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NOTICE

The Media at the Tip of the Spear

Kevin A. Smith

EMBEDDED: THE MEDIA AT WAR IN IRAQ. By *Bill Katovsky*¹ and *Timothy Carlson*.² Guilford, Connecticut: The Lyons Press. 2003. Pp. xix, 422. \$23.95.

Due largely to the first widespread availability of the telegraph, through which breaking stories could be transmitted to the presses in moments, the debut of the American war correspondent occurred during the Civil War.³ From their beginning, American war correspondents have frequently “embedded” with the troops on whom they reported.⁴ General Grant, for example, allowed his favorite *New York Herald* reporter to travel with his entourage, and even used him as a personal messenger.⁵

Reporters proved an important component of the war effort for both the North and the South. Papers on both sides proved willing providers of propaganda to rally citizen support.⁶ Southern papers exaggerated Northern casualties, refused to acknowledge Confederate defeats, and characterized Union troops as drunken foreigners.⁷ Northern papers ignored Union difficulties in drafting troops and racism in the Union Army, and downplayed Union defeats.⁸

But from the beginning, the war correspondents’ value to both society and the military has been questioned. Civil War-era dispatches were frequently inaccurate, biased, and sensationalist, “a series of wild ravings about the roaring of the guns and the whizzing of the shells and the superhuman valour of the men.”⁹ Just as today, not every officer appreciated journalists’ efforts. General Sherman wrote, “Now

1. Former researcher at the Brookings Institute.

2. FORMER staff writer for the *Los Angeles Herald Examiner*.

3. See PHILLIP KNIGHTLEY, *THE FIRST CASUALTY 19-20* (rev. ed., Prion Books Ltd. 2000) (1975).

4. *Id.* at 28.

5. *Id.*

6. *Id.* at 24-26.

7. *Id.* at 25-26, 29-30.

8. *Id.* at 21, 30-31.

9. *Id.* at 21 (quoting Edwin Godkin, *STRAND MAGAZINE*, Vol. 4 at 571).

to every army and almost every general a newspaper reporter goes along . . . inciting jealousy and discontent, and doing infinite mischief."¹⁰ The desire to suppress that mischief produced early, haphazard efforts to censor dispatches harmful to the military effort.¹¹ Nevertheless, their reports proved profitable to newspapers, multiplying circulation when a large battle was featured.¹²

The Civil War established the framework that would characterize the media-military relationship to the present day. The two institutions have always shared a tense but symbiotic relationship. During times of war, the military depends on the media to defuse enemy propaganda, to serve as an information conduit to the people, and to rally domestic support.¹³ A war that lasts more than a few days requires the consent of the public, and that consent is not forthcoming without at least some favorable information on the war's progress.¹⁴ Consequently, the military has sought to mold that coverage to serve its own ends, frequently relying on prepublication review of reporters' stories and restricting their access to the battlefield and politically damaging information.

10. *Id.* at 28.

11. *Id.* at 27.

12. *Id.* at 23 (noting that during the Civil War, "a large New York newspaper could sell five times its normal circulation when it ran details of a big battle" (emphasis omitted)); *id.* at 69 (describing the First World War as "good business for newspapers"); Lawrence K. Grossman, *War and the Balance Sheet*, COLUM. JOURNALISM REV., May/June 2003, at 6 ("The *Los Angeles Times* published an extra 200,000 copies a day during Desert Storm."). But war increases the Pentagon's need for secrecy. See Douglas Porch, *No Bad Stories*, 55 NAVAL WAR C. REV. 85, 86 (2002) ("[T]he military, like most bureaucracies, prefers to do its business behind closed doors — all the more so because the nature of its business is so often shocking to the sensitivities of the public, on whose support it must rely.").

13. See p. 206 (quoting Deputy Assistant Secretary of Public Affairs Bryan Whitman: "We looked for ways that could mitigate Saddam's lying, and of course, one of the things that came to mind . . . was to put independent objective observers throughout the battlefield."); Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, FOREIGN AFF., July/Aug. 2003, at 60, 67 ("Embedding reporters with forward military units undercut Saddam's strategy of creating international outrage by claiming that U.S. troops were deliberately killing civilians.").

14. Arthur Lubow, *Read Some About It*, NEW REPUBLIC, Mar. 18, 1991, at 23, 25. The Department of Defense acknowledged its dependence on the media in the ground rules issued to embeds in the War in Iraq, stating:

Media coverage of any future operation will, to a large extent, shape public perception of the national security environment now and in the years ahead. This holds true for the U.S. public: the public in allied countries whose opinion can affect the durability of our coalition; and publics in countries where we conduct operations, whose perceptions of us can affect the cost and duration of our involvement.

P. 402 app. (citing Dep't of Def. Public Affairs Guidance on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Commands Area of Responsibility para. 2.A (2003), available at <http://www.dod.mil/news/Feb2003/d20030228pag.pdf> (last visited Mar. 1, 2004) [hereinafter "PAG"].

The stationing of over five-hundred journalists within military units during Operation Iraqi Freedom represents the most recent round in this relationship and the largest expansion of the century-old practice of embedding.¹⁵ Selected reporters lived, traveled, and slept with the units to which they were assigned for weeks or months at a time. They ate the same military rations, faced the same enemy fire, and rode in the same Humvees as the troops on whom they reported. Some were seasoned battlefield reporters, some former soldiers themselves, and still others as green as many of the troops they were covering.

The recent war in Iraq provided fodder for many a soldier or journalist's post-war memoir, most of which were hastily produced to reach the market before the public's attention turned elsewhere. Some, such as former-marines-turned-embeds Ray Smith and Bing West's *The March Up*¹⁶ documented the fighting and strategy of the war; others, such as Todd Purdum's *A Time of Our Choosing*¹⁷ framed the war in its larger political context; still others, such as Anne Garrels's *Naked in Baghdad*¹⁸ painted a more intimate picture of the fear and uncertainty of reporting from inside a city under attack; but *Embedded: The Media at War in Iraq*, through its sheer breadth of interviews, has established itself as the definitive account, not of the fighting, but the coverage of the fighting.

Embedded is the story of several dozen journalists who secured slots within military units, as well as some, whom the Pentagon dubbed unilaterals, who chose to operate independently of the military's embed program. Told in the form of short interviews, *Embedded* provides an oral history of covering "the most covered war in history" (pp. xi, 419). The interviewees are pro- and anti-war; pro- and anti-embedding; American, European, and Middle-Eastern; men and women; embed and unilateral. They are photographers, radio correspondents, television talking heads (ranging from Al-Jazeera to Fox News), authors of magazine features, and ordinary newspaper reporters. This variety of perspectives makes *Embedded* a surprisingly useful lens through which to view the media and military's new, hand-in-glove relationship.

This Notice relies on the stories in *Embedded* to argue that the embed program was a successful accommodation of the needs of the

15. P. xiv; Andrew Jacobs, *My Week at Embed Boot Camp*, N.Y. TIMES, Mar. 2, 2003, (Magazine), at 34, 36. The Pentagon defines an embedded reporter as "a media representative remaining with a unit on an extended basis — perhaps a period of weeks or even months." P. 403 (citing PAG, *supra* note 14).

16. RAY L. SMITH & BING WEST, *THE MARCH UP: TAKING BAGHDAD WITH THE 1ST MARINE DIVISION* (2003).

17. TODD S. PURDUM, *A TIME OF OUR CHOOSING* (2003).

18. ANNE GARRELS, *NAKED IN BAGHDAD* (2003).

military, the media, and the public. Whereas past military regulation of war correspondents was plagued by practices that were only questionably in compliance with the First Amendment, embedding created unprecedented opportunities for battlefield reporting free from censorship. Parts I and II provide the historic and legal background that ultimately led to the embedding program. Part I traces the gradual decline in media-military relations during the latter half of the twentieth century. It is this history of progressively increasing mutual mistrust that made the embedding process such a surprising and interesting experiment. Part II discusses past First Amendment challenges to military efforts to control media coverage of war and the obstacles those plaintiffs faced in achieving judicial review of their claims. Those challenges centered largely on access limitations and prepublication security review of news stories.

Part III relies on the stories in *Embedded* to argue that embedding made great strides towards resolving the public's need to know with the militaries need to control information during wartime. Section A contends that the media were able to gather frontline news stories without censorship, and the military received comparatively favorable coverage while maintaining mission security. Section B cautions, however, that embedding did take its toll on reporters by calling into question their objectivity and their ability to provide a global perspective of the War, and by potentially compromising their First Amendment protections. Section C argues that relaxing restraints on unilateral reporting served as an essential component of embedding's success. Unilaterals reported on aspects of the War outside of the scope of the embed program, and those stories were presumptively more objective, providing a needed counterpoint to embed reports.

I. A SHORT HISTORY OF THE LATE-TWENTIETH CENTURY MILITARY-MEDIA RELATIONSHIP

Although war correspondents have been commonplace since the Civil War, the Vietnam War marked the birth of the modern military-media relationship. It featured both the advent of televised combat and a monumental shift in military-press interaction.¹⁹ In the early years of the Vietnam War, the media and the military shared a relationship of unprecedented openness.²⁰ Access to the battlefield

19. Margaret H. Belknap, *The CNN Effect: Strategic Enabler or Operational Risk?*, 32 *PARAMETERS* 100, 103 (2002).

20. See Porch, *supra* note 12, at 91 ("Journalists were allowed practically unrestricted access, accompanying units and freely filing stories, photographs, and film."); Matthew J. Jacobs, Note, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 *STAN. L. REV.* 675, 683 (1992) [hereinafter Jacobs Note] ("Military press restrictions in Vietnam stand in virtual contrast to the censorship of earlier wars. In previous conflicts,

was remarkably unrestricted, with over seven-hundred correspondents roaming the countryside at any given time, sometimes with U.S. troops, and sometimes hiring their own transportation, translators, and guides.²¹ Unlike in previous wars, the military imposed no formal security review or censorship.²² The United States Mission in Saigon merely issued guidelines that requested that reporters not release information concerning U.S. casualty figures, troop movements, and other battle information until it was clear that the Viet Cong had access to it.²³ The guidelines were largely complied with voluntarily, with only a very few reporters having their accreditation revoked for violations.²⁴

During previous conflicts, the press acted as a military booster, loyal to the armed forces and supportive of its aims.²⁵ During the initial stages of Vietnam, most reporters backed the administration, even if they were somewhat critical of its methods.²⁶ When the war began to turn sour, however, so did the military/press relationship.²⁷

editorial review. . . . The press was not censored. . . . Censorship was uneven but pervasive. During the Vietnam War, however, the Pentagon imposed neither censorship by restricted access nor censorship by prepublication review.”).

21. Pp. xi-xii; KNIGHTLEY, *supra* note 3, at 387. There were, however, aspects of the War that the press did not report or were excluded from. For example, reporters were excluded from the operational area during the Dewey Cannon II operation for six days. Paul Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and 'Off-the-Record-Wars'*, 73 GEO. L.J. 931, 942 (1985); James P. Terry, *Press Access to Combatant Operations in the Post-Peacekeeping Era*, 154 MIL. L. REV. 1, 9 n.41 (1997).

22. KNIGHTLEY, *supra* note 3, at 391; Terry, *supra* note 21, at 9.

23. KNIGHTLEY, *supra* note 3, at 371; Terry, *supra* note 21, at 9; see *News Policies in Vietnam: Hearings Before the Senate Comm. On Foreign Relations*, 89th Cong. 2d Sess. 32, 154 (1966).

24. See GANNET FOUNDATION, *THE MEDIA AT WAR 14-15* (1991) (reporting that only six journalists “committed violations of the guidelines so severe, in the military’s view as to warrant revoking their credentials”); Terry, *supra* note 21, at 9 (reporting that “at least two” reporters had their accreditation revoked for thirty days).

25. See p. xv (“It’s an American tradition for the pen to ally itself with the sword.”); Belknap, *supra* note 19, at 103; Lubow, *supra* note 14, at 25.

26. GANNET FOUNDATION, *supra* note 24, at 15 (“[J]ournalists who criticized the military’s performance did so out of a sense of frustration that [the] military strategy and tactics were failing to accomplish the goal of decisively defeating the North Vietnamese forces.”); KNIGHTLEY, *supra* note 3, at 348 (“What the correspondents questioned was not American policy, but the tactics used to implement that policy”); Fred W. Friendly, *TV at the Turning Point*, COLUM. JOURNALISM REV., Winter 1970/1971, at 13, 14 (“The broadcast journalist went into Vietnam the same way he went into World War II and Korea — ‘as a member of the team.’ (The extent of cooperation was such that the U.S. Navy’s official film on Tonkin was narrated by NBC’s Chet Huntley.)”).

27. See generally WILLIAM J. SMALL, *TO KILL A MESSENGER* (1970); WILLIAM WESTMORELAND, *A SOLDIER REPORTS* 420 (1976); Charles Mohr, *Once Again — Did the Press Lose Vietnam?*, COLUM. JOURNALISM REV., Nov.-Dec. 1983, at 51; Winant Sidle, *A Battle Behind the Scenes*, MIL. REV., Sept. 1991, at 52, 54; David H. Hackworth, *Learning How to Cover a War: Both “Thought Control” and “No Control” Don’t Work*, NEWSWEEK, Dec. 21, 1992, at 32; Drew Middleton, *Barring Reporters from the Battlefield*, N.Y. TIMES, Feb. 5, 1984, § 6 (Magazine), at 37.

