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Notes

ASSAULT ON GRENADA AND THE FREEDOM OF THE PRESS

This Note discusses the constitutional arguments in favor of press access to military operations. Following an initial discussion of the role of the press in American democracy, the author cites a series of Supreme Court cases, concluding that a right of press access to military operations exists. This constitutional right is then examined in light of its unprecedented violation during the invasion of Grenada. The author proposes a realistic compromise between the need for national security and the press right to access.

INTRODUCTION

BEFORE DAWN ON October 25, 1983, the United States military invaded Grenada,¹ a tiny Caribbean island that was a British colony until 1974. The President of the United States, Ronald Reagan, announced the invasion at a White House news conference at 9 a.m.—four hours after the operation had begun.² That afternoon, Secretary of State George P. Shultz also held a news conference in Washington, D.C., in which he stated that the invasion was undertaken because of the President's "concern for the welfare of American citizens living on Grenada" and because the United States had received an "urgent request from . . . the Organization of Eastern Caribbean States [O.E.C.S.] . . . to help them in their desire to insure peace and stability in their area,"³ following the overthrow and assassination of Grenadian Prime Minister Maurice Bishop.

For the first two and one-half days of the invasion, American news reporters were denied access to the military operations.⁴ This

1. Kaufman, *Airports Seized, Drive on Capital Faces Stiff Fire*, N.Y. Times, Oct. 26, 1983, at A1, col. 4.

2. *Text of Reagan's Announcement of Invasion*, N.Y. Times, Oct. 26, 1983, at A16, col. 1; see also P. BRAESTRUP, *BATTLE LINES* 83 (1985).

3. *Transcript of Shultz's News Conference on Why U.S. Acted*, N.Y. Times, Oct. 26, 1983, at A18, col. 1; see also *U.S. Sums Up Reasons for Invading Grenada*, N.Y. Times, Dec. 17, 1983, at A3, col. 3 (Reagan administration citing communist presence and safety of Americans as justifications for invasion); *Letter Asking U.S. to Act*, N.Y. Times, Oct. 26, 1983, at A19, col. 5 (text of Oct. 23 letter from O.E.C.S. to the United States requesting military intervention).

4. Farrell, *U.S. Allows 15 Reporters to Go to Grenada for Day*, N.Y. Times, Oct. 28, 1983, at A13, col. 5.

was the first such press exclusion in American history⁵ and was a violation of the first amendment guarantees of free speech and press.⁶ The exclusion of reporters as independent observers caused serious and irreparable harm to the ability of the American public to make fully-informed decisions about the use of military force in the invasion of Grenada⁷ and established a dangerous precedent for future restraints on access to the press.⁸ Indeed, then White House Chief of Staff James A. Baker III told reporters that although he did not know of the plan to exclude the press beforehand, he approved of it and would exclude the press again in a similar situation.⁹

This Note will initially discuss the origins and development of the first amendment guarantee of freedom of the press and the role of this freedom in a democracy.¹⁰ Next, the right of access to overt military operations¹¹ in light of relevant Supreme Court decisions will be reviewed.¹² Then, this Note will analyze the constitutionality of the press exclusion from the invasion of Grenada.¹³ Finally, possible solutions to the problem of access suggested by a panel commissioned by the Pentagon, by various press entities, and by the

5. See *infra* notes 70-82 and accompanying text.

I fear that in Grenada, the real price the administration is worried about is the one which policymakers must pay when independent observers and journalists can provide their own accounts of events, and the public does not have to rely on official hand-outs and the networks do not have to run Government videotape and film.

Nor does it make much sense to suggest that reporters must be barred or their access restricted in order to preserve the secrecy of the Grenada invasion. There is a long and honored tradition of journalists pledging secrecy and keeping that pledge during the opening phase of a sensitive military operation . . . I hope that there is nothing to hide from our citizens about the invasion. I am certain that there is not justification for maintaining a policy which shrouds the truth and hides the reality from independent journalists and American camera crews . . . For my part Mr. President, I am wholly unwilling to cede civilian authority on this issue. The administration's policy of censorship about events in Grenada is unprecedented, seemingly unjustified, and probably unconstitutional.

CONG. REC. S14877 (daily ed. Oct. 28, 1983) (statement of Sen. Kennedy).

6. See *infra* notes 30-69 and accompanying text.

7. See *infra* notes 130-37 and accompanying text.

8. See *infra* note 9.

9. Friendly, *Weinberger Tied to Curb on Press*, N.Y. Times, Nov. 13, 1983, at A19, col.

1. Apparently, the Reagan administration has decided to continue its policy on restricting press access to overt military operations. See Landau, *Military Censorship: Two More Lessons*, The Plain Dealer, Apr. 9, 1986, at A27, col. 1 (criticizing the Pentagon for excluding the press from U.S. military operations held in March, 1986 off the coasts of Libya and Honduras).

10. See *infra* notes 15-29 and accompanying text.

11. This Note will not discuss a right of access to covert military operations.

12. See *infra* notes 30-69 and accompanying text.

13. See *infra* notes 109-69 and accompanying text.

author will be discussed.¹⁴

I. THE ROLE OF THE PRESS AND THE GENERAL CONSTITUTIONAL RIGHT OF ACCESS

A. *The Structural Role of the Press*

Since the establishment of our republican form of government, much has been written about the function of the first amendment in the workings of a free society.¹⁵ Individuals as diverse as Thomas Jefferson¹⁶ and Ronald Reagan¹⁷ have written about the critical role of an untrammelled press as a preserver of a free society based on self-government. Professor Thomas I. Emerson¹⁸ described this role well when he wrote:

The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision-making by the people, to whom that function is committed, becomes impossible. Whether or not such a guarantee of the right to know is the sole purpose of the first amendment, it is surely a main element of the provision and should be recognized as such.¹⁹

The structural role of the press in providing the American pub-

14. See *infra* notes 170-220 and accompanying text.

15. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government."); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting) ("What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues.")

16. In a letter to Edward Carrington dated January 16, 1787, Thomas Jefferson wrote: "The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I would not hesitate a moment to prefer the latter." IV WRITINGS OF THOMAS JEFFERSON 359-60.

17. In observance of National Newspaper Week, October 9-15, 1983, President Ronald Reagan wrote: "There is no more essential ingredient than a free, strong, and independent press to our continued success in what the Founding Fathers called our 'noble experiment' in self-government." EDITOR & PUBLISHER, Oct. 8, 1983, at 17.

18. Emerson is the Lines Professor of Law at Yale University.

19. Emerson, *Legal Foundation and the Right to Know*, 1976 WASH. U.L.Q. 1, 14 (1976); see also *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information.")

lic with information about the operation and activities of its government has also frequently been recognized by the Supreme Court. The Court in *Mills v. Alabama*,²⁰ discussed the critical function of the press in assuring governmental accountability to the people. Justice Black, writing for the majority, stated:

The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.²¹

Historically, the liberty of the press guaranteed by the first amendment was considered to be limited primarily to "immunity from previous restraints or censorship."²² This view comported with the traditional Anglo-American fear of prior restraints as the major threat to freedom of the press.²³ The Supreme Court, however, has recognized that the breadth of first amendment protection for the press must extend beyond merely barring prior restraints. In *Near v. Minnesota*,²⁴ the Court explicitly recognized that the freedom of the press continues to be challenged by new and unique threats.²⁵

For example, in *Grosjean v. American Press Co.*,²⁶ the Court found a Louisiana license tax imposed on newspapers with circulations greater than 20,000 copies per week unconstitutionally restrictive of the freedom of the press. The tax was imposed for the privilege of selling advertising.²⁷ The Court adopted the following

20. 384 U.S. 214 (1966) (state statute, which made it a crime to publish an editorial on election day which solicits voters to vote in a particular way, violates the first amendment).

21. *Id.* at 219.

22. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). However, as the Court points out, the immunity from prior restraint is not absolute, for "[n]o one would question but that a government might prevent . . . publication of the sailing dates of transports or the number and location of troops." *Id.*

23. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication . . ." *Id.* at 713 (quoting Blackstone). See generally L. LEVY, *EMERGENCE OF A FREE PRESS* (1985) (discussing the history of freedom of the press in Anglo-American society).

24. 283 U.S. 697 (1931).

25. *Id.* at 716-17.

26. 297 U.S. 233 (1936).

27. *Id.* at 240.

test, formulated by Judge Thomas M. Cooley, for determining first amendment violations: "The evils to be prevented [by the first amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."²⁸ The Court viewed the license tax as "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of the constitutional guarantees."²⁹

Thus, when faced with a challenge to the freedom of the press, the courts should take two preliminary factors into consideration. First, an informed public is vital to the democratic institutions upon which our government is based. Second, freedom of the press is a dynamic concept which requires a constant evolution of protective measures.

B. *The Development of the Right of Access*

The process of gathering news about governmental activities has operated continuously since America was colonized,³⁰ yet the development of a constitutional right of access to information has occurred relatively recently. One commentator, however, argued for the existence of that right four decades ago. In *Legal Control of the Press*, published in 1944, Frank Thayer³¹ argued that the right of access to newsworthy information was implicitly granted to the people in the United States Constitution. Thayer maintained that the right of access was subsumed by the first amendment because newsgathering is a prerequisite for accurate and complete reporting of governmental activities. Neither the United States Constitution nor the several state constitutions, Thayer argued, prohibited news-

28. *Id.* at 249-50 (quoting J. COOLEY, 2 COOLEY'S CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927)). The Court went on to state: "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information . . . and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean*, 297 U.S. at 250.

29. *Grosjean*, 297 U.S. at 250.

30. See S. KOBRE, *THE DEVELOPMENT OF AMERICAN JOURNALISM* (1972); F. L. MOTT, *AMERICAN JOURNALISM: A HISTORY 1690-1960* (1969); *NEWSPAPER HISTORY FROM THE SEVENTEENTH CENTURY TO THE PRESENT DAY* (G. Boyce, J. Curran, P. Wingate eds. 1978); A. SMITH, *THE NEWSPAPER: AN INTERNATIONAL HISTORY* 72-86, 133-41, 168-70 (1979).

