

Press Pools, Prior Restraint and the Persian Gulf War

by

Capt Jon Mordan

I. Introduction

By and large, the news media are suspicious of the military. And they should be. Questioning is the media's job because a military without public scrutiny can lead to dictatorship. The First Amendment is supposed to ensure unfettered reporting of information, at least unfettered by government control.¹ Through the years, Congress and the courts have added restrictions and nuances to (or clarified the meaning of) "make no law." Press coverage of military operations is one of them.

Journalists often are criticized and blamed for creating or exacerbating the conflicts they report. Similarly, criticism falls on military commanders who walk a narrow line of openness while protecting the lives of their soldiers and the secrecy needed for wartime operations. Obviously, shooting the messenger has never worked, although it might serve as a signal because the Constitution, itself, provided for civilian control of the armed forces.² As a tool of the government, the military reflects governmental policies.

The Persian Gulf War represents to journalists and military leaders alike a pivotal point in the contentious relationship between presumed press freedoms and accepted military authority in a war zone. While the press always wants more rope than it needs to do the job, the military and the government have used that rope as a leash. I do not intend to debate in this study the ideological nature of the media, whether it is liberal or conservative. I will explore the basis of using press pools in the Gulf War and the issues surrounding free press in a military environment. Was the military's reliance on press pools in the Gulf War an unjust, unprecedented use of licensing and prior restraint? Are any precedents available that support speech restrictions, especially those of content?

II. Historical tension

There can be few professions more ready to misunderstand each other than journalists and soldiers.³

--S.F. Crozier

A. Dichotomy of interests

Many people fail to realize that a war zone legally never has been a place for unfettered reporting. All-too-often said but forgotten is information is power. Wars are won and lost often based on the quality and timeliness of intelligence, information that unfettered reporting and

scrutiny can compromise. During the Gulf War, Sadaam Hussein watched CNN; George Bush watched CNN. And so did the deputies and proxies in between.⁴

The thorny relationship between the media and the military stems from the dichotomy of interests involved. The media, which assume a surprisingly libertarian viewpoint during wartime, say their job as fourth estate government watchdog requires open access to the battlefield and the battle plan. The Pentagon's position is to prevent disclosure of classified or sensitive information to deny the enemy any useful intelligence. The military's position is not arguable. The media's wartime function, however, is debated even among industry professionals.⁵

A communication infrastructure has several components including technological, economic and political. Similarly, the media institution is interdependent on technology, markets and policy, a relationship in which Pentagon leaders readily participate but don't exclusively control.⁶ Today's news media may provide information and publicity, but they also program entertainment. Arguably, entertainment has taken precedent in news making. For example, during the Desert Storm, from among the thousands of journalists applying for the press pools, military officials had the opportunity to select correspondents from the women's fashion magazine *Mirabella*, *Audubon* magazine as well as talk show host Geraldo Rivera. Each has the right to report, but:

"[T]he financial ability to send a reporter or camera crew does not, in turn, obligate the government, the military, or combat unit commanders to then provide for each and every reporter or camera crew that arrives at the front with what they all seemed to demand: (1) exclusive interviews, (2) unrestricted access, (3) unlimited information, (4) food, water, and transportation to the front and the protection that comes along with it....[T]he First Amendment does not guarantee the best sound bite, the best ratings share, or a Pulitzer prize for every journalist who wants to cover a war....These 'realities' of modern, mobile combat, and of covering military operations seem to have been lost in the rhetorical fog of postwar debate."⁷

B. Occupational misunderstandings and misconceptions

An aspect of news taught in journalism schools is conflict,⁸ which is supported by writer Fred Reed, who wrote: "I know that I can easily sell articles criticizing the military, but that a piece praising anything the services do is nearly impossible to peddle. In conversation, magazine editors almost without exception are hostile and contemptuous of the military."⁹ Indeed, the journalists often report what they perceive as conflict.¹⁰ Pentagon supporters are quick to point out such issues, which could be sour grapes. Any institution, business or company would have the news media as its own public relations tools. Obviously, this is unrealistic.

From the libertarian viewpoint, the news media's job is to probe and question but to question reasonably and intelligently. A misconception is the media is the military's advocate and the media's function is publicity. Arguably, the Persian Gulf War demonstrated the Pentagon's ability to run a public relations campaign. Military sources were, after all, the only game in town. In the abstract, whether reporters sought, as a matter of routine, official sources or outside information is not the debate. During the Persian Gulf War, reporters did not have much choice.