After the 1968 Tet Offensive, Walter Cronkite declared the war unwinnable. The Pentagon began blaming the press for its impending defeat, and the press, in turn, accused the Pentagon of lying about the war.²⁸ Phillip Knightley recounts in his history of war correspondents:

In Vietnam, the United States military had accepted war correspondents, called on all ranks to give them full co-operation and assistance, fed them on a reimbursable basis, briefed them, armed them when necessary, defended them, drank with them, and, in general, treated them like members of the team. The military was not happy with what it got in return.²⁹

Eventually, “[o]fficials . . . grew convinced that the reporters were on ‘the other side’ and blamed the press for souring the American public on the war effort.”³⁰ The idea that anti-war reporters exploited the Pentagon’s generous access to publish unfavorable stories that contributed to defeat became conventional wisdom and paved the way for media restrictions on combat coverage during the remainder of the century.³¹

The policy of unrestricted press access was drastically curtailed in preparation for America’s next conflict, Grenada, in which the military adopted a system of press pools to manage battlefield reporting. A press pool is a collection of reporters from various news outlets granted special access by the military. In exchange, the work product of any pool member becomes the property of any accredited organization covering the war.³² The press pool system was created in part as a response to unfavorable coverage during the Vietnam War (p. 74). “[T]here was some backlash from Vietnam; the pool concept was a way to manage the media”³³

28. P. xii; KNIGHTLEY, *supra* note 3, at 365. Belknap writes:

The media’s enormous negative coverage of the Tet Offensive marked the turning point in the Vietnam War and, as such, became the basis for heated debate as to whether the military or the media lost the war. The disturbing images on the TV screen were in sharp contrast to the official reports by the government and military leadership After Tet in 1968, the reports began to be about the difference between what Washington said versus what reporters in Vietnam saw.

Belknap, *supra* note 19, at 103; Porch, *supra* note 12, at 91.

29. KNIGHTLEY, *supra* note 3, at 395.

30. Lubow, *supra* note 14, at 25.

31. See Belknap, *supra* note 19, at 103; Porch, *supra* note 12, at 87, 91-92.

32. Malcolm W. Browne, *The Military vs. the Press*, N.Y. TIMES, March 3, 1991, § 6 (Magazine), at 27.

33. P. 74 (statement of Army Public Affairs Officer Guy Shields); see also KNIGHTLEY, *supra* note 3, at 484 (“Basically the [Pentagon’s] plan was to confront the media head on, to tell journalists that unlike Vietnam, this was a war they would not be allowed to cover.”); GANNET FOUNDATION, *supra* note 24, at 15 (“[O]fficials in the military and Reagan administration restored a kind of *de facto* censorship regime, and they did so out of a sense of dissatisfaction with the results of the voluntary approach used in Vietnam.”); Belknap, *supra* note 19, at 104 (“The overwhelming lesson from Vietnam seemed to have been, ‘Keep

The Press pool system failed to provide reporters with the degree of access that Vietnam had made them accustomed to. During the first two days of the invasion, the military refused to transport reporters to the island, and turned away reporters' boats by firing shots across their bows.³⁴ Four reporters who managed to reach the island on their own were detained and held incommunicado for two days.³⁵ It was not until the majority of fighting was concluded that the press was allowed on the island, and even then, reporters could only venture out with the escorted press pools.³⁶ Complete, unsupervised press access did not occur until a week after the fighting ended.³⁷

As a result of the ensuing press outcry, the Pentagon commissioned a panel to study the strained relationship between the media and the military.³⁸ Winant Sidle, the former chief of Public Affairs for the combined U.S. Services in Vietnam was chosen as its head.³⁹ Media representatives urged the panel to recommend measures that would assure significant access to future military operations.⁴⁰ The panel agreed and suggested limiting the use of press pools to the early stages of military operations; broad access to those pools; and military assistance to the media in the form of equipment, military personnel, and access to communications facilities.⁴¹ At the time, despite the unsatisfactory deployment in Grenada, press pools seemed to be a reasonable method of accommodating the needs of several thousand reporters simultaneously.⁴² Though the press

the press out!' "). President Reagan felt the media restrictions were justified because during the Vietnam War, "the press was not on 'our side, militarily.'" Middleton, *supra* note 27.

34. P. xii; Belknap, *supra* note 19, at 104; Fred Hiatt, *The Defense Department*, WASH. POST, Oct. 4, 1984, at A17.

35. Edward Cody, *U.S. Forces Thwart Journalists' Reports*, WASH. POST, Oct. 28, 1983, at A16; Peter Schmeisser, *Shooting Pool: How the Press Lost Their Gulf War*, NEW REPUBLIC, March 18, 1991, at 21.

36. HUGH O'SHAUGHNESSY, *GRENADA: AN EYEWITNESS ACCOUNT OF THE U.S. INVASION AND THE CARIBBEAN HISTORY THAT PROVOKED IT* 205 (1984); Frank B. Cross & Stephen M. Griffin, *A Right of Press Access to United States Military Operations*, 21 SUFFOLK U.L. REV. 989, 1004 (1987).

37. Cross & Griffin, *supra* note 36, at 1004-05; Marjorie Hunter, *U.S. Eases Restrictions on Coverage*, N.Y. TIMES, Oct. 31, 1983, at A12.

38. GANNETT FOUNDATION, *supra* note 24, at 15-16.

39. *Id.* at 16; *Text of Journalists' Joint Statement*, N.Y. TIMES, Jan. 11, 1984, at A10.

40. *See Text of Journalists' Joint Statement*, N.Y. TIMES, Jan. 11, 1984, at A10.

41. Cassell, *supra* note 21, at 946; Terry, *supra* note 21, at 13.

42. *See* Howard B. Homonoff, Note, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial in Military Operations*, 17 N.Y.U. J. INT'L L. & POL. 369, 403-04 (1985) ("In general, the Sidle Report's recommendations have been applauded as a major step towards ensuring the greatest possible press access . . ."); Jacobs Note, *supra* note 20, at 685 ("At the time of the Sidle Report, pools seemed a reasonable way to lessen the logistical problems of several thousand reporters attempting to

welcomed the resulting report as a victory,⁴³ some feared that the recommendations were unnecessarily vague, leaving open the possibility of case-by-case limitations on press access.⁴⁴

Those fears were realized when the recommendations of the Sidle Panel were put into practice during the invasion of Panama.⁴⁵ Secretary of Defense Dick Cheney delayed activating the press pool to prevent coverage during the initial hours of the invasion.⁴⁶ Even after its late arrival, the pool was largely restricted to a local military base.⁴⁷ The military in fact confined some reporters already in Panama to a warehouse during the early fighting (p. xii). By the time the press was allowed to investigate the battlefield, fighting had largely ceased.⁴⁸

Press-military relations deteriorated further during Operation Desert Storm.⁴⁹ President George H.W. Bush stated in 1990 that media coverage of the War would “not be a new Vietnam,” which some journalists interpreted to mean that they would not have the opportunity to broadcast negative reports from the field.⁵⁰ Emblematic of the administration’s opinion of the press during Desert Storm was

cover the same war on a limited battlefield, a problem exacerbated in the Gulf by an increase in the number of correspondents.”).

43. Belknap, *supra* note 19, at 104. Jacobs writes:

Still smarting from their initial exclusion from the battlefield in Grenada, many in the press viewed the Sidle Report as a boon, because while the report advocated a pool system, it made no mention of field censorship, military escorts, or even tight control over access. Therefore, when the Pentagon announced the formation of a Department of Defense press pool in October 1984, all major news organizations with the exceptions of *Time Magazine* signed up readily, and *Time* eventually relented when faced with the prospect of being excluded from major military stories.

Jacobs Note, *supra* note 20, at 685; Charles Mohr, *The Continuing Battle Over Covering Wars*, N.Y. TIMES, Sept. 14, 1984, at A24; Barry Zorthian, *Now, How Will Unfettered Media Cover Combat?*, N.Y. TIMES, Sept. 12, 1984, at A31.

44. See, e.g., Richard Halloran, *Weinberger and the Press: An Ebb in the Flow*, N.Y. TIMES, Aug. 25, 1984, at 6 (quoting Pentagon spokesman Michael I. Burch as stating “How the press is to operate must be decided on a case-by-case basis.”).

45. Belknap, *supra* note 19, at 104-05.

46. GANNETT FOUNDATION, *supra* note 24, at 16; Jacobs Note, *supra* note 20, at 685; Schmeisser, *supra* note 35, at 22.

47. Schmeisser, *supra* note 35.

48. David A. Frenznick, *The First Amendment on the Battlefield: A Constitutional Analysis of Press Access to Military Operations in Grenada, Panama, and the Persian Gulf*, 23 PAC. L.J. 315, 325 (1992) (“By the time the military allowed nonpool reporters to land their aircraft late in the evening on December 21, President Bush had already declared the operation ‘pretty well wrapped-up.’” (footnotes omitted)); Patrick J. Sloyan, *The War You Won’t See: Why the Bush Administration Plans to Restrict Coverage of Gulf Combat*, WASH. POST, Jan. 13, 1991, at C2.

49. Porch, *supra* note 12, at 95 (“If Panama did little to foster trust between the media and the military, the war in the Persian Gulf lifted matters to a new plateau of acrimony.”).

50. Justin Ewers, *Is the New News Good News?*, U.S. NEWS & WORLD REP., Apr. 7, 2003, at 48.

Secretary of Defense Dick Cheney's comment, "I do not look on the press as an asset. Frankly, I looked on it as a problem to be managed."⁵¹ One Air Force officer was quoted as stating, "I'm not a great fan of the press, and I want you to know where we stand with each other. I suppose the press has its purpose. But one thing is certain: you can't do me any good, and you sure as hell can do me harm."⁵² Such rhetoric was fueled, in part, by the juxtaposition of the military victory in Grenada in the absence of press coverage and the well-documented defeat in Vietnam.⁵³

The resulting press restrictions included prepublication review of media reports, a press blackout during the first day of the invasion, limitations on access to information and locations, and prolonged use of press pools.⁵⁴ Prepublication review proved to be a particularly effective and self-enforcing method of censorship. Although nominally justified to prevent the release of sensitive information,⁵⁵ military censors sometimes requested alterations as a method of skewing the war coverage. In one case, censors required a reporter to change a description of troops returning from a mission from "giddy" to "proud";⁵⁶ another required the deletion of a description of American troops watching pornography;⁵⁷ and many stories deemed offensive to Saudi culture were altered, such as a report about soldiers' celebration of Mardi Gras.⁵⁸ Although reporters had the opportunity to appeal

51. P. xii. For an interesting comparison, consider Secretary of Defense Donald Rumsfeld's recent statement: "Well I think that as a principle, given our Constitution and the way our free system works, that it's always helpful, generally almost always helpful to have the press there to see things and be able to report and comment and provide information about what's taking place." Meeting with Victoria Clarke, Assistant Secretary of Defense for Public Affairs and Bureau Chiefs, in Washington, D.C. (Oct. 30, 2002), at http://www.defenselink.mil/news/Nov2002/t11012002_t1030sd.html (last visited Mar. 3, 2004).

52. Browne, *supra* note 32, at 27.

53. *Id.* at 30.

54. P. xii; Richard L. Berke, *News From Gulf Is Good, and Cheney's Press Curbs Are Loosened*, N.Y. TIMES, Feb. 25, 1991, at A17 [hereinafter Berke, *News From Gulf*]; Howard Kurtz, *Journalists Say 'Pools' Don't Work*, WASH. POST, Feb. 11, 1991, at A1 [hereinafter Kurtz, *Journalists*].

55. See U.S. Dep't of Def., *Guidelines for News Media* (Jan. 7, 1991). The Department of Defense writes:

Security at the source will be the policy. In the event of hostilities, pool products will be subject to security review prior to release to determine if they contain information that would jeopardize an operation of the security of U.S. or coalition forces. Material will not be withheld just because it is embarrassing or contains criticism.

Id., reprinted in *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1576 (S.D.N.Y. 1991).

56. Kurtz, *Journalists*, *supra* note 54.

57. Jason DeParle, *Keeping the News in Step: Are the Pentagon's Gulf War Rules Here to Stay?*, N.Y. TIMES, May 6, 1991, at A9.

58. GANNETT FOUNDATION, *supra* note 24, at 29; Berke, *News from Gulf*, *supra* note 54.

decisions to censor, and if no agreement could be reached on appeal the decision to publish was left to the news organization,⁵⁹ the time-sensitive nature of reporting rendered the process worthless.⁶⁰ Instead, reporters generally agreed to whatever alterations military censors proposed in exchange for prompt dispatch of their stories.⁶¹

Outright censorship and prepublication review were not, however, the military's principal means of controlling media coverage.⁶² Instead, the military relied on limiting access to potentially damaging information, thereby avoiding the need to censor.⁶³ Reporters were excluded from the frontlines unless they registered with the military, signed an agreement to comply with military rules, were in a press pool, and were accompanied by a military escort.⁶⁴ As a result, reporters found themselves under the watchful, interview-inhibiting gaze of a public affairs officer.⁶⁵ Requests to visit the frontlines were frequently denied due to lack of transport or security concerns.⁶⁶ A principal complaint among reporters was that, because the pools were too few in number, many news outlets such as the *Village Voice*, *The Nation*, *Harper's*, and *Mother Jones* were denied access entirely.⁶⁷

Journalists who operated outside the pool system often dealt with harassment by the American military.⁶⁸ Some were arrested and removed from the country;⁶⁹ others were denied Geneva Convention

59. See U.S. Dep't of Def., *Guidelines for News Media* (Jan. 14, 1991), reprinted in *Nation Magazine*, 762 F. Supp. at 1577-78.

60. Jacobs Note, *supra* note 20, at 687.

61. *Id.*; see GANNETT FOUNDATION, *supra* note 24, at 18 (describing the lack of timely appeal from the security-review process as likely resulting in "a kind of *de facto* censorship"); Browne, *supra* note 32, at 27 ("[T]o make newspaper deadlines . . . I agreed to all the proposed changes, on the condition that our copy is dispatched hastily.").

62. GANNETT FOUNDATION, *supra* note 24 ("Fewer than one in five (17 percent) reporters said they were ever unable to file stories because of security review.").

63. See *id.* ("The real problem was access, getting to the story."); Porch, *supra* note 12, at 95 ("The primary issue was what seemed to journalists to amount to censorship and manipulation, arising from tight restrictions on all media travel. . . . [M]ost reporters never saw the war . . .").

64. GANNETT FOUNDATION, *supra* note 24, at 19; Major Lisa J. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 43 (2001); Richard L. Berke, *Pentagon Defends Coverage Rules, While Admitting to Some Delays*, N.Y. TIMES, Feb. 21, 1991, at A14 [hereinafter Berke, *Pentagon Defends*].

