



## Press Controls in Wartime: The Legal, Historical, and Institutional Context

Stephen D. Cooper

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Department of Communication Studies

[Marshall University](#)

[coopers@marshall.edu](mailto:coopers@marshall.edu)

(304) 696-2733

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### Abstract

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News coverage of warfare poses a dilemma for social systems with a free press, such as the United States. In an era of high-tech weaponry and nearly instantaneous global communications, conflict is inevitable between the obligation of the press to inform the general public and the obligation of the military to successfully conduct war. The importance of secrecy to the conduct of warfare heightens the issue in the current counterterrorism operations. The competitive advantage of live coverage raises the stakes in a crowded media market.

The military's control over newsgathering during the 1990-91 Persian Gulf War set off a controversy still smoldering during the Haiti crisis of 1994, and revived by Operation Enduring Freedom in 2001-02. The practice of "embedding" journalists in combat units, adopted in 2003 for Operation Iraqi Freedom, is a balancing of the opposing interests of the military and the press. This paper examines the historical, legal, and institutional dimensions of this issue.

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## Introduction

The United States government's decision to control newsgathering during the 1990-91 Persian Gulf War sparked a lively debate in legal, journalistic, and academic circles. During this war, journalists were denied free access to the theater of operations during deployment and combat, and were restricted by a system of military escorts, pooled coverage, and military review of copy for its potential to disclose classified information. Although similar restrictions had been in place during the military operations in Grenada and Panama, the Persian Gulf War prompted serious challenges to the press restrictions, including lawsuits contesting their constitutionality. Operation Enduring Freedom, the antiterrorism campaign begun in response to the terrorist attacks of September 2001, revived this controversy. At issue are the legality and social desirability of such restrictions in a media system with libertarian and neoliberal underpinnings ([Helle](#), 1995).

From a legal perspective this question involves the First Amendment. Critical positions hold that such access restrictions constitute a *de facto* prior restraint of the press, and thus violate the First Amendment. Supportive positions point to legal precedents allowing government control of information on grounds of national security, and the legal distinction between the expansive protections afforded publishing and the minimal protections afforded newsgathering.

The social dimensions of this question concern the functions of the press in a democratic society. Objections to the restrictions turn largely on the idea that the press serves as a watchdog for the public interest. Careful scrutiny of ongoing military operations is critical, in this view, to the informed consent or disapproval of the American citizenry; press restrictions thus damage the political process by impeding the flow of timely and accurate information to the public. Skeptics point out that media outlets often seem more concerned with their ratings than with the quality of their content, and that access to sources does not guarantee the quality of the coverage.

The principal lawsuit filed during the Gulf War was [\*Nation Magazine v. United\*](#)

*States Department of Defense* (1991). At the time the decision seemed inconclusive regarding the restrictions' constitutionality, but it has recently been cited as precedent in two suits filed during Operation Enduring Freedom, *Flynt v. Rumsfeld* (2002) and *Getty Images News Services v. Department of Defense* (2002). The Clinton administration chose in Somalia not to appreciably restrict the press, but in Haiti to prepare controls similar to those of the Gulf War.<sup>[1]</sup> Access restrictions and pooled coverage were implemented during the first month of operations in Afghanistan, after which journalists were granted freer access. Technological developments in newsgathering and broadcasting, particularly live satellite transmission from the battlefield, have heightened the urgency of this issue for both the press and the military.

This paper will explore the legal and institutional dimensions of government control over newsgathering, such as those during the Persian Gulf War, Operation Enduring Freedom, and Operation Iraqi Freedom. It will argue that access restrictions are not *prima facie* violations of the First Amendment but instead a contemporary restructuring of the relationship between the military and the press, driven by a crowded media market, innovations in electronic communications, and the shift from traditional battlefield warfare to limited strategic operations. The embedding of journalists into combat units, used in Operation Iraqi Freedom, is the result of this restructuring.

### The Legal Context

Serious questions surfaced about the legality of the press restrictions in place during the Gulf War. Media outlets, interest groups, and journalists joined in lawsuits brought against the Department of Defense [<http://www.defenselink.mil/>] during the combat operations, charging the government with violating the First Amendment [<http://caselaw.lp.findlaw.com/data/constitution/amendment01/>] guarantee of free speech and the Fifth Amendment [<http://caselaw.lp.findlaw.com/data/constitution/amendment05/>] guarantee of due process.<sup>[2]</sup> After the end of that war, a number of law journal articles appeared, many of which judged the press restrictions to have been unconstitutional and argued that the military should never again control the press to the degree it did in the Persian Gulf War.

Three lawsuits in all were filed challenging the constitutionality of the press restrictions during the Gulf War. Two suits concerning access to the war zone in Kuwait were combined and heard in the United States District Court in New York, as *Nation Magazine v. U.S. Dept. of Defense* (1991). A third suit, concerning the military's refusal to allow picture coverage of casualties being returned to Dover Air Force Base in Delaware, was heard in the federal district court in Washington

(*JB Pictures, Inc. v. United States Department of Defense*, 1991). In both trials the plaintiffs' requests for injunctive and declarative relief were denied. [3]

The U.S. District Court in the District of Columbia recently heard two lawsuits challenging the press restrictions during Operation Enduring Freedom. The plaintiff's arguments in *Flynt v. Rumsfeld* (2002) were substantially the same as in *Nation* (1991); the plaintiff's arguments in *Getty Images News Services v. Department of Defense* (2002) were similar to those in *JB Pictures* (1991). In both these cases, the court denied the plaintiff's request for injunctive relief, and dismissed the complaint (*Flynt v. Rumsfeld, 2002*; *Flynt v. Rumsfeld 2003*; *Getty Images News Services, 2002*). In both cases, *Nation* (1991) was cited as an important precedent.

Of the cases concerning restrictions on newsgathering in a combat theater, *Nation* thus raises the issues most pertinent to this discussion. Does the press have, as the plaintiffs claimed, "a First Amendment right to unlimited access to a foreign arena in which American military forces are engaged" (*Nation Magazine*, 1991, p. 1561)?

### **The Legal Precedent Set By the *Nation* Decision**

There were two fundamental questions to be addressed in the *Nation* suit: do courts have jurisdiction over the military's control of the press, and if so, were the Gulf War restrictions constitutional? Whether a court could even entertain a challenge to the military hinged on three points: whether the plaintiffs had standing to file the complaint, whether it was a political question rather than a judicial question, and whether the issue had become moot. The first task of the plaintiffs was to establish that the suit represented a complaint capable of judicial resolution, and that the plaintiffs had in fact suffered injury because of the defendants' actions. That the court, if it chose, could resolve the issue by striking down the press guidelines was clear. The plaintiffs claimed damage to their First Amendment rights to publish, and asserted that the access restrictions violated the Fifth Amendment guarantee of due process. The court found the plaintiffs to have standing to file the suit (*Nation Magazine*, pp. 1559 and 1561).

The second point concerned whether the complaint was actually a political issue disguised as a judicial matter. While noting that civilian courts have long been reluctant to intrude into military affairs, the *Nation* court observed that in this case the plaintiffs were not challenging "this country's military establishment, its goals, directives or tactics" (*Nation Magazine*, 1991, p. 1567) but rather objecting to the controls on newsgathering. Accordingly, the court determined this case to be a judicial question.

The press restrictions had been lifted by the time *Nation* was heard, and the final point was whether the complaint had thus been rendered moot. Although an earlier case concerning the press restrictions in Grenada had been thrown out on this ground (*Flynt v. Weinberger*, 1984; *Kenealey*, 1992, p. 295), the *Nation* court observed that the question was likely to arise again in the next war. When an injury is too short in duration to be litigated before it ceases, but may occur again—that is to say, the action is “capable of repetition, yet evading review” (*Nation Magazine*, 1991, p. 1568)—a court may properly decide to hear the complaint anyway. The *Nation* court found that even though the provocation for the suit had been removed, the issue itself was not moot, and thus judicable.

Having heard the case, the court then denied the requests for both injunctive and declarative relief. The decision was handed down after the cessation of hostilities and the lifting of the press restrictions; hence, an injunction was pointless by then. The decision noted that an issue such as this was likely to arise in a future conflict, and thus there was a possibility of declarative relief. Nonetheless, the court refused to directly rule on the constitutionality of the particular restrictions used in the Gulf War, choosing instead to defer to future action by the Supreme Court [<http://www.supremecourtus.gov/>] (see *Nation Magazine*, 1991, p. 1560). While the decision did not satisfy those advocating an absolute right of press access, *Nation* nonetheless did establish precedent for judicial review of military controls on the press, and support for a qualified right of access to information (cited in *Flynt v. Rumsfeld*, 2002). Yes, the media could raise legal challenges to access restrictions and have their day in court.