31. Thayer was a member of the Illinois Bar and a professor of journalism and lecturer on law of the press at the University of Wisconsin School of Journalism.

gathering, so the right of access is reserved to the people.³²

The Supreme Court did not expressly refer to a constitutional right of access to information until 1965. In *Zemel v. Rusk*,³³ the Court ruled that the Secretary of State's refusal to grant Zemel a passport to enable him to travel to Cuba did not violate any first amendment rights.³⁴ In addition to the fact that the Court did not believe Zemel's first amendment claim to be bona fide, the Court ruled that the denial of a passport was an "inhibition of action" rather than an inhibition of speech.³⁵ The Court then stated in dicta that "[t]he right to speak and publish does not carry with it the *unrestrained* right to gather information."³⁶ This statement implies, that to some degree, a constitutional right of access to information does exist.

Seven years later, in *Branzburg v. Hayes*,³⁷ the Court again implied that some constitutional right to gather information exists. The issue in *Branzburg* was whether the first amendment protected a reporter who refused to divulge to a grand jury the names of confidential news sources in connection with a pending criminal investigation.³⁸ The reporter protested that disclosure would severely burden his ability to gather news because informants would be unwilling to give information if they knew that their identities could

32. F. THAYER, LEGAL CONTROL OF THE PRESS 139 (1944). This Note will use the terms "right of access" and "right to gather news" interchangeably. Although the Supreme Court has stated that the press has no greater right of access than does the public, *Pell v. Procunier*, 417 U.S. 817, 834 (1974), the Court has recognized that in situations where it is impracticable or impossible for all who might desire to attend to do so, the press acts as a surrogate for the public. In *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), the Court stated, "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily on the press to bring to him in convenient form the facts of those operations." See also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1974) (Press access "affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice."); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) ("For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government.").

33. 381 U.S. 1 (1965). In *Zemel*, the Court ruled that the Secretary of State, acting under statutory authority, could properly deny the appellant a passport to travel to Cuba, based on the Secretary's determination that travel to Cuba posed a threat to national security. *Id.* at 14-15. *Zemel* was a tourist who desired to travel to Cuba to satisfy his "'curiosity about the state of affairs in Cuba'" and to make him "'a better informed citizen.'" *Id.* at 4.

34. *Id.* at 16.

35. *Id.* at 16-17.

36. *Id.* at 17 (emphasis added).

37. 408 U.S. 665 (1972).

38. *Id.* at 708-09.

be revealed.³⁹ The Court found this argument to have some merit⁴⁰ but determined that a reporter's interest in maintaining the confidentiality of news sources must give way to societal interests in pursuing and prosecuting crimes.⁴¹ Yet, the Court recognized a constitutional right to gather information, pointing out that "without some protection for seeking out the news, freedom of the press could be eviscerated."⁴² Justice Stewart wrote in dissent: "No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised."⁴³

The Supreme Court, for the first time, squarely faced the issue of the press and public right of access to information in the control of the government in the 1974 companion cases of *Pell v. Procunier*⁴⁴ and *Saxbe v. Washington Post Co.*⁴⁵ In *Pell*, the Court upheld a California Department of Corrections regulation which provided that "[p]ress and other media interviews with *specific* individual inmates will not be permitted."⁴⁶ The Court decided the case only after recognizing that the public and the press have general access to all parts of California prisons "to observe prison conditions,"⁴⁷ and that newsmen are permitted to visit both minimum and maximum security sections of the prisons and to "stop and speak about any subject to any inmate whom they might encounter."⁴⁸ It was also noted that newsmen are permitted to enter the prisons "to interview inmates selected at random by the corrections officials."⁴⁹ The level of access which already existed in the depart-

39. *Id.* at 682.

40. *Id.* at 693-95.

41. *Id.* at 695.

42. *Id.* at 681.

43. *Id.* at 728.

44. 417 U.S. 817 (1974).

45. 417 U.S. 843 (1974). For a discussion of *Pell* and *Saxbe*, see Note, *The Media, The Public and Government—Is There a Constitutional Right of Access?*, 39 LA. L. REV. 1005 (1979).

46. *Pell*, 417 U.S. at 819 (emphasis added). The regulation was adopted following a "violent episode" that California prison authorities believed was "at least partially attributable to the former policy of . . . face-to-face prisoner-press interviews." *Id.* at 831. Apparently, because the press had chosen to interview the same inmates repeatedly, a small group of inmates had obtained disproportionate notoriety and influence among their fellow inmates. *Id.* at 831-32.

47. *Id.* at 830.

48. *Id.*

49. *Id.* In *Saxbe*, the Court, by the same five-to-four majority, upheld a Federal Bureau of Prisons policy statement that contained a similar prohibition against press interviews with

ment was a significant factor in the Court's decision.

As Justice Stevens pointed out in his dissenting opinion in *Houchins v. KQED, Inc.*,⁵⁰ the *Pell* Court's extensive discussion of the general access afforded to the press and the public in the California prisons demonstrates that the governmental prohibition of access must be considered in light of the total access that is otherwise afforded.⁵¹ Denial of access is not likely justified unless there is in fact an opportunity for the press and the public to observe prison conditions.⁵²

The Supreme Court has also recently addressed the right of press access to information in criminal trials. In *Richmond Newspapers, Inc. v. Virginia*,⁵³ the Court ruled that the right of the public and the press to attend criminal trials is guaranteed under the first and fourteenth amendments.⁵⁴ The Court found that the right of access to criminal trials exists because of the "unbroken, uncontradicted history"⁵⁵ of open trials in Anglo-American society, which

individually selected inmates. The Court found the *Saxbe* case to be "constitutionally indistinguishable" from *Pell* and therefore fully controlled by it. *Saxbe*, at 850.

50. 438 U.S. 1, 19 (1978) (Brennan, J. and Powell, J., concurring in dissent). In *Houchins*, a plurality of the Court upheld a sheriff's decision to deny the press access to a county jail to observe the conditions therein. As Stevens points out in his dissent, this is clearly inconsistent with the analysis of the majority of the Court in *Pell*. *Id.* at 29-30. The vote in *Houchins* was four to three. Justices Blackmun and Marshall did not participate in the consideration or decision of the case.

It is likely that had Marshall participated in *Houchins*, he would not have agreed with the plurality opinion inasmuch as he joined the dissenting opinions in *Pell* and *Saxbe* and has consistently voted in favor of access in all the subsequent right-of-access cases. It is also likely that had Blackmun participated he would have disagreed that the sheriff's denial of access was constitutional in light of his vote in favor of access in the subsequent right-of-access cases. Also, in his concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), Blackmun wrote that "the public has an intense need and a deserved right to know about the administration of justice in general . . ." *Id.* at 604. See also *Gannett Co. v. DePasquale*, 443 U.S. 368, 412-13 (1979) (Blackmun, J., dissenting) (discussing the importance of the traditional open access to trials and its role in a democracy). Surely, the public's interest in the conduct of public officials involved in the criminal justice system does not end once an individual who has been convicted of an offense passes through the prison gates.

51. *Houchins*, 438 U.S. at 27-29.

52. *Id.*

53. 448 U.S. 555 (1980).

54. *Id.* at 580. The Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). *Richmond Newspapers*, 448 U.S. at 580.

55. *Richmond Newspapers*, 448 U.S. at 573. The Court stated: "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id.*

the Court traced back to "the days before the Norman Conquest."⁵⁶ The Court concluded that "[t]he right of access to places traditionally open to the public, as criminal trials have long been, may be such as assured by the amalgam of the First Amendment guarantees of speech and press"⁵⁷

The Court also recognized the structural role of the first amendment guarantees in the proper functioning of the government. Chief Justice Burger noted that the freedoms enumerated in the first amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."⁵⁸ In his concurring opinion, Justice Brennan stated:

[P]ublic access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power, . . . [w]ithout publicity, all other checks are insufficient.⁵⁹

The Supreme Court once again relied on the factors of traditional openness and the structural role of the right of access to decide the issue in *Globe Newspaper Co. v. Superior Court*.⁶⁰ In *Globe*, the Court held unconstitutional, as violative of the first amendment, a Massachusetts statute⁶¹ which barred the press and public during the testimony of a minor in a sexual offense trial.⁶² Justice Brennan, writing for the majority, stated the constitutional standard applied

56. *Id.* at 565; *see also id.* at 564-69 (the Court's discussion of the history of open trials).

57. *Id.* at 577; *see also id.* at 582 (Stevens, J., concurring) ("This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.").

58. *Id.* at 575.

59. *Id.* at 596; *see also id.* at 600 (Stewart, J., concurring) (public access to trials "serves to assure the integrity of what goes on").

60. 457 U.S. 596 (1982).

61. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

62. *Globe Newspapers*, 457 U.S. at 610-11. As to the structural role of the right of access, the Court stated, "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs,' *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.* at 604. *See also* *Houchins v. KQED, Inc.*, 438 U.S. 1, 30-32 (1978) (Stevens, J., dissenting) (stressing that the core objective of the first amendment is preservation of a full and free flow of information to the general public); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597-98 (1974) (Brennan, J., concurring) ("resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances."); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (stressing "societal

in this case: "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is *necessitated* by a compelling governmental interest, and is narrowly tailored to serve that interest."⁶³

The right of access to information has arisen in a variety of contexts, from the right to travel in foreign nations⁶⁴ to the right to hear the testimony in a sexual offense trial.⁶⁵ Any general standard adopted by the Supreme Court must be sufficiently flexible to deal with such a wide variety of situations with differing degrees of restraint and governmental interests. One commentator, William Van Alstyne,⁶⁶ has suggested an alternative phrasing of the constitutional standard in right-of-access cases.⁶⁷ The question in each case should be "whether the 'interference with access to important information' represented by the decision to exclude is 'arbitrary' in the ordinary first amendment sense of being inadequately justified by sufficiently compelling, countervailing reasons, in light of the scope of the access restriction."⁶⁸

Both the Van Alstyne standard and the one adopted by the *Globe* Court would require the government to show that its action was necessary to achieve a compelling governmental interest in order to justify a complete denial of access. Under the *Globe* Court's approach any interference less than a complete denial of access would be subject to review under a less strict standard.⁶⁹ The Van Alstyne standard, however, implies that a varying judicial standard

function of the First Amendment in preserving free public discussion of governmental affairs").

63. *Globe Newspapers*, 457 U.S. at 606-07 (emphasis added). The Court in *Globe* found the state's interest in safeguarding the physical and psychological well-being of a minor is a compelling one, but concluded that the complete exclusion of the public and the press was overbroad to achieve that goal. This was because the Massachusetts statute required "closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence." *Id.* at 608. The Court reaffirmed *Richmond* and *Globe* in *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984).