65. GANNETT FOUNDATION, *supra* note 24, at 19.

66. Porch, *supra* note 12, at 95.

67. See *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991); R.W. Apple, Jr., *Press and Military: Old Suspicions*, N.Y. TIMES, Feb. 4, 1991 (stating that although the plaintiffs were primarily alternative and progressive news outlets, they did not allege that their exclusion was a product of view-point discrimination).

68. Kevin P. Kenealey, Comment, *The Persian Gulf War and the Press: Is there a Constitutional Right of Access to Military Operations?*, 87 NW. U. L. REV. 287, 291 (1992).

69. Browne, *supra* note 32.

cards, which would identify them as noncombatants.⁷⁰ Some journalists reported frequent detentions and hostile encounters with American, Iraqi, and Saudi forces.⁷¹ Many reporters found such conflict unavoidable; in one survey, many said that the only way to get access to real information in a timely fashion was to operate outside of the Pentagon-imposed restrictions, thereby exposing themselves to official sanctions.⁷²

Partly in response to the restrictive nature of the pool system, some reporters self-embedded, often with the aid of the more sympathetic units they were trying to cover. Malcolm Browne reported that some journalists were given uniforms and gear by troops and field officers so as to look inconspicuous, hidden from the gaze of press-hostile commanders.⁷³ He quoted one such reporter lamenting, "I spend two-thirds of my time evading the [military police] and only one-third interviewing troops."⁷⁴ Others became commanders' "pet journalists," bartering favorable coverage for access to the front.⁷⁵ Some even embedded with Saudi and Egyptian units, who were occasionally more hospitable to reporters.⁷⁶

Response by the media and legal communities to the restrictions was almost uniformly negative.⁷⁷ Walter Cronkite, testifying before a Senate committee, advocated a return to the free-roaming days of Vietnam, stating, "I don't know [if the public had received complete news coverage] because the American press is not able to go everywhere. We have no independent monitor on whether the system is working or not."⁷⁸ Many in the press feared that they were being

70. Kenealey, *supra* note 68, at 291.

71. See GANNETT FOUNDATION, *supra* note 24, at 19; Kenealey, *supra* note 68, at 291-92.

72. GANNETT FOUNDATION, *supra* note 24, at 32 ("Four-fifths went outside established channels to find information, while two-thirds (68 percent) said that they knew journalists who violated the guidelines. . . . Most said that the only way to get access to any real information in a timely fashion . . . was to operate outside the [Pentagon's Joint Information Bureau].").

73. Browne, *supra* note 32, at 30.

74. *Id.*

75. Porch, *supra* note 12, at 96.

76. GANNETT FOUNDATION, *supra* note 24, at 66.

77. See Apple, *supra* note 67 ("[M]any of the more than 500 journalists assigned to cover the war express intense dissatisfaction with the quality of information furnished to them by the United States command and even more with restrictions on their ability to go see for themselves."); William Boot, *The Press Stands Alone*, COLUM. JOURNALISM REV., Mar./Apr. 1991, at 23 ("Reporters fumed that these rules undercut 'the public's right to know' . . ."); and sources cited *infra* note 80.

78. Berke, *Pentagon Defends*, *supra* note 64.

spoon-fed misinformation during news briefings.⁷⁹ Reiterating the arguments made in the wake of Grenada, many legal commentators claimed that the restrictions deprived the media of its right of access to the front and that prepublication review constituted an impermissible prior restraint.⁸⁰ Even some members of the military who were active during the Vietnam War were critical of the degree of press restriction during Desert Storm. General Wesley Clark, for example, later remarked that the lack of press coverage meant that “[t]here was nobody there to tell the story of the youth of American going out and doing this great mission It was a missed opportunity that I hope we don’t repeat.”⁸¹

The first indication that the Gulf War would mark the highpoint of military censorship came in 1992, when in the face of growing media pressure, the military agreed to renegotiate the recommendations of the Sidle Panel.⁸² Winning the public relations war at home, some argued, would require more access than previously granted.⁸³ The process concluded with the publication of Department of Defense Directive 5122.5, which embodies the principles of 1) open and independent coverage; 2) limited use of press pools; 3) access to all major military units; 4) noninterference with reporting by public affairs officers; and 5) provision of military transport to the press.⁸⁴ The directive left unclear the exact meaning of “open and independent coverage,” which members of the press would be given

79. GANNETT FOUNDATION, *supra* note 24, at 20; *see also* Michael W. Klein, *The Censor's Red Flair, the Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions*, 19 HASTINGS CONST. L.Q. 1037, 1064-65 (1992); Apple, *supra* note 67 (describing misinformation given about the battle for Khafji).

80. *E.g.*, Frenznick, *supra* note 48; Klein, *supra* note 79; Gara LaMarche, *Managed News, Stifled Views: Free Expression as a Casualty of the Persian Gulf War*, 9 N.Y.L. SCH. J. HUM. RTS. 45 (1991); Committee on Civil Rights of the Association of the Bar of the City of New York, *Military Restrictions on Press Coverage: The Unacceptability of the Pentagon's Policies During the Persian Gulf Conflict*, 46 REC. ASS'N. BAR CITY N.Y. 843 (1991), reprinted in 23 U. TOL. L. REV. 421 (1992); Jacobs Note, *supra* note 20; Kenealey, *supra* note 68.

81. Tammy L. Miracle, *The Army and Embedded Media*, MIL. REV., Sept./Oct. 2003, at 41, 41.

82. Terry, *supra* note 21, at 3.

83. News Transcript, Dep't of Defense, ASD PA Clarke meeting with Bureau Chiefs (Nov. 7, 2001), at http://www.defenselink.mil/transcripts/2001/t1112001_t1107bc.html (quoting Owen Ullman as saying “I would suggest to you that there is a linkage between perhaps losing the PR war and not allowing American news media to have greater access to cover the war and perhaps provide the fair balanced picture that you want”).

84. William E. Lee, “*Security Review*” and the *First Amendment*, 25 HARV. J.L. & PUB. POL'Y 743, 746-47 (2002); Terry, *supra* note 21, at 3-4; Department of Defense Directive 5122.5 (Sept. 27, 2000) [hereinafter DOD Directive], available at <http://www.dtic.mil/whs/directives/corres/html/51225.htm> (last visited Feb. 23, 2004).

military transportation and access to units, and the status of security review.⁸⁵

The press restrictions loosened a bit further during the War in Afghanistan. Foreshadowing the extensive embedding to come, the military invited a few reporters to be stationed on battleships and cargo planes in the region and subjected their reports to only minimal security review.⁸⁶ This relaxation of media restrictions was in part a response to criticisms stemming from Desert Storm, in part an effort to curry favorable press coverage and in part a method of avoiding the First Amendment challenges brought during past wars.

II. FIRST AMENDMENT CHALLENGES TO PAST MILITARY PRACTICE

This recent history of press-military relations produced several First Amendment lawsuits, which focused on two issues. First, security review of reporters' stories is a classic prior restraint, which outside the national security context, is presumptively unconstitutional. Second, plaintiffs and commentators have repeatedly argued that the press has a First Amendment right of access to war zones. Due to various justiciability limitations, however, courts have repeatedly refused to reach these claims on the merits. Part A provides a recent history of battlefield First Amendment litigation, and demonstrates that courts have relied on various justiciability doctrines to avoid settling these difficult issues. Part B does what the courts generally have not: evaluate the press's arguments on the merits. It argues that the Pentagon's press restrictions, though possibly ill-advised, were consistent with the Supreme Court's First Amendment decisions.

A. *History of Legal Challenges to Past Military Practices*

The media seldom took post-Vietnam restrictions on reporting lightly; each new conflict begat new litigation. These challenges invariably sought to establish a First Amendment right of access to the battlefield. The military has, however, seldom had to seriously defend a challenge to its press restrictions. The Pentagon has primarily depended on the mootness and ripeness doctrines, as well as the time sensitive nature of news, to discourage suit and insulate its programs from review. Modern war happens so rapidly and courts move so slowly that most major fighting is over and press restrictions are lifted before any court can rule on their legality. And since the value of any piece of news diminishes rapidly, the press has little incentive to litigate any particular application of security review.

85. See Terry, *supra* note 21, at 4-5 (discussing ambiguities in DOD Directive 5122.5).

86. Lee, *supra* note 84, at 748-49.

Larry Flynt, publisher of *Hustler Magazine*, brought the first battlefield access case during the invasion of Grenada.⁸⁷ Flynt filed his suit on October 26, 1983, the day after the invasion began.⁸⁸ Because of the brevity of the invasion, the press ban was lifted the very next day.⁸⁹ Eight months later, the district court declared the request moot with no reasonable expectation that the controversy would recur.⁹⁰ Each military operation, the court held, was unique, and there was no demonstrated probability that an objectionable press ban would be imposed again in the future.⁹¹ The Court of Appeals affirmed the dismissal in a per curiam opinion.⁹²

A similar controversy reoccurred, however, during Desert Storm. *The Nation Magazine* and others brought suit, contending that the military's discriminatory granting of access to press pools violated the First Amendment.⁹³ The plaintiffs argued that the press had a right to unlimited access to the battlefield and requested that the court enjoin the Department of Defense from using pools that exclude some members of the press.⁹⁴ Despite finding "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, for example, an overt combat operation,"⁹⁵ the court refused to rule on the merits, finding that the plaintiffs' request for injunctive relief was moot in light of the end of the War.⁹⁶ With regard to the request for declaratory relief, the court held the claim not moot because capable of repetition.⁹⁷ Nevertheless, the court declined to answer the question in the abstract.⁹⁸

Perhaps anticipating the changes to come, Larry Flynt again filed for an injunction and declaratory relief during the War in Afghanistan to prevent Secretary of Defense Donald Rumsfeld from "interfering with [Flynt's] asserted First Amendment right to have [*Hustler*

87. *Flynt v. Weinberger*, 588 F. Supp. 57 (D.D.C. 1984).

88. Kathleen A. Buck, *The First Amendment — An Absolute Right?*, 26 WM. & MARY L. REV. 851, 852 (1985).

89. *Flynt*, 588 F. Supp. at 58.

90. *Id.*

91. *Id.* at 59.

92. *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985). Judge Harry T. Edwards stated in a concurring opinion that, although the case was moot, it "raised a potentially important issue of constitutional law." *Id.* at 136 (Edwards, J., concurring).

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

94. *Id.* at 1561, 1569.

95. *Id.* at 1572.

96. *Id.* at 1570.

97. *Id.*

98. *Id.* at 1572.

Magazine] correspondents accompany American troops on the ground.”⁹⁹ The court held that the request for an injunction was premature because the Department of Defense had not yet actually denied *Hustler* access to U.S. troops,¹⁰⁰ and exercised its discretion not to consider the declaratory relief.¹⁰¹ The District of Columbia Circuit affirmed on alternate grounds, holding that there is no constitutional right to embed with U.S. troops and that Department of Defense Directive 5112.5, as applied, did not violate the First Amendment.¹⁰²

Given this history of frequently having wartime media-access litigation mooted by the outbreak of peace, it was not surprising that Flynt filed prematurely, resulting in the district court finding the case not ripe. The District of Columbia Circuit’s opinion aside, challenges to wartime press restraints show an uncanny ability to evade judicial review, which has prompted proposals to designate special courts to ensure prompt hearings and “force the military to clearly justify” its wartime restrictions.¹⁰³ Until that occurs, the mootness and ripeness and courts’ traditional reluctance to interfere with military operations doctrines combined with the brief nature of most military operations are likely to insulate most future military press restrictions from judicial scrutiny.

B. *The First Amendment Claims on the Merits*

The press and commentators have commonly asserted that past military practices violated the First Amendment in two regards. First, some have argued that the First Amendment guarantees the press at least a limited right to gather war-related news, which requires physical access to the battlefield. The argument relies on Supreme Court precedent granting public access to criminal trials as a First Amendment right. The battlefield, however, is a context far removed from a criminal trial, placing the argument on shaky ground. The District of Columbia Circuit’s recent rejection of a similar right to

99. Flynt v. LFP, Inc., 245 F. Supp. 2d 94, 94 (D.D.C. 2003).

100. *Id.* at 101-03.

101. *Id.* at 109-110.

102. Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004). Flynt did eventually triumph in Iraq, however, by convincing the Pentagon to allow him to embed a *Hustler* reporter with a military unit during that conflict. Observer — U.S., FIN. TIMES, Feb. 24, 2003, available at 2003 WL 3919881.

103. Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F. L. REV. 957, 1003-06 (1994); see also Matthew Silverman, Comment, *National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information*, 78 IND. L.J. 1101, 1118 (2003) (advocating the creation of a “National Security Court” to provide speedy review to First Amendment wartime access claims).

embed with troops further suggests that reporters do not have First Amendment right of access to war zones.

Second, many have argued more persuasively that the republication review of news stories during Desert Storm was an impermissible prior restraint. The argument relies, generally, on the long tradition of hostility to prior restraints and, in particular, on the Court's decision in *New York Times v. United States*, refusing to grant an injunction against publication of classified documents pertaining to the Vietnam War.¹⁰⁴ As compelling as the arguments against prior restraints are, however, the Court's subsequent decision in *United States v. Snepp*¹⁰⁵ has placed substantial limits on the fractured and confusing *New York Times* opinion in cases when the plaintiff either consented to the restraint or occupied a position of trust with the government.

Security review and access limitations were applied sparingly, if at all, during Operation Iraqi Freedom.¹⁰⁶ Nonetheless, analysis of these issues remains relevant because the Pentagon has not disavowed their use in future wars.¹⁰⁷ As history indicates, the Pentagon adjusts its media policies according to the needs of the operation. Accordingly, there are no guarantees that restrictions similar to those in place during Desert Storm will not be imposed in the future.