### **But Which Supreme Court Doctrine Should Apply To Wartime?**

Three legal doctrines exist which might be applied to press coverage of war: *prior restraint*, *public forum*, and *right of access to information*. Despite some legal commentators’ enthusiasm for applying it to wartime restrictions on newsgathering (for example, *Boydston*, 1992 and *Smith, J. E.*, 1993), the Supreme Court doctrine of prior restraint, if carefully considered, is not the proper framework. Prior restraint, prohibiting the publication of information in the possession of the press, bears a heavy burden of proof. While the cases of *Schenck v. U.S.* (1919) and *Near v. Minnesota* (1931) had recognized national security interests as justification for prior restraint, the “Pentagon Papers” case, known formally as *New York Times Co. v. U.S.* (1971) established how difficult it would be for the government to prevail. There is very little possibility, if the press restrictions did indeed constitute prior restraint, that they would be upheld. The critical point here, however, is that information *gathering*, not publication, was the issue in the Gulf War and subsequent military operations. The doctrine of prior restraint, while convenient for

opponents of the press restrictions, is therefore inappropriate to considering a question of access to information.

If we consider the news process as expressive activity, is the military barred from restricting newsgathering activities? The public forum doctrine protects against government interference in places traditionally open to the public for debate and expression ([Smolla](#), 1992, p. 208-211). However, the Court has explicitly ruled that military bases are not public fora ([Greer v. Spock](#), 1976, p. 828; [U.S. v. Albertini](#), 1985, p. 676).<sup>[4]</sup> Again, arguing against the access restrictions on this basis misapplies “a doctrine designed to protect expressive activities to activities that involve the gathering of information” ([Cassell](#), 1985, p. 951).

The doctrines of prior restraint and public forum are thus tangential to the question at hand. Recent Federal Court and Supreme Court decisions have begun to delineate a limited right of access to information, and it is in this context that the newsgathering restrictions should be considered.

### **The Supreme Court, the Press, and a Limited Right of Access**

The First Amendment guarantees freedoms of speech and publishing. The “Pentagon Papers” decision was a ringing endorsement of the freedom to publish, even when sensitive material was obtained illegally. In contrast, the Court has affirmed many times that the First Amendment protects speech and publishing but not necessarily the gathering of information ([Zemel v. Rusk](#), 1965, p. 17), that the First Amendment guarantees the press no special right of access to information, beyond that of the general public’s ([Branzburg v. Hayes](#), 1972, p. 684; [Pell v. Procunier](#), 1974, pp. 818 and 834-835; [Saxbe v. Washington Post Co.](#), 1974, p. 850; [Houchins v. KQED, Inc.](#), 1978, p. 2), and that the government’s regulation of information in its hands is not a *prima facie* infringement of the right to engage in speech ([Los Angeles Police Dep’t. v. United Reporting Publishing](#), 1999, pp. 32 and 40). As yet there has been no Supreme Court decision specifically concerning a right of the press to obtain information about military operations ([Olson](#), 1992, p. 525). There have been a number of decisions granting the press limited access to government information in nonmilitary situations, but these in fact are quite narrow in their application despite much advocacy for a broader right comparable to that of free speech (for example, [Kenealey](#), 1992, p. 311 and [Smith, J. E.](#), 1993, p. 338).

Ironically enough, the language suggesting any right of access first appeared in a case in which the Supreme Court denied reporters’ First Amendment claims. In [Branzburg v. Hayes](#) (1972) the Court rejected journalists’ arguments that the guarantee of a free press implied a right to withhold the names of their confidential

sources from a grand jury. While noting that “newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded” (*Branzburg*, 1972, pp. 684-685), the decision nonetheless reined in the inference that might have been drawn: “Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” (*Branzburg*, 1972, p. 681). As cautious and limited as the reference may seem, this passage is the source of later assertions of a right of access.

The Court directly took up the question of a putative right of access two years later in *Pell v. Procunier* (1974) and *Saxbe v. The Washington Post Co.* (1974). Both cases dealt with reporters’ demands to conduct interviews with prison inmates, requests which state and federal prison authorities had denied. In both cases the embryonic right of access fared badly: the Court determined that no violation of the First Amendment had in fact occurred. The decision in *Pell*, written by Justice Potter Stewart (*Pell v. Procunier*, 1974), sharply distinguished the right to engage in newsgathering activity from a government obligation to provide sources.

It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public. . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. (p. 834)

While the press could not gain access to restricted areas of prisons (*Pell v. Procunier*, 1974; *Saxbe v. Washington Post Co.*, 1974; *Houchins v. KQED*, 1978), it fared much better with regard to criminal trials. Two cases, *Richmond Newspapers, Inc. v. Virginia* (1980) and *Globe Newspaper Co. v. Superior Court for the County of Norfolk* (1981) established that government restrictions on access to trials must satisfy a stringent three-part test.

In *Richmond Newspapers* the Court found that the press indeed had a right to attend criminal trials, just as the public did. The decision, written by Chief Justice Burger, noted that “a presumption of openness adheres in the very nature of a criminal trial under our system of justice” (*Richmond Newspapers*, 1980, p. 573). A separate concurrence by Justice Stevens broadened the scope considerably: “the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government” (*Richmond Newspapers*, 1980, p. 584). Justice Brennan in his separate concurrence supported “the special nature of a claim of First Amendment right to gather information”

(*Richmond Newspapers*, 1980, p. 586). [5]

Details of how the government would have to justify restricting access were forthcoming in *Globe Newspaper* (1981). The Court struck down a Massachusetts law excluding the press from trials of sex crimes involving minors, again affirming that trials were presumptively open to the public and that the press performed a valuable service in bringing information to the public. Justice Brennan's majority opinion delineated three points on which the question of press access turned: "the criminal trial historically has been open to the press and general public" (*Globe Newspaper*, 1981, p. 605); "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole" (*Globe Newspaper*, 1981, p. 606); denial of access must be "necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest" (*Globe Newspaper*, 1981, p. 607).

Not all justices shared Justice Brennan's apparent enthusiasm for broadening the scope of the case. Justice Sandra Day O'Connor's separate concurrence in *Globe* specifically disclaimed any broader applicability of the decision: "I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials" (*Globe Newspaper*, 1981, p. 611). The dissent of Justices Burger and Rehnquist criticized the majority opinion's "expansive interpretation" (*Globe Newspaper*, 1981, p. 613).

Given the ambiguity whether the *Globe* decision should extend to press coverage of war, it is not surprising that the *Nation* court was so reluctant to apply it to the Gulf War restrictions. Nonetheless, scholars have looked to *Globe* to provide a relevant doctrine, variously arguing that *Globe* supports both positions on the constitutionality of the restrictions (for example, *Boydston*, 1992, p. 1098; *Cassell*, 1985, pp. 958-959; *Kenealey*, 1992, p. 309; *Smith, J. E.*, 1993, pp. 309-311). Both sides seem ready to apply *Globe* to wartime access restrictions, and then argue the specifics.



The three conditions of the *Globe* decision can be generalized in this way: First, a claimant [of access] must show that the place ‘historically had been open to the press and general public.’ Second, the right of access must ‘play a particularly significant role’ in the functioning of the process in question and of the government as a whole. Finally, if these two elements have been satisfied, access may be denied if the government establishes that ‘the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.’ (Cassell, 1985, pp. 958-959)

If the assumption is made that the *Globe* test applies to situations beyond criminal trials, as lower courts have subsequently done (Kenealey, 1992, pp. 309-311), the question becomes whether a combat theater is exempt from press access under the terms outlined above. The first prong of the *Globe* test requires an examination of how war has traditionally been covered by the American press.

### The Historical Context

Reportage of early conflicts in America’s history was both unrestricted and haphazard, with much of the information gleaned from soldiers’ correspondence (Kenealey, 1992, pp. 312-313). Prior to the Civil War, reports from the battlefield were so slow to arrive that there were few concerns about their threat to military security (Jacobs, 1992, p. 679; Olson, 1992, p. 514). With the introduction of the telegraph and the professionalization of the press in the first half of the nineteenth century, the situation changed dramatically. Both postpublication sanctions and access restrictions were common during the Civil War in the North and the South. Government control of the press extended even to the extreme of shutting down newspapers (Boydston, 1992, pp. 1076-1077; Jacobs, 1992, p. 680).

Press restrictions during the Spanish-American War also seem harsh by present-day expectations. “Censors were stationed at key telegraph offices to monitor incoming dispatches, although reporters remained free to roam the battlefield” (Jacobs, 1992, p. 680). The timeliness of telegraphed dispatches created a new strategic value in the information; the government response was to control the content of the dispatches at the point of a technological bottleneck.

Similar restrictions continued during World War I. While reporters could travel freely in the theater of operations of the American Expeditionary Force, they were required to obtain accreditation, one condition of which was that “[t]he newspaper representative was to submit all correspondence, except personal letters, to the press officer or his assistant . . . and, the correspondent agreed to accept the press

officer's instructions as to further censorship rules from time to time" ([Boydston](#), 1992, p. 1078).<sup>[6]</sup> During this time the Supreme Court upheld a number of convictions under the Espionage Act of 1917, which prohibited certain antiwar expressions. While most cases concerned speakers and pamphleteers ([Franklin](#), 1987, p. 47; [Hixson](#), 1989, pp. 288-298), the editors of two German-language newspapers were held to have violated the Espionage Act by publishing material disparaging the American military (*Schaefer v. U.S.*, 1920). During World War I the military first set up a bureau to issue information about the war, and first designated a specialist to provide public information ([Jacobs](#), 1992, p. 681).

