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## The First Amendment Fights Back: A Proposal For The Media To Reclaim The Battlefield After The Persian Gulf War

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## THE FIRST AMENDMENT FIGHTS BACK: A PROPOSAL FOR THE MEDIA TO RECLAIM THE BATTLEFIELD AFTER THE PERSIAN GULF WAR

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to Farce or a Tragedy; or perhaps both.

—James Madison<sup>1</sup>

The Persian Gulf War renewed American patriotism and restored the pride that American soldiers had lost in Vietnam.<sup>2</sup> However, behind this veil of national fervor, Operations Desert Shield and Desert Storm also provided for one of the First Amendment's most crushing defeats.<sup>3</sup> Public opinion polls show that the American public's highest priority was winning the war, regardless of the cost to press freedoms.<sup>4</sup> While the public tolerated

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910), quoted in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 110-11 (1973).

2. See Ron Dorfman, *Censored*, N.W. PERSP., Fall 1991, at 34, 35 (asserting that military's control over media assured favorable coverage of Persian Gulf War and exorcised ghosts left by unfavorable press coverage during Vietnam); David Lamb, *Liberating Kuwait Buries the Past, Resurrects Pride in Being a Soldier*, L.A. TIMES, Mar. 3, 1991, at M4 (describing how military victory by United States in Persian Gulf War restored pride that American soldiers had lost in Vietnam).

3. See Tom Wicker, *A Free Press Was One Casualty of the Gulf War*, L.A. DAILY J., Mar. 25, 1991, at 6 (asserting that United States government manipulated media more during Persian Gulf War than in any other conflict of war); see also U.S. CONST. amend. I. (stating "Congress shall make no law . . . abridging the freedom of speech, or of the press").

4. GANNETT FOUNDATION, *THE MEDIA AT WAR: THE PRESS AND THE PERSIAN GULF CONFLICT*, 80, 83, 86-95 (1991) [hereinafter *THE MEDIA AT WAR*] (available from Gannett Foundation) (stating public opinion polls showed public more concerned with victory in Persian Gulf War than with freedom of press) (citing Gannett Foundation Poll (Aug. 2, 1990—Mar. 10, 1991)). The Roper Center for Public Opinion Research, a non-profit research institute at the University of Connecticut, compiled data for this poll. *Id.* at 86. The Roper Center collects survey data from about 51 polling organizations with survey sample sizes varying from 412 to 1,208. *Id.* During the time period of the study, approximately 2,500 poll questions involved various aspects of the the gulf war, and 92 of these questions concerned media coverage issues. *Id.* Overall, respondents favored censorship of the media during the gulf crisis, although most respondents said the media did a good job of reporting on the war. *Id.* at 87, 91. In one poll cited by the study, however, 57 percent of the respondents said that the media should be able to accompany American forces into combat zones. *Id.* at 87. The Gannett Foundation Poll included surveys conducted by nine of the nation's leading polling organizations. *Id.* at 86. Some of the polls the Gannett Foundation Poll included were: the Times Mirror Center for People and the Press Poll (Jan. 25—27, 1991) (showing 57 percent of respondents thought military should assert more control over how news organizations report about the gulf war), cited in *THE MEDIA AT WAR*, *supra* at 91; Times Mirror Center for People and the Press Poll (Mar. 14—18, 1991) (determining that most respondents are satisfied with amount of censorship imposed by military during gulf war and that two-to-one respondents answered that they felt

censorship and unprecedented restrictions on reporters' access to the battlefield,<sup>5</sup> the press failed to protest the restrictions with one collective voice.<sup>6</sup> Journalists and First Amendment scholars agree that the media lost the battle for information during the Persian Gulf War.<sup>7</sup>

As in other military conflicts, the Department of Defense (DOD) restricted the information which the media both could have access to and could publish during the Persian Gulf War.<sup>8</sup> The DOD ground rules established twelve categories of information, such as the specific numbers of troops and troop movements, on which the press could not report.<sup>9</sup> In

that military censorship is more important than media's ability to report war news), *cited in* THE MEDIA AT WAR, *supra* at 83; Gallup Organization Poll (Feb. 15, 1991) (finding that 65 percent of respondents preferred American reporters reporting only stories cleared by Iraqi censors, instead of not reporting from Iraq at all), *cited in* THE MEDIA AT WAR, *supra* at 92.

5. THE MEDIA AT WAR, *supra* note 4, at 80 (stating public opinion polls showed public was willing to sacrifice freedom of press for victory in Persian Gulf War).

6. *See id.* at xi (stating that press failed to band together and organize strategy to protest military press restrictions, such as censorship and limitations on access to combat zones).

7. *See, e.g., Press Lost Persian Gulf Information War; Should United for Access, Report Says*, P.R. NEWswire, June 19, 1991 (publicizing release of Gannett Foundation report, THE MEDIA AT WAR, asserting that media allowed military to censor reports and limit right of access to battlefield); *Gannett Foundation Makes Major Announcements*, P.R. NEWswire, June 19, 1991 (publicizing release of Gannett Foundation report, THE MEDIA AT WAR, asserting that media should develop workable plan for coverage before next military conflict); Frederick Schauer, *Parsing the Pentagon Papers*, HARV. UNIV. RESEARCH PAPER R-3 5-6 (1991) (asserting that Pentagon Papers case did not secure press's right of access to information, as demonstrated by press restrictions during gulf war); *see also For Better War Coverage, Everyone Out of the Pool*, NEWSday, July 8, 1991, at 32 (stating that top news executives presented report to Secretary of Defense Dick Cheney, complaining about press restriction during Persian Gulf War).

8. *See* DOD OPERATION DESERT SHIELD GROUND RULES AND SUPPLEMENTARY GUIDELINES (Revised Jan. 14, 1991) [hereinafter GROUND RULES AND GUIDELINES], *reprinted in* Nation Magazine v. United States Dept. of Defense, 762 F. Supp. 1558, 1581-82 (S.D.N.Y. 1991) (explaining security review process to which reporters must submit before reporters can release information to public); DOD CENTCOM POOL MEMBERSHIP AND OPERATING PROCEDURES (Jan. 30, 1991) [hereinafter POOL MEMBERSHIP AND OPERATING PROCEDURES], *reprinted in* Nation Magazine, 762 F. Supp. at 1578-81 (setting forth criteria for admission into DOD press pools); *see also* Sean Scally, *Press Restrictions in Gulf War Revive 'Right to Know' Debate*, NAT'L L.J., Aug. 12, 1991, at 40, 41 (setting forth that press pool regulations adopted during gulf war were modeled on, but not identical to, press pool regulations developed during Grenada and Panama conflicts).

9. *See* GROUND RULES AND GUIDELINES, *supra* note 8, *reprinted in* Nation Magazine, 762 F. Supp. at 1581-82 (explaining ground rules of security review process that reporters must submit to before reporters can release information to public). The DOD stated that the media should not report the following information because publication or broadcast could jeopardize operations or endanger lives:

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

addition to the ground rules, the DOD developed supplementary guidelines that required media reports to go through a security review process before release to the public.<sup>10</sup> The supplementary guidelines afforded reporters the

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force," and "carrier battle group." Number or amount of equipment and supplies may be described in general terms such as "large," "small," or "many."

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

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

(4) Rules of engagement details.

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

(6) During an operation, specific information on friendly force troop movements, tactical deployments, and dispositions that would jeopardize operational security or lives. This would include unit designations, names of operations, and size of friendly forces involved, until released by CENTCOM.

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

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

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

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

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

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

*Id.*

10. See DOD GUIDELINES FOR NEWS MEDIA (Revised Jan. 14, 1991) [hereinafter GUIDELINES FOR NEWS MEDIA], reprinted in *Nation Magazine v. United States Dept. of Defense*, 762 F. Supp. 1558, 1577-78 (S.D.N.Y. 1991) (explaining supplementary guidelines of security review process that reporters must submit to before reporters can release information to public). The DOD stated that:

In the event of hostilities, pool products will be subject to review before release to determine if they contain sensitive information about military plans, capabilities, operations, or vulnerabilities (see attached ground rules) that would jeopardize the outcome of an operation or the safety of U.S. or coalition forces. Material will be examined solely for its conformance to the attached ground rules, not for its potential to express criticism or cause embarrassment. The public affairs escort officer on scene will review pool reports, discuss ground rule problems with the reporter, and in the limited circumstances when no agreement can be reached with a reporter about disputed materials, immediately send the disputed material to JIB Dhahran

opportunity to challenge the security review process.<sup>11</sup> Given the importance of timeliness in reporting war news, however, the time-consuming review process functioned as de facto censorship.<sup>12</sup> Most journalists did not contest the review process, however, because the journalists believed that the rules advanced legitimate security concerns.<sup>13</sup> The media, nevertheless, did contest the DOD supplementary guidelines that limited the media's access to the battlefield.<sup>14</sup> These access limitations were more restrictive on the press in duration and effect than any limitations the government had imposed on the press in any other conflict.<sup>15</sup> The press's major obstacle in covering the gulf war was not dodging bullets, but getting the story.<sup>16</sup>

The DOD prevented reporters from getting the story by limiting reporters' access to the battlefield. The DOD created this obstacle in response to the large number of reporters assigned to cover the gulf war.<sup>17</sup> More than 1,400 journalists, photographers and news media personnel descended upon the desert during the gulf war to report on the conflict.<sup>18</sup> The DOD resolved the logistical problem of fighting a war in the midst of so many reporters by creating "press pools."<sup>19</sup> Press pools are small groups of reporters who have been given access to cover events when security or logistical concerns prevent full coverage by all available reporters.<sup>20</sup> Because

for review by the JIB Director and the appropriate news media representative. If no agreement can be reached, the issue will be immediately forwarded to OASD(PA) for review with the appropriate bureau chief. The ultimate decision on publication will be made by the originating reporter's news organization.

*Id.*; see also *infra* notes 19-21, 34-49 and accompanying text (defining and discussing use of DOD press pools during gulf war).

11. See *THE MEDIA AT WAR*, *supra* note 4, at 18 (explaining that reporters could challenge security review process).

12. See *THE MEDIA AT WAR*, *supra* note 4, at 17-18 (explaining time consuming security review process and how war news is often perishable commodity); see also *GUIDELINES FOR NEWS MEDIA*, *supra* note 10, reprinted in *Nation Magazine*, 762 F. Supp. at 1577-78 (explaining security review process to which reporters must submit to before release of such information as sensitive news reports, photographs, and videotapes).

13. See *THE MEDIA AT WAR*, *supra* note 4, at xii, 26-32 (stating results of Gannett Foundation Poll based on interviews with 43 journalists, military accredited to be in Persian Gulf region during gulf war).

14. See *id.* at 26 (stating that media's greatest complaint was lack of access to battlefield).

15. See Wicker, *supra* note 3, at 6 (asserting that United States government manipulated media more during gulf war than in any other conflict of war); see also *infra* notes 144-66 and accompanying text (discussing history of military restrictions on press coverage during American conflicts of war).

16. See *THE MEDIA AT WAR*, *supra* note 4, at 29 (explaining press's frustration over military restrictions on media access, based on interviews with over 43 journalists who had covered gulf war, and on interviews with other well-known journalists).

17. See *id.* at 18, 26-28 (recognizing logistical problem of large number of press who desired access to combat zones).

18. *Id.* at 26.

19. See *POOL MEMBERSHIP AND OPERATING PROCEDURES*, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-81 (explaining structure of DOD press pool system).

20. See Thomas G. Havener, Note, *Assault on Grenada and the Freedom of the Press*,

the press pool system severely limited the number of reporters who could gain access to the battlefield, the DOD press pools became the subject of much controversy during the gulf war.<sup>21</sup>

At the center of this controversy were two lawsuits which charged that the DOD press pool system was an unconstitutional limitation on the press's right of access to the battlefield.<sup>22</sup> On January 10, 1991, the Center for Constitutional Rights was the first organization to file an action against the DOD on behalf of thirteen United States news organizations and writers, including *Nation Magazine*.<sup>23</sup> One month later, Agence France-Presse (AFP), a French News Agency that the DOD had excluded from the press pools, filed a second suit against the DOD.<sup>24</sup> The United States District Court for the Southern District of New York consolidated these two suits into *Nation Magazine v. United States Dept. of Defense*.<sup>25</sup> Although *Nation Magazine* addressed censorship concerns, the plaintiffs primarily sought to contest governmental restrictions on media access during wartime, particularly regarding the military's press pool membership and operating procedures.<sup>26</sup>

Addressing plaintiffs' concerns over access restrictions, the court in *Nation Magazine* first recognized that the case presented an important and

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36 CASE W. RES. L. REV. 483, 510-11 (1986) (defining press pools and asserting that press pools are compromise solution to problem of balancing media's right of access to battlefield and military's need for operational security).

21. See THE MEDIA AT WAR, *supra* note 4, at 17-33 (explaining frustrations of journalists caused by gulf war's press pool system).

22. See *Nation Magazine v. United States Dept. of Defense*, 762 F. Supp. 1558, 1560 (S.D.N.Y. 1991) (noting that case combined two causes of action, Center for Constitutional Rights brought first cause of action on behalf of *Nation Magazine* and other plaintiffs, Agence France-Presse brought second cause of action).

23. See THE MEDIA AT WAR, *supra* note 4, at 21 (describing history of filing of *Nation Magazine* action against DOD); see also *Nation Magazine*, 762 F. Supp. at 1558 (providing background information on plaintiffs and filing of case). The other plaintiffs to the suit included *Harper's Magazine*, *In These Times*, *Pacific News Service*, *The Guardian*, *The Progressive Magazine*, *Mother Jones Magazine*, *The L.A. Weekly*, *The Village Voice*, *The Texas Observer* and *Pacific Radio News*. *Id.* The following writers also joined the suit as plaintiffs: Sydney H. Schanberg, E.L. Doctorow, William Styron, Michael Klare and Scott Armstrong. *Id.*

24. See THE MEDIA AT WAR, *supra* note 4, at 21 (describing history of filing of *Nation Magazine* action against DOD).

25. 762 F. Supp. 1558 (S.D.N.Y. 1991).