1. Access

The First Amendment right of access first appeared in *Richmond Newspapers v. Virginia*,¹⁰⁸ in which the Court struck down a trial judge's order to close a murder trial to the public.¹⁰⁹ The Court has rested the right of access to criminal trials on two factors. First, although there was no majority opinion in *Richmond Newspapers*, a plurality relied heavily on the extensive historical tradition of public trials.¹¹⁰ Second, in a subsequent case, a majority clarified that the holding also rested on the notion that public scrutiny of criminal proceedings serves an important role in the criminal process because it "enhances the quality and safeguards the integrity of the factfinding

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

105. 444 U.S. 507 (1980) (per curiam).

106. P. 367; pp. 415-16 app. (quoting PAG, *supra* note 14, at para. 6).

107. See, e.g., News Transcript, U.S. Dep't of Def., Secretary Rumsfeld Meeting with Media Pool Bureau Chiefs (Oct. 18, 2001), http://www.dod.gov/transcripts/2001/t10192001_t1018bc.html (last visited May 20, 2004) (quoting Secretary of Defense Rumsfeld as stating that he can conceive of situations where security review would be appropriate).

108. 448 U.S. 555 (1980) (plurality opinion).

109. *Id.* at 581.

110. *Richmond Newspapers*, 448 U.S. at 564-70 (plurality opinion) (Burger, C.J.).

process . . . fosters an appearance of fairness . . . and serve[s] as a check upon the judicial process.”¹¹¹ The Court added that access may be restricted by narrowly tailored means to serve a compelling interest.¹¹²

The Court has never extended the First Amendment right of access beyond the confines of judicial proceedings.¹¹³ Nevertheless, commentators and media litigants have pressed for its application to the battlefield.¹¹⁴ Although no court has addressed the issue,¹¹⁵ it is unlikely that a request for access to the battlefield would survive either prong of the *Richmond Newspapers* test, even assuming that the test is properly applied outside of the context of judicial proceedings. Although its history has been interspersed with periods of openness, warfare has frequently led to the exclusion of civilians and the media from the battlefield.¹¹⁶ War therefore lacks the historical tradition of continuous public access that was crucial in *Richmond Newspapers*.

Nor does open access to the battlefield serve as compelling an interest as open criminal trials. Although the media can check the military in the same manner that it does the judiciary in a criminal trial by, for example, exposing civilian casualties and military overreaching, a criminal trial’s functioning seldom depends on the element of

111. *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 606 (1982).

112. *Id.* at 606-07.

113. *Ctr. for Nat’l Security Studies v. Dep’t of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (stating that the Supreme Court has not applied the *Richmond Newspapers* test outside the context of criminal proceedings).

114. *See, e.g., Flynt*, 355 F.3d 697 (D.C. Cir. 2004); Kenealy, *supra* note 68; John E. Smith, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM. J.L. & SOC. PROBS. 291 (1993).

115. The District of Columbia Circuit Court of Appeals recently held that the First Amendment does not guarantee the press the right to embed with military units, but the court did not address whether unilateral reporters may be excluded from the battlefield. *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004). In doing so, the D.C. Circuit limited application of the *Richmond Newspapers* test solely to criminal proceedings. *Id.* at 704. At least two other courts have disagreed by applying the *Richmond Newspapers* test to deportation proceedings. *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). The D.C. Circuit relied on cases where the court had held that the government did not have an affirmative duty to disclose certain information, such as the names of post-9/11 detainees or addresses of arrestees. *See Flynt*, 355 F.3d at 704 (discussing *Center for National Security Studies v. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003)). The court did not address whether the First Amendment guarantees a right of access to Iraq as a unilateral. *Id.* at 702 (stating that the challenged DOD directive did not prevent *Flynt* from accessing the battlefield as a unilateral). A unilateral seeking access to the battlefield, however, is not requesting that the government affirmatively provide information or accommodations. Rather, he is merely requesting that the government allow him to move freely about a large expanse of land.

116. *Flynt*, 355 F.3d at 704-05; Cassell, *supra* note 21, at 959-60; William A. Wilcox, Jr., *Security Review of Media Reports on Military Operations: A Response to Professor Lee*, 26 HARV. J.L. & PUB. POL’Y 355, 359-60 (2003); *see* 3 ELLIOT’S DEBATES 170 (J. Elliot ed. 1881) (recounting the Patrick Henry’s assertion that details of military operations need not be publicized despite his general opposition to government secrecy).

surprise. Secrecy is critical to military victory in a way that it rarely is to criminal justice. Given that battlefield access fails the first two elements of the Court's test, it matters little that the press restrictions have seldom been narrowly tailored.¹¹⁷

2. *Prior Restraint*

Even though there is no First Amendment right of media access to the battlefield, there remains the question of whether the military can condition a grant of access on the submission of stories to security review prior to publication, as it did during Desert Storm.¹¹⁸ That process occasionally resulted in military censors requesting that changes be made, ostensibly to preserve security, but occasionally for more political reasons.¹¹⁹

Modern prior restraint doctrine in the contest of national security stems from *New York Times v. United States*,¹²⁰ in which the Court declined to grant the government's request to enjoin publication of the Pentagon Papers, a classified military study of the Vietnam War. In addition to the per curium opinion striking down the lower court's injunction, each justice wrote separately. The result ultimately rested on two factors. First, three justices emphasized that Congress has not authorized the injunction.¹²¹ Second, three justices argued that a rigorous form of strict scrutiny be applied, requiring that the government demonstrate that publication "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."¹²²

The *Pentagon Papers* case was, however, severely undermined a decade later in *Snepp v. United States*.¹²³ In *Snepp*, the CIA sought to enforce a secrecy agreement with a former agent.¹²⁴ Snepp's employment contract required him to submit manuscripts pertaining to his work with the Agency prior to publication.¹²⁵ Snepp argued that

117. *But see* Frenznick, *supra* note 48, at 348-52 (concluding that the press does enjoy a right of access to the battlefield); Kenealey, *supra* note 68, at 309-24 (same); Klein, *supra* note 79, at 1068-72 (same).

118. *Nation Magazine v. United States Dep't of Def.*, 762 F. Supp. 1558, 1576 (S.D.N.Y. 1991); U.S. Dep't of Def., *Guidelines for News Media* (Jan. 14, 1991).

119. *See supra* notes 54-61.

120. 403 U.S. 713 (1971) (per curium).

121. *Id.* at 745 (Marshall, J., concurring); *id.* at 732 (White, J., concurring); *id.* at 730 (Stewart, J., concurring).

122. *Id.* at 732-27 (Brennan, J., concurring); *id.* at 730 (Stewart, J., concurring); *id.* at 732-33, 40 (White, J., concurring).

123. 444 U.S. 507 (1980).

124. *Snepp*, 444 U.S. at 508.

125. *Id.* at 507-08.

he had a First Amendment right to publish his book without submitting it to a censor, that any waiver of that right was invalid, and that this prior restraint was imposed without explicit authority from Congress.¹²⁶ The Court rejected these arguments, holding that Snepp had breached a fiduciary obligation when he published a book about CIA activities in Vietnam without obtaining clearance from the Agency.¹²⁷

In granting the government's request for an injunction requiring Snepp to submit future writings to prepublication review,¹²⁸ the Court emphasized two factors. First, Snepp had voluntarily waived his right to be free from prepublication review.¹²⁹ Second, in dicta the Court stated that because Snepp's employment relationship necessitated a high degree of trust, the government could impose reasonable limitations on his speech even in the absence of an express waiver.¹³⁰ The majority neither discussed nor attempted to distinguish the *Pentagon Papers* case.

Snepp poses a substantial obstacle to First Amendment challenges to security review by the military. It forecloses the argument that an injunction against publication requires congressional authorization. The only statute the CIA relied on was a generally worded statement in the National Security Act of 1947 that the Director of the CIA was responsible for "protecting intelligence sources and methods from unauthorized disclosure."¹³¹ *Snepp*, therefore, allows the Executive to impose prior restraints when Congress has at best spoken ambiguously.

Snepp also threatens the *Pentagon Papers* requirement that the government demonstrate that the speech would threaten a compelling government interest. None of the information Snepp sought to publish was classified; his sole indiscretion was his failure to submit the book to prepublication review.¹³² The Court merely relied on the lower court's finding that an agent's publication of unreviewed material "*can be detrimental to vital national interests*" by potentially discouraging foreign intelligence sources from cooperating with the CIA.¹³³ Such a harm is indirect, not inevitable, and not immediate. Nor is it of the same magnitude as imperiling the safety of a transport at sea. The

126. See *United States v. Snepp*, 595 F.2d 926, 931 (4th Cir. 1979).

127. *Snepp*, 444 U.S. at 507.

128. *Id.* at 516 (reinstating judgment of district court, which included injunction).

129. *Id.* at 509 n.3.

130. *Id.* at 509 n.3, 510-11.

131. See *Snepp*, 595 F.2d at 932 (quoting National Security Act of 1947, 50 U.S.C. § 403(d)(3) (2000)).

132. See *id.* at 929.

133. *Snepp*, 444 U.S. at 511-12 (emphasis added).

Court found it sufficient that preventing the threat of harm posed by Snapp's speech was a substantial interest and the prior restraint was a reasonable means of achieving that end.¹³⁴

The Court has therefore applied two very different tests when evaluating prior restraints in the national security context. Under the *Pentagon Papers* standard, the prior restraint must be congressionally authorized and survive strict scrutiny. Under *Snapp*, the prior restraint can be imposed in the absence of congressional authorization and need merely survive intermediate scrutiny. Because the *Snapp* Court made no effort to distinguish the *Pentagon Papers* case, it left unclear when each standard applies.

The two decisions can most easily be reconciled by analysis of the two variables the Court found critical in *Snapp*: waiver and trust. In the *Pentagon Papers* case, the *New York Times* neither waived its First Amendment rights, nor enjoyed a relationship of trust with the government. Where a relationship of trust of the order of that between a CIA agent and the government exists, the prior restraint must survive intermediate scrutiny. Where no relationship of trust exists and the speaker to be enjoined has not waived his First Amendment rights, strict scrutiny is appropriate.¹³⁵ What the cases do not directly answer is what standard applied to war correspondents during Desert Storm, who waived their right to be free from prior restraint but lacked a relationship of trust with the government.¹³⁶

The two cases can be visualized using a two-by-two matrix:

	Waiver	No Waiver
Trust/Employment	<i>Snapp</i>	<i>Snapp (dicta)</i>
No Trust/No Employment	Desert Storm Reporters	<i>Pentagon Papers</i>

134. *Id.* at 509 n.3. The opinion actually suggests some uncertainty about whether the government's interest must be compelling or merely substantial. *See id.* The Court first declared that "[T]he CIA [is entitled] to protect substantial government interests by imposing reasonable restrictions . . ." *Id.* In the next sentence, however, the Court stated, "The Government has a compelling interest in protecting both the secrecy of information to our national security . . . The agreement that Snapp signed is a reasonable means for protecting this vital interest." *Id.* (citations omitted).

135. *New York Times v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

136. Judge Cassell has, however, argued that Desert Storm reporters did enjoy a relationship of trust with the military due to their receipt of sensitive information, and were therefore similarly situated to Snapp. Cassell, *supra* note 21, at 951. The extensive Pentagon-imposed media restrictions and resulting press backlash belie this claim. *See supra* notes 49-81 and accompanying text. Whatever trust the two parties enjoyed, it clearly did not match that which is expected between the CIA and one of its agents.

This reasoning suggests that the prior restraints imposed on Desert Storm reporters would be analyzed under *Snepp*'s more lenient intermediate scrutiny test and be upheld. If the *Pentagon Papers* standard applied, the only relevant variable in determining the applicable test would be the existence of a relationship of trust. Regardless of the existence or non-existence of a waiver, the level of scrutiny the Court would apply would hinge solely on the relationship of the speaker to the government. Some commentators have adopted this view, arguing that upholding waivers of First Amendment rights allows private speakers to "bargain away" the public's interest in listening to the speech in question.¹³⁷

While making waivers irrelevant to First Amendment analysis can plausibly be defended on this ground, the *Snepp* Court clearly rejected it, stating, "When *Snepp* accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency."¹³⁸ In dicta, the Court then stated that *Snepp*'s employment relationship, even absent an express waiver, was sufficient to sustain the prior restraint.¹³⁹ Given that the employment relationship was alone a sufficient basis to enjoin *Snepp*'s speech, the Court would have had no reason to first discuss the existence and validity of the waiver if it were not also a sufficient ground for the decision. Furthermore, the Court cited with approval lower court opinions in *Alfred A. Knopf, Inc. v. Colby*¹⁴⁰ and *United States v. Marchetti*¹⁴¹ that had explicitly relied on the existence of identical CIA contracts in enjoining the former employee's speech. To give meaning to this analysis, the waiver and the high-trust employment relationship must be interpreted as each independently sufficient to sustain the prior restraint.

This attempted reconciliation of the *Snepp* and *Pentagon Papers* decisions supports the conclusion that, pursuant to Desert Storm reporter's agreement to submit their stories to security review, the Court would likely have applied intermediate scrutiny and upheld the practice. The military had a substantial, if not compelling, interest in preventing the release of sensitive information during wartime, and

137. See RONALD DWORKIN, A MATTER OF PRINCIPLE 396-97 (1985); see also Jonathan C. Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775, 811-814 (1982) (arguing that a waiver is "relevant only to the extent that the document evidences, as would a statute, the state's desire to impose the restriction at issue" (citation omitted)).

138. *Snepp*, 444 U.S. at 509 n.3.

139. *Id.*

140. 509 F.2d 1362, 1370 (4th Cir. 1975).

141. 466 F.2d 1309, 1317 (4th Cir. 1972).

the flexible security review system, which gave the ultimate publication decision to the reporter, was a reasonable means of achieving that end. The lack of a relationship of trust, while a plausible means of distinguishing *Snepp*, is in tension with the Court's method of analysis.

