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PRESS CENSORSHIP AND ACCESS RESTRICTIONS DURING THE PERSIAN GULF WAR: A FIRST AMENDMENT ANALYSIS

I. INTRODUCTION

The Persian Gulf War began on August 2, 1990 when Iraqi forces, massed on the Iraq-Kuwait border, invaded the tiny Gulf state of Kuwait and quickly overwhelmed its armed forces.¹ Official Iraqi statements claimed that the invasion was undertaken at the request of a Kuwaiti faction representing the legitimate government of Kuwait.² Led by the United States, nations around the world rushed military forces into Saudi Arabia to form a coalition force, while the United Nations imposed unprecedented economic and military sanctions on Iraq.³ The United Nations Security Council passed a resolution giving Iraq until midnight on January 15, 1991 to withdraw from Kuwait or face United Nations sanctioned military attack.⁴ Saddam Hussein, the leader of Iraq, refused to order his armed forces to retreat from Kuwait.⁵ On January 16, 1991, the United Nations coalition force in Saudi Arabia began an air bombardment of Iraqi military forces and command and control centers in preparation for a ground assault.⁶ On February 23, 1991, the coalition forces entered Kuwait and captured or isolated thousands of Iraqi soldiers.⁷ Quickly defeated, the Iraqi forces withdrew from Kuwait on February 25, 1991.⁸

During the Persian Gulf War, the Pentagon imposed the tightest restrictions on battlefield press coverage in American military history.⁹ The restrictions subjected all news gathered to a security review before it could be published¹⁰ and severely restricted media access to the battle-

1. Kim Murphy, *Iraq Tightens Grip on Kuwait, Sets Up Interim Government*, L.A. TIMES, Aug. 3, 1990, at A1.

2. Lisa Beyer, *Iraq's Power Grip*, TIME, Aug. 13, 1990, at 19.

3. See Lisa Beyer, *The World Closes In*, TIME, Aug. 20, 1990, at 27-29.

4. S.C. Res. 678, U.N. SCOR, 45 Sess. (1991).

5. See *Special Report: Witness to War*, L.A. TIMES, Mar. 12, 1991, World Report, at 3.

6. *Id.*

7. *Id.*

8. *Id.*

9. Thomas B. Rosenstiel, *Gulf War No Model for Coverage, Media Tell Pentagon*, L.A. TIMES, July 1, 1991, at A4.

10. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1577-78 (1991).

field.¹¹ A small number of reporters were allowed access to the battlefield in pool groups¹² but had to remain with escorts at all times.¹³ “[C]ensorship created by the pool group system and mandatory security reviews made the Gulf War the most undercovered major conflict in American history.”¹⁴

This Comment explores the constitutionality of the restrictions placed upon the media during the Persian Gulf War. First, this Comment describes the history of media access to American military conflicts prior to the Gulf War and any censorship imposed on the news gathered by reporters.¹⁵ Second, this Comment sets forth the Department of Defense (DOD) restrictions placed upon the media during the Persian Gulf War.¹⁶ Next, the First Amendment doctrines of prior restraint and right of access are discussed in the context of their limit on the government’s ability to impose restrictions on the press.¹⁷ This Comment then analyzes whether the restrictions placed upon the media during the Persian Gulf War violated the First Amendment.¹⁸ This Comment concludes by recommending that in future military conflicts, the DOD should only impose voluntary censorship on reporters and grant the media unrestricted access to the battlefield.¹⁹

II. BACKGROUND

The history of American press coverage of military operations is well documented and can be traced back to the Revolutionary War.²⁰ Generally, the government has permitted the press widespread access to the battlefield.²¹ Nevertheless, the government has, at times, instituted

11. *Id.* at 1578-79.

12. Press pools consist of groups of reporters organized by the military. Malcolm W. Browne, *The Military vs. the Press*, N.Y. TIMES, Mar. 3, 1991, § 6 (Magazine), at 29.

13. *Nation Magazine*, 762 F. Supp. at 1577-79.

14. *U.S. News Executives Propose New War Coverage Guidelines*, UPI, June 30, 1991 (LEXIS, Nexis Library, UPI File).

15. See *infra* notes 20-115 and accompanying text.

16. See *infra* notes 117-39 and accompanying text.

17. See *infra* notes 140-215 and accompanying text.

18. See *infra* notes 216-58 and accompanying text.

19. See *infra* notes 259-77 and accompanying text.

20. Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and “Off-the-Record Wars,”* 73 GEO. L.J. 931, 932 (1985).

21. See Howard B. Homonoff, Note, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial in Military Operations*, 17 N.Y.U. J. INT’L L. & POL. 369, 380 (1985). While press access to military operations has been the general rule, “‘commando raids’—quick, surprise attacks designed to achieve limited, discrete objectives—have routinely been conducted without the presence of reporters.” Roger W. PinCUS, Comment, *Press Access to Military Operations: Grenada and the Need for a New Analyti-*

editorial restrictions on the press in order to protect "national security."²² This section briefly chronicles the history of press access to American military conflicts and the government limitations placed on the publication of news gathered in those conflicts.²³

A. *The American War of Independence Through the Civil War*

1. American War of Independence

During the early days of American history, no corps of professional war reporters existed.²⁴ Newspapers had no organized means of reporting on the American War of Independence and had to rely on private letters as well as official and unofficial messages.²⁵ A few reporters were present on the battlefield, however, covering the battles of Concord and Lexington as well as other opening battles of the War of Independence.²⁶ Despite the existence of censorship laws, there are no reported incidents of press censorship during the war.²⁷

2. War of 1812

During the War of 1812, news coverage of campaigns and incidents was almost as unorganized as it was during the Revolutionary War.²⁸ Still, the press had access to the various battlefields including the American retreat from Washington²⁹ and the burning of the capital.³⁰ While official censorship did not exist,³¹ reporters did face impromptu extralegal censorship.³² For example, Andrew Jackson imposed his own code

cal Framework, 135 U. PA. L. REV. 813, 837 (1987). In most military conflicts, the government grants the press access to the battlefield. Nonetheless, the government did not grant the press access to the "covert" Bay of Pigs operation. *Id.* In 1980 the government excluded the press from covering the attempted rescue mission of the American hostages who were held in Iran. *Id.*

22. Homonoff, *supra* note 21, at 372.

23. *See infra* notes 25-139.

24. Cassell, *supra* note 20, at 933.

25. FRANK L. MOTT, *AMERICAN JOURNALISM: A HISTORY 1690-1960*, at 99 (3d ed. 1962).

26. JOHN HOHENBERG, *FREE PRESS/FREE PEOPLE* 54 (1971). For example, reporter Isaiah Thomas was present at the battlefields and issued the first eyewitness account of the American War of Independence in the *Massachusetts Spy*. *Id.* at 54-55.

27. Cassell, *supra* note 20, at 933. Although there was little censorship by legal means in the Revolutionary period, the Tory press's liberty was threatened by mobs and threats of violence made by the Sons of Liberty. MOTT, *supra* note 25, at 103-04.

28. MOTT, *supra* note 25, at 196.

29. *200-Year Tradition Broken*, NEWS, MEDIA & L., Jan.-Feb. 1984, at 4.

30. *Id.*

31. THE GANNETT FOUNDATION, *THE MEDIA AT WAR: THE PRESS AND THE PERSIAN GULF CONFLICT* 8 (1991).

32. JAMES R. MOCK, *CENSORSHIP 1917*, at 9 (1941).

of censorship on reporters and, in a classic example of Jacksonian autocracy, imprisoned a writer who opposed his rules.³³

3. Mexican-American War

The modern war correspondent emerged during the Mexican-American War of 1846-1847.³⁴ Newspaper reporters had widespread access to the conflict's campaigns and battlefields³⁵ and, for the first time ever, newspapers printed extensive and comprehensive articles about the war.³⁶ Moreover, neither the government nor the military saw a need to place any legal restrictions on reporters.³⁷

4. Civil War

The American Civil War became the most thoroughly reported violent conflict of its time.³⁸ Over 150 eyewitness correspondents served the northern papers during the Civil War.³⁹ In addition to allowing complete press access to the battlefield, the government afforded the correspondents many privileges, including the use of government horses, wagons and transportation with baggage privileges on government steamers and military trains.⁴⁰ In turn, the newspapers devoted a significant amount of space to military news of the Civil War.⁴¹

The prolific coverage of the Civil War, however, occurred within a system of sometimes heavy-handed censorship.⁴² Both the Union and the Confederacy instituted censorship rules for the press.⁴³ At the beginning of the war, the Union government suggested voluntary self-imposed newspaper censorship, but failed to provide guidelines, making the ap-

33. *Id.*

34. JOSEPH J. MATHEWS, REPORTING THE WARS 34 (1957).

35. *Id.*

36. *Id.* at 53.

37. *Id.* at 54.

38. MOTT, *supra* note 25, at 329.

39. *Id.* at 332.

40. M. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS 21 (1968). Although the press had widespread access to the battlefield, certain military commanders distrusted and harassed the individual war correspondents. HOHENBERG, *supra* note 26, at 123. For example, General Henry W. Halleck expelled all newspaper correspondents from the Union Forces in the East. *Id.* Because of fear of security violations, General William T. Sherman also kept reporters at a distance. *Id.*

41. MOTT, *supra* note 25, at 329. New York papers such as the *Times*, *Tribune* and *World* contained only 48 columns per issue and often devoted one-third of each issue to news from the battlefield. *Id.*

42. Jack A. Gottschalk, "Consistent with Security" . . . *A History of American Military Press Censorship*, 5 COMM. & L. 35, 36 (1983).