26. *Nation Magazine v. United States Dept. of Defense*, 762 F. Supp. 1558, 1561 (S.D.N.Y. 1991); see also *infra* notes, 52-55, 188 and accompanying text (describing constitutional allegations brought by *Nation Magazine* plaintiffs). The *Nation Magazine* plaintiffs primarily alleged that the press has an unlimited First Amendment right of access to a foreign arena where American military forces are involved. *Nation Magazine*, 762 F. Supp. at 1561. The plaintiffs alleged that the DOD press pool regulations, which limited the number of press representatives granted access and which imposed certain restrictions on the press representatives, violates the First Amendment right to gather the news. *Id.* One of the plaintiffs, Agence-France Presse, a wire service which the DOD excluded from the press pool, also claimed that the DOD press pool regulations violated the Fifth Amendment right to Due Process because the DOD did not provide Agence France-Presse with a forum to contest its exclusion from the DOD wire services press pool. *Id.* at 1563.

novel question concerning the role of the First Amendment during wartime.<sup>27</sup> The court, however, dismissed the complaint on April 16, 1991, after the Persian Gulf War ended.<sup>28</sup> The court reasoned that the dismissal was proper because the DOD had since lifted the restrictions and currently was in the process of reviewing the regulations for probable revisions.<sup>29</sup> The court also noted the recurring problem of mootness, stating that the unique circumstances of each war may call for a new set of guidelines in the future.<sup>30</sup> The court further criticized plaintiffs for not focusing the case by devising specific alternatives to the DOD pool system implemented during the gulf war.<sup>31</sup> The court stated that if the plaintiffs had provided specific alternatives, the court would have had a more focused controversy and could have determined whether the pool system used during the gulf war unjustifiably restricted media access.<sup>32</sup>

The district court's dismissal of *Nation Magazine* due to the lack of a well-focused controversy demonstrates that the courts will not accept an absolutist claim that press pools are always an unconstitutional limitation on access to the battlefield.<sup>33</sup> Although the absolutist approach of the plaintiffs in *Nation Magazine* is not an effective method of contesting the press pools, the press pool system that the DOD implemented during the gulf war was, in fact, unnecessarily restrictive and did violate the rights of the press to report on the war. The media should propose specific alternatives to the structure of the DOD press pool system that will provide greater protection for the press's right of access in future conflicts.

The DOD created the structure of the press pool system by dividing the pools according to the type of communication medium.<sup>34</sup> For example,

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27. *Id.* at 1571. Judge Leonard Sand stated that the case presented a novel question concerning two firmly established rights. *Id.* These rights include the right of the American public to be informed, and the need to limit information for national security concerns. *Id.*

28. *Id.* at 1575.

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.* at 1575 (explaining that plaintiffs' failure to propose specific alternatives to DOD press pool system gave court cause to exercise discretion and dismiss case due lack of well-focused controversy).

33. *See id.* (criticizing plaintiffs' absolutist approach that all press pools are unconstitutional).

34. *See* POOL MEMBERSHIP AND OPERATING PROCEDURES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79 (characterizing press pool divisions and requirements for entry into press pools). The DOD divided the media into the following pool divisions: television, radio, wire service, news magazine, newspaper, photo, and pencil (print reporter). *Id.* at 1578. The DOD divided the photo category into four subcategories of wire, newspaper, magazine, and photo agency. *Id.* at 1579. Participants could take part only in one subcategory. *Id.* The DOD formed the general category of "pencil" to allow the print media coordinator to assign print reporters to smaller pools. *Id.* All print reporters could participate. *Id.* The DOD also formed the Saudi and International pools, which did not make distinctions based on media category. *Id.* The DOD created these pools for media organizations which did not principally serve the American public or have a long-term presence covering DOD military operations. *Id.* Competition to gain access to these pools was less severe. *Id.*

television reporters and magazine reporters comprised two separate respective pools.<sup>35</sup> The DOD did not allow all eligible pool members to cover the same event at the same time.<sup>36</sup> Instead, the DOD gave a certain number of media organizations, which met press pool criteria, access to military events on a rotating basis.<sup>37</sup> The DOD required each pool to appoint a coordinator to serve as a contact person and to resolve disputes within the pools.<sup>38</sup> DOD regulations also required pool members with access to the press pools to share all media products with other eligible pool participants in their medium.<sup>39</sup> The regulations did not require pool members to distribute information to media members who did not meet DOD criteria for pool admission.<sup>40</sup> Non pool media members had to rely on official military press briefings or the generosity of pool members for news.<sup>41</sup>

In addition to these regulations, the DOD press pool system imposed several unnecessarily restrictive rules on the press.<sup>42</sup> One of the most restrictive features of the DOD's press pool system was the requirement that only representatives of major media organizations, which had a long-time presence covering DOD military operations, could gain admission to the pools.<sup>43</sup> This admission requirement severely limited the number of

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35. See POOL MEMBERSHIP AND OPERATING PROCEDURES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79 (setting forth press pool divisions and requirements for entry into press pools).

36. See *id.* (setting forth press pool divisions and requirements for entry into press pools).

37. *Id.*

38. *Nation Magazine*, 762 F. Supp. at 1564.

39. See DOD SHARING OF MEDIA PRODUCTS WITHIN THE CENTCOM POOLS (Jan. 30, 1991), reprinted in *Nation Magazine*, 762 F. Supp. at 1579-80 (describing requirement for sharing pool products). Participants in each medium determined the procedures for sharing pool products and operating expenses of the pool. *Id.*

40. See POOL MEMBERSHIP AND OPERATING PROCEDURES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79 (setting forth press pool divisions and requirements for entry into press pools); see also THE MEDIA AT WAR, *supra* note 4, at 19 (describing how press pool members assumed pool responsibilities). Some pool reporters took their obligations to the pool seriously, whereas others refused to abandon traditional journalistic competition and provide eligible pool members with useful information. *Id.* at 19. Infighting among pool members was common. *Id.* at 28.

41. See THE MEDIA AT WAR, *supra* note 4, at 18-19 (describing available alternatives for reporters not meeting press pool criteria).

42. See *infra* notes 43-49 and accompanying text (setting forth DOD censorship system and press pool regulations).

43. See POOL MEMBERSHIP AND OPERATING PROCEDURES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79 (setting forth press pool divisions and requirements for entry into press pools). The DOD required the members of the media who do not principally serve the American public to participate in the CENTCOM media pool international category. *Id.* at 1578. The DOD also created the Saudi pool for reporters chosen by the Saudi Ministry of Information in the JIB - Dhahran. *Id.* The Saudi reporters had to speak and write English and file their reports in English. *Id.* at 1579. The DOD opened the television and wire services category to the major networks and wire services. *Id.* The DOD also opened the news magazine category to major national news magazines serving a general news function. *Id.* The DOD divided the newspaper category into two groups. *Id.* The first group included those



media representatives assigned to each pool.<sup>44</sup> At the height of the gulf war, the DOD had allowed only 192 press corp members to join military units through membership in one of twenty-four press pools.<sup>45</sup>

Even though the DOD gave a limited number of media organizations access to the press pools, the DOD military guidelines also severely limited the pool reporters' freedom in reporting.<sup>46</sup> Not only did the DOD require pool reports to undergo security clearance, but the DOD also required that reporters have a military escort under certain circumstances.<sup>47</sup> Although the DOD stated in the guidelines that the DOD created this requirement to protect journalists' safety, the requirement also effectively inhibited soldiers from speaking openly with reporters.<sup>48</sup> These requirements, which formed the basis for the DOD press pool system, existed for the duration of the gulf war and became the subject of much controversy concerning the tension between the First Amendment right of access and national security.<sup>49</sup>

*Nation Magazine* underscores the tension between the military and the media and demonstrates that the courts will be reluctant to declare that press pools used during wartime are unconstitutional per se.<sup>50</sup> *Nation Magazine* articulates the need for a strategy to enhance the press's First Amendment right of access to the battlefield in future conflicts. The media should base this strategy on the revision of DOD press pool regulations to allow members of the media who represent more diverse interests to join the press pools. Taking into consideration the unpredictable aspects of each military conflict, the DOD also should establish an accelerated system of administrative review for media organizations which claim that the DOD unreasonably has denied them access to the battlefield. Upon request, federal courts then should provide an accelerated review of the DOD's findings. Upon the cooperation of the military and the media, this strategy to protect the press's right of access in future military conflicts can succeed.<sup>51</sup> The first step toward restructuring the DOD's regulation of the press in future military

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newspapers providing continuous or near-continuous coverage in Saudi Arabia since the early stages of the operation, such as the *New York Times*, Cox, Knight Ridder, *Wall Street Journal*, *Chicago Tribune*, *Los Angeles Times*, *Washington Post*, *USA Today*, and *Boston Globe*. *Id.* The DOD included all other newspapers in the second category. *Id.*

44. See *THE MEDIA AT WAR*, *supra* note 4, at 18 (discussing DOD press pool system).

45. *Id.*

46. *Id.*; see also *GUIDELINES FOR NEWS MEDIA*, *supra* note 10, reprinted in *Nation Magazine*, 762 F. Supp. at 1577-78 (setting forth DOD procedures that pool reports must undergo, and limitations that pool reporters must submit to while reporting).

47. See *THE MEDIA AT WAR*, *supra* note 4, at 18-19 (describing DOD security review process).

48. *Id.* at 19.

49. *Id.*

50. See *Nation Magazine v. United States Dept. of Defense*, 762 F.Supp. 1558, 1575 (S.D.N.Y. 1991) (criticizing plaintiffs' absolutist approach that all press pools are unconstitutional).

51. See Norman Redlich, *Can a 'Free' Press Cover a War?*, *FREE SPEECH AND NAT'L SECURITY* 159 (1991) (stating that like partners in uneasy marriage military and media can work together and facilitate wartime media coverage).

conflicts is to understand how a modern court might define the press's right of access during wartime.

## I. LEGAL AND HISTORICAL PRECEDENTS FOR

### DECIDING *Nation Magazine*

In defining the press's right of access to information during wartime, the *Nation Magazine* plaintiffs first claimed that the First Amendment gives the press an unlimited right of access to a foreign arena in which American military forces are engaged.<sup>52</sup> The plaintiffs asserted that the denial of an unlimited right of access in the form of press pools is an unconstitutional limitation on the media's right to gather and report news.<sup>53</sup> The media plaintiffs further asserted that the DOD may not limit access to the battlefield unless military plans, secrets, operational information or strategic sessions are involved.<sup>54</sup> Plaintiffs suggested, however, that they did not seek to expand their constitutional right to access because they did not seek access to secret information, but instead that they sought to observe events as the events overtly occurred in an allegedly open area.<sup>55</sup>

Plaintiffs claimed that the press pools created an unconstitutional limitation on plaintiffs' right to gather and report news. In response, the *Nation Magazine* court recognized that plaintiffs' claim encompassed a question of first impression because a court had never explored the First Amendment right of access to the battlezone.<sup>56</sup> The court, however, declined to explore this constitutional question, stating that it would wait for another case in which the controversy was more sharply focused.<sup>57</sup> If the court had decided to try *Nation Magazine* on its merits, however, prior case law establishing the press's right of access to information and freedom from prior restraint would have been the foundation for such exploration.<sup>58</sup>

### A. Prior Restraint

The Supreme Court has addressed the interests of the First Amendment and national security on a number of occasions.<sup>59</sup> These cases involving

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52. *Nation Magazine*, 762 F. Supp. at 1561, 1571.

53. *Id.*

54. *Id.*

55. See Plaintiffs' Memorandum in Support of Cross-Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss at 2, *Nation Magazine v. United States Dept. of Defense*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (91 Civ. 0238 (LBS)) [hereinafter Plaintiffs' Memorandum] (setting forth grounds for plaintiffs' suit).

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

57. *Id.* at 1572.

58. See *infra* notes 59-143 and accompanying text (discussing case law concerning First Amendment guarantee of right of access to information and freedom from prior restraint).

59. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (holding that prior restraint against press is assumed unconstitutional, with exception of national security); see also *Snepp v. United States*, 444 U.S. 507, 514-15 (1980) (holding that former C.I.A. agent violated obligation to submit writings to C.I.A. for pre-publication review merited by national security concerns and personal safety of other C.I.A. agents); *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) (supporting freedom from prior restraint of publication of historical overview of ongoing Vietnam War).

national security, however, have arisen in the context of a prior restraint.<sup>60</sup> A prior restraint is any attempt by the government or courts to mandate the content of printed matter in advance of publication or broadcast.<sup>61</sup> A prior restraint is, in essence, a form of pre-publication censorship<sup>62</sup> that violates the First Amendment's guarantee of freedom of speech and press.<sup>63</sup> Like censorship, a prior restraint prevents the public from receiving ideas and information.<sup>64</sup> Traditionally, the courts have recognized a heavy presumption against upholding a prior restraint.<sup>65</sup>

The Supreme Court emphasized the presumption against prior restraint<sup>66</sup> in the landmark case of *Near v. Minnesota*.<sup>67</sup> In *Near* the editor of the *The Saturday Press*, a tabloid journal, challenged a Minnesota statute that provided for the abatement, as a public nuisance, of "malicious, scandalous, and defamatory" publications.<sup>68</sup> The statute further stated that if a court found any person guilty under the statute, the court could enjoin that person permanently from further publication of malicious, scandalous, and defamatory matter.<sup>69</sup> According to the statute, once a court found a newspaper guilty, the newspaper could seek pre-publication review<sup>70</sup> as a safeguard against a permanent injunction.<sup>71</sup> The Supreme Court in *Near* declared

60. See *Near*, 283 U.S. at 716 (recognizing that prior restraint against press is assumed unconstitutional, with exception of national security); *New York Times*, 403 U.S. at 714 (stating that there is "heavy presumption" against constitutional validity of prior restraint); see also *Nation Magazine*, 762 F. Supp. at 1561 (exploring prior case law balancing First Amendment right of freedom of press against national security concerns).