III. REPORTING FROM IRAQ

Regardless of the merits of war correspondents' claims during past military operations, the advent of embedded reporting and the opening of Iraq to unilateral reporters deftly put them to rest. Through an examination of the stories reported in *Embedded: The Media at War in Iraq*, this Part contends — with some caveats — that the embed program was largely a success. Section A argues that the embed program remedied the First Amendment deficiencies of past war efforts. Reporters enjoyed widespread access to the battlefield with virtually no censorship. The embed program was not, however, without limitations; Section B explores several of them. Embedding resulted in an alignment between reporter and subject that undermined objectivity, and the limits on reporters' independent mobility limited the types of stories they could pursue.

Although embeds have so far enjoyed minimal interference with their reporting efforts, the imposition of censorship and security review in future operations is still a possibility. Section B also argues that should such measures be implemented and challenged in court, embeds may discover that by integrating themselves so completely within the military environment, they have sacrificed a degree of First Amendment protection. In furtherance of a doctrine of military deference, the Court has greatly limited the protection of civilian and servicemen speech within a military environment.

Section C contends that the deficiencies identified in Section B, were remedied by unilateral reporting, which proved to be a necessary complement to embedding. Unilaterals were free to travel where U.S. soldiers did not, and their reports were presumptively free of the bias that may have influenced embeds. Their stories allowed for a more complete and accurate picture of the War to emerge than would have been available from embeds alone. Perhaps most importantly, the opening of Iraq to unilaterals secured the public's interests in obtaining war-related news from reporters enjoying full First Amendment protection and a fully competitive marketplace of war-related ideas and news. The relaxed restrictions on unilateral reporting, therefore, comprised an essential component of the success of the entire program of news reporting from the second Iraq War.

A. *The Successes of the Embed Program*

To implement the embed program, the Pentagon promulgated its “Public Affairs Guidance on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Commands” (“PAG”) (reprinted at pp. 401-17 app.). The PAG aspired to achieve largely what the press had been demanding for decades: access without security review. It was remarkably successful in achieving that goal.

The PAG envisions “long term, minimally restrictive access . . . to facilitate maximum, in-depth coverage of U.S. forces in combat” as part of a “long-term commitment to supporting our democratic ideals” and “ensur[ing] a full understanding of all operations.”¹⁴² The PAG grants broad access, including observation of combat mission, mission preparation, and debriefing.¹⁴³ Contrary to the practice during Desert Storm, the PAG does not consider the lack of a military escort or the reporter’s safety to be sufficient reasons to preclude media access.¹⁴⁴ The PAG also requires commanders to provide for all of a reporter’s physical needs such as transportation of equipment, rations, and medical care, as well as assistance in transmitting stories.¹⁴⁵

Officially, embeds were free to report news critical of the military; the PAG allows only an extremely minimal degree of security review.¹⁴⁶ In a refreshing rejection of the precedent of Desert Storm,

142. Pp. 402-03 app. (quoting PAG, *supra* note 14, at paras. 2.A-B).

143. Pp. 402-03 app. (quoting PAG, *supra* note 14, at para. 2.B).

144. Specifically, PAG states:

An escort may be assigned at the discretion of the unit commander. The absence of a PA escort is not a reason to preclude media access to operations.

Commanders will ensure the media are provided with every opportunity to observe actual combat operations. The personal safety of correspondents is not a reason to exclude them from combat areas.

Pp. 405-06 app. (quoting PAG, *supra* note 14, at paras. 3.F-G).

145. Pp. 405-06 app. (quoting PAG, *supra* note 14, at para. 2.C).

146. The PAG states:

The primary safeguard will be to brief media in advance about what information is sensitive and what the parameters are for covering this type of information. If media are inadvertently exposed to sensitive information they should be briefed after exposure on what information they should avoid covering. In instances where a unit commander or the designated representative determines that coverage of a story will involve exposure to sensitive information beyond the scope of what may be protected by prebriefing or debriefing, but coverage of which is in the best interests of the DOD, the commander may offer access if the reporter agrees to a security review of their coverage. Agreement to security review in exchange for this type of access must be strictly voluntary and if the reporter does not agree, then access may not be granted. If a security review is agreed to, it will not involve any editorial changes; it will be conducted solely to ensure that no sensitive or classified information is included in the product. If such information is found, the media will be asked to remove that information from the product and/or embargo the product until such information is no longer classified or sensitive. Reviews are to be done as soon as practical so as not to interrupt combat operations nor delay reporting.

the PAG prefaces its ground rules with the statement that they “are in no way intended to prevent release of derogatory, embarrassing, negative, or uncomplimentary information.”¹⁴⁷ When dealing with sensitive information and embeds, the PAG requires commanders to ask themselves “Why not release?” as opposed to “Why release?” and encourages such decisions to be made promptly.¹⁴⁸ The restrictions the PAG did impose were reasonable, being largely related to strategic information useful to the enemy¹⁴⁹ and the specific identity of U.S. casualties before their families were notified.¹⁵⁰

For the first time in decades, journalists’ responses to military press controls were positive. Nancy Bernhard of the *Nieman Report* described embedding as a “win-win policy.”¹⁵¹ John Koopman of the *San Francisco Chronicle* agreed, “It’s the way wars should always have been covered, and probably it’s the wave of the future” (p. 121). *Jerusalem Post* reporter Janine Zacharia concurred, “[T]he embed process overall was very good. . . . In general, being an embed was an invaluable experience. . . . I haven’t talked to many embeds who had a negative experience” (p. 239). Rem Reider of the *American Journalism Review* gushed that embedding was “a home run as far as the news media — and the American people — are concerned.”¹⁵²

The Pentagon also viewed the program as a success.¹⁵³ The embed coverage produced “a lot of firsthand accounts — and really compassionate accounts — of what it’s like to be a soldier or what it’s like to be on a battlefield. The military knew they would get that kind of ‘positive reporting’ ” (p. 262). Pentagon spokeswoman Victoria Clarke repeatedly praised the program for providing sympathetic stories of “the wonderful dedication and discipline of the coalition

Pp. 415-16 app. (quoting PAG, *supra* note 14, at para. 6.A.1).

147. P. 408 app. (quoting PAG, *supra* note 14, at para. 4).

148. P. 407 app. (quoting PAG, *supra* note 14, at para. 3.Q) (“The standard for release of information should be to ask, ‘Why not release’ vice ‘Why release.’ Decisions should be made ASAP, preferably in minutes, not hours.”).

149. *See, e.g.*, pp. 411-13 app. (quoting PAG, *supra* note 14, at paras. 4.G.1-19) (prohibiting reporting of specific numbers of troops, tanks and planes, future operations, rules of engagement, tactics, effectiveness of enemy tactics, etc.).

150. P. 413 app. (quoting PAG, *supra* note 14, at para. 4.H.2).

151. *See, e.g.*, Nancy Bernhard, *Embedding Reporters on the Frontline*, NIEMAN REPORTS, Summer 2003, at 87.

152. Rem Rieder, *In the Zone*, AM. JOURNALISM REV., May 2003, at 6.

153. *See, e.g.*, pp. 269-72 (statement of Sergeant Major Carol Sobel, Public Affairs Officer); Dan Miller, *General Labels Embedding a Success*, HARRISBURG PATRIOT-NEWS, Sept. 5, 2003, at B07; *Pentagon Mulls Adding ‘Media Embed’ to Public Affairs Doctrine*, INSIDE THE AIR FORCE, June 20, 2003, 2003 WL 7602358 (quoting Pentagon spokeswoman Victoria Clarke as stating “I am quite confident people feel so good about this process that you’ll see more people in the military embracing it.”).

forces.”¹⁵⁴ Other benefits cited include dampening the effects of Iraqi propaganda and second-guessing by media pundits.¹⁵⁵ The Pentagon has since announced it expects to continue the program during future military conflicts.¹⁵⁶

Contrary to reservations expressed by many within the media, embeds did not operate merely as a cheering section for the war effort. Many reports critical of the U.S. military originated from embeds. Two reporters, broadcast journalist Mike Cerre and *The Washington Post's* William Branigin, witnessed and reported on checkpoint shootings of cars filled with civilians (p. 95). As Cerre describes his dilemma, “These people had become friends of mine and protected me through some terrible combat, and here I was now reporting on something which I thought was probably going to end the careers of the officers involved” (p. 96). Cerre, however, did not report facing repercussions for his negative story.¹⁵⁷ Branigin also reported the shooting that he witnessed, though his account differed markedly from the Pentagon’s official version (p. 234). Still, the only response he received from the battalion commander was “I read your story” (p. 234). Most agree that in comparison to previous conflicts, military censorship of critical reporting was exceedingly minimal.¹⁵⁸

Other stories were either reported more quickly due to embeds or only made possible by their unique position. The infamous grenade attack on his own unit by Sergeant Hasan Akbar in the 101st Airborne Division was broken, in part, by embedded reporter Chantal Escoto.¹⁵⁹ “If it weren’t for the embed program,” stated former CNN correspondent Robert Wiener, “I doubt the American public would have heard about that fragging incident for a long, long time — maybe even years.”¹⁶⁰ David Zucchini, similarly found that embedding made new stories possible, stating, “I wrote stories I could not have produced had I not been embedded — on the pivotal battle for Baghdad; the performance of U.S. soldiers in combat; the crass

154. Chantal Escoto, *Mission to Iraq*, LEAF-CHRONICLE (Clarksville), June 22, 2003, at 11.

155. Matt Kelley, *Pentagon Ponders Embedded Reporter Policy*, ASSOC. PRESS, June 18, 2003, available at 2003 WL 57309513.

156. *Id.*

157. See p. 96.

158. See, e.g., p. 367 (Ron Martz, Military Affairs Reporter for the *Atlanta Journal-Constitution*, stating that “[t]here was absolutely no effort to censor anything”).

159. P. 130; Chantal Escoto, *Grenade Attack Surprises, Shocks Fort Campbell Troops*, LEAF-CHRONICLE (Clarksville), Mar. 24, 2003, at 1A; see also Paul Friedman, *TV: A Missed Opportunity*, COLUM. JOURNALISM REV., May/June 2003, at 29, 30-31 (discussing the grenade attack and arguing that it was embedded reporters who first reported problems with the invasion). Escoto reported facing some resistance from a commanding officer prior to making her report. P. 130.

160. Ewers, *supra* note 50, at 49.

opulence of Hussein's palaces; U.S. airstrikes on the office tower in central Baghdad; souvenir-hunting by soldiers and reporters; and the discovery of more than \$750 million in cash in a neighborhood that had been the preserve of top Iraqi officials."¹⁶¹

B. *The Limits of the Program*

Although embedding was, on the whole, a remarkable victory for the press, military, and the public, it was no panacea. The program came with its own set of inherent limitations. This Section explores several of them, including the pressure troops exerted on embeds to self-censor, the extreme narrowness of embed reports, embeds' reduced objectivity, and the reduced measure of First Amendment protection that integrating into a military unit potentially entails.

1. *Pressure to Self-Censor*

Some of the reporters in *Embedded* faced pressure from officers to self-censor. *Washington Times* photographer Joe Eddins described his situation after taking pictures of Marines drowned after being ordered to cross a canal in full gear without adequate safety precautions:

The morning after it came out, I was greeted by the Captain who had printed the story out from the Internet. He held it to my face as I was trying to shave. He said "Well, here's your story. I just want you to know that a lot of the officers in the COC (Command Operations Center) are telling me not to talk to you. To steer clear of you, not to help you out, that kind of thing. I'll do what I can for you." (p. 69)

Eddins eventually concluded that "it became pretty evident that with a smile on their faces, that I was being blackballed" (p. 70).

After writing a story expressing the soldiers' frustrations with the humanitarian aspects of their mission, Brett Lieberman of the *Patriot-News* recalled that the commander "chewed me out" (p. 320). Later, after publishing a story describing his unit's lack of resources, Lieberman stated, "I found that I had an appointment at the Public Affairs Office . . . I felt like I was being called to the principal's office. I knew it wasn't good . . ." (p. 321). Lieberman believed this unflattering story was what eventually led to his "disembedding," though the official reason was that he reported information on troop movements and operational security.¹⁶²

161. P. 142 (quoting David Zucchino, *The War, Up Close and Very Personal*, L.A. TIMES, May 3, 2003, at A8).

162. P. 321; Brett Lieberman, *Covering Echo Showed Slice of War in Iraq*, SUNDAY PATRIOT-NEWS, May 4, 2003, at D1; *Story Dispute Forces Reporter to Leave Iraq*, PATRIOT-NEWS, Apr. 29, 2003, at 1A.

Al Jazeera's one embed, Amr El-Kakhy, faced substantial opposition to his stories. El-Kakhy reported being excluded from briefings to which Western news sources were invited (p. 182). When he questioned the exclusion he was told, "You know, guys, you are a station with a reputation" (p. 182). El-Kakhy eventually disembedded after Free Iraqi Forces, who were stationed with his unit and hostile to Al Jazeera for what they perceived as pro-Hussein coverage, threatened his life (pp. 183-84). Typical of the military's view of Al Jazeera was Public Affairs Officer Guy Shields, who stated, "[W]e gave [Al Jazeera] the opportunity to be responsible journalists, they failed miserably. . . . Their reporting was totally anti-American" (p. 78). The sentiment was echoed throughout the American ranks.¹⁶³

Just as in Desert Storm, the appeals process proved worthless in resolving such disputes. The PAG provides that disputes that cannot be resolved at the unit level or through the chain of command are to be referred to the Office of the Assistant Secretary of Defense for Public Affairs ("OASDPA") for final resolution.¹⁶⁴ Making use of such procedure would likely be both futile, given the time-sensitive nature of news, and unwise antagonism of the embed's commanding officer. Appeals to the OASDPA were potentially useful only when a commanding officer sought to disembed a reporter for a purported violation of the ground rules, at which point post-appeal access was presumably better than permanent disembedding. The appellate process was further hampered when access to higher authorities was blocked further down the chain of command. Lieberman, for example, later claimed that his unit refused to allow him to appeal his disembedding.¹⁶⁵

The enlisted men also placed subtle and not-so subtle pressure on embeds to both abide by security limitations and produce pro-war coverage. Dean Staley of KSTP-TV, for example, reported that after Geraldo was disembedded for drawing troop positions in the sand on live television, "soldiers were making jokes that they should have tied Geraldo Rivera to a Humvee and driven him back through the desert" (p. 139). Lieberman reported that "there was no place to escape when [the Marines] weren't happy with everything I wrote. For example, when I quoted commanders as referring to Marines 'acting like third-grade girls' . . . [they] were none too pleased."¹⁶⁶

163. See p. 181 (quoting a statement of El-Kakhy that "I was told a lot of the troops said: 'Why should we have Al Jazeera? They are the enemy. It is the potential enemy's channel.[']").

