

The Censor's Red Flair, the Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions

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“Good! Now we shall have news from hell before breakfast!”

—Gen. William Tecumseh Sherman,
upon learning that three Civil War
press correspondents had just been
killed by an exploding shell, circa
1863.¹

In the handling of the press, the American practice was to provide every facility that would permit an individual to go wherever he wanted, whenever he wanted. While this imposed upon us some additional administrative burdens, it paid off in big dividends because of the conviction in the minds of all that there was no attempt to conceal error and stupidity.

—Gen. Dwight D. Eisenhower,
describing U.S. military relations
with the press during World War II.²

“Having reporters running around would overwhelm the battlefield.”

—Col. Bill Mulvey,
director of the Joint Information
Bureau, Dhahran, Saudi Arabia,
1991.³

“[T]he strongest emotion yet discovered in the human creature is neither love nor hate, but the naked desire to edit.”

—Joseph L. Galloway,
reporter for *U.S. News & World
Report*, describing the censorship
procedures of Operation Desert
Storm.⁴

Introduction

Before the leaders of the U.S. military decided to drop the first bombs on Iraq to begin the Persian Gulf War on January 16, 1991, the Department of Defense had already laid down news restrictions to diffuse the power of the media covering the hostilities in the Middle East.⁵ On-

1. Frank B. Cross & Stephen M. Griffin, *A Right of Press Access to United States Military Operations*, 21 SUFFOLK U. L. REV. 989, 993 n.18 (1987) (quoting F. MOTT, *AMERICAN JOURNALISM: A HISTORY 1690-1940* 337 (1962)).

2. *Id.* at 998 (quoting DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* 300-01 (1948)).

3. Richard Zoglin, *Volleys on the Information Front*, TIME, Feb. 4, 1991, at 44, 45.

4. Joseph L. Galloway, *Who's Afraid of the Truth?*, U.S. NEWS & WORLD REP., Feb. 4, 1991, at 49.

5. The Department of Defense issued lists of “releasable” and “unreleasable” material, along with procedures for “security reviews” and interviews, on January 7, 1991. These in-

site censorship and limited access to battlefields through a "pooling" system hampered the efforts of the press to keep up with Scud missiles in the sky, oil slicks in the sea, and combat on the ground.⁶ Some reporters complained that pool reporting not only slowed the flow of information to the public, but also reduced the chances of getting either candid opinions or negative views from soldiers, thereby keeping the public from accurately assessing the war.⁷ Because all reporters received the same information, "scoops" were not possible, and the competitiveness of the members of the news industry was largely quelled.⁸ Above all, the media restrictions threatened the First Amendment's guarantee of freedom of the press.⁹

Members of the media went to court to voice their objections over the military's Guidelines for News Media and its Ground Rules.¹⁰ Several writers and publications, including *The Village Voice* and *The Nation*, filed suit on January 10, 1991. In *Nation Magazine v. United States Department of Defense*, the plaintiffs alleged that the Pentagon's denial of free battlefield access and the creation of media pools damaged their exercise of freedom of speech and freedom of the press and deprived them of equal protection under the law.¹¹ The plaintiffs also alleged that the

structions were revised with guidelines (procedures for press pool members) and ground rules (updated lists of "unreleasable" material) three times in two weeks. See *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1575-78, 1580-82 (S.D.N.Y. 1991) (apps. A, B, C, and E).

All restrictions were lifted on March 4, 1991, on informal cessation of hostilities. *Id.* at 1563.

6. The Department of Defense did not allow all interested correspondents to cover first-hand the hostilities in the Persian Gulf. The military formed press pools composed of representatives from media organizations, such as television networks and wire services, that met criteria set forth in the Pentagon's guidelines. CENTCOM Pool Membership and Operating Procedures (Jan. 30, 1991), reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79 (app. D.) [hereinafter "App. D"]. Pool members traveled through Saudi Arabia, Iraq, and Kuwait with military escorts.

7. Zoglin, *supra* note 3, at 45.

8. Richard Zoglin, *Jumping Out of the Pool*, TIME, Feb. 18, 1991, at 39.

9. "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

10. The military distributed Combat Correspondent Pool Media Ground Rules on January 3, 1991 [hereinafter CCP Ground Rules] [available on file at *Hastings Constitutional Law Quarterly*]. Their progeny, the Guidelines for News Media, CENTCOM Pool Membership and Operating Procedures, and Operation Desert Shield Ground Rules, appear in the appendices of *Nation Magazine*, 762 F. Supp. at 1575-82 (apps. A-E).

11. First Amended Complaint at 21, 28-29, *Nation Magazine*, 762 F. Supp. 1558 (S.D.N.Y. 1991).

In order to focus on broad First Amendment issues, this Article will not discuss the claims regarding discriminatory application of the Desert Storm pooling procedures.

For the approach of Judge Leonard B. Sand, who presided over the *Nation Magazine* case, see *Nation Magazine*, 762 F. Supp. at 1573-75. Judge Sand found that the government,

pools and "security reviews" of reports constituted a prior restraint and that disparate treatment of reporters by the government (including paid travel and expedited visas for pro-government correspondents) violated the First and Fifth Amendments.¹²

The court in the *Nation Magazine* case ruled that despite its "power to hear the case on the merits"¹³ because the issues were not moot,¹⁴ none of the plaintiffs' claims were eligible for the relief sought. The case was dismissed on April 16, 1991.

The plaintiffs sought injunctive and declaratory relief, including the following:

- (1) A preliminary injunction "barring defendants, for any reason other than *bona fide* security reasons, from hindering any member of the press in coverage of deployment and overt combat by United States forces and prohibiting defendants from excluding the press from areas where United States forces are deployed or engaged in combat;"

by establishing media pools to cover the war, rendered the Persian Gulf theater a "limited public forum," and the government therefore had to provide access to that forum in a nondiscriminatory manner. *Id.* at 1573 (citations omitted). Access may be limited, however, by reasonable time, place, and manner restrictions. *Id.* at 1574 (citations omitted). Judge Sand did not determine whether the pooling procedures were applied discriminatorily because the plaintiffs' prayer for relief lacked specificity. *Id.* at 1575. The plaintiffs stood by their demand for a declaration that the press should have unlimited unilateral access to combat areas. *Id.* Judge Sand had pressed the plaintiffs to propose specific remedial measures, "such as suggesting that any regulations must include provisions for a speedy administrative review process for those who claim they were improperly excluded from a pool" *Id.*

12. First Amended Complaint at 28-29, *Nation Magazine*, 762 F.Supp. 1558 (S.D.N.Y. 1991).

13. *Id.* at 1569.

14. "[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)). Even if an issue is no longer "live," it is not moot if it is "capable of repetition, yet evading review." *Id.* (quoting *Southern Pac. Terminal v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)).

Two elements must exist for the "capable of repetition, yet evading review" doctrine to apply:

- (1) "the challenged action must have been too short in duration to be fully litigated prior to its cessation or expiration," *id.*; and
- (2) "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)).

Applying the "capable of repetition, yet evading review" test to *The Nation's* complaint, the court did not find the case moot because (1) the Persian Gulf War ended too quickly for the judicial process to resolve the dispute over the media restrictions, and (2) "it is not unreasonable to suppose that in future military activities, [the Department of Defense] will behave in a manner that is susceptible to the same challenges as those raised in this complaint," and that *The Nation*, with a "long history of covering wartime stories, will be seeking to report the news during the next conflict." *Id.* at 1569.

(2) A permanent injunction "ordering defendants to provide the press access where U.S. forces are deployed or engaged in overt operations;"

(3) A permanent injunction "enjoining defendants from preventing, hindering, obstructing, delaying or exercising a prior restraint on conduct constituting freedom of the press by plaintiffs and other members of the U.S. press;"

(4) A declaration "that the defendants' policy, pattern and practice limiting, preventing, hindering, obstructing and delaying news-gathering and freedom of the press violate the constitutional rights of plaintiffs and the United States press"; and

(5) A declaration that "defendants' creation and promotion of a pool of journalists is unconstitutional."¹⁵

The judge ruled that the plaintiffs' claims for injunctive relief were moot.¹⁶ Because the Pentagon had lifted its media restrictions by the time *The Nation's* case was heard and the press was no longer constrained from traveling throughout the area of the war, "there [was] no longer any presently operative practice for [the c]ourt to enjoin."¹⁷ The court also ruled that the past injuries suffered by the press were inappropriate bases for injunctive relief.¹⁸ Under the Supreme Court's standard, injunctive relief is available when there is a danger of irreparable harm.¹⁹ In *Nation Magazine*, there was no threat of irreparable harm as the plaintiffs were then "able to gather and report news freely."²⁰

The court declined to rule on the two requests for declaratory relief because they were grounded in unclear issues. These claims for declaratory relief, based on the Department of Defense's use of media pools, were not moot because they were broad and "capable of repetition."²¹ The court found instead that the case did not present the First and Fifth Amendment issues in a "clean-cut and concrete form."²²

This "clean-cut" standard is derived from *Rescue Army v. Municipal Court*,²³ in which the United States Supreme Court considered the constitutionality of city ordinances governing the solicitation of charitable contributions in Los Angeles. The ordinances prohibited solicitation in specified public places "by means of any box or receptacle" except "by the express written permission of the Board [of Social Service Commis-

15. First Amended Verified Complaint at 30-31, *Nation Magazine*, 762 F. Supp. 1558 (No. 91 Civ. 0238 (LBS)).

16. *Nation Magazine*, 762 F. Supp. at 1570.

17. *Id.*

18. *Id.*

19. *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

20. *Nation Magazine*, 762 F. Supp. at 1570.

21. *Id.*

22. *Id.* at 1571 (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947)).

23. 331 U.S. 549 (1947).

sioners]” and only if the solicitor first filed a notice of intention with the Department of Social Service.²⁴ In addition, any person soliciting contributions had to exhibit an information card for potential contributors to see.²⁵

The complex procedural history of *Rescue Army* in the California state courts kept the United States Supreme Court from ruling on the alleged constitutional shortcomings of the ordinances. The Rescue Army was a religious group that solicited donations for charity as part of its religion.²⁶ One of the Rescue Army’s officers was arrested and charged with violating the Los Angeles ordinances that regulated soliciting.²⁷ He had been convicted twice under those ordinances, but both convictions had been reversed.²⁸ Rescue Army challenged the constitutionality of the ordinances under the First and Fourteenth Amendments and alleged that the ordinances imposed a prior restraint on, and unduly abridged its rights to, the free exercise of religion.²⁹

The United States Supreme Court refused to consider the constitutional questions for three reasons. First,

the constitutional issues [were presented] in highly abstract form. . . . The record presents only bare allegations that [the Rescue Army officer] was charged criminally with violating [the ordinances], and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations. We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial.³⁰

Second, the Court was unclear whether the officer was charged with two or three distinct offenses³¹ and was therefore precluded from ruling on the constitutionality of the regulation to be used to secure his conviction.³² Third, the Court found the California Supreme Court’s construction of the local licensing requirements to be ambiguous.³³ Together, these factors created so many uncertainties that the Court declined to exercise jurisdiction.³⁴

The *Nation Magazine* court declined to exercise its jurisdiction to declare the Desert Storm access restrictions unconstitutional because,

24. *Id.* at 553-54 (quoting LOS ANGELES, CA. MUN. CODE §§ 44.09(a) and (b)).