61. See *Near*, 283 U.S. at 713 (defining concept of prior restraint as essence of censorship); see also RALPH L. HOLSLINGER, *MEDIA LAW* 509 (1987) (defining prior restraint as any attempt by government or courts to mandate content of printed matter and as form of censorship that violates First Amendment guarantee of freedom of speech and press).

62. See *Near*, 283 U.S. at 713 (defining concept of prior restraint as essence of censorship); see also BLACK'S LAW DICTIONARY 224 (6th ed. 1991) (defining censorship). *Black's Law Dictionary* defines censorship as the following:

Review of publications, movies, plays, and the like for the purpose of prohibiting the publication, distribution, or production of material deemed objectionable as obscene, indecent, or immoral. Such actions are frequently challenged as constituting a denial of freedom of press and speech.

*Id.*

63. See HOLSLINGER, *supra* note 61, at 509 (defining prior restraint as any attempt by government or courts to mandate content of printed matter; form of censorship that violates First Amendment guarantee of freedom of speech and press).

64. *Id.*

65. See *Near v. Minnesota*, 283 U.S. 697, 716, 719 (1931) (setting forth that history of liberty of press has meant immunity from prior restraint or censorship); see also *New York Times v. United States*, 403 U.S. 713, 714 (1971) (setting forth in per curiam opinion that government must satisfy heavy burden when seeking prior restraint).

66. *Near*, 283 U.S. at 716, 719.

67. 283 U.S. 697 (1971).

68. *Near v. Minnesota*, 283 U.S. 697, 701-02 (1971).

69. *Id.* at 702-03.

70. *Id.* at 711-13.

71. See *id.* at 711-13 (setting forth that newspaper would seek pre-publication review by court for malicious, scandalous and defamatory content and explaining statute was, in essence, resulting in judicial censorship).

that the Minnesota statute was unconstitutional on the grounds that the First Amendment historically gave the press immunity from pre-publication review and censorship.<sup>72</sup> However, the Court carved out narrow exceptions in which prior restraint was permissible, such as the publication of the location and numbers of troops during wartime.<sup>73</sup>

Forty years later in *New York Times Co. v. United States*,<sup>74</sup> the Supreme Court found that *Near* did not fully address conflicts between national security and prior restraint.<sup>75</sup> In *New York Times*, commonly known as the Pentagon Papers case, the Supreme Court ruled that the government could not enjoin the *New York Times* and the *Washington Post* from publishing classified information relating to the history and past conduct of the ongoing Vietnam War, despite the government's allegations that the publication threatened national security.<sup>76</sup>

The plaintiffs alleged that in seeking injunctions against publication of the Pentagon Papers, the government was attempting to inflict an unconstitutional prior restraint on the press.<sup>77</sup> Although no single theory carried even a plurality of the Court, the Court's per curiam opinion did recognize that a strong presumption exists against a prior restraint.<sup>78</sup> Because of that presumption, the Court found that the government carried a heavy burden in implementing a prior restraint against the media.<sup>79</sup> Justice Stewart's concurring opinion required that the government prove to the Court's satisfaction that publication of the Pentagon Papers would result in direct, immediate and irreparable damage to the war movement or to national security.<sup>80</sup> In setting this standard Justice Stewart emphasized the value of a free press to the security of the American democratic system.<sup>81</sup> Justice Black's concurring opinion stressed that the government must tolerate an overzealous press in order to safeguard the First Amendment's guarantee of free speech to the press and public and to protect the people's right to know through access to information.<sup>82</sup> Given these values, the Court denied

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72. *Id.* at 716.

73. *Id.*

74. 403 U.S. 713 (1971).

75. *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971).

76. *New York Times*, 403 U.S. at 714 (per curiam); *id.* at 718 (Black, J. concurring).

77. *Id.*

78. *Id.* at 714.

79. *Id.*

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

81. *Id.* at 729. Justice Stewart recognized the importance of the principle of separation of powers and stated that the press served as a check on executive policy and power in areas of national defense and foreign affairs. *Id.*

82. *See id.* at 719 (Black, J., concurring) (stressing security of United States depends on role of free press); *see also* *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971), *aff'd*, 403 U.S. 714 (1971) (same). In *United States v. New York Times Co.*, the District Court for the Southern District of New York granted a temporary restraining order against the *New York Times*, but refused to grant the government's request for a

the government's request that the Court restrain the publication of the Pentagon Papers.<sup>83</sup>

The media heralded the Pentagon Papers case as an important First Amendment victory, with the press triumphing over the government's attempt to suppress the publication of secret military information. In the Pentagon Papers case freedom of the press outweighed the government's concern with national security.<sup>84</sup> However, the media could construe the victory that the Pentagon Papers case provided as somewhat hollow. The six member per curiam opinion implied that the government could enjoin the media from publishing truthful matters of public interest if the government had acquired sufficient proof of some serious effect on the war movement or on national security.<sup>85</sup> Two Justices also noted that the case's outcome may have been different if a federal statute provided for an injunction against publication of such potentially sensitive material during wartime, or if the government had more time to develop its defense.<sup>86</sup> By providing scenarios where national security concerns would outweigh the presumption against prior restraint, the case encouraged self-censorship by the press, as the press began to exercise greater restraint before publishing sensitive information.<sup>87</sup> The Pentagon Papers case also possibly paved the way for future government censorship based on wartime security concerns.<sup>88</sup>

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permanent injunction. *Id.* at 331. The court reasoned that:

The security of the nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. In this case there has been no attempt by the government at political suppression. There has been no attempt to stifle criticism. Yet in the last analysis, it is not merely the opinion of the editorial writer or the staff columnists which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions.

*Id.*

83. *New York Times Co. v. United States*, 403 U.S. at 714.

84. See David Rudenstine, *The Pentagon Papers Case: Recovering its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869, 1870 (1991) (setting forth that Pentagon Papers case is one of most significant affirmations of value to free press).

85. See *New York Times Co. v. United States*, 403 U.S. at 730 (Stewart, J., concurring) (setting forth criteria by which government could restrain media). Chief Justice Burger's dissenting opinion noted that the Court did not have enough time to learn all of the facts of the case, or to read the Pentagon Papers thoroughly. *Id.* at 731 (Burger, C.J., concurring).

86. *Id.* at 732 (White, J., concurring); *id.* at 745-46 (Marshall, J., concurring).

87. See Schauer, *supra* note 7, at 4-5 (asserting that Pentagon Papers leaves open possibility of subsequent punishment, leaving non-mainstream, less powerful press especially vulnerable).

88. See *New York Times Co. v. United States*, 403 U.S. at 726-63 (noting situations where Court would find prior restraint valid as described in concurring and dissenting opinions). Justices Brennan, White, Stewart and Marshall maintained that although a prior restraint was improper in the Pentagon Papers case, a prior restraint may be proper in some circumstances. *Id.* at 724-48 (opinions of Brennan, J., White J., Stewart, J., and Marshall, J., concurring). Justices Burger, Harlan and Blackmun maintained that a prior restraint was appropriate in

Although the Pentagon Papers case appeared to be a victory for proponents of the First Amendment, the case provides little support for the First Amendment outside the issue of prior restraint. The case sets a standard for government censorship of information that the press has already gathered and fails to confront the journalist's right of access to information that the government has made unavailable.<sup>89</sup> This First Amendment right became an especially relevant concern during the Persian Gulf War, following the enforcement of DOD press restrictions.<sup>90</sup>

### B. Right of Access

The media bases its complaint against the press restrictions that the DOD applied during the gulf war on the First Amendment's guarantee of right of access, which refers to the press's and public's freedom to gather information.<sup>91</sup> The press's and public's right to speak and publish loses meaning absent the right of access. Some commentators characterize right of access cases as having the same detrimental effects as a prior restraint and argue that preventing the media from attending an event is even more restrictive than censorship.<sup>92</sup>

The Supreme Court emphasized the detrimental effects caused by the government limiting access to information in *Richmond Newspapers, Inc. v. Virginia*,<sup>93</sup> the first case to recognize the existence of a First Amendment right to obtain information that is under government control.<sup>94</sup> In *Richmond Newspapers*, a lower court granted a criminal defendant's motion to exclude the public and the press from attending a murder trial.<sup>95</sup> The lower court agreed with the government's allegation that the criminal defendant had a

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the Pentagon Papers case. *Id.* at 748-63 (Burger, C.J., Harlan, J., and Blackmun, J., dissenting); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.17, at 975-78 (4th ed. 1991) (noting situations where Court would find prior restraint valid as described in concurring and dissenting opinions).

89. See Schauer, *supra* note 7, at 5 (emphasizing that Pentagon Papers case proved to be incomplete victory for First Amendment). The Pentagon Papers only discussed the issue of prior restraint and did not discuss the freedom from subsequent punishment or right of access to information. *Id.* The Persian Gulf War brought the debate over right of access to information into focus. *Id.*

90. *Id.* at 5-6.

91. See HOLSLINGER, *supra* note 61, at 510 (defining public's right of access to all information regarding government action).

92. See Roger W. Pincus, Note, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813, 819-23 (1987) (asserting that government's denial of press's access to battlefield should undergo "strict scrutiny" test or "time, place and manner" analysis); see also Diane Zimmerman, *Private' War: The Problem of Access*, FREE SPEECH AND NAT'L SECURITY 184-89 (1991) (asserting that if courts fail to enforce right of access during military conflicts, history demonstrates that public will encourage elected officials to enforce First Amendment).

93. 448 U.S. 555 (1980).

94. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

95. *Id.* at 560.

Sixth Amendment right to a fair trial and that publicity would destroy the trial's integrity.<sup>96</sup> The government also argued that the Constitution does not provide for the public's right to attend criminal trials and that nowhere is such a right protected.<sup>97</sup>

Plaintiffs, *Richmond Newspapers* and two of its reporters, alleged that the press and the public have a constitutional right to attend criminal trials and that the lower court could have ensured the criminal defendant a fair trial through means other than closing the courtroom.<sup>98</sup> Although the criminal trial that plaintiffs sought to attend had ended, the Supreme Court in *Richmond Newspapers* determined that the case was not moot.<sup>99</sup> Instead, the Court issued a holding because the Court found that it was reasonably foreseeable that the government would seek to exclude the public from other criminal trials in the future.<sup>100</sup>

The Supreme Court in *Richmond Newspapers* consequently held that the First Amendment implicitly granted the press and the public the right to attend criminal trials, and without that right, the government could destroy key aspects of freedom of speech and of the press.<sup>101</sup> However, the Court noted that a First Amendment right of access to criminal trials was not absolute and that the courts could close criminal trials if there was a specific overriding interest.<sup>102</sup> The Court, in deciding *Richmond Newspapers*, strongly considered the history of openness to the criminal justice system and the importance of an informed American citizenry.<sup>103</sup>

After determining in the tradition of *Richmond Newspapers* that the media historically has enjoyed a right of access to an event and that this right serves an important public function, a court must apply the proper test for protecting access.<sup>104</sup> In *Globe Newspaper v. Superior*

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96. *Id.* at 564.

97. *Id.* at 575, 579.

98. *Id.* at 560.

99. *Id.* at 563.

100. *Id.*

101. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (recognizing First Amendment protection to newsgathering, or right of access to information)).

102. *Id.* at 581. Justice Brennan, in his concurring opinion, provided a specific test to determine if the Court should let the media exercise its First Amendment right of access. *Id.* at 587-88 (Brennan, J., concurring). Justice Brennan stated that the Court should look to the existence of a tradition of a right of access to proceedings or information in order to determine whether granting press access to a trial was appropriate in a particular case. *Id.* Justice Brennan also suggested that the Court inquire whether access is integral to the governmental process at stake. *Id.* at 589; see also Zimmerman, *supra* note 92, at 184 (asserting that Brennan's opinion, although not endorsed, serves to provide single guide to how and where court can strike balance between public's right to know and government's administrative and security needs).

103. *Richmond*, 448 U.S. at 577-78; see also Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 Mo. L. REV. 751, 754 (1987) (asserting that right of access to information provides information about government and serves as checking function on governmental misconduct); Zimmerman, *supra* note 92, at 184-89 (noting historical right of access to courtroom).

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

*Court*,<sup>105</sup> the Supreme Court reaffirmed its analysis in *Richmond Newspapers*, holding that a Massachusetts statute could not mandate a courtroom closed to the press and public during the testimony of minor victims of sexual offenders.<sup>106</sup> The plaintiff, *Globe Newspaper*, alleged that a trial court, acting in accordance with the state statute, violated the public's First Amendment right to attend criminal trials.<sup>107</sup> The government defended the validity of the Massachusetts statute based on the government's interest in protecting minors who were victims of sex crimes from further trauma and embarrassment and in encouraging minor victims to come forward.<sup>108</sup>

Confronted with the issue of whether the Massachusetts statute violated the First Amendment, the Court in *Globe* stated that denial of the First Amendment right of access should be subject to a strict scrutiny test.<sup>109</sup> Under a strict scrutiny test, the government must justify access denial by demonstrating the existence of a compelling government interest and by demonstrating that the government has employed narrowly tailored means to achieve that interest.<sup>110</sup> The government must articulate and support its interests with specific findings.<sup>111</sup> The Court held that although the state's interest in protecting minor victims of sexual offenders was compelling, the state did not use narrowly tailored means to achieve that interest and that the state's interest did not justify indiscriminate exclusion of the press and public during the testimony of minor victims.<sup>112</sup> The government's exclusion of the press and public did not pass the Court's strict scrutiny standard.<sup>113</sup>

The Supreme Court chose not to apply strict scrutiny to protect the public's right of access in *Cox v. New Hampshire*,<sup>114</sup> given reasonable "time, place and manner" considerations.<sup>115</sup> In *Cox v. New Hampshire* the Court upheld a New Hampshire statute that prohibited anyone from conducting a parade or procession on a public street without a special license. The government had applied this statute against a Jehovah's Witness group.<sup>116</sup> The plaintiffs alleged that the statute violated the First Amendment by depriving plaintiffs of their freedom of religion and freedom of speech and assembly.<sup>117</sup>

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that right of access to courtroom subject to strict scrutiny test); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (asserting that statute prohibiting public parades and processions subject to time, place, and manner analysis).