A misconception the media adheres to is the military, as a governmental entity, is obligated to grant media access. Yes, but only to a limited extent. "It is one thing to say that a journalist is free to seek out sources....It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information....That proposition finds no support in the words of the Constitution or in any decision of this Court."¹¹

News coverage, has focused on military budgets (inflated due to pork barrel politics), expensive weapons (again, attributable in some instances to politics), and the occasional odd occurrence that manages to indict the entire institution.¹² Time writer Richard Zoglin wrote of his surprise at the "broad political and worldly sophistication" of military officers.¹³ This is a curious observation. College education is required to become a military officer. Advanced degrees are required for more senior promotions. Most of today's journalists, however, have neither served in the services nor received formal education about the services.¹⁴ Barbie Zelizer quotes:

A new generation of journalists is learning about war and they're learning about the military...They're ahistorical; they can't remember any precedent for anything. they keep discovering the world around anew. They either concentrate on high-tech stories or on what an ABC producer described as "boo-boo journalism," that is, asking "How do you feel?" not "What do you know?"...They're yuppies in the desert.¹⁵

Conversely, anyone who has ever had American history in grade school learned the historical attributes of a free press and important function in a free society. Professional military training and education courses and schools reinforce this; military regulations reinforce this. Entertainment as news, however, has damaged the noble idea of journalism. "[G]iven the media's focus on conflict, deviance, and melodrama, most senior military men [sic] do not see the media as allies of civic peace and virtue."¹⁶ Everette Dennis finds broadcasters in particular (in this sense, televised information) aren't informers but storytellers. "More broadly stated, the broadcast industry was founded to entertain, not to inform...."¹⁷

What many--whether military or civilian--don't grasp about the news media or reporting are the demands of perpetual deadlines, the competitive pressure of the media industry or the reality of the bottom line. The idea of a collective media agenda is groundless.

C. Wartime retrospectives

1. Civil War

Such observations are, no doubt, historically consistent. During the Civil War, for example, both the Union and the Confederacy controlled and restricted media access to battlefields and troops. The governments on both sides further banned printing stories that could have been damaging to the cause or helpful to the enemy.¹⁸ The Union government called for newspapers to voluntarily censor, which proved unrealistic at the time. General William Tecumseh Sherman's well-documented disdain for the press, for instance, stemmed at least partly from the speed with which the mass media informed. Through the telegraph and railroad, media indiscretion allowed Confederate armies to position themselves prior to Sherman's arrival, advertised weaknesses in

his armies and discussed movement of reinforcements.¹⁹ At one point, he banned journalists from accompanying his troops and ordered them to stop delivering their dispatches. When one New York Herald correspondent willfully violated the general's order, Sherman had him arrested and convened a court martial to try the reporter for being a spy and giving intelligence to the Confederacy.

Although courts at the time may have considered prior restraint reasonable, those papers that printed improper information were punished post facto through restrictions on using the U.S. mail and telegraph system. Most media restrictions came from the field and varied from unit to unit, mainly through withholding information or restricting access and interviews. Neither the Union nor the Confederacy established a consistent policy.²⁰

2. World War I

The First World War presents an example of governmental censoring on a national scale. The government restricted publishing within the United States in addition to censoring reports from the war. The Espionage Act of 1917 prohibited publishing any information that conceivably could benefit the enemy, interfere with military operations or production. Following that, the Sedition Act of 1918 forbade criticism of the government, its military or troops. Even criticizing military uniforms was punishable. The Supreme Court declared both acts constitutional despite First Amendment considerations.

Congress nationalized radio broadcasting and established the nation's first office of propaganda and censorship, the Committee on Public Information.²¹ The committee set rules for voluntary censorship for the media, which prohibited printing sailing dates and troop movements among others. These prohibitions, too, were upheld by the Supreme Court.²² Such extreme measures demonstrated public and administrative distrust and fear of the media to influence, not simply report. Overseas, censorship of the 90 press correspondents sent to cover the war was strict, if not overbearing.²³

3. World War II

The Second World War witnessed the creation of the Office of Censorship under the War Powers Act and then the Office of War Information, which became the nation's official office of propaganda. Mainly, the government asked for voluntary censorship and review of militarily sensitive subjects, later codified as the Code of Wartime Practices in 1942. Unlike any other war, the media were part of the military's wartime strategy. The government called for and received their cooperation to help win the war. Although the military heavily censored stories in the field, it did so in an organized, consistent manner without the restrictions of the Espionage or Sedition Acts. Cultivating the press as allies in the cause gained their cooperation to aid the war effort.²⁴

Occasional missteps did occur, some potentially major. The Chicago Tribune, for example, unwittingly reported the U.S. had broken the Japanese message-encoding system when the newspaper printed a story that named Japanese ships involved in a battle. The names were known only because the U.S. had deciphered Japanese messages.²⁵

4. Korean War

War coverage in Korea and Vietnam completely changed expectations the media had about reporting from the field. Initially during the Korean War, military planners opted not to impose official censorship of reports from the field. Only following the Chinese entrance into the conflict did the U.S. begin a censorship program. Journalists were required to submit their materials to a field censor who then submitted the materials to senior level officers in Tokyo for another review. Later, the field review was eliminated.

Security breaches did occur, and some journalists and media outlets felt provoked to intentionally taunt censors. For example, Newsweek published a map that depicted the battle order for the U.S. 8th Army.²⁶ Like during World War I, the military extended censorship beyond security to include areas of legitimate commentary and debate.

5. Vietnam War

Military officials decided early against compulsory censorship, perhaps with the hope press coverage of the conflict would rally support for American intervention. Unlike previous wars, the military did not control civilian transportation into or within the war zone. Reporters could travel with relative freedom into and around Vietnam. Furthermore, technology had sped the transmission of information, which could elude mandatory censorship. In an effort to cultivate a cooperative environment, the military asked journalists to follow a voluntary censorship system.