25. *Id.* at 554 (quoting LOS ANGELES, CA. MUN. CODE § 44.12).

26. *Id.* at 550.

27. *Id.*

28. *Id.* at 552.

29. *Id.* at 550.

30. *Id.* at 575.

31. *Id.*

32. *Id.* at 577.

33. *Id.* at 581.

34. *Id.* at 584.

just as the constitutional challenge against the city ordinances in *Rescue Army* had been "highly abstract,"³⁵ the claimed right of access to military operations has been an unsettled right compared to press access to such places as prisons, parks, and courtrooms.³⁶ Finding a First Amendment right "to gather and report news that involves United States military operations" and a right "to observe events as they occur" would have required the court to "chart[] new constitutional territory."³⁷ The court wrote:

In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access. 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. *See Rescue Army*, 331 U.S. at 575-85. 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.³⁸

Had the *Nation Magazine* court adjudicated the case, it would have found ample evidence to rule that the Department of Defense had violated the First Amendment. Two types of obstacles impeded the freedom of the press: prior restraints and denial of access. The court would have had to invoke strict scrutiny to evaluate the Pentagon's treatment of the press, thereby placing a heavy burden on the government to justify its restrictive actions.³⁹ To evaluate such justifications in the past, the Supreme Court has weighed the interests of national security against the historical rights of the press.⁴⁰

35. *Id.* at 575.

36. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991); *see Pell v. Procunier*, 417 U.S. 817, 830-31 (1974) (stating that the press has no general access to state prisons); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (holding that the press has no general access to federal prisons); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (affirming that the public has general access to parks); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (stating that the press has access to criminal trials).

37. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1571 (S.D.N.Y. 1991).

38. *Id.* at 1572.

39. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (stating that system of prior restraints "comes to this Court bearing a heavy presumption against its constitutional validity") (quoting *Bantam Book v. Sullivan*, 372 U.S. 58, 70 (1963)); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (denying that the right of access must be "necessitated by a compelling governmental interest").

40. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 577 (1980) (holding that the First Amendment assures access of press to places traditionally open to public); *Near v.*

I. Censorship in War

A. From the Civil War to Grenada

Under conditions of war, the United States government has often sought to censor news reports in the name of national security and to make restrictions tighter as the sources of communication have crept closer to battle zones. During the first year of the Civil War, the Union Army and members of the press agreed on a set of voluntary censorship guidelines. The Northern military asked newspaper editors to refrain from publishing "any matter that may furnish aid and comfort to the enemy."⁴¹ In contrast, the Confederate government stringently censored Southern newspapers.⁴² During World War I, President Woodrow Wilson's Committee on Public Information asked that newspapers voluntarily not print advance reports about troop strengths, troop and ship movements, anti-aircraft defenses, and harbor defenses.⁴³ At the front, where reporters sometimes lived permanently with the soldiers,⁴⁴ newspaper writers were required to secure the prior approval of government censors before transmitting their copy by cable or delivering it through the mail.⁴⁵

Similar domestic and front-line constraints hindered reporters during World War II, although they had substantial access to combat areas. The U.S. Office of Censorship's Code of Wartime Practices, effective January 15, 1942,⁴⁶ requested that newspapers not publish sensitive information about troop, plane, and ship movements, fortifications, weather conditions, casualty lists, damage by enemy attack, transportation of war materials, and movements of U.S. officials abroad.⁴⁷ Correspondents in the field had to agree to submit all their copy to military censors in order to be accredited.⁴⁸ Once accredited, however, reporters roamed freely.

Minnesota, 283 U.S. 697, 716 (1931) (stating that prior restraints may be imposed in interests of national security).

41. 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, 372-73 (1985) (quoting FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 228 (H. Nelson ed., 1967)).

The government also suspended the operations of newspapers it considered to be undermining the war effort, and it forbade publications containing supposedly "disloyal content" from using the mails. *Id.* at 373.

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

43. Homonoff, *supra* note 41, at 373-74.

44. *Id.* at 381.

45. *Id.* at 376.

46. Gottschalk, *supra* note 42, at 40.

47. Homonoff, *supra* note 41, at 377; see also Cross & Griffin, *supra* note 1, at 999 n.66.

48. Cross & Griffin, *supra* note 1, at 999.

Correspondents accompanied the troops invading North Africa and Sicily, witnessed the Battle of Iwo Jima from ships and planes and on the ground, and landed with the invasion forces at Normandy on D-Day.⁴⁹

After the Korean War, censorship restrictions eased on war correspondents until the invasion of Grenada in 1983. As the war in Korea escalated, reporters at the front had to submit all proposed stories to censors at Army headquarters.⁵⁰ In Vietnam, however, correspondents received credentials from U.S. military authorities in exchange for a signed pledge to adhere to security guidelines.⁵¹ Reporters agreed not to release such information as future plans, operations, or strikes; unit designations and troop movements during an operation; the exact number and types of casualties or damage suffered by friendly units; or aerial photos of fixed installations.⁵² Over 2000 members of the news media reported from Vietnam,⁵³ and they enjoyed nearly unrestricted mobility. Access to observe battles was granted at the discretion of field commanders, who rarely denied access.⁵⁴ During the war, only six correspondents violated security regulations seriously enough to lose their accreditation.⁵⁵

Despite the media's record of respect for national security during wartime, the Reagan Administration excluded representatives of the media from Grenada for the first two days of the invasion of that island on October 25 and 26, 1983.⁵⁶ The United States invasion aimed to secure the safety of Americans in Grenada and to help restore "law and order and responsive governmental institutions" to the island.⁵⁷ Military officials imposed a media blackout by refusing to transport the press to Grenada, by turning away chartered press boats, and by removing any

49. *Id.* at 997 n.55, 998.

50. Homonoff, *supra* note 41 at 379. Accounts of the Korean conflict are inconsistent about the degree of enforcement of the censorship procedures. See Matthew J. Jacobs, Note, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 683 (1992).

51. Roger W. Pincus, Comment, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813, 838 n.162 (1987).

52. *Excerpts from Rules Governing Public Release of Military Information*, Reports Committee for Freedom of the Press, §§ 1, 4, 6, 15 (Oct. 31, 1966 and Mar. 29, 1967) (copy on file with the author).

53. Gottschalk, *supra* note 42, at 49.

54. Homonoff, *supra* note 41, at 379; *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1563 (S.D.N.Y. 1991).

55. Homonoff, *supra* note 41, at 379.

56. Pincus, *supra* note 51, at 813. The decision to exclude the press reportedly was made by the invasion task force commander with the Secretary of Defense and the White House declining to overrule him. *Id.* at 841-42.

57. *Id.* at 843 n.181.

reporters who had reached the island.⁵⁸ These measures were designed to achieve military surprise, to permit the invasion force to concentrate on military objectives without the supposed distraction or physical obstruction caused by the press, to avoid allocating troops to protecting reporters, and to avoid the difficulty of selecting media pools to accompany the troops from the 1800 reporters accredited by the White House.⁵⁹ When most of the operation was completed by the third day, the military transported seven correspondents to the island.⁶⁰ By November 7, almost two weeks after the invasion began, all travel restrictions were lifted.⁶¹ On October 28, 1983, publisher Larry Flynt and others filed suit against the government for prohibiting press coverage of the initial stages of the invasion.⁶²

Unlike the relief sought by *The Nation*, which called for a broad application of the First and Fifth Amendments beyond the immediate circumstances of Desert Storm, the relief sought in *Flynt* was limited to the U.S. government's actions toward the press on Grenada. Flynt wanted an injunction prohibiting Secretary of Defense Caspar Weinberger and other government officials from "preventing or otherwise hindering Plaintiffs from sending reporters to the sovereign nation of Grenada to gather news" ⁶³ Flynt also sought a declaration that "the course of conduct engaged in by Defendants, . . . in preventing Plaintiffs, 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 [sic] laws, and treaties of the United States. . . . [sic]" ⁶⁴

The requests for both injunctive and declaratory relief were found moot.⁶⁵ Because all travel restrictions to Grenada were rescinded on November 7, 1983, and the military action on the island ended by December 15, 1983, the court found the request for injunctive relief "clearly

58. *Id.* at 813 n.3.

59. *Id.* at 813; Cross & Griffin, *supra* note 1, at 1005. The U.S. government traditionally formed press pools by determining what categories of news media (e.g., television) should be represented and having the reporters themselves choose representatives from each category. *Flynt v. Weinberger*, 588 F. Supp. 57, 58 n.1 (D.D.C. 1984), *aff'd but vacated on other grounds*, 762 F.2d 134 (D.C. Cir. 1985) (per curiam).

60. The seven correspondents permitted to enter Grenada on October 27, 1983, were chosen according to the traditional pooling method. The U.S. government decided the categories of news media that would be allowed on the island and the press corps selected representatives from each category. *Flynt*, 588 F. Supp. at 58 n.1.

61. *Id.* at 58.

62. *Id.*

63. *Id.* (quoting Plaintiff's complaint).

64. *Id.*

65. *Flynt v. Weinberger*, 762 F.2d 134, 135 (D.C. Cir. 1985) (per curiam).

moot.”⁶⁶ The request for declaratory relief was determined to be moot because the plaintiffs sought a declaratory judgment “solely with respect to the constitutionality of the press ban in Grenada,” making the issues raised in the complaint “no longer ‘live.’”⁶⁷ The case was not “capable of repetition, yet evading review” because there was “no ‘reasonable expectation’ that the Grenada controversy would recur.”⁶⁸

Having escaped legal challenge for its treatment of the press on Grenada, the military developed the concept of pooling the media to cover future military operations. The Sidle Report, written by the Chairman of the Joint Chiefs of Staff Media-Military Relations Panel in August 1984, made several recommendations in the wake of the Grenada invasion. These suggestions included planning media coverage of military actions concurrently with planning the action itself, providing for a press pool when circumstances warrant, developing an accreditation system for correspondents, and encouraging voluntary compliance by the media with security guidelines similar to those guidelines used in Vietnam.⁶⁹ The

66. *Id.*

67. *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

68. *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). The trial court noted, “The invasion of Grenada was, like any invasion or military intervention, a unique event. Its occurrence required a combination of geopolitical circumstances not likely to be repeated.” *Flynt v. Weinberger*, 588 F. Supp. 57, 59 (D.D.C. 1984).

This reasoning, however, has been attacked as flying in the face of First Amendment precedent:

[The *Flynt* decisions are] clearly at odds with established First Amendment jurisprudence. The district court judge gave the field commander total authority to curb or even ban the press. The court set no standard by which the government would have to justify its decision, and even suggested the government need not justify its decision at all. Clearly, the government should have been forced to present its justifications to the court, even if the regulations were valid.

Jacobs, *supra* note 50, at 716 (citations omitted).