105. 457 U.S. 596 (1982).

106. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602, 610-11 (1982).

107. *Id.* at 603-06.

108. *Id.* at 607-10.

109. *Id.* at 606-07.

110. *Id.*

111. *Id.* at 609-10.

112. *Id.* at 607-09.

113. *Id.*

114. 312 U.S. 569 (1941).

115. *Cox v. New Hampshire*, 312 U.S. 569, 575 (1941).

116. *Id.* at 570-71, 578.

117. *Id.* at 571.



In interpreting the statute the Court accepted the government's reasoning that the purpose of the statute was to maintain public order, and, without maintenance of public order, the public would lose civil liberties.<sup>118</sup> The Court ruled that as long as the government did not aim the statute at the communicative impact of the marchers' procession, the Court could uphold the conviction.<sup>119</sup> *Cox v. New Hampshire* demonstrated that courts will apply mid-level scrutiny when the government restricts speech based on reasonable time, place and manner considerations.<sup>120</sup> Mid-level scrutiny requires that restrictions serve a significant state interest, leave open alternative methods of communication, and that the government does not base the restrictions on the content or subject matter of the speech.<sup>121</sup>

However, in *Cox v. Louisiana*<sup>122</sup> the Supreme Court applied mid-level scrutiny based on time, place and manner considerations to invalidate two Louisiana statutes that prohibited the obstruction of public passages and breach of the peace.<sup>123</sup> Local authorities applied the statutes against a group of civil rights demonstrators protesting segregation, stating that the government based the statutes on valid time, place and manner considerations and promoted the peace.<sup>124</sup> The appellants alleged that the statutes were unconstitutionally vague and overbroad and that the state applied the statutes discriminatorily against them, depriving them of their First Amendment right of free speech and assembly.<sup>125</sup>

Faced with determining whether the statutes violated the appellants' First Amendment rights, the Court found that the breach of the peace statute was unconstitutionally vague and that local authorities had acted with completely uncontrolled discretion in applying both of the statutes against the demonstrators.<sup>126</sup> The Court reasoned that as applied selectively against certain groups, the Louisiana statutes restricted speech based on the communicative impact of the speech and not on valid time, place and manner considerations.<sup>127</sup> *Cox v. Louisiana* demonstrates that the Supreme Court will not uphold restrictions on access without investigating the validity of the government's claims that the government has based such restrictions on legitimate time, place and manner considerations.

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118. *Id.* at 574.

119. *Id.* at 575, 577.

120. *Id.* at 575-76.

121. See *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981) (articulating test for mid-level scrutiny as courts apply today); see also *Nation Magazine v. United States Dept. of Defense*, 762 F. Supp. 1558, 1574 (S.D.N.Y. 1991) (articulating standard used in *Heffron* and reviewing cases dealing with time, place and manner analysis).

122. 379 U.S. 536 (1965).

123. *Cox v. Louisiana*, 379 U.S. 536, 558 (1965).

124. *Id.* at 546, 550, 555-57.

125. See *id.* at 551-52, 555-58 (citing Court's holding and reasoning which recognizes appellants' argument).

126. *Id.*

127. *Id.* at 555-58.

In other decisions involving restrictions on access following *Richmond Newspapers*, the courts have continued to award the media an extensive right of access to criminal trials.<sup>128</sup> The courts also have extended an almost absolute right of access to open places, including such forums as streets and parks.<sup>129</sup> However, there is no right of access to forums traditionally closed to the press and the public, such as meetings involving the internal discussions of government officials.<sup>130</sup> The courts have also restricted access to places such as prisons<sup>131</sup> and military bases.<sup>132</sup>

In *Branzburg v. Hayes*<sup>133</sup> the Supreme Court refused to interpret the First Amendment as extending more rights to the media than to the general public.<sup>134</sup> Subsequent decisions have reaffirmed the Court's holding in

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128. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (recognizing public's First Amendment right of access to attend criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982) (striking down Massachusetts statute barring public from attending criminal trials of certain sexual offenses involving minors).

129. See *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (reaffirming importance and central meaning of First Amendment rights of assembly and petition); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (recognizing that states may not abridge First Amendment rights of assembly and petition).

130. See *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (noting that government has inherent right to keep certain matters secret, especially matters pertaining to national security and diplomatic affairs).

131. See *Houchins v. KQED, Inc.* 438 U.S. 1, 15-16 (1978) (holding that First Amendment did not give news media guaranteed right of access to jails for broadcast purposes); *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974) (holding that government could bar media from interviewing specifically designated penitentiary inmates); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (upholding Federal Bureau of Prisons ban on press interviews with specifically designated penitentiary inmates, because government also applied restriction against general public); see also Collins, *supra* note 103, at 754 (asserting that courts should grant media preference over public in right of access to limited public forums); Zimmerman, *supra* note 92, at 184-89 (providing overview of legal precedents on right of access to information).

132. See *Greer v. Spock*, 424 U.S. 828, 838-40 (1976) (denying use of military base for speech activities); see also John C. Cruden & Calvin M. Lederer, *The First Amendment and Military Installations*, 4 DET. C.L. REV. 845, 865-69 (1984) (asserting that government should be able to control public access to military bases, as sole purpose of military bases is to prepare soldiers for war); Zimmerman, *supra* note 92, at 187-88 (stating that restrictions on access to military bases demonstrate judicial reluctance to second-guess judgment of military).

133. 408 U.S. 665 (1972).

134. *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972). In *Branzburg*, the Supreme Court determined whether a reporter should be exempt from testifying before a grand jury regarding what a confidential source told him concerning illegal drug activity. *Id.* at 667-71. The newsmen who brought the action did not claim that an absolute privilege existed against such testimony, but argued that the state must demonstrate that the information is not available from another source, that sufficient grounds exist to believe that a reporter possesses information relevant to the crime the grand jury is investigating, and that the need for information is sufficiently compelling to override a reporter's First Amendment interest in maintaining the confidentiality of sources. *Id.* at 680. The plaintiffs alleged that a court damages a reporter's ability to gather information when a court forces a reporter to reveal the identity of his confidential sources. *Id.* The government alleged that a reporter's sources of information are not privileged under the First Amendment. *Id.* at 670. The government also alleged that the First Amendment and a Kentucky reporter's privilege statute do not provide a reporter with greater protections

Branzburg and have not granted the media a greater right of access to information than the general public.<sup>135</sup> In *Pell v. Procunier*<sup>136</sup> and *Saxbe v. Washington Post Co.*<sup>137</sup> the Supreme Court upheld state and federal regulations that barred reporters from interviewing specifically designated prison inmates.<sup>138</sup> In a five-four decision in *Pell*, the Supreme Court denied the press access based on the Court's holding in *Branzburg* that the press enjoys no greater First Amendment right of access than the public.<sup>139</sup> The Court reasoned that because the government gives the public no general access to prisons and their inmates, the regulations against media access were valid under the First Amendment.<sup>140</sup>

The Supreme Court has justified access limitations based on the lack of an historically demonstrated right.<sup>141</sup> Relying on history, the Supreme

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against testifying before a grand jury than the average citizen. *Id.* The Supreme Court noted that it is generally held that the First Amendment does not guarantee the press a constitutional right of special access to information that is not available to the public. *Id.* at 684-85. The Court held that the public interest in law enforcement and grand jury proceedings is sufficiently compelling to override any burden on newsgathering that may result when the court requires a reporter to reveal a confidential source. *Id.* at 690-91. Therefore, a reporter had the same obligation as a normal citizen to testify before a grand jury as to what his confidential source told him. *Id.* at 682, 709.

135. See *Pell v. Procunier*, 417 U.S. 817, 827-28, 834-35 (1974) (upholding statute barring both reporters and public from access to specific prisoners); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (upholding statute barring both reporters and public from access to specific prisoners).

136. 417 U.S. 817 (1974).

137. 417 U.S. 843 (1974).

138. See *Pell v. Procunier*, 417 U.S. 817, 827-28, 834-35 (upholding statute barring both reporters and public from access to specific prisoners); see also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (upholding statute barring both reporters and public from access to specific prisoners). In *Pell* the Supreme Court considered the validity of a California Department of Corrections statute that prohibited media interviews with specific prisoners. *Pell*, 417 U.S. at 819. The purpose of the statute was to prevent discipline and morale problems within the prison. *Id.* The Supreme Court addressed the fact that the media does not enjoy a greater right of access to information than the public, and that the statute also denied the media the opportunity to interview these prisoners. *Id.* at 829-35. Furthermore, the Court reasoned that alternative means of communication remained open to allow the inmates to exercise their First Amendment rights. *Id.* at 824-28. The Court held that the statute did not abridge the constitutional rights of the inmates or the press. *Id.* at 835. In *Saxbe* the Supreme Court considered the validity of a Federal Bureau of Prison's policy statement that prohibited any interviews between the media and specifically designated prison inmates. *Saxbe*, 417 U.S. at 844. The Supreme Court refused to balance the plaintiffs' First Amendment interest against the state's assertion that granting media interviews created discipline and morale problems in the prison. *Id.* at 849. The Court stated that the issues in *Saxbe* were constitutionally indistinguishable from *Pell*. *Id.* at 850. The Court therefore confirmed its decision in *Pell* and held that because the statute did not deny the press the access granted to the public, the statute was constitutional. *Id.*

139. *Pell*, 417 U.S. at 834-35.

140. *Id.*; *Saxbe*, 417 U.S. at 850. In determining that the statute had not violated the inmates' rights of free speech, the Court in *Pell* and *Saxbe* also considered the fact that the inmates had alternate channels of communication. *Pell* at 827-28; *Saxbe* at 851.

141. See *supra* notes, 103-05, 128-32, 141 and accompanying text (discussing importance

Court has restricted access to the public and media to such places as prisons<sup>142</sup> and upheld public and media access to such events as criminal trials.<sup>143</sup> The first step in analyzing the constitutionality of access restrictions to the battlefield is to determine the media's involvement in prior conflicts.

### 1. *Historical Right of Access to the Battlefield*

In *Nation Magazine* the plaintiffs emphasized that the presence of correspondents in the battlefield is as old as America itself.<sup>144</sup> Since the Revolutionary War, war correspondents have been an integral part of the American war effort.<sup>145</sup> However, the relationship between the press and the military has been more antagonistic than cooperative.<sup>146</sup> This antagonism

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of historically demonstrated right of access to specific places, such as right of access to courtroom).

142. See *supra* notes 135-40 and accompanying text (discussing government's restriction of public and media access to prisons).

143. See *supra* notes 103-13, 128 and accompanying text (discussing right of public and media to attend criminal trials).

144. See Plaintiffs' Memorandum, *supra* note 55, at 25 (discussing press's historical right of access to battlezone).

145. See MEYER L. STEIN, *UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS* 12-13 (1968) (discussing role of war correspondents in Revolutionary War). During the Battle of Lexington in 1775, Isaiah Thomas, a Revolutionary soldier, left the ranks of the militia to report on the battle. *Id.* From this inauspicious beginning, war correspondents have reported on every American conflict. *Id.*; see also *id.* at 13-14 (detailing role of American reporters during various military conflicts); FREDERICK L. BULLARD, *FAMOUS WAR CORRESPONDENTS* 6, 351-74 (1914) (same); ROBERT W. DESMOND, *THE PRESS AND WORLD AFFAIRS* 17-21 (1937) (same).

146. See *THE MEDIA AT WAR*, *supra* note 4, at 8 (discussing antagonistic relationship between government and media concerning restrictions on press coverage of military conflicts). During the Civil War, the United States government began to censor news media on the pretext of aiding the war effort. *Id.* at 8-9. Additionally, the government denied the press access to battlefields during the Civil War, as a result of generals often barring reporters from the battlefield or keeping reporters at a distance from events. *Id.* Despite these restrictions, reporters from the Northern states succeeded in reporting about the war. *Id.* at 9. The media's circumvention of military policies during the Civil War marked the birth of government-media antagonism that has resurfaced in all subsequent military conflicts. *Id.* Following the Civil War, the government imposed little or no limitations on the press during the Spanish-American War. *Id.* However, censorship reemerged during World War I when the government imposed rigorous censorship on any individual who the government believed was weakening the war effort. *Id.* at 9-10. During World War I General John Pershing required journalists to be accredited, and limited the number of accredited journalists to 31. *Id.* at 10. Unaccredited journalists and other visitors undercut the effectiveness of this policy. *Id.* The severity of government censorship during World War I brought critical response from scholars over the next two decades. *Id.* The legal community adopted the consensus that during World War I the government went much further than legitimate military considerations had warranted. *Id.*; see also Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars"*, 73 GEO. L.J. 931, 932-45 (1985) (providing historical overview of developing right of access during conflicts of war). In exchange for heavy censorship, World War II journalists had fairly wide access to the battlefield. *Id.* at 939. However, there were not enough reporters to cover every battle. *Id.* (quoting STEIN, *supra*

primarily has resulted from the media's reaction to military censorship rather than from a denial of access to the battlefield.<sup>147</sup>

The DOD departed from its practice of censoring media reports during the Vietnam War and gave the media unprecedented press freedoms.<sup>148</sup> Despite growing military sentiment that the press was "losing" the war through biased reporting,<sup>149</sup> virtually all reporters followed the government's voluntary censorship policy.<sup>150</sup> Between 1964 and 1968 the military also granted approximately 2,000 reporters wide access to the battlefield, which continued regardless of how unpopular the press became with the military.<sup>151</sup> The military allowed a large press corps to have access to military bases and personnel and combat zones, even during active battle.<sup>152</sup>

During the Vietnam War, the advent of television allowed reporters for the first time to bring the tragedy of war into American living rooms.<sup>153</sup> Radio and print media also benefitted from improvements in communications technologies.<sup>154</sup> In reaction to these developments, the Pentagon's wartime news management program in 1971 began to relax its policy concerning military censorship of the media and even chose to eliminate the term "censorship" from the news management program's vocabulary.<sup>155</sup> In 1981 the Under Secretary of Defense sent a memo to the Joint Chiefs of Staff noting that new communication and transportation technologies had rendered field censorship obsolete.<sup>156</sup>

note 145, at 95). During the Korean conflict, the military subjected journalists to a haphazard system of censorship where the military expelled reporters whose stories they did not like. *Id.* at 940. The media's situation became so desperate that members of the media banded together and requested that the military impose full, compulsory censorship. *Id.* Ninety percent of the correspondents supported this request. *Id.*; see also JOSEPH J. MATTHEWS, REPORTING THE WARS, at 198 (1957) (describing press's role in American military conflicts). *The London Daily Dispatch* wrote that the resulting censorship was so strict "that it was no longer officially possible to say anything about United Nations troops other than that they were in Korea." PHILLIP KNIGHTLEY, THE FIRST CASUALTY - FROM THE CRIMEA TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST AND MYTH MAKER 345-46 (1975). The military relaxed censorship restrictions after MacArthur's expulsion. Cassell, *supra*, at 941. Despite censorship, American reporters were often a strong force on the front lines, as the military imposed no access restrictions. STEIN, *supra* note 145, at 149-50.