164. P. 407 app. (quoting PAG, *supra* note 14, at para. 3.N).

165. Lieberman, *supra* note 162.

166. *Id.*

The political leaning of the reporter and news organization to which he belonged also affected journalists' impressions of the quality of access. Fox News Reporter Rick Levanthal recalled, "The Marines all seemed to love Fox and they were glad that we were there. They would speak disparagingly about other networks and they just loved us I'd rather have them like us than dislike us . . . because we're going to get better access" (p. 192). In contrast, some Marines referred to CNN as the "Communist News Network" (p. 2), and anti-war *El Correo* correspondent Mercedes Gallego felt compelled to keep her feelings from the Marines she was embedded with, who she describes as "very intolerant" (p. 88). "A liberal was like a demon [to them]" (p. 88).

2. *Narrowly Focused Reporting*

The embed system fostered a key-hole style of reporting, focusing on the minutiae of day-to-day infantry life as opposed to broader assessments of the war.¹⁶⁷ The individual reporter's perspective was "cocooned" (p. 89). It was like "squinting into a microscope," reported Zucchini, "[o]ften I was too close or confined to comprehend the war's broad sweep. I could not interview survivors of Iraqi civilians killed by U.S. soldiers or speak to Iraqi fighters trying to kill Americans. . . . I had no idea what ordinary Iraqis were experiencing."¹⁶⁸

The myopia was exacerbated by the essentially passive nature of embedded reporting (p. 333). Even though he may have been an objective observer of the war, the subject of the embed's gaze was largely determined by the military. Reporters had little ability to investigate stories, being limited largely to what they saw, which was dictated by where the division was ordered to go (p.90). Because they were prohibited from bringing their own vehicles, embeds were physically restricted by the movement of their units.¹⁶⁹ Nor were embeds free to "disembed," investigate, and return to their units; once disembedded, reporters were not permitted to return.¹⁷⁰ The inability

167. See p. 309. While the actual content of most reports was narrow, it may be, at least in theory, possible, as Public Affairs Officer Guy Shields states, to "put together all those 600 individual pieces [and] get a pretty good overall picture." P. 75. Others have compared this to "looking at the battlefield through 600 straws." Howard Kurtz, *Capturing the War*, RECORD, May 4, 2003, at 0-1.

168. Zucchini, *supra* note 161.

169. See p. 403 app. (quoting PAG, *supra* note 14, at para. 2.C.1).

170. John Laurence, *There's Geraldo, Then There Are the Rest of Us*, COLUM. JOURNALISM REV., May/June 2003, at 41 (describing a reporter's attempt to "re-embed"); Sherry Ricchiardi, *Preparing for War*, AM. JOURNALISM REV., Mar. 2003, at 29, 32 (quoting Pentagon spokesman Bryan Whitman: "[O]nce you [disembed], there are no guarantees that you'll get another opportunity with that unit or necessarily even with another unit. . . . That's

to travel independent of their unit prevented embeds from verifying much of what they were told in briefings.¹⁷¹ As translator for the *Los Angeles Times* Mohammed Fahmy stated about his role as a unilateral: “We had more freedom. We got more humanitarian stories. We were able to go to the families’ houses. We were able to deal with ex-prisoners. The embedded journalists were just covering the army and how the war was going on” (p. 242).

The narrow focus did prove ideal for providing snapshots of troop life.¹⁷² As opposed to generals and politicians who provide military briefings, “[s]oldiers . . . speak honestly. They just don’t care about what they say. They speak the truth, which is so refreshing” (p. 266). The soldiers, however, largely shared the embeds’ tunnel vision. Their honesty proved useful in covering intradivision squabbles,¹⁷³ but less so in evaluating the overall conduct of the war. “Anyone in the United States reading a newspaper or watching TV had a far better understanding of the war [than soldiers or embeds],” explained Zucchini.¹⁷⁴ Some officials viewed this as a benefit of embedded reporting; the lack of perspective prevented the embeds from reporting a cohesive story that could help the enemy.¹⁷⁵

3. *Diminished Objectivity*

The lack of scope, tight living quarters, and dependence on U.S. troops exacted an additional cost in decreased objectivity. Maintaining an impartial stance proved difficult when embeds’ lives depended

what I am talking about when I say [a reporter] ‘embeds for life.’ ”). Pentagon Spokesman Bryan Whitman explains:

[T]he question has to do with a hypothetical, what if my reporter goes off and does independent reporting from his unit. First of all he won’t be permitted to do that. An embed is precisely an embed. You stay with that unit and you stay with that unit for as long as you want to stay with that unit. . . . I would disabuse anybody of the idea that you can go out in embed status and then when you get tired just do some independent coverage

Department of Defense News briefing, Mar. 3, 2003, at 2003 WL 14795066 and http://www.defenselink.mil/news/Feb2003/t02282003_t0227bc.html (statement of Pentagon spokesman Bryan Whitman).

171. John Burnett, *Embedded/Unembedded II*, COLUM. JOURNALISM REV., May/June 2003, at 43, 43 (“The single most common criticism I heard from my embedded colleagues during the war was the lack of mobility. . . . The inability to verify the military’s version of the war made for one-sided reporting.”).

172. See, for example, pp. 329-39, discussing an interview with *Rolling Stone* reporter Evan Wright, who wrote a 28,000 word chronicle about marine-grunt life.

173. See p. 266.

174. Zucchini, *supra* note 161.

175. See John Cook, *Military, Media Meet off Battlefield to Debate War Coverage*, CHI. TRIB., Aug. 18, 2003, at 1 (quoting a public affairs officer as stating that “[a] unilateral could roam from division to division and get a better perspective than an embed on what exactly was going to happen next, perhaps putting troops in danger if they report it.”).

upon the subjects of their reports. Embed reports suffered not from failing to report the truth, but in solely reporting the “marine grunt truth.” Civilian deaths were told from the perspective of “scared young men trying to protect themselves,”¹⁷⁶ and stories of the deaths of Iraqi soldiers from that of one whose life they had recently threatened.¹⁷⁷ CNN correspondent Martin Savidge put it most eloquently when he stated:

[T]here was a constant battle between Martin Savidge, who was with the Marines, and Martin Savidge, who was a journalist. It was a conflict of the soul. The reason is because if you are in a fight as a noncombatant, and that your life and your fate are in the hands of the unit, there will form a bond with the soldiers. I know I did.¹⁷⁸

Zucchini described the “subtle and insidious alchemy” embedded reporting as being a product of the near perfect alignment of reporter and troop interests in the heat of battle.¹⁷⁹ Zucchini was even asked to perform a soldier’s task during a firefight: scanning one of the Bradley’s vision blocks to locate targets for the vehicle’s gunners.¹⁸⁰ After the battle, Zucchini “wanted to feel compassion” for the fallen Iraqis surrounding his Bradley, but he “could not stop thinking that [the Iraqi’s] RPG (rocket propelled grenade) could have left me dead on the spot.”¹⁸¹

Indicative of the closeness of quarters, many reporters picked up military habits and lingo. Concerning his experience at embed boot camp, John Koopman reported, “Richard Leiby, *The Washington Post* writer, reminded people to keep their heads on a swivel (look around for booby traps and enemy soldiers). In the barracks we talked about getting a ‘sitrep’ (situation report) on whether there would be morning ‘pt’ (physical training)” (p. 111). Carl Nolte, also of the *San Francisco Chronicle*, described how the troops he was embedded with adopted him as their mascot (p. 168). This amiable relationship produced a

176. Gordon Dillow, *Grunts and Pogues: The Embedded Life*, COLUM. JOURNALISM REV., May/June 2003, at 33 (“The point wasn’t that I wasn’t reporting the truth; the point was that I was reporting the marine grunt truth — which had also become my truth.”).

177. For example, *Los Angeles Times* reporter Geoffrey Mohan stated:

[N]o matter how much you guard against it, you start to identify with the people that you’re embedded with, particularly when you’re being shot at. You start to look at the other side as the enemy; you lose sympathy toward the dead enemy, or those you classify as the enemy. There were several incidents where I really did feel that way and was shocked at how I adopted that posture. In retrospect, I look at it as perfectly rational under the circumstances, but it wasn’t something I expected to see in myself.

Pp. 262-63.

178. P. 277; see also p. 309 (“[J]ust the fact that you’re putting your life in the hands of the Marines is . . . not conducive to objective journalism . . . ?”).

179. Zucchini, *supra* note 161.

180. *Id.*

181. *Id.*

divided sense of loyalty in some reporters. Nolte, for example, contradictorily warned the troops he was embedded with, “Okay, don’t fuck up. If you fuck up, don’t let me find out, because I’m gonna report it” (p. 170).

After disembedding, some reporters maintained ties to the troops they covered. Kevin Peraino of *Newsweek* described “hanging out in my Baghdad hotel room” with soldiers from his division because “[t]here is no doubt you like the people you cover” (p. 266). Fox News reporter Maya Zumwalt stated, “I developed a number of friendships. I felt like I inherited a battalion of brothers” (p. 351). “There will probably be some journalists that become godparents to some of the soldiers’ kids,” speculated Public Affairs Officer Guy Shields (p. 75).

Some reporters, accepting that objectivity under embedded conditions would be difficult, resigned themselves to producing inevitably biased reports. As Dillow stated, “I couldn’t look anybody in the eye and say, ‘Hey, I’m being completely objective,’ because I liked and respected these guys. I called them ‘my Marines.’ I lived with these guys. If I were to tell you, ‘Oh, I was completely objective,’ wouldn’t you think I was bullshitting you?” (p. 53). One UPI correspondent stated candidly, “[r]eporters love troops. Put us with these eighteen-year-old kids and we just turn to jelly” (p. xiii).

4. *Limited First Amendment Protection*

The embed program eliminated the primary First Amendment objections to previous regulation of war correspondents: access restrictions and prepublication review. Unlike past programs, which largely depended on mootness and ripeness limitations for protection from judicial review, embedding provided reporters with the latitude and freedom to report well within the bounds of the First Amendment. But the embed program was not without First Amendment implications. Although the program proved remarkably accommodating to reporter First Amendment rights, the Iraqi experience may prove to be an outlier in the same vein as Vietnam. Historically, the military has conditioned grants of access on censorship of varying degrees, and it has not disclaimed any intent to do so in the future. Because the military has a constant need for secrecy during war, relaxing access restrictions may produce the unintended consequence of expanded censorship.¹⁸² Should the military choose that course, embeds may find that courts will offer

182. For an elaboration on this argument, see Cassell, *supra* note 21, at 969 (“The military often conditions access to military operations on acceptance of censorship.”). Judge Cassell has argued that access demands may, if granted, be accompanied by the unintended consequence of a “censorship counterreaction.” *Id.* at 972-73.

them less protection than they would receive had they remained unilateral.

Courts may not scrutinize embed claims as thoroughly as they would those of a unilateral reporter. When reviewing constitutional challenges to military regulations, the Court employs what has become known as “the military deference doctrine,” which requires a more lenient application of the constitutional right than would be appropriate in the civilian context.¹⁸³ The military deference doctrine diminishes the vitality of First Amendment protection to varying degrees according to two overlapping factors: the extent to which the speech occurs within the military community and whether the speaker is a service member. Embedding implicates both by integrating the reporter into the military community and blurring the distinction between soldier and reporter.

The modern military deference doctrine dates to the Court’s decision in *Parker v. Levy*.¹⁸⁴ Levy, an army captain, was court-martialed for violating two provisions of the Uniform Code of Military Justice that prohibited “conduct unbecoming an officer,” and “all disorders and neglects to the prejudice of good order and discipline in the armed forces.”¹⁸⁵ The conduct in question was Levy’s rabble-rousing remarks to enlisted men condemning the Vietnam War.¹⁸⁶ The Third Circuit granted Levy’s petition for habeas relief, holding that the regulations were unconstitutionally vague and overbroad.¹⁸⁷

The Supreme Court began its analysis of Levy’s claim by announcing, “[T]he military is, by necessity, a specialized society separate from civilian society,”¹⁸⁸ thereby drawing a sharp distinction between speech within the military and civilian contexts. The military’s unique need for control and obedience, and its status apart from civilian life, justified applying a more relaxed First Amendment analysis.¹⁸⁹ While paying lip service to the First Amendment rights of military personnel, the Court rejected Levy’s claim, stating that the needs of the military community “may render permissible within the military that which would be constitutionally impermissible outside it.”¹⁹⁰ Because the First Amendment — indeed, the Constitution

183. For a history and discussion of the military deference doctrine, see generally John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

184. 417 U.S. 733 (1974). ‘

185. *Parker*, 417 U.S. at 738 (citing 10 U.S.C. §§ 933-34 (2000)).

186. *Id.* at 736-37.

187. *Levy v. Parker*, 478 F.2d 772, 797-99 (3d Cir. 1973).

188. *Parker*, 417 U.S. at 743.

189. *Id.* at 743-44.