Although the plaintiffs’ complaint is mostly to blame for the *Flynt* court’s narrow focus, the *Nation Magazine* court expressed a general judicial reluctance to find that all wars are alike and that particular wartime restrictions on the press will recur. The *Nation Magazine* court asked,

Who today can even predict the manner in which the next war may be fought? . . . If there is a certain lesson that Desert Storm has taught us, it is that the nature of warfare has changed radically as a result of new technology. There is little similarity between the Vietnam War and Desert Storm. The traditional battlefield of the two World Wars and of Vietnam may be a phenomenon of the past.

Nation Magazine v. United States Dep’t of Defense, 762 F. Supp. 1558, 1574-75 n.16 (S.D.N.Y. 1991).

Some critics may argue that this reasoning is a shield of insincerity held by the courts to deflect constitutional attacks from government policy. Charges of insincerity aside, future press-access plaintiffs must prepare to penetrate the “no two wars are alike” shield, using broad First Amendment complaints sufficiently sharpened to slice through the *Rescue Army* argument. *See id.* at 1575.

69. *Troops To Take Media Into Battle*, NEWS MEDIA & L., Nov./Dec. 1984, at 43-44.

military put some of these ideas into play within the next few years. After forming its first press pool in October 1984,⁷⁰ the Pentagon allowed only pool-assigned reporters to cover the U.S.-Honduras military exercises in April 1985,⁷¹ the hostilities with Libya in March 1986,⁷² the U.S. Navy Convoy operations in the Persian Gulf in July 1987,⁷³ and the invasion of Panama in December 1989.⁷⁴

B. "Storms" and "Pools" in the Desert

Pools may have been familiar, therefore, to the 700⁷⁵ to 1100⁷⁶ journalists reporting from the Gulf, although the selection process they faced was new. The military granted pool membership mostly to media organizations rather than to individuals⁷⁷ with the result that fewer than one in seven applicants received admission to a pool.⁷⁸ Most organizations had to meet two initial criteria: they must have belonged to "media that principally serve[d] the American public and that [had] a long-term presence covering Department of Defense military operations."⁷⁹ The military divided pool positions into nine categories of media: television, radio, wire service, news magazine, newspaper, pencil, photo, Saudi, and international.⁸⁰ An organization could participate in pool activities "af-

70. Jacobs, *supra* note 50, at 685.

71. Cross & Griffin, *supra* note 1, at 1047.

72. Philip Shenon, *Reporters' Pool Kept from Action*, N.Y. TIMES, Mar. 26, 1986, § 1, at 7.

73. Cross & Griffin, *supra* note 1, at 1047 n.364.

74. *Id.* at 1048.

A Defense Department spokesman has acknowledged, however, that in Panama, pools arrived too late and got too little coverage of the battle. Elaine Sciolino, *Voice of the Pentagon Delivers Press Curbs with a Deftness Honed on TV*, N.Y. TIMES, Feb. 8, 1991, at A9. Criticism of the military's treatment of the press during the Panama invasion helped create another panel, this one chaired by Fred S. Hoffman, a Pentagon spokesman under President Reagan. Hoffman's committee concluded that the press should receive more freedom to cover military operations. Jacobs, *supra*, note 50, at 685.

75. Zoglin, *supra* note 3, at 45.

76. Sciolino, *supra* note 74.

77. App. D., *supra* note 6, at 1578. Specific individuals received membership in the "pencil" category, that is, print reporters who did not write for a newspaper, wire service, or news magazine. *Id.*

The military based media pool membership on affiliation with an organization "[b]ecause of the extensive media presence in the Arabian Gulf, the fact that some media organizations are represented by many individuals, and the likelihood that more organizations and individuals will arrive in the future [after Jan. 30, 1991, when these procedures went into effect]." *Id.*

78. Malcolm W. Browne, *The Military vs. The Press*, N.Y. TIMES, Mar. 3, 1991, § 6 (Magazine), at 26, 28.

79. App. D., *supra* note 6, at 1578.

Media organizations that did not principally serve the American public qualified to participate in the international media pool. *Id.*

80. *Id.* The number of media categories expanded to accommodate the growing number of correspondents arriving in the Persian Gulf to cover the hostilities. During Desert Shield,

ter being a member of the appropriate media pool category for three continuous weeks," which apparently meant it had stayed in Saudi Arabia for at least three consecutive weeks.⁸¹

The composition and size of the pools changed as the war progressed. Membership in the pools was supposed to rotate every two or three weeks.⁸² At the start of the war, eleven pools covered actual combat, with a total of ninety-nine reporters, photographers, and camera operators assigned to the field.⁸³ As the war advanced, the military allowed more journalists onto the battlefields and expanded the types of pools. Eighteen-member pools reported on ground combat and seven-member pools focused on ground combat and other coverage.⁸⁴ About 200 reporters accompanied the troops during the invasion of Kuwait.⁸⁵

Eligibility for pool membership was essential to obtaining the latest-breaking information about action in the Gulf for two reasons. First, any pool member's work, including written reports, photographs, and videotape, became the property of all pool participants and media organizations eligible to join the pools.⁸⁶ Correspondents shared their work among all of the representatives of their own medium. For example, all television pool members shared video footage.⁸⁷ "In effect," one reporter wrote, "each pool member [became] an unpaid employee of the Department of Defense, on whose behalf he or she prepare[d] the news of the war for the outer world."⁸⁸ Non-pool media representatives inhabited this "outer world," for they did not receive pool reports.⁸⁹ In addition, non-pool reporters risked violating camp security if they ventured onto the field. The Pentagon warned non-pool reporters:

News media personnel who are not members of the official . . . media pools will not be permitted into forward areas. Reporters

there were only four media-specific pools: television, radio, print, and photo. CCP Ground Rules, *supra* note 10, at 2, § 1.G. (Jan. 3, 1991).

81. App. D., *supra* note 6, at 1578. Jacobs, *supra* note 50, at 691 n.100. Journalists from outside the United States who wanted to cover the U.S.-led military efforts had to follow the U.S. military's press restrictions. It is doubtful that the First Amendment protected foreign reporters from these restrictions, especially in light of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), which denied Fourth Amendment protection to citizens of other countries from unconstitutional searches and seizures. Jacobs, *supra* note 50, at 691 n.100.

82. App. D., *supra* note 6, at 1579.

83. Galloway, *supra* note 4.

84. App. D., *supra* note 6, at 1578.

85. Richard Zoglin, *It Was a Public Relations Rout Too*, TIME, Mar. 11, 1991, at 56, 57.

86. App. D., *supra* note 6, at 1579.

87. *Id.*

88. Browne, *supra* note 78, at 29. See *infra* part III.B.3 for discussion of possible takings issues (text accompanying notes 258-73).

89. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1564 (S.D.N.Y. 1991).

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.⁹⁰

Although pool members were welcome in combat areas, they could not travel freely. They had to remain with a military escort at all times and follow the escort's instructions. Such instructions were "not intended to hinder . . . reporting. They [were] intended to facilitate troop movement, ensure safety, and protect operational security."⁹¹ The pool arrangement also restricted reporters largely to specified trips arranged by military officials.⁹² Correspondents were not allowed to live with military units, but rather had to rotate in and out of camps with military escorts.⁹³ There were no formal penalties for violating the rules, but U.S. military officials reported some offenders to the Saudi Arabian government, which temporarily revoked their press credentials.⁹⁴

The military sometimes prevented pools from covering events as they unfolded, raising the same kind of access complaints heard in Grenada. For example, pool reporters were not allowed into the town of Khafji until eighteen hours after the fighting there had begun.⁹⁵ The best information on that battle came from two French TV crews and a British news team who entered Khafji well before American pool camera crews.⁹⁶ A British crew also captured some of the first pictures of the Iraqi-caused oil slick in the Persian Gulf two days before U.S. pool cameras arrived at the scene.⁹⁷

When pool reporters did have timely access to events, a public affairs officer of the Department of Defense at the scene subjected the stories to a security review "to determine if they contain[ed] sensitive information about military plans, capabilities, operations, or vulnerabilities . . . that would jeopardize the outcome of an operation or the safety of U.S. or coalition forces."⁹⁸ Information that was "not releasable" included pinpoint datelines ("[n]o specific locations will be used when filing . . . stories"); specific numbers of troops and aircraft; news about future operations; photography that revealed the name or specific location of

90. Guidelines for News Media (Jan. 14, 1991), *reprinted in Nation Magazine*, 762 F. Supp. at 1577 (app. C.) [hereinafter "App. C."].

91. CCP Ground Rules, *supra* note 10, at 1, § 1.B.

92. Zoglin, *supra* note 3, at 44.

93. Sciolino, *supra* note 74.

94. Zoglin, *Jumping Out of the Pool*, *supra* note 8.

95. *Id.*

96. *Id.*

97. *Id.*

98. App. C, *supra* note 90, at 1577.

military forces or showed the level of security at military installations or encampments; reports on the effectiveness or ineffectiveness of enemy "camouflage, cover, deception, targeting, direct and indirect fire, intelligence collection, or security measures"; and "[d]uring an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational security or lives."⁹⁹ If disagreements arose between correspondents and public affairs officers about material to be censored, the director of the Joint Information Bureau in Dhahran and the media representative would review the material in question.¹⁰⁰ Unresolved issues would go to the Office of the Assistant Secretary of Defense for Public Affairs for review with the appropriate bureau chief, with the originating reporter's news organization making the ultimate decision on publication.¹⁰¹

The extensive web of censorship procedures sometimes snared information that it ostensibly was not designed to catch. The Guidelines for News Media stated, "Material will be examined solely for its conformance to the . . . ground rules, not for its potential to express criticism or cause embarrassment."¹⁰² Nevertheless, Assistant Secretary of Defense for Public Affairs Louis A. (Pete) Williams told the Senate Governmental Affairs Committee that some reporters had been denied interviews because military officials regarded the reporters' coverage as "unfavorable."¹⁰³ A reporter for *The Detroit Free Press*, who wanted to describe pilots as "giddy" after returning from early bombing missions, saw security officers change the description to "proud"; they compromised on "pumped up."¹⁰⁴ Some information the military tried to keep to itself. For instance, a military spokesman refused to acknowledge the capture of some American pilots even after they appeared on Iraqi television.¹⁰⁵

When Defense Department officials permitted the release of a report, sometimes approval came too late, either rendering the story unnewsworthy or allowing others to pick up the news. Some reports for the *Wall Street Journal* withstood delays up to sixty hours.¹⁰⁶ After a *New York Times* reporter complied with a request not to report that Ameri-

99. Operation Desert Shield Ground Rules (Jan. 14, 1991), reprinted in *Nation Magazine*, 762 F. Supp. at 1581-82 (app. E) [hereinafter "App. E"].

100. App. C, *supra* note 90, at 1577-78.

101. *Id.* at 1578.

102. *Id.* at 1577.

103. Richard L. Berke, *Pentagon Defends Coverage Rules, While Admitting to Some Delays*, N.Y. TIMES, Feb. 21, 1991, at A14.