147. See Cassell, *supra* note 146, at 939 (describing how military predominantly censored media rather than denied media access to battlefield during prior military conflicts).

148. See STEIN, *supra* note 145, at 149-50 (describing media's unlimited right of access during Vietnam War as well as military's system of voluntary, rather than compulsory, censorship of media).

149. See THE MEDIA AT WAR, *supra* note 4, at 15 (describing how press enjoyed great freedoms during Vietnam, despite growing anti-war sentiment).

150. *Id.*

151. *Id.* at 14-15.

152. *Id.*; see also Cassell, *supra* note 146, at 941-42 (describing wide press freedoms that media enjoyed during Vietnam War).

153. See THE MEDIA AT WAR, *supra* note 4, at 15 (describing how Vietnam War coverage differed from coverage of prior war due to new communications technologies).

154. *Id.*

155. *Id.*

156. *Id.*

## 2. Grenada and the Creation of the Sidle Panel

The DOD once again imposed press restrictions on October 25, 1983, when approximately 1,900 United States soldiers stormed the tiny island of Grenada.<sup>157</sup> Press members, denied access to the island until two days after the invasion, received a rude awakening once they realized the government had denied them access.<sup>158</sup> During the military's ban on news coverage, the military prevented small boats that carried reporters from actually entering the island.<sup>159</sup> According to DOD officials who refused to be identified by the press, the DOD based its ban against press coverage in part on the success of the press controls that Great Britain imposed on the media during the Falkland Islands conflict.<sup>160</sup> The DOD also based its decision to break with the tradition of open access on an overwhelming dissatisfaction with the voluntary approach used in Vietnam.<sup>161</sup> During the Vietnam War, many military officials developed a great distrust of the media and accused the press of contributing to the military's defeat and loss of reputation.<sup>162</sup> Each day, the press brought the realities of the Vietnam War to the attention of the American public.<sup>163</sup> The conventional perception that unlimited media access caused a reversal of support for the Vietnam War is a highly plausible explanation for the restrictions set in place during the Grenada invasion.<sup>164</sup>

The DOD's restrictions on media access during the Grenada invasion inspired widespread commentary and media uproar.<sup>165</sup> This news blackout

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157. See Stuart Taylor, Jr., *In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light*, N.Y. TIMES, Nov. 6, 1983 at A20 (discussing government's spread of misinformation and withholding of significant facts during invasion of Grenada).

158. *Id.*

159. *Id.*; see also *Admiral Says It Was His Decision to Tether the Press*, N.Y. TIMES, Oct. 31, 1983, at A12 (discussing Admiral Metcalf's battle with press). In greeting one group of reporters on October 29, 1983, the commander of the American task force, Admiral Metcalf, asked whether any reporters had arrived on a press boat. *Id.* Metcalf further warned that he would shoot at any boat that approached the island, because of the difficulty of determining whether its passengers were the enemy or the press. *Id.*

160. See Taylor, *supra* note 157, at 20 (discussing government's reasons for banning press coverage during United States invasion of Grenada).

161. See THE MEDIA AT WAR, *supra* note 4, at 15 (discussing rationale for excluding media from covering invasion of Grenada).

162. See John B. Engber, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press A Right of Access to Wartime News?*, 58 TEMP. L.Q., 873, 878 (1985) (asserting that military believed media portrayal of Vietnam War created misconception of battle outcomes and diminished public support of military). Some military officials accused the media of misinterpreting the effects of major events of the Vietnam War, such as the Tet offensive. *Id.* Other military officials asserted that war was too traumatic for American television to report on daily. *Id.*

163. *Id.*

164. See David Goldberg, *War and the Press: U.K. versus U.S.*, CONST. MAG., Fall 1991, at 27, 29 (equating history of onerous restrictions on wartime reporting in Great Britain to restrictions Pentagon imposed on American press during Persian Gulf War); see also Engber, *supra* note 162, at 878 (asserting that Great Britain's success in shaping public opinion by controlling press coverage of conflict with Argentina in Falkland Islands served as model for Pentagon during invasion of Grenada).

165. See Engber, *supra* note 162, at 876 (describing reaction of media and public to

was virtually unprecedented in American history, as the press had covered military conflicts since the Revolutionary War.<sup>166</sup> In response to media complaints, the DOD appointed a panel under the direction of retired Army Major General Winant Sidle for the purpose of developing a policy regarding the media's desire to gain access to the battlefield.<sup>167</sup> The Sidle Panel held hearings in February 1984 in order to receive testimony from various members of the media.<sup>168</sup> The Panel subsequently released recommendations in August 1984 and the DOD immediately put the recommendations into effect.<sup>169</sup>

The recommendations, known as the Sidle Report, initially emphasized that the United States news media must be able to cover United States military operations as thoroughly as possible while remaining consistent with mission security and troop safety.<sup>170</sup> For the media and the military to achieve this goal, the Sidle Panel recommended more public-affairs planning, voluntary compliance by the media with security guidelines, logistical help offered by the military for the media as soon as possible and the operation of the largest press pool system practical for the briefest period of time.<sup>171</sup> The Panel's comments also stressed the importance of applying guidelines

military's exclusion of media from covering Grenada invasion). Expressing anger at the ban, journalists condemned the news blackout in fiery editorials. *Id.* In January 1984, 10 major news organizations banded together to release "A statement of principle on Press Access to Military Operations," which elaborated opposition to press bans in military operations. *Id.* These organizations included the American Newspaper Publishers Association, American Society of Magazine Editors, American Society of Newspaper Editors, Associated Press Managing Editors, National Association of Broadcasters, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Society of Professional Journalists, Sigma Delta Chi, The Associated Press, and United Press International. *Id.*

166. See Engber, *supra* note 162, at 873 (asserting importance of upholding historical right of access to battlefield); see also *supra* notes 144-65 and accompanying text (discussing history of press coverage during American military conflicts).

167. See Cassell, *supra* note 146, at 945 (discussing creation of Sidle Panel in response to press's exclusion from invasion of Grenada); see also THE MEDIA AT WAR, *supra* note 4, at 15-16 (discussing creation of Sidle Panel, and Panel's findings and recommendations for press coverage during future military conflicts).

168. See Cassell, *supra* note 146, at 945 (discussing history of Sidle Panel).

169. *Id.*

170. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF-MEDIA RELATIONS PANEL, REPORT TO GENERAL JOHN W. VESSEY, JR., (Aug. 23, 1984) reprinted in Engber, *supra* note 162, at 905-15 [hereinafter SIDLE PANEL REPORT]. The Sidle Panel's final report consisted of eight recommendations, which included the recommendation that the military should use the largest possible press pool that is practical and that the military should dissolve the press pools as soon as full coverage is feasible. Recommendations 1-8, at 906-07.

171. SIDLE PANEL REPORT, *supra* note 170, Recommendations 3-5, at 906-07. The Panel's recommendations included a statement that the press should voluntarily comply with Pentagon rules governing media access to military operations. *Id.*, Recommendation 4. However, violations of these "voluntary" guidelines would mean exclusion of the correspondent involved from further coverage of the military operation. *Id.* According to the Panel's recommendations, the military would establish the ground rules and security guidelines, and the military should establish as few rules as possible. *Id.* The military should establish the rules during the planning process for each operation. *Id.*

similar to those used in Vietnam and noted the media's approval of all of the Panel's recommendations.<sup>172</sup> The media generally agreed that the DOD should use pool coverage only in the rare circumstances when full coverage is impossible because of transportation, security, or other concerns.<sup>173</sup> The media cautioned that the government should, as a general rule, provide maximum media access at the earliest time possible while remaining consistent with mission security and troop safety.<sup>174</sup>

The military failed, however, to satisfy this general rule during the Panama crisis when press pools did not reach the battle scene until after the invasion. The pools, therefore, did not acquire any eyewitness reports of the fighting.<sup>175</sup> The media subsequently agreed that by refusing to provide access to front line operations in Panama, the DOD breached understandings that the press had formed with the military.<sup>176</sup> Critics asserted that in spite of months of research completed by the Sidle Panel in order to reach a workable solution, the military lacked an adequate understanding of how the news media operate.<sup>177</sup>

The Sidle Panel's desire to reach a workable solution, coupled with the uproar over the media's denial of access during the Grenada invasion, is testament to the American press's historical right of access to the battlefield.<sup>178</sup> The *Nation Magazine* plaintiffs, as well as many members of the

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172. SIDLE PANEL REPORT, *supra* note 170, Comments 1, 2, at 909. The Panel's comments noted that the media supported the Sidle Panel's findings and that the media would abide by the ground rules. *Id.* The Sidle Panel noted that the ground rules ideally should be similar to those the DOD applied in Vietnam. *Id.*

173. See RESPONSE OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO INQUIRIES FROM THE JOINT CHIEFS OF STAFF, at 2 (Jan. 27, 1984), *quoted in* Havener, *supra* note 20, at 511 (1986) (asserting that despite problems with military press pools, pools are best solution to problem of balancing First Amendment right of access to battlefield with military strategy and security).

174. See RESPONSE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION TO INQUIRIES FROM THE JOINT CHIEFS OF STAFF, at 3 (Jan. 11, 1984), *quoted in* Havener, *supra* note 20, at 511 (1986) (asserting that in any instance government should provide maximum amount of media access possible at the earliest possible time consistent with mission security and troop safety).

175. See Plaintiffs' Memorandum, *supra* note 55, at 15-16 (discussing military's failure to notify media and implement press pool system during first two days of American military invasion of Panama).

176. See *id.* (discussing military's failure to notify media and implement press pool system during first two days of American military invasion of Panama).

177. See *id.* (discussing failure of press pool system during American military invasion of Panama). In response to the DOD's failure to mobilize the pools during the Panama invasion, the Pentagon commissioned the HOFFMAN REPORT, which attributed the decision not to immediately mobilize the pool system to Secretary of Defense Richard Cheney. *Id.* at 16. Following the release of the HOFFMAN REPORT, Pentagon spokesperson Pete Williams pledged on March 20, 1990 that the DOD would try to ensure that the media could cover future conflicts in entirety. *Id.* at 18; see also Havener, *supra* note 20, at 513 (explaining failure of military press pools during test run in Honduras on April 21, 1985).

178. See *supra* notes 144-66 and accompanying text (describing media's right of access to battlefield in prior American conflicts of war).



media, asserted that during the gulf war the military once again failed to follow the Sidle Panel's recommendations of open access consistent with military strategy and safety.<sup>179</sup> Closely tied to this historic freedom of access is the importance of the press holding the government accountable for its actions.<sup>180</sup> As television journalist Walter Cronkite articulated:

It is drummed into us, and we take pride in the fact that these are 'our boys (and girls,)' 'our troops,' 'our forces' in the gulf. They are, indeed, and it is our war. Our elected representatives in Congress gave our elected president permission to wage it. We had better darned well know what they are doing in our name.<sup>181</sup>

## II. APPLYING *Nation Magazine* TO A LEGAL FRAMEWORK

Given the importance of the press's public function and the historical support for access to the battlefield,<sup>182</sup> the media deserve a more significantly protected right of access than the DOD pool system provided during the Persian Gulf War. The *Nation Magazine* court declined to determine, however, to what extent the First Amendment guarantees the media a right of access to the battlezone.<sup>183</sup> The court in *Nation Magazine* characterized the battlefield as a limited public forum and recognized that the government could not deny the media access to a limited public forum arbitrarily.<sup>184</sup> The court also stated that the logistical and safety concerns of wartime merited the DOD's enforcement of a press pool system based on time, place and manner considerations.<sup>185</sup> Time, place and manner considerations trigger mid-level analysis.<sup>186</sup> Mid-level analysis still would require that the DOD not base its regulations on content and that the DOD regulations must serve a significant governmental interest and must leave open alternative channels of communication.<sup>187</sup>

179. See Plaintiffs' Memorandum, *supra* note 55, at 13-25 (noting recommendations of Sidle Panel, and restrictive press pool regulations during gulf war); THE MEDIA AT WAR, *supra* note 4, at 23 (discussing *Nation Magazine* plaintiffs' claim that restrictions on press access should be no more restrictive than restrictions imposed on press during Vietnam War); see also SIDLE PANEL REPORT, *supra* note 170, at 913 (noting that freedom of press that existed during Vietnam War should be model for future military conflicts).