43. *Id.*

proach unworkable.⁴⁴ On its own initiative, the War Department censored messages that were delivered over the telegraph lines.⁴⁵ The Postmaster General refused to distribute publications whose content was deemed disloyal to the government.⁴⁶ The military suspended the publication of the *New York Journal of Commerce* and the *New York World* because they had printed false reports deemed harmful to the Union's cause.⁴⁷ The military also ordered the *Chicago Times* to stop publication temporarily because of its incessant attacks on the Lincoln Administration.⁴⁸ The Confederacy, unrestricted by the Federal Constitution, imposed even more stringent censorship rules on the press.⁴⁹ Southern newspapers able to overcome the severe shortages of paper, ink and labor had to be wary of using sensitive military information.⁵⁰ Once their cities were occupied by the Union army, newspapers in New Orleans, Vicksburg and Memphis either submitted to federal censorship or were suspended.⁵¹

B. The Spanish-American War Through World War I

1. Spanish-American War

Not surprisingly, during the "yellow journalism"⁵²-inspired Spanish-American War of 1889, the military allowed correspondents widespread access to the battlefields and broad freedom to report the war

44. THE GANNETT FOUNDATION, *supra* note 31, at 8. As ineffective as the voluntary censorship agreement turned out to be in the Civil War, it stands as one of the earliest American efforts to employ a wartime code for information practices. FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 227 (Harold L. Nelson ed., 1967). The principles of voluntary censorship by the press and the maximum release of information by the government enjoyed more success in World War I and World War II. *Id.*

45. MOCK, *supra* note 32, at 11.

46. *Id.*

47. THE GANNETT FOUNDATION, *supra* note 31, at 9. The military suspended the *New York Journal of Commerce* and the *New York World* for two days each for publishing a false presidential proclamation calling for the draft of 400,000 men in 1864. HOHENBERG, *supra* note 26, at 121. The military ordered the author of the hoax jailed for three months. *Id.*

48. THE GANNETT FOUNDATION, *supra* note 31, at 9.

49. *Id.* at 8.

50. HOHENBERG, *supra* note 26, at 122.

51. *Id.* One newspaper, the *Memphis Appeal*, became a transient newspaper in order to escape federal control; it was published in 10 towns in four states before the war ended. *Id.* at 123.

52. "Yellow journalism" is a term used to describe sensationalism in news stories. 7 DICTIONARY OF AMERICAN HISTORY 356 (1976). "At the turn of the [20th] century the scare headline, the scandal section, the sob story, and elaborate Sunday features had become permanent elements of the sensational press." *Id.* Historians have attributed yellow journalism to starting the Spanish-American War. See MOTT, *supra* note 25, at 533-34.

news.⁵³ As many as 500 writers, photographers and artists representing many newspapers and magazines were mobilized to cover the activities of the blockading fleet.⁵⁴ Reporters gathered at the Florida camps, went into Cuba, sent news from Spain, and sailed with Dewey to Manila.⁵⁵ The Navy formed censorship units in mid-1898 led by a former *New York Tribune* reporter, Grant Squires, who served as a liaison between the military and the press.⁵⁶ The military did not enforce stringent censorship rules and, consequently, the newspapers freely printed reports of Army and Navy movements.⁵⁷

2. World War I

During World War I, the military required war correspondents who wanted access to the American Expeditionary Force (AEF) in France and to the front lines to obtain accreditation.⁵⁸ Accredited correspondents enjoyed freedom and uninhibited access to the battlefield, and could even report from front-line trenches if they so desired.⁵⁹ The content of the war correspondents' reports were subjected to military censorship by the AEF's Intelligence Section of the General Staff.⁶⁰ During 1917, while a press officer from what was then referred to as the Censorship Division of the Intelligence Section reviewed reporters' correspondence,⁶¹ reporters were not explicitly required to make any statement contrary to their opinions.⁶²

53. MOTT, *supra* note 25, at 533-34.

54. *Id.* at 533.

55. *Id.* Few or no war correspondents actually tried to preserve their status as noncombatants. *Id.* at 536. William Randolph Hearst led a force of 20 writers, photographers and artists to the scene of the war and captured 26 Spanish soldiers. *Id.* at 535.

56. Gottschalk, *supra* note 42, at 38.

57. MOTT, *supra* note 25, at 536.

58. *Id.* at 620. Correspondents with the AEF were accredited upon the filing of a \$2000 bond and a maintenance deposit of \$1000. *Id.* Correspondents had to sign an agreement which included the following restrictions:

[T]he newspaper representative was to submit all correspondence, except personal letters, to the press officer or his assistant (the personal letters were censored at the base); the correspondent agreed to repeat no information he received at the front unless it had previously passed the censor; he was to give neither name nor location of any unit; there was to be no revelation of future plans or of any information that Military Intelligence might have thought of value to the enemy; and, the correspondent agreed to accept the press officer's instructions as to further censorship rules from time to time.

MOCK, *supra* note 32, at 103. Unaccredited correspondents were sometimes allowed to observe and to report on the war. MOTT, *supra* note 25, at 620-21.

59. MOTT, *supra* note 25, at 621.

60. MOCK, *supra* note 32, at 103-05.

61. *See supra* note 58.

62. MOCK, *supra* note 32, at 103.

In 1918 the Censorship Division promulgated rules governing the content of correspondents' news coverage.⁶³ These rules were aimed at maximizing the amount of information reported to the public without aiding the enemy.⁶⁴ All newspaper articles had to meet the following four conditions: (1) the article must be accurate in statement and implication; (2) the article must not supply military information to the enemy; (3) the article must not injure the morale of our forces abroad, at home, or among our allies; and (4) the article must not embarrass the United States or the Allies in neutral countries.⁶⁵ Reporters who published articles without clearing them with a censor had their credentials revoked.⁶⁶ The vast majority of the reporters tolerated these rules⁶⁷ and only five journalists lost their accreditation.⁶⁸

C. *World War II Through the Invasion of Panama*

1. World War II

World War II was "the most openly reported conflict in which the United States has ever been involved, with some 2,000 correspondents in action on all fronts for American news organizations."⁶⁹ Photographers brought a new and significant dimension to war reporting, and telephoto by cable and wireless brought pictures to the news desks with a speed and accuracy previously unknown.⁷⁰ The press was allowed widespread access to combat zones and even accompanied the military on aerial bombing raids.⁷¹ Seventy-eight reporters accompanied the first landing forces in the invasion of Normandy.⁷² Additionally, a reporter for the *New York Times* flew with the Army Air Corps during the atomic bombing of Nagasaki.⁷³ To regulate the content of battlefield news, President Franklin Delano Roosevelt created the United States Office of Censorship and named Byron Price, a well-respected newspaper man, to be its director.⁷⁴ Under a separate directive from Roosevelt, Director Price in-

63. *Id.*

64. *Id.* at 103-04.

65. *Id.* Additionally, there were specific rules that dealt with the manner in which a war correspondent could identify persons and places without revealing sensitive information. *Id.* at 104.

66. STEIN, *supra* note 40, at 72.

67. HOMONOFF, *supra* note 21, at 377.

68. HOHENBERG, *supra* note 26, at 184.

69. *Id.* at 258.

70. See MOTT, *supra* note 25, at 743.

71. *Id.* at 754.

72. *Id.* at 755-56.

73. HOHENBERG, *supra* note 26, at 270.

74. MOTT, *supra* note 25, at 761.

stituted a system of voluntary self-censorship for the press and issued *A Code of Wartime Practices for the American Press*, which warned the press against improper publication of news related to shipping, planes, troops, fortifications, war production, armaments and weather.⁷⁵ There was no statutory sanction or any legal penalty which could be imposed upon violators of the Code—compliance was voluntary⁷⁶—but the press abided by the guidelines, thereby obviating the need for enforcement penalties.⁷⁷ While the Code's provisions applied to all the traditional categories of sensitive military information, some military commanders in the field, unaccustomed to public scrutiny, imposed their own local rules of censorship.⁷⁸

2. The Korean War

A massive number of war correspondents covered the Korean War from the front lines.⁷⁹ At the beginning of the conflict, press censorship was purely voluntary.⁸⁰ The self-censorship guidelines were vague, however, and not solely based on security and military exigencies.⁸¹ After newspapers printed stories about "panic, inferior U.S. equipment, and South Korean civil corruption," the military implemented a mandatory system of content censorship.⁸² War correspondents had to submit all news material, including film, to the military for approval.⁸³

3. The Vietnam War

In Vietnam, the accreditation program for war correspondents was simple and straightforward and ensured the media access to combat activities during the war.⁸⁴ After applying for an entry visa,⁸⁵ the corre-

75. *Id.*

76. *Id.* at 762.

77. *Id.* at 763.

78. THE GANNETT FOUNDATION, *supra* note 31, at 11. For example, General Douglas MacArthur required each war correspondent's copy to go through a multiple censorship review before being released. *Id.*

79. MOTT, *supra* note 25, at 848.

By the time the U.N. counteroffensive began in September, 238 accredited correspondents were in the fighting area . . . and seventy-two more had been issued papers and were presumably on the way. This was more than half as many as had covered the far-flung fighting fronts of World War II at any one time.

Id.

80. THE GANNETT FOUNDATION, *supra* note 31, at 12.

81. *Id.*

82. Gottschalk, *supra* note 42, at 45-46.

83. *Id.* at 46.

84. PHILLIP KNIGHTLEY, *THE FIRST CASUALTY* 403 (1975).

85. Entry visas were rarely denied. *Id.*

spondent presented the United States authorities with either a letter from a newspaper accepting responsibility for the correspondent, or a letter from two organizations stating that they were prepared to buy the reporter's dispatches.⁸⁶ The correspondent was then given an accreditation card which entitled him or her to "full co-operation and assistance . . . rations and quarters on a reimbursable basis . . . and air, water, and ground transportation."⁸⁷ The correspondent in turn agreed to a set of ground rules regulating content to preserve military security.⁸⁸ The voluntary system of self-censorship of news content was the only form of censorship used during the Vietnam War.⁸⁹ The press voluntarily observed the military security rules and in over four and one-half years, dealing with over 2000 news media representatives, only six reporters lost their DOD accreditation for security violations.⁹⁰

4. Grenada

Despite the apparent success of the Vietnam ground rules in preventing security leaks by the press, the military drastically changed its policy of unrestricted access and voluntary censorship during its military operations in Grenada.⁹¹ For the first time in American history the military went beyond restrictions on press content and instituted restrictions on press access.⁹² The commander of the Grenada invasion excluded the news media from the entire island for the first two days of the operation.⁹³ The military enforced this policy of complete press exclusion by refusing to transport the members of the press to Grenada, by turning away boats that the press had chartered, and by forcibly removing any reporters who had reached the island.⁹⁴ After three days, the military allowed limited press access to the island.⁹⁵

The complete denial of press access to the island of Grenada provided the Reagan Administration with a total monopoly of invasion-related information for the crucial initial days of the invasion.⁹⁶ After

86. *Id.*

87. *Id.*

88. *Id.*

89. THE GANNETT FOUNDATION, *supra* note 31, at 14.

90. *Id.* at 14-15; Gottschalk, *supra* note 42, at 49.

