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Press Access to American Military Operations and the First Amendment: The Constitutionality of Imposing Restrictions

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PRESS ACCESS TO AMERICAN MILITARY OPERATIONS AND THE FIRST AMENDMENT: THE CONSTITUTIONALITY OF IMPOSING RESTRICTIONS

"This stinks! *Newsweek* just printed our entire battle plan."
-General H. Norman Schwarzkopf, Ret. (1991)[1]

I. INTRODUCTION

General Schwarzkopf's comments indicate that an unfettered right of the press to gather information from a battlefield and globally disseminate it within seconds can harm American fighting forces. However, the First Amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom . . . of the press."[2] The question thus arises: can the government restrict the freedom of the press to cover military operations? This comment answers this question affirmatively, demonstrating that operational security and troop safety justify restrictions on the press' right to access military operations and publish information obtained from those operations.

II. GENERAL AREAS OF DISCUSSION

First, this comment describes the history of press access to military operations from the Revolutionary War to the present.[3] This brief discussion focuses on the Sidle Panel convened in 1984 to arrive at

1. GENERAL H. NORMAN SCHWARZKOPF, RET., IT DOESN'T TAKE A HERO 440 (1992). Prior to the start of the ground war between the Allies and Iraq on February 23, 1991, a CNN pool reporter inadvertently revealed, on live television, the identity of American forces involved in an artillery duel with Iraqi forces. *Id.* at 459. Schwarzkopf commented that "any halfway competent Iraqi intelligence officer watching CNN . . . would then discover that the 82nd [Airborne] was positioned for a flanking attack, a fact . . . [CENTCOM] had taken great pains to conceal." *Id.* at 440. Schwarzkopf also postulated that this enabled *Newsweek* to publish a map which "almost exactly depict[ed]" the 82nd flanking plan. *Id.*

2. U.S. CONST. amend. I.

3. *See* discussion *infra* section III.

"workable solutions for media-military relations in future military operations."[4] Second, this comment analyzes the First Amendment doctrines of prior restraint and right of access in the context of past and current access restrictions imposed by the military on the press.[5] This discussion demonstrates that these restrictions are constitutional. This comment concludes by recommending that the Pentagon continue to follow its current policy of pool system reporting and security review in future military operations.[6]

III. The History of Press Coverage of American Military Operations

A. *Pre-Sidle Panel Conflicts: The Revolutionary War Through Grenada*

Press coverage during the Revolutionary War depended "wholly on the chance arrival of private letters and of official and semi-official messages."[7] Soldiers doubling as correspondents provided many of the stories for the newspapers.[8] Although censorship laws existed at the time, the government did not censor press reports during the war.[9]

Press coverage in the War of 1812 was "almost as haphazard as that of the Revolutionary War," however, news reporters were able to report particular events of the war due to their close proximity to the conflict.[10] There is no available evidence from this war which indicates that the press had special access to military operations.[11]

The Mexican-American War "marked the beginning of modern war correspondence."[12] The newspapers still relied significantly on

4. Report by Chairman Joint Chiefs of Staff Media-Military Relations Panel (Aug. 23, 1984)[hereinafter Sidle Panel Report] (quoting letter from retired Major General Winant Sidle to General John W. Vessey, Jr. (undated) (accompanying Sidle Panel Report)); *see also* discussion *infra* section III.B.

5. *See* discussion *infra* section IV.

6. *See* discussion *infra* section V. A *pool* is a group of media personnel, credentialed by the military and provided with an escort officer, assembled for the purpose of providing press coverage of military operations. *See infra* notes 55, 69.

7. Frank Luther Mott, American Journalism, A History: 1690-1960 99 (3d ed. 1962).

8. 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, 933 (1985).

9. *Id.*

10. Mott, *supra* note 7, at 196. When the British captured and burned the nation's capital, correspondents were present. Cassell, *supra* note 8, at 933.

11. Cassell, *supra* note 8, at 934.

12. Mott, *supra* note 7, at 249.

private correspondence, however, press coverage of this war was extensive.[13] Furthermore, the military did not place restrictions on correspondents during the war.[14]

During the Civil War, the military frequently but inconsistently imposed press restrictions and censorship.[15] In the North, Lincoln's administration imposed restrictions and censorship on the press in order to ensure military success.[16] Moreover, "the lack of any standardized rules controlling the press, coupled with the inconsistent enforcdment of published regulations, resulted in hostility and mistrust between some Union commanders and wartime journalists."[17] In the Confederacy, the military frequently excluded correspondents from the lines.[18] The exclusion was due, in part, to the small size of the Southern press corps.[19] However, despite the aforementioned exceptions, the press published almost any story it pleased.[20]

Press restrictions during the Spanish-American War in 1898 virtually did not exist; the military granted journalists a remarkable degree of journalistic freedom.[21] "Newspapers printed anything their editors desired, including military plans and movements."[22] The military

13. Cassell, *supra* note 8, at 934.

14. JOSEPH J. MATHEWS, REPORTING THE WARS 54 (1957). General Zachary Taylor permitted reporters to ride into battle with his troops. M.L. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS 13-14 (1968).

15. MOTT, *supra* note 7, at 336.

16. Karl T. Olson, Note, *The Constitutionality of Department of Defense Press Restrictions on Wartime Correspondents Covering the Persian Gulf War*, 41 DRAKE L. REV. 511, 514 (1992). Due to the size and geography of the war, "[m]ajor battles were fought without the presence of authorized newspaper reporters." MATHEWS, *supra* note 14, at 80.

17. Olson, *supra* note 16, at 514. Some commanders excluded the press completely. In 1861, General William T. Sherman expelled every newspaper correspondent from the lines because he found that his operations in Kentucky had been exposed by reports of his movements in the press. Cassell, *supra* note 8, at 935. Similarly, General Henry Halleck "expelled all newspaper men from his army in May, 1862." MOTT, *supra* note 7, at 338.

18. Cassell, *supra* note 8, at 935.

19. *Id.* "For a great battle or campaign to occur without the presence of representatives of the Northern newspapers was exceptional; for the Southern press to be inadequately represented was commonplace, and on a number of occasions it had no civilian [reporters] on the scene." MATHEWS, *supra* note 14, at 95.

The military also denied correspondents access to telegraph lines. MOTT, *supra* note 7, at 338. In February 1862, President Lincoln, acting with congressional authorization, ordered all telegraph lines to be placed under military supervision. MATHEWS, *supra* note 14, at 82. This action limited the ability of correspondents to send stories without submitting to censorship, and also forced several correspondents to personally deliver stories "from the battlefields to their newspapers—some stories being three to four days old by the time they reached press." Olson, *supra* note 16, at 515.