180. See *New York Times Co. v. United States*, 403 U.S. 713, 717-20 (1971) (emphasizing importance of press holding government accountable). Justice Black wrote of the press's vital role in checking executive power over foreign affairs. *Id.*

181. Walter Cronkite, *What Is There to Hide*, NEWSWEEK, Feb. 25, 1991, at 43.

182. See *supra* notes 103, 144-66 and accompanying text (discussing press's role in covering American military conflicts and acting as check on government).

183. See *Nation Magazine*, 762 F. Supp. at 1575 (explaining that plaintiffs' failure to propose specific alternatives to DOD press pool system gave court cause to exercise discretion and dismiss case due to lack of well-focused controversy).

184. *Id.* at 1573 (quoting *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977)).

185. See *id.* at 1574 (stating that all parties agreed that DOD may place reasonable time, place and manner restrictions on press upon showing of significant governmental interest).

186. *Id.*

187. *Id.* (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)).

Falling subject to mid-level analysis, *Nation Magazine* addresses both the constitutionality of press pools in general and the allegedly discriminatory fashion in which the DOD has applied press pool regulations.<sup>188</sup> The court in *Nation Magazine*, in response to the issues presented by the press pool regulations, maintained that plaintiffs' crucial flaw in presenting the case was plaintiffs' failure to articulate alternatives to the DOD's present pool system.<sup>189</sup>

The *Nation Magazine* court based its need for such alternatives on the military's contention that different conflicts require different means of control as well as the judicial system's historical reluctance to intrude on matters traditionally left to military discretion.<sup>190</sup> In *Nation Magazine* the military argued that the controversy was moot due to the end of the Persian Gulf War.<sup>191</sup> The United States Court of Appeals for the District of Columbia Circuit had accepted such reasoning in *Flynt v. Weinberger*,<sup>192</sup> a case that addressed press restrictions during the Grenada conflict. The court in *Flynt* dismissed the case for mootness because the Grenada conflict was over by the time the case came to trial.<sup>193</sup> Unlike the court in *Flynt*, the *Nation Magazine* court decided not to dismiss the case, although the DOD had lifted the regulations and the Persian Gulf War was over by the time the case came to trial.<sup>194</sup> The court explained that the case was not moot but instead qualified under the "capable of repetition, yet evading review" mootness exception, because the plaintiffs could contest the DOD's press pool regulations in future conflicts.<sup>195</sup> However, the court exercised its discretion and decided not to hear the case based on the fact that different military conflicts may merit the imposition of different press restrictions and the fact that it was plaintiffs' duty to suggest alternatives to revise the current DOD pool system.<sup>196</sup> The court stated that although the controversy was not moot, it lacked focus.<sup>197</sup>

The court in *Nation Magazine* based its need for plaintiffs to present a more focused controversy on the great deference the courts traditionally

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188. *Id.* at 1570.

189. *See id.* at 1575 (explaining that plaintiffs' failure to propose specific alternatives to DOD press pool system gave court cause to exercise discretion and dismiss case due to lack of well-focused controversy).

190. *See id.* at 1574 (stating difficulty in predicting whether press restrictions imposed by DOD would be reasonable time, place and manner restrictions during next military conflict); Sean P. Scally, *Press Restrictions in Gulf War Revive 'Right to Know' Debate*, NAT'L L.J., Aug. 12, 1991, at 40, 41-42 (asserting unpredictable aspects of war give DOD convenient way to escape merits of claim that press pools are unconstitutional access restriction).

191. *Nation Magazine*, 762 F. Supp. at 1561-62.

192. 762 F.2d 134 (D.C. Cir. 1985).

193. *Flynt v. Weinberger*, 762 F.2d 134, 134-36.

194. *Nation Magazine*, 762 F. Supp. at 1569.

195. *Id.*

196. *See id.* at 1574-75 (explaining that plaintiffs' failure to propose specific alternatives to DOD press pool system gave court cause to exercise discretion and dismiss case due to lack of well-focused controversy).

197. *Id.*

have given to the military during wartime.<sup>198</sup> Although the court in *Nation Magazine* was prepared to review plaintiffs' proposals for a new pool system, the court was not prepared to rule that all press pools used during military conflicts are unconstitutional.<sup>199</sup> The *Nation Magazine* court also refused to determine whether the press pool system that the DOD implemented during the gulf war was unconstitutional because the court did not know if the DOD could justifiably implement the pool system in future conflicts, or even whether the DOD would create a new pool system in the future.<sup>200</sup> The court refused to assume the burden of determining what other alternatives the government could have adopted to create a less discriminatory pool selection process.<sup>201</sup> The *Nation Magazine* court, however, was willing to place that burden on plaintiffs and review plaintiffs' general proposal for revising the military press pools.<sup>202</sup> By providing alternatives, plaintiffs could have demonstrated that time, place and manner considerations did not require the DOD's press pool system to be so restrictive.<sup>203</sup>

### III. PROPOSED ALTERNATIVES TO THE PRESENT POOL SYSTEM

#### A. Administrative and Judicial Review

Whereas the *Nation Magazine* plaintiffs adhered to an absolutist approach, asserting that all press pools that restrict access to the battlefield are unconstitutional,<sup>204</sup> the media should propose specific alternatives to the press pool system that the DOD implemented during the Persian Gulf War. Conceding that sometimes legitimate logistical and security concerns require

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198. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (allowing American military to detain Japanese-Americans in prison camps during World War II based on national security concerns); Stephanie A. Levin, *The Deference that Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1058-59 (1990) (asserting that judicial system gives too much deference to military when plaintiff charges military with violating individual constitutional rights); Justice William J. Brennan, Jr., *The American Experience: Free Speech and National Security*, FREE SPEECH AND NAT'L SECURITY 10, 16-18 (Shimon Shetreet ed., 1991) (advocating that courts should be more suspicious of asserted national security claims); Floyd Abrams, et al., *The First Amendment and National Security*, 43 U. MIAMI L. REV. 61, 61-90 (1988) (debating when media should not disclose government secrets due to national security concerns).

199. See *Nation Magazine*, 762 F. Supp. at 1575 (criticizing plaintiffs' "no limitation" approach). The court noted that only Agence-France Presse's requested relief for entry into the wire news services photo pool system was specific. *Id.* However, the court in *Nation Magazine* held that this particular claim was moot due to the end of the gulf war. *Id.*

200. *Id.*

201. See *id.* at 1575 (implying that burden is on plaintiff to devise specific alternatives to DOD press pool system).

202. *Id.*

203. See *id.* at 1574 (asserting that DOD may place reasonable time, place and manner restrictions on press if there is significant governmental interest).

204. *Id.* at 1575.

the DOD to use press pools,<sup>205</sup> the DOD must develop a system of accelerated administrative review.<sup>206</sup> Members of the media would obtain administrative review if they felt the DOD had improperly excluded them from a pool or if conditions had changed and no longer warranted the press pool system.

The DOD conveniently may pattern this system providing accelerated administrative review of DOD findings regarding the press pools on the three-tier system that the DOD used during the gulf war to review news releases for the purpose of safeguarding military strategy or security.<sup>207</sup> The first stage of the review process would require a DOD administrator to respond to complaints of improper exclusion.<sup>208</sup> A DOD administrator would determine whether a media organization met press pool criteria. For instance, Agence-France Presse, one of the plaintiffs in *Nation Magazine*, asserted that it principally serves an American audience,<sup>209</sup> which is one of the criteria for inclusion in the DOD wire services photo pool.<sup>210</sup> A DOD administrator would make findings of fact regarding this assertion. The second level of review would enable Agence-France Presse to appeal immediately to a joint

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205. See *id.* at 1574 (asserting that DOD may place reasonable time, place and manner restrictions on press if there is significant governmental interest); see also *THE MEDIA AT WAR*, *supra* note 4, at 27-28 (reporting that most of 43 journalists interviewed by Gannett Foundation acknowledged that press pools were necessary during gulf war because of confusion created by the presence of 1,400 reporters).

206. See *Nation Magazine*, 762 F. Supp. at 1575 (criticizing plaintiffs for not devising specific alternatives to press pool system, such as regulations including procedures for speedy administrative review).

207. See *Nation Magazine* at 1565 (describing DOD three-tier security review process); *supra* notes 8-10 and accompanying text (same).

208. See *Nation Magazine* at 1565 (describing DOD security review process); *supra* notes 8-10 and accompanying text (same). Under the first stage of the DOD's three-tier system security review process, a DOD public affairs officer could review the news that the pool participants gathered in the field before pool participants could release the news to the public. *Nation Magazine* at 1565. The three-tier review process determined if news reports might jeopardize an operation or the security of United States or coalition troops. *Id.* The DOD stated that the military would not censor news for its potential "to express criticism or embarrassment." *Id.*; see also *GROUND RULES AND GUIDELINES*, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1581 (describing criteria for military censorship of news); *supra* note 9 and accompanying text (same).

209. *Id.* at 1562. Agence-France Presse, a news service with reporters and photographers in the Persian Gulf, argued that by serving 24 million readers in the United States, the service satisfied the "principally serve the American public" requirement. *Id.* Alternatively, Agence-France Presse asserts that the "principally serve the American public" requirement violated the First Amendment by functioning as content-based discrimination. *Id.* The *Nation Magazine* court recognized the principle that content-based regulations are discriminatory and violate the First Amendment. *Id.* at 1573.

210. See *POOL MEMBERSHIP AND OPERATING PROCEDURES*, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-80 (requiring that "due to logistics and space limitations, participation in pools will be limited to media that principally serve the American public and that have had a long-term presence covering Department of Defense military operations, except for pool positions designated as 'Saudi' or 'International'"); see also *supra* note 34 and accompanying text (describing DOD press pool regulations and divisions and explaining that Saudi and International pools received less access than other pools).

committee comprised of the head on-site military public affairs director and the wire services pool coordinator.<sup>211</sup> If the parties once again failed to reach a consensus, the third level of review would enable Agence-France Presse to forward the issue immediately to the Office of the Assistant Secretary of Defense (Public Affairs).<sup>212</sup>

This three-tier system of accelerated administrative review would require the DOD to provide a complaining media organization, such as Agence-France Presse, with a statement at each stage explaining the DOD's reasons for denying access to a particular pool. The DOD also would have to provide a similar system of administrative review to news organizations which would charge that conditions had changed and that the DOD could no longer justifiably continue the pool system. This system of administrative review would require the DOD to state particular reasons for continuing the pool system based on the situation at that particular point in time.<sup>213</sup> This system of administrative review also would require the DOD to enforce the regulations evenhandedly and to explain how the press pool system is the DOD's least intrusive alternative in balancing First Amendment concerns with mission security and troop safety.<sup>214</sup> Although this system of admin-

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211. See *Nation Magazine* at 1565; *supra* notes 8-10 and accompanying text (describing DOD security review process). In the case of disagreement between the DOD public affairs officer and the media organization, the second stage required that the DOD send the disputed information to the Joint Information Bureau (JIB) in Dhahran, Saudi Arabia. *Nation Magazine*, 762 F. Supp. at 1565; see also *supra* note 208 and accompanying text (describing first stage of DOD security review process).

212. See *Nation Magazine* at 1565; *supra* notes 8-10 and accompanying text (describing DOD security review process). During the third stage, if the media organization and the JIB Director did not reach a consensus, the military forwarded the issue to the Office of Assistant Secretary of Defense (Public Affairs). *Id.* The media organization could make the ultimate decision concerning publication. *Id.*; see also GROUND RULES AND GUIDELINES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1581-83 (discussing security review process); *supra* note 12 and accompanying text (discussing how security review process functioned as type of de facto censorship); *supra* notes 206, 209 and accompanying text (describing first two stages of DOD security review process).

213. See Collins, *supra* note 103, at 770, 786 (suggesting that government must articulate media access restrictions using understandable and reasonable standards).

214. See *id.* at 751, 786 (suggesting that courts require government to explain its rationale for access restrictions, give particular reasons for restrictions, apply regulations evenhandedly and adopt least intrusive approach). Collins bases these requirements on the Supreme Court's endorsement of the government supplying proper notice and other procedural relief before the government limits access to the media. Such an endorsement is seen in *Pell v. Procunier* where the Court upheld a statute that prohibited media interviews with specifically designated prison inmates. *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 817-55 (1974)). The Supreme Court also recognized the importance of proper notice and other procedural relief before the government limited media access in *Greer v. Spock*, where the Court reversed an injunction permitting access of political candidates to military base. *Id.* (citing *Greer v. Spock*, 424 U.S. 828, 838-40 (1976)). Collins then compared the approaches of the Supreme Court in *Pell* and *Greer* to the Supreme Court's approach in two similar cases where the court gave little reason for the government action. *Id.* See *Houchins v. KQED, Inc.*, 438 U.S. 1, 8-9 (1978) (prohibiting television interviews of certain prisoners, but allowing other types of interviews); *Flower v. United States*, 407 U.S. 197, 198-99 (1972) (*per curiam*) (reversing conviction of citizen for

istrative review should not require the DOD to divulge confidential military secrets in providing these statements, the DOD also should not be able to implement the pool system for nebulous security and logistical reasons.<sup>215</sup>

The courts have supported the articulation of government policies as a prerequisite to government denial of access in a variety of circumstances involving time, place and manner considerations.<sup>216</sup> However, *Sherrill v. Knight*<sup>217</sup> went beyond requiring a general policy statement supporting access denial to providing an individualized system of administrative review.<sup>218</sup> In *Sherrill* the United States Court of Appeals for the District of Columbia Circuit held that the Secret Service could not deny a bona fide Washington journalist a White House press pass based on vague security concerns.<sup>219</sup>

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trespassing on military base); see also *infra* notes 219, 223-24, 228 and accompanying text (noting court's assertion in *Sherrill* that limitations on newsgathering must be no more restrictive than necessary and establishing court's invocation of principles promoted in *Sherrill*).