91. THE GANNETT FOUNDATION, *supra* note 31, at 15.

92. See *supra* notes 24-90 and accompanying text.

93. Jonathan Friendly, *Accord Asked on Reporting of U.S. Military Operations*, N.Y. TIMES, Jan. 11, 1984, at A10.

94. Fred Hiatt, *The Defense Department*, WASH. POST, Oct. 4, 1984, at A17.

95. Bernard Weintraub, *U.S. Press Curbs: The Unanswered Questions*, N.Y. TIMES, Oct. 29, 1983, § 1, at 1.

96. THE GANNETT FOUNDATION, *supra* note 31, at 15.

observing the situation first hand, many reporters found the Administration's explanation for the invasion unpersuasive.⁹⁷ By excluding the press from the island, the military prevented any refutation of the Administration's factual assertions about the situation in Grenada and quashed debate on the propriety of the United States' invasion.⁹⁸

The denial of media access during the invasion of Grenada came about as a result of the military's sense of dissatisfaction with the results of widespread press access and voluntary censorship in Vietnam.⁹⁹

There is little doubt in the minds of experienced observers that post-Vietnam military attitudes influenced the decision to shut the media out of the landing in Grenada and of the earliest mop-up operations. The majors and commanders of the Vietnam War who believed the media had worked against the American command there had become influential generals and admirals determined not to expose the Grenada operation to what they continue to view as a hostile adversary. That attitude was reflected by President Reagan during a December press conference when he said that in Vietnam the press was not on "our side, militarily."¹⁰⁰

The policy of voluntary censorship in Vietnam resulted in media reports of corruption in the South Vietnamese government and army and of the harm inflicted upon Vietnamese civilians and their homeland by United States military units.¹⁰¹ Because such subjects were political rather than strictly military in nature, they did not run afoul of the censorship provisions designed to protect military secrets and security.¹⁰² United States military officials came to believe that the press undermined public support for the Johnson and Nixon Administrations' Vietnam pol-

97. See, e.g., Anthony Lewis, *What Was He Hiding?*, N.Y. TIMES, Oct. 31, 1983, at A19. Two weeks after the invasion of Grenada, reporters declared that the Reagan Administration lacked solid evidence to support its stated rationale for the invasion. Stuart Taylor, Jr., *In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light*, N.Y. TIMES, Nov. 6, 1983, § 1, at 20. The Administration calculatedly disseminated inaccurate information, including an inaccurate account of the number of Cubans on the island and the danger faced by American medical students on the island. *Id.*

98. THE GANNETT FOUNDATION, *supra* note 31, at 15.

99. *Id.*; see also Walter Goodman, *Gulf Tensions: TV's Cause and Effect*, N.Y. TIMES, Jan. 10, 1991, at C24 (restricted media access resulted from media coverage of Vietnam War); Thomas B. Rosenstiel & David Lamb, *Military, Media Face Off in Gulf*, L.A. TIMES, Jan. 12, 1991, at A1 (fear of increased exposure to United States' military strategy led to restricted media access).

100. Drew Middleton, *Barring Reporters From the Battlefield*, N.Y. TIMES, Feb. 5, 1984, § 6 (Magazine), at 36-37.

101. THE GANNETT FOUNDATION, *supra* note 31, at 15.

102. See *supra* notes 88-90 and accompanying text.

icies.¹⁰³ Thus, the new approach was to totally ban press access to the Grenada war zone, obviating the need to control the content of news coverage.¹⁰⁴

The military has expressed satisfaction with the results of denying the press access to Grenada.¹⁰⁵ "In many . . . public statements and articles, influential military officers have implied a causal relationship between two facts: that reporters were barred from on-the-ground coverage of the Grenada war in October 1983, and that Grenada has been America's only unequivocal military victory since World War II."¹⁰⁶

5. Panama

When the United States invaded Panama in 1989, the press was again denied access during the initial and most active hours of combat.¹⁰⁷ For the most part, the fighting had ended before most reporters were able to investigate the battlefield situation.¹⁰⁸ Not a single combat photograph or combat eyewitness account was published.¹⁰⁹ Even when reporters were allowed access to the battlefield, they could only move around in groups of "press pools."¹¹⁰ Since the war was short-lived,¹¹¹ by the time the newspapers reported the unbiased truth about the inva-

103. THE GANNETT FOUNDATION, *supra* note 31, at 15. But see KNIGHTLEY, *supra* note 84, at 410-13 for a discussion of evidence that the news media's television coverage of Vietnam either had no effect on public opinion or that television coverage of Vietnam increased support of the war.

104. THE GANNETT FOUNDATION, *supra* note 31, at 15.

105. *Id.*

106. Browne, *supra* note 12, at 30.

107. Patrick J. Sloyan, *The War You Won't See*, WASH. POST, Jan. 13, 1991, at C2.

108. *Id.*

109. *Id.*

110. Browne, *supra* note 12, at 29. The military decided which reporters could travel to the front and be members of a press pool. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1564 (S.D.N.Y. 1991). No reporters could travel on their own as they had in past wars. *Id.* at 1565. Further, even press pool groups had to remain with military escorts at all times. *Id.*

111. Fighting in Panama began at 1:00 a.m. on Wednesday, December 20, 1989 and ended on Friday, December 22, 1989. Douglas Jehl & Bob Specter, *Invasion: A Web of Surprises*, L.A. TIMES, Dec. 27, 1989, at A1.

sion,¹¹² the public's interest in the invasion had diminished.¹¹³ The military was pleased with the political results of the press pools and the elimination of independent reporting in Panama through restricted press access.¹¹⁴ Less than eight months later, the military revived the pool system at the start of the Persian Gulf War and began one of the most novel and comprehensive systems of press censorship in American history.¹¹⁵

6. Persian Gulf War

When the United States sent troops to the Middle East in the summer of 1990,¹¹⁶ the DOD issued regulations¹¹⁷ to restrict press access, and thereby inherently restrict press coverage of events occurring in the

112. A significant amount of the initial information about the Panama invasion turned out to be false. Douglas Jehl & John M. Broder, *Accuracy a Casualty in Panama*, L.A. TIMES, Apr. 24, 1990, at A1. For example, initially military officials stated that the Stealth bombers performed their mission flawlessly, but later Pentagon officials admitted that the pilots had confused and missed their targets. *Id.* Pentagon officials had stated that more than 300 Panamanian soldiers were killed, but later it was revealed that only approximately 50 soldiers were killed. *Id.* The military has abandoned efforts to produce a final tally of civilians killed in the invasion. *Id.* at A16. Estimates range from the Southern Command's figure of 202 civilians killed to more than 3000 civilians killed, as reported by former Attorney General Ramsey Clark. *Id.* During the invasion, the military reported finding "cocaine" in Noriega's headquarters which later turned out to be tamale flour. *Id.* at A1.

113. Michael Linfield, *Hear No Evil, See No Evil, Speak No Evil: The Press and the Persian Gulf War*, 25 BEVERLY HILLS B. ASS'N J. 142, 144 (1991).

114. *Id.*

115. *Id.* at 144-45.

116. James Gerstenzang, *U.S. Sends Planes, G.I.'s to Gulf*, L.A. TIMES, Aug. 8, 1990, at A1.

117. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1563-64 (S.D.N.Y. 1991). The guidelines that were in effect during the Persian Gulf War follow:

GUIDELINES FOR NEWS MEDIA

News media personnel must carry and support any personal and professional gear they take with them, including protective cases for professional equipment, batteries, cables, converters, etc.

Night Operations—Light discipline restrictions will be followed. The only approved light source is a flashlight with a red lens. No visible light source, including flash or television lights, will be used when operating with forces at night unless specifically approved by the on-scene commander.

Because of host-nation requirements, you must stay with your public affairs escort while on Saudi bases. At other U.S. tactical or field locations and encampments, a public affairs escort may be required because of security, safety, and mission requirements as determined by the host commander.

Casualty information, because of concern of the notification of the next of kin, is extremely sensitive. By executive directive, next of kin of all military fatalities must be notified in person by a uniformed member of the appropriate service. There have been instances in which the next of kin have first learned of the death or wounding of a loved one through the news media. The problem is particularly difficult for visual media. Casualty photographs showing a recognizable face, name tag, or other identifying feature or item should not be used before the next of kin have been notified. The anguish that sudden recognition at home can cause far outweighs the news value

of the photograph, film or videotape. News coverage of casualties in medical centers will be in strict compliance with the instructions of doctors and medical officials.

To the extent that individuals in the news media seek access to the U.S. area of operation, the following rule applies: Prior to or upon commencement of hostilities, media pools will be established to provide initial combat coverage of U.S. forces. U.S. news media personnel present in Saudi Arabia will be given the opportunity to join CENTCOM media pools, providing they agree to pool their products. News media personnel who are not members of the official CENTCOM media pools will not be permitted into forward areas. Reporters are strongly discouraged from attempting to link up on their own with combat units. U.S. commanders will maintain extremely tight security throughout the operational area and will exclude from the area of operation all unauthorized individuals.