104. Jonathan Alter, *Showdown at "Fact Gap,"* NEWSWEEK, Feb. 4, 1991, at 61.

105. *Id.*

106. Howard Kurtz, *Pentagon Aims to "Discourage" Restrictions on Media*, WASHINGTON POST, Feb. 21, 1991, at A28.

can pilots believed they had destroyed Iraq's nuclear weapons facilities, first Agence France-Presse and then General Schwartzkopf released the information over the next two days.¹⁰⁷

On the domestic front, the military banned the media and the rest of the public from observing soldiers' coffins arriving from the Gulf at Dover Air Force Base in Delaware. When the buildup of troops in the Persian Gulf began in the fall of 1990 and Dover served as a supply depot, members of the press regularly reported from the base under escort by a public affairs officer.¹⁰⁸ Arguing that this past practice made Dover a limited public forum for press access with an escort,¹⁰⁹ the press sought access to the runways where the airplanes bearing the bodies arrived and to the hangars where the Air Force stored the caskets.¹¹⁰

The Defense Department argued that Dover was a nonpublic forum so that government regulation of speech on the base need only be reasonable and viewpoint-neutral.¹¹¹ The military said that its regulations did not suppress a particular point of view because "[e]veryone ha[d] been excluded from the base."¹¹² Such a policy was reasonable because it prevented a diversion from the base's mission as a primary departure point for supplies to the Persian Gulf.¹¹³ In addition, the military argued that holding public honor ceremonies for returning casualties would

107. Browne, *supra* note 78, at 45.

108. *J.B. Pictures, Inc. v. Department of Defense*, No. 91-397, at 3 (D.D.C. Mar. 8, 1991).

109. *Id.* at 7. When ruling on limitations to free speech on public property, courts apply a three-tiered analysis to determine the standard under which it must evaluate those limitations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *United States v. Kokinda*, 110 S. Ct. 3115 (1990).

(1) Public sites traditionally used for assembly and communication, such as parks and streets, are obviously public property. *Perry*, 460 U.S. at 45. To restrict speech based on content in such a forum, the government must prove its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Id.* The government may regulate the time, place, and manner of expression in traditional public fora if the regulations are content neutral, narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. *Id.*

(2) The second category of public property is a site opened by the State "for use by the public as a place for expressive activity," such as university meeting facilities, school board meetings, and municipal theaters. *Id.* at 45. Courts will evaluate regulations on speech in such a forum as if it were a traditional public forum. *Id.* at 46.

(3) The third classification of public property is a site "not by tradition or designation a forum for public communication," which requires different First Amendment standards. *Id.* at 46. In addition to time, place, and manner restrictions, the government may "reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

110. *J.B. Pictures*, No. 91-397, at 4.

111. *Id.* at 13; see *Perry*, 460 U.S. at 46.

112. *J.B. Pictures*, No. 91-397, at 17.

113. *Id.* at 15.

compel "families of servicemen . . . to travel to Dover. . . . The military had good reasons for not wanting to put that burden on families that were already suffering and grieving."¹¹⁴ The plaintiffs claimed that the purpose behind the exclusion of the public was to prevent news coverage of the soldiers killed in the war.¹¹⁵

The press lost its argument for a preliminary injunction against the restrictions at Dover. The United States District Court for the District of Columbia held that the press did not show a substantial likelihood of success on the merits that its exclusion from covering the arrival of military casualties violated the First Amendment.¹¹⁶ The court ruled that Dover Air Force Base is not a public forum, that the regulations were viewpoint-neutral, and that the regulations were reasonable.¹¹⁷ Agreeing with the government, the court said that allowing public access to the base "would detract from the security function at Dover . . . because of the emotional situation that is created by the presence of bodies"¹¹⁸

Like the regulations at Dover, the battlefield restrictions on the press also took into account the emotions of the families of fallen soldiers, although the justifications for the restrictions changed as Desert Shield became Desert Storm. One of the first sets of media ground rules during Desert Shield was "designed to (1) protect the security and the safety of service members, (2) protect next of kin sensitivities with regard to wounded and killed service members, and (3) allow CCP [combat correspondent pool] members the greatest permissible freedom and access in covering operations."¹¹⁹ During Desert Storm, the purpose behind the pools was "to get media representatives to and from the scene of military action, to get their reports back to the Joint Information Bureau—Dhahran for filing—rapidly and safely, and to permit unilateral media coverage of combat and combat-related activity as soon as possible."¹²⁰ The Department of Defense formed the media pools to

balance the media's desire for unilateral coverage with the logistics realities of the military operation, which make it impossible for every media representative to cover every activity of his or her

114. *Id.* at 16.

115. *Id.* at 8.

116. *Id.* at 24-25. Ruling on the other requirement for a preliminary injunction, the court found that the plaintiffs would not be irreparably injured without the injunction. *Id.* at 28.

117. *Id.* at 27.

118. *Id.* at 27-28.

119. CCP Ground Rules, *supra* note 10, at 1, preamble.

120. App. D, *supra* note 6, at 1578.

"Unilateral coverage" is the Department of Defense's antonym for "pool coverage." *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1564 n.6 (S.D.N.Y. 1991).

choice, and with [the military's] responsibility to maintain operational security, protect the safety of the troops, and prevent interference with military operations.¹²¹

According to Pete Williams, the chief spokesman for the Department of Defense, "The goal of the system isn't to deprive anyone of news. . . . It's simply to discourage information that would jeopardize military operations and endanger human lives—pure and simple."¹²²

One author has generalized into three categories the government's interests in the security reviews and pooling procedures. The categories are:

- (1) logistics, including protecting reporters and "preparing a viable battle plan";
- (2) surprise, requiring safeguarding information from the enemy; and
- (3) the morale of troops and the public.¹²³

The author formed these generalizations because "neither legislative history nor major statements by members of the executive branch offer an explanation for these rules [for prepublication reviews and access restrictions]."¹²⁴ On the contrary, the government's official reasons for imposing restraints on the media appear in the many versions of the guidelines and ground rules handed to reporters.¹²⁵ The unofficial explanation—the goal of discouraging information—came from the Pentagon's own spokesperson.¹²⁶

II. The Constitution and the Press

A. Censorship and National Security

Given the Department of Defense's rationale, may the government curtail freedom of the press in the name of national security, specifically to protect the lives of troops fighting a war? The U.S. Supreme Court first offered an affirmative opinion, albeit dictum, regarding censorship provisions, in the 1931 case *Near v. Minnesota*.¹²⁷ In that case, the Court struck down a Minnesota statute stating that any person "engaged in the business of regularly . . . producing, publishing or circulating . . . an obscene, lewd and lascivious newspaper, magazine or other periodical, or . . . a malicious, scandalous and defamatory newspaper, magazine or

121. App. D, *supra* note 6, at 1578.

122. Sciolino, *supra* note 74.

123. Jacobs, *supra* note 50, at 693-94.

124. Jacobs, *supra* note 50, at 693 n.112.

125. *See supra* notes 120-22 and accompanying text.

126. *See supra* note 122 and accompanying text.

127. 283 U.S. 697, 716 (1931).

other periodical, is guilty of a nuisance, and . . . may be enjoined.”¹²⁸ Holding that the statute suppressed the offending publication rather than merely punishing the publisher,¹²⁹ and that it also put the publisher under an “effective censorship,”¹³⁰ the Court found the statute “to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.”¹³¹ Such liberty is not, however, unqualified. “The protection . . . as to previous restraint is not absolutely unlimited,” the *Near* Court wrote.¹³² Among the Court’s four exceptions to freedom from prior restraints was the protection of 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.” *Schenck v. United States*, 249 U.S. 47, 52 (1919). No 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.¹³³

Forty years later, the Supreme Court directly confronted the issue of First Amendment restrictions in a military situation in the “Pentagon Papers” case, *New York Times Co. v. United States*.¹³⁴ While the war in Vietnam dragged on, the federal government requested that the Court enjoin *The New York Times* and *The Washington Post* from continuing to publish the contents of a classified Defense Department study entitled “History of U.S. Decision-Making Process on Viet Nam Policy.”¹³⁵ The government argued that publication of further installments would present a “grave and immediate danger” to U.S. security.¹³⁶ In a *per curiam* decision, the Court held that “[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity.”¹³⁷ The government had “‘a heavy burden of showing justification for the imposition of such a restraint,’ ”¹³⁸ and the Court ruled that the

128. *Id.* at 702 (quoting MINN. STAT. §§ 10123-1 to 10123-3 (Mason’s 1927)).

129. *Id.* at 711.

130. *Id.* at 712.

131. *Id.* at 723.

132. *Id.* at 716.

133. *Id.* The other three exceptions were obscenity, “incitements to acts of violence and the overthrow by force of orderly government,” *id.*, and the utterance of words “‘that may have all the effect of force.’ ” *Id.* (quoting *Gompers v. Bucks Stove & Range*, 221 U.S. 418, 439 (1911)).

134. 403 U.S. 713 (1971) (*per curiam*).

135. *Id.* at 714.

136. *Id.* at 741 (Marshall, J., concurring) (quoting the Brief for the United States at 7).

137. *New York Times*, 403 U.S. at 714 (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)).

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

government failed to meet that burden in this instance.¹³⁹

Because six Justices filed separate concurring opinions and three Justices dissented,¹⁴⁰ no clear standard for evaluating wartime censorship emerged from the Pentagon Papers case. Justices Black and Douglas both denounced prior restraints in absolute terms. Black wrote, "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."¹⁴¹ Douglas, in his concurring opinion, said, "[t]he First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press."¹⁴²

Justices Brennan and Stewart both found room within the First Amendment for restraints grounded in national security.¹⁴³ In *New York Times*, Brennan faulted the government for merely claiming that publication of the Pentagon Papers "might" compromise the national interest.¹⁴⁴ He demanded a higher degree of certainty: "[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."¹⁴⁵ Stewart's test also required stronger proof of an impending breach of security. To allow a prior restraint, a judge must be able to find "that disclosure . . . will surely result in direct, immediate, and irreparable damage to our Nation or its people."¹⁴⁶

Brennan, combining his ideas with Stewart's from *New York Times*, wrote a concurring opinion in *Nebraska Press Assoc. v. Stuart*¹⁴⁷ to form what may be viewed as the majority opinion of the Pentagon Papers case.¹⁴⁸ With Marshall and Stewart joining, Brennan wrote that the "military security" exception to the First Amendment's prohibition against prior restraints was to be construed "very, very narrowly."

139. *Id.*

140. *Id.* at 714 (Black, J., concurring), 720 (Douglas, J., concurring), 724 (Brennan, J., concurring), 727 (Stewart, J., concurring), 730 (White, J., concurring), 740 (Marshall, J., concurring), 748 (Burger, C.J., dissenting), 752 (Harlan, J., dissenting), 759 (Blackmun, J., dissenting).

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

142. *Id.* at 720 (quoting U.S. CONST. amend I).

143. *Id.* at 726-27 (Brennan, J., concurring), 727-30 (Stewart, J., concurring).

144. *Id.* at 725 (Brennan, J., concurring).

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

146. *Id.* at 730 (Stewart, J., concurring).

147. 427 U.S. 539, 572 (1976) (Brennan, J., concurring). *Nebraska Press* involved a successful challenge to a Nebraska prosecutor's efforts to restrain press coverage in a highly publicized murder case.