Press pools were widely used for the first time in World War II ([Olson](#), 1992, p. 516). Reporters could travel relatively freely, although not completely without restrictions ([Cassell](#), 1985, p. 939). Again, the tradeoff took the form of censorship. President Roosevelt set up the United States Office of Censorship, which "instituted a system of voluntary self-censorship for the press and issued *A Code of Wartime Practices for the American Press*" ([Boydston](#), 1992, pp. 1079-1080). While censorship was nominally voluntary, field commanders had latitude in controlling the flow of news information, and some imposed harsh restrictions ([Jacobs](#), 1992, p. 682). In addition, the price of accreditation as a correspondent was signing an agreement to submit all copy for military review ([Cassell](#), 1985, p. 938), as it had been during World War I.

In Korea, press censorship initially was voluntary ([Boydston](#), 1992, p. 1080). Criticism of the American command's performance so outraged General Douglas MacArthur ([Olson](#), 1992, p. 518) that the journalists themselves eventually requested a formal system of censorship ([Cassell](#), 1985, p. 940). To journalists, censorship was a protection from the wrath of MacArthur, described as "You-write-what-you-like-and-we'll-shoot-you-if-we-don't-like-it" ([Jacobs](#), 1992, p. 683).

The Vietnam War stands alone in American journalistic history in terms of freedom of access, freedom from review of dispatches, and even logistical support in getting reporters to the battlefield.

In previous conflicts, censorship was uneven but pervasive. During the Vietnam War, however, the Pentagon imposed neither censorship by restricted access nor censorship by prepublication review. . . . Reporters were free to venture almost anywhere at any time and to write about whatever interested them. ([Jacobs](#), 1992, pp. 683-684)

The price of this unprecedented freedom was merely voluntary adherence to a set of

guidelines regarding military security ([Boydston](#), 1992, p. 1081). Relations between the military command and the press deteriorated as the press reports became progressively more critical, and “while war correspondents had traditionally served as instruments of their country, press boosterism slowly and painfully eroded” ([Jacobs](#), 1992, p. 684). Television reportage was a potent weapon in the newly adversarial relationship between the press and the military: “graphic war footage and stories of American atrocities undermined the public’s will to support the war” ([Olson](#), 1992, p. 519). Despite the controversy connected with this war, the military never instituted any form of censorship other than voluntary security guidelines, although some actions were conducted in secrecy, notably the bombing of Laos and Cambodia in 1969 and 1970 ([Cassell](#), 1985, p. 942).

The 1983 action in Grenada marked a different kind of first: reporters were not allowed to accompany an invasion force. On the third day of the operation, a group of reporters was escorted around the island for a few hours. Full press access to Grenada did not come until the sixth day, when the fighting was effectively over ([Kenealey](#), 1992, pp. 316-317; [Olson](#), 1992, pp. 520-521). Journalists railed against these restrictions, yet the public seemed by and large to support the policy ([Cassell](#), 1985, pp. 944-945).

Press furor took two forms: a lawsuit and editorial complaints. The lawsuit, *Flynt v. Weinberger* (1984), was dismissed by a federal district court as moot, and the finding upheld on appeal ([Jacobs](#), 1992, p. 715; [Olson](#), 1992, pp. 525-526). The bitter complaints of the press led the military to convene a panel to develop policy on wartime press coverage. The Sidle Panel, named after its chairman, retired Major General Winant Sidle, produced a set of recommendations, including “the largest possible pooling procedure to be in place for the minimum time possible” and “voluntary compliance by the media with security guidelines or ground rules established and issued by the military” ([Cassell](#), 1985, p. 946).

The cautious acceptance of the Sidle Panel’s report evaporated with the 1989 operation in Panama. The press pool was not allowed to accompany the first invasion forces; once in Panama reporters were again delayed for military escorts and transportation ([Olson](#), 1992, p. 522). Again, the action was of short duration, and the serious fighting was over by the time the press could visit the battlefield ([Boydston](#), 1992, p. 1083; [Smith, J. E.](#), 1993, p. 300).

The Persian Gulf War continued pooling, military escorts, and security review of the dispatches.<sup>[7]</sup> The major objections of the press concerned restricted access in the form of pooling, delays in the transmission of stories for copy review, and military escorts’ interference in reporters’ interviews with the troops ([Dennis et al.](#),

1991, p. 19), although some journalists working outside the press pools claimed they were harassed by members of the armed forces ([Committee to Protect Journalists](#), 1992, pp. 167-169). Censorship *per se*, however, was minimal. Few stories were altered as a result of military review ([Dennis et al.](#), 1991, pp. 26-30), and the guidelines provided that the news organizations, not the military, would make the final determination in the event of a dispute ([Nation Magazine](#), 1991, pp. 1577-1578).[8]

Last-minute diplomatic initiatives averted war in Haiti in the fall of 1994, but the Department of Defense had prepared for a full-scale military invasion. Press guidelines were similar to those in the Persian Gulf War, and again included provisions for military escorts, review of reporters' copy for violations of the security ground rules, and a requirement that reporters obtain accreditation before gaining access to the front ([U.S. Department of Defense, 1994a](#)).[9] The media ground rules were also similar to those issued during the Gulf War; in addition to detailing specific kinds of information that could not be reported without jeopardizing the correspondent's accreditation, the rules left open the options of restricted access and press pools ([U.S. Department of Defense, 1994b](#)).[10]

At the beginning of Operation Enduring Freedom in the fall of 2001, the Department of Defense again implemented rotating pool coverage. However, the Assistant Secretary of Defense for Public Affairs, Victoria Clarke, characterized pools as a "last resort" in maintaining the security of sensitive information about military operations and solicited comments from news bureau chiefs about ways reporters might be "embedded" in military units without compromising the operations ([ASD PA Meeting](#), 2001). By the end of November 2001 reporters were allowed more open access to the operations in Afghanistan (documented in [Flynt v. Rumsfeld](#), 2002). Even though these operating rules are noticeably less restrictive than those during the Persian Gulf War, journalists still railed against what one newspaper editor described as a "lack of direct contact with American forces who've actually participated in the war" ([News Media Protest](#), 2001). In response, the Department of Defense indicated it would take steps to increase media access to the combat theater ([Rutenberg](#), 2001; [Clarke](#), 2002)

The change from press pools to embedding became Department of Defense policy with the issuance of press guidelines for Operation Iraqi Freedom. Under this policy journalists effectively become noncombatant members of combat units; they "live, work and travel as part of the units with which they are embedded" ([U.S. Department of Defense, 2003a](#)). Maximizing the opportunity to observe military operations is stated as an explicit intent of this policy. In return, embedded journalists are required to observe ground rules concerning specific types of

information which could jeopardize the military operations (see section 4 [U.S. Department of Defense, 2003a](#)), and hold the government harmless for physical injuries they might suffer ([U.S. Department of Defense, 2003b](#)). In addition to the journalists embedded with combat units, about an equal number were not affiliated with any particular unit. These journalists received credentials designating them as “unilateral.” The unilaterals were not guaranteed the logical support, physical protection, or access to combat operations the embedded journalists enjoyed. Nonetheless, some journalists preferred to operate as unilaterals, rather than accept the limitations of the embedding system ([Fisher, 2003](#); [Ricchiardi, 2003a](#)).

The practice of embedding journalists with combat units virtually guarantees that the journalists will have access to sensitive information. The commanders of the military units are responsible for preventing the disclosure of sensitive information, primarily by explaining the restrictions on that information to the journalists. The policy bars confiscating or impounding media products; there is only minimal provision for security review of media products. For the most part, embedding seems to have addressed a major concern of the press, that it have direct access to the front lines of military operations (see, for instance, [Blumenthal & Rutenberg, 2003](#); [Rieder, 2003](#)).

## **The Institutional Context**

### **Is There a Tradition of Openness?**

That criminal trials have historically been open to the public is clear. Battlefields and military bases, however, are not presumptively open as are trials and public fora. While control over making war and funding military forces is firmly in civilian hands, a power tracing back to Article I, Section 8 and Article II, Section 2 of the Constitution, we in fact do not have a tradition of public access to areas in which the military operates, nor complete public access to information in possession of the military. If the *Globe* test is taken literally, “there is no tradition of *public* [emphasis in original] openness” with regard to military operations ([Cassell, 1985, p. 959](#)).

Still, an argument can be made that the press acts as a surrogate for the public in its scrutiny of government activities. Justice Powell’s dissent in [Saxbe](#) (1974) makes such an argument.

In seeking out the news the press therefore acts as an agent of the public at large. . . . By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. (p. 863)

Thus, situations historically open to the press might be construed as, in effect, open to the public. Accredited correspondents have long had some kind of access to war. Is there a tradition of openness to the press?