20. Cassell, *supra* note 8, at 936.

21. Olson, *supra* note 16, at 515.

22. *Id.* "Most correspondents . . . ignored their proper status as noncombatants and actively fought against the Spanish, some actually performing espionage." *Id.*

made efforts to control the press, but for the most part, the military gave extreme deference to correspondents.[23]

During the more than twenty expeditions conducted by the United States military into the Caribbean and Central America between 1880 and 1924, the military permitted the press to go ashore with the troops.[24] In World War I, correspondents accompanied the first American troops when they arrived in St. Nazaire, France in 1917.[25] Upon arrival, the American press was strictly controlled and heavily censored by measures which France and Great Britain instituted; however, the restrictions for the American press gradually abated.[26] Stories from American correspondents were still scrutinized and censored by the Military Intelligence Service at press headquarters.[27]

After America entered World War II on December 7, 1941, the government immediately imposed censorship.[28] Following the Japanese attack on Pearl Harbor, "the government created an elaborate censorship apparatus."[29] The Office of Censorship, created as part of that apparatus, issued a Code of Wartime Practice to press organizations.[30] "Correspondents were not allowed in the theaters of war unless they were accredited, and one of the conditions of accreditation was that the correspondent must sign an agreement to submit all his copy to military or naval censorship."[31] The press generally recognized and accepted the need for censorship, yet some reporters frequently criticized military censors for purportedly withholding

23. *Id.*

24. Cassell, *supra* note 8, at 936. The U.S. Army did not implement press censorship during its expedition against the Mexican bandit-revolutionary Pancho Villa in 1916. *Id.* at 937 n.37. However, there were some instances of press exclusion. "John J. Pershing excluded the press from the Mindoro Island pacification operation in the Philippines and fought a successful campaign without any media scrutiny." *Id.* at 936-37.

25. JOHN HOHENBERG, FOREIGN CORRESPONDENCE: THE GREAT REPORTERS AND THEIR TIMES 236 (1964).

26. Kevin P. Kenealey, Comment, *The Persian Gulf War and the Press: Is There a Constitutional Right of Access to Military Operations?* 87 NW. U. L. REV. 287, 314 (1992). "Once accredited, correspondents might go and come as they pleased; writers with other armies were commonly compelled to go about with military escorts, but American correspondents could visit front-line trenches alone if they pleased, or even 'go over the top'" and accompany the troops into battle. MOTT, *supra* note 7, at 621.

27. MOTT, *supra* note 7, at 621.

28. Cassell, *supra* note 8, at 937-38.

29. *Id.* at 938.

30. *Id.*

31. PHILLIP KNIGHTLEY, THE FIRST CASUALTY, FROM CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER 275 (1975).

information unnecessarily.[32] Even so, the press capitulated to heavy censorship in exchange for wide access to the frontlines.[33] The American press, however, was not present at every military engagement because there simply were not enough reporters to cover every action.[34] Most of the war's major actions were reported from headquarters far to the rear of the battlefront.[35] Only a handful of reporters landed with troops on the shores of Normandy during the D-day landings of June 6, 1944.[36]

The press restrictions in place during the Korean War were basically the same as those in place during World War II.[37] General

32. MOTT, *supra* note 7, at 763. General Douglas MacArthur established the strictest censorship of any theater of operations. KNIGHTLEY, *supra* note 31, at 281-82. He ordered that "any correspondent who interviewed any member of the Allied forces would be banned from advanced bases and that the soldier would be court-martialed." *Id.* at 281. MacArthur also ordered that all press reports had to pass through his headquarters for review regardless of whether they had already been cleared by another censor in the Pacific theater of operations. *Id.*

"In some cases, heavy censorship distorted the news." Cassell, *supra* note 8, at 938. In the Pacific, the Navy only conceded the loss of one battleship at Pearl Harbor when in fact the Japanese sunk five and damaged three. KNIGHTLEY, *supra* note 31, at 273. News of naval losses at the Battle of Savo in the Solomon Islands, and the sinking of the aircraft carriers *Lexington*, *Yorktown*, and *Wasp* was held up for weeks. MOTT, *supra* note 7, at 763. The Navy withheld the bad news in order to deny the Japanese knowledge of the losses they had actually inflicted. *Id.* at 763-64. Military censors attempted to conceal other stories such as the American victory at Midway, for fear that the Japanese might figure out that the Americans broke their code. Cassell, *supra* note 8, at 938.

"In the European theater, all publications had to be cleared as well, [but the] censorship was less rigorous." Cassell, *supra* note 8, at 939. Nonetheless, some stories could not be repeated such as the General Patton soldier-slapping incident in Italy and the loss of twenty transport planes and over 400 American soldiers to American guns at Bari. MATHEWS, *supra* note 14, at 215. Also, a news blackout was initially imposed during the Battle of the Bulge. *Id.* at 215-16.

33. Cassell, *supra* note 8, at 939. "American correspondents accompanied the assault troops in the first stage of the battle on numerous occasions, including 'along the fronts in Tunisia, Sicily, Italy, and northwest Europe, [where] reporters had complete freedom of movement.'" Kenealey, *supra* note 26, at 214. On many occasions "[c]orrespondents flew on bombing missions, rode destroyers, went on patrols, were strafed and shelled and frequently became the targets for snipers." M.L. STEIN, UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS 95 (1968).

34. Cassell, *supra* note 8, at 939.

35. *Id.* at 939-40.

36. *Id.* at 940.

37. Kenealey, *supra* note 26, at 315.

Douglas A. MacArthur, the U.N. commander in Korea, made reporting the war difficult.[38] After MacArthur's dismissal, the military relaxed censorship and the American press was no longer restricted from the front lines.[39]

In terms of complete and open access given to the press, no other war can match that of the conflict in Vietnam.[40] Even today, many still believe that the American public turned against the war due to biased reporting.[41] At the beginning of American involvement in Vietnam, the military treated the press well.[42] Later, even as distrust grew between the military and the press, the military still provided reporters with access to combat operations.[43] Military censorship of news reports was nonexistent in Vietnam as reporters merely signed an agreement to abide by a set of simple ground rules that dealt primarily with the preservation of military security.[44] The official military policy in Vietnam was to provide wide press coverage which was flexible and informally censored.[45]

The American invasion of Grenada on October 25, 1983, "marks a historical break in press coverage."[46] The Pentagon did not permit

38. Cassell, *supra* note 8, at 940. The press was "at the mercy of the army for communications, transportation, and housing" which, the army told reporters, was "urgently needed elsewhere." KNIGHTLEY, *supra* note 31, at 338. MacArthur's press chief, Colonel Pat Echols, "regarded the press as natural enemies." *Id.*

In a strange twist, the Korean War correspondents requested that the military impose full, compulsory censorship. Cassell, *supra* note 8, at 940. The media saw this censorship as a tradeoff for greater access. Kenealey, *supra* note 26, at 315. In January, 1951, MacArthur's headquarters imposed full censorship placing correspondents under complete jurisdiction of the army and mandating that for any violation of a long list of regulations a reporter could be punished by measures ranging from suspension to court-martial. KNIGHTLEY, *supra* note 31, at 345-46.