When the war became increasingly unpopular, the Johnson Administration mounted a public relations campaign, perhaps more aptly called propaganda, to win support from the American people and the South Vietnamese. The administration did not understand the indirect nature of media influence.²⁷ Reality countered each official message about the success of the South Vietnamese forces. Official rhetoric did not stand up to scrutiny following journalists' reports. Stories critical of military activities and the collateral, consequential damage to Vietnamese civilians circulated ever more frequently as the war progressed. Whether such reporting undermined public support for U.S. policies is arguable, but the notion that it did had lasting consequences on media-military relations.

III. Forming the press pool

Preparing the news is like making sausage: it is not necessarily a handsome process even under the best conditions.²⁸

--John Fialka

A. What it is and why it's used

Press coverage continues to be a concern of the military and the media. The latest trend has been the press pool system. A press pool generally consists of 11 people with additions or subtractions depending on circumstances: one wire-service photographer and correspondent, one network television correspondent and two technicians, one radio correspondent, one national news

magazine correspondent and photographer, and three newspaper reporters.²⁹ The purpose of the media pool is to enable independent, breaking news coverage of U.S. troops deployed worldwide and in remote areas with no American press.³⁰ Essential to trust and openness is voluntary compliance with security and secrecy ground rules. The pool of reporters essentially becomes a trusted agent of the U.S. military. The Department Defense accredits the news organizations, which then accredits their selected correspondents. The senior public affairs escort and local operations representative conducts security reviews of all press pool products to ensure no classified information is reported. This review is only for press pool journalists, not those outside the pool.

The idea for a national pool of reporters to cover military wartime operations grew from the news blackout enacted during Operation Urgent Fury, the Grenada invasion, which began Oct. 25, 1983. Military authorities refused to allow media representatives access to the island at the time of the invasion. Two days later, the military flew a limited number of reporters to the island. Only on November 7 did the military reopen unrestricted travel to the island. Arguably, this restriction stemmed from ill feelings toward press involvement in Vietnam and the belief that the press coverage and opinion caused the public to protest the war. If he was still living, General Sherman would probably agree.

Following Urgent Fury, the press strongly protested the ban. To help reconcile military-media relations, then-Joint Chiefs of Staff Chair Gen. John W. Vessey Jr. convened a panel of military officers and journalists to examine the situation and determine guidelines for future coverage. Known as the Sidle Panel, its recommendations were the basis for the Department of Defense National Media Pool. Among the panel's recommendations were that public affairs planning be conducted with operational planning.³¹

Since their inception, the press pools have covered 11 military activities, most being war games and exercises. The last two activities, however, were actual conflicts and battles.

B. Criticisms from Operation Just Cause, the Panama invasion

The five-year period of press pool coverage (including a year-long stint in the Persian Gulf) was battlefield-tested in Panama. It didn't work well. The press pool used in Panama arrived too late to cover events as they unfolded. Secretary Cheney publicly took responsibility for the delay. Because Panama was reasonably accessible, journalists could report from the battlefield before it became a battlefield. Cheney feared early reports would compromise security.

Arguably, sending the Washington press pool was not necessary in this situation. Panama was not a remote location. American media were already in touch with the public affairs office in Panama and enough U.S. news people were present in the area to form a pool.³² Cheney said later he called the press pool to avoid being criticized for not using it.³³

Shortcomings pool correspondents encountered were primarily transportation related e.g. few helicopters were available to ferry correspondents to battle areas. Logistics to transfer film and reports to media bureaus in the U.S. was inconsistent. Similar criticisms would emerge from

press pools in the Gulf War. Other complaints were lack of official briefings to bring the reporters up to date and few newsworthy stories to cover.³⁴

C. Criticisms from Operation Desert Shield/Storm, the Persian Gulf War

The speed and real-time capabilities of satellite technology blurred considerably the distinction between reporting news and making it during Desert Storm. Because live reports require something lively, non-events became stories and journalists became the subject e.g. live video coverage of journalists scrambling to put on their gas masks.³⁵ Speed of communication attracted scrutiny.

Cultural constraints from Saudi Arabia required some planning, especially considering the sheer number of correspondents.³⁶ Consider the historical comparisons. During World War I, 90 correspondents were accredited to accompany the U.S. forces. The Second World War had 461 journalists covering the Normandy invasion (180 American). Only 27 reporters went ashore on D-Day. The largest number of reporters accredited during the Korean conflict was 270. Vietnam had, at its height, 637 accredited journalists. Compare those numbers with Desert Storm: estimates range from 1,400 to 1,600 journalists in Saudi Arabia with hundreds more in Jordan, Turkey, Israel and Bahrain, which surround the war zone.³⁷ "[T]he media have some difficult questions to consider, beginning with the matter of how to control large numbers of journalists covering the battlefield. At some point, the numbers of journalists, as they did in this war, overwhelm the military's capabilities to accommodate them."³⁸