64. See *supra* notes 33-36 and accompanying text.

65. See *supra* notes 60-63 and accompanying text.

66. William Van Alstyne is the Perkins Professor of Law at Duke University.

67. W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 55 (1984). For an additional constitutional standard, see *supra* note 63 and accompanying text.

68. W. VAN ALSTYNE, *supra* note 67, at 55.

69. The *Globe* Court ruled that a total barring of reporters was a first amendment violation but stated that limitations which resemble "'time, place, and manner' restrictions . . . would not be subjected to such strict scrutiny." *Globe Newspapers*, 457 U.S. at 607 n.17 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976)).

should be applied depending on the level of governmental interference with access to important information.

The attractiveness of the Van Alstyne standard is that it is flexible enough to permit the Court to weigh the public's first amendment interests against the government's interests in light of the practical exigencies of different situations. The proper weight to be given to each interest will vary considerably, depending on the nature of the information and the way the information would be obtained. The more flexible standard would be especially well-suited to the analysis of the complex problems that press access to overt military operations poses.

II. THE CONSTITUTIONAL RIGHT OF ACCESS TO OVERT MILITARY OPERATIONS

A. *The Unbroken History of Press Access to Overt Military Operations*

In American history, the presence of war correspondents in the battlefield is as old as the nation itself.⁷⁰ Isaiah Thomas reported the battle of Lexington in the May 3, 1775 issue of the *Massachusetts Spy*, after having fought with the militia against the British.⁷¹ The Mexican-American War of 1846-47 was reported by newsmen who rode on horseback into battle with General Zachary Taylor.⁷² American war correspondents also reported from the battlefield in the American Civil War,⁷³ the Spanish-American War,⁷⁴ and

70. M.L. STEIN, *UNDER FIRE: THE STORY OF AMERICAN WAR CORRESPONDENTS* 12-13 (1968). *But see* Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars"*, 73 GEO. L.J. 931 (1985) (admitting that the press has been allowed access to the front lines, but arguing that censorship and press embargoes evidence a broken history of press access to overt military operations).

71. *See supra* note 70. *See generally* B. FAY, *NOTES ON THE AMERICAN PRESS AT THE END OF THE EIGHTEENTH CENTURY* (1927) (discussing the American press during the American Revolutionary War and the late 1700's).

72. M.L. STEIN, *supra* note 70, at 13-14; *see also* F. BULLARD, *FAMOUS WAR CORRESPONDENTS* 6, 351-74 (1914); R. DESMOND, *THE PRESS AND WORLD AFFAIRS* 17-21 (1937) (discussing war correspondence during the Mexican-American War).

73. F. BULLARD, *supra* note 72, at 375-408; R. DESMOND, *supra* note 72, at 22; J. HOHENBERG, *FOREIGN CORRESPONDENCE: THE GREAT REPORTERS AND THEIR TIMES* 62-72 (1964); P. KNIGHTLEY, *THE FIRST CASUALTY* 20-39 (1975); M.L. STEIN, *supra* note 70, at 14-32; Sears, *The First News Blackout*, *AMERICAN HERITAGE*, June-July 1985, at 24; Middleton, *Barring Reporters from the Battlefield*, *N.Y. Times*, Feb. 5, 1984, (Magazine), at 36.

74. F. BULLARD, *supra* note 72, at 409-24; J. HOHENBERG, *supra* note 73, at 130-33; P. KNIGHTLEY, *supra* note 73, at 130-38; M.L. STEIN, *supra* note 70, at 33-48.

World War I.⁷⁵

American correspondents played a large role in keeping the public informed of the events occurring in World War II.⁷⁶ Edward Murrow gave Americans regular reports from England before the United States entered the war.⁷⁷ Five-hundred and fifty-eight American reporters accompanied the allied forces on the D-Day invasion of Normandy.⁷⁸ A *New York Times* reporter flew in the Air Force plane that dropped the atomic bomb on Nagasaki in 1945.⁷⁹

Both the Korean⁸⁰ and the Vietnamese⁸¹ wars were covered extensively by news correspondents. The extent of coverage during the Vietnamese war is demonstrated by the fact that at least fifty-three reporters were killed in Southeast Asia between 1961 and 1975.⁸²

B. *The Right of Access of the Press to Overt Military Operations*

The right of access of the press to information regarding overt military operations is different from other right-of-access cases in at least three ways. First, the institutional framework of the government, which in the foreign policy area places a large amount of power in the hands of the executive branch, gives a unique role to the press in its duty to keep the public informed.⁸³ Second, the way in which the executive branch has historically handled military operations strongly suggests a critical role in our democratic system

75. J. HOHENBERG, *supra* note 73, at 202-43; P. KNIGHTLEY, *supra* note 73, at 79-135; M.L. STEIN, *supra* note 70, at 60-78.

76. P. BRAESTRUP, *supra* note 2, at 27-45; J. HOHENBERG, *supra* note 73, at 332-84; P. KNIGHTLEY, *supra* note 73, at 269-333; M.L. STEIN, *supra* note 70, at 93-148; Chancellor, *From Normandy to Grenada*, AMERICAN HERITAGE, June-July 1985, at 32; Middleton, *supra* note 73, at 36, 61.

77. J. HOHENBERG, *supra* note 73, at 336-37.

78. P. KNIGHTLEY, *supra* note 73, at 322.

79. N.Y. Times, Oct. 28, 1983, at A26, col. 1.

80. P. BRAESTRUP, *supra* note 2, at 47-60; J. HOHENBERG, *supra* note 73, at 390-98; P. KNIGHTLEY, *supra* note 73, at 335-56; M.L. STEIN, *supra* note 70, at 149-59.

81. P. BRAESTRUP, *supra* note 2, at 61-75; D. HALBERSTAM, THE POWERS THAT BE 445-534 (1979); J. HOHENBERG, *supra* note 73, at 446-49; P. KNIGHTLEY, *supra* note 73, at 373-425; D. RATHER, THE CAMERA NEVER BLINKS 195-214 (1977); M.L. STEIN, *supra* note 70, 160-76.

82. Weintraub, *U.S. Press Curbs: The Unanswered Questions*, N.Y. Times, Oct. 29, 1983, at A7, col. 5 (cont. from page 1); *Grenada — and Mount Suribachi*, N.Y. Times, Oct. 28, 1983, at A26, col. 1.; see also Dudman, *U.S. Newsmen Freed in Cambodia Tells of 40-Day Ordeal*, N.Y. Times, June 23, 1970, at A2, col. 3 (report from Richard Dudman of the St. Louis Post-Dispatch after his release by Vietnamese communists who held him and two other American newsmen prisoner for six weeks).

83. See *infra* notes 90-104 and accompanying text.

for the press as "watchdog" of the government.⁸⁴ Finally, however, it is in the areas of military operations and national security that the government can legitimately claim a compelling interest in limiting the access of the press to information.⁸⁵

The term "national security" is by its very nature amorphous. Few, if any, can argue that self-preservation is anything but the most important governmental interest, yet there can be reasonable disagreement about what must be done or not done to preserve our national existence. Invocation of the term "national security" as a justification for barring press access to overt military operations may reflect important concerns which must be addressed, but may also be an attempt to cover up activities which the government wishes to keep hidden from the public.⁸⁶

As Justice Black noted in his concurring opinion in *New York Times Co. v. United States*,⁸⁷ "[t]he word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."⁸⁸

The primary governmental interest which would allow the government to censor or limit press access to overt military operations is in protecting the secrecy of information, which if released, would jeopardize military success or endanger lives of United States military personnel. Common examples of this type of information are the sailing dates of transports and the location of troops.⁸⁹ Beyond these archetypical cases, however, the vagueness of national secur-

84. See *infra* notes 105-08 and accompanying text.

85. The Supreme Court has recognized national security as a compelling governmental interest. *Haig v. Agee*, 453 U.S. 280, 307 (1980).

86. L. RIESELBACH, *PEOPLE VS. GOVERNMENT: THE RESPONSIVENESS OF AMERICAN INSTITUTIONS* 228 (1975) ("The term national security has often been invoked to justify increases in military appropriations, subordination of individual rights, and disregard of normal constitutional processes.").

87. 403 U.S. 713 (1970).

88. *Id.* at 719; see also *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of consitutional government."). For a general discussion of national security and a free press, see Note, *National Security Interests vs. The First Amendment*: *Haig v. Agee*, 13 U. Tol. L. Rev. 1437 (1982).

89. See *supra* note 22.

ity becomes evident, and the dangers inherent in the abuse of such a strong governmental interest become clear.

The role of the press in informing the American people is especially critical in the context of the President acting within his constitutional powers over foreign affairs and as Commander-in-Chief.⁹⁰ The constitutional checks on presidential power over foreign affairs are weak in practice, because the Congress⁹¹ and the

90. U.S. CONST. art. II, § 2. In addition to the problem of deference, the governmental check on the President's power is also inadequate because the President might not inform the Congress about his actions as Commander-in-Chief. See, e.g., *Text of Goldwater's Letter to Head of C.I.A.*, N.Y. Times, Apr. 11, 1984, at A9, col. 1 (letter from Sen. Barry Goldwater, Chairman of the Senate Select Committee on Intelligence, to William J. Casey, Director of Central Intelligence, angrily chastising Casey for not informing him of the American involvement in the mining of the Nicaraguan harbors); *Text of Moynihan Statement*, N.Y. Times, Apr. 16, 1984, at A8, col. 3 (Sen. Daniel Moynihan, issued the following statement in Washington, D.C., on April 15, 1984: "I have announced today that I will resign as Vice Chairman of the Senate Select Committee on Intelligence. This appears to me the most emphatic way I can express my view that the Senate committee was not properly briefed on the mining of Nicaraguan harbors with American mines from an American ship under American command."). Two weeks later Sen. Moynihan withdrew his resignation after he received an apology from Casey. Taubman, *Moynihan To Keep Intelligence Post*, N.Y. Times, Apr. 27, 1984, at A1, col. 5; Finney, *President Assailed by Fulbright Panel*, N.Y. Times, May 5, 1970, at A1, col. 7 ("The Senate Foreign Relations Committee complained today that the Nixon administration, by sending American troops into Cambodia 'without the consent or knowledge of Congress' was usurping the war-making powers of Congress.").