148. Homonoff, *supra* note 41, at 392.

Specifically:¹⁴⁹

when disclosure “will surely result in direct, immediate, and irreparable damage to our Nation or its people,” . . . or when there is “governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea [But] [i]n no event may mere conclusions be sufficient.”¹⁵⁰

With Brennan, Stewart, and Marshall in agreement, and speculating that Black and Douglas, who would prefer absolute protection, would support “first amendment protections at least as strong as those in the direct damage test,”¹⁵¹ one commentator claimed that “the direct damage test can be regarded as the majority interpretation of the Pentagon Papers case.”¹⁵²

The federal government has satisfied the direct damage test only once, in a case involving the publication of a magazine article on how to design a hydrogen bomb.¹⁵³ In *United States v. Progressive, Inc.*, the court held that the article, entitled “The H-Bomb Secret: How We Got It, Why We’re Telling It,”¹⁵⁴ “could possibly provide sufficient information to allow a medium size nation to move faster in developing a hydrogen weapon.”¹⁵⁵ Citing alternate grounds, the court granted the government’s request for a preliminary injunction preventing publication of the article. First, the government met its burden of proof under the Atomic Energy Act of 1954 to prohibit communication of “restricted data” that could “injure the United States or . . . secure an advantage to any foreign nation.”¹⁵⁶ Even in the absence of statutory authorization, the court would have granted the preliminary injunction “because of the existence of the likelihood of direct, immediate and irreparable injury to our nation and its people.”¹⁵⁷

149. *Nebraska Press*, 427 U.S. at 593.

150. *Id.* at 593 (Brennan, J., concurring) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring), 726-27 (Brennan, J., concurring)).

151. Homonoff, *supra* note 41, at 392.

152. *Id.*

153. *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

154. *Id.* at 991.

155. *Id.* at 993.

156. *Id.* at 994 (quoting 42 U.S.C. § 2274 (1976)).

157. *Id.* at 1000 (citing *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring); *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). The injunction lasted seven months. No appellate court heard the First Amendment issue because the government dropped the case after another publication printed the atomic bomb “secret.” Jacobs, *supra* note 50, at 702.

With regard to two specific types of people—military personnel and intelligence agents—the government may satisfy a lesser standard in order to suppress information that may damage military preparedness or national security.¹⁵⁸ In *Priest v. Secretary of the Navy*, the Navy court-martialed a seaman apprentice for publishing newsletters in the spring of 1969 calling on fellow sailors to resist the war in Vietnam.¹⁵⁹ One newsletter provided addresses of groups in Canada that aided military deserters.¹⁶⁰ These publications violated Article 134 of the Uniform Code of Military Justice, which prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces.”¹⁶¹ Reviewing the instructions given to the court-martial, the court declared that the proper standard of review was whether “the publication, under the circumstances, tended to interfere with responsiveness to command or to present a clear danger to military loyalty, discipline, or morale.”¹⁶²

The government may impose restraints on publications written by CIA agents who have a fiduciary duty to submit for prepublication review any proposed publication about certain agency activities.¹⁶³ One such publication was *Decent Interval*, a book written by Frank W. Snapp III, a senior analyst for the CIA who was one of the last Americans evacuated from the American embassy when Saigon fell on April 30, 1975.¹⁶⁴ The book described the final days of the American presence in Saigon and criticized the CIA’s evacuation plan.¹⁶⁵ As an express condition of his employment, Snapp had agreed that he would not publish “any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency.”¹⁶⁶ Upon leaving the agency in 1976, Snapp signed another agreement “never” to reveal “any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his rep-

158. See *Priest v. Secretary of the Navy*, 570 F.2d 1013 (D.C. Cir. 1977); *Snapp v. United States*, 444 U.S. 507 (1980).

159. 570 F.2d at 1014-15.

160. *Id.* at 1015.

161. 10 U.S.C. § 934 (1988).

162. *Priest*, 570 F.2d at 1017. See also *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Parker v. Levy*, 417 U.S. 733, 759 (1974).

163. *Snapp*, 444 U.S. at 510; *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972).

164. FRANK SNAPP, *DECENT INTERVAL* 547-48 (1977).

165. See generally *id.* See also RONALD ROTUNDA ET. AL., 3 TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE 79 n.33 (1986).

166. *Snapp*, 444 U.S. at 508.

representative.”¹⁶⁷ The government sued to enforce the agreements.

The Supreme Court imposed a “reasonable means and substantial ends” standard to evaluate the CIA’s rights.¹⁶⁸ The Court held that the agreements signed by Snepp were “a reasonable means for protecting” the government’s interest.¹⁶⁹ Even absent the agreement, “the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment.”¹⁷⁰ The government had 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.”¹⁷¹

The Court denied that Snepp’s agreement was a form of censorship. It said Snepp’s contract called for “no more than a clearance procedure subject to judicial review.”¹⁷² The Court presumed that if Snepp had submitted his manuscript to the CIA for review and the CIA found that it contained sensitive material, Snepp and the agency would have worked together to prevent harmful disclosures.¹⁷³ Without such a cooperative agreement, the CIA would have had to secure an injunction against publication.¹⁷⁴ Because of the contract agreements, the Court imposed a constructive trust on Snepp’s profits from the book.¹⁷⁵

By keeping its analysis within the confines of Snepp’s contract agreements, the Court devised a narrow rule. When individuals, such as government employees, receive governmental information to which they have no constitutional right of access, the government may restrict the use of such information when:

- (1) Those persons in fact agree not to discuss or disclose the information;
- (2) The agreement is a narrow means of promoting governmental interests unrelated to censorship goals;
- (3) The government has a significant interest in [restricting] use of the information; and

167. *Id.* at 508 n.1.

168. *Id.* at 509 n.3.

169. *Id.* at 509 n.3.

170. *Id.*

171. *Id.* at 509 n.3.

172. *Id.* at 513 n.8.

173. *Id.*

174. *Id.*

175. *Id.* at 516. The Court reached its conclusion despite the government’s concession that the book disclosed no classified information. *Id.* at 511. The Court ruled that the government’s concession did not “undercut[] its claim that Snepp’s failure to submit to prepublication review was a breach of his trust.” *Id.*

(4) The governmental interest is truly unrelated to the suppression of information.¹⁷⁶

Because of the many specific factors that must be present for *Snepp* to apply, its wording does little to define the boundaries of permissible prior restraints. A recent article, extrapolating from the federal courts' prior restraint holdings, proposes an eight-step analysis to evaluate when a court will most likely uphold a prior restraint. The factors are:

- (1) the nation is at or near war or has some extremely vital interest at stake;
- (2) the danger that publication poses is immediate;
- (3) the danger is not speculative or conjectural;
- (4) the harm that publication would inflict is concrete, . . . [meaning it] would directly cause casualties or military losses;
- (5) a delayed or suppressed report would not significantly harm the public;
- (6) judges cannot evaluate the threat because they lack an understanding of the technology involved;
- (7) the censorship does not appear to have been imposed to cover up embarrassing information; and
- (8) the prior restraint is narrowly drawn, such that it is aimed either at one article or a limited class of publications.¹⁷⁷

As these eight steps indicate, the government faces a steep constitutional climb when it sets out to restrain communication protected by the First Amendment.¹⁷⁸ If a court finds that the government may place a prior restraint on someone's speech, the restraint must still meet certain procedural safeguards.¹⁷⁹

176. ROTUNDA, *supra* note 165, at 80.

177. Jacob, *supra* note 50, at 704 (citations omitted).

178. All speech is protected by the First Amendment except: (1) subversive speech creating a clear and present danger of imminent lawlessness, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); (2) fighting words likely to incite physical retaliation, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); (3) defamatory speech, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); (4) obscenity, *Roth v. United States*, 354 U.S. 476 (1957); and (5) commercial speech that is misleading or that concerns unlawful activity, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). *See also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1048-51 (2d ed. 1988) (tests to determine if speech is protected include relative certainty of harm, quality of competing interests at stake, and impact of the restraint as an incidental restraint rather than a gag order).

179. These safeguards include: (1) specifying a brief period of time within which the administrator of the prior restraint must act, *Freedman v. Maryland*, 380 U.S. 51, 59 (1965); (2) having a statute or an authoritative judicial construction that requires the administrator of the prior restraint either to allow the speech or go to court to apply the restraint, *id.*; (3) forbidding ex parte court orders if an adversarial hearing on the question of interim relief is practicable, *see Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181-83 (1968); (4) limiting restraints imposed before a final judicial determination on the merits to "preservation of the status quo for the shortest fixed period compatible with sound judicial resolution," *Freedman*, 380 U.S. at 59; (5) assuring a "prompt final judicial decision" reviewing any "interim and possibly erroneous denial of a license," *id.*; and (6) if the prior restraint is ordered by

B. The Right of Access for the Press

While the open door to freedom of publication for protected speech is wide and closes only in the face of imminent national danger, the door to freedom of access is narrower and only leads to where the general public may freely go. The Supreme Court has held "that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."¹⁸⁰ For example, because the general public does not have unlimited access to state prisons, federal prisons, or military bases, members of the press have no constitutional right of access to these places.¹⁸¹

The Court has held that the press possesses a right of access similar to that of the public at large when it finds an historic right of access for the public and it believes that access serves the policies behind the First Amendment.¹⁸² In overturning a trial judge's order to exclude all members of the press and public from a murder trial, Chief Justice Burger ruled in *Richmond Newspapers, Inc. v. Virginia* that the First Amendment guarantees of free speech, free press, and assembly assured the "right of access to places traditionally open to the public, as criminal trials long have been . . ."¹⁸³ Such access would advance one of the core purposes behind those guarantees, namely "assuring freedom of communication on matters relating to the functioning of government."¹⁸⁴ In *Globe Newspaper Co. v. Superior Court*, Justice Brennan specified how the right of access to a criminal trial "plays a particularly significant role in the functioning of the judicial process and the government as a whole."¹⁸⁵

- (1) Public scrutiny of the trial protects the integrity of the factfinding process;

a court, requiring the state either to stay the order pending its appeal or provide immediate appellate review, *see National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (per curiam). *See generally* TRIBE, *supra* note 177, § 12-39, at 1059-61.

180. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (citation omitted).

181. *See, e.g., Greer v. Spock*, 424 U.S. 828, 839 (1976) (upholding Army post regulations barring political activities on the base, including speeches, demonstrations, and distribution of literature); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (upholding federal regulations barring press interviews with prisoners); *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (upholding California prison regulations prohibiting interviews with specific inmates).

182. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (upholding the right to remain in courtroom during testimony of a minor allegedly a victim of sexual offense); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (upholding the right to attend murder trials).

183. *Richmond Newspapers*, 448 U.S. at 577; *see also Globe Newspaper*, 457 U.S. at 605 ("the criminal trial historically has been open to the press and general public").

184. *Richmond Newspapers*, 448 U.S. at 575.

185. *Globe Newspaper*, 457 U.S. at 606.