This presented an interesting dilemma: how to ensure fair, accurate coverage for the media without burdening or endangering combat commanders and their soldiers. Realistically, wartime correspondents had to rely on official military sources simply due to the number of reporters. The Pentagon recognizes that members have the constitutional right to speak to the media.³⁹ But the obvious danger of reporting off-the-cuff interviews is the unwitting release of sensitive information or the appearance of opinions that could be misconstrued as official policy. To deal with the huge number of reporters, the military had no choice than to use pool reporting.⁴⁰

The original National Media Pool of 17 journalists and technicians was activated two days after the first U.S. fighters arrived in Saudi Arabia. The pool arrived several days later apparently due to diplomatic negotiations with the Saudi government.⁴¹ Criticisms from the press pools and the press in general surrounding the Gulf War focus mainly on access to people and battlefronts. As mentioned earlier, the number of media personnel in the Persian Gulf region was overwhelming. Of the estimated 1,500 correspondents and related support people, 159 (later 192) moved with the combat units.⁴²

Outright censorship was rarely a problem. The appeals process a reporter could travel ended with civilian editors. Pool reporters, especially those with print media, found unreasonable delays transferring dispatches to the U.S. Despite modern technology--satellites, fax machines, laptop computers--reports often were couriered via ground vehicles. Delays of any length make news reports dated; delays of three days made reports worthless.⁴³

The media were "mentally prepared to cover another Vietnam" and weren't prepared for desert warfare.⁴⁴ Correspondent did not anticipate the pace of the war, nor were they prepared to be as controlled as they were. As John Fialka noted, coverage depended upon cooperation, which varied from service to service and unit to unit. Pool reporters also apparently lacked solidarity among themselves and did not share stories and information as the pools were designed to do.⁴⁵

Unlike Panama, further frustration emanated from the abundance of official press briefings, which reporters said yielded little more than generic information. The press was caught in a situation that forced them to rely on official sources, like it or not.

A misconception of Gulf War coverage was all stories were censored. Wrong. According to David Arant and Michael Warden, the military's security review applied only to pool reporters assigned to front line combat units. The press guidelines called for reviewing press pool products only for sensitive information about plans, capabilities, operations or vulnerabilities. The guidelines specifically state the review is for security and not for criticisms or for potentially embarrassing information.⁴⁶ Moreover, most reporters were not in the pools, remaining behind the battle front, and were free to report openly. Of the more than 1,300 reports filed from press pool reporters during the entire war, five were "flagged" as potential security violations, and only one remained unresolved. It was withheld from release by the reporter's editor, not by military reviewers.⁴⁷ Access to people and places stymied free reporting more than outright censorship.⁴⁸

IV. Protection through law and regulation

Secrecy in government is fundamentally anti-democratic....⁴⁹

--Justice Douglas

A. The public's right to know

Wartime coverage relies on the First Amendment to ensure press freedom. The ideas of free speech and free press have grown through interpretation, and while not expressly written, among those would seem to be the right to be heard. For example, the Fairness Doctrine, although now defunct, gave those attacked through broadcasting reports the right to reply as well as equal time provisions for all sides of controversial subjects. This is compelling speech. Another interpretation is the public's right to know, which is the basis for the Freedom of Information Act (FOIA).⁵⁰ Further regulations of broadcasting based on the idea of indecency or variable obscenity (not fit for children but OK for adults) are based not on the speaker's rights but on the listener's or viewer's rights to hear. A prior restraint interferes with both speaker and listener.

The press has been a strong advocate of free speech agendas, and the courts long have frowned upon prior restraints as inappropriate and an unconstitutional violation of the right of expression. As the court wrote in *HBO v. FCC*, "The point of ultimate interest is not the words of the speakers, but the minds of the hearers."⁵¹ Indeed, prior restraints are upheld only in the most extreme circumstances.

Another example of governmental restraint of expression is licensing. As the fourth estate, the media have never been held to a standard of licensing, which amounts to a government stamp of approval of the information published, broadcast or otherwise communicated to the public. Naturally, if approval can be granted, it can be taken away, which is why such standards largely have been frowned upon.

Obviously, the Pentagon has used both to regulate information in war zones and battlefields. (As presented earlier, at one time the government even exercised such control within the U.S. itself.) While prior restraints are rare but they do occur. Licensing is even more common in the form of accreditation. Consider regulatory constraints on broadcasters, for example, or common carrier regulations. Public demonstrations must have permits. Accreditation and the use of media credentials are both forms of licensing.

B. Protection within military regulations

The FOIA requires and directs military representatives, among others, to provide citizens access to government documents and accurate disclosure of information to the public. As an agency of the government, Department of Defense regulations reflect this requirement. According to at least one service regulation, "As an instrument of the American people, the Air Force must be open to public scrutiny. We must explain what we do, why we do it, and how we do it."⁵²

An important point to consider is that control of the DoD is through its civilian leadership.⁵³ It is civilian leadership that dictates military policy and often controls the flow of information. Generally, the unit commander (or designated representative) is authorized to release information.⁵⁴ "Although commanders and public affairs staffs are responsible for releasing information, they seldom are the source of the information." Regulations specifically encourage Air Force people to discuss the military by accepting interviews with the media, accepting speaking engagements, publishing professional writings and becoming active in the community. And the regulation specifically forbids withholding unfavorable information to avoid public criticism.⁵⁵

The military is anxious to avoid controversy or accusations of withholding embarrassing information that is not otherwise restricted. For example, Air Force Policy Directive 35-2 reiterates the official policy of maximum and forthright openness.

