and are aimed at protecting sensitive government information by punishing government employees for unauthorized disclosures and nongovernment individuals if the intent of the violator is to do harm to the United States or to aid a foreign nation.<sup>47</sup> These provisions are aimed at the source of a leak, and 11 violators—including most recently Edward Snowden—have faced federal charges or prosecutions under these provisions.

Still, only a patchwork of statutes exists today to protect sensitive government information, and there is no single statute that criminalizes unauthorized disclosures of secret information.<sup>48</sup> While sources are held accountable for disclosures, the media, which receive and publish the leaks, face minimal legal restraints—no publisher over the last half-century has faced prosecution in a US federal court for disclosing or possessing leaked government information.<sup>49</sup> Courts and prosecutors have favored journalists over leakers, probably because of the First Amendment, even though it is through journalists that the sensitive information is divulged to the public and foreign adversaries.<sup>50</sup>

When the media come before the court on charges of disclosing sensitive or secret information not authorized by the government, judges hold a high bar for the government in proving that leaked information poses, or has the potential to pose, grave or immediate dangers. It is difficult for the government to meet the standard, in part because by doing so it risks confirming the validity of disclosed information or disclosing

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**As our forebears discovered during the Civil War, deciding where to draw the [censorship] line without compromising competing constitutional values is a difficult and recurring debate,**

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more secrets to prove its case. The Supreme Court decision in the 1973 *Pentagon Papers* case remains a key legal opinion for adjudicating cases against the media. The court held that the government had not met its heavy burden of justifying prior restraints on the *New York Times* and *Washington Post* for publishing the secret study on US decisionmaking during the Vietnam War provided to them by defense contractor Daniel Ellsberg.<sup>51</sup>

The *Pentagon Papers* case also highlighted the role that leaks play in the symbiotic relationship among government leaders and the mainstream press, which many observers believe contributes to a government hesitance to prosecute the media. *New York Times* publisher Max Frankel in his affidavit in the *Pentagon*

*Papers* case stated his view of the relationship:

[There is an] “*informal but customary traffic in secret information*” that characterized the interactions of a small and specialized corps of reporters and a few hundred American officials...[within which] high-level leaks of classified information are “the coin of [the] business”...their [the media] power to dictate outcomes is substantial.<sup>52</sup>

The *Pentagon Papers* case also brought to the forefront what many believed to be the unwarranted increase in state secrets. A leading constitutional scholar of the 20th century, Alexander Bickel, who represented the *New York Times* during the trial,

stated that the case had demonstrated that the press provided the “countervailing power” against undue secrecy, because the First Amendment’s disapproval of prior restraint meant that while the government was permitted to “guard mightily” against leaks, it had little choice but to “suffer leaks if they occurred.” He said that while the resulting cat-and-mouse “game” might be “disorderly,” it was nonetheless “effective.”<sup>53</sup>

Democracies, loathing any form of political censorship, have shown a tolerance for censorship of military information during times of war but jealously guard against extending censorship beyond its intended purpose.<sup>54</sup> As our forebears discovered during the Civil War, deciding where to draw the line without compromising competing constitutional values is a difficult and recurring debate, but it is a crucial and necessary one to safeguard the lives and liberties of individuals in a democracy.



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11. Risley, *Civil War Journalism*, 26.
12. Andrews, *The North Reports the Civil War*, 227.
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17. Rahul Sagar, *Secrets and Leaks—The Dilemma of State Secrecy* (Princeton University Press, 2013), 34–35. See review by Jason Manosevitz in this issue.
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36. Joseph J. Mathews, *Reporting the News* (University of Minnesota Press, 1957), chapters 4, 5, 6.
37. Harris, *War News*, 15.
38. Andrews, *The North Reports the Civil War*, 532–35.
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41. *Ibid.*, 245; Andrews, *The North Reports the Civil War*, 379.
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43. *Ibid.*, 541.
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46. *Ibid.*, 3.
47. Jennifer K. Elsea, *Criminal Prohibitions on the Publication of Classified Defense Information* (Congressional Research Service, 2013), 8.
48. *Ibid.*
49. David E. Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review* 127, no. 2 (December 2013): 535.
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52. *Ibid.*, 531.
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