190. *Id.* at 758.

generally — operates differently within the military community, the civilian precedents Levy relied on were not controlling.¹⁹¹ The Court then declined to apply its standard overbreadth doctrine to the challenged provision of the Uniform Code of Military Justice, instead applying the more lenient vagueness standard, for which the Court applies a strong presumption of validity.¹⁹²

The Court extended the reasoning of *Parker* to reach the speech of a civilian, unaffiliated with the military in *Greer v. Spock*.¹⁹³ In *Spock*, People's Party and Socialist Workers Party candidates for President and Vice President brought suit to enjoin the enforcement of a regulation that prohibited distribution of campaign literature and making of political speeches in Fort Dix Military Reservation.¹⁹⁴ Fort Dix was open to the public, containing numerous public roads; its entrance was unguarded and marked by a sign that said "Visitors Welcome."¹⁹⁵ Had the candidates sought to make their speeches and disseminate their pamphlets on off-base public streets, similar restrictions would have clearly violated the First Amendment, and the Court so acknowledged.¹⁹⁶ But because the speech occurred on a military base, which was presumptively not a public forum, the regulations were upheld.¹⁹⁷ The Court found it sufficient that the military had not "abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation."¹⁹⁸ *Spock* marked a substantial expansion of the doctrine of military deference. Whereas *Parker v. Levy* involved censorship of a serviceman's speech pursuant to the congressionally enacted Uniform Code of Military Justice, *Spock* was a civilian whose speech was silenced pursuant to a purely executive regulation.¹⁹⁹

The Court confirmed that precedents establishing the military deference doctrine applied to both civilians and servicemen in *Brown v. Glines*,²⁰⁰ a case involving a regulation that prohibited Air Force

191. *See id.* at 756 (holding that vagueness challenges to the Uniform Code of Military Justice are to be judged by the standard that applies to criminal statutes regulating economic activity).

192. *Id.* at 756-57.

193. 424 U.S. 828, 837 (1976).

194. *Spock*, 424 U.S. at 832-34.

195. *Id.* at 830. The Court of Appeals held that the government could not allow access to some members of the public and deny it to others based solely on the political content of their speech. *Spock v. David*, 469 F.2d 1047, 1056 (1972).

196. *See Spock*, 424 U.S. at 835-36 (citing *Hague v. CIO*, 307 U.S. 496, 515-16 (1939)).

197. *Id.* at 840.

198. *Id.* at 837.

199. O'Connor, *supra* note 183, at 247-48.

200. 444 U.S. 348, 361 (1980).

members from collecting signatures for a petition without first obtaining the permission of their commander. Captain Glines had been removed from active duty after circulating a petition, ultimately intended for Congress, concerning the Air Force's grooming standards.²⁰¹ In upholding the prior restraint, the Court relied heavily on *Spock*, even though Glines was a member of the armed forces while the speakers in *Spock* were not.²⁰² In so doing, the Court emphasized that the strength with which the military deference doctrine operated was determined by both the identity of the speaker and the context of the speech.²⁰³ Regardless of the identity of the speaker, First Amendment rights are weaker when exercised within a military context because most property under military control is not a public forum.²⁰⁴ That the speaker is a serviceman and therefore a member of "the military community" merely grants the military even greater leeway to restrict speech.²⁰⁵

Although the Court's application of the military deference doctrine to the First Amendment has been limited to speech on bases, there are reasons to think it would similarly apply to a military unit engaged in combat.²⁰⁶ The purpose of the military-civilian community distinction, the Court has stated, is to allow the military to "maintain the discipline essential to perform its mission effectively."²⁰⁷ It would make little sense to allow speech restrictions on the grounds that they

201. *Brown*, 444 U.S. at 351.

202. See *Spock*, 424 U.S. at 832 (describing speakers as candidates for president).

203. See *Brown*, 444 U.S. at 356 n.13 ("[T]he military has greater authority over servicemen than a civilian."); *id.* at 357 n.14 (emphasizing that the Court's decision applies to a variety of military installations).

204. *Id.* at 358 n.13 ("Glines would distinguish *Spock* on the ground that the plaintiffs in that case were civilians who had no specific right to enter a military base. The distinction is unpersuasive."); see also *Ethredge v. Hail*, 56 F.3d 1324, 1327-29 (11th Cir. 1995) (applying a lenient form of review to a military base's ban on bumper stickers that "embarrass[] or disparage" the President when enforced against a civilian contractor); Jonathan Turley, *The Military Pocket Republic*, 97 *Nw. U. L. Rev.* 1, 73 (2002) ("On a military base, commanders have been allowed to restrict speech of servicemembers and civilians alike, though the degree of such restrictions is far greater for the former than the latter.").

205. *Brown*, 444 U.S. at 356 n.13 ("Unauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians. Furthermore, the military has greater authority over a serviceman than over a civilian.").

206. Note also that the First Amendment would not apply at all to a foreign reporter embedded overseas. See *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (holding that an alien attempting to enter the United States is not protected by First Amendment); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that Fourth Amendment does not apply to overseas alien without voluntary attachment).

207. *Parker v. Levy*, 417 U.S. 733, 744 (1974); see also *Brown*, 444 U.S. at 356 (stating that because a commander "is charged with maintaining morale, discipline, and readiness, he must have authority over [speech] that could affect adversely these essential attributes of an effective military force").

are necessary to ensure combat readiness, and then to allow that same speech during actual combat. If anything, the need for discipline is heightened during combat, and similarly so should the vigor with which the military deference doctrine is applied.

The military deference doctrine may prove problematic on two grounds should future embeds bring First Amendment claims. First, courts may permit more substantial restrictions on embed speech because a military unit, like a military base, is not a public forum. Both units and bases are ordinarily closed to the public, and the military still has not abandoned its interest in regulating speech in either environment.²⁰⁸

Although embedding opened the military unit to some speech activities, embedding did not transform the military unit into a designated public forum. By opening public property to indiscriminate use as a place for expressive activity, the government can become bound by the same stringent First Amendment standards as are applicable in a traditional public forum.²⁰⁹ But a designated public forum is not created when access is limited to select speakers, as opposed to general access for a class of speakers.²¹⁰ When members of that class of designated speakers must still obtain permission to gain access, no designated public forum has been created.²¹¹ Although embedding was a widespread practice, military units were not thrown indiscriminately open to any reporter who should wish to embed. Instead, the Pentagon retained discretion in allocating slots, basing its decision largely on the news outlet's nationality and circulation, no doubt excluding many willing journalists.²¹² Similarly, the Pentagon continued to impose some content limitations on embed speech relating to American casualties and troop movements, thereby

208. See *Spock v. Greer*, 424 U.S. 828, 837-38 (1976) (holding that because the military had not abandoned any claim of interest in regulating speech on a military base, the base was not a public forum); *United States v. Albertini*, 472 U.S. 675, 686 (1985) ("Military bases generally are not public fora . . .").

209. See 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 8:7 (1996) (describing the designated public forum as "opened by the state for indiscriminate use as a place for expressive activity").

210. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679-80 (1998).

211. *Id.* at 679.

212. See Howard Kurtz, *Little media flak about Pentagon*, SAN JOSE MERCURY NEWS, Mar. 12, 2003, at 12A (stating that *The New York Times*, *The Washington Post*, and *The Wall Street Journal* each received a dozen slots; ABC, NBC, CBS, CNN, Fox, and the Associated Press each received twenty-six slots; and foreign news sources were allocated only twenty percent of the slots); Interview by BBC TV with Brian Whitman, Deputy Assistant Secretary of Defense, U.S. Department of Defense (Apr. 18, 2003), at <http://www.defenselink.mil/transcripts/2003/tr20030418-0142.html> (describing the allocation of embed slots as complex and subjective).

retaining its interest in regulating embed speech and exhibiting an intent to not transform the unit into a public forum.²¹³

An embedded reporter, therefore, likely would enjoy the same First Amendment protection as that enjoyed by the leafleteers and speakers in *Greer v. Spock*. Content-based regulations in nonfora, like military units and bases, are governed by a reasonableness standard.²¹⁴ Entire classes of speech can be excluded, so long as such efforts are not intended to suppress expression based on the speaker's viewpoint.²¹⁵

Even these meager limits on the military's power to suppress speech in a nonpublic forum might not be strenuously enforced by the courts. The Eleventh Circuit has, for example, applied the viewpoint-neutrality requirement in a less-than-rigorous manner to the speech of a civilian contractor on a military base in *Ethredge v. Hail*.²¹⁶ Ethredge, a civilian aircraft mechanic on Robins Air Force Base, was ordered to remove bumper stickers critical of the President from the car he used on base, pursuant to an administrative order barring "bumper stickers . . . that embarrass or disparage' the President."²¹⁷ The court first concluded that Ethredge's speech occurred in a nonpublic forum, and could therefore be subject to reasonable, viewpoint-neutral regulation.²¹⁸ The court then remarkably concluded that banning only speech that embarrasses the President was viewpoint neutral. The court reasoned that it was conceivable that a message supportive of the President might still embarrass him.²¹⁹ This conclusion is dubious, and the court's reasoning is disingenuous.²²⁰ By prohibiting speech that embarrasses the President, but not speech pleasing to him, the order handicaps one side of the political debate much more severely than

213. *But see* Nation Magazine v. United States Dep't of Def., 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (holding that the Desert Storm press pool was a limited public forum despite access limitations). This holding has subsequently been undermined by *Arkansas Educational Television Commission v. Forbes*, where the Court stated that "[a] designated forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Forbes*, 523 U.S. at 679.

214. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

215. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

216. 56 F.3d 1324 (11th Cir. 1995).

217. *Ethredge*, 56 F.3d at 1325.

218. *Id.* at 1327.

219. *Id.*

220. Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 342 (1998) ("[D]espite the court's conclusion to the contrary, the order is undoubtedly both content and viewpoint based."); Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 146-47 (1996) ("In *Ethredge* the court turned intellectual somersaults to avoid finding viewpoint discrimination . . ."); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 73 n.322 (2002) (describing the court's conclusion as "highly dubious").

the other.²²¹ *Ethredge*, therefore, suggests that even the lessened protection that embeds would be entitled to as speakers in a non-fora might be circumscribed by the military deference doctrine.

During Operation Iraqi Freedom the Pentagon did, however, indiscriminately open the battlefield to all unilaterals for use as a place of expressive activity, thereby arguably producing a designated public forum.²²² By opening Iraq's borders, the military intended to make the battlefield "generally available."²²³ Because access to the battlefield and Iraq generally ceased to be "selective," unilaterals operated inside a designated public forum.²²⁴ The same highly protective legal standards apply to the regulation of speech in a designated public forum as in a traditional public forum.²²⁵ In particular, content-based restrictions are subject to strict scrutiny.²²⁶ Forum analysis therefore suggests that unilaterals enjoyed a higher degree of protection than embeds, who because they were closely tied to their units,²²⁷ were not able to enjoy the benefits of the designated public forum.

The second potential limitation on the First Amendment rights of embeds is that, due to their extensive integration into the functioning of the units they covered, a court may hold that their speech can be more completely regulated due to their similarity to a service member or military employees. Embeds were more than temporary visitors on a military base, they were long-term members of a military unit. In some instances, they even assisted their units in important military tasks such as acting as a spotter for marine gunners²²⁸ or, in the case of one reporter who also happened to be a doctor, performing surgery on fallen soldiers (pp. 36-37). When an embed occupies a position in a military unit that but for his presence would be taken by another

221. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992) ("[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *see also* United States v. Eichman, 496 U.S. 310, 317 (1990) (holding that prohibitions of actions that "deface" and "defile" the flag are not viewpoint neutral); Heins, *supra* note 220, at 146. It is worth noting that courts have not limited forum analysis to areas strictly within the territory of the United States. *See* Nation Magazine v. United States Dep't. of Def., 762 F. Supp. 1558, 1573 (S.D.N.Y. 1991) (applying forum analysis to overseas press pools).

222. *See, e.g.*, Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir. 1996) (opening of a senior center to the public for speech purposes created a designated public forum).

223. *See generally* *Forbes*, 523 U.S. at 678-79 (1998) (discussing the requirement that, to create a designated public forum, the government intend to make it generally available).

224. *See id.* at 679-80 (discussing the selective versus general access distinction).

225. 1 SMOLLA, *supra* note 209, at § 8:9.

226. 1 *id.*

227. *See supra* notes 169-172, and accompanying text (discussing mobility limitations on embeds, who were not permitted to leave their units).

228. Zucchini, *supra* note 161, at A8.

soldier, and that embed performs functions vital to the unit's operation, the military's interest in applying a uniform body of military law and regulation is implicated.²²⁹ A court may therefore apply the doctrine of military deference as developed in cases involving the speech of servicemen and military employees to embeds' speech.

This blurriness between civilians, military employees, and servicemen, is also reflected in the Eleventh Circuit's opinion in *Ethredge v. Hail*.²³⁰ After applying a less-than-rigorous viewpoint-neutrality analysis, the court addressed the reasonableness and possible overbreadth of the order,²³¹ relying on precedent originally applied to servicemen. In finding the order reasonable, the court first quoted *Goldman v. Weinberger*,²³² a case pertaining to a serviceman's First Amendment rights, for the proposition that "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state"²³³ The court then noted that under the Uniform Code of Military Justice ("UCMJ") the military can punish "[a]ny commissioned officer who uses contemptuous words against the President,"²³⁴ while ignoring that this provision, by its terms, does not apply to civilians. The court ultimately found the order reasonable because deference was due to the military's professional judgment, again relying on *Goldman*.²³⁵ Finally, in addressing Ethredge's overbreadth challenge, the court unhesitatingly applied *Parker v. Levy*'s more lenient vagueness standard, rather than the more stringent civilian standard.²³⁶ The *Ethredge* court's willingness to rely on Supreme Court precedent that had previously only been applied to the speech of servicemen suggests that, for First Amendment purposes, the line between reporter and soldier may be blurrier than the media would like.

229. 10 U.S.C. § 802(a)(b) (applying uniform code of military justice to persons accompanying armed forces during war); cf. *Parker v. Levy*, 417 U.S. 733, 744 (1974) ("Just as military society has been a society apart from civilian society, so '[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'") (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

230. *Ethredge*, 56 F.3d 1324 (11th Cir. 1995).

231. *Id.* at 1328-29.

232. *Goldman*, 475 U.S. 503 (1986).

233. *Ethredge*, 56 F.3d at 1328.

234. *Id.* (quoting 10 U.S.C. § 888 (2000)).

235. *Id.* at 1328-29.

236. *Id.* at 1329 (relying on *Parker*, 417 U.S. 733 (1974)).