"In the execution of any program to increase and enhance the Air Force's image with both the public and the media, no information shall be classified or otherwise withheld to protect the Air Force from criticism or embarrassment....Any attempts to protect members who violate policy will only damage the institution's morale and integrity, tarnish the Air Force image and reputation, and violate the American public's trust and confidence."

Journalists must understand that despite the openness implied by regulations military members' expression is restricted by the Uniform Code of Military Justice (UCMJ), the system of military law that governs life for soldiers. Asking a soldier for opinions about the war could unwittingly create problems because "attacking the war aims of the United States" is considered disloyalty,

and the UCMJ forbids disloyal statements. "A declaration of personal belief can amount to a disloyal statement..."⁵⁶ Moreover, military members, despite being United States citizens and legal voters, are forbidden from criticizing elected officials.

"Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he [sic] is on duty or present shall be punished as a court-martial may direct....The truth or falsity of the statements is immaterial."⁵⁷

Making statements about wartime activities or conditions opens members to legal scrutiny. Obviously, openness is a desirable attribute for journalists, but must be exercised with certain caution by military members regardless of the sensitivity of the material. For example, Secretary of Defense Dick Cheney fired Air Force Chief of Staff General Michael Dugan in 1990 after Dugan openly expressed his opinions on the record for the press, opinions that were critical or non-conformal to administration policy.⁵⁸ The message for military members is implicit.

V. Legal precedent

The Constitution does no more than assure the public and the press equal access once the government has opened its doors.⁵⁹

--Justice Stewart

A. Historical footing

Until another solution for media coverage is found, press pools are here to stay. Any notion of special access for the press in military operations apparently has gained neither support in statutory law nor in the courts.

Constitutional questions of content-based or viewpoint-based restrictions generally are reviewed by the courts under what's known as strict scrutiny. The ban must serve a compelling government interest and be the least restrictive method to meet it. The compelling interest is evident. The least restrictive method is questionable.⁶⁰ Press pools, as presented, probably don't pass strict scrutiny. More likely, the unique nature of the military and war may have caused the courts to abandon such scrutiny standards, relying instead on "expert" advice from Pentagon officials. Indeed, the FOIA applies to all federal agencies but doesn't apply to the military during wartime. Exemptions also include classified information in the interest of national defense.⁶¹

Branzburg v. Hayes established that the right to publish includes the right to gather news.⁶² Conversely, the Supreme Court has held in several cases including *Branzburg* that the press isn't entitled to any special access privilege that isn't afforded other citizens.⁶³ "The prevailing view is the press is not free to publish with impunity everything and anything it desires to publish."⁶⁴

All speech is not permissible all the time. As the court found in *Branzburg*, "At the federal level, Congress has freedom to determine whether a statutory newsmen's [sic] privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary...."⁶⁵ Freedom of the press, apparently, is not outside government control. *Near v. Minnesota* may prohibit prior restraint, but Chief Justice Hughes established instances in which speech may be banned. Such instances include obscenity, inciting a riot, publishing of sailing dates of transports or the number and location of troops.⁶⁶

National security will always be a compelling interest for government intervention. In *Snepp v. United States*, for example, former CIA employee Frank Snepp printed a book about his experiences while employed with the agency.⁶⁷ The CIA sued to prevent further publishing, arguing national security and breach of contract. The court agreed with the CIA's argument, finding that Snepp's book had caused the country irreparable harm even if the information in it was unclassified. For example, intelligence sources ceased cooperating with the CIA following the book's publication.⁶⁸ The court also found that although Snepp had intimate knowledge of activities, the agent's own judgment of what information could be detrimental wasn't broad enough to consider the larger mission and involvement of the CIA. The court found the government's interest in secrecy and national security compelling and the CIA's contract valid.⁶⁹

Compare this with *New York Times Co. v. United States*, commonly known as the Pentagon Papers.⁷⁰ The finding in this case restates the notion anyone proposing prior restraint faces a court that bears "a heavy presumption against its constitutional validity."⁷¹

The government's argument hinged primarily on national security. The court ultimately ruled against prior restraint. Despite testimony from the Department of State, Department of Defense and the Joint Chiefs of Staff, the court reasoned the likelihood of damage from printing stories based on a dated, though still classified Pentagon study was nil.⁷² The study offered no operationally useful information. The real danger, the court reasoned, lay in government-enforced prior restraint of opinions. Enjoining public scrutiny of government activity would deny the press a vital role in society. The distinction is noteworthy.