215. See *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (asserting that security is "broad, vague generality whose contours should not be invoked to abrogate" First Amendment).

216. See *supra* notes 213-15 and accompanying text (advocating government supply media with clear rationale for implementing restrictions on media access); see also *Pell v. Procunier*, 417 U.S. 817, 827-28 (1974) (explaining government's rationale for implementing restrictions preventing public and media from interviewing certain prisoners). For instance, in *Pell*, the Supreme Court considered the validity of a California Department of Corrections regulation which limited media access to interviews with certain specifically designated prison inmates. *Id.* at 819. Three professional journalists, who wished to interview some of these prisoners, alleged that the regulation violated the First Amendment by infringing on the press's newsgathering activity. *Id.* at 820-21. Four of the inmates affected by the regulation also alleged that the regulation infringed on their First Amendment right of freedom of expression. *Id.* The Supreme Court upheld the validity of the regulation, reasoning that prison officials had clearly articulated to the media their reasons for not allowing reporters to interview specifically designated prisoners. *Id.* at 831-35. Prison officials alleged that such prisoners had gained celebrity status with fellow prisoners that subsequently created a violent prison episode that debilitated the prison's function. *Id.* The Court also noted that the California Department of Corrections had adopted the limitations properly. *Id.* at 819. The regulation provided the media with a reasoned analysis, which rationally supported the need for the particular limitations the regulation imposed on the media. *Id.* at 831; see also *Collins, supra* note 103, at 780 (advocating government supply media with clear rationale for implementing restrictions on media access, as seen in *Pell*). Furthermore, the *Pell* Court emphasized that the prison also denied the general public access to these prisoners, and that the media had no greater right of access to information than the general public. *Id.* at 833-35. The Court also noted that the plaintiff inmates had alternative methods of communication at their disposal, such as visits with family, clergy and writing letters. *Id.* at 823-28.

217. 569 F.2d 124 (D.C. Cir. 1977).

218. See *Sherrill v. Knight*, 569 F.2d, 124, 130-31 (D.C. Cir. 1977) (stating that reporter to whom Secret Service denied access was entitled to notice of factual basis for denial, opportunity to respond and final written statement of reasons for denial).

219. *Id.* at 130. The *Sherrill* court noted that the court would not require the Secret Service to provide a detailed articulation of narrow specific standards or precise identification of factors that the Secret Service might have considered in determining whether to deny a professional journalist, who had credentials for the House and Senate galleries, a press pass. *Id.* The court stated instead that, given the circumstances, the Secret Service only must demonstrate that the journalist potentially could cause harm to the President or his immediate

The plaintiff in *Sherrill* alleged that the First Amendment protected plaintiff's interest as a journalist in obtaining a White House press pass and that the government's system for denying press passes violated plaintiff's First Amendment and Due Process rights.<sup>220</sup> The government justified its denial of plaintiff's request for a press pass with a one sentence statement explaining that the government had fined the plaintiff for assault in Florida.<sup>221</sup> The government alleged that the court should uphold its system for granting press passes based on the compelling interest of protecting the President's safety.<sup>222</sup> Although the court recognized that the President's safety is a sufficient interest, the court reasoned that restrictions on news gathering generally must be no more restrictive than necessary, and that the government may not exclude individual newsmen arbitrarily from sources of information.<sup>223</sup> The court emphasized that once the White House had created a limited public forum by voluntarily establishing White House press facilities for correspondents, the government could not deny right of access arbitrarily or for less than compelling reasons.<sup>224</sup> In addition to a final written statement articulating the reasons for the denial, the court in *Sherrill* required notice of the factual basis for denying access and an opportunity for the applicant to respond.<sup>225</sup>

Although the *Sherrill* court applied strict scrutiny<sup>226</sup> instead of mid-level scrutiny in reviewing the case,<sup>227</sup> there seems to be no appreciable difference between procedural protections in either context. The *Nation Magazine* court's invocation of *Sherrill*, coupled with the court's assertion that time, place and manner analysis is the proper standard of review, support this interpretation.<sup>228</sup> The *Nation Magazine* court deferred to the *Sherrill* court's rationale, emphasizing that any infringement of a constitutional right, such

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family, and that harm must be so serious as to justify exclusion from the White House. *Id.* However, the Secret Service merely could not have informed individually rejected applicants that the Secret Service had based rejection of a press pass on "reasons of security" without providing a basis for that exclusion. *Id.*; see also *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (asserting that "security" is "broad, vague generality whose contours should not be invoked to abrogate" First Amendment).

220. *Sherrill*, 569 F.2d at 128.

221. *Id.* at 127.

222. *Id.* at 130.

223. *Id.* at 129-30; see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (holding that Georgia statute which prohibited media release of deceased rape victim's name was overly broad, and that state had failed to articulate sufficient reasons for limiting First Amendment right of access).

224. *Sherrill*, 569 F.2d at 129.

225. *Id.* at 130-31.

226. *Id.* at 130.

227. See *Nation Magazine*, 762 F. Supp. at 1574 (asserting that proper standard for reviewing DOD press pool system is time, place and manner analysis, prompting mid-level scrutiny).

228. See *id.* at 1573-74 (implying that court must recognize policies in *Sherrill* in order to decide case on merits and asserting that proper standard for reviewing DOD press pool system is time, place and manner analysis, prompting mid-level scrutiny).

as the First Amendment right of access to information, requires procedural due process.<sup>229</sup> The *Sherrill* court also emphasized that limitations on access must be no more restrictive than necessary.<sup>230</sup> These policies promoted in *Sherrill* arguably apply to the DOD press pool system that involves mid-level time, place and manner analysis.<sup>231</sup>

Despite applying the policies promoted in *Sherrill* to the DOD press pool system, the prospect of the DOD deciding which members of the media the DOD shall allow to exercise their First Amendment right of access is still disconcerting because the DOD will be motivated to protect its own self-interest. However, government agencies routinely have substantial discretion in choosing which members of the media will receive access to information because the legislature usually grants such power to the agency.<sup>232</sup> The DOD should temper its discretion to determine media access with principles of equality.<sup>233</sup> The requirement that the DOD provide not only a standard for entry into the press pools, but also a system of accelerated administrative review for individualized complaints promotes even-handed application.<sup>234</sup>

After the DOD has provided a system of accelerated administrative review to the media, the federal courts should review the DOD's administrative findings under the doctrine of hard look judicial review,<sup>235</sup> which

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229. *Nation Magazine*, 762 F. Supp. at 1573 (quoting *Sherrill v. Knight*, 569 F.2d at 129); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1974) (holding that Georgia statute which prohibited media release of deceased rape victim's name was overly broad, and that state had failed to articulate sufficient reasons for limiting First Amendment right of access).

230. *Nation Magazine*, 762 F. Supp. at 1573 (quoting *Sherrill v. Knight*, 569 F.2d at 130).

231. See *id.* at 1573 (recognizing procedural requirements government must fulfill, as promoted in *Sherrill*, when government denies press access to limited public forum, and characterizing battlefield as limited public forum).

232. See Collins, *supra* note 103, at 772 (asserting that government must articulate reasons for access restrictions and apply regulations evenhandedly, given legislature's grant of substantial discretion to agency).

233. See *id.* at 772 (asserting that government must articulate reasons for access restrictions and apply regulations evenhandedly); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975) (asserting that courts must exert careful judicial scrutiny when government based on time, place and manner considerations selectively excludes certain persons and organizations from access to government information and facilities).

234. See Collins, *supra* note 103, at 772 (asserting that government must articulate reasons for access restrictions and apply regulations evenhandedly).

235. See *id.* at 772 (asserting that federal courts should review administrative decisions limiting First Amendment right of access under hard look judicial review) (quoting *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), (defining doctrine of hard look judicial review), *cert. denied*, 403 U.S. 923 (1971)). In *Greater Boston* the Circuit Court of Appeals for the District of Columbia Circuit stated that assuming consistency with the law and legislative mandate, an agency may do more than find facts and make judgments. *Id.* at 851. An agency may also select policies in the public's best interest. *Id.* The *Greater Boston* court stated that a court's function, then, is to require the agency to "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." *Id.* Such a



requires the agency to articulate a policy and then apply that policy reasonably to the facts at issue.<sup>236</sup> The doctrine also enables the court to carefully examine all pertinent facts in the administrative record before upholding an agency's decision.<sup>237</sup> The four goals of hard look judicial review include a reasoned explanation, adequate consideration, consistency, and absence of arbitrariness.<sup>238</sup> The federal courts also should be open to reviewing the DOD's findings on an accelerated level, as the courts have for important press cases in the past.<sup>239</sup> Accelerated judicial review is justified given the theory that denial of access is, in effect, a prior restraint.<sup>240</sup> During times of national crisis, newsworthy events of vital public interest occur daily, and the public suffers when the government silences news sources that may offer the public valuable insight.

### B. *Serving the Public by Creating More Diverse Pools*

The quality of information reaching the American public also would improve if the DOD allowed for more diversity in press pool membership.<sup>241</sup>

requirement prevents the agency from acting in a discriminatory fashion. *Id.* The *Greater Boston* court provided that a court could intervene more broadly than in the context of procedural inadequacies or bypassing of the mandate in the legislative charter, if the court recognizes that the agency has not "taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Id.* However, if the agency has not neglected its duties, a court must exercise restraint and affirm the agency's findings, even if a court would have made different findings or created different standards. *Id.* Likewise, a court is subject to the doctrine of harmless error, and must not reverse an agency's decision based on an agency's immaterial errors. *Id.*

236. *Greater Boston*, 444 F.2d. at 850-53; see also *supra* note 235 and accompanying text (articulating court's approach in *Greater Boston*).

237. *Greater Boston*, 444 F.2d. at 850-53; see also *supra* note 235 and accompanying text (articulating court's approach in *Greater Boston*).

238. See *Greater Boston*, 444 F.2d. at 851; see also Collins, *supra* note 103, at 772 (explaining goals and merits of hard look judicial review); *supra* note 235 and accompanying text (same); JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING 295-98 (1983) (defining hard look judicial review consistent with court's approach in *Greater Boston*).

239. See *supra* notes 75-89 and accompanying text (discussing accelerated judicial review of Pentagon Papers case). The Pentagon Papers case considered the validity of two injunctions against publication, the first against the *New York Times* and the second against the *Washington Post*. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). The District Court for the District of Columbia Circuit issued its decision that the injunction against the *Washington Post* was invalid on the date of the hearing, June 21, 1971. *Id.* at 714, 754 (Harlan, J., dissenting). The District Court for the Southern District of New York remanded the case and continued the stay after the court heard arguments, on June 19, 1971. *Id.* The appeals court heard the cases on June 22, 1971, and issued the decision the following day. *Id.* The Supreme Court heard arguments on June 26, 1971 and issued its decision on June 30, 1971. *Id.* at 713; see also Pincus, *supra* note 92, at 815 n.9 (recounting procedural history of Pentagon papers). Pincus argues federal courts would have even greater reason to react quickly to press restrictions involving ongoing news events such as wars. *Id.*

240. See *supra* note 92 and accompanying text (asserting that restrictions on newsgathering are even more onerous on press than prior restraint).

241. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377, 389 (1969) (asserting

On February 26, 1991, the DOD had included 186 media organizations on the DOD pool list.<sup>242</sup> Of the entire list, only the ultra-conservative *Washington Times* arguably represented a non-mainstream political view.<sup>243</sup> The *Nation Magazine* court characterized the DOD requirements for entry into the American media pools as non-content-based, thus triggering mid-level time, place and manner analysis.<sup>244</sup> However, the DOD requirements result in a press pool articulating a mainstream political view.<sup>245</sup> In reality, the press pool regulations run the risk of functioning as the type of content-based discrimination against which the First Amendment seeks to guard.<sup>246</sup>

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importance of variety of viewpoints reaching public by upholding fairness doctrine requiring broadcasters to allow presentation of contrasting views); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (rejecting argument that press is immune from antitrust laws and asserting that First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society").

242. See Schauer, *supra* note 7, at 6 (describing that representatives to DOD pool system represented mainstream American media). The DOD press pool system included the following representatives: Twenty-one pool participants represented the four major wire services, AP, UPI, and Reuters, with one representative coming from Knight-Ridder. *Id.* Forty-three members of the pool represented major newspapers such as the *Los Angeles Times* and the *New York Times*. *Id.* The DOD admitted 35 photographers representing the foregoing wire services and newspapers, as well as *Newsweek*, *Time*, and *U.S. News and World Report* to the pool system. *Id.* The DOD included 11 representatives from the following magazines, *Newsweek*, *Time*, *Esquire*, *U.S. News and World Report*. *Id.* The pool also included 63 television representatives, almost all of whom were from ABC, CBS, NBC, CNN or their affiliates. *Id.* Thirteen radio representatives comprised the pool, primarily representing ABC, CBS, NBC, NPR and Voice of America. *Id.*

243. *Id.*

244. See *Nation Magazine*, 762 F. Supp. at 1574 (explaining that DOD may place reasonable time, place and manner restrictions on press if there is significant government interest, thus triggering mid-level scrutiny).