In July 1965, five months after the United States had begun bombing North Vietnam, President Lyndon Johnson was faced with a major decision about America's role in the Vietnam war. Then Secretary of Defense Robert McNamara presented President Johnson with three options: "to cut our losses and withdraw, to continue fighting at the current level, or to substantially expand our military pressure Not surprisingly President Johnson chose option No.3 Going to Congress meant, in effect, going to the nation with an announcement of war, likely to be a long war, which would demand sacrifice on their part. The alternative strategy—which was Johnson's strategy—was to tell Congress and the public no more than absolutely necessary." D. KEARNS, *LYNDON JOHNSON & THE AMERICAN DREAM* 281 (1976).

91. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936) ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."). It is precisely this type of situation (the exclusion of the press from overt military operations by the Executive) in which the Court should intervene, despite its great reluctance, to preserve the press check on executive power because of the inadequacy of any other means of maintaining presidential accountability. See also A. THOMAS, *THE WAR-MAKING POWERS OF THE PRESIDENT* 89-90 (1982) (discussing "congressional acquiescence in presidential commitments" of armed forces); J. JAVITS, WHO

Court⁹² consistently defer to the Chief Executive in recognition of the President's special constitutional role in this area.

Although Congress has the sole power to declare war,⁹³ this has never prevented presidents from using military force against foreign nations.⁹⁴ In 1973, Congress passed the War Powers Resolution⁹⁵ over the veto of President Richard Nixon⁹⁶ in an attempt to check the President's power, but this measure's effectiveness is in doubt.⁹⁷

MAKES WAR—THE PRESIDENT VERSUS CONGRESS 267 (1973) ("Over the past ten years we have been forced to confront the fact that constitutional process has eroded, that congressional responsibility has been abdicated, that unfettered presidential power has been asserted and that it's time to call a halt.").

92. See, e.g., *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

93. U.S. CONST. art. I, § 8.

94. A. THOMAS, *supra* note 91, at 36-37 ("The Constitution of the United States grants to the Congress with precision and with clarity the power to declare war. Thus it seems somewhat anomalous that from the beginning of the nation's history presidential power to use armed force against a foreign nation or nations has been exercised with no such declaration or indeed without congressional authorization of any kind.") (footnotes omitted); see also A. THOMAS, *supra* note 91, at 9-30 (discussing presidential assertions of military force since 1789); E. KEYNES, UNDECLARED WAR 110-60 (1982) (discussing the Vietnam war). See generally Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213 (1983) (urging the restoration of a congressional role in the war-making process).

95. 50 U.S.C. §§ 1541-48 (1973).

96. Veto of the War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973).

97. Leigh, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unwise*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 165, 169 (1984) (from American Bar Association Standing Committee on Law and National Security conference held May 10-11, 1984); see also Moore, *The War Powers Resolution . . . of Doubtful Constitutionality*, 70 A.B.A. J. 10 (Mar. 1984) (recommending implementation of a panel to reach compromise between Congress and executive branch on War Powers Resolution dispute); Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A.L. REV. 683 (1984) (urging repeal of the War Powers Resolution); Note, *The Conduct of United States Foreign Policy After Chadha: Upsetting a Critical Balance of Power*, 11 BROOKLYN J. INT'L L. 79 (1985). Every President since Franklin Roosevelt has expressed the view that the legislative veto is an unconstitutional restriction on the executive's power. A. THOMAS, *supra* note 92, at 135; see also Roberts, *Democrats to Move on War Powers Act*, N.Y. Times, Oct. 27, 1983, at A18, col. 1 ("Mr. Reagan, like other Presidents in the 10-year history of the War Powers Resolution, has insisted that the law cannot tie his hands as Commander in Chief"). On October 26, 1983, the House and Senate approved a joint resolution invoking the 60-day limit on the use of American troops in Grenada which would presumably have required the President to withdraw the troops after that time, unless Congress approved an extension. S.J. Res. 186, 98th Cong., 1st Sess., 129 CONG. REC. 14,694-95 (1983); H.R.J. Res. 402, 98th Cong., 1st Sess., 129 CONG. REC. 5,187 (1983). President Reagan promptly announced his belief that the time limit places an unconstitutional restriction on his power as Commander-in-Chief. Roberts, *House Votes Bill Applying War Law to Grenada Moves*, N.Y. Times, Nov. 2, 1983, at A16, col. 6. Moreover, the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), which in part invalidated the use of the legislative veto, makes the validity of the War Powers Resolution questionable at best.

Although Congress theoretically could withdraw financial support for military actions,⁹⁸ it is unlikely to do so.⁹⁹ In the absence of effective congressional restraint on presidential power, the "watch-dog" role of the press becomes an extremely important means of limiting presidential discretion.¹⁰⁰

The Supreme Court has recognized this institutional deference and the resultant, heightened importance of the press. In *New York Times Co. v. United States*,¹⁰¹ Justice Black wrote of the vital role of the press in checking executive power over foreign affairs:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.¹⁰²

Justice Stewart, in a concurring opinion,¹⁰³ concluded that the press is the sole means for making the government accountable to the people in the area of foreign affairs:

In the absence of the governmental checks and balances present in other areas of our national life, the *only* effective restraint

98. L. RIESELBACH, *supra* note 86, at 246 ("[The power of the purse] restriction has been avoided by simply going through the motions of a yearly budget process which in fact permits long-term outlays for the military. Congress' power over appropriations has also failed to provide much check upon military budgetary autonomy. The military, especially since the Second World War, has developed its own power base within Congress, and, with some notable exceptions, has been able to obtain appropriations from Congress without concomitant limitations and controls.").

99. *See, e.g.,* Finney, *Stennis Says U.S. May Have to Ease Curb in Cambodia*, N.Y. Times, Jan. 28, 1971, at A1, col. 8 (Sen. John Stennis, then chairman of the Senate Armed Services Committee, told reporters that if the Department of Defense and President Nixon were to decide that the military situation in Cambodia required a larger United States commitment, the Senate would relax restrictions attached to a military aid bill which prohibited the introduction of ground combat troops or military advisors into Cambodia). For an analysis of Congress' attempt to end the Vietnam war by withdrawing financial support, see R. NIXON, *THE MEMOIRS OF RICHARD NIXON* 887-89 (1978); A. THOMAS, *supra* note 91, at 119-27.

100. *See supra* notes 15-29 and accompanying text.

101. 403 U.S. 713 (1971) (per curiam) (the United States cannot enjoin publication of certain classified materials—the Pentagon Papers).

102. *Id.* at 717.

103. *Id.* at 728.

upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.¹⁰⁴

Presidents have been and will be willing to commit American troops without congressional approval¹⁰⁵ in military operations for purposes that, once analyzed in the forum of public debate, might well be considered by reasonable people to be improper. The President must be made especially accountable to the American people for his use of power in this area. Without the presence of members of the press as independent observers at overt military operations, the most important check on executive power in this area is missing. Without complete and accurate information from sources other than interested participants, it would be virtually impossible for the American people, or even Congress, to make informed decisions regarding the nation's foreign policy.¹⁰⁶ The absence of the press could enable the President to present the news in a manner which would rally public support based on half-truths and deceptions.¹⁰⁷ Eventually, the "real" facts would surface. By that time, however, the nation might be so deeply involved that withdrawal of troops

104. *Id.* (emphasis added).

105. A. THOMAS, *supra* note 91, at 119 ("Truman continued to base his actions [in the Korean war] upon his total constitutional powers, including his power as President to enforce our international treaty obligations; and his successors in office, Eisenhower, Kennedy, Johnson, and Nixon, all apparently adopted his stance, sending troops into combat generally prior to either a direct or even an indirect congressional approval.") (footnote omitted); *see also supra* note 97 (discussing presidential resistance to congressional veto of executive war-making actions).

106. If the American people, acting under incomplete and possibly inaccurate information, express support for the military involvement, few Congressmen would be able to ignore political realities and vote against the President.

107. One of the so-called "lessons of Vietnam" is that an unpopular war cannot be won and should never be fought. Halloran, *U.S. Will Not Drift Into a Latin War, Weinberger Says*, N.Y. Times, Nov. 29, 1984, at A4, col. 3 (cont. from page 1) (listing six tests developed by Secretary Weinberger to be applied by the President before committing United States forces in combat, one of them being: "Before the U.S. commits combat forces abroad, there must be some reasonable assurance we will have the support of the American people" Defense Department officials told reporters that Weinberger developed the tests after reading the history of the Vietnam war and other conflicts.); Specter, *Learning "Lesson" From Vietnam*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 83 (1984) ("I believe that a bitter lesson which was learned from Vietnam is the impossibility—impracticality—of fighting a war without the support of the American people."); *War's Lessons Struck Home: Nation's Support Crucial on Distant Battlefields*, Wash. Post, Apr. 15, 1985, § 1, at 9, col. 2.

would arguably dishonor those who had already fought and those who had been killed, leading to pressure to prolong the use of military force.¹⁰⁸

III. THE UNPRECEDENTED EXCLUSION OF THE PRESS FROM AN OVERT MILITARY OPERATION

A. *The Invasion of Grenada*

From dawn on October 25, 1983, until the afternoon of October 27, 1983, United States military personnel carried out an invasion of foreign territory without the presence of American news reporters as independent observers.¹⁰⁹ It was the first time in American history that reporters had been barred from observing overt operations of the United States military.¹¹⁰ On the night before the invasion, Larry Speakes, White House deputy press secretary, in response to requests for confirmation of reports of an imminent invasion, told reporters that such reports were "preposterous."¹¹¹

Seven journalists chartered a fishing boat to take them to Grenada.¹¹² Three of them accepted the offer of a helicopter escort to the *U.S.S. Guam*, from which they believed they would be permitted to file their stories.¹¹³ Instead, they were not permitted to contact their editors and were held on board the *Guam* until the

108. Letter from President Nixon to author (May 2, 1972) (on file with the Case Western Reserve Law Review) ("I want you to know that we are doing everything within our power to obtain a lasting peace—a peace that will be worthy of the courage and sacrifice of those who have fought, and a peace that will insure that your generation will never have to fight in any war at all.")