39. Cassell, *supra* note 8, at 941.

40. Kenealey, *supra* note 26, at 315.

41. Cassell, *supra* note 8, at 941; *see also* GENERAL WILLIAM C. WESTMORELAND, A SOLDIER REPORTS 420-21 (1976). In praising Drew Middleton, a reporter for the *New York Times*, for his unbiased reporting of the events in South Vietnam, General Westmoreland also criticized other reporters who attempted to "influence the course of events" there. *Id.* at 66. General Westmoreland believed that these new "folk heroes" sought recognition and reward through criticism of and negativism toward American policy in South Vietnam. *Id.*

42. Cassell, *supra* note 8, at 941. The military provided transport for correspondents to fly to Vietnam for short tours to "get a first-hand acquaintance with the facts." KNIGHTLEY, *supra* note 31, at 382.

43. Cassell, *supra* note 8, at 941. Prior to the Tet Offensive in December 1968, relatively few reporters saw any combat despite the ease of access to the battlefield. *Id.* at 941-42.

44. KNIGHTLEY, *supra* note 31, at 403. "These voluntarily enforced ground rules were successful in preventing security violations." Kenealey, *supra* note 26, at 316.

45. Kenealey, *supra* note 26, at 316.

46. *Id.* American forces were used sparingly during the time period between Vietnam and Grenada. No correspondents accompanied the failed raid to rescue American hostages in Iran in 1980. Cassell, *supra* note 8, at 943. The military permitted correspondents to accompany American peacekeeping forces in Lebanon and American advisors in El Salvador with only a few restrictions. *Id.*

correspondents to join in the invasion force, because their presence would jeopardize security and "complicate the force's logistical problems."[47] On the day following the invasion, U.S. warships prevented journalists from gaining access to Grenada by private boats.[48]

A pool of fifteen journalists were permitted onto the island during the third day of the operation.[49] Although the military provided escorts for these journalists, they "were allowed to remain on the island for only a few hours."[50] The military refused to grant unrestricted access to Grenada until six days after the initial invasion, but by then, the operation was nearly complete.[51]

Press organizations criticized the Pentagon for denying media access to the Grenada operation.[52] The criticism led to allegations that "Reagan Administration officials and military authorities disseminated much inaccurate information and many unproven assertions . . . [and] did so while withholding significant facts and impeding efforts by journalists to verify official statements."[53] Conversely, the American public supported the Reagan administration's decision to restrict press coverage of the invasion.[54]

B. *The Sidle Panel*

After the operation in Grenada, the Chairman of the Joint Chidfs of Staff convened a panel of former war correspondents and esteemed journalists to make recommendations regarding the management of

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47. Cassell, *supra* note 8, at 943.

48. Olson, *supra* note 16, at 520. The only independent news reports of the initial stages of the invasion came from two ham radio operators who lived on Grenada, Cassell, *supra* note 8 at 943, and "from reports by Radio Havana." Olson, *supra* note 16, at 520.

49. Olson, *supra* note 16, at 520.

50. *Id.*

51. *Id.*

52. Cassell, *supra* note 8, at 944.

53. *Id.* at 945.

54. *Id.* "Letters to NBC ran ten-to-one against admitting the press," forcing the press to do "a great deal of soul searching." *Id.* Unexpected support for the exclusion came from columnist George Will:

> Many journalists advocate an 'adversary' stance toward their government, denying any duty to weigh the consequences of what they print or broadcast. But incantation of the words 'the public's right to know' is no substitute for thinking. Someone must make judgements. Many journalists assert a moral as well as constitutional right to the statute of—strictly speaking—irresponsibility.

JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 994 (1990).

military-media relations during military operations.[55] The panel prefaced its recommendations with three points.[56] First, the panel unanimously agreed that "the U.S. media should cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces."[57] Second, the panel declined to assess military-media procedures in place during the Grenada operation, since the Joint Chiefs did not request that they do so.[58] Third, the panel recognized that the media has the responsibility to make possible the comprehensive, intelligent, and objective reporting of military operations.[59]

Initially, the media was pleased with the military's level of cooperation "in accepting the panel's recommendations."[60] However, the media quickly became skeptical of the Pentagon's new policy when, soon thereafter, the Pentagon imposed absolute control regarding the

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55. SIDLE PANEL REPORT, *supra* note 4, at 1. Retired Major General Winant Sidle, a former military spokesman in Vietnam, headed the panel. Cassell, *supra* note 8, at 945. The group was comprised of retired media personnel and representatives from the four branches of the military services. SIDLE PANEL REPORT, *supra* note 4, at 1.

The panel made eight recommendations, including the creation of media pools for early press access to military operations and the development of security guidelines. SIDLE PANEL REPORT, *supra* note 4, at 4-6. The eight recommendations were as follows:

1. "That public affairs planning for military operations be conducted concurrently with operational planning."
2. That the largest practical press pools be employed during military operations to provide "the media with early access to an operation."
3. That the Secretary of Defense "study the matter of whether to use a pre-established and constantly updated" list of accredited correspondents to be used when a pool of correspondents is required for a particular military operation.
4. "That a basic tenet governing media access to military operations should be voluntary compliance by the media with security guidelines or ground rules established and issued by the military."
5. That military planning include "sufficient equipment and qualified military personnel whose function is to assist correspondents in covering [an] operation adequately."
6. That the military, "if necessary and feasible," dedicate communication facilities to the media.
7. That the military provide for intra- and inter-theater transportation to support the media.
8. That top military public affairs representatives meet with news organization leadership on a regular basis to discuss mutual problems that might arise during media coverage of military operations.

Id. The Secretary of Defense approved and released these recommendations on August 23, 1984. News Release from the Office of the Assistant Secretary of Defense (Public Affairs) (Aug. 23, 1984) (No. 450-84).

56. Letter from retired Major General Winant Sidle to General John W. Vessey, Jr. (undated) (accompanying SIDLE PANEL REPORT, *supra* note 4).