For news media personnel participating in designated CENTCOM Media Pools:

(1) Upon registering with the JIB [Joint Information Bureau], news media should contact their respective pool coordinator for an explanation of pool operations.

(2) In the event of hostilities, pool products will be the [sic] subject to review before release to determine if they contain sensitive information about military plans, capabilities, operations, or vulnerabilities (see attached ground rules) that would jeopardize the outcome of an operation or the safety of U.S. or coalition forces. Material will be examined solely for its conformance to the attached ground rules, not for its potential to express criticism or cause embarrassment. The public affairs escort officer on scene will review pool reports, discuss ground rule problems with the reporter, and in the limited circumstances when no agreement can be reached with a reporter about disputed materials, immediately send the disputed material to JIB Dhahran for review by JIB Director and the appropriate news media representative. If no agreement can be reached, the issue will be immediately forwarded to OASD(PA) for review with the appropriate bureau chief. The ultimate decision on publication will be made by the originating reporter's news organization.

(3) Correspondents may not carry a personal weapon.

Id. at 1577-78. The following ground rules were also in effect during the Persian Gulf War:

OPERATION DESERT SHIELD GROUND RULES

The following information should not be reported because its publication or broadcast could jeopardize operations and endanger lives:

(1) For U.S. or coalition units, specific numerical information on troop strength, aircraft, weapon systems, on-hand equipment, or supplies (e.g. artillery, tanks, radars, missiles, trucks, water), including amounts of ammunition or fuel moved by support units or on hand combat units. Unit size may be described in general terms such as "company-size," "multi-battalion," "multi-division," "naval task force," and "carrier battle group." Number or amount of equipment and supplies may be described in general terms such as "large," "small," or "many."

(2) Any information that reveals details of future plans, operations, or strikes, including postponed or canceled operations.

(3) Information, photography, and imagery that would reveal the specific location of military forces or show the level of security at military installations or encampments. Locations may be described as follows: all Navy embark stories can identify the ship upon which embarked as a dateline and will state that the report is coming from the "Persian Gulf," "Red Sea," or "North Arabian Sea." Stories written in Saudi Arabia may be datelined "Eastern Saudi Arabia," "Near Kuwaiti border," etc. For specific countries outside Saudi Arabia, stories will state that the report is coming from the Persian Gulf region unless that country has acknowledged its participation.

(4) Rules of engagement details.

(5) Information on intelligence collection activities, including targets, methods, and results.

(6) During an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational se-

Persian Gulf before and during Operation Desert Shield/Storm.¹¹⁸ The regulations required news media personnel to remain with an escort while on all Saudi bases and some United States bases.¹¹⁹ Moreover, no individual reporting or coverage of events was allowed.¹²⁰ News media personnel had to join pool groups to gain access to the combat coverage and any person who was not a member of a pool group was not allowed to be present in any area of military operation.¹²¹

The pools were allegedly a cooperative arrangement designed to balance the news media's desire for unilateral coverage with the "logistical realities" of the military operation.¹²² The DOD did not allow every news reporter who desired to be a pool member to join the pools but, rather, limited press pool access to a minute percentage of the newsmen present.¹²³ Not only did the DOD greatly limit the number of pool

curity and lives. This would include unit designations, names of operations, and size of friendly forces involved, until released by CENTCOM.

(7) Identification of mission aircraft points of origin, other than as land or carrier-based.

(8) Information on the effectiveness or ineffectiveness of enemy camouflage, cover, deception, targeting, direct and indirect fire, intelligence collection, or security measures.

(9) Specific identifying information on missing or downed aircraft or ships while search and rescue operations are planned or underway.

(10) Special operations forces' methods, unique equipment or tactics.

(11) Specific operating methods and tactics (e.g., air ops angles of attack or speeds, or naval tactics and evasive maneuvers). General terms such as "low" or "fast" may be used.

(12) Information on operational or support vulnerabilities that could be used against U.S. forces, such as details of major battle damage or major personnel losses of specific U.S. or coalition units, until that information no longer provides tactical advantage to the enemy and is, therefore, released by CENTCOM. Damage and casualties may be described as "light," "moderate," or "heavy."

Id. at 1581.

118. General Colin Powell explained the meaning of the terms "Operation Desert Shield" and "Operation Desert Storm":

[The military went to the Persian Gulf initially to] put a deterrent and defensive force on the ground, to stop any further aggression by the Iraqi army and Saddam Hussein . . . to let him know that the armed forces of the United States of America . . . are on the ground and in the desert serving as a shield. . . . The shield had served its purpose and a storm was now about to descend on Saddam Hussein.

National Newspaper Government Affairs Conference, Federal News Service, Mar. 15, 1991 (LEXIS, World Library, Gulf File).

119. *Nation Magazine*, 762 F. Supp. at 1577.

120. *Id.*

121. *Id.*

122. *Id.* at 1578.

123. *Id.* In fact, one of the plaintiffs in the *Nation Magazine* suit, Agence France-Press, was excluded from the media pool and sued the DOD, alleging the pool membership restrictions violated the First Amendment. *Id.* at 1562.

Most reporters were excluded from pool membership. THE GANNETT FOUNDATION, *supra* note 31, at 18.

By the eve of the allied offensive into Kuwait and Iraq in late February [1991], when

participants, it also allowed only those members of the news media who met the DOD criteria¹²⁴ to become pool members.¹²⁵ Using this criteria, the DOD further restricted the limited pool access to those members of the "media that principally serve the American public and that . . . [had] a long-term presence covering Department of Defense military operations."¹²⁶

Pool membership was essential to obtaining access to information involving United States and Allied Forces in the Persian Gulf.¹²⁷ Only pool participants could enter forward areas during combat activities.¹²⁸ The press was unable to freely observe all military activities.¹²⁹ The military determined where pool members could travel and journalists had to remain with their escorts at all times.¹³⁰ Membership in the standing pools rotated every two to three weeks so not all pool members participated in each expedition to the front lines.¹³¹ Additionally, the regulations required pool participants to share media products only with other pool members.¹³² Thus, a non-pool media representative had no access to military operations or information.¹³³

After pool participants gathered news, it was subject to a more traditional content review by a DOD public affairs officer before dissemination.¹³⁴ According to the regulations, the security review's purpose

those numbers [of journalists] peaked, more than 1,400 journalists, photographers and other news media personnel were in the region. Of that number, only 192 had been allowed to join military units through membership in one of the 24 press pools.

Id.

124. The DOD criteria were as follows:

CENTCOM POOL MEMBERSHIP AND OPERATING PROCEDURES

Pool Participation

Due to logistics and space limitations, participation in the pools will be limited to media that principally serve the American public and that have had a long-term presence covering Department of Defense military operations, except for pool positions specifically designated as "Saudi" or "international." Pool positions will be divided among the following categories of media: television, radio, wire service, news magazine, newspaper, pencil, photo, Saudi, and international. Media that do not principally serve the American public are qualified to participate in the CENTCOM media pool in the international category.

Nation Magazine, 762 F. Supp. at 1578.

125. *Id.* at 1564.

126. *Id.* at 1578. For press representatives who did not meet the membership criteria, the DOD created a pool designated as "international." *Id.* at 1579.

127. *Id.* at 1564.

128. *Id.*

129. *Id.* at 1565.

130. *Id.*

131. *Id.*

132. *Id.* at 1564.

133. *Id.*

134. *Id.* at 1565.

was to determine if the news reports contained any information that would jeopardize either a military operation or the general security of the United States or coalition troops.¹³⁵ If the media representative and the public affairs officer disagreed about the sensitive nature of particular news gathered, the disputed information was sent to the director of the Joint Information Bureau (JIB) in Dhahran.¹³⁶ If an agreement could not be reached, the issue was forwarded to the Office of the Assistant Secretary of Defense (Public Affairs) for review.¹³⁷ The guidelines provided that “[t]he ultimate decision on publication would be made by the originating reporter’s news organization.”¹³⁸ The security review system caused significant delays and, therefore, the news organization’s ultimate discretion to publish information was little more than a shallow concession by the military.¹³⁹

III. ANALYSIS

A. *The Constitutionality of Censorship and Restricting Press Access to the Battlefield*

During the Persian Gulf Crisis, the DOD promulgated regulations restricting both media news content and media access to the conflict.¹⁴⁰ The First Amendment to the United States Constitution protects the press against pre-publication censorship and access restrictions.¹⁴¹ The First Amendment provides in pertinent part, “Congress shall make no law . . . abridging the freedom of . . . the press.”¹⁴² The United States Supreme Court has considered the scope of the First Amendment’s protection of freedom of the press during wartime only once, in *New York Times Co. v. United States*,¹⁴³ more commonly known as the “Pentagon Papers” case.¹⁴⁴ The Court’s interpretation of the First Amendment in

135. *Id.* at 1577.

136. *Id.*

137. *Id.* at 1578.

138. *Id.*

139. See *Journalists Call For Meetings With Cheney*, IAC, July 1, 1991 (LEXIS, Nexis Library, OMNI File). “Stories and film of the one-sided victory from the field were delayed for days. A few reporters arriving from Iraq and Kuwait after the cease-fire beat their own reports back.” *Military Pool Broke Down*, Gannett News Serv., Mar. 4, 1991 (LEXIS, Nexis Library, OMNI File). The government stated that news organizations should expect delays of a year to eighteen months before they receive footage shot during the Persian Gulf War. *Journalists Call For Meetings With Cheney*, *supra*.

140. See *supra* note 117.

141. See *infra* notes 146-215 and accompanying text.

142. U.S. CONST. amend. I.

143. 403 U.S. 713 (1971) (*per curiam*).