Press complaints about the Pentagon's restrictions in the Gulf War were long, loud, and often adversarial. (See, for instance, [Browne](#), 1991; [Cronkite](#), 1991; [Kurtz](#), 1991; [Rykken](#), 1991; [Schanberg](#), 1991). Similar complaints were voiced during Operation Enduring Freedom (for instance, [An Unwitnessed War?](#), 2001; [Getler](#), 2001; [Hickey](#), 2002; [Kirtley](#), 2001; [Shields](#), 2001a; [Shields](#), 2001b). Review of the historical context of American press coverage of warfare, however, suggests that the Gulf War restrictions were neither extraordinary nor unusually restrictive by comparison to the heavy-handed controls frequently in place prior to the Vietnam War; in fact, "wartime regulation of the press is hardly a recent development" ([Jacobs](#), 1992, p. 677). While some writers decry the pool coverage begun in the Grenada action as an unconstitutional encroachment on the press freedom benchmarked by Vietnam (for example, [Smith, J. E.](#), 1993) it is historically more accurate to see Vietnam as the exception rather than the rule ([Jacobs](#), 1992, pp. 683-684).

The pool coverage system used in the Persian Gulf War and in the early weeks of Operation Enduring Freedom is not a regression on a historical trend of ever-freer press coverage of combat. There are two distinct trends moving in opposing directions: access to sources of information has become more restrictive, as interference with news copy has become less restrictive. Some would rather the press gain greater access at the expense of censorship ([Cronkite](#), 1991); others fear that demands for greater access may bring exactly that tradeoff ([Cassell](#), 1985; [Jacobs](#), 1992). Regardless of how one might see the desirability of the situation, in fact "the press has been able to view wartime operations only at the sufferance of the military" ([Cassell](#), 1985, p. 959, footnote 210), and courts have rightly been reluctant to second-guess "when the cost of judicial error is so high" ([Jacobs](#), 1992, p. 703). In military operations other than Vietnam, the press enjoyed unrestricted access only at the cost of censorship of its copy, which is no longer a legally or socially palatable tradeoff. [\[11\]](#)

It is interesting to note that even though the embedded media system used in

Operation Iraqi Freedom was far more acceptable to the press than the press pool system it replaced, it still reflects these opposing trends of access and control over copy. Embedded journalists were required to remain with their units, and were not allowed to travel on their own (see paragraphs 2.A, 2.C, and 2.C.1 of [U.S. Department of Defense, 2003a](#)). Violating security guidelines was cause for removal from the theater of operations (see section 4 of [U.S. Department of Defense, 2003a](#); Carr, 2003). In return, the military specifically waived general review of reporters' stories (see paragraph 3.R of [U.S. Department of Defense, 2003a](#)) and impounding of media products in the event of a dispute over the guidelines (see paragraph 6.A.2 of [U.S. Department of Defense, 2003a](#)). Moreover, the guidelines specified that disputes were to be resolved expeditiously, and a rationale was required for a decision not to release information (see paragraph 3.Q of [U.S. Department of Defense, 2003a](#)).

### **Is Press Access Significant to the Process?**

It is hard to argue that public scrutiny helps the military in the conduct of war; on the contrary, secrecy is of prime operational importance ([Clausewitz, 1832/1993](#), pp. 233-234). One of the few exceptions the Supreme Court has recognized to the First Amendment right of free speech concerns national security during wartime.

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. ([Near v. Minnesota, 1931](#), p. 716)

The communication technology used in contemporary journalism radically differs from that used in earlier wars ([Sherman, 1992](#), pp. 636-637); field reports are processed and disseminated far more rapidly.<sup>[12]</sup> The heightened security concerns of the military are well founded: real-time news broadcasts eliminate any security review of the material before it becomes public. Technology changes have been significant not only in the news process, but in the conduct of warfare. Smart bombs and stealth fighters illustrate the strategic importance of information to modern warfare. In short, the more technology-dependent the warfare, the more critical the control of technical information and the more difficult the task of controlling it ([Smolla, 1992](#), p. 304).

Now that global television coverage is commonplace, news broadcasts can easily serve as intelligence for the enemy: "even the most careless newspaper reporter has her work scanned by editors, while the remarks of a television reporter broadcasting

live go unchecked” ([Jacobs](#), 1992, p. 709). In World War II, a serious breach of the security guidelines occurred when a reporter revealed that the Allies had cracked the Japanese naval code ([Jacobs](#), 1992, p. 682). No apparent harm came of the article, published in the *Chicago Tribune*, but the potential damage of a comparable television story today is clearly much greater. In the Gulf War, a story on how the Air Force located and destroyed Iraqi tanks was subsequently judged by the military as having breached security guidelines, and the information may well have been useful to the Iraqi forces ([Dennis et al.](#), 1991, p. 20). A television news executive, explaining CNN’s decision to delay reporting on military planes taking off for Haiti, acknowledged the unique ability of live television coverage to compromise a military operation: “Unlike the print process, our work is instantly available to global eyes: friend, foe, neutral alike” ([Turner](#), 1994).

The potential harm of routine news stories to such nontraditional warfare as Operation Enduring Freedom is, if anything, even greater. As one Department of Defense official explained to news bureau chiefs, even stories about operations already completed may accumulate over time into useful intelligence for the adversary.

We’re going to be using special tactics, techniques and procedures. While the military has always prized the element of surprise, you don’t want the enemy to know exactly what you’re going to do when you’re going to do it. Now it’s even more important to build on that and to not reveal exactly what we’re doing. Even historically. Because what that does is it takes away our ability to use those special tactics, techniques and procedures freely in the future. We have laid out to them exactly how we’re doing it. ([ASD PA Meeting](#), 2001)

A dramatic increase in the speed of transporting some material (in this case, information about warfare) is likely to produce a crisis in the control of that material ([Beniger](#), 1986). The speed and geographical coverage of satellite communications have thus rendered obsolete the traditional security controls over reporters’ stories, by eliminating opportunities to review the copy before dissemination. With little or no time remaining between the origination of the stories and reception by worldwide viewers, the military’s access restrictions are an attempt to rebuild a control mechanism capable of satisfying its legitimate need for secrecy. [13] The guidelines for embedded media in Operation Iraqi Freedom reflect this reconstruction process. Embedded journalists could use any communications technology they wished, provided the operational concerns of the unit commander were addressed (see paragraph 2.C.4 of [U.S. Department of Defense, 2003a](#)). The key point here is that there was no blanket restriction on the



technology the journalists could use in the theater of operations, but that localized security considerations could justify the imposition of a delay in transmission (see paragraph 4.E of [U.S. Department of Defense, 2003a](#)).

Beyond the strategic concerns of the military stands the larger context: the role of public information in policy formation and implementation. While war must be waged in relative secrecy, our form of government requires policy to be formed in relative openness. The dilemma is that while “[s]peech concerning national security is unique in its potential for catastrophe. . . . [s]ecrecy is the antithesis of free speech and an anathema to an open democracy” ([Smolla](#), 1992, p. 303).

In the late twentieth and early twenty-first centuries the prevailing image of the press is that of watchdog: the press checks the three branches of Federal government ([Stewart](#), 1982; [Boydston](#), 1992, p. 1096), guarding against possible abuses of power. This is a reformist role ([Gans](#), 1980, pp. 68-69); the value of the press to the public is that it draws attention to undesirable governmental policies or actions and stimulates change. The tie between the press and various reform movements is a long-standing tradition, dating back to the middle 1800s ([Dickens-Garcia](#), 1989, pp. 40-41). While the press exerts influence on public discourse in various ways, including setting an agenda ([Iyengar & Simon](#), 1993) and inhibiting particular viewpoints ([Noelle-Neumann](#), 1993), the essence of its challenge to the power structure is the demand for self-reform. The news industry’s protests about the Gulf War restrictions are good examples of such calls for policy change. [14]

An apparent source of frustration to the press, in fact, is the public’s acceptance of the restrictions during wartime ([Dennis et al.](#), 1991, p. 82 ff.; [Hickey](#), 2002; [Mitchell](#), 2001). Far from seeing the constraints on information flow as a violation of either their right to know or their vital interest in monitoring the government’s actions, ordinary citizens tend to react favorably. [15] While the press may see a righteous conflict between itself and the military (for example, [Browne](#), 1991; [Getler](#), 2001; [Kirtley](#), 2001), the public clearly wants the press to support national security interests during wartime.

The military’s aversion to microscopic scrutiny by the press has at least some basis in the critical stance the press takes toward it ([Weinberger](#), 2001), in the competitiveness of the media market which can drive the coverage toward “a sensationalized focus on emotional issues . . . in a desperate search for high ratings” ([Sherman](#), 1992, p. 638) or lead journalists to ignore ethical considerations ([Barringer](#), 1998), and in the physical danger to the reporters themselves ([Hackworth](#), 1992; [Callahan](#), 1994; [Stockwell](#), 1996). Battlefield reports can easily

exaggerate the importance of a single event or viewpoint at the expense of the deeper policy issues.<sup>[16]</sup> Journalists may not fully understand military situations, yet their commentary can carry a weight disproportionate to their expertise.<sup>[17]</sup> In the current antiterrorism operation, the adversary has demonstrated a canniness in using the media to advantage.