57. *Id.*

58. *Id.*

59. *Id.*

60. Olson, *supra* note 16, at 522.

selection of reporters and the media had no control over the composition of the combat press pool.[61] Some journalists flouted the panel's recommendations, while other journalists believed "the Pentagon intended to continue its recent policy of reviewing, on a case-by-case basis, whether press access should be granted in future conflicts."[62]

C. *Post-Sidle Panel Conflicts: Panama and the Persian Gulf*

On December 20, 1989, American forces invaded Panama in order to topple Panamanian dictator General Manuel Noriega.[63] The invasion provided the first opportunity to implement the Sidle Panel's recommendations.[64] However, the military called the media-assigned pool reporters "too late" to allow them "to cover the decisive U.S. assaults in the . . . war."[65] The heavy combat had ended by the time the media pool arrived.[66] A military review board commissioned after the conflict concluded that "there was no effort to manipulate the pool in Panama" but rather that the failure to implement it effectively resulted from "good intentions gone awry, and unanticipated obstacles."[67] Despite the military's efforts to facilitate press coverage of combat operations, the problem of media access "was raised again during the Persian Gulf War."[68]

Before and during Operation Desert Storm, the Department of Defense (DOD) issued regulations which restricted both press access and its coverage of events.[69] Two aspects of the press restrictions, the

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61. *Id.*
62. *Id.*
63. *Id.* at 522 n.107.
64. Olson, *supra* note 16, at 522.
65. DEPARTMENT OF DEFENSE REVIEW OF PANAMA POOL DEPLOYMENT at 1 (Mar. 1990) [hereinafter HOFFMAN REPORT].
66. Olson, *supra* note 16, at 522. "Consequently, pooled video footage of American soldiers engaged in combat was rare; most material consisted of noncombat activities." *Id.*
67. HOFFMAN REPORT, *supra* note 65, at 1-3.
68. Olson, *supra* note 16, at 523.
69. Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558, 1563-64 (S.D.N.Y 1991).

The Central Command (CENTCOM) pool membership pools provided the following:

> The following procedures pertain to the CENTCOM news media pool concept for providing news to the widest possible American audience during the initial stages of U.S. military activities in the Arabian Gulf area . . . . There will be two types of pools: eighteen-member pools for ground combat operations and smaller,seven-member pools for ground combat coverage and other coverage. Pools will be formed and governed by the media organizations that are qualified to participate and will be administered through pool appointed coordinators working in conjunction with the JIB [Joint Information Bureau]—Dhahran. The media will operate under the ground rules issued by CENTCOM on January 15, 1991 . . . . Pool participants and media organizations eligible to participate in the pools will share all media products within their medium; e.g., television products will be shared by all other television pool members and photo products

pool system and the security review, made the Persian Gulf regulations the most strict in the history of press coverage of U.S. military operations.[70] With the conclusion of the first week of the air war

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will be shared with other photo pool members. The procedures for sharing those products and operating expenses of the pool will be determined by the partici- pants of each medium. Recommendations for changes to pool membership or other procedures will be considered on a case-by-case basis.

Id. at 1578-80.

The CENTCOM guidelines for the media provided the following:

For news media personnel participating in designated CENTCOM Media Pools:
(1) Upon registering with the JIB, news media should contact their respective pool coordinator for an explanation of pool operations.
(2) In the event of hostilities, pool products will be [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 materials to JIB Dhahran for review by the 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.

Id. at 1577-78.

The Operation Desert Storm Ground Rules provided the following:

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, weapons systems, on-hand equipment, or supplies . . ., including amounts of ammunition or fuel moved by or on hand in support and combat units . . . .
(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 . . . .
(4) Rules of engagement details.
(5) Information on intelligence collection activities . . . .
(6) During an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational security or lives . . . .
(7) Identification of mission aircraft points of origin, other than as land-based or carrier-based.
(8) Information on effectiveness or ineffectiveness of [the] enemy . . . .
(9) Specific identifying information on missing or downed aircraft while search and rescue operations are planned or underway.
(10) Special operations forces' methods, unique equipment or tactics.
(11) Specific operating methods unique equipment or tactics . . . .
(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 . . . .

Id. at 1581-82.

70. David A. Frenznick, *The First Amendment on the Battlefield: A Constitutional Analysis of Press Access to Military Operations in Grenada, Panama and the Persian Gulf*, 23 PAC. L.J.

against Iraq, the press demanded that the regulations be lifted.[71] The Pentagon eventually responded by imposing a complete news blackout immediately following the start of the ground offensive against Iraqi forces on February 23, 1991.[72] The blackout lasted until February 24, 1991, when Secretary of Defense Dick Cheney gave permission for General Schwarzkopf to brief reporters in Riyadh, Saudi Arabia on the early events of the offensive.[73] When the military campaign against Iraq concluded on March 4, 1991, the Pentagon lifted all press restrictions in the Persian Gulf region.[74]

IV. THE CONSTITUTIONALITY OF RESTRICTING PRESS ACCESS TO MILITARY OPERATIONS

A. *The Prior Restraint Doctrine*

Under the constitutional doctrine of prior restraint, the government may not restrain publishers and broadcasters from disseminating

315, 327 (1992). "Prior to the Persian Gulf War, correspondents had never been subject to both escorted movement *and* censorship." *Id.* at 327 n.83.

71. *Id.* at 327. When the American bombardment of Iraq and Kuwait began on January 17, 1991, the military deployed pools to watch aircraft take off on and return from missions. *Id.* The military also allowed the reporters to speak with returning pilots. *Id.* "However, military officials released very few details about the progress of the air war, and some censorship occurred." *Id.*

When ground fighting began in late January 1991, reporters began to circumvent the organized pools. *Id.* at 328. By February 12, 1991, the military detained more than two dozen reporters for violating the pool regulations. *Id.*

72. *Id.* Although the Pentagon suspended regular briefings in Riyadh and Washington and delayed dispatches from pool reporters, some journalists were able to provide accounts of the ground war by travelling into the desert on their own in violation of the pool regulations. *Id.* at 328-29.