144. GERALD GUNTHER, CONSTITUTIONAL LAW 1420 (11th ed. 1985).

New York Times, as well as in other cases, posits the proper framework for analyzing the DOD regulations.¹⁴⁵

1. Prior restraints

Prior restraints—restrictions on expression imposed before publication or broadcasting—are regarded as a more significant infringement on First Amendment rights than punishments imposed on a speaker subsequent to the making of the prohibited statements.¹⁴⁶ The Supreme Court first discussed the constitutionality of prior restraints on military-related information in *Near v. Minnesota ex rel. Olson*.¹⁴⁷ In *Near*, a Minnesota statute mandated that one who engaged “in the business of regularly or customarily producing [or] publishing . . . a malicious, scandalous and defamatory newspaper . . . is guilty of a nuisance, and . . . may be enjoined.”¹⁴⁸ An action was brought under the statute to enjoin the publication of an article in *The Saturday Press*.¹⁴⁹ A series of articles charged that a Jewish gangster controlled gambling, bootlegging and racketeering in Minneapolis, and that law enforcement officers and agencies were not energetically performing their duties to arrest his activities.¹⁵⁰ The trial court declared that *The Saturday Press* was a nuisance and enjoined the defendants from producing, editing or publishing any publication that was malicious, scandalous or defamatory and from further conducting a nuisance under the name and title of *The Saturday Press*.¹⁵¹ Defendant *Near* appealed to the state supreme court who affirmed the judgment of the lower court.¹⁵² *Near* then appealed the decision to the United States Supreme Court.¹⁵³ The Supreme Court reversed the decision and held

145. See *infra* notes 146-215 and accompanying text.

146. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-15 (1931). Traditionally, the general purpose of the First Amendment’s provision protecting the freedom of the press was to protect against previous restraints on publication. *Id.* at 713.

147. *Id.* at 716.

148. *Id.* at 702. Section one of the statute provided:

Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling, or giving away (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

Id. (citing 1925 MINN. SESS. LAW 285 (Mason)).

149. *Id.* at 703.

150. *Id.* at 704. The complaint alleged that on eight subsequent dates the defendant periodical published articles that were largely malicious, scandalous and defamatory. *Id.* at 703.

151. *Id.* at 706.

152. *Id.* at 706-07.

153. *Id.* at 707.

that the statute, as applied, was an unconstitutional prior restraint because it infringed upon freedom of the press.¹⁵⁴ In dicta, the Court created an exception to the general rule that prior restraints are unconstitutional:¹⁵⁵

[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: When a nation is at war . . . [n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.¹⁵⁶

In *New York Times Co. v. United States*¹⁵⁷ the Supreme Court considered the constitutionality of a prior restraint on the publication of military information.¹⁵⁸ The federal government sought to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."¹⁵⁹ In a short per curiam opinion, the Court cited the general rule that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"¹⁶⁰ and, therefore, the government "carries a heavy burden of showing justification for the imposition of such a restraint."¹⁶¹ Without further explanation, the Court concluded that the government did not meet its burden of proof and the prior restraint was unconstitutional.¹⁶²

In a concurring opinion, Justice Black, with whom Justice Douglas joined,¹⁶³ addressed the importance of allowing the press to publish military information during wartime.¹⁶⁴ Justice Black wrote:

The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.

154. *Id.* at 722-23.

155. *Id.* at 716 (dicta).

156. *Id.* (dicta) (citations omitted).

157. 403 U.S. 713 (1971) (per curiam).

158. *Id.* at 714.

159. *Id.*

160. *Id.* (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

161. *Id.* (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

162. *Id.*

163. Justice Douglas also wrote a separate concurring opinion in which Justice Black joined. *Id.* at 720-24 (Douglas, J., concurring). In Justice Douglas' view, the government could never restrain the press from publishing an article. *Id.* at 720 (Douglas, J., concurring).

164. *Id.* at 717 (Black, J., concurring).

And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.¹⁶⁵

Justice Black rejected the government's argument that the newspapers should be enjoined in the name of national security.¹⁶⁶ Instead, Justice Black found the word "security" to be a broad, vague generality that should not be invoked to abrogate the First Amendment's protection of a free press.¹⁶⁷

Justice Brennan, in his concurring opinion, recognized that the First Amendment bans prior restraints and this ban can only be overridden when the nation is at war.¹⁶⁸ In Justice Brennan's view, the government did not meet its burden of proof because it did not even allege that publication of items from a classified study would "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea [and, therefore, the evidence does not] . . . support even the issuance of an interim restraining order."¹⁶⁹ Without proof that publication of the contents of the study would cause great harm, Justice Brennan concluded that any restraints on the publication of the article would have violated the First Amendment.¹⁷⁰

Although the Justices wrote a very brief per curiam opinion in *New York Times*, the six concurring opinions provide some guidance on the question of whether a prior restraint on the publication of news in a wartime situation would be unconstitutional.¹⁷¹ Based on those opinions, the government must present a heavy justification for imposing prepublication censorship on the media.¹⁷²

165. *Id.* (Black, J., concurring).

166. *Id.* at 718 (Black, J., concurring).

167. *Id.* at 719 (Black, J., concurring).

168. *Id.* at 726 (Brennan, J., concurring).

169. *Id.* at 726-27 (Brennan, J., concurring).

170. *Id.* at 727 (Brennan, J., concurring).

171. *But see* Homonoff, *supra* note 21, at 389 (arguing that implications of *New York Times* are difficult to determine).

172. *New York Times*, 403 U.S. at 714. In a later case, a district court upheld a prior restraint on publication in peacetime because of national security concerns. In *United States v. Progressive, Inc.* the federal government sought an injunction against *The Progressive* magazine from publishing any restricted data in an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." 467 F. Supp. 990, 991 (W.D. Wis. 1979) (preliminary injunction issued Mar. 28, 1979), *mandamus denied*, 443 U.S. 709, *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (moot). The district court relied on *New York Times* and *Near* when it articulated the test for determining the constitutionality of a prior restraint. *Id.* at 1000. The court held that a prior restraint was constitutional if the government could prove that there was a "likelihood of direct, immediate and irreparable injury to our nation and its people." *Id.* The court

2. Right of access

Although the issue of the media's right of access to military operations has been raised, a court has never decided whether the press has a First Amendment right of access to military operations.¹⁷³ In *Flynt v. Weinberger*,¹⁷⁴ the first case to challenge the government's denial of media access to military operations, the court refused to reach the merits of the case.¹⁷⁵ The plaintiffs challenged the government's decision to prohibit press coverage of the initial stages of the United States military intervention in Grenada via a blanket denial of press access.¹⁷⁶ By the time the district court decided the case, the United States' military intervention in Grenada was over and only a small detachment of 300 military personnel remained on the island.¹⁷⁷ The court refused to reach the merits of the case,¹⁷⁸ holding that the plaintiffs' claim was moot.¹⁷⁹ On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the district court's decision that the controversy was moot, but vacated the remainder of the district court's opinion.¹⁸⁰

held that the government proved that publishing the article would irreparably harm the national security of the United States by providing information that could assist other nations in developing thermonuclear weapons. *Id.* at 999. Thus, the court held that the facts of the case fell into the national security exception in which a prior restraint on publication is appropriate. *Id.* at 1000.

173. When the military denied the media access to the United States invasion of Grenada, a publisher filed suit. *Flynt v. Weinberger*, 588 F. Supp. 57 (1984), *aff'd in part, vacated in part*, 762 F.2d 134 (D.C. Cir. 1985). The court refused to decide the merits of the First Amendment right of access claim. *Id.* at 60. When the military restricted press access to the Persian Gulf War, another suit was filed and, again, a court declined to decide the case on the merits. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991).

174. 588 F. Supp. 57 (1984), *aff'd in part, vacated in part*, 762 F.2d 134 (D.C. Cir. 1985).

175. *Id.* at 60.

176. *Id.* at 58. Plaintiffs, who were American publishers, sought an injunction prohibiting United States military authorities from preventing or otherwise hindering plaintiffs from sending reporters to Grenada to gather news. *Id.* Plaintiffs also asked the court to declare that the defendants' conduct of preventing plaintiffs' efforts to send reporters to Grenada for the purpose of gathering news violated the Constitution, laws and treaties of the United States. *Id.*

177. *Id.*

178. In the district court's decision, the court stated that if it were to decide the merits of the case, it would not issue an injunction restraining the government from restricting press access to future United States military operations. *Id.* at 60 (*dicta*). The court explained that national security concerns would justify excluding the press from military operations. *Id.* (*dicta*). The court, however, did not expound any First Amendment theory or test for denying the press access. *See id.*

179. *Id.* at 59, 61. Ironically, the court decided that the situation did not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. *Id.* at 59. Yet, five years later, the situation was repeated as the press was completely barred from reporting the initial hours of the United States' invasion of Panama. *See supra* notes 107-10 and accompanying text.

180. *Flynt v. Weinberger*, 762 F.2d 134, 136 (D.C. Cir. 1985).

In *Nation Magazine v. United States Department of Defense*,¹⁸¹ the plaintiffs¹⁸² challenged the regulations promulgated by the DOD¹⁸³ to govern military activities of American armed forces in the war against Iraq.¹⁸⁴ The plaintiffs maintained that the regulations violated the First and Fifth Amendments.¹⁸⁵ The plaintiffs specifically claimed that the press has a First Amendment right to unlimited access to a foreign arena when American military forces are engaged in military operations.¹⁸⁶ The plaintiffs urged that the DOD pooling regulations, which limited access to the battlefield to a specified number of press representatives and subjected them to certain restrictions, infringed on news gathering privileges accorded by the First Amendment.¹⁸⁷ The federal district court rejected the defendants' arguments that: (1) the plaintiffs had no standing to bring the suit;¹⁸⁸ (2) the court should decline to hear the merits of the case because it is a non-justiciable political question;¹⁸⁹ and (3) be-

181. 762 F. Supp. 1558 (S.D.N.Y. 1991).