Another important case supports access restrictions to military bases. Like *Branzburg et al.*⁷³ *Greer v. Spock* reinforced the notion that access is not a right. The *Greer* case focused on the commander of Fort Dix, New Jersey when he refused to allow political candidates to campaign on the reservation. The court ruled that a federal military installation is for military training, is not a public forum and, therefore, not open to access for the public.⁷⁴ It found commanders have the historically unquestionable power to exclude civilians from areas under their command.⁷⁵

B. Recent challenges

These findings present press pools as a reasonable compromise. Nonetheless, three cases challenged military policy in court following the Gulf War.

The first suit, *The Nation Magazine v. U.S. Department of Defense*, challenged that the pool system, military escorts and the security review violated the press' First and Fifth Amendment rights. The Judge Leonard B. Sand dismissed the case April 16, 1991 at the Defense

Department's request, saying because the Persian Gulf War was over, he did not have enough information to rule whether such restrictions would be valid in another war.⁷⁶

The second suit, *Agence France-Presse v. U.S. Department of Defense*, involved the French wire service, which was not included in the press pools.⁷⁷ The challenge claimed the press pools were unconstitutional because they interfered with the agency's news gathering operation. The court consolidated this with the first complaint, which was thrown out. Ironically, the same issues were presented in court following the 1983 Grenada invasion in *Flynt v. Weinberger*. The court ruled the case moot because the war was over.⁷⁸

The third suit challenged base restrictions that prevented the press and other groups from entering Dover Air Force Base, Delaware, where the bodies of deceased soldiers arrived from Desert Storm. The complaint called for a temporary restraining order based on the press' right to gather news and the public's right to free expression. The court ruled in favor of the government, finding that the base was not a public forum, that the base commander had the right to restrict access, and that protecting the privacy of the deceased members' families was salient.⁷⁹

VI. Conclusion

[W]hen everything is classified, then nothing is classified....⁸⁰

--Justice Stewart

Has the speed of communication in today's "information society" overtaken the Bill of Rights? Historically, the answer is no. Control of information during war is a precedent reconfirmed throughout history. Vietnam is the exception to the rule and is unprecedented. The press pool system essentially is licensing. Perhaps the courts today would rule on press restrictions differently if the government banned outright viewpoints to which it objected. During the Gulf War, however, the appeals process through which correspondents could present their arguments left the final say about presentation to civilian editors, not the government. Is this an unjust prior restraint? No, not in the literal sense, but it is in a practical sense. Information is perishable, especially in wartime. Was the first casualty of this latest war truth? Maybe, depends on whether one was on the winning side and followed the rules. A significant issue journalists must realize is the public overwhelmingly supported press restrictions and thought reports from the Gulf were accurate, informative and thorough.⁸¹

One could say the media-military struggle is a clash of cultures. Military structure is an authoritarian system, especially during time of war. Generally, soldiers are educated, goal-oriented team players by training and necessity who often have no recourse than to salute smartly and follow orders. They survive through sacrifice and cooperation. "The First Amendment assures journalists the right to publish....But there is no counterpart in journalism to 'duty, honor, country,' or the military leader's ultimate responsibility for life and death."⁸²

Individual reporters generally have no authority within their institutions to decide policy or set agendas. Journalists may be individualistic, but they are confined to the ideology and taste of the organization. Reporters are focused but largely have no responsibility to others unless they move

to editorial positions. They aren't necessarily team players, often competing within their own organizations as well as with commercial competition. Difficulties within the press pools during the Gulf War testify to this. Reporters work under perpetual deadlines and often have little time to reflect upon and debate their reports or positions, even less time set agendas outside organizational flavor.

Legally, the military has the right to restrict access and information. Press pools are a practical attempt to address the need for security and the public's right to know. Have abuses taken place? No doubt.

Bearing the restrictions in mind and the support from the courts, journalists still must fight complacency. Regulations and policies granting media coverage don't ensure compliance, even from military members. And the dichotomy of directives governing service members almost ensures that when in doubt, soldiers will tow the company line.

Notes

1. T. Barton Carter, Marc A. Franlin, Jay B. Wright, *The First Amendment and the Fifth Estate: Regulation of Electronic Mass Media*, 3d ed., (Westbury, New York: The Fountain Press Inc., 1993), 824. "Congress shall make no law...abridging the freedom of speech, or of the press...."
2. *id.*, 818-21. Article 1, sect. 8, United States Constitution: "The Congress shall have Power To...declare War...To raise and support armies...To provide and maintain a Navy...To provide for calling forth the Militia." Article 2, sect. 2, United States Constitution: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia...."
3. Alan Hooper, *The Military and the Media*, (Cambridge, Great Britain: University Press, 1993), 3.
4. Patrick O'Heffernan, "Sobering Thoughts on Sound Bites Seen 'Round the World," *Desert Storm and the Mass Media*, ed. Bradley S. Greenberg and Walter Ganz, (Cresskill, New Jersey: Hampton Press Inc., 1993), 19-23.
5. James M. Fallows, *Breaking the News: How the Media Undermine American Democracy*, (New York: Pantheon Books, 1996), 10-16. Fallows recalls a televised discussion posing the ethical dilemma of an American reporter accompanying an enemy patrol that was set to ambush American soldiers. The discussion featured Mike Wallace and Peter Jennings.
6. Thomas A. McCain, *The 1,000 Hour War: Communication in the Gulf*, (Westport, Connecticut: Greenwood Press 1994), introduction. He cites his 1992 study, presented at Ohio State University, of perspectives on policy, technology and markets for Ohio's telecommunications networks.
7. William J. Small, "The Gulf War: Mass Media Coverage and Restraints," *The 1000 Hour War: Communication in the Gulf*, ed. Thomas A. McCain and Leonard Shyles, (Westport, Connecticut: Greenwood Press 1994), 34.
8. Floyd K. Baskette, Jack Z. Sissors and Brian S. Brooks eds, *The Art of Editing*, (New York: The MacMillan Co. 1986), 24. According to *The Art of Editing*, conflict is among seven aspects a reporter and editor should consider in a story. The other six are audience,