Another new reality: The nation is dealing with an opponent who is as media savvy as he is diabolical, with a strong sense of public relations and ready access to international airwaves. What do we broadcast of Osama bin Laden? In a recent story on this subject, the Post's Paul Farhi, a frequent A[merican] J[ournalism] R[evue] contributor, conjured an interesting analogy. He wrote, "Imagine if the broadcast of President Roosevelt's 'Day of Infamy' speech after the Japanese bombing of Pearl Harbor was followed by Emperor Hirohito's reaction on American radio." ([Kunkel](#), 2001).

The government's concern about the effect of press coverage on the home front is both longstanding, and realistic. On the whole, American war reportage has traditionally spared the public the most grotesque images of war. (See [Fussell](#), 1989, for rather unvarnished descriptions of the anatomical remains of battle.) Faced with graphic evidence of the horror of war, the public may lose the will to wage it ([Olson](#), 1992, p. 519), even though they might agree the situation required such use of brutal force. It is plausible that military operations in the Gulf War might have continued into Iraq (and many now argue that they should have) had the scenes of carnage on the highway out of Kuwait City not come to national attention so dramatically. The images of the air war in the Persian Gulf, on the other hand, seemed cleaner and thus easier to accept, perhaps fulfilling a hope that "the war could be won by shrewd Yankee technological expedients, like, for example, bombing from costly airplanes flying at safe altitudes" (as [Fussell](#), 1989, p. 13 comments about World War II).

While it is a tribute to our humanity that we abhor the brutality to which war coverage bears testimony, that emotion is not the sole basis on which to debate waging war, or to decide military strategy once combat has begun.

Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst. ([Clausewitz](#), 1832/1993, pp. 83-84)

If the primary reason for a free press is “its function of providing information to the public so that the citizenry may adequately govern” ([Kenealey](#), 1992, p. 320), the information provided must be appropriate to that governance. Even if the press has unimpeded access to the front, the public is still not guaranteed a flow of information useful for reasoned consideration of policy.

Broadly speaking, disputes over the use of American troops often will center not on precisely what the troops were doing or what the conditions surrounding their involvement were, but rather on the propriety of using force as an instrument of national policy. In such disputes, press access to the battlefield is simply irrelevant. ([Cassell](#), 1985, p. 968)

It is interesting to note the arenas in which various interested parties have chosen to contest the issue of access restrictions. During the Persian Gulf War, the progressive news organizations, Congressmen, and academics chose the courts, via the *Nation* suit, as the venue in which to advance their interests. Because they have comparatively less clout in the media marketplace, the institutional arena was the best choice for these stakeholders. During Operation Enduring Freedom there was relatively little interest in litigation but some degree of advocacy for a legislative guarantee of access (for instance, [Garneau](#), 2001). Again, the press and the military engaged in the arena of public discourse, via op-ed broadsides on the one hand (for example, [Convention Delegates](#), 2001; [Joint Statement of Principles](#), 2001; [SPJ Leads the Fight](#), 2001; [SPJ Says Media Should Carefully Weigh](#), 2001) and media relations strategies on the other (for example, [ASD PA Meeting](#), 2001). Since public support is cultural capital vital to both these institutions, we might think of this as a struggle for positional advantage in the marketplace of ideas. Through the lens of an economist, the argument over access restrictions would appear as a negotiation of transaction costs for the interested parties. [18]

In that light, the policy of embedding journalists in particular combat units for extended periods of time can be seen as an agreement which balances costs and benefits in a way acceptable to both parties. It addresses the chief concerns of both parties: operational security for the military, and front-line access for the press. It

entails risks acceptable to both: the possibility of unfavorable reportage, and the possibility of physical harm to the journalists. Finally, it imposes costs acceptable to both parties: that combat units incorporate civilian members, and that journalists restrict their movements to that of the unit in which they are embedded.

The embedded media policy is effectively a negotiated solution to a conflict with roots predating the 1990 Persian Gulf War. Prior to the start of hostilities in Operation Iraqi Freedom, there was a predictable degree of skepticism about the military's promised openness ([Bushell & Cunningham](#), 2003; [Ricchiardi](#), 2003a). Another concern was fraternization, the possibility that embedded journalists would lose the critical distance needed to report the events, simply because they lived so closely with members of the military (see, for instance, [Bedway](#), 2003; [Chasen](#), 2003; [Cockburn](#), 2003; [Jensen](#), 2003; [Martin](#), 2003; [Strupp & Berman](#), 2003). On the whole, however, it appears that this solution has proven satisfactory to both the military and the press ([Blumenthal & Rutenberg](#), 2003; [Fisher](#), 2003; [Galloway](#), 2003; [Mitchell & Bedway](#), 2003; [Ricchiardi](#), 2003b; [Rieder](#), 2003; [Shooting at the Messenger](#), 2003; [Zinsmeister](#), 2003).

Whether in support of a war or in opposition to it, press coverage can be no more than imperfect information serving an imperfect discourse on matters of utmost importance. If war is best waged in secrecy and public decisions best made with full knowledge, then military operations exist in state of tension between those two imperatives. In an open democracy such as America, public opinion about a military operation is of crucial significance to the operation's success. Changes in both communication technology and military strategy have forced us to reexamine the balance between the need to hide and the need to disclose.

### **Is There a Compelling Government Interest? Were the Restrictions Narrowly Drawn?**

The press, for its part, has been adamant in framing press restrictions as a government power play in an adversarial relationship between itself and the military (for example, [An Unwitnessed War?](#), 2001; [Cronkite](#), 1991; [Denniston](#), 1991; [Getler](#), 2001; [Kurtz](#), 1991; [Rykken](#), 1991; [Schanberg](#), 1991; [Shields](#), 2001a; [Sloyan](#), 1992; [SPJ Says Media Should Carefully Weigh](#), 2001), an animosity it says dates back to Vietnam.<sup>[19]</sup> While the military has repeatedly justified the restrictions on grounds of operational security and protection for the reporters themselves (for example, [ASD PA Meeting](#), 2001; [Gersh](#), 1991; [Pete Williams Debriefs](#), 1991; [Press, Politicians Weigh Coverage](#), 1991), many journalists simply refuse to accept that explanation. Access restrictions, they argue, are a thinly disguised public relations strategy to keep the home front supportive of the war

effort.[\[20\]](#)

So it's all too clear that the current restrictions have nothing to do with military security and everything to do with political security. Political security requires that the government do as complete a job as possible at blacking out stories that might lead to embarrassment or criticism of the government or to questions from ordinary Americans about the war policy. ([Schanberg](#), 1991, pp. 24-25)

Even if this deconstruction of the pool system was accurate and the real intent of access restrictions is to muzzle the kind of critical reportage which fueled public discontent with the Vietnam War, the operational security concerns raised by instantaneous electronic communications and global dissemination still remain.

The problem with the pool system is that it became a convenient tool to reward and punish reporters for the stories they wrote, and to keep journalists from learning embarrassing or unfavorable information. However . . . the existence of an illegitimate purpose does not negate a legitimate purpose. ([Jacobs](#), 1992, p. 722)

While some in the press might be willing to volunteer for censorship of television and print reports in exchange for freer access ([Cronkite](#), 1991), the doctrine of press freedom defined by the Pentagon Papers case bars such clear-cut prior restraint. In the final analysis, access restrictions may be the only way to guarantee protection of national security interests when technology has reduced transmission times to nearly zero and broadened the dissemination of news stories to virtually the entire planet.

### **A Tension Between Conflicting Imperatives**

This paper cannot resolve whether there ought to be such a thing as war. History tells us there is, and current events suggest there will continue to be. Since Vietnam the public has a clearer picture of the horrors of war, a picture brought into painfully sharp focus by the recent terrorist attack on civilians in New York City. Our struggles over the reportage of war may well have a direct outcome both in our ability to thoughtfully debate the need to engage in war, and to successfully conduct war if that option is chosen. The interest of the press in showing war in its raw and uncut form is thus legitimate, as is the military's interest in controlling information about war. In modern televised warfare, information is armament, not just in the technical and strategic realms but in the impact news stories can have on policy

formation.

Instantaneous global dissemination of reporting makes the task of balancing the need to hide and the need to know even more difficult than it has been in the past. Technological and tactical changes in both warfare and the news media have raised the stakes for both sides. The emergence of carefully organized and well-funded terrorist groups poses a danger to national security unlike those the military has faced before. A hypercompetitive media marketplace likewise poses a threat to established news organizations and established traditions in journalistic practice. Thus, the cost of an error in establishing a new equilibrium between military secrecy and press access may be extremely high for either party, and for the American public as a whole. Just as the invention of the telegraph prompted the use of prior restraint to control public dissemination of information about warfare, the evolution of instantaneous global journalism has prompted the use of access restrictions.