182. The plaintiffs were: *The Nation* magazine (The Nation Company, Inc.), *Harper's* magazine, *In These Times* (The Institute of Public Affairs, Inc.), Pacific News Service (Bay Area Institute, Inc.), *The Guardian* (Institute for Independent Social Journalism, Inc.), *The Progressive* magazine (The Progressive, Inc.), *Mother Jones* magazine (Foundation for National Progress, Inc.), *The L.A. Weekly* (Los Angeles Weekly, Inc.), *The Village Voice* (VV Publishing Corp.), *The Texas Observer* (The Texas Observer Publishing Company), Pacifica Radio News (The Pacifica Foundation, Inc.), Sydney H. Schanberg, E.L. Doctorow, William Styron, Michael Klare, and Scott Armstrong. *Id.*

183. See *supra* note 117 and accompanying text.

184. *Nation Magazine*, 762 F. Supp. at 1560.

185. *Id.* at 1560-61.

186. *Id.* at 1561.

187. *Id.*

188. *Id.* The court stated:

For a plaintiff to have standing to raise constitutional claims, he must show he has suffered an actual or threatened injury which is fairly traceable to the defendant's conduct and which is likely to be redressed by a favorable decision. . . . [C]ourts should also consider whether there are any prudential concerns that militate against granting standing to the plaintiff.

Id. at 1565-66. The court concluded that the harms alleged by the plaintiffs were "distinct and palpable" because in both their access denial and discrimination claims the plaintiffs alleged injury to their First and Fifth Amendment interests. *Id.* Further, one plaintiff was denied access to the pools and clearly suffered immediate injury resulting from the regulations, which definitively resolved the standing issue. *Id.* For a discussion of the standing doctrine, see GUNTHER, *supra* note 144, at 1559-80.

189. *Nation Magazine*, 762 F. Supp. at 1561. The court described the political question doctrine as encompassing three inquiries: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" *Id.* at 1566. The court acknowledged a long line of cases addressing the role of the judiciary in reviewing military decisions made by the Executive Branch pursuant to its Article II powers under the Constitution. *Id.* The court stated that these cases caution courts not to interfere with the unique structure of the military. *Id.* at 1566-67. The court distinguished the case before them from

cause the regulations restricting media access were lifted, the controversy was moot.¹⁹⁰ The court refused to reach the merits of the case,¹⁹¹ however, by concluding that although it had the power to hear the case, it was inappropriate for the court to utilize its power because the plaintiffs' issues were not presented in a "clean-cut and concrete form."¹⁹² The

the previous cases because the plaintiffs were not challenging the military's goals, directive or tactics. *Id.* at 1567. The court held that the President's Article II powers as Commander-in-Chief were not implicated because resolution of the case did not impact on the internal functioning and operation of the military and, therefore, the question of what restrictions may be placed on the press's access to combat zones is not committed by the text of the Constitution to a coordinate branch of government. *Id.* The court concluded that the question of access would not require it to move beyond traditional areas of judicial expertise because clearly the federal judiciary is competent to decide questions of First Amendment freedoms and Fifth Amendment equal protection claims. *Id.* Thus, the court decided that the mere fact that the DOD promulgated the regulations to restrict press access during military operations does not render the controversy a non-justiciable political question. *Id.* at 1568. For a discussion of the political question doctrine, see GUNTHER, *supra* note 144, at 1608-21.

190. *Nation Magazine*, 762 F. Supp. at 1561. The court explained that "a case becomes moot when the issues 'presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 1568 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). The rationale of the rule is that a controversy must exist so that the court does not render advisory opinions on abstract propositions of law. *Id.* One exception to the mootness doctrine is if the issue is "capable of repetition, yet evading review." *Id.* The exception applies when two elements are satisfied. "First, the challenged action must have been too short in duration to be fully litigated prior to its cessation or expiration. Second, there must be a 'reasonable expectation' that the party bringing the action would be 'subjected to the same action again.'" *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). The court noted the speed with which recent wars had terminated and decided that the issue of press access met the first element of the "capable of repetition, yet evading review test." *Id.* at 1569. The court also noted that in the last three military efforts of the United States abroad, various types of pooling arrangements were utilized and the DOD admitted that the regulations could be reactivated. *Id.* The court found it reasonable to assume that if the regulations were reinstated, the same plaintiffs would sue and the second element of the test would be satisfied. *Id.* The court concluded that it had the power to hear the case on the merits if any of the plaintiffs' claims were eligible for the relief sought. *Id.* For a discussion of the mootness doctrine, see GUNTHER, *supra* note 144, at 1578-80.

191. *Nation Magazine*, 762 F. Supp. at 1571-75.

192. *Id.* at 1570-75. The court explained:

Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation.

Id. at 1572. The court also refused to decide the merits of the plaintiffs' second claim that the government acted in a discriminatory manner when it gave some members of the press preferential treatment in the form of financial assistance and more extensive access to events, thereby violating the First and Fifth Amendments. *Id.* at 1573-75. The court noted that the plaintiffs refused to propose alternative regulations. *Id.* at 1575. Instead, the plaintiffs continued to ask for unlimited unilateral access. *Id.* The court explained that it "should not now be evaluating a set of regulations that are currently being reviewed for probable revision, to determine their reasonableness in the context of a conflict that does not exist and the precise contours of which are unknown and unknowable." *Id.*

court explained: "Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards."¹⁹³

In dicta, the court offered some guidance as to how a court would resolve a First Amendment challenge by the press against regulations limiting their right of access to military operations in the future.¹⁹⁴ It noted that no cases have directly addressed the role and limits of news gathering under the First Amendment in a military context abroad, so it analogized the facts to case law on questions involving the access rights of the press and the public in other circumstances.¹⁹⁵ The court initially noted that the press does not have a right of access to fora which have traditionally been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials.¹⁹⁶ Limitations may also be placed on access to government controlled institutions, such as prisons¹⁹⁷ and military

193. *Id.* at 1572.

194. *Id.* at 1571-72 (dicta).

195. *Id.* at 1571 (dicta). The plaintiffs urged the court that the action did not seek to establish a new right of access because they were not requesting any affirmative assistance from the government, only the freedom to report the events without interference. *Id.* The court rejected the plaintiffs' argument and found the question of press access to military operations "to be one of first impression, the answer to which would require charting new constitutional territory." *Id.*

196. *Id.* (dicta) (citing *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (holding no absolute unqualified presidential privilege of immunity from judicial process in all circumstances)).

197. The Supreme Court has held that the press does not have a First Amendment right of access to prisons. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 833 (1974). In *Pell* the Supreme Court rejected a claim by journalists that prison regulations prohibiting anyone to interview specific individual inmates infringed upon the freedom of the press and violated the First and Fourteenth Amendments. *Pell*, 417 U.S. at 819-21. The Court noted that the regulations did not completely deny the press access to prisons. *Id.* at 830. The Court also explained that allowing the press to interview specific inmates had resulted in outbreaks of violence and had created security problems in the past. *Id.* at 832. Against this factual background, the Court explained that the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally. *Id.* at 833. The Court held that since the regulation did not deny the press access to sources of information available to members of the general public, it did not abridge the protection of the First and Fourteenth Amendments. *Id.* at 835; see also *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding press does not have special right of access to government information or sources of information within government's control, such as prison); *Saxbe*, 417 U.S. 843 (holding prison regulations that prohibit personal interviews between newsmen and individually designated federal prison inmates does not violate First Amendment).

Unlike *Pell*, the DOD regulations completely deny non-pool group members access to information. *Nation Magazine*, 762 F. Supp. at 1578-79. Pool group members of the press are denied access to all information except information that they could gather while escorted by the military in the pools. *Id.* at 1577-78. In addition, when the press has had unrestricted

bases.¹⁹⁸ The Supreme Court, however, has held that the public and the press have an almost absolute right of access to open places, such as streets or parks.¹⁹⁹

The court reviewed cases in which the Supreme Court focused on the importance of an informed American citizenry and granted the press a right of access to certain situations.²⁰⁰ The court acknowledged that with respect to the public and the press's right of access to criminal trials, the Supreme Court has generously interpreted the public's right to know about government functioning under the First Amendment.²⁰¹ The court described that a fundamental theme in *Richmond Newspapers v. Virginia*²⁰² and *Globe Newspaper v. Superior Court*²⁰³ was to ensure press access, so that the press could inform the public, thus enabling an informed discussion of government affairs.²⁰⁴ Further, the court emphasized that the Supreme Court has recognized the importance of the press performing a checking function against the abuse of government power even when national security concerns were implicated.²⁰⁵ The court concluded that the affirmative right to gather news, ideas and information is

access to military conflicts in the past, the press has acted with caution and restraint so as not to endanger military security. THE GANNETT FOUNDATION, *supra* note 31, at 14-15; Gottschalk, *supra* note 42, at 49.

198. *Nation Magazine*, 762 F. Supp. at 1571 (dicta). For example, in *Greer v. Spock* the Supreme Court held that regulations that prohibited political campaigning and the distribution of literature without prior approval on a military base did not violate the First Amendment. 424 U.S. 828, 838 (1976).

199. *Nation Magazine*, 762 F. Supp. at 1572. The court cited *Hague v. C.I.O.*, 307 U.S. 496 (1939). In *Hague* the Supreme Court held that an ordinance forbidding the distribution of printed matter and the holding of public meetings without permits in streets and other public places violated the First Amendment. *Id.* at 515.

200. *Nation Magazine*, 762 F. Supp. at 1572 (dicta); see *supra* notes 166-70 and accompanying text.

201. *Nation Magazine*, 762 F. Supp. at 1572 (dicta) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980)).

202. 448 U.S. 555 (1980). In *Richmond Newspapers* the Supreme Court held that, absent an overriding interest, the right of the public and the press to attend criminal trials is guaranteed under the First Amendment. *Id.* at 580. The Court explained its rationale:

These expressly guaranteed freedoms [in the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history and the opinions of this Court.

Id. at 575.

203. 457 U.S. 596 (1982). See *supra* notes 174-79 and accompanying text for a discussion of *Globe Newspaper*.

204. *Nation Magazine*, 762 F. Supp. at 1572 (dicta).