C. *Unilaterals*

Although the Pentagon's position towards unilaterals was begrudging acceptance,²³⁷ many military officials were critical of the decision to allow unilateral reporters into Iraq,²³⁸ and some non-embedded journalists practice were treated with hostility reminiscent of Desert Storm. In response to the shelling of the Palestine Hotel in Baghdad that killed three unilateral journalists, Public Affairs Officer Guy Shields stated, "Well, maybe the journalists who were staying in the Palestine decided to embed on the wrong side" (p. 75). One Marine commander described unilaterals as "leeches."²³⁹ Susan Glassner of the *Washington Post* commented, "The idea of an independent journalist covering the conflict was anathema to the military. I think Public Affairs Officer, Colonel Shields, was never able to work it out, though there was general goodwill on his part. . . . They wanted to channel everything to its own embed program, which was controlled" (p. 292).

Unilaterals often reported suffering from coalition-created difficulties.²⁴⁰ In contrast to the embeds' easy entry into Iraq, many unilaterals snuck across the border early in violation of military rules.²⁴¹ One technique was for reporters to disguise themselves as aid workers, who were permitted to cross the border.²⁴² When, during the riots in Basra, she sought refuge in a government palace held by the British, Glasser reported that "they wouldn't let us in there because we were unilateral journalists and not embedded. . . . [T]here was a standing order not to admit any unilateral journalists" (p. 295). In one incident, two Israeli and two Portuguese unilaterals were detained for forty-eight hours by U.S. forces in Iraq and accused of being spies.²⁴³

While it is tempting to view the throwing open of individual military units as the pinnacle of First Amendment freedom, the press was often the most informative and objective when it operated independent of Marines or Public Affairs Officers. Embedded reporting, while providing a valuable supplement to independent

237. See John Donovan, *For the Unilaterals, No Neutral Ground*, COLUM. JOURNALISM REV., May/June 2003, at 35; Jennifer LaFleur, *Embed Program Worked, Broader War Coverage Lagged*, NEWS MEDIA & L., May 1, 2003, at 46.

238. Cook, *supra* note 175, at 231.

239. *Id.*

240. See Mark Jurkowitz, *Media protest treatment in Iraq: Letter to Pentagon accuses US troops of intimidation*, BOSTON GLOBE, Nov. 13, 2003, at A25, available at 2003 WL 66477237.

241. See p. 292; Donovan, *supra* note 237, at 36.

242. Donovan, *supra* note 237, at 36.

243. P. xvi; Sherry Ricchiardi, *Close to the Action*, AM. JOURNALISM REV., May 2003, at 28, 32.

coverage, would not have alone provided means to fully assess the conduct of the War. This Section argues that by providing breadth of vision while maintaining greater objectivity, unilaterals remedied many of the limitations inherent in embedded reporting.

1. *Unilaterals as a Supplement to Embeds*

Despite Pentagon- and Iraqi-imposed difficulties, unilateral reporting proved essential to providing a full, balanced picture of the War in two respects. First, unilaterals had access to information that embeds lacked. Unilaterals were able to observe the effects of the fighting in parts of Iraq geographically isolated from U.S. troops, and to interact with Iraqi officials and civilians. For example, unilateral Anna Badkhen of the *San Francisco Chronicle* worked closely with peshmerga fighters to report on the war's impact on the Kurdish resistance.²⁴⁴ Other unilaterals provided coverage of the aftermath of the Iraqi government's collapse, the fates of deserters from the Iraqi army, and the impact of the war on Iraqi civilians.²⁴⁵ Unilaterals were also able to provide follow-up coverage long after an embed's unit had moved on. John Donovan of ABC News, for example, reported that the warm welcome embeds and U.S. troops received from Iraqi civilians often deteriorated after the tanks and guns were out of sight.²⁴⁶ Most significantly, unilaterals were able "to report on what was going on beyond the narrow aperture of [a] particular unit" (p. 375).

Second, because their interests were not so closely aligned with those of U.S. troops, unilaterals were more easily able to maintain the objectivity necessary to adequately inform the public of the conduct of the war.²⁴⁷ Unilateral reporting not only guaranteed that the press had access to much of the information necessary to inform the public, but

244. See pp. 17-18; Anna Badkhen, *Iraqi Kurds Hope Against Hope: Peshmarga fighters look to U.S. for their long-awaited liberation*, S.F. CHRON., Mar. 31, 2003, at W1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/03/31/MN78738.DTL>; Anna Badkhen, *Living and Farming in the Shadow of Iraqi Guns: Kurdish enclave of Kalak faces new risks with invasion of Iraq*, S.F. CHRON., Mar. 24, 2003, at W5, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/03/24/MN266619.DTL>; Anna Badkhen, *Turkish-Kurd conflict feared — WAITING: Ethnic minority relying on U.S. invasion*, S.F. CHRON., Mar. 21, 2003, at W12, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/03/21/MN223039.DTL>.

245. See, e.g., p. 124 (unilateral freelance photographer Robert J. Galbraith describing post-war looting within Baghdad); pp. 296-97 (unilateral Susan Glasser of the *Washington Post* describing her encounters with recently freed Iraqi political prisoners); Anna Badkhen, *Iraqi Soldier's Life — or Death — mystery at bombed base*, S.F. CHRON., Apr. 7, 2003, at A16, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle=/archive/2003/04/07/MN270266.DTL>; Anthony Shadid, *Baghdad: Minding Your Minder*, COLUM. JOURNALISM REV., May/June 2003, at 36.

246. Donovan, *supra* note 237, at 35.

247. See *supra* note 171.

it ensured that reporters were willing to report critically and objectively. These presumptively objective reports allowed editors to balance unilateral against embed stories, thereby providing the perspective necessary to make informed editorial decisions and evaluate competing claims.²⁴⁸

2. *Unilaterals in the Marketplace of Ideas*

Although objectivity and mobility made unilaterals an invaluable supplement to the embed program, there is no guarantee that the next war will provide unilaterals with the same degree of access they enjoyed in Operation Iraqi Freedom. In addition to the quantity of information that a limited-access policy would deprive the public of, a policy of embed-only war reporting threatens to remove a vitally important voice from the marketplace of ideas on military policy.

What truly distinguished the embed program from previous efforts to shape war coverage is that the embed program forsook official coercion as a means. Favorable reports were garnered, not by previewing stories or limiting reporters' access to the more gruesome aspects of the fighting, but by a particularly subtle form of persuasion.²⁴⁹ As opposed to previous wars, where reporters were kept distinctly apart from the troops, embeds became a part of and identified with the American military effort, inevitably producing a more sympathetic portrayal.

This conclusion is troubling because it suggests that the Pentagon was advancing a particular viewpoint on Operation Iraqi Freedom, not through directly advocating that position to the American people, but by creating the embed program as a means of placing subtle situational pressures on private speakers that would produce a more favorable style of war coverage.²⁵⁰ Although the Pentagon was not speaking per se, it nevertheless adopted the embed program with the hope that it would impact the content of public discourse.²⁵¹ The

248. See Geert Linnebank, *Counteract Drawbacks of 'Embedded' Reporters*, USA TODAY, Mar. 31, 2003, at 15A ("[The news executive] has to ensure that he deploys some roving reporters . . . to try to balance, if not verify, what the 'embeds' are saying. . . . Finally, the news executive needs a vigilant — and skeptical — editing desk . . .").

249. See Burnett, *supra* note 171, at 43 ("Much of the Marine command that I met saw us, not as neutral journalists who had a job to do, but as instruments to reflect the accomplishments and glory of the United States Marine Corps.").

250. Cf. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 145 (1983) ("Government has the potential to engineer public consent by dominating communications networks and selectively disclosing or revealing information.").

251. Tim Burt, *Embedded Reporters Gave "More Balanced War Coverage,"* FIN. TIMES, Nov. 6, 2003, at 13 (describing a BBC study that concluded that the embed program was "designed to keep public opinion on the side of the U.S. forces"), available at 2003 WL 66615841.

embed program can, therefore, be analogized to a form of government speech.

Government speech and its impact on public discourse has been a topic of lively debate in recent years;²⁵² a few observations will suffice for our purposes. Government efforts to shape the content of political discourse and the flow of information is most troubling when the government is either the only voice in the relevant speech market or a pervasive force in shaping the functioning of that market.²⁵³ A competitive marketplace of ideas, with multiple sources of information and competing voices, ensures a fractured source of political truths. A government that obtains a monopoly as either the sole source of information concerning its own actions or as the lone norm-articulating voice can skew the ideas that reach an interested audience and threaten an entrenchment of political power.²⁵⁴ This concern is compounded when the government influence on the marketplace of ideas is non-obvious.²⁵⁵ Knowledge of the government's role in shaping speech enables the listener to assess its value, exposes potential biases, and facilitates the pursuit of competing speakers and viewpoints.²⁵⁶

Because the government has the power to restrict all access to the battlefield, it also may, by restricting the access of unilateral reporters, grant it solely to embeds. Substantial restriction of unilateral access would distort the marketplace of ideas in two manners. First, an embed-only style of coverage would lack the unique voices and perspectives offered by unilateral reporters. Elimination of these reports and ideas would not be because they were unfit to compete

252. See generally *id.*; Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1491-95 (2001); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 379 (1983) (reviewing YUDOF, *supra* note 250); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 J. L. & CONTEMP. PROBS. 530 (1966).

253. See Bezanson & Buss, *supra* note 252, at 1488 (discussing the danger of government participation in the marketplace of ideas that drowns out rival communications); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680-81 (1992) (discussing the danger of the "indoctrinating effect of a monopolized marketplace of ideas"); Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 27-40 (2000) [hereinafter Greene, *Government of the Good*] (discussing the effects of government monopolization of the marketplace of ideas); Schauer, *supra* note 252, at 379-80 (arguing that government speech is less of a problem when the government is one of many speakers).

254. See YUDOF, *supra* note 250, at 170 ("The greater the state's monopoly, the more apparent the dangers of government communications."); Bezanson & Buss, *supra* note 252, at 1491.

255. See Greene, *Government of the Good*, *supra* note 253, at 50 (discussing the importance of transparent identification of the speaker as a means of warding off monopolization of the marketplace of ideas).

256. See *id.*

with embed reports in the marketplace of ideas, but because they faced the barrier to entry imposed by the Pentagon's access restrictions. While government-sponsored speech is often criticized for its ability to "drown out" other speakers,²⁵⁷ exclusion of unilaterals from the battlefield would go one step further by eliminating their voices entirely.²⁵⁸

Second, an embed-only style of reporting would decrease the saliency of the limitations of that style of reporting. Unilaterals did more than add an additional, competing viewpoint to the marketplace of ideas; they clarified the value of embed speech and thereby heightened the exercise of our collective judgment.²⁵⁹ Comparison of unilateral to embed reports made transparent both the military's influence on those reports and their gaps and narrowness. By making the government's influence on embed reports more apparent, unilateral reports both encouraged the pursuit of and provided a source of competing voices.²⁶⁰ The availability of both unilateral and embed reports revealed the deficiencies and biases of each group of reporters. The unilateral coverage of the Iraqi military and civilians and the diverse perspectives those reports offered made the embeds' situational constraints apparent.²⁶¹

CONCLUSION

The same qualities that made the Pentagon's Operation Iraqi Freedom media policies a success also make *Emedded* a dynamic and diverse read. Access to U.S. troops and the battlefield allowed the journalists of *Embedded* to produce the extensive frontline coverage that was missing from Grenada, Panama, and Desert Storm. Unlike those operations, during which the story of the American soldier went

257. E.g., YUDOF, *supra* note 250, at 155 ("There is the danger that a well-heeled government might so dominate the opportunities for mass communications (which are not infinite) that individual voices would be drowned out."); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Van Alstyne, *supra* note 252, at 533.

258. Cf. Schauer, *supra* note 252, at 379-81 (criticizing the "drowns out" metaphor because government speech does not eliminate private speech entirely).

259. Cf. YUDOF, *supra* note 250, at 156 ("The 'thinking process of the community' may be mutilated as much by government expression and nondisclosure as by government censorship.")

260. See Greene, *Government of the Good*, *supra* note 253, at 50 ("[T]he transparent identification of speech as the government's helps to ward off monopolization. By knowing the source of speech, one can more readily assess its value and search for competing speakers and viewpoints.")

261. See YUDOF, *supra* note 250, at 169 ("[I]t appears likely that government may be more persuasive . . . when alternative voices are muffled."); Bezanson & Buss, *supra* note 252, at 1491-92 (arguing that government speech is less objectionable when there is wide opportunity for non-government voices to reach listeners).

largely untold, and the actions of the military largely unobserved, Operation Iraqi Freedom featured an unsurpassed volume of original, up close war reporting.

Embedded also reveals, however, the inherent limitations of that style of reporting. As the journalist in *Embedded* admit, reporting from within a military unit resulted in overly focused coverage, a diminished sense of objectivity, and the pressure to self-censor. Embeds were unable to cover events that they couldn't observe through a gun aperture, and their reports suffered from the actual and perceived pressure to self-censor unflattering portrayals of their new hosts.

Embeds, by gaining greater access to the front lines, may also have sacrificed a degree of First Amendment protection. In addition to the waivers that embeds were forced to sign, embeds may have subjected their First Amendment claims to application to a less protective set of precedents. The Supreme Court has repeatedly declined to scrutinize First Amendment claims as closely when the relevant speech occurs in a military environment or the speaker is closely affiliated with the armed forces. Embedding may invite application of this less protective line of cases.

Unilaterals proved a necessary remedy to these limitations and an invaluable component to the success of both *Embedded*, the book, and embedding, the policy. Because their movement was not limited to that of the unit they covered, unilaterals were able to report on events far removed from actual combat. Their presence also guaranteed a competing, non-government-influenced set of perspectives on the conduct of the War.

Although far from perfect, the success of the Pentagon's new policies refutes the conventional wisdom gleaned from Vietnam, Grenada, Panama, and Desert Storm, that a war must be conducted in complete secrecy to be successful. The Operation Iraqi Freedom experience, as illustrated by *Embedded*, could serve as a rough blueprint for maximizing press freedom without sacrificing security in future conflicts.