- (2) Public access fosters an appearance of fairness and increases respect for the judicial process; and
 (3) Public access "permits the public to participate in and serve as a check upon the judicial process" ¹⁸⁶

In *Sheppard v. Maxwell*,¹⁸⁷ the Court similarly acknowledged the important role that the press plays when it covers a trial: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."¹⁸⁸

Like freedom from prior restraint, freedom of access is not absolute, but the burden of proof is again a heavy one. The standard set forth in *Globe* provides: "Where . . . the State attempts to deny the right of access in order 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."¹⁸⁹ If the purpose behind the restricted access is not suppression of information, but rather a limitation of access according to "time, place, and manner," the restrictions must serve significant state interests and must leave open adequate alternative channels of communication.¹⁹⁰

The pools covering such events as White House press conferences and presidential debates have been found constitutional on "time, place, and manner" grounds.¹⁹¹ For example, space limitations required limiting the number of media representatives at certain White House events.¹⁹² The 1984 presidential and vice presidential debates received pooled TV coverage in the interests of security and space.¹⁹³ The federal

186. *Id.*; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (stressing the importance of "the right of free public discussion of the stewardship of public officials").

187. 384 U.S. 333 (1966).

188. *Id.* at 350.

189. 457 U.S. at 606-07.

190. *Id.* at 607 n.17 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976)); *Schad v. Mt. Ephraim*, 452 U.S. 61, 75-76 (1981); see also *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). But see *Jacobs*, *supra* note 50, at 721 ("[T]he government need only demonstrate that the access restriction is based on a minimally plausible explanation."). This conclusion that the courts would evaluate access restrictions on a rational basis standard is faulty. It overlooks the *Globe Newspaper* case, which establishes strict scrutiny for disclosure-inhibiting access restrictions and a standard of "significant state interests" and "adequate alternative channels of communication" for limitations restricting the time, place, and manner of access. See *Globe Newspaper*, 452 U.S. at 606-07, 607 n.17.

191. See *Cable News Network v. American Broadcasting Co.*, 518 F. Supp. 1238, 1239-40 (N.D. Ga. 1981) (regarding White House press conferences); *WPIX v. League of Women Voters*, 595 F. Supp. 1484, 1485 (S.D.N.Y. 1984) (regarding 1984 presidential and vice presidential debates).

192. See *Cable News Network*, 518 F. Supp. at 1239-40.

193. *WPIX v. League of Women Voters*, 595 F. Supp. 1484, 1485-86 (S.D.N.Y. 1984).

courts have approved such pools provided that they serve "direct governmental interests."¹⁹⁴ For the Persian Gulf press pools, however, the courts would not use this intermediate standard of evaluation because instead of serving time, place, and manner considerations, the pools were meant to inhibit the disclosure of information.¹⁹⁵

III. The Constitutionality of the Desert Storm Media Restrictions

A. Censorship

Applying the standards developed in the Pentagon Papers case and in *Globe*, an analysis of the Desert Storm censorship procedures and pool requirements reveals abridgements of the media's First Amendment rights. To impose prior restraints on news reports, the government should be required to prove that disclosure " 'will surely result in direct, immediate, and irreparable damage to our Nation or its people,' or . . . must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport at sea."¹⁹⁶

The government can more easily justify its censorship procedures at the beginning of the Persian Gulf War—when the need for surprise was greatest and the information-gathering capabilities of Iraq were strongest—than its use of the same procedures during the later stages of the conflict. The Allies designed their first air assault to occur on a moonless night to avoid anti-aircraft fire while pilots knocked out key command centers. The plan worked almost flawlessly as aircraft jammed Iraqi radar, missiles destroyed command-and-control centers in Baghdad and bombers took out Iraqi missile batteries and air defenses.¹⁹⁷ "[T]he Iraqis . . . appear to have been taken by surprise, or at least to have been unprepared for the fury of the assault," one reporter wrote.¹⁹⁸ Security reviews may have helped to prevent the press from divulging information

194. See *Cable News Network*, 518 F. Supp. at 1245 ("The Court is at a loss to find any direct governmental interest served by this policy" of total exclusion of TV media from limited-coverage White House events.). For the debates, a private party, not the government, formed the press pool, but the court approved of it because it helped to solve "feasibility and security problems." *WPIX*, 595 F. Supp. at 1490.

195. See *infra* notes 231-34 and accompanying text.

196. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 593 (1976) (Brennan, J., concurring) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring), 726-27 (Brennan, J., concurring)).

197. Brian Duffy, *Desert Storm*, U.S. NEWS & WORLD REP., Jan. 28, 1991, at 20, 25.

198. George J. Church, *So Far, So Good*, TIME, Jan. 28, 1991, at 22 [hereinafter Church, *So Far, So Good*].

about the scale of the coalition forces' first strikes.¹⁹⁹

By the third week of the war, however, the allied coalition had achieved total air supremacy and had severely weakened Saddam Hussein's forces.²⁰⁰ Iraq was no longer equipped to take advantage of any information it might have learned from the media, thereby ending the need for censorship. With its air-defense system in ruins, Baghdad abandoned attempts at central control: every anti-aircraft and missile battery was on its own to trace and intercept allied bombers.²⁰¹ By the last weeks of fighting, Iraqi troops could not communicate either with Baghdad or with adjoining companies and battalions. They had to fight in isolation rather than in coordination.²⁰² With the enemy in such disarray, it is unlikely that a court would be convinced that the militarily unsupervised release of information through the media would have risked immediate damage to American troops.²⁰³

The weakness of the Iraqi army was not the only reason why uncensored reports did not pose an immediate danger to national security. Uncensored reports also contained information from allied authorities that was intentionally inaccurate. A report early in the war that sixty Iraqi tanks had defected was a ruse planted by the CIA to try to lure real defectors.²⁰⁴ In the days leading to the ground offensive, military escorts frequently took correspondents to observe troops near the Kuwaiti border so that reports from there would distract Iraqis from the buildup of troops to the west.²⁰⁵ Similarly, U.S. Marines conspicuously rehearsed amphibious landings that were reported by the press and deceived Iraq into preparing for an assault on the Kuwaiti coast that never came.²⁰⁶ "[T]he press coverage, as General Norman Schwarzkopf pointedly ob-

199. According to one author, to preserve surprise the Department of Defense could more easily justify prohibiting live television broadcasts from areas under fire than censoring printed reports, which lack live television's immediacy. Jacobs, *supra* note 50, at 709.

200. George J. Church, *A Long Siege Ahead*, TIME, Feb. 4, 1991, at 20 [hereinafter Church, *A Long Siege Ahead*].

201. George J. Church, *Combat in the Sand*, TIME, Feb. 11, 1991, at 21-22 [hereinafter Church, *Combat in the Sand*].

202. George J. Church, *The 100 Hours*, TIME, Mar. 11, 1991, at 22, 25 [hereinafter Church, *The 100 Hours*].

203. If any information did pose a security risk, the plaintiffs in the *Nation Magazine* case were confident that the past policy of the Department of Defense to provide "directions to the press as to what they should not reveal" was sufficient to keep such information from the enemy. First Amended Verified Complaint at 12, *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (No. 91 Civ. 0238 (LBS)).

204. Zoglin, *supra* note 85, at 56.

205. *Id.*

206. Church, *The 100 Hours*, *supra* note 202, at 25.

served, was a big help."²⁰⁷

The government's planting of disinformation has greater implications than rendering security reviews unnecessary. False leads and manipulation by the military made some members of the media feel duped at the hands of the government and distrusted in the eyes of the public.²⁰⁸ The estranged relationship between the media and the military, simmering since the Vietnam War, grew more heated with the imposition of press pools, the censorship of stories, and the presentation to the press of staged military operations designed to deceive the enemy.²⁰⁹ By trying to dig beyond the allies' official line of information during a popular war, the press darkened its public image. "There is probably greater public anger with the press than at any time since the end of the war in Vietnam," according to First Amendment attorney Floyd Abrams.²¹⁰ Some journalists are afraid that the military's public relations victory "may serve as a model for wars to come."²¹¹

B. Pooling Procedures

1. *The Right of Access to War*

Members of the media have a strong argument that any future limitations placed on their access to war modeled after the Desert Storm procedures will be unconstitutional. First, although the Supreme Court has not expressly ruled that the public, and therefore the press, has a right of access to war zones, the press historically has had access to military operations in covering all the major conflicts of the past 130 years.²¹² Admittedly, this history of access cannot compare to the centuries-long public access to Anglo-Saxon trials, which Chief Justice Burger

207. Zoglin, *supra* note 85, at 56. Because of the absence of immediate danger, the government failed to meet its "heavy burden of showing justification for the imposition of [the pre-publication reviews]." See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Assuming, however, that the burden to justify prior restraints had been met, the government prepublication reviews would still have had to meet certain procedural safeguards. See *supra* note 179; see also Jacobs, *supra* note 50, at 708-11.

As applied to the Desert Storm prepublication reviews, these procedural safeguards were met because in case of disputes between security officers and reporters, the disputed material was sent "immediately" to the Joint Information Bureau Director and then, if necessary, "immediately" to the Assistant Secretary of Defense for Public Affairs for review, with the ultimate decision to publish made by the reporters' news organization. App. C, *supra* note 89, at 1577-78; see *supra* notes 97-100 and accompanying text.

208. See Zoglin, *supra* note 85, at 56-57.

209. *Id.*

210. *Id.* at 57.

211. *Id.*

212. Homonoff, *supra* note 41, at 398.

traced back before the Norman Conquest.²¹³ Allowing for the relative youth of the American press, one may see the news coverage of America's wars as steady. Reporters passed easily from one side to the other during the Civil War,²¹⁴ accompanied the first U.S. troops to Europe in 1917,²¹⁵ and joined the invasion forces of Normandy in 1944²¹⁶ and of Cambodia in 1970.²¹⁷

Second, the media's reports on military operations, like reports on criminal trials, advance the policy of the First Amendment to place public debate in the forefront of a democratic society.²¹⁸ First-hand news accounts make military commanders directly accountable to the public for their decisions, and the public is able to make its own judgments about the actions of such leaders.²¹⁹ Similarly, news reports open the decisions of the federal government to scrutiny and enable the public to engage in a well-informed discussion of governmental affairs. For example, the plaintiffs in *Nation Magazine* noted, "[T]he question whether or when a ground operation should be undertaken, is a subject of national

213. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 565 (1980).

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

215. John Hohenberg, FOREIGN CORRESPONDENCE: THE GREAT REPORTERS & THEIR TIMES 236 (1964).

216. Cross and Griffin, *supra* note 1, at 998.

217. Homonoff, *supra* note 41, at 382. See *infra* text accompanying notes 351-55.

218. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-04 (1982); *Richmond Newspapers*, 448 U.S. at 575.

Some differences should be noted, however, between courtrooms and battlefields. Judges have imposed access restrictions in their courtrooms often to ensure a defendant's right to a fair trial under the Sixth Amendment. See, e.g., *Richmond Newspapers*, 448 U.S. at 560-61. In *Globe*, the Supreme Judicial Court of Massachusetts imposed an access limitation "to encourage young victims of sexual offenses to come forward . . . [and] to preserve their ability to testify by protecting them from undue psychological harm at trial." 457 U.S. at 600 (quoting *Globe Newspaper v. Superior Court*, 401 N.E.2d 360, 369 (Mass. 1980)).