109. Farrell, *U.S. Allows 15 Reporters to Go to Grenada for Day*, N.Y. Times, Oct. 28, 1983, at A13, col. 5.

110. Chancellor, *From Normandy to Grenada*, AMERICAN HERITAGE, June-July 1985, at 32; *Keeping the Press from the Action*, TIME, Nov. 7, 1983, at 65; Landau, *Excluding the Press from the Grenada Invasion: A Violation of the Public's Constitutional Rights*, EDITOR & PUBLISHER, Dec. 10, 1983, at 10; Sears, *The First News Blackout*, AMERICAN HERITAGE, June-July 1985, at 24; Middleton, *Barring Reporters from the Battlefield*, N.Y. Times, Feb. 5, 1984 (Magazine), at 36; *Text of Journalists' Joint Statement*, N.Y. Times, Jan. 11, 1984, at A10, col. 1; Burnham, *Curbs on Grenada News Coverage Criticized in House Hearing*, N.Y. Times, Nov. 3, 1983, at A21, col. 1; Gailey, *U.S. Bars Coverage of Grenada Action; News Groups Protest*, N.Y. Times, Oct. 27, 1983, at A1, col. 6.

111. Friendly, *Weinberger Tied to Curb on Press*, N.Y. Times, Nov. 13, 1983, at A19, col. 1. Apparently, Speakes had not been informed in advance of the invasion, and later expressed anger that his credibility had been damaged. *Keeping the Press from the Action*, TIME, Nov. 7, 1983, at 65; Roper, *D.C. Press Corps 'Brawl' with White House*, EDITOR & PUBLISHER, Nov. 5, 1983, at 11.

112. Bohning, *Seven Journalists Get to Grenada First*, EDITOR & PUBLISHER, Nov. 5, 1983, at 12.

113. *Id.*

afternoon of October 27, when they were escorted to Grenada.¹¹⁴ Other members of the press attempted to reach Grenada by boat, but turned back when United States forces began firing at them.¹¹⁵ Vice Admiral Joseph Metcalf III, commander of the task force which conducted the invasion, was quoted as saying: "I know how to stop those press boats. We've been shooting at them. We haven't sunk any yet, but how are we to know who's on them?"¹¹⁶

When journalists were finally allowed to travel to Grenada on October 27, many problems hampered their ability to obtain and disseminate the news.¹¹⁷ For the first week, the press was permitted only limited access to the island.¹¹⁸ Reporters were escorted continuously by military personnel and were permitted to remain on the island for only short periods.¹¹⁹ No live television transmissions were permitted, and stories could only be filed several hours later from nearby Barbados.¹²⁰

Press briefings by military officers in Barbados consisted primarily of shortened versions of reports already released to reporters in Washington, D.C.¹²¹ Some of the information provided by the military was misleading or false. Admiral Metcalf first told reporters that Bernard Coard, the Deputy Prime Minister of Grenada believed to have been involved in the overthrow of Maurice Bishop, had been detained by Grenadians.¹²² When a marine officer told the press that United States marines had in fact captured and detained Coard, Admiral Metcalf then said to reporters asking for a clarification: "O.K. Let's be technical."¹²³ Several more serious instances of incomplete information and false statements further angered the press.¹²⁴

The United States government initially inflated the number of

114. *Id.*; *Keeping the Press from the Action*, TIME, Nov. 7, 1983, at 65.

115. *Admiral Says It Was His Decision to Tether the Press*, N.Y. Times, Oct. 31, 1983, at A12, col. 3.

116. *Id.*

117. Feron, *Covering Grenada: Host of Problems*, N.Y. Times, Nov. 5, 1983, at A5, col. 1.

118. Hunter, *U.S. Eases Restrictions on Coverage*, N.Y. Times, Oct. 31, 1983, at A12, col. 1.

119. *Id.*

120. *Id.*; *An Off-the-Record War*, NEWSWEEK, Nov. 7, 1983, at 83.

121. Feron, *Covering Grenada: Host of Problems*, N.Y. Times, Nov. 5, 1983, at A5, col. 1.

122. *Admiral Says It Was His Decision to Tether the Press*, N.Y. Times, Oct. 31, 1983, at A12, col. 3.

123. *Id.*

124. *An Autopsy of an Invasion*, MACLEAN'S, Nov. 14, 1983, at 28; Taylor, *In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light*, N.Y. Times, Nov. 6, 1983, at A20, col. 1; *Military v. Press: Troubled History*, N.Y. Times, Oct. 29, 1983, at A7, col. 1.

Cuban military personnel in Grenada and concealed several mishaps which caused the deaths of Grenadians and United States military personnel.¹²⁵ The inadvertent bombing of a civilian mental hospital, which killed at least seventeen persons, was not reported for six days.¹²⁶ President Reagan declared the invasion a "rescue mission,"¹²⁷ but the airport on Grenada had been open on the day before the invasion, and some Americans had left and others could have, if they had chosen to.¹²⁸ Charles R. Modica, chancellor of the medical school on Grenada, where most of the Americans were located, stated that the invasion was "very unnecessary" to save American lives.¹²⁹

Press reaction to the exclusion of reporters from the initial days of the invasion and the subsequent limits on coverage throughout the first week was rapid and intensely critical.¹³⁰ Anthony Lewis,¹³¹ in a column in the *New York Times*, wrote: "The American people needed light on [important] questions from the start to enable them to perform their duty of critical judgment on official policy. But Mr. Reagan did not want the inconvenience of democratic judgment. He wanted unrestrained power. Hence his great effort to keep the public in powerless ignorance."¹³²

John Chancellor of NBC News said: "The Reagan Administration has produced a bureaucrat's dream Do anything, no one

125. Taylor, *In Wake of Invasion, Much Official Misinformation by U.S. Comes to Light*, N.Y. Times, Nov. 6, 1983, at A20, col. 1.

126. *Id.*

127. See *supra* note 3 and accompanying text.

128. Clines, *A Reagan Press Official Resigns Over Grenada*, N.Y. Times, Nov. 1, 1983, at A17, col. 1; Smith, *Ex-U.S. Official Cites Ease in Leaving Grenada Day Before Invasion*, N.Y. Times, Oct. 29, 1983, at A7, col. 3 ("The former director of President Reagan's National Commission on Social Security said today [Oct. 28] that he flew out of Grenada on a chartered plane last Monday [Oct. 24], a day on which the White House contended that it could not evacuate Americans because the Grenadian international airport was closed.").

129. N.Y. Times, Oct. 26, 1983, at A20, col. 5.

130. Radolf, *News Organizations Protest Grenada Restrictions*, EDITOR & PUBLISHER, Nov. 5, 1983, at 14; Friendly, *Press Voices Criticism of 'Off-the-Record War'*, N.Y. Times, Nov. 4, 1983, at A16, col. 1; Gailey, *U.S. Bars Coverage of Grenada Action; News Groups Protest*, N.Y. Times, Oct. 27, 1983, at A1, col. 6.

Publisher Larry Flynt filed a lawsuit against Secretary of Defense Caspar W. Weinberger claiming the press exclusion was unconstitutional and seeking a declaratory judgment and an injunction ordering that the press be permitted access to Grenada. *Flynt v. Weinberger*, 762 F.2d 134 (D.C. Cir. 1985) (per curiam). The court of appeals held that the action was moot because the administration began to permit some limited access two days after the complaint was filed.

131. Anthony Lewis is an editorial columnist for the *New York Times*.

132. Lewis, *What Was He Hiding?*, N.Y. Times, Oct. 31, 1983, at A19, col. 5.

is watching.”¹³³ Walter Cronkite, former CBS News anchorman, said: “This nation is founded on the belief that people have the right to know and that we participate in our Government’s actions These are our marines, our Rangers down there. This is our foreign policy and we have a right to know precisely what is happening, and there can be no excuse in denying the people that right.”¹³⁴

Columnists and editorial writers protested the treatment of the press and called for the administration to abandon its new policy of press exclusion.¹³⁵ The high level of press criticism of the news blackout prompted the House Committee on the Judiciary’s Subcommittee on Courts, Civil Liberties, and the Administration of Justice to hold hearings on the press exclusion.¹³⁶ The United States Senate adopted an amendment to a debt limit bill declaring that “restrictions imposed on the press in Grenada shall cease.”¹³⁷ The administration eventually lessened the restrictions and allowed reporters limited access to the island.¹³⁸ However, by that time, the military operations had been completed, and the United States had control of the island.

B. *Who Should Determine the Limits of Press Access to Overt Military Operations?*

Determination of the limits of press access to overt military operations requires careful consideration of the first amendment interests involved. Therefore, the issue of who should make this decision is critical.

It is difficult to determine conclusively who made the decision to exclude the news media from the invasion of Grenada, but several persons have been credited with having made it. Deputy Secretary of State Kenneth W. Dam told members of the Senate Foreign Relations Committee that the press had been excluded based on advice from the Joint Chiefs of Staff that the security of the reporters could

133. Farrell, *U.S. Allows 15 Reporters to Go to Grenada for Day*, N.Y. Times, Oct. 28, 1983, at A13, col. 5.

134. *Id.*

135. Wall, ‘1984’ Looms Ahead, CHRISTIAN CENTURY, Nov. 16, 1985, at 1035.

136. 129 CONG. REC. D1452 (daily ed. Nov. 2, 1983); Burnham, *Curbs on Grenada News Coverage Criticized in House Hearing*, N.Y. Times, Nov. 3, 1983, at A21, col. 1.

137. 129 CONG. REC. S14991 (daily ed. Oct. 31, 1983); Hunter, *U.S. Eases Restrictions on Coverage*, N.Y. Times, Oct. 31, 1983, at A12, col. 1.

138. See *supra* notes 117-20 and accompanying text.

not be guaranteed.¹³⁹ In Barbados on October 29 (four days after the invasion began), Admiral Metcalf told reporters that it was his decision to keep the press out of Grenada.¹⁴⁰ Admiral Metcalf later told reporters that part of the reason that journalists were excluded was "many of his fellow officers harbored a strong dislike of the media."¹⁴¹

At a news conference on October 26, Secretary of Defense Caspar W. Weinberger said that the decision to exclude the press was made by military commanders in the field and that he would not overrule their decision.¹⁴² On November 1, 1983, the *New York Times* reported that on the night before the invasion, officials from the Pentagon and the State Department met to discuss the administration's policy with respect to news coverage of the invasion. It was reported that the officials decided that the military should enforce a news blackout.¹⁴³

However, on November 13, the *New York Times* reported that Pentagon spokesman Michael I. Burch told reporters that Secretary Weinberger had decided to exclude the press.¹⁴⁴ In spite of the con-

139. 129 CONG. REC. D1400 (daily ed. Oct. 27, 1983); Farrell, *U.S. Allows 15 Reporters To Go to Grenada for Day*, N.Y. Times, Oct. 28, 1983, at A13, col. 5.