73. *Id.* at 329. Soon after the suspension of the blackout, "dispatches began to arrive from pool reporters in the field." *Id.*

74. Frenznick, *supra* note 70, at 329. The Pentagon has placed few, if any, restrictions on press access to military operations following the Persian Gulf War. Telephone Interview with Clifford H. Bernath, Principal Deputy Assistant to the Secretary of Defense for Public Affairs (OATSD(PA)) (November 24, 1994). In the Somalia peacekeeping operation from April 1992 to March 1994, the DOD did not impose restrictions on the press. *Id.* In the October 1994 peacekeeping Operation in Haiti (which still continues), the DOD offered the press a few guidelines, some of which the press agreed to follow and others which it chose not to follow. *Id.* For instance, the press agreed to avoid approaching soldiers during an operation and to refrain from using lights that could adversely affect a soldier's night vision. *Id.* The DOD also advised the press to stay off roofs, because in the event soldiers received fire from a roof, they would immediately "take out" the roof and anyone on it regardless of their nationality. *Id.* Correspondents covering the Haiti operation chose to disregard this guideline, and assured the DOD that they would take care of themselves in the event that such a crisis arose. *Id.* In the October 1994 troop deployment to Saudi Arabia and Kuwait, countering an Iraqi military threat to Kuwait's northern border, the DOD arranged with the Saudi Embassy to obtain visas for all journalists - as it did during the 1991 deployment to the Middle East. *Id.* Furthermore, the DOD did not place restrictions on the press during the 1994 deployment. *Id.*

information unless certain extraordinary circumstances apply.[75] In *Near v. Minnesota*,[76] the first case to discuss the constitutionality of prior restraints on military-related information, a 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."[77] A county attorney brought an action under the statute to enjoin the publication of an article in a local newspaper which alleged that a Jewish gangster controlled criminal activities in Minneapolis and that law enforcement officers were not energetically performing their duties to bring about an end to his activities.[78] The trial court declared that the newspaper constituted a public nuisance and enjoined the defendants from producing, editing or publishing any publication that was "malicious, scandalous or defamatory" and from conducting a nuisance under the title of the newspaper.[79] The defendant, Near, appealed to the state supreme court who affirmed the judgment upon the authority of the lower court's decision.[80] Near then appealed the decision to the United States Supreme Court.[81] The Supreme Court reversed the decision and held that the statute was unconstitutional because it infringed upon the liberty of the press guaranteed in the Constitution.[82] In dicta, Chief Justice Hughes recognized an exception for national security:

> When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops.[83]

75. Near v. Minnesota, 283 U.S. 697, 715-17 (1931).

76. 283 U.S. 697 (1931).

77. *Id.* at 702 (citing 1927 MINN. SESS. LAW 285 (Mason)).

78. *Id.* at 703-04. The complaint alleged that the defendant periodical, on nine separate dates from September to November, 1927, published and circulated articles that were largely malicious, scandalous, and defamatory. *Id.* at 703.

79. *Id.* at 706.

80. *Id.* at 706-07.

81. *Near*, 283 U.S. at 707.

82. *Id.* at 722-23.

83. *Id.* at 716 (dicta) (citations omitted).

In *New York Times Co. v. United States* (the "Pentagon Papers" case)[84] the Supreme Court addressed the issue of whether the government could enjoin the publication of classified military information already obtained by the press.[85] 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."[86] In a brief per curiam opinion, the Court stated the general rule that "[a]ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity" and, therefore, the government "carries a heavy burden of showing justification for the imposition of such restraint."[87] The Court held that the prior restraint was unconstitutional since the government failed to meet its burden of proof.[88]

In a concurring opinion, Justice Black, with whom Justice Douglas joined, wrote that "[o]nly a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . ."[89] Justice Black rejected the government's argument that the newspapers should be enjoined in the name of national security and concluded that the newspapers only did that which the Founders intended when they disclosed the workings of the government which gave rise to the Vietnam War.[90]

Justice Brennan, in his concurring opinion, recognized that the First Amendment ban on prior restraints can only be overridden when the nation is at war.[91] Justice Brennan concluded that, absent any clear proof that the publication of the contents of the study could cause great harm, any injunction on the publication of the article would violate the First Amendment.[92]

The six concurring opinions in *New York Times* mandate that the government has the burden of showing justification for imposing prepublication censorship on the press.[93] However, when the government denies the press access to military operations, it prevents the

84. 403 U.S. 713 (1971) (per curiam).
85. *Id.* at 714.
86. *Id.*
87. *Id.*
88. *New York Times Co.*, 403 U.S. at 714.
89. *Id.* at 717 (Black, J., concurring).
90. *Id.*
91. *Id.* at 726 (Brennan, J., concurring).
92. 403 U.S. at 727 (Brennan, J., concurring).
93. *Id.* at 714.

press from gathering news rather than preventing the publication of any information.[94] Generally, governmental actions that prevent publication of material that has already been obtained is the focus of any prior restraint analysis.[95] Consequently, the Court has been unwilling to invoke the prior restraint doctrine in news gathering situations.[96]

In *Pell v. Procunier*,[97] three professional journalists and four prison inmates brought an action in federal district court challenging the constitutionality of a regulation in the California Department of Corrections manual which provided that the press could not interview specific individual inmates.[98] The district court, in granting the defendant's motion to dismiss, held that the broad access afforded prisoners by the press' right to interview inmates at random sufficiently protects the press' rights.[99] The journalists appealed to the Supreme Court.[100] The Court held that newsmen have the same constitutional right of access to prisons and their inmates as the general public and no more.[101] The Court concluded:

> It is one thing to say . . . that government cannot restrain the publication of news emanating from [certain] sources . . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.[102]

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94. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976) (holding that the First Amendment "guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a 'previous' or 'prior' restraint"); *see also* Cassell, *supra* note 8, at 950.

95. Cassell, *supra* note 8, at 950.

96. *Id.* Some scholars question the usefulness of prior restraint analysis. *See generally*, John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983).

97. 417 U.S. 817 (1974).

98. *Id.* at 819.

99. *Id.* at 821. The district court, in granting the inmates' motion for summary judgment, held that the regulation prohibiting the inmates from being interviewed in person by journalists,violated their First and Fourteenth Amendment freedoms. *Id.* The prison officials appealed to the Supreme Court. *Id.* at 819. The Court reversed holding that in light of alternative channels of communication that are open to the inmates, the regulation does not constitute a violation of their rights of free speech. *Id.* at 835.

100. *Id.* at 821.

101. *Id.* at 834.

102. Pell v. Procunier, 417 U.S. 817, 834-35 (1974); *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 385-86, 391 (1979) (holding no Sixth Amendment public right of access to a pretrial judicial proceeding exists); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (upholding travel restrictions to Cuba because the First Amendment does not guarantee an "unrestrained right to gather information").