245. See Schauer, *supra* note 7, at 6 (discussing how DOD press pool members represented mainstream American media); see also *Nation Magazine*, 762 F. Supp. at 1564 (same). The *Nation Magazine* plaintiffs claimed that the DOD unconstitutionally discriminated among various members of the media by choosing only "mainstream" media organizations as pool members on the pretext that such organizations reached the largest audiences. *Id.* at 1564; see also POOL MEMBERSHIP AND OPERATING PROCEDURES, *supra* note 8, reprinted in *Nation Magazine*, 762 F. Supp. at 1578-79; Memorandum of Amicus Curiae Fairness and Accuracy in Reporting, Inc. in Support of Plaintiffs' Motion for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss, at 2, 762 F. Supp. 1558 (S.D.N.Y. 1991) [hereinafter FAIR Memorandum] (asserting in amicus curiae brief that DOD press pools articulate mainstream political view). Fairness and Accuracy in Reporting, Inc. (FAIR) has conducted studies drawing attention to the national news media's reliance on a narrow range of sources, experts and viewpoints, often to the exclusion of independent, critical or minority perspectives. FAIR Memorandum, at 2. FAIR's studies showing the narrowness of major media coverage have been distributed widely, reported in hundreds of daily newspapers, entered into Congressional Record, and discussed in academic circles. *Id.*

246. See Schauer, *supra* note 7, at 6 (asserting that any government selection process, such as DOD press pool system, is in danger of drawing content or viewpoint distinctions that First Amendment seeks to guard against); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 25 (1989) (White, J., concurring) (invalidating statute that exempted periodicals with religious

In response to the dilemma of the DOD press pools producing a mainstream political view, First Amendment scholar Frederick Schauer proposes that the DOD create a lottery with all American media organizations and individual citizens entitled to an equal chance to exercise their right of access to information.<sup>247</sup> Schauer acknowledges, however, that the DOD ultimately will employ some type of selection process when logistical concerns limit access.<sup>248</sup> Any DOD selection process will likely give preferential treatment to publications like the *New York Times* instead of another publication, such as *Muhammad Speaks*.<sup>249</sup>

Although the DOD's preferential treatment of certain media organizations is inevitable, it is possible for the DOD press pools to represent mainstream America and alternative views. The DOD press pool system must represent more diverse media organizations to safeguard against the threat of content-based restrictions masquerading as restrictions based on time, place and manner analysis.<sup>250</sup> To promote diversity, the DOD press pools should include media organizations not meeting the DOD's gulf war pool criteria. Media organizations not meeting the DOD's gulf war pool criteria would qualify for an alternate pool list. The DOD would draw pool members from this list on a rotating basis. To gain admission, media organizations only must have the capability to report from the battlezone and an established American audience that will benefit from the organization's insights. The DOD would base its decision concerning what percentage of media organizations not meeting regular DOD pool criteria to include on such factors as the number of applicants, the size of individual press pools, and the overall effect caused by addition of pool members.<sup>251</sup> The

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sponsorship or religious message from sales tax based on reasoning that statute functioned as content-based discrimination and triggered strict scrutiny analysis); *Boos v. Barry*, 485 U.S. 312, 318-21 (1988) (holding that government statute prohibiting demonstrations in front of foreign embassies that criticize particular foreign government does not restrict speech based on valid time, place and manner considerations, but on content of speech); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-34 (1987) (invalidating statute providing for sales tax exemption for some, but not all, periodicals based on reasoning that statute functioned as content-based discrimination and triggered strict scrutiny analysis); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 579-93 (1983) (supplying broad holding that taxes drawing distinctions among members of press are suspect even when state has not created exemption based on content or for purpose of suppressing speech); see generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-252 (1983) (explaining distinction between content-based and content-neutral restrictions on speech).

247. See Schauer, *supra* note 7, at 6 (offering alternative to government's preferential system for choosing powerful, mainstream media organizations as recipients of information to which government limits access).

248. *Id.*

249. See *id.* at 6-7 (commenting that as long as government restricts access based on time, place and manner considerations, government will favor mainstream news sources).

250. See *id.* at 7 (commenting that government is often vehicle of content-based discrimination when government limits access to certain number of media).

251. In weighing these and other factors, the DOD should base its decision not only on military experience, but also should consider testimony from media experts.

courts have promoted the overall effect of diversity of news sources because diversity improves the quality of information reaching the public and is vital to the functioning of a free society.<sup>252</sup>

### C. Applying the Proposed Alternatives

If the *Nation Magazine* plaintiffs had presented the court with a system to increase the diversity of press pool membership as well as an accelerated system of administrative and judicial review, the plaintiffs could have presented the court with a well-focused controversy.<sup>253</sup> Accordingly, the *Nation Magazine* court could have proceeded to the merits.<sup>254</sup> The court first would have examined the history of prior American military conflicts and concluded that the press has had an historically demonstrated First Amendment right of access to the battlefield.<sup>255</sup> The court then would have considered that in wartime this right of access is subject to reasonable time, place and manner restrictions.<sup>256</sup> Under time, place and manner analysis, the court then would have applied mid-level scrutiny,<sup>257</sup> which would require that the access limitations serve a significant state interest, leave open alternative methods of communication and not be content-based.<sup>258</sup>

In applying mid-level scrutiny, the courts require that limitations on the First Amendment right of access to the battlefield must be no more restrictive than valid time, place and manner considerations merit.<sup>259</sup> The government's reasons for restricting access once the government has created a limited public forum must be well-articulated.<sup>260</sup> The system of speedy administrative and judicial review protects the press's right of access to a greater extent than the current DOD pool system without infringing on the DOD's time, place and manner concerns. Furthermore, the proposed system better provides a media organization with procedural due process.<sup>261</sup> Given these

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252. See *supra* note 241 and accompanying text (asserting value of diversity of news sources in informing public); see also *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997, 3017 (1990) (holding that interest in promoting diversity in broadcast industry is important interest and is sufficient to uphold racial classification scheme whereby FCC awarded enhancement of minority ownership of broadcast licenses).

253. See *Nation Magazine*, 762 F. Supp. at 1575 (dismissing case due to lack of well-focused controversy due to plaintiffs' failure to devise specific alternatives to DOD pool system).

254. *Id.*

255. See *id.* at 1571-72 (asserting that press has at least some minimal right of access to battlefield); see also *supra* notes 144-66 and accompanying text (demonstrating historical right of access to battlefield).

256. *Nation Magazine*, 762 F. Supp. at 1574.

257. *Id.* at 1573.

258. *Id.*

259. *Id.*

260. *Id.*

261. See *supra* notes 213-30 and accompanying text (asserting importance of granting media procedural due process when government has taken away media organization's right of access).

specific alternatives to the press pool system, the *Nation Magazine* court arguably could have determined that the DOD does not have a significant state interest in insisting on the current DOD pool system over the plaintiffs' less restrictive alternative. The *Nation Magazine* court could have struck down the existing DOD pool system and suggested that the DOD implement plaintiffs' proposal for speedy administrative and judicial review.

Similarly, the *Nation Magazine* court could have suggested that the DOD implement plaintiffs' proposal for a more diverse press pool system. Courts have long recognized the value of information coming from a variety of sources.<sup>262</sup> Furthermore, plaintiffs could have argued that, in reality, the current pool system borders on content-based discrimination.<sup>263</sup> The DOD pool system presumably denies the American public more independent and critical coverage of military conflicts.<sup>264</sup> Arguably, there is no significant state interest which would prevent the DOD from accepting plaintiffs' proposal to allow media organizations not meeting press pool criteria to comprise a percentage of the pools.<sup>265</sup> Balancing the value of diversity against the addition of a few extra pool members supports the rationality of this alternative.<sup>266</sup>

#### IV. CONCLUSION

Although the courts are a vehicle to improve the DOD press pool system, advocates for change should not wait for another war to set the scene for a remedy. Both the mainstream and alternative press must unite now to increase media access to the battlefield in the next military conflict.<sup>267</sup> There is a general consensus among the media that the DOD press pool system significantly diminished the quality of reliable, objective information about the gulf war.<sup>268</sup> The DOD's restrictions on press coverage during the

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262. See *supra* notes 241, 245-46, 252 and accompanying text (asserting importance of diversity of sources of information in contributing to well-informed public).

263. See *supra* notes 241-50 and accompanying text (asserting that limiting access to certain media organizations based on time, place and manner analysis functions as content-based discrimination).

264. See FAIR Memorandum, *supra* note 245, at 7 (emphasizing how public benefits from receiving news from diverse sources of information).

265. See *Nation Magazine*, 762 F. Supp. at 1574 (asserting that DOD must demonstrate significant governmental interest before enforcing restrictions on media's right of access).

266. See *supra* notes 241, 245-46, 252 and accompanying text (stressing value of diversity of news sources in achieving informed American public); see Collins, *supra* note 103, at 786 (stressing that media should have access to public places unless such access seriously disrupts functioning of place or unless access threatens safety).

267. See *supra* notes 6-7 and accompanying text (discussing importance of press working as one unit to increase media access).

268. See THE MEDIA AT WAR, *supra* note 4, at 28-32 (discussing media dissatisfaction with DOD press pool system). In a survey conducted by the Gannett Foundation of 37 journalists who covered the gulf war, 75 percent said the military guidelines were a hindrance, and 25 percent characterized the guidelines as an extreme hindrance. *Id.* at 32. More than half said the press pool reports were not helpful, or only somewhat helpful. *Id.* at 28. For example,

Persian Gulf War have been a topic of research by media organizations and discussed among the media, military and the public.<sup>269</sup>

Although discussion is a step in the right direction, the media must do more than speak in generalities.<sup>270</sup> The media must be armed with specific alternatives to the press pool system, just as the *Nation Magazine* court requested.<sup>271</sup> The media then should present these specific alternatives to the DOD, while proposing general recommendations and raising grievances about the press pool system during the Persian Gulf War. The media must warn the DOD that the courts may be given the opportunity to endorse this reasoning during the next military conflict. The DOD will be motivated to avoid a lawsuit that, unlike *Nation Magazine*, could yield a media victory.

The Persian Gulf War damaged press freedoms, and the media may find that pressuring the DOD to restructure the press pool system will be

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*Baltimore Sun* correspondent Daniel Fesperman said the pool system was "basically a stupid system," designed "to spread disinformation." *Id.* NBC News correspondent Brad Willis said, "The deal should have never been made with the pools. It was a mistake." *Id.* Willis characterized the pool system as an "effort by the military to manipulate and control coverage in the name of 'operational security.'" *Id.* The reporters surveyed by Gannett said problems arose because there were too few pools; that inclusion in the pools seemed to favor certain news organizations (e.g., large organizations, those with connections) and that assignments to the pools often made little sense and those in the pool did not always know the pool rules or chose to ignore them. *Id.* at 32. The many incidents where the best reporting of the gulf war came from reporters who got away from the press pools demonstrates that the press pools hindered reporters.; see Richard Zoglin, *The Press Jumping Out of the Pool*, *TIME*, Feb. 18, 1991, at 39 (describing how reporters increasingly abandoned press pools as war progressed). The battle for Khafji is an example. *Id.* Although the DOD stationed pool reporters with the First U.S. Marine Division outside the Saudi city, the DOD did not allow the reporters into the town until 18 hours after the fighting started between Iraqi and coalition forces. *Id.* Early accounts of the battle came mostly from reporters who were reporting on their own. *Id.* One renegade reporter explained how the pools' version of the battle differed dramatically from that of those reporters who had actually witnessed how long the battle took, what happened or how many Iraqis defended the city. *Id.* The best footage of the battle came from two French TV crews and a British team, who were in Khafji well before the U.S. pool cameramen. *Id.*; see also Richard Zoglin, *Volleys on the Information Front*, *TIME*, Feb. 4, 1991, at 44 (asserting press pools diminished supply of reliable, objective information about gulf war); *THE MEDIA AT WAR*, *supra* note 4, at 27-30 (same); Dorfman, *supra* note 2, at 35-37 (same).

269. See *THE MEDIA AT WAR*, *supra* note 4, at 96-97 (offering recommendations and conclusions to help press regain freedoms during next military conflict). One organization, the Gannett Foundation, has even developed broad recommendations to stimulate discussion among the military, the media and the public. *Id.* These recommendations propose, among other things, that the American news media learn to represent themselves collectively; that the media educate the public about the importance of press freedoms; that in keeping with the Sidle Panel the press pools are only to be used as a temporary measure when required by legitimate national security needs; that the DOD reform the pools to create a mechanism to arbitrate judiciously the needs of the different media, and that the media strive to increase the diversity of news sources. *Id.*

270. See *supra* note 269 and accompanying text (discussing broad recommendations offered by Gannett Foundation); *Nation Magazine*, 762 F. Supp. at 1575 (criticizing plaintiffs' absolutist approach).

271. See *Nation Magazine* at 1575 (criticizing plaintiffs' absolutist approach).

difficult.<sup>272</sup> One of the barriers the media will encounter will be that the DOD will be motivated to protect its own self-interests.<sup>273</sup> Another barrier is that the American public also appears to have supported the DOD's press restrictions during the gulf war.<sup>274</sup> However, eventually the public will realize that it cannot risk the consequences of being uninformed or deceived by the military.<sup>275</sup> Because public awakening may come later than the media would prefer,<sup>276</sup> the media's most effective remedy is to present the DOD with specific alternatives to the press pool system based on legal reasoning.<sup>277</sup> By presenting the DOD with a proposal to restructure the DOD press pool system, the media will not only be defending its First Amendment right of access to the battlefield but will be fighting for the public's right to make informed decisions during times of military crisis.

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272. See *THE MEDIA AT WAR*, *supra* note 4, at xi-xii (summarizing press restrictions during gulf war and public's support for such restrictions).

273. See Collins, *supra* note 103, at 771 (asserting that agencies may not provide media organizations with all benefits of procedural due process after agency has restricted media organization's access).

274. See *THE MEDIA AT WAR*, *supra* note 4, at xi-xii (summarizing press restrictions during gulf war and public's support for such restrictions).

275. See Redlich, *supra* note 51, at 159 (stating that public will not tolerate military restrictions on First Amendment freedoms).

276. See *THE MEDIA AT WAR*, *supra* note 4, at xi-xii, 82-85 (assessing difficulty of media's task in swaying public opinion to support greater media freedoms). As Michael Kagay, Director of Surveys for the *New York Times*, remarked, "The press's complaint never became the public's complaint." *Id.* at 83.

277. See *Nation Magazine*, 762 F. Supp. at 1575 (expressing *Nation Magazine* court's displeasure with plaintiffs' failure to devise alternatives to press pool system).