205. *Id.* (dicta) (citing *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

strengthened by the case law and, after viewing the cases collectively, found the media has at least some constitutional right of access to military operations.²⁰⁶

The court in *Nation Magazine* stated that the reasoning of the recent Supreme Court decisions discussing the press's right of access to events that affect the functioning of government should be followed when deciding whether the press has a right of access to military operations.²⁰⁷ For example, the Supreme Court case of *Globe Newspaper v. Superior Court*²⁰⁸ discussed the press's right of access to criminal trials, which plays a particularly significant role in the functioning of the government.²⁰⁹ In *Globe Newspaper* the plaintiff argued that a statute excluding the press and the public from a criminal trial for a specified sex offense involving a victim under eighteen years of age violated the First Amendment.²¹⁰ The Supreme Court held that the First Amendment protects the press's right of access to a particular fora if the place historically had been open to the press and the general public²¹¹ and if the right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole.²¹² The Court recognized that the press does not have an absolute right of access and if the government is attempting "to deny access to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest."²¹³ Applying this three-prong test to the facts of the case before it, the Court concluded that the statute in question violated the First Amendment.²¹⁴

206. *Id.* (dicta).

207. *Id.* (dicta). The court, by refusing to decide the merits of the case, did not apply the reasoning of the recent Supreme Court cases to the access restrictions imposed on the media during the Persian Gulf War. *Id.*

208. 457 U.S. 596 (1982).

209. *Id.* at 606.

210. *Id.* at 602.

211. *Id.* at 605.

212. *Id.* at 606.

213. *Id.* at 606-07.

214. *Id.* at 605-10. The Court explained:

First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." . . . Second, 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. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government. . . . The state's interests . . . [in] the protection of minor victims of sex crimes from further trauma and embarrassment . . . and the encouragement of such victims to come

Following the Court's directive in *Nation Magazine*, then, a court should use the *Globe Newspaper* test when considering whether the press has a right of access to military operations.²¹⁵

B. Restrictions on the Press During the Persian Gulf War

1. The DOD security reviews were a constitutional prior restraint

It is clear that any system of prior restraints on expression bears a heavy presumption against constitutional validity.²¹⁶ Courts have recognized, however, that during a time of war, the First Amendment's ban on prior restraints may be overridden.²¹⁷ The government carries the heavy burden of showing a justification for the imposition of a prior restraint.²¹⁸

During the Persian Gulf War, all news material was reviewed by military censors before it was published or broadcast.²¹⁹ The government justified the security review of news content with the need to ensure that neither the outcome of military operations nor the safety of United States or coalition forces would be jeopardized.²²⁰ The press expressed dissatisfaction with the security review system and argued that articles were censored for reasons other than national security.²²¹ The security review system itself would most likely pass constitutional muster.²²² If some articles were censored for reasons that were unrelated to national security, however, the security review system would be unconstitutional

forward and testify in a truthful and credible manner . . . [are] compelling. . . . But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.

Id. (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980)).

215. Commentators suggest that this three-prong test is consistent with the Court's recent right of access decisions and should be used when determining whether the press has a right of access to military operations. See generally Cassell, *supra* note 20, at 958-59 (*Globe Newspaper* three-prong test should be used to determine whether press has right of access to military operations); Jeanne L. Nowaczewski, Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286, 290 (1984) (*Globe Newspaper* analysis should be model for determining whether governmental proceeding must be open to press).

216. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

217. *Id.* at 727 (Brennan, J., concurring).

218. *Id.* (Brennan, J., concurring).

219. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1577 (S.D.N.Y. 1991). See *supra* note 117 for a discussion of the security review imposed on the news gathered during the war.

220. *Nation Magazine*, 762 F. Supp. at 1577.

221. THE GANNETT FOUNDATION, *supra* note 31, at 19. For example, descriptions of soldiers' moods before and during battle were sometimes censored for reasons that appeared unrelated to national security. *Id.*

222. See *infra* notes 224-26 and accompanying text.

as applied.²²³ Clearly, ensuring the secrecy, and therefore the safety and success, of military operations during a war is a reasonable endeavor.²²⁴ The Supreme Court has recognized that “[w]hen 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.”²²⁵ Publication of sensitive military information could endanger the outcome of military operations as well as threaten the safety of troops.²²⁶ Thus, the government could very foreseeably demonstrate that the special need for secrecy during wartime justified the security review of news materials during the Persian Gulf War.

2. The pool groups violated the press’s right of access

The Supreme Court in *Globe Newspaper v. Superior Court*²²⁷ crafted a three-prong test for determining whether a press right of access exists, as described above.²²⁸ Commentators suggest that this test should be used when analyzing whether the press has a right of access to military operations.²²⁹

The first level of analysis focuses on whether the place that the press desires access to is properly afforded First Amendment protection.²³⁰ A court will examine whether the place has historically been open to the press and the general public.²³¹ The press has historically had widespread access to military operations and combat areas during wartime.²³² From the War of Independence to the Vietnam War, the press has had

223. It is unlikely that the military could overcome the heavy presumption of unconstitutionality regarding its censorship of articles discussing soldiers’ moods. In *Near v. Minnesota ex rel. Olson*, the Supreme Court struck down a statutory prior restraint on the publication of a particular article because the statute was unconstitutional as applied. 283 U.S. 697, 722-23 (1931). The Court endorsed broad immunity for the press from prior restraints and censorship. *Id.* at 716-17. Thus, the military’s prior restraint of news reports and broadcasts for reasons unrelated to national security, such as soldiers’ moods, appears to be an unconstitutional application of the DOD regulations.

224. *See Near*, 283 U.S. at 716 (acknowledging that government censorship during wartime acceptable to protect troop safety); *Schenk v. United States*, 249 U.S. 47, 52 (1919) (recognizing censorship during wartime permissible to ensure national security).

225. *Schenk*, 249 U.S. at 52.

226. *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)).

227. 457 U.S. 596 (1982).

228. *Id.* at 605-07; *see supra* notes 211-13 and accompanying text.

229. Cassell, *supra* note 20, at 958-59; Nowaczewski, *supra* note 215, at 290.

230. *Globe Newspaper*, 457 U.S. at 604-05.

231. *Id.* at 605. The Court in *Globe Newspaper* concluded that criminal trials in the United States had long been presumptively open. *Id.*

232. *See supra* notes 24-90 and accompanying text.

virtually unrestricted access to the front lines²³³ and has even accompanied the military on aerial bombing raids.²³⁴ "This uniform rule of openness has been viewed as significant in constitutional terms not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'"²³⁵

The right of access must also play a significant role in the functioning of the government as a whole.²³⁶ Courts have recognized that the press plays an important role in informing the American people so that they can intelligently debate important issues. "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public issues there should be 'uninhibited, robust, and wide-open' debate."²³⁷ Courts have emphasized that it is especially important that citizens are informed in the area of national defense and international affairs.²³⁸

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.²³⁹

While the First Amendment should protect the press's right of access to military operations, the right is not absolute.²⁴⁰ For press access to be denied, the government must demonstrate that the denial of access is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.²⁴¹ Courts have recognized that national

233. See *supra* notes 24-90 and accompanying text.

234. HOHENBERG, *supra* note 26, at 270; MOTT, *supra* note 25, at 743.

235. *Globe Newspaper*, 457 U.S. at 605 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring)).

236. *Id.* at 606. The Court in *Globe Newspaper* found that public scrutiny of a criminal trial serves as a check on the judicial process and also fosters an appearance of fairness. *Id.*

237. *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

238. *Id.* at 728 (Stewart, J., concurring).

239. *Id.* (Stewart, J., concurring).

240. *Globe Newspaper*, 457 U.S. at 606-07.

241. *Id.* at 607. The Court held that although safeguarding the physical and psychological

security is a compelling interest.²⁴² The Supreme Court has expounded that “[i]t is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the nation.”²⁴³ The government restricted press access to ensure that news reports did not jeopardize military operations or the safety and security of U.S. and coalition troops.²⁴⁴ Further, the news media has acknowledged the importance of United States military mission security and troop safety.²⁴⁵ The government could, therefore, demonstrate that it denied the press unrestricted access to the battlefield in an attempt to further a compelling governmental interest.

While irresponsible press reports clearly threaten the success of military operations, the restrictions on the media during the Persian Gulf War were not narrowly tailored to address concerns of military secrecy and national security. The government’s interest in protecting national security and troop safety could be served just as well by allowing the press to have unrestricted access to military operations and restricting the content of the news reports.²⁴⁶ Historically, the government has allowed widespread access to the battlefield and then regulated the content of the news reports to ensure that the reports did not endanger national security.²⁴⁷

Mission security and troop safety interests have been pro-

well-being of a minor is a compelling interest, the mandatory closure of criminal trials was not narrowly tailored to serve that interest. *Id.* at 607-10.

242. *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 309 (1981) (recognizing government may suspend passport if substantial likelihood of damage to national security); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (acknowledging government has compelling interest in protecting secrecy of information important to protect national security); *United States v. Nixon*, 418 U.S. 683, 706 (1974) (finding President must turn in communications unless needed to protect national security); *New York Times v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) (finding publication of articles on Vietnam War would not jeopardize national security); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (holding prior restraint on publication of articles did not fall within national security exception); *Nation Magazine v. United States Dep’t of Defense*, 762 F. Supp. 1558, 1571 (S.D.N.Y. 1991) (finding need to limit availability of information for reasons of national security legitimate); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 992-93 (W.D. Wis. 1979) (preliminary injunction issued Mar. 28, 1979) (holding prior restraint on publication of article about hydrogen bomb justified because of national security concerns), *mandamus denied*, 443 U.S. 709, *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (moot).

243. *Haig*, 453 U.S. at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

244. *See supra* note 117. The government expressed concern that photographs and television broadcasts of combat scenes would communicate secrets to the enemy. *Rosenstiel & Lamb, supra* note 99, at A1.

245. *Text of Journalists’ Joint Statement*, N.Y. TIMES, Jan. 11, 1984, at A10.