- impact, proximity, timeliness, prominence and oddity. I would add controversy considering the evolution of journalism and dominance of televised news since 1986.
9. William V. Kennedy, *The Military and the Media*, (Westport, Connecticut: Praeger Publishers 1993), 14. Quote originally printed in the *Army Times*, May 18, 1987.
 10. Peter Braestrup, *Newsmen and National Defense: Is Conflict Inevitable?*, ed. Lloyd Mathews, (New Jersey: Brassey's Inc., 1991), introduction.
 11. *Pell v. Procnier*, 417 U.S. 817 (1974).
 12. see Small supra note 7 at 26. Barbie Zelizer, "The Gulf War and Journalistic Practice," *Journal of Communication*, 42 (Winter 1992), 66-72.
 13. Richard Zoglin, "It was a public relations rout, too," *Time*, March 11, 1991, 56.
 14. see Zelizer supra note 12.
 15. id., 69. First quoted by R. Valerinani, "Covering the Gulf War: Talking Back to the Tube," *Columbia Journalism Review*, (March/April 1991).
 16. see Braestrup supra note 10.
 17. see Kennedy supra note 9 at 27.
 18. William M. Hammond, "The Army and Public Affairs: A Glance Back," *Newsmen and the National Defense Is Conflict Inevitable?*, ed. Lloyd Mathews, (New Jersey: Brassey's Inc., 1991), 1-6. David Stebenne, "The Military and the Media: The Gulf Conflict in Historical Perspective," *The Media at War: The Press and the Persian Gulf Conflict*, (New York: Gannett Foundation, 1991), 8-9.
 19. Joseph H. Ewing, "The New Sherman Letters," *American Heritage*, July/August, 1987, 24-41.
 20. see Hammond supra note 18. See Stebenne supra note 18.
 21. id., Stebenne, 8-9. M. David Arant and Michael L. Warden, "The Military and the Media: A Clash of Views on the Role of the Press in Time of War," *The 1000 Hour War: Communication in the Gulf*, ed. Thomas A. McCain and Leonard Shyles, (Westport, Connecticut: Greenwood Press, 1994), 32.
 22. *Near v. State of Minnesota*, 283 U.S. 697 (1931).
 23. see Arant and Warden supra note 21 at 32. During the First World War, 90 correspondents were accredited to accompany the American Expeditionary Forces.
 24. Id., 22. See Stebenne supra note 18 at 10-12.
 25. see Hammond supra note 18 at 9-11. See Stebenne supra note 18 at 11.
 26. id., Hammond, 12.
 27. Jon B. Mordan, "Propaganda, media effect and the Gulf War," unpublished paper.
 28. John J. Fialka, *Hotel Warriors: Covering the Gulf War*, (Washington D.C.: The Woodrow Wilson Center Press, 1991), 2.
 29. id., 11.
 30. Fred S. Hoffman, "The Panama Press Pool Deployment: A Critique," *Newsmen and National Defense: Is Conflict Inevitable?*, ed. Lloyd Mathews, (New Jersey: Brassey's Inc., 1991), 92.
 31. James O'Rourke, "The Media Pool: Is it the solution?" *Military Media Review*, (Summer 1989), 10.
 32. Id., 92. Ronald T. Sconyers, "Crisis in Panama: A public affairs success story," *Military Media Review*, (Summer 1989), 2-7.
 33. see Hoffman supra note 30 at 92.
 34. id., 93-101.