However deeply the press may feel it is entitled to legal relief from the military's control, warfare is exempted by the Globe Newspaper test, which is the current Supreme Court doctrine regarding access to information. It now appears settled that access restrictions such as those used during the Persian Gulf War and Operation Enduring Freedom are legally permissible. For that reason, it is doubtful journalists will make any further gains through litigation.

That unlimited coverage of warfare can damage the conduct of the operations is apparent. That press access to the battlefield is socially desirable is at least arguable. That unlimited access is a right guaranteed by the First Amendment is contrary to constitutional law. The front-line access the press enjoyed in Operation Iraqi Freedom is an indicator that the press will fare better in negotiation with the military than in legal confrontation.

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## Works Cited

- An Unwitnessed War? (2001). *Editor & Publisher*, 134(38). Retrieved January 16, 2002 from the Academic Search Elite database.
- ASD PA Meeting with Media Pool Bureau Chiefs. (2001, September 28). Retrieved February 1, 2002 from [http://www.defenselink.mil/news/Sep2001/t09302001\\_t0928asd.html](http://www.defenselink.mil/news/Sep2001/t09302001_t0928asd.html).
- Barringer, F. (1998, May 18). Seeking dramatic footage no matter what the cost. *New York Times*, pp. D1-2.
- Bedway, B. (2003, February 24). Reporters part of problem? *Editor & Publisher*, 136(8), p. 22. Retrieved May 18, 2003 from the Academic Search Elite database.
- Beniger, J. R. (1986). *The control revolution*. Cambridge, MA: Harvard University Press.
- Blumenthal, R., & Rutenberg, J. (2003, February 18). Journalists are assigned to accompany U.S. troops. *New York Times*, p. A12.
- Boydston, M. D. (1992). Press censorship and access restrictions during the Persian Gulf War: A First Amendment analysis. *Loyola of Los Angeles Law Review*, 25, 1073-1106.
- Branzburg v. Hayes*, 408 U.S. 665 (1972).
- Browne, M. W. (1991, March 3). The military vs. the press. *New York Times Magazine*, pp. 27-30, 44-45.
- Bushell, A. & Cunningham, B. (2003, March/April). Being there. *Columbia Journalism Review*, 41(6), p. 18. Retrieved May 21, 2003 from the Academic Search Elite database.
- Callahan, C. (1994, September). When a journalist is kidnapped. *American Journalism Review*, 16(7), pp. 36-39.
- Carr, D. (2003, April 1). Pentagon says Geraldo Rivera will be removed from Iraq. *New York Times*, p. B14.
- Carter, B. (1994a, September 18). TV ready for battle, with high-tech access. *New York Times*, p. 13.
- Carter, B. (1994b, September 20). Networks held back the news that invasion planes were headed for Haiti. *New York Times*, p. A12.
- Cassell, P. G. (1985). Restrictions on press coverage of military operations: The right of access, Grenada,

and "off-the-record" wars. *Georgetown Law Journal*, 73, 931-973.

Chasen, A. (2003, May). Spins of omission. *World Press Review*, p. 3.

Clarke, V. (2002, September/October). Striking a balance: Government needs versus those of the media. *Columbia Journalism Review*, 41(3), p. 72. Retrieved May 18, 2003 from the Academic Search Elite database.

Clausewitz, C. von (1993). *On War* (M. Howard & P. Paret, Trans.). New York: Knopf. (Original work published 1832)

Cockburn, A. (2003, May 12). The decline and fall of American journalism. *Nation*, 276(18), p. 9. Retrieved May 18, 2003 from the Academic Search Elite database.

Committee to Protect Journalists. (1992, March). *Attacks on the press*. New York: Author.

Convention Delegates Pass 11 Resolutions (2001). *Quill*, 89(9). Retrieved January 16, 2002 from the Academic Search Elite database.

Cronkite, W. (1991, February 25). What is there to hide? *Newsweek*, p. 43.

Dennis, E. E., Stebenne, D., Pavlik, J., Thalhimer, M., LaMay, C., Smillie, D., FitzSimon, M., Gazsi, S., & Rachlin, S. (1991). *The media at war: The press and the Persian Gulf conflict*. New York: Gannett Foundation.

Denniston, L. (1991, March). Suing the Pentagon for access to war. *Washington Journalism Review*, p. 48.

Dicken-Garcia, H. (1989). *Journalistic standards in nineteenth-century America*. Madison, WI: University of Wisconsin Press.

Erlanger, S. (1994, December 20). Russians watch first war on uncensored TV, to Yeltsin's alarm. *New York Times*, p. A14.

Fisher, M. (2003, May). Embedded with the Allies. *World Press Review*, pp. 11-12.

*Flynt v. Rumsfeld*, 180 F. Supp. 2d 174 (D.C. Cir. 2002). Retrieved March 14, 2002, from Loislaw.

*Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.C. Cir. 2003). Retrieved May 19, 2003, from Westlaw.

*Flynt v. Weinberger*, 588 F. Supp. 57 (1984), affirmed in part, vacated in part, 762 F. 2d 134 (D.C. Cir.



1985).

Franklin, M. A. (1987). *Cases and materials on mass media law*. Mineola, NY: Foundation Press.

Fussell, P. (1989). *Wartime*. New York: Oxford University Press.

Galloway, J. (2003, March 31). On the fog of war. *Editor & Publisher*, 136(13), p. 26. Retrieved May 21, 2003 from the Academic Search Elite database.

Gans, H. J. (1980). *Deciding what's news*. New York: Vintage Books.

Garneau, G. (2001). War reporting, news censorship. *News Photographer*, 56(9), 10. Retrieved January 16, 2002 from the Academic Search Elite database.

Gersh, D. (1991, April 6). Pentagon spokesman speaks. *Editor & Publisher*, pp. 16-17.

Getler, M. (2001). Challenges. *Columbia Journalism Review*, 40(4). Retrieved January 16, 2002 from the Academic Search Elite database.

*Getty Images News Services, Corp. v. Department of Defense*, 193 F. Supp. 2d 112 (D.C. 2002). Retrieved March 14, 2002, from Loislaw.

*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596 (1981).

Gordon, M. R., & Friedman, T. L. (1993, October 25). Disastrous U.S. raid in Somalia nearly succeeded, review finds. *The New York Times*, pp. A1 & A10.

*Greer v. Spock*, 424 U.S. 828 (1976). Retrieved October 24, 2002 from Loislaw.

Gulf War access cases dismissed. (1991, Spring). *The News Media and the Law*, pp. 35-36.

Hackworth, D. H. (1992, December 21). Learning how to cover war. *Newsweek*, 120(25). Retrieved November 23, 2002 from the Academic Search Elite database.

Helle, S. J. (1995). Libertarianism and neoliberalism in First Amendment law. In J. C. Nerone (Ed.), *Last Rights: Revisiting Four Theories of the Press* (pp. 52-62). Urbana, IL: University of Illinois Press.

Hickey, N. (2002). Access denied. *Columbia Journalism Review*, 40(5). Retrieved March 6, 2002 from the Academic Search Elite database.

Hixson, R. (1989). *Mass media and the Constitution*. New York: Garland.

*Houchins v. KQED*, 438 U.S. 1 (1978).

Iyengar, S. & Simon, A. (1993). News coverage of the Gulf Crisis and public opinion: A study of agenda-setting, priming, and framing. *Communication Research*, 20(3), 365-383.

Jacobs, M. T. (1992). Assessing the constitutionality of press restrictions in the Persian Gulf War. *Stanford Law Review*, 44, 675-726.

*JB Pictures, Inc. v. United States Department of Defense*, 927 F. 2d 1257 (D.C. Cir. 1991).

Jensen, R. (2003, May). The military's media. *The Progressive*, pp. 22-25.

Joint statement of principles sent to White House, Congress (2001). *Quill*, 89(9). Retrieved January 16, 2002 from the Academic Search Elite database.

Kenealey, K. P. (1992). The Persian Gulf War and the press: Is there a constitutional right of access to military operations? *Northwestern University Law Review*, 87(1), 287-325.

Kirtley, J. (2001). Waving the flag. *American Journalism Review*, 23(9). Retrieved January 16, 2002 from the Academic Search Elite database.

Kohut, A. & Toth, R. C. (1994, November/December). Arms and the people. *Foreign Affairs*, 73(6). Retrieved November 23, 2002 from the Academic Search Elite database.

Kunkel, T. (2001). War comes home. *American Journalism Review*, 23(10). Retrieved January 16, 2002 from the Academic Search Elite database.

Kurtz, H. (1991, May 14). News chiefs vow to resist Pentagon war coverage rules in future. *The Washington Post*, p. A4.

Lichter, S. R. (1991). *Keeping the news media honest: How the news media covered the war* (Heritage Lecture No. 347). Washington, D.C.: Heritage Foundation.

*Los Angeles Police Dep't. v. United Reporting Publishing*, 528 U.S. 32 (1999). Retrieved October 25, 2002 from Loislaw.

Maren, M. (1993, December 6). Spinning Dunkirk. *New Republic*, 209(23). Retrieved November 23, 2002 from the Academic Search Elite database.