The Court also has blocked constitutional challenges, based on the prior restraint doctrine, to prepublication security review agreements.[103] In *Snepp v. United States*,[104] Snepp, a former CIA Agent who signed a lifetime prepublication agreement as a condition of his employment with the CIA, was obligated not to disclose any classified information relating to the Agency without proper authority.[105] The Court upheld the agreement against First Amendment challenge, mentioning in a footnote to the opinion that "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."[106] The Court concluded that the prepublication agreement that Snepp signed was a reasonable means for protecting the government's interest in national security and the operation of our foreign intelligence service.[107]

Unlike the agreement signed by Snepp, a prepublication agreement signed by a military correspondent is not a condition of employment.[108] Moreover, the Court's rationale makes any distinction between Snepp and a military correspondent irrelevant.[109] In *Snepp* the Court found that when Snepp joined the CIA, he was "entering a trust relationship."[110] Likewise, "a correspondent who becomes accredited and joins a military unit similarly enters a trust relationship because he will be privy to sensitive information."[111] Thus, the constitutional doctrine of prior restraint cannot serve as a basis for a challenge to military censorship.[112]

The Supreme Court places a heavy burden on the government to show justification for the imposition of prepublication restraint on information already obtained by the press.[113] However, the Court has

103. Typically, "[c]orrespondents were not allowed in the theaters of war unless they were accredited," and in order to get accreditation and access to front lines, a correspondent had to "sign an agreement to submit all his copy to military or naval censorship." KNIGHTLEY, *supra* note 31, at 275 (discussing accreditation during World War II). The Sidle Panel recommended that reporters who violate security guidelines established by the Pentagon should be excluded from further coverage of the operation. SIDLE PANEL REPORT, *supra* note 4, at 5.

104. 444 U.S. 507 (1980).

105. *Id.* at 507-08.

106. *Id.* 't 509 n.3.

107. *Id.*

108. Cassell, *supra* note 8, at 951

109. *Id.*

110. *Snepp*, 444 U.S. at 510.

111. Cassell, *supra* note 8, at 951.

112. *Id.*

113. *See supra* notes 75-94 and accompanying text.

been reluctant to invoke the prior restraint doctrine where the government has denied the press access to gathering information.[114] Thus, the doctrine of prior restraint is not useful in considering whether the Constitution requires press access to military operations.[115]

B. *The Development of the Right of Access*

In *Branzburg v. Hayes*,[116] the Supreme Court recognized a "limited First Amendment right of access to information."[117] In *Branzburg*, a newspaper reporter who wrote an article describing in detail his observance of drug activity sought First Amendment protection to avoid disclosing the identity of his sources before a grand jury.[118] The reporter claimed that his First Amendment right to gather news required that on some occasions he "agree either not to identify the source of information published or to publish only part of the facts revealed."[119] He argued that forcing him to testify in front of a grand jury would discourage confidential sources of other reporters from coming forward in the future, thereby measurably deterring the free flow of information that the First Amendment protects.[120]

The Court in its holding declined to grant newsmen a testimonial privilege under the First Amendment beyond that granted to ordinary citizens.[121] However, Justice White endorsed a limited First Amendment right of access to information when he wrote: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[122]

A few years later, the media's aspiration of a complete First Amendment right of access suffered a setback.[123] In the companion

114. *See supra* notes 95-109 and accompanying text.
115. Cassell, *supra* note 8, at 949.
116. 408 U.S. 665 (1972).
117. Olson, *supra* note 16, at 523 (summarizing *Branzburg*, 408 U.S. at 681).
118. 408 U.S. at 670.
119. *Id.* at 679.
120. *Id.* at 679-80.
121. *Id.* at 690-91.
122. *Id.* at 681. Justice Stewart agreed: "A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated." *Id.* at 727 (Stewart, J., dissenting).
123. Cassell, *supra* note 8, at 953.

cases of *Pell v. Procunier*[124] and *Saxbe v. Washington Post Co.*,[125] the Court held that regulations which barred the press from conducting face-to-face interviews with specific inmates did not violate the First Amendment.[126] The Court "emphasize[d] the ability of the general public to gain access as a guide to the appropriate level of access for the press."[127] Furthermore, the Court refused to impose an affirmative duty on the government to make special access for the press.[128]

In *Houchins v. KQED, Inc.*[129] the Court considered the question of whether limited press access to a dilapidated county jail violated the First Amendment rights of the press.[130] Justice Stewart wrote the crucial concurrence in a three-one-three split agreeing that there was no special right of access: "The Constitution does no more than assure the public and the press equal access once government has opened its doors."[131] However, Justice Stewart also concluded that "terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see."[132] The Court emphasized the availability of other channels for the press to receive information regarding the conditions in jails.[133] In any event, the outcome of the case was unfavorable for a special right of press access to government information.[134]

The next year, in *Gannett Co. v. DePasquale*,[135] a newspaper owner challenged an order closing a pretrial suppression hearing.[136] The Supreme Court rejected the attack and declined to reach a decision on the First Amendment question. Instead, it held that the public has no constitutional right under the Sixth Amendment to attend a

124. 417 U.S. 817 (1974). *See supra* notes 97-102 and accompanying text.

125. 417 U.S. 843 (1974).

126. *Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 850.

127. Frank B. Cross & Stephen M. Griffin, *A Right of Press Access to United States Military Operations*, 21 SUFFOLK U. L. REV. 989, 1023 (1987).

128. *Pell*, 417 U.S. at 834.

129. 438 U.S. 1 (1978).

130. *Id.* at 3-4.

131. *Id.* at 16 (Stewart, J., concurring) (footnote omitted).

132. *Id.* at 17 (Stewart, J., concurring).

133. *Id.* at 15-16.

134. Cross & Griffin, *supra* note 127, at 1024. The opinion held "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to governmental information or sources of information within the government's control." *Houchins*, 438 U.S. 1, 15.

135. 443 U.S. 368 (1979).

136. Cassell, *supra* note 8, at 954.

pretrial hearing.[137] However, in light of the Court's decision in *Richmond Newspapers, Inc. v. Virginia*,[138] *Gannett's* precedential worth is uncertain.[139] In *Richmond Newspapers* members of the press contested a court order which closed a murder trial to the public.[140] The Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[141] The Court emphasized the historical openness of criminal trials as a significant basis for its decision.[142]

Justice Stevens, in his concurrence, announced: "This is a watershed case .... [Today] ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."[143] Justice Stewart concurred, stating that "[i]n conspicuous contrast to a military base, ... a trial courtroom is a public place."[144]

However, confusion reigned following the decision of *Richmond Newspapers* because the holding was a plurality opinion.[145] Some scholars viewed the decision in *Richmond Newspapers* as a prominent step toward more extensive free press rights.[146] Other scholars argued that the only right assured by the decision was the constitutional right to attend a criminal trial.[147] Chief Justice Burger favored a public right of access to a criminal trial, however, he did not square his opinion in *Richmond Newspapers* with his plurality opinion in *Houchins* which was more hostile.[148]

Two years after *Richmond Newspapers*, the Court, in *Globe Newspaper Co. v. Superior Court*,[149] substantially extended the First Amendment right of access to criminal proceedings.[150] The Court found that a Massachusetts statute excluding the press and public from rape trials during the testimony of a minor victim violated the

137. 443 U.S. at 391.
138. 448 U.S. 555 (1980).
139. Cassell, *supra* note 8, at 954.
140. 448 U.S. at 560.
141. *Id.* at 581 (plurality opinion).
142. *Id.* at 573.
143. *Id.* at 582-83 (Stevens, J., concurring).
144. *Richmond Newspaper, Inc.*, 448 U.S. at 599 (Stewart, J., concurring).
145. Cross & Griffin, *supra* note 127, at 1026.
146. *Id.*
147. *Id.* at 1027.
148. *Id.*
149. 457 U.S. 596 (1982).
150. Cross & Griffin, *supra* note 127, at 1027.