35. see Zelizer supra note 12 at 66-72.
36. Douglas A. Boyd, "Arab Audiences for Gulf War Coverage: Where Did They Turn and Why?" *The 1000 Hour War: Communication in the Gulf*, ed. Thomas A. McCain and Leonard Shyles, (Westport, Connecticut: Greenwood Press, 1994), 73-87.
37. see Small supra note 7 at 4. See Arant and Warden supra note 21 at 32. John Pavlik and Seth Rachlin, "On Assignment: A Survey of Journalists Who Covered the War," *The Media at War: The Press and the Persian Gulf Conflict*, (New York: Gannett Foundation, 1991), 26.
38. see Fialka supra note 28 at 8.
39. Air Force Policy Directive 35-2, amendment to Air Force Instruction 35-206.
40. see Arant and Warden supra note 21 at 33, citing Colonel William L. Mulvey, director of the Joint Information Bureau in Dhahran, "Inside media relations: Observations from Desert Storm," *U.S. Army Public Affairs Monthly Update*, 1-5.
41. id, Arant and Warden, 32.
42. id, 33. See Fialka supra note 28 at 4.
43. id, Fialka, passim. Delays caused by transportation and the review process (if used) may have been intentional to render any intelligence value useless to Iraq.
44. id, 8.
45. see Pavlik and Rachlin supra note 37 at 26-33.
46. The press ground rules and supplementary guideline are attached as appendix B to *The Media at War: The Press and the Persian Gulf Conflict*, ed. Craig LeMay, Martha FitzSimon and Jeanne Sahadi, (New York: Gannett Foundation, 1991).
47. The review process for censored stories allowed the final decision to fall with the originating reporter's news organization.
48. see Pavlik and Rachlin supra note 37 at 26-33.
49. *New York Times Co. v. United States*, 403 U.S. 722 (1971).
50. Title 5 United States Code sect. 542.
51. 567 F.2d 9 (D.C. Cir. 1977).
52. Air Force Instruction 35-206, sect. 1.1.
53. Military law and regulation is a product of civilian lawmakers. Title 10 and Title 32 of the United States Code governs the Armed Forces and the National Guard. The Uniform Code of Military Justice is a federal statute and is codified as Title 10 USC chapt. 47, sect. 801-935.
54. Air Force Instruction 35-206, sect. 1.3.2
55. id, section 1.3.3.
56. Article 134, Disloyal Statements, Uniform Code of Military Justice (10 USC 836).
57. Article 88, Uniform Code of Military Justice (10 USC 888).
58. Colin Powell, *My American Journey*, (New York: Random House 1995), 476-78.
59. *Saxbe v. Washington Post*, 417 U.S. 833 (1974).
60. The strict standard is not always rigidly applied. The courts see broadcasting, for example, as a unique technology and medium. Decisions regarding broadcasting content restrictions have been considered under intermediate scrutiny, which requires only a substantial government interest and the regulation must directly advance that interest.
61. see Freedom of Information Act supra note 50.
62. 408 U.S. 665 (1972). *Branzburg* involved a reporter who refused to testify before a grand jury about drug use and manufacturing in Kentucky, stories about which he had written.

63. *id.*, see Pell *supra* note 11, 417 U.S. 817 (1974); Saxbe *supra* note 59, 417 U.S. 833 (1974).
64. see Branzburg *supra* note 62, 408 U.S. 665 (1972).
65. *id.*
66. 283 U.S. 697 (1931).
67. 444 U.S. 507 (1980). When Frank Snepp, the defendant, joined the CIA, he signed an agreement that stipulated at any time during or after his employment, he submit any writings that involved the CIA to agency representatives for screening. He didn't before publishing his book, which contained details of CIA activities in Vietnam.
68. Note the opposing finding compared with that of *New York Times v. United States*. The court ruled in Snepp that even a former CIA agent, intimate with classified details of the agency, did not have enough scope to comprehend the damaging nature or secretness of information. The court made no effort to unclassify information.
69. A similar situation involving a former CIA agent can be found in *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) and *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975). The former involves the agent's appeal to allow publishing and the latter is the same case remanded to the district court. The court ultimately ruled against publishing for reasons of security, and Marchetti's contractual obligations. Unlike *New York Times v. United States*, the court found classifying information outside its scope of authority.
70. 403 U.S. 670 (1971). *New York Times Co. v. United States* involved a classified historical analysis of U.S. involvement in Vietnam. The *New York Times* and the *Washington Post* both had received copies of the study and began printing a series of stories based on the study. The government sued to prevent further publication and sought and received a temporary restraining order until the court could hear the case.
71. *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1968).
72. Essentially, the Judiciary branch assumed Executive responsibility for classifying documents in this case. The court found the information contained in the study was not secret but rather contained information that could be used by those critical of the U.S. involvement in the war.
73. see Pell *supra* note 11, 417 U.S. 817 (1974); Saxbe *supra* note 59, 417 U.S. 833 (1974).
74. 424 U.S. 828 (1977). Candidates for U.S. president and vice president sought to speak on the Army post, reasoning that it was public property and, thus, a public forum. Reservation regulations strictly forbid partisan, political speeches or demonstrations. The base commander denied their attempts to speak.
75. "A military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures....[T]he existence of the two systems [military and civilian does not] mean that constitutional safeguards, including the First Amendment, have no application at all within the military sphere. It only means that the rules must be somewhat different." 96 S.Ct. 1211, 1220.
76. 91 Civ. 238, U.S. Southern District of New York. The ground war ended Feb. 28, 1991.
77. 91 Civ. 910, U.S. Southern District of New York.
78. 762 F.2d 134 (D.C. Cir. 1985).
79. *J. B. Pictures v. Department of Defense* as cited in *Legal Times*, March 18, 1991.
80. see *New York Times supra* note 70, 403 U.S. 730 (1971).

81. Martha FitzSimon, "Public Perception of War Coverage: A Survey Analysis," *The Media at War: The Press and the Persian Gulf Conflict*, (New York: Gannett Foundation, 1991), 86-95.
82. *supra* note 74.