Martin, J. (2003, April 7). Of many things. *America*, 188(12), p. 2. Retrieved May 21, 2003 from the Academic Search Elite database.

- Milavsky, J. R. (1991, March/April). The war, the media, and the public. *The Public Perspective: A Roper Center Review*, pp. 29-32.
- Military censorship lives (1994, September 21). *New York Times*, p. A22.
- Mitchell, G. (2001). Media passing muster: Poll. *Editor & Publisher*, 134(47), p. 5. Retrieved January 16, 2002 from the Academic Search Elite database.
- Mitchell, G., & Bedway, B. (2003). >From quick war to quagmire? *Editor & Publisher*, 136(13), p. 10. Retrieved May 21, 2003 from the Academic Search Elite database.
- Nation Magazine v. United States Department of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991).
- Near v. Minnesota*, 283 U.S. 697 (1931).
- News Media Protest Lack of Access. (2001, December 5). *The Las Vegas Sun*. Retrieved December 6, 2001 from <http://www.lasvegassun.com>.
- New York Times Co. v. U.S.*, 403 U.S. 713 (1971).
- Noelle-Neumann, E. (1993). *The spiral of silence* (2nd ed.). Chicago, IL: University of Chicago.
- Olson, K. T. (1992). The constitutionality of Department of Defense press restrictions on wartime correspondents covering the Persian Gulf War. *Drake Law Review*, 41, 511-535.
- Parenti, M. (1993). *Inventing reality: The politics of news media*. New York: St. Martin's Press.
- Pejovich, S. (1990). *The economics of property rights: Towards a theory of comparative systems*. Dordrecht, The Netherlands: Kluwer.
- Pell v. Procunier*, 417 U.S. 817 (1974).
- Pete Williams debriefs the press (1991, March 18). *Broadcasting*, p. 26.
- Plunging ashore into blazing--TV lights? (1992, December 21). *Time*, 140(25). Retrieved November 23, 2002 from the Academic Search Elite database.
- Press, politicians weigh coverage restrictions (1991, February 25). *Broadcasting*, pp. 52-53.
- Pringle, P. (1993, December). Horror comes home for GI's in Somalia. *World Press Review*, 40(12), pp.

9-11.

Ricchiardi, S. (2003a, March). Preparing for war. *American Journalism Review*, p. 29. Retrieved May 18, 2003 from the Academic Search Elite database.

Ricchiardi, S. (2003b, May). Close to the action. *American Journalism Review*, pp. 28-35.

*Richmond Newspapers, Inc. v Virginia*, 448 U.S. 555 (1980).

Rieder, R. (2003, May). In the zone. *American Journalism Review*, p.6.

Rutenberg, J. (2001, December 10). Noting "shortcomings," Pentagon says it will remove some obstacles to covering war. *New York Times*, p. B6.

Rykken, R. (1991, April). War over, the press looks back. *presstime*, pp. 40-41.

*Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

*Schaefer v. U.S.*, 251 U.S. 466 (1920).

Schanberg, S. H. (1991, March). Censoring for political security. *Washington Journalism Review*, pp. 23-26, 53.

*Schenck v. U.S.*, 249 U.S. 47 (1919).

Sharkey, J. (1993, December). When pictures drive foreign policy. *American Journalism Review*, pp. 14-19.

Sherman, M. T. (1992). Forgive us our press passes. *St. John's Law Review*, 66, 633-648.

Shields, T. (2001a). Administration pressed on rules of engagement. *Editor & Publisher*, 134(40). Retrieved January 16, 2002 from the Academic Search Elite database.

Shields, T. (2001b). Washington pressed for access. *Editor & Publisher*, 134(41). Retrieved January 16, 2002 from the Academic Search Elite database.

Shooting at the messenger (2003, March 25). *Opinion Journal*. Retrieved March 25, 2003 from <http://www.opinionjournal.com/editorial/feature.html?id=110003246>.

Sloyan, P. J. (1992). Press restrictions during the Gulf War: "Hail Fredonia". *St. John's Law Review*, 66, 649-654.

- Smith, J. E. (1993). From the front lines to the front page: Media access to war in the Persian Gulf and beyond. *Columbia Journal of Law and Social Problems*, 26, 291-339.
- Smith, P. M. (1991). *How CNN fought the war: A view from the inside*. New York: Carol Publishing Group.
- Smolla, R. A. (1992). *Free speech in an open society*. New York: Alfred A. Knopf.
- Solomon, W. S. (1992). News frames and media packages: Covering El Salvador. *Critical Studies in Mass Communication*, 9, 56-74.
- SPJ Leads Fight for Press Freedoms in War Coverage (2001). *Quill*, 89(9). Retrieved January 16, 2002 from the Academic Search Elite database.
- SPJ Says Media Should Carefully Weigh Government Requests Regarding Coverage of War on Terrorism (2001). *Quill*, 89(9). Retrieved January 16, 2002 from the Academic Search Elite database.
- Stewart, P. (1982). Or of the press. In D. L. Brenner & W. L. Rivers (Eds.), *Free but regulated: Conflicting traditions in media law*. Ames, IA: Iowa State University Press.
- Stockwell, D. (1996, January 29). Press relations: Lessons learned. *Army Times*, 56(27), p. 51.
- Strupp, J. & Berman, A. (2003, February 17). Journalists set to bunk down with armed forces. *Editor & Publisher*, 136(7), p. 6. Retrieved May 21, 2003 from the Academic Search Elite database.
- Turner, E. (1994, September 28). In Haiti reporting, CNN acted responsibly. *New York Times*, p. A20.
- United States v. Albertini*, 472 U.S. 675 (1985). Retrieved October 24, 2002 from Loislaw.
- U.S. Department of Defense (1994a, September 16). Guidelines for news media.
- U.S. Department of Defense (1994b, September 16). Haiti operations media ground rules.
- U.S. Department of Defense (2003a). Public affairs guidance (PAG) on embedding media. Retrieved May 7, 2003 from <http://www.dod.mil/news/Feb2003/d20030228pag.pdf>.
- U.S. Department of Defense (2003b). Release, indemnification, and hold harmless agreement. Retrieved May 18, 2003 from <http://www.defenselink.mil/news/Feb2003/d20030210embed.pdf>.
- Weinberger, C. W. (2001). Our war against terrorism—A good progress report. *Forbes*, 168(15). Retrieved January 16, 2002 from the Academic Search Elite database.

*Zemel v. Rusk*, 381 U.S. 1 (1965). Retrieved October 25, 2002 from Loislaw.

Zinsmeister, K. (2003, April 21). They're in the army now. *National Review*, 55(7), p. 32. Retrieved May 21, 2003 from the Academic Search Elite database.

## Notes

[1] Arguably the news reports from Somalia, especially the picture coverage of the treatment of U.S. casualties and a prisoner of war, pressured President Clinton to redefine the U.S. mission there (see [Sharkey](#), 1993 for discussion of the impact of "parachute journalism" on policy decisions).

The military operations in Somalia, called Operation Restore Hope, spanned the end of the George Bush administration and the beginning of the Clinton administration. News media were present in substantial numbers when American troops first landed in Mogadishu ([Plunging Ashore](#), 1992), during the last months of the Bush administration. Journalists had free reign in the theater of operations ([Stockwell](#), 1996), but the use of military escorts (called "jiblets"), planned media opportunities, and scripted responses to reporters' questions increased toward the end of the operation ([Maren](#), 1993), as the Clinton administration prepared to withdraw American troops.

[2] While no mainstream news organization chose to challenge the press restrictions in court, the list of plaintiffs in *Nation Magazine* is something of a who's-who of the American progressive journalism world. Joined in this suit are Nation [\[http://www.thenation.com/\]](http://www.thenation.com/), Harper's, In These Times, Pacific News Service, The Guardian, The Progressive, Mother Jones, The L.A. Weekly, The Village Voice, The Texas Observer, Pacifica Radio News, Sydney H. Schanberg, E. L. Doctorow, William Styron, Michael Klare, and Scott Armstrong, plus a separate lawsuit filed by Agence France-Presse. The list of interested parties with amicus curiae briefs included thirteen members of Congress, the American Civil Liberties Union, Fairness and Accuracy in Reporting, and academics Ben Bagdikian, Todd Gitlin, and Herbert I. Schiller, among others. The defendants included Secretary of Defense Richard Cheney, Assistant Secretary of Defense for Public Affairs Peter Williams, Chairman of the Joint Chiefs of Staff General Colin Powell, and President of the United States and Commander-in-Chief of the Armed Forces George Bush. While the mainstream press did not join in this suit (see [Parenti](#), 1993, p. 167 for criticism on this point), *Nation Magazine v. U.S. Dept. of Defense* nonetheless was fraught with the possibility of a different kind of defeat for the military.

[3] Injunctive relief halts an activity in progress. Declarative relief prohibits the action in the future.