Rather than grounding itself on a constitutional right, the policy to exclude the press from military operations has instead invoked the interests of national security. The U.S. military leaders in Grenada banned press coverage to ensure surprise, to prevent obstruction by the press, and to avoid the need to protect reporters. Pincus, *supra* note 51, at 813; Cross & Griffin, *supra* note 1, at 1005. The Desert Storm pool restrictions strove to "maintain operational security, protect the safety of the troops, and prevent interference with military operations." App. D, *supra* note 6, at 1578.

The potential hazards presented by the press during a trial differ drastically from the dangers that may occur during a war. If a defendant does not receive a fair trial because the presence of the media has tainted the proceedings, the defendant may appeal and secure a reversal and directions for a new trial. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). If the interference of the press causes a breach of security during war, no appeals process may undo the deaths or other losses that may result.

219. Homonoff, *supra* note 41, at 399. See also *supra* notes 184-88 and accompanying text.

debate.”²²⁰ As Justice Black wrote in his concurring opinion in the Pentagon Papers case, “[P]aramount 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.”²²¹ Seeing a similar role for the press in wartime, the *Nation Magazine* court leaned toward finding the Desert Storm battlefield access limitations to be unconstitutional: “[T]here is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including . . . an overt combat operation.”²²²

Despite the goals of the First Amendment, it is arguable that the press may be excluded from covering military operations.²²³ This argument is based on the Supreme Court’s holding that military sites are not public forums.²²⁴ In addition, the Secretary of State may deny tourist visas for travel to countries with which the United States has broken diplomatic ties, such as Cuba.²²⁵ Because members of the press have no greater right to access than the rest of the public,²²⁶ one could conclude that the government may keep the media from battlefields.²²⁷ This argument, however, overlooks an important provision in the now-moot visa restrictions upheld by the Supreme Court.²²⁸ The Secretary of State could make an exception to the visa restrictions for “persons whose travel may be regarded as being in the best interests of the United States, such as newsmen.”²²⁹ In addition, the State Department allowed journalists to travel to Ethiopia during that country’s war with Italy in 1935 and to Spain during the Spanish Civil War in 1936, areas to which citi-

220. First Amended Verified Complaint at 27, *Nation Magazine v. United States Dep’t of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (No. 91 Civ. 0238 (LBS)).

221. *New York Times Co. v. United States*, 403 U.S. 713, 717 (Black, J., concurring).

222. *Nation Magazine*, 762 F. Supp. at 1572.

223. See James David Kleeger, *The First Amendment, the Press, and the U.S. Invasion of Grenada: Balancing the Constitutional Interests*, 12 W. ST. U. L. REV. 217, 227-28 (1984).

224. *Greer v. Spock*, 424 U.S. 828 (1976). For the Supreme Court’s three-tiered analysis of public forums and the restriction of speech therein, see *supra* note 109.

225. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

226. *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972).

227. Kleeger, *supra* note 223, at 227-28.

228. The restrictions are moot because the Secretary of State may no longer deny passports to travel to particular geographic areas during peacetime. 22 U.S.C. § 211a (1989).

A recent article explains that one way that the government may still restrain international travel, for example, is to prohibit people subject to the jurisdiction of the United States from paying Cuba or a Cuban national for any service connected with travel to Cuba. Jacobs, *supra* note 50, at 714 n.240 (citing C.F.R. § 515.561 (j) (1991)).

229. *Zemel*, 381 U.S. at 3.

zens could not generally receive passports during those times.²³⁰

2. *A View From the Globe: Strict Scrutiny and Narrow Tailoring*

Assuming that a constitutional right of access to war zones for the press exists, the purposes behind the formation of the Persian Gulf press pools should determine the level of scrutiny a court would apply to them. Although one of the stated purposes of the Media Ground Rules was to "protect the security and the safety of the service members," the Defense Department official in charge of the ground rules admitted that they were designed "to discourage information that would jeopardize military operations."²³¹ If the Desert Storm pools were formed primarily for a disclosure-inhibiting purpose, they contrast with the pools covering such events as White House press conferences and presidential debates, which have been organized to accommodate such "time, place, and manner" concerns as space limitations and security.²³² The Supreme Court requires such pools to serve "direct governmental interests."²³³ Because they arguably were designed more to inhibit the dissemination of information than to accommodate time, place, and manner constraints, the Persian Gulf pools must withstand strict scrutiny to be constitutional.²³⁴

Under a strict scrutiny analysis, the government must prove that denial of access is necessitated by "a compelling governmental interest, and is narrowly tailored to serve that interest."²³⁵ Given the federal

230. *Id.* at 9. When the government has specifically denied a reporter a passport to a sensitive part of the world, the courts have supported those decisions. See *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959) (denying a journalist passport renewal when he would not agree to refrain from travelling to five areas, including communist territories of China, Vietnam, and Korea), *cert. denied*, 361 U.S. 918 (1959).

231. See *supra* notes 119-22 and accompanying text.

232. See *WPIX v. League of Women Voters*, 595 F. Supp. 1484, 1494 (S.D.N.Y. 1984) (dictating use of pooled TV coverage for 1984 presidential and vice presidential debates because of security and space interests); *Cable News Network v. American Broadcasting Co.*, 518 F. Supp. 1238, 1239-40 (N.D. Ga. 1981) (limiting number of media representatives at White House events required by space limitations).

233. See *supra* note 194 and accompanying text.

234. *Globe Newspaper Co. v. Superior Court*, 452 U.S. 596, 606-07 (1982). Considering the discriminatory application of the press pool rules, the *Nation Magazine* court analyzed the pooling procedures under the time, place, and manner standard. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1574 (S.D.N.Y. 1991).

One author, applying the governmental interests of surprise and logistics, concludes that the access restrictions are constitutional. *Jacobs, supra* note 50, at 721-23. This conclusion results from an initial assumption that access restrictions must pass only a rational basis test. *Id.* at 721. In light of *Globe Newspaper*, which the author does not consider in his analysis, the Desert Storm restrictions must at least conform to the standards for time, place, and manner restrictions, namely, serving significant state interests and leaving open adequate alternative channels of communication. See *Globe Newspaper*, 452 U.S. at 607 n.17.

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

courts' reluctance to adjudicate political questions involving Executive decisions regarding foreign affairs, defense policy, and the military,²³⁶ a court could find that the government's perceived need "to maintain operational security, protect the safety of troops, and prevent interference with military operations"²³⁷ through media pools during the Persian Gulf War was a sufficiently compelling interest. For instance, when military officials imposed a curfew on all Japanese Americans on the West Coast as part of an anti-espionage and anti-sabotage program during World War II, the Supreme Court held:

Since the Constitution commits to the Executive and to the Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selecting of the means for resisting it.²³⁸

Similarly, the federal courts relied on the political question doctrine to thwart challenges against the legality of the war in Vietnam.²³⁹ In *Atlee v. Laird*, seven plaintiffs in a class action asked that a three-judge panel be convened to determine the constitutionality of the Vietnam

236. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (declining to interfere with commissioning of Army officers, which is a matter of discretion within province of the President); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (upholding congressional resolution that if the President found that prohibition of selling arms to countries fighting in the Chaco, an area between Argentina, Bolivia, and Paraguay, would help re-establish peace there, it would be a crime to sell such weapons); *Goldwater v. Carter*, 444 U.S. 996 (1979) (granting certiorari, vacating judgment, and remanding case with directions to dismiss complaint against President Carter for terminating treaty of defense of Government of Taiwan).

Echoing the *Curtiss-Wright* Court's emphasis on foreign versus internal affairs, Justice Rehnquist wrote in his *Goldwater* concurrence, "I think that the justifications for concluding that the question here is political in nature are . . . compelling . . . because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked." 444 U.S. at 1003-04.

237. App. D, *supra* note 6, at 1578.

238. *Hirabayashi*, 320 U.S. at 93.

Hirabayashi and a related case based on the same internment program imposed by the military, *Korematsu v. United States*, 323 U.S. 214 (1944), may be of questionable precedential value today because of recent legislation passed by Congress. In the Civil Liberties Act of 1988, Congress acknowledged "the fundamental injustice of the evacuation, relocation and internment" of Japanese Americans on the West Coast during World War II. 50 U.S.C. app. § 1989(1) (1988). Congress apologized "on behalf of the people of the United States," and it pledged "to discourage the occurrence of similar injustices and violations of civil liberties in the future." *Id.* §§ 1989(2), (6). Each eligible individual received \$20,000 as compensation. *Id.* § 1989b-4(1).

239. See *Atlee v. Laird*, 347 F. Supp. 689, 707 (E.D. Pa. 1972) (three-judge panel), *aff'd sub nom.*, *Atlee v. Richardson*, 411 U.S. 911 (1973) (holding that the legality of Vietnam War nonjusticiable); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (holding that the legality of Cambodian bombing nonjusticiable).

War. The complaint alleged that American participation in the war and the expenditure of funds for it violated the Constitution, and that the conduct of the war violated treaties signed by the United States.²⁴⁰ After tracing the development of the political question doctrine,²⁴¹ the court declared,

It is clear that weighty arguments can be mustered to support either side of the merits of the question whether the President has the authority to maintain American forces in Southeast Asia. This is so because modern technology has so altered global relationships of good faith that our military presence in Vietnam is necessary to protect the security interests of the United States. Under these circumstances—when plausible arguments tend to support either of two sides of the merits of a question concerning the foreign affairs field—a court should refrain from determining whether the President in making war has properly done so under the power committed to him by the Constitution.²⁴²

The *Nation Magazine* court, however, found “unpersuasive . . . [the] argument that the political question doctrine bars an Article III court from adjudicating any claims that involve the United States military.”²⁴³ The court envisioned the judicial power to invalidate regulations that either explicitly made admission to a war-time press pool dependent on the political content of a correspondent’s prior work or that made admission contingent on racial or religious grounds.²⁴⁴

Even if a court were to find a governmental interest in the Desert Storm access restrictions compelling enough to meet the first prong of the *Globe* standard, the pooling arrangements would not satisfy *Globe*’s second prong. Confining all media representatives to escorted pools was not a narrowly tailored means of protecting national security. Granting the press entry to the battlefields or the bombing sites of their choice need not have jeopardized surprise. For example, during the war between Britain and Argentina in the Falkland Islands, the British Navy kept the press confined to ships until the operations began.²⁴⁵ The military then permitted the press to go ashore with the landing teams, thereby preserving secrecy, security, and access to the press.²⁴⁶

During Desert Storm the timing of the first attacks was no real surprise and the military could have preserved security by enforcing the

240. 347 F. Supp. at 691.

241. *Id.* at 693-700.

242. *Id.* at 706-07.