140. *Media Curbed Out of Dislike, Admiral Says*, Wash. Post, Dec. 16, 1983, § 1, at 10, col. 1.

Admiral Metcalf received a letter of caution from the Pentagon for trying to bring 24 captured AK-47 rifles back from Grenada, in violation of federal law, to pass out as souvenirs. *Pentagon Plans New Inquiry On Admiral's Grenada Arms*, N.Y. Times, Mar. 1, 1985, at A3, col. 6; Keller, *For Admiral, Warning: for G.I.s, Jail*, N.Y. Times, Feb. 16, 1985, at A5, col. 3. Admiral Metcalf's apparent ignorance of federal laws regarding importation of weapons suggests that he should not be trusted to make the decision about press access to military operations.

141. *Media Curbed Out of Dislike, Admiral Says*, Wash. Post, Dec. 16, 1983, § 1, at 10, col. 1. *But see* Watkins, *The Media and the Military—To See the World As It Is*, VITAL SPEECHES OF THE DAY, Vol. L, at 199 (Jan. 15, 1984); A. HAIG, CAVEAT: REALISM, REAGAN, AND FOREIGN POLICY 357 (1984) ("Our foreign policy must reflect the values of the nation. Military power and economic strength are important, but they are not everything. Americans will support a policy that demands a world of peaceful change, the defense of human values, the liberation of human genius, and the advancement of social justice. The world will believe in an America that defends these values and asks other nations to share the burden and the promise of defending them."); (Watkins, United States Chief of Naval Operations, in speaking for the military, stated: "The fact is *we would die*, and some of our people *have died*, to protect first amendment rights which some say we ignore. Our belief in freedom is what separates us from some of our potential enemies. *We all know that.*") (emphasis in original).

142. Gailey, *U.S. Bars Coverage of Grenada Action; News Groups Protest*, N.Y. Times, Oct. 27, 1983, at A12, col. 6.

143. Clines, *A Reagan Press Official Resigns Over Grenada*, N.Y. Times, Nov. 1, 1983, at A17, col. 1.

144. Friendly, *Weinberger Tied to Curb on Press*, N.Y. Times, Nov. 13, 1983, at A19, col. 1.

tradictory statements by government officials about the source of the decision to bar the press, the exclusion during the invasion of Grenada establishes a clear pattern of news management by the Reagan administration.

In a debate held on December 15, 1983, Richard Willard, Acting Assistant Attorney General, said:

The courts are now unwilling to impose, except in very drastic situations, any kind of prior restraint on the press or to permit the government to do so. The only way the government can keep the press from jeopardizing national security is to keep them from learning national security information in the first place. That is firmly embedded now in First Amendment jurisprudence as a result of the absolutism of such people as Mr. [Floyd] Abrams.^[145] And we have to live with that. But the way we live with it is to keep the press from finding it out in the first place

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Willard's statement of the Reagan administration's policy of secrecy suggests that the decision to exclude the press from the invasion of Grenada was a calculated policy decision at high levels rather than a decision made by a military commander in the field.

The press has written extensively about the Reagan administration's manipulation of the flow of governmental information. In a 1982 *Columbia Journalism Review* article written by a research associate for the Center for National Security, the Central Intelligence Agency (CIA) and the Reagan administration were accused of placing "unprecedented restrictions on press access to intelligence information [while being] at least as willing as past administrations to use leaks and selective declassification to support its foreign policy."¹⁴⁷ The Reagan administration has seemingly placed a high priority on controlling and manipulating the amount and content of information which reaches the American public.¹⁴⁸

145. Abrams is an attorney specializing in the first amendment.

146. *National Security and the First Amendment*, ABA Standing Comm. on Law and Nat'l Security 24 (1984) (transcript of a debate held on Dec. 15, 1983).

147. Peterzell, *The Government Shuts Up—The Reagan Administration Is Stonewalling Reporters on the Intelligence Beat—Except, of Course, When Leaks Serve Its Purposes*, COLUM. JOURNALISM REV., July-Aug. 1982, at 31. The Center for National Security Studies is a Washington-based organization funded by the American Civil Liberties Union and The Fund for Peace.

148. See, e.g., *infra* text accompanying note 150 (accusing Reagan administration of unprecedented exclusion of press to governmental information).

In April 1982, President Reagan issued Executive Order No. 12,356, 47 Fed. Reg. 14,874 (1982), which, among other things, allows the CIA to reclassify any material it deems sensitive, even if the information has already been published and widely circulated. See also Hitt, *Warning: CIA Censors at Work*, COLUM. JOURNALISM REV., July-Aug. 1984, at 44 (discuss-

In the March-April 1985 issue of the *Columbia Journalism Review*, Anthony Marro, managing editor of *Newsday*, wrote an in-depth history of how presidents since Dwight Eisenhower have used deception, half-truths and known falsehoods to manipulate the flow of information about governmental affairs.¹⁴⁹ Marro found that the Reagan administration has done more than any recent administration to "bottle up information, to prevent public access to governmental officials and records, to threaten and intimidate the bureaucracy in order to dry up sources of information, and to prevent the press and the public from learning how their government is functioning."¹⁵⁰ To support his argument, Marro noted that during the invasion of Grenada President Reagan and Pentagon cameramen showed the American public warehouses stacked full of armaments that President Reagan said would have armed thousands of

ing how the CIA's censorship program is selectively applied to serve the government's needs and suggesting that Reagan's order will be similarly applied).

The Reagan administration has also made it more difficult for the press to obtain information under the Freedom of Information Act, 5 U.S.C. § 552 (1982) [hereinafter cited as FOIA]. For example, Executive Order No. 12,356, *supra*, designated more information as classified. In addition, the Reagan administration has used several techniques to obstruct the use of the FOIA. According to an article written by the executive director of Investigative Reporters and Editors, bureaucrats have charged fees without justification, then refused to act on the request until the money is paid for information which might turn out to be of little or no value or never released. Bureaucrats have also failed to respond to requests for information within the time mandated by law, intentionally understaffed FOIA offices citing fiscal restraint, forced expensive, time-consuming court cases, transferred documents to other offices within the same agency or to other agencies without informing the requester, and have interpreted the nine exemptions so broadly that the exemptions leave little or no force to the rule. Weinberg, *Trashing the FOIA—How Bureaucrats Have Been Licensed to Thwart the Intent of Congress—and Drive Reporters Up the Wall*, COLUM. JOURNALISM REV., Jan.-Feb. 1985, at 21.

The Reporters Committee for Freedom of the Press assembled a list of 51 executive acts made by the Reagan administration since March 1981, in an attempt to severely limit access to information. The list cites invasions of editorial privacy, restrictions on access to governmental information, and instances of prior restraint. *Reporters Committee Raps Reagan Administration*, EDITOR & PUBLISHER, Apr. 6, 1985, at 12.

Another list of the Reagan administration's actions to limit free public debate about governmental affairs was published in THE NATION. Sheinfeld, *Four More Years of Secrecy—Washington vs. The Right to Know*, THE NATION, Apr. 13, 1985, at 426. The Article, written by an attorney and associate professor of journalism, accused the Reagan administration of "[u]sing secrecy, censorship and sleek propaganda to protect itself from public scrutiny and criticism . . . to achieve its goals without justifying them in debate." *Id.*

As the NATION Article points out, the frustration of the press with the Reagan administration's restrictions must be turned into positive energy in order to create means of forcing the administration to be more open about information (admittedly a difficult task) or to obtain governmental information in other ways.

149. Marro, *When the Government Tells Lies*, COLUM. JOURNALISM REV., Mar.-Apr. 1985, at 29.

150. *Id.*

terrorists. When reporters from the American news media later went to the warehouses they found some of them half-empty, some of them filled with cases of sardines and many of the weapons antiquated.¹⁵¹

Marro concluded that the press will have to become more aggressive and follow the advice of former Attorney General John Mitchell who said, "Watch what we do instead of what we say."¹⁵² It is not sufficient merely to criticize the Reagan administration for its policy of secrecy and sophisticated news management. Members of the press must make it their responsibility to counteract efforts to stifle public debate about governmental activities, particularly activities like the invasion of Grenada.

C. *The Reasons Advanced by the Reagan Administration for Excluding the Press from the Invasion of Grenada*

The Reagan administration cited three primary reasons for denying the press access to the island of Grenada during the first days of the October, 1983 invasion. Considering the long history of press access to overt military operations, it is unclear how any of the rationales offered by the administration distinguish this invasion from all previous overt military operations.

The initial justification cited by Secretary Weinberger was that he did not want to "second-guess our commanders in the field."¹⁵³ As pointed out by an editorial in the *New York Times*, which quoted Secretary Weinberger as saying he "wouldn't ever dream of overriding a commander's decision,"¹⁵⁴ this justification is inconsistent with the theory of civilian control of the military.¹⁵⁵ The

151. *Id.* at 39.

152. *Id.* at 33, 41. Additionally, Marro urges reporters to personally contact people affected by governmental action to see if what they say has happened to them coincides with what the administration maintains is the result of its action. *Id.* at 39. Other suggestions include checking official documents personally instead of accepting the administration's summary of their contents and checking official records to confirm numbers provided by administration officials. *Id.* at 40.

153. Safire, *Two-Front Peace*, N.Y. Times, Oct. 27, 1983, at A31, col. 5. Additionally, it should be noted that there was sufficient time for the Reagan administration to include the press in its plans for the invasion. Grenadian Prime Minister Maurice Bishop was killed on October 19, 1983. According to Secretary Shultz, the President ordered naval ships into the area on October 20, 1983, and by October 23 had made a tentative decision to respond to the urgent request for help from the O.E.C.S. *Transcript of Shultz's News Conference on Why U.S. Acted*, N.Y. Times, Oct. 26, 1983, at A18, col. 1.

154. *Grenada — and Mount Suribachi*, N.Y. Times, Oct. 28, 1983, at A26, col. 1.