[4] Accordingly, the District Court ruled in [Getty Images](#) (2002) that "the Guantanamo Bay Naval Base is not a public forum and that consideration of Getty's First and Fifth Amendment claims must be undertaken through the prism of the heightened deference due to military regulations and decision-

making.”

[5] The delicate balancing of the public’s right to know and the legitimate need to keep certain information confidential is evident in Justice Brennan’s concurrence.

[T]he First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information. . . . Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. . . . [A]ny privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security and confidentiality. (*Richmond Newspapers*, 1980, p. 585-586)

[6] Quotation is from an agreement signed by accredited correspondents, cited in *Boydston*, 1992, p. 1078, footnote 58.

[7] Iraqi forces invaded Kuwait on August 2, 1990. American forces were deployed on August 8, followed by the press pool on August 12. On August 26 the pool was abolished and access allowed to all accredited journalists. In advance of the hostilities, the Department of Defense renewed pooling on January 7, 1991 and added review of stories and military escorts to the requirements. The air war began on January 16, and the ground offensive on February 24. Pool coverage of the ground warfare was blacked out for forty-eight hours at the start of the ground campaign; dispatches from correspondents accompanying the ground forces were delayed. Hostilities ceased on February 27, and all press restrictions ended on March 4. (See *Olson*, 1992, pp. 512-513). The *Nation* suit was filed on January 10, 1991, prior to the start of the air war, and decided on April 16, 1991, after the restrictions had been lifted.

[8] The full texts of the ground rules, media guidelines, and operating policies of the press pools appear in the appendices of *Nation Magazine*, 1991, pp. 1575-1582.

[9] Note the following passages from the Defense Department’s “*Guidelines for News Media*,” issued September 16, 1994:

Media representatives are asked to assist the operation by blacking out network broadcasts from launch points prior to the landing of forces in the area of operation. . . . Do not approach military personnel, especially during hours of darkness, without express military approval. . . . News media representatives who are not accredited with the Joint Task Force Joint Information Bureau (JTB) will not be permitted into forward areas. . . . Security at the source will be the primary and desired means of protecting the operations security of the mission and enforcing the media ground rules.

[10] Note the following passage from the Defense Department's "[Haiti Operation Media Ground Rules](#)," issued September 16, 1994:

. . . the media will be provided timely access to the operation, subject to operations security and legal consideration. However, situations may arise in which movement of news media representatives will be restricted or in which a media pool is necessary.

[11] In Operation Enduring Freedom, as in the Persian Gulf War, advocates for unlimited press access to the battlefield have sometimes used the term "censorship" to denote the restrictions on newsgathering, "self-censorship" to denote copy editors' compliance with security guidelines, or at the least to invoke the term somewhere in taking a position against the access restrictions. (For example, see [An Unwitnessed War?](#), 2001; [Kirtley](#), 2001; [SPJ Says Media Should Carefully Weigh](#), 2001. A very interesting example occurs in the database abstract of the article by [Hickey](#), 2002. The abstract begins, "Discusses the censorship policy of the United States Defense Department.")

We should note that censorship actually denotes prior restraint, in the form of prepublication inspection and alteration of copy, or of sanctions against publication. Perhaps the word is invoked because of its extreme negative connotation and concomitant rhetorical power, but it is clear that the access restrictions used in the last decade do not constitute censorship in any but the most metaphorical sense.

[12] A survey of news executives listed ten new communication technologies the press used in the Gulf War: electronic mail and computer-to-computer communications; digital transmission of still photographs; facsimile transmission; portable satellite telephones; remotely sensed satellite imagery; frame capture of video images to print; laptop computers; international data transmission networks; flyaway satellite uplinks; and computer graphics ([Dennis et al.](#), 1991, p. 35). All of these technological changes increase the speed of newsgathering and reporting, which stresses or bypasses the traditional security mechanisms.

[13] The timeliness of news pictures is of crucial importance to both the military and the news media. The significance of this technological development—and the opposing interests embedded in it—is evident in this exchange between news bureau chiefs and Defense Department public affairs officers (contained in [ASD PA Meeting](#), 2001).



Q: How will the photos be moved and from where?... From the actual site, or is this when everyone comes back to—

A: Every night the pool will come back together to file. That's so you guys can share the stories, share the information. Remember, this is non-competitive. You go out for the day, you cover stories, you come back in the afternoon, whatever the situation is, and you file.

Q: My consideration on that is our technology now will allow us to transmit immediately. That gives our readers the chance to see the photographs as soon as possible. It seems like it's offsetting technology if they aren't going to be reviewed, to come back in, to do something that we could do on site.

A: A photograph that shows up five minutes after the two F-14's take off to go on a mission, that tells the whole world that five minutes ago two F-14's took off to go do something.

Q: Well, they don't know where it is.

A: Those are the kinds of things we have to work out. The instantaneous technology versus these guys are still in the air....We don't mind your technology, just our time.

[14] Not everyone is satisfied with a moderate role for the press. Some critics have charged that despite its assertions to the contrary the mainstream press acts not as a watchdog but as a mouthpiece for government interests (for example, [Parenti](#), 1993; [Solomon](#), 1992), particularly when military operations are concerned. Nonetheless, it is hard to discount the stridency of the mainstream press' protests about the access restrictions simply because the protests operated within the "system."

[15] Polling during Operation Enduring Freedom is generally consistent with polls during the Gulf War. In November 2001, a Pew Research Center poll found that "half of the respondents say the military should exert more control over news about the war; only 40% think the media should decide how to report it" ([Hickey](#), 2002). A Gallup poll in the same month found Secretary of Defense Rumsfeld to have an 80% approval rating, compared with 43% for the news media ([Hickey](#), 2002).

Even while aware that the government had withheld information about the war from them, 57% answered "give military more control" to a January 1991 Times Mirror poll question whether the government or the press should exert more control over the Gulf War reporting. In the same survey, another item asking "do you think the United States military is hiding bad news (about the Gulf) from the public or do you think it is telling the public as much as it can under the circumstances?" generated a 78% response of "telling as much as it can" ([Milavsky](#), 1991, p. 32). If the wartime polls on news coverage constitute something of a referendum on the press restrictions, there is ample reason to believe a majority of Americans "feel that censorship for national security is more important than the media's ability to report the news the way it wants to report it" ([Lichter](#), 1991, p. 2).

That the public entrusted the government with a higher degree of control over information during the Gulf War than it would tolerate in peacetime is not unprecedented. A poll taken during World War II

showed 55% of the respondents supported “having official government spokesmen write the war news for the papers and broadcast it over the radio” ([Milavsky](#), 1991, p. 32).

[16] The dramatic change in U.S. policy goals in Somalia following the publication of pictures of mistreated American casualties is illustrative of the potency of news coverage in public dialogue about war. (See, for instance, [Gordon & Friedman](#), 1993; [Pringle](#), 1993; [Kohut & Toth](#), 1994.)

This relationship between the press and government policy is not unique to the United States, but a characteristic of a political system which allows a free press in an age of electronic communications. (See, for instance, [Erlanger](#), 1994 on the impact of the newly-free Russian press on government efforts to suppress a rebellion in Chechnya.)

[17] One military expert noted that in the Gulf War coverage “[a] gross mistake repeated over and over tended to gain a level of legitimacy” ([Smith, P. M.](#), 1991, p.131).

[18] See [Pejovich](#), 1990, pp. 38-41 for discussion of transaction costs.

[19] One journalist comments, “I cannot entirely dismiss from my mind the anti-press cant that has pervaded American military journals and pronouncements ever since the Vietnam War” ([Browne](#), 1991, p. 30). Another is more direct: “The military is acting on a generally discredited Pentagon myth that the Vietnam War was lost because of the uncensored press coverage” ([Cronkite](#), 1991). A soldier-turned-writer agrees: “Of the many myths fathered by the Vietnam War, probably the biggest was that we lost because of uncensored, free-ranging press coverage” ([Hackworth](#), 1992).

It may be, however, that journalists perceive their relationship with the military to be more polarized than the military does. An American officer who served as chief military spokesperson for the United Nations Operation in Somalia expressed cautious optimism, in reflecting on CNN's handling of footage of an American pilot held hostage and the corpse of a soldier dragged through the streets of Mogadishu: “With responsible media representatives who are willing to learn from us, we can successfully negotiate these sensitive issues with them” ([Stockwell](#), 1996). A more collaborative view is also visible in the comments of Department of Defense officials in their briefing with bureau chiefs at the beginning of Operation Enduring Freedom ([ASD PA Meeting](#), 2001).

[20] It is likely that the press guidelines issued for the Haiti operation in the fall of 1994 would have sparked similar complaints had actual combat broken out. While news executives were pleased that they were able to deploy equipment and correspondents on Haiti in advance of an expected U.S. invasion force ([Carter, 1994a](#)), some journalists nonetheless denounced the press guidelines as too similar to those of the Gulf War ([Military Censorship Lives](#), 1994). It is worth noting, however, that the television networks agreed to a White House request to delay reports that planes carrying paratroopers were en route to Haiti, and cited concern for the success of the operation as the reason ([Carter, 1994b](#)).