246. *Id.*

247. *See supra* notes 24-90 and accompanying text.

tected—when essential—by limiting the number of journalists accompanying the troops, by voluntary reporting restraints, by limited censorship of information that might aid the enemy or by delay in the filing of dispatches; but not by exclusion of all journalists. Exclusion of journalists never has been deemed appropriate²⁴⁸

During prior American military conflicts, press reports and broadcasts have not endangered military operations or troop safety.²⁴⁹ Moreover, the military has declined to offer specific examples of the press harming national security during previous military conflicts.²⁵⁰ The military's criticism of the press's reporting of the Vietnam War was not based upon incidents of security violations.²⁵¹ In fact, Pentagon spokesman Pete Williams acknowledged that with voluntary self-censorship during the Vietnam War only five or six reporters violated the military guidelines.²⁵² The military was dissatisfied with the political results of the media's reporting of the war—public support for the war decreased²⁵³ and Congress refused to continue funding of the war.²⁵⁴ Since the press has followed the military's reporting guidelines in past wars without endangering national security, the DOD regulations promulgated during the Persian Gulf War were unnecessary.

The access restrictions placed on the media during the Persian Gulf War, following the Supreme Court's analysis in *Globe Newspaper*, fail to pass constitutional scrutiny. Press access to military conflicts is properly afforded First Amendment protection.²⁵⁵ Historically, the press has had widespread access to military conflicts.²⁵⁶ The press plays a vital role in informing the people so they can intelligently debate important issues.²⁵⁷ The DOD regulations violate the First Amendment because even though the government's interest in national security is compelling, the regulations were not narrowly tailored.²⁵⁸

248. *Text of Journalists' Joint Statement*, *supra* note 245, at A10.

249. Middleton, *supra* note 100, at 37.

250. See Rosenstiel & Lamb, *supra* note 99, at A16.

251. See *id.*

252. *Id.*

253. GUENTER LEWY, *AMERICA IN VIETNAM* 435-36 (1978).

254. Second Supplemental Appropriation Act, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973).

255. See *supra* notes 227-52 and accompanying text.

256. See *supra* notes 24-90 and accompanying text.

257. See *supra* notes 236-39 and accompanying text; *infra* notes 272-75 and accompanying text.

258. See *supra* notes 246-54 and accompanying text.

IV. RECOMMENDATION

The government's interest in protecting effective military operations and ensuring the safety of United States troops can be reconciled with the press's interest in providing an independent source of military information to the public.²⁵⁹ First, the DOD should develop a liberal system of accreditation for news reporters who desire access to combat.²⁶⁰ During past wars, liberal accreditation programs for journalists did not create any security problems for the military.²⁶¹ All journalists who desire to be accredited should show some form of documentation verifying that they are journalists.²⁶² In turn, journalists must agree to abide by the military's rules and be prepared to have their accreditation revoked if they violate the rules. A permissive accreditation system would ensure that all viewpoints on the war could be expressed, thereby encouraging public debate on the issues. This system would also be consistent with the history of independent war correspondents reporting on United States military conflicts.²⁶³

The military should institute a system of voluntary censorship and promulgate guidelines for the media to follow. For example, such guidelines should counsel the media not to publish or broadcast specific numerical information about troop strength or location of troops, details of future military plans, information about intelligence collection activities or details of the results of intelligence collection.²⁶⁴ If any reporter published or broadcast prohibited information, the military could revoke their accreditation. In the past, voluntary censorship based on reasonable content restrictions effectively safeguarded military security.²⁶⁵ For example, during World War II, the government instituted a system of voluntary self-censorship for the press and, even though there was no penalty for violators, the press abided by the guidelines.²⁶⁶ Similarly, voluntary self-censorship of news content was the only form of censorship during the Vietnam War.²⁶⁷ Again, the press voluntarily observed

259. See *infra* notes 260-73 and accompanying text.

260. For example, during the Vietnam War, the military instituted a liberal accreditation system for journalists. KNIGHTLEY, *supra* note 84, at 403.

261. See *id.*

262. See *supra* notes 84-88 and accompanying text for a description of the accreditation system for the media during the Vietnam War.

263. See *supra* notes 24-90 and accompanying text.

264. For example, the ground rules promulgated during the Persian Gulf War could be used as a guide. See *supra* note 117.

265. HOHENBERG, *supra* note 26, at 184; THE GANNETT FOUNDATION, *supra* note 31, at 14-15.

266. MOTT, *supra* note 25, at 762-63.

267. THE GANNETT FOUNDATION, *supra* note 31, at 14.

the military's publication and broadcast guidelines.²⁶⁸

Finally, the military should allow accredited reporters unrestricted access to military operations during a war.²⁶⁹ Any national security concerns could be addressed through prohibitions in the publishing and broadcast guidelines.²⁷⁰ Even if the government prohibits the publication or broadcasting of information, if the reporters have access to the battlefield, they can see, and later report, the details about the various military operations.²⁷¹ The press provides an important check on the government and the military.²⁷² "[W]orse calamities would result if those in power at the moment could manage affairs without having their conduct and policies subjected to a thorough-going review. Such a review may point out our errors or operate as a deterrent or eventually cause a change of rulers."²⁷³

Moreover, unrestricted media access to military operations is essential for the media to be able to independently inform the public about a war.²⁷⁴ It is vital that a voter has the opportunity to read and hear information and arguments about a war.²⁷⁵ Indeed, the First Amendment's "purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."²⁷⁶ Once informed, members of the public can debate the merits of a war and foreign policy and vote accordingly.²⁷⁷ The Vietnam War provides a good example of

268. *Id.* at 14-15; Gottschalk, *supra* note 42, at 49.

269. *See Text of Journalists' Joint Statement, supra* note 245, at A10.

270. *See supra* note 248 and accompanying text.

271. *See, e.g.,* Taylor, *supra* note 97, § 1, at 20. During the United States invasion of Grenada, reporters were denied access to the island and later journalists reported that Reagan Administration officials disseminated much inaccurate information that went uncontradicted because the press was not present to independently report on the invasion. *Id.*

272. *See* 1 ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS* 41 (1947).

273. *Id.*

274. *See Text of Journalists' Joint Statement, supra* note 245, at A10.

Our society remains healthy and free primarily because our public has an independent source of information about its Government. Preservation of this principle is essential to the proper functioning of our constitutional democracy and to our national well-being. Without this open flow of information, our system of self-government would not work.

Id.

275. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 75 (1960).

276. *Id.*

277. *Id.* at 116. "In the view of the Constitution, then, we the people are not only the supreme agency. We are also, politically, an active electorate—a Fourth, or perhaps better, a First Branch which, through its reserved power, governs at the polls." *Id.* "Liberty of speech and of the press may be described as public opinion in the soft. Open discussion eventually culminates in votes." CHAFEE, *supra* note 272, at 40.

the press performing its watchdog function. The press informed the public about the war and, in turn, the public voiced its opposition to the war to its elected representatives.²⁷⁸ Congress reacted to public opinion and refused to continue military funding of the war.²⁷⁹

V. CONCLUSION

From the War of Independence through the Vietnam War, the press has had widespread access to the battlefield,²⁸⁰ although at times, the government has imposed censorship restrictions on the press to protect military security and troop safety.²⁸¹ During the Vietnam War, the press enjoyed widespread access to combat and the government only employed a system of voluntary self-censorship.²⁸² Even though the press observed the military security guidelines and thereby protected national security, the military was dissatisfied with the media's reporting of the war.²⁸³ The military blamed the press for decreasing public support for the war and for Congress's decision to discontinue funding of the war.²⁸⁴

Determined to influence public opinion by controlling the content of what the public reads and sees during military conflicts, the military began to restrict press access to the battlefield by instituting a pool group system.²⁸⁵ During the invasion of Grenada in 1983 and the invasion of Panama in 1989, the military used the pool group system and was satisfied with the political results.²⁸⁶ During the Persian Gulf War, the government again denied the press unrestricted access to the battlefield.²⁸⁷ In addition, the government subjected all news reports and broadcasts to a security review.²⁸⁸ Although the press has had widespread access to the battlefield throughout the history of American military conflicts,²⁸⁹ and press access restrictions are unnecessary to protect national security,²⁹⁰ it appears as though the pool group system will be used in the

278. See 119 CONG. REC. 22,284 (1973) (statement of Senator Hughes); see also LEWY, *supra* note 253, at 435-36 (1978) (public opposition to American involvement in Vietnam brought end to war).

279. See Second Supplemental Appropriation Act, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973). On June 29, 1973, Congress voted to end funding of the Vietnam War. *Id.*

280. See *supra* notes 24-90 and accompanying text.

281. See *supra* notes 24-90 and accompanying text.

282. See *supra* note 89 and accompanying text.

283. See *supra* notes 99-100 and accompanying text.

284. See *supra* notes 100, 278-79 and accompanying text.

285. See *supra* notes 91-114 and accompanying text.

286. See *supra* notes 91-114 and accompanying text.

287. See *supra* notes 117-33 and accompanying text.

288. See *supra* notes 134-39 and accompanying text.

289. See *supra* notes 24-90 and accompanying text.

290. See *supra* notes 266-68 and accompanying text.

future.²⁹¹

The First Amendment protects the press against prepublication censorship and access restrictions.²⁹² Although censorship of news reports is not an unconstitutional prior restraint, the denial of press access to the battlefield during wartime violates the First Amendment.²⁹³ Freedom of the press is important for the functioning of our system of democratic government.²⁹⁴ There is no need for the government to overly restrict the press²⁹⁵ because past experience proves that the press will voluntarily adhere to military guidelines to protect national security. Clearly a system of voluntary censorship and widespread press access safeguards the First Amendment as well as national security.²⁹⁶ In future military conflicts, the government should reinstate the prior system of voluntary censorship and grant the press widespread access to battlefields.

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291. *See* Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558, 1569 (1991).

292. *See supra* notes 146-215 and accompanying text.

293. *See supra* notes 217-58 and accompanying text.

294. *See supra* notes 237-39 and accompanying text.

295. *See supra* notes 265-68 and accompanying text.

296. *See supra* notes 266-68 and accompanying text.

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