First Amendment.[151] A majority of the Court concluded that the First Amendment guaranteed a right of access to criminal trials because "the criminal trial historically has been open to the press and general public"[152] and because "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."[153] The public must be admitted to criminal trials unless "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[154] The Court invalidated Massachusetts' mandatory closure statute because although the statute served a compelling governmental interest, it was not narrowly tailored to serve that interest.[155] The Court concluded that a trial court should "determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor [rape] victim necessitates closure."[156]

The Court's decisions in *Richmond Newspapers* and *Globe Newspaper* suggest a three-part test in determining whether the press has a First Amendment right of access of government information:[157] (1) the claimant must show that the area sought to be accessed has historically been open to the press and the general public;[158] (2) the right of access must play a "particularly significant role in the functioning of the process in question and the government as a whole;"[159] and (3) if the first two tests are met, the government may only deny access if it establishes "that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[160] This test suggests in theory that the press may have a First Amendment right of access to the battlefield, but the Court has never afforded the press such a right. The issue of a First Amendment right of press access has been raised in the lower federal courts on two separate occasions.[161]

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151. *Globe Newspaper Co.*, 457 U.S. at 607-11.

152. *Id.* at 605.

153. *Globe*, 457 U.S. at 606.

154. *Id.* at 607.

155. *Id.* at 609.

156. *Id.*

157. *See* Frenznick, *supra* note 70, at 348.

158. *Globe*, 457 U.S. at 605.

159. *Id.* at 606.

160. *Id.* at 606-07.

161. *See* Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985) (per curiam), *aff'g the judgment but vacating the opinion of* 588 F. Supp. 57 (D.D.C. 1984); Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y 1991).

C. *Applying Press Access Rights to Military Operations*

In *Flynt v. Weinberger*,[162] the publisher of *Hustler* magazine, Larry Flynt, filed suit against then Secretary of Defense Caspar Weinberger and others, alleging that the military violated the First Amendment rights of the press by banning them from covering the 1983 American invasion of Grenada.[163] Flynt challenged the decision of the American government to prohibit press coverage of the initial stages of the military operation in Grenada seeking injunctive and declaratory relief.[164] The Court of Appeals for the District of Columbia held that the case was moot and therefore no longer justiciable.[165] In its holding, the court noted that the military granted *Hustler* limited access to Grenada, by military transport, on October 27, 1983, and unlimited access by November 7, 1983.[166] Because Flynt sought "declaratory judgment solely with respect to the constitutionality of the press ban in Grenada," the court found no live controversy at the time of review.[167]

Six years later, in *Nation Magazine v. United States Department of Defense*,[168] several press organizations filed an action against the Department of Defense challenging the constitutionality of DOD press restrictions issued during the Persian Gulf War.[169] The plaintiffs claimed that "the press [had] a First Amendment right to unlimited access to foreign arenas in which American military forces are engaged."[170] The plahntiffs further asserted that "the DOD 'pooling regulations,' which limit access to the battlefield to a specified number

162. 762 F.2d 134 (D.C. Cir. 1985).

163. *Flynt*, 762 F.2d at 134-35.

164. *Id.* The complaint alleged that "the defendants . . . in preventing . . . or otherwise hindering Plaintiffs' efforts to send reporters to the sovereign nation of Grenada for the purpose of gathering news is in violation of the Constitution, laws, and treaties of the United States." *Id.* at 135. The complaint also requested that "the Defendants . . . be restrained and enjoined from preventing or otherwise hindering Plaintiffs from sending reporters to the sovereign nation of Grenada to gather news and [be] direct[ed] . . . to take such steps as may be necessary . . . for the purpose of gathering and transmitting the news." *Id.*

165. *Id.* at 136.

166. *Id.* at 135.

167. *Id.* By the time the court heard the arguments in the case, the military concluded its operation in Grenada and lifted all press restrictions. *Id.*

168. 762 F. Supp. 1558 (S.D.N.Y. 1991).

169. *Nation Magazine*, 762 F. Supp. at 1560-61. *See* note 69 *supra* for the Persian Gulf press restrictions.

170. *Id.* at 1561.

of press representatives and subject them to certain restrictions, infringe[d] on news gathering privileges accorded by the First Amendment."[171] The DOD argued that "the First Amendment [did] not bar the government from restricting access to combat activities and that the regulations [were] narrowly tailored and necessitated by compelling national security concerns."[172]

By the time the court heard oral arguments on February 14, 1991, the military lifted all press restrictions.[173] The defendants moved to dismiss the case expounding three arguments: (1) the plaintiffs lacked standing since they had not shown that they were excluded from admission to any media pool;[174] (2) the controversy presented a political question;[175] and (3) the issue became moot once the regulations were suspended.[176] The court, however, found that the harms alleged by the plaintiffs were "distinct and palpable" and concluded that the plaintiffs had standing to raise First and Fifth Amendment claims.[177] The court also found that "the case [could not] be held non-justiciable on political question grounds."[178] The most difficult question for the court was whether the case would survive a mootness challenge.[179]

Under the doctrine of mootness, a case becomes moot "when the issues presented are no longer live" at the time of review.[180] However, as with most doctrines, exceptions to the mootness doctrine exist. The exception applicable in *Nation Magazine* was that an issue is not moot if it is "capable of repetition, yet evading review."[181] The

171. *Id.*

172. *Id.*

173. *Nation Magazine*, 762 F. Supp. at 1560. Press restrictions were lifted on March 4, 1991. *Id.*

174. *Id.* at 1561. A person has standing to bring a claim in a federal court if he can show (1) an injury in fact, (2) traceable to the defendant's challenged conduct, that is (3) redressable by a favorable court decision. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

175. *Nation Magazine*, 762 F. Supp. at 1561.