155. W. BINKLEY, *A GRAMMAR OF AMERICAN POLITICS* 662 (1951) ("Towering above all other considerations in charting national defense policies is one cardinal principle: the supreme control must remain in civilian hands."); see also comments of Sen. Kennedy *supra*

military, some of whom admit that antagonism toward the press exists among its members,¹⁵⁶ cannot be permitted to possess complete discretionary power to exclude the press from overt operations. The public would be left ill-informed, misinformed, or even ignorant of governmental and military activities about which it has a right to be fully and accurately informed.

The second reason for denial of access advanced by Secretary Weinberger was that the military could not guarantee reporters "any kind of safety."¹⁵⁷ This statement betrays a lack of understanding of the history of American war correspondence. News reporters have always accepted the danger that comes with being at the scene of breaking news events.¹⁵⁸ War correspondents, no less than soldiers, are willing to jeopardize their own safety to fulfill their responsibilities. As long as American reporters have been covering military operations from the front lines, they have been dying on the front lines as well.¹⁵⁹ When the Secretary of Defense attempted to justify the exclusion of the press from Grenada because the reporters' safety could not be guaranteed, he dishonored the hundreds of dedicated and courageous men and women who were wounded or killed while covering the news from battlefields all over the world.¹⁶⁰

The third rationale cited for excluding the press was military necessity or "national security." The primary concern articulated by General John W. Vessey, Jr., former chairman of the Joint Chiefs of Staff, was the need for surprise.¹⁶¹ This is, of course, a compelling reason for prohibiting the dissemination of information about an imminent attack, but it is not a legitimate justification for barring reporters completely. President Reagan announced the invasion himself only four hours after it began on October 25.¹⁶² Reporters recognize the sensitivity of information which would

note 5 (refusing to cede civilian control over the military); L. RIESELBACH, *supra* note 86, at 235 ("The concept of civilian control of the military envisions that the military should only execute orders to engage in hostilities, that it should neither decide when nor how force will be used nor question an order from the appropriate civilian authority to use force.").

156. *Media Curbed Out of Dislike, Admiral Says*, Wash. Post, Dec. 16, 1983, § 1, at 10, col. 1; see also *Military vs. Press: Troubled History*, N.Y. Times, Oct. 29, 1983, at A7, col. 1 (tracing the Reagan administration's restrictions on news coverage of the invasion of Grenada to the military's resentment about media coverage of the Vietnam War).

157. *Grenada — and Mount Suribachi*, N.Y. Times, Oct. 28, 1983, at A26, col. 1.

158. See *supra* notes 70-82 and accompanying text.

159. *Id.*

160. *Id.*

161. *Grenada — and Mount Suribachi*, N.Y. Times, Oct. 28, 1983, at A26, col. 1.

162. See *supra* note 2 and accompanying text.

jeopardize military operations and have submitted to wartime censorship and news embargoes when necessary for the security of military operations.¹⁶³ The justification of the need for surprise no longer made sense after the invasion had begun and President Reagan announced it to the world.

Additionally, the exclusion of American news reporters could not have ensured total surprise because Radio Free Grenada had broadcast mobilization orders on the two days before the invasion began.¹⁶⁴ The forces which resisted the American invasion had apparently been expecting military intervention. In addition, American ham radio operators living on the island broadcast reports of the invasion soon after it began.¹⁶⁵ The press exclusion did not keep the operation secret from anyone but the American people.

The press exclusion was not only insufficient to meet the objective of secrecy, but it was also an unnecessary measure. A small group of reporters could have been transported to Grenada with little danger of jeopardizing the invasion. Members of the news media have been willing to accept some restrictions on dissemination of sensitive information at the commencement of a military operation in exchange for access to it.¹⁶⁶ The critical first amendment concern is the presence of independent observers rather than the immediate dissemination of sensitive military information at the outset of a military operation.

The constitutional right of access has arisen in several different situations. In each case the Court has looked to the competing interests involved and determined the degree of access which is constitutionally necessary.¹⁶⁷ The right of access of the press to criminal trials is extensive,¹⁶⁸ while the right of access to prisons is limited to a greater degree.¹⁶⁹ Therefore, in order to find the appro-

163. R. DESMOND, *supra* note 72, at 138-54; P. KNIGHTLEY, *supra* note 73, at 119, 307-08, 345-51, 375-83; F. THAYER, *supra* note 32, at 43-46.

164. N.Y. Times, Oct. 26, 1983, at A17, col. 3 (cont. from page 1).

165. *Under Fire, Ham Radio Operations Describe Invasion*, N.Y. Times, Oct. 26, 1983, at A20, col. 2.

166. *Text of Journalists' Joint Statement*, N.Y. Times, Jan. 11, 1984, at A10, col. 1. (American Newspaper Publishers Association, 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, The Associated Press, United Press International) ("Mission security and troop safety interests have been protected—when essential— . . . by voluntary reporting restraints.").

167. See *supra* notes 33-63 and accompanying text.

168. See *supra* notes 53-63 and accompanying text.

169. See *supra* notes 44-52 and accompanying text.

priate level of access of the press to overt military operations, the courts must take each of the competing interests involved, and reach a conclusion which recognizes the value of both sides of the issue. Such a conclusion, while permitting access of the press to military operations, must be consonant with the compelling governmental interest in the safety of Americans troops. One compromise solution which seems to meet this strict criteria is the press pool.

IV. A COMPROMISE SOLUTION TO MEDIA MILITARY RELATIONS

The use of press pools to cover news events where logistical problems prohibit access by large numbers of reporters is not new. Press pools have been used in covering political conventions, presidential debates, and courtroom trials, among other situations. More importantly, the press pool was recommended as a solution to the problem of press access to overt military operations by a panel of military officials and journalists commissioned by the Joint Chiefs of Staff to study this issue.

The panel, the Media-Military Relations Panel (Sidle panel), was chaired by Major General Winant Sidle, United States Army, Retired.¹⁷⁰ Although invited by General Sidle to join the panel, the major "umbrella" media organizations chose not to join as members of a governmental panel, but instead to appear as witnesses and submit written responses to questions prepared by the panel.¹⁷¹

In a letter to General Vessey submitted with the panel's report, General Sidle stated that the panel did not address "the matter of so-called First Amendment rights," but would leave that to the legal profession and the courts. General Sidle did state in the letter, however, that "the U.S. media should cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces."¹⁷²

The panel's final report consists of eight recommendations which include the use of "the largest possible press pool that is practical and minimize the length of time the pool will be necessary before 'full coverage' is feasible."¹⁷³ The primary focus of the report was to encourage the military to plan for media access concur-

170. Chairman of the Joint Chiefs of Staff-Media Relations Panel, Report to General John W. Vessey, Jr., Enclosure 1 [hereinafter cited as Sidle Panel Report].

171. *Id.* at Introduction.

172. Letter from Gen. Sidle to Gen. Vessey (undated) (accompanying submission of Sidle Panel Report, *supra* note 170).

173. Sidle Panel Report, *supra* note 170, at 4.

rently with the planning of military operations.¹⁷⁴ The panel recognized that without better understanding between the military and the media, problems like those which occurred during the Grenada invasion would likely recur.¹⁷⁵

The press responses to the Sidle panel's questions generally agreed that in the rare circumstances when "transportation, security or other factors make full coverage impossible,"¹⁷⁶ pool coverage may be a necessary measure. But they also generally agreed that pool coverage should last only as long as is necessary and should be replaced by full access as soon as possible.¹⁷⁷

Although concurring in the use of press pools when necessary, the Cable News Network (CNN) offered several criticisms of press pools in general. CNN argued that it would prefer not to rely on reports from press pools, because of its probable unfamiliarity with the pool members, reporters over whom it has no control.¹⁷⁸ It also noted that pool coverage eliminates the diversity of news sources, which is a necessary component of a free press.¹⁷⁹ Another problem is that because pool schemes generally envision a rotation system, reporters would not be able to build the experience and knowledge necessary to adequately cover the operations or to establish valuable relationships with sources.¹⁸⁰ Despite these problems, however, the use of a press pool, when necessary, is apparently the best solution to a difficult problem.

Once it is agreed that full press access is not possible and that a press pool will be used, it must next be decided what the structure of the pool arrangement will be, and who should determine that structure. Because of the large number of newspapers, magazines, radio stations, television networks and wire services which would desire to be represented in any pool arrangement, some type of rotation system seems to be the only workable solution. The size of the pool would be dictated by the circumstances in each case. Assuming a pool of approximately ten members, one possible composition

174. *Id.*

175. *Id.* at 5-6 (see recommendation eight).

176. Response of the National Association of Broadcasters to inquiries from the Joint Chiefs of Staff (Jan. 27, 1984) at 2.

177. *See, e.g.*, response of the American Newspaper Publishers Association to inquiries from the Joint Chiefs of Staff (Jan. 11, 1984) at 3 ("Media access provided by the government in any instance should be the maximum amount possible at the earliest possible time consistent with mission security and troop safety.").

178. Response of the Cable News Network to inquiries from the Joint Chiefs of Staff (Jan. 27, 1984) at 2-3.

179. *Id.* at 3.

180. *Id.*

of the pool would include a representative of at least two major national newspapers, one news magazine, two still photographers, three television cameramen and sound crew, and two wire service reporters.

The issue of whether pool members should be accredited by the Pentagon is still being debated.¹⁸¹ The military wants trustworthy reporters belonging to the pool,¹⁸² but the news media fear that accreditation would turn into licensing.¹⁸³ The news media want to prevent the military from excluding individual reporters who the military believes are too critical.¹⁸⁴

As the pool arrangement currently operates, certain news organizations are notified by the Pentagon that they might be asked to supply a reporter to the pool.¹⁸⁵ When the pool is to be activated, the Pentagon selects the news organizations which are to participate.¹⁸⁶ Each news organization is to identify for the Pentagon two reporters.¹⁸⁷ The Pentagon then chooses one of these nominees.¹⁸⁸

181. *See, e.g.*, response of NEWSWEEK to inquiries from the Joint Chiefs of Staff (Jan. 24, 1984) ("We would have no objection to an accreditation system, similar to that now in force for press access to the White House, being adopted for short-notice coverage of military operations."); response of the National Association of Broadcasters to inquiries from the Joint Chiefs of Staff (Jan. 27, 1984) ("A news organization's and its reporters' regular press credentials should suffice for coverage of military operations.").

182. *See* Sidle Panel Report, *supra* note 170, at app. (news briefing by Michael Burch, Assistant Secretary of Defense, held on August 23, 1984) ("I must emphasize the need for security of the mission and the safety of our forces. We must be able to work with people and news organizations who respect those two very important criteria.").