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

244. *Id.*

245. Homonoff, *supra* note 41, at 401.

246. *See* Homonoff, *supra* note 41, at 401.

night operations guidelines already in place. In November 1990, when the United Nations proclaimed that Iraq must withdraw from Kuwait by January 15, 1991, "the deadline for combat [was] set six weeks in advance and [was] publicized more intensively than any other in history. . . . [T]he attack proceed[ed] in precisely the fashion that had all but officially been proclaimed in advance, with massive air attacks."²⁴⁷ The U.S. military could have allowed media correspondents to be present during these and most other operations as long as they respected the safety precautions in the guidelines. One such precaution aimed to protect high-tech nighttime maneuvers: "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."²⁴⁸

As the war progressed and Saddam Hussein's forces were depleted, strict pool requirements were no longer necessary to protect American troops.²⁴⁹ As a result, the pooling procedures became increasingly less narrowly tailored. The Pentagon recognized the decreased need to suppress media access and expanded the number of correspondents allowed in combat pools from 99 to 200 during the ground campaign.²⁵⁰

A specific component of the press pool requirements—restricted travel—also was not narrowly tailored. One of the justifications for having media members remain with a military escort and follow the escort's instructions was to "facilitate troop movement."²⁵¹ Such travel restrictions would make sense if confined to situations of military necessity, such as correspondents covering "commando" units that operated at night to make quick seizures of discrete targets.²⁵² The *Nation Magazine* court agreed with this rationale for limited restrictions on the press, stating that the court "would have neither the power nor the inclination to review a military determination that the presence of a large cadre of press representatives at a particular time and place would jeopardize the covert nature of a military operation."²⁵³ The court recognized the need "for some selection process when either logistics or security concerns may

247. Church, *So Far, So Good*, *supra* note 198, at 18.

248. App. C, *supra* note 90, at 1577.

249. See *supra* notes 200-03 and accompanying text. See also Pincus, *supra* note 51, at 845-47 (arguing that the need to deny press access to Grenada to ensure secrecy and surprise abated after the first day of the operation).

250. Zoglin, *supra* note 85, at 57.

251. CCP Ground Rules, *supra* note 10, at 1, § 1.A.

252. See Pincus, *supra* note 51, at 848 (In Grenada, the U.S. government had a significant interest in avoiding the potentially distracting presence of the press while troops seized the airport, the governor's mansion, and a medical school campus.).

253. *Nation Magazine*, 762 F. Supp. at 1567.

mandate limitation on the number of journalists who may be present.”²⁵⁴ Such a limitation would be a constitutional time, place, and manner restriction.

Some commentators suggest that “narrowly tailored” censorship may be more benign than broad restrictions on press access.²⁵⁵ They contend that because the government’s main concern is the release of sensitive information and not the presence of reporters, courts should look more favorably on prior restraints on war reports than on denial of access to battlefields.²⁵⁶ In other words, a “press with access and censorship is superior to a press with no access when it comes to informing the public.”²⁵⁷

3. *Shared Media Reports: Illegal “Community Pool”?*

In addition to security reviews and access restrictions, the Desert Storm pooling procedures also subjected members of the media to involuntary sharing. Forcing the media to pool their reports and pictures is arguably a governmental taking under the Fifth Amendment. The Fifth Amendment states, “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”²⁵⁸ To determine if a government action is a taking that requires compensation, courts will conduct a “substantially related means, legitimate ends” analysis and an economic evaluation.²⁵⁹ For example, a land-use regulation does not constitute a taking “if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’ ”²⁶⁰

Despite appearances, the government’s treatment of news reports during the hostilities in the Persian Gulf did not amount to a taking. The media reports, photos, and videotape did not go toward a public use, but rather to other private parties. The pool participants distributed their work among pool-eligible representatives of their medium, albeit at the direction of the government as a condition for pool membership.²⁶¹ But the government’s regulations did not require pool members to make their reports available to non-pool members.²⁶²

254. *Id.* at 1574.

255. Cross & Griffin, *supra* note 1, at 1042; Homonoff, *supra* note 41, at 401.

256. Homonoff, *supra* note 41, at 401.

257. Cross & Griffin, *supra* note 1, at 1042.

258. U.S. CONST. amend. V.

259. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987).

260. *Id.* (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

261. App. D, *supra* note 6, at 1579.

262. *See id.*; *Nation Magazine*, 762 F. Supp. at 1564.

Assuming that the reports did go to public use, the members of the media still retained an economically viable use of their work even after distributing it to their competitors. Although such distribution eliminated the value that a report may have had as an "exclusive," the report could still be published or broadcast by its originator. The economic loss to a newspaper or a television network caused by the elimination of the exclusivity of its news reports is difficult to measure. "There was a national craving for news" during the war,²⁶³ and the three major television networks pumped out forty-two continuous hours of coverage after the first air raids.²⁶⁴ The networks each spent an estimated \$1.5 million a week covering the war, in part to expand their evening half-hour news programs to one hour.²⁶⁵

Under the second part of the takings analysis, the government stated its purposes for the pooling procedures so broadly and the shared-work requirement was so integrally bound with those procedures, a court could find that the pooling procedures—including the directive to share news reports—substantially advanced legitimate state interests. The Department of Defense claimed that it formed the media pools as a compromise between the media's wish to have all interested correspondents cover the war and the military's responsibility to maintain national security.²⁶⁶ Unimpeded and safeguarded military operations are no doubt legitimate state interests. Does forcing the media to share its work advance those interests? By itself, no. But limiting the number of media members throughout the Persian Gulf theater substantially advanced the government's goals. The government would argue that the fewer reporters in the field, the fewer outsiders observed operations and the greater security there was.²⁶⁷ Once the government reduced the number of reporters who could roam the battlefields, it made its plan more palatable to the press by arranging, through shared reports, that no news team would have the unfair advantage of exclusive coverage. The press went along with the idea, distributing its work to fellow pool members and submitting to the other media constraints in order to get its share of first-hand accounts of the action. A *New York Times* reporter wrote, "[T]he few who gain[ed] places in the pool . . . count[ed] themselves lucky" and considered the military's restrictions the "price for seeing the war."²⁶⁸

263. Nancy Gibbs, *A First Thick Shock of War*, TIME, Jan. 28, 1991, at 34, 37.

264. Richard Zoglin, *Live From the Middle East!*, TIME, Jan. 28, 1991, at 69, 70.

265. *Id.* at 70; Alter, *supra* note 104, at 61.

266. App. D, *supra* note 6, at 1578. See also note 121 and accompanying text.

267. See Zoglin, *supra* note 3, at 44-45.

268. Browne, *supra* note 78, at 29.

Historically, the backdrop of war has made it more difficult to establish a governmental taking. In *United States v. Central Eureka Mining Co.*,²⁶⁹ the plaintiffs challenged an order passed by the War Production Board in 1942 that mandated nonessential gold mines to close down in order to attract gold miners to nonferrous mines that were producing materials depleted by the war.²⁷⁰ The Court first recognized that under traditional analysis, governmental regulation "can so diminish the value of property as to constitute a taking."²⁷¹ In the context of war, however, the Court noted:

we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. [Citations omitted.] The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. It makes demands which otherwise would be insufferable. But wartime economic restrictions, temporary in character, are insignificant when compared to the widespread uncompensated loss of life and freedom of action which war traditionally demands.²⁷²

Although the gold mining restrictions during World War II provide an inexact analogy to the pooling regulations during Desert Storm, *Central Eureka* indicates how a court would probably evaluate a takings challenge to the Desert Storm pooling procedures. Balancing the value of news footage and interviews against the potential loss of soldiers' lives or compromised military action, a court would probably find the scales of justice, centered on a takings analysis, tipped toward national security.²⁷³

IV. Conclusion

National security does not so easily tip the scales of justice against the First Amendment. The prerequisites for prior restraints and re-

269. 357 U.S. 155 (1958).

270. *Id.* at 156, 157.

271. *Id.* at 168.

272. *Id.* at 168.

273. At most, the sharing of the media's reports may have violated procedural due process. Under a procedural due process analysis, a court would determine the type of procedures necessary to pool the media's work by balancing the importance of the private interest affected by the official action; the risk of erroneously depriving such interest through the procedures used, and the probable value of additional procedural safeguards; and the government's interests, including fiscal and administrative efficiency. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The press certainly has an interest in maintaining control of its work, but the members of each medium determined the procedures for sharing once they agreed to participate in the military news pools. App. D, *supra* note 6, at 1579. These procedures facilitated the government's interest in a nonobstructive press corps that cooperated with military directives. Therefore, under the *Mathews* test, the media pool procedures appear constitutional.

stricted access are stringent. Security reviews and access restrictions during Operation Desert Shield and Operation Desert Storm flouted one of the primary goals of the First Amendment: an informed public citizenry that may intelligently discuss the workings of government.²⁷⁴ When a government decides to commit its troops to war, the significance of the press as a source of information intensifies. The journalists' reports allow "the folks back home" to know how events are progressing "over there." Attempts to stifle what the press can say or to conceal what the press can see require the strict scrutiny of the courts. The Department of Defense escaped such an examination when the court evaluating the Desert Storm media procedures dismissed the case.²⁷⁵

If the court in *Nation Magazine* had reached the merits of the case, it would have been forced to confront the constitutional deficiencies of the media ground rules and guidelines used during the war in the Persian Gulf. Applying the national security exception for prior restraints developed by Justices Brennan and Stewart in *New York Times Co. v. United States*, it is difficult to see the "inevitabl[e], direct[], and immediate[]" danger or the "direct, immediate, and irreparable damage"²⁷⁶ that the troops or the nation as a whole would have faced if the press had been free to decide what information about the war to report.²⁷⁷ Voluntary ground rules—consisting of a list of types of information that should not be released—worked in Vietnam against a more formidable opponent, and the press admits that during wartime, it is willing to adhere to such rules again.²⁷⁸

Subjecting the government's justifications for using press pools to the *Globe Newspaper* test, the government's "compelling interest"²⁷⁹ in maintaining the security and secrecy of military operations was credible, at least during the opening stages of the war. The extensive travel restrictions and the need for escorts throughout the Persian Gulf theater were not, however, "narrowly tailored."

While trying to extricate Saddam Hussein's dictatorial regime from Kuwait, the U.S. military could have best demonstrated democracy in action by allowing the press both to fend for itself and to decide for itself

274. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

275. *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp. 1558, 1575 (S.D.N.Y. 1991); see *supra* notes 10-40 and accompanying text.

276. See 403 U.S. 713, 730 (Stewart, J., concurring) (1971).

277. See *id.* at 726-27 (Brennan, J., concurring).

278. *Nation Magazine*, 762 F. Supp. at 1564 n.4 ("[I]t is a version of the ground rules as presently written that were utilized during the Vietnam conflict, which the plaintiffs suggest should be the only restriction on the press in war time.") See *supra* note 70.

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

what information would harm national security. Even in Vietnam, where the press was notably critical of the military,²⁸⁰ one colonel explained why he allowed the media to follow his troops: "We are an Army of free men, defending a nation of free men and women who have the right to know what we are doing in their names."²⁸¹

280. See Malcolm W. Browne, *Conflicting Censorship Upsets Many Journalists*, N.Y. TIMES, Jan. 21, 1991, at A10 ("The system implemented [in the Persian Gulf] has its roots in military dissatisfaction with news coverage of the Vietnam War, which some military officials continue to argue was lost by the news media.").

281. Galloway, *supra* note 4, at 49.