176. *Id.*

177. *Id.* at 1566. At first, none of the plaintiffs had been excluded from a media pool, however, the consolidation of the case with Agence-France Presse resolved this dispute since they had actually been excluded. *Id.*

178. *Id.* at 1566-67. The political question doctrine incorporates 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?" Goldwater v. Carter, 444 U.S. 996, 998 (1979).

179. *Nation Magazine*, 762 F. Supp. at 1568.

180. *Id.* (citing Murphy v. Hunt, 455 U.S. 478, 481 (1982)).

181. Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

court found that this exception applied and heard opposing arguments in the case.[182] The court concluded:

> The war in the Persian Gulf . . . was short and swift. Even with efforts by all parties, the judicial process often will not be able to resolve legal controversies such as this before hostilities have ceased. . . . As such, this Court concludes that the controversy engendered by the CENTCOM regulations did not "last long enough for complete judicial review.". . . Because of the speed with which wars have terminated, as is clearly documented by the sequence of events in Qanama and Grenada, the evading review test . . . is satisfied.[183]

However, by the time the court heard arguments the military had lifted all press restrictions.[184] The court noted that injunctive relief is an inappropriate remedy for past injuries, and since there was no longer "any presently existing operative practice" for the court to enjoin, the plaintiffs' claims were dismissed as moot.[185] Furthermore, in dicta, the court recognized that "[c]ivilian courts should hesitate long before entertaining a suit which asks the court to tamper with the . . . necessarily unique structure of the [m]ilitary [e]stablishment."[186]

The lower federal courts, in *Flynt* and *Nation Magazine*, avoided constitutional issues by finding that the claims of the plaintiffs were moot.[187] However, future conflicts involving American forces potentially can give rise to similar press restrictions and resultant First Amendment claims.[188] If a claim by the press were to survive a mootness challenge, the Supreme Court may resolve the dispute by applying the tests outlined in *Richmond Newspapers* and *Globe*

182. *Nation Magazine*, 762 F. Supp. at 1569. In Flynt v. Weinberger, however, the court found that the case "did not fall within the mootness doctrine for those controversies 'capable of repetition, yet evading review' exception because there was no 'reasonable expectation' that the controversy in Grenada would recur." 762 F.2d at 135 (citing Welnstein v. Bradford, 423 U.S. 147, 149 (1975)).

183. *Nation Magazine*, 762 F. Supp. at 1569 (citations omitted).

184. *Id.* at 1575.

185. *Id.* at 1570.

186. *Id.* at 1566-67 (citations omitted).

187. *Flynt*, 762 F.2d at 136; *Nation Magazine*, 762 F. Supp. at 1575.

188. Olson, *supra* note 16, at 528; *see also* Department of Defense Directive No. 5122.5 at 1, 2-1, 3-1 (Dec. 2, 1993) (providing authorization to the Assistant to the Secretary of Defense for Public Affairs (ATSD(PA)) to "[e]nsure a free flow of news and information to the media, the general public, the internal audiences of the Armed Forces, and other appropriate forums, limited only by the national security constraints . . ." and maintaining the limited use of press pools and security review).

Newspaper.[189] A right of access may exist if two conditions are satisfied: (1) a showing that the area sought to be accessed has been historically open to the press and the general public and (2) a showing that the right of access plays a significant role in the process of government as a whole.[190]

Throughout history the U.S. government has not held its military operations open to the public.[191] Access to military operations usually is limited to accredited members of the press, and in comlando-type raids neither the press nor the public has been given access.[192] "Furthermore, media access to military operations arguably fails to play a significant role in the functioning of our government and its ability to wage war."[193] "The ability of the media to independently report on the conduct of a war does not contribute significantly to the government's ability to wage war."[194] Operational security and the element of surprise are essential to conducting successful warfare and thus require a controlled press.[195]

The decision in *Globe Newspaper* may require that press access restrictions be narrowly tailored to serve compelling government interests.[196] A DOD directive issued on December 2, 1993, provides for limited pooling arrangements "even under conditions of open [press] coverage."[197] Given the lethal circumstance of war and the need for heightened security, the current DOD regulations meet the condition of being narrowly tailored. A reporter with unlimited access to American military plans and strategies poses a direct and serious threat to the safety of American forces if that reporter improvidently leaks such information.[198] The pooling arrangements provide a narrowly tailored "check" on such a threat.

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189. *See* discussion *supra* section IV.B.

190. *See supra* notes 158-60 and accompanying text.

191. *See* Olson, *supra* note 16, at 528.

192. *Id.* at 528-29.

193. *See* Olson, *supra* note 16, at 529.

194. *Id.*

195. *Id.*

196. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982).

197. Department of Defense Directive No. 5122.5 at 3-1 (Dec. 2, 1993) [hereinafter DOD DIRECTIVE]. The directive's "Statement of DOD Principles for News Media Coverage of DOD Operations" provides, in pertinent part, that "[o]pen and independent reporting will be the principle means of coverage of U.S. military operations," however, "[e]ven under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited." *Id.* at 3-1. The directive also provides that "[j]ournalists in a combat zone will be credentialed . . . and will . . . abide by a clear set of military security ground rules that protect U.S. forces and their operations." *Id.*

198. *See supra* note 1.

The directive also establishes a security review of information obtained by pool reporters.[199] Although the Court noted in *New York Times* that "any system of prior restraint of expression . . . bear[s] a heavy presumption against its constitutional validity,"[200] the Court in its decision in *Near* supported the government's right to censor information in time of war.[201] In this age of satellite communications, information transmitted to the United States can easily be intercepted by foreign countries.[202] Security review of material obtained by the press in time of war ensures that the enemy does not receive information it could use against American forces during war.[203]

V. CONCLUSION

Throughout American history, the government has restricted press coverage of its military operations. At no time have restrictions been more crucial than now due to the ability of the press to disseminate information globally and the concomitant ability of anyone to receive it.

The latest DOD regulations establish a reasonable and narrowly tailored means by which the American military can maintain operational security and the ensure the greatest possible degree of safety to those who serve. The current regulations reconcile the interest of the press in keeping the public informed about the American government's military operations and the interests of the military in conducting effective operations with minimal or no casualties. Thus, the latest DOD pooling regulations and security reviews are constitutional and should be implemented during future military operations.

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199. *See* DOD DIRECTIVE, *supra* note 186, at 2-1. The directive's "Principles of Information" provide, in pertinent part, that "[i]nformation will be withheld only when disclosure would adversely affect national security or threaten the safety or privacy of the men and women of the Armed Forces." *Id.*

200. New York Times Co. v. United States, 403 U.S. 713 (1971).

201. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931).

202. Olson, *supra* note 16, at 534.

203. *Id.*