183. *See, e.g.*, response of the Associated Press to inquiries from the Joint Chiefs of Staff (Jan. 23, 1984) ("The danger here is that [a] fine line [exists] between accreditation and license."); response of the American Newspaper Publishers Association to inquiries from the Joint Chiefs of Staff (Jan. 11, 1984) ("Accreditation should not be construed as a licensing process whereby only those accredited/licensed would ever be allowed to cover U.S. military operations.").

184. *See, e.g.*, response of NEWSWEEK to inquiries from the Joint Chiefs of Staff (Jan. 24, 1984) ("We would have very strong objections if it appeared that the accreditation process were being used to try to affect the coverage—in other words, if certain correspondents were blackballed because of what they had written in the past.").

185. *See, e.g.*, Memorandum from Robert L. Burke, Vice President, Industry and Public Affairs, American Newspaper Publishers Association, to Steve Green, Managing Editor, Copley Press (June 6, 1985) (describing a meeting with Michael Burch who discussed pool procedures with those newspapers most likely to be involved in the next press pool activation) and attached memorandum detailing Department of Defense requirements for pool arrangement.

186. *Id.*; *see also* Mohr, *The Continuing Battle Over Covering Wars*, N.Y. Times, Sept. 14, 1984, at A24, col. 3 (quoting Michael Burch, Assistant Secretary of Defense for Public Affairs, as saying that the people to serve in the pool, as well as the particular news agencies selected, would be "more or less" selected by the Pentagon).

187. *See* Memorandum from Robert L. Burke, *supra* note 185.

188. *Id.*

The Pentagon has carried out two tests of the pool arrangement as recommended by the Sidle panel. The first occurred on April 21, 1985 in Honduras.¹⁸⁹ The pool members, like all reporters who are granted access to military operations, signed "Nondisclosure-Censorship" agreements.¹⁹⁰ The agreements state, among other things, that the reporter agrees not to divulge classified military information until he or she has been "properly authorized by the United States Government to release it."¹⁹¹ The reporter also agrees to submit all dispatches which might contain classified military information to the Department of Defense for review.¹⁹² The agreement also states that the reporter acknowledges that the government has "full authority to delete sensitive information"¹⁹³ and warns that breach of the agreement may result in criminal sanctions.¹⁹⁴

In addition to the restrictions listed in the Nondisclosure-Censorship agreement, the pool reporters were given a list of "ground rules" for coverage of the military operation (the reporters were not told that they were only part of a test).¹⁹⁵ The pool members were instructed not to "mention to anyone" the fact that the pool had been activated¹⁹⁶ and that no stories were to be filed until the material of all the pool members was released to other news organizations.¹⁹⁷ The pool reporters were also required to remain with their military escorts at all times and to follow their instructions.¹⁹⁸

The first test of the press pool arrangement demonstrated that, in spite of months of work done by the Sidle panel, the military continues to lack an adequate understanding of how the news media operate.¹⁹⁹ The secrecy of the pool activation appears to have been non-existent.²⁰⁰ In fact, when the press pool landed in Honduras,

189. A second test occurred on September 19, 1985. *Pentagon Tests New System*, N.Y. Times, Sept. 20, 1985, at D16, col. 5 ("The Pentagon said today [Sept. 19] that it secretly flew 12 reporters to a routine training exercise in Kentucky early this morning in a successful test of a system for allowing news coverage of the early stages of American military operations.").

190. Draft of the Reporter Nondisclosure/Censorship Agreement; For Use by The Military Prior to Allowing The Press Access to Military Operations.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Pentagon Tests Media Coverage of Missions*, BROADCASTING, Apr. 29, 1985, at 83.

196. Document entitled "Ground Rules" provided to pool members by the office of the Assistant Secretary of Defense on Apr. 21, 1985.

197. *Id.*

198. *Id.*

199. *Pentagon Tests Media Coverage of Missions*, BROADCASTING, Apr. 29, 1985, at 83, 84.

200. Willenson, *Frolics in Honduras*, WASH. JOURNALISM REV., July 1985, at 17, 19.

approximately two days after the pool had been activated, other American reporters and photographers were waiting for them on the beach at Puerto Castilla.²⁰¹

Benjamin Shore, a member of the Honduran test pool, noted in a letter to the *Washington Journalism Review* that the Department of Defense had alerted the news media that a military operation was imminent eleven days before the pool was activated.²⁰² In addition, the Pentagon itself broke the secrecy of the pool's activation before the pool members had gathered.²⁰³ The Pentagon publicly acknowledged that a press pool had been activated in a phone call from Jack Smith, CBS News Washington Bureau Chief.²⁰⁴ Smith called because he was serving as chief of the network television pool at the time but had not been notified of the activation.²⁰⁵ Also, the Pentagon had notified CNN directly that it was to be the pool's television operator instead of notifying the chief of the television pool as the established procedure provided.²⁰⁶

Other problems with the Honduran test showed that the military had not engaged in the pre-activation planning²⁰⁷ that the Sidle panel had concluded was crucial to successful military-media relations. Some of the eight news organizations which the Pentagon selected to provide reporters and photographers were not notified that they were candidates to participate in the pool until they were invited to participate at 6 p.m. on April 20.²⁰⁸ Those news organizations did not have time to make a careful selection of representatives.²⁰⁹ If they had had more time, they would have been better able to select persons with knowledge of military operations and with the physical ability to travel with military personnel in battle conditions.

The problems of press access to reliable communication lines, which occurred during the Grenada invasion, were again exper-

201. *Id.*

202. Letter from Benjamin Shore, of the Copley News Service, to the *WASH. JOURNALISM REV.* (June 26, 1985).

203. *Pentagon Tests Media Coverage of Missions*, *BROADCASTING*, Apr. 29, 1985, at 83, 84.

204. *Id.* at 84.

205. *Id.*

206. *Id.*

207. See letter from the eight news organizations (Associated Press, Cable News Network, Copley News Service, Mutual Broadcasting, N.Y. Times, *NEWSWEEK*, United Press International, and the Wall Street Journal), that participated in the Honduran test, to Secretary Weinberger (Apr. 29, 1985).

208. *Id.*

209. *Id.*

inced in the Honduran test.²¹⁰ The pool members were first told by military officers that the Navy was unable to get an open line of communication and that therefore the pool stories could not be filed.²¹¹ The pool reporters later learned from a Navy communications officer that there were telephones on board Navy ships which could reach the United States, but that the pool was not permitted to use them.²¹² One of the pool members learned from a different officer that troops were permitted to make calls to the United States every night.²¹³ Then, on the day the pool returned from the operation, the pool members learned from their editors that the pool reports had been received in the form of Mailgrams by the news media in the United States the morning after they were submitted to military officers.²¹⁴

Clearly, the military and the news media need to begin the process of establishing an ongoing, meaningful dialogue. Any such process must begin with the military and the news media gaining an understanding of how the other operates. If this can be achieved, and if both are willing to give enough to establish an acceptable compromise, a workable solution to the current problem of press coverage of military operations can be reached. Additional tests of the pool arrangement will provide valuable knowledge of the problems that are likely to occur during real operations, as well as provide the military and the news media with the experience of engaging in cooperative activities. None of this is likely to occur, however, until the military and the news media change their common attitudes of "us versus them."²¹⁵

The Department of Defense should engage in regularly scheduled face-to-face discussions with members of the news media. Such meetings could be held between the Secretary of Defense Media Advisory Committee, which was established by Secretary Weinberger in response to the Sidle panel's recommendations,²¹⁶ and the chiefs of the current pool candidates. Large, comprehensive meetings with representatives from all forms of the media should be held, instead of the media-specific meetings the Pentagon has held

210. *Id.* See *supra* notes 113-14 and accompanying text.

211. Willenson, *Frolics in Honduras*, WASH. JOURNALISM REV., July 1985, at 17, 19.

212. *Id.*

213. *Id.*

214. *Id.*

215. For a discussion of the difficulties which remain as obstacles to productive future cooperation, see Denniston, *Planning For Future Grenadas*, THE QUILL, Jan. 1984, at 10.

216. See statement by the Secretary of Defense in August 23, 1984 press release accompanying the release of the Sidle Panel Report to the public.

in the past.²¹⁷ Topics of discussion should initially include finalizing the procedure to be used to inform the selected news organization of the pool activation. During the Honduran test, in addition to its failure to notify all the pool chiefs, the military officers who contacted the news organizations communicated sensitive information to employees not designated to receive information about the pool activation.²¹⁸

The military must also educate the news organizations in the basic scheme of military operations. Without a clear understanding of routine military activities, the news media cannot report about them accurately and completely. To perform their responsibilities regarding military secrecy, reporters need to know what types of information are sensitive. In addition, the news media must explain to the military the basic functions and operations of news organizations.

Another topic which should be discussed is the manner in which the pool members will communicate the information contained in their reports to the rest of the news organizations. Once each type of news organization within the pool compiles its pool report, satellite links must be provided to all news organizations in the United States who desire access. In the past, a lack of planning, technical difficulties and use of disinformation by military officials has resulted in confusion and created ill-will and angry words between the military and the news media.²¹⁹

V. CONCLUSION

The objective of granting press freedom in the United States Constitution was, in part, to ensure that the American public would be fully and accurately informed about the affairs of government. Prior restraint was one of the early tools used by governments to suppress dissemination of governmental information. To prevent the government from thwarting the democratic ideal of a free press, the prior restraint doctrine was adopted by the Supreme Court.²²⁰ Today the government has become more sophisticated in the ways it

217. Letter from the eight news organizations that participated in the Honduran test to Secretary Weinberger (Apr. 29, 1985).

218. *Id.*

219. *See, e.g., Willenson, Frolics in Honduras*, WASH. JOURNALISM REV., July 1985, at 19 ("Back out at the ship we have our third argument in three days with [military officials] over when, if ever, the Navy is going to file our copy.").

220. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (vacating a stay which enjoined the publication of the Pentagon Papers).

seeks to suppress dissemination of governmental information. Being all too aware of the prior restraint doctrine, the government has decided to get around it by preventing the press from obtaining information in the first instance.

The action of a government in involving the nation in war has a very direct effect upon individual life and liberty. If the government is to require men to go to foreign lands to fight and die, the public deserves to be fully and accurately informed about the circumstances and nature of the involvement. To this end, the press must have access to overt military operations.

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