The United States Military vs. the Media: Constitutional Friction

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I. INTRODUCTION

The long history of the relationship between the military and the media has been somewhat enigmatic. The fact that each institution has a strong constitutional mandate for its operations necessarily implicates the judiciary as a player in the inevitable conflict between the armed forces and the press. Ironically, these three entities—the military, media, and judiciary—frequently meet on the same First Amendment battlefield. The purpose of this Comment is to discuss this relationship historically and currently, assert the possible roles of each institution generally and with respect to one another, and attempt to predict the ebb and flow of the future relationship. Before discussing the specifics of this triangular relationship and the impact that the courts should or should not have on the relationship, one must first understand the current general status of both the military and the media.

II. CURRENT STATUS OF MILITARY AND THE MEDIA

A. The Military

When Ronald Reagan assumed office, he made the refurbishment of the military one of his top priorities. Whether one supports increases in defense spending or not, most would agree that the financial and ideological dedication to improving the military resulted in a better fighting force. The evidence for this conclusion is reflected in the militarily successful operations in Panama, Grenada, the Middle East, and in the Persian Gulf in the war against Iraq.

Following Vietnam, the military had endured an incredible rate of attrition in manpower, equipment, and expertise. This attrition was similar to and different than similar drawdowns in force following each preceding war in which the United States participated. Resources declined, as America turned inward following a major conflict, much as we had done following most of the major wars in our history. Unlike the previous occasions, however, many lost their respect for the military as
an institution—an attitude that resulted in an ideological abandonment of the armed forces and the troops. Many Vietnam veterans were castigated for their service in the military. This prevalent attitude among the citizens and even the government further debilitated the strength of the military. The overall weakness of the force became all too evident in the wake of such disasters as the hostage rescue attempt in Iran. That debacle demonstrated that the military was unprepared to handle important and relevant operations. Red McDaniel, retired Navy captain and president of the American Defense Institute, noted that the "failed Iranian hostage rescue was the culmination of poor training, poor equipment and poor morale after Vietnam." As a result, when the nation called upon the military to perform, it did not have the leadership, manpower or technology to effectively project force overseas.

The election of President Reagan in 1980 coincided with the rise to prominence and power of some dedicated military leaders such as Generals Powell, Schwarzkopf, Waller, et al., who had persevered through hard times, having entered the military as young platoon leaders and company commanders during Vietnam. These men understood the role and the nature of the military and knew how to best train and utilize the armed forces. They had learned valuable lessons from their Vietnam experience and put those lessons into practice. They upgraded and streamlined the force both from a technological and human standpoint. This improvement most likely also contributed meaningfully to the United States victory over the Russians in the Cold War. In addition, actual usage of the military resulted in highly effective and efficient operations. The new leadership was superb, and technology resulting in smart bombs, patriot missiles and M1A1 Abrams Tanks demonstrated that President Reagan's investment in the military was money well spent—at least from the military's perspective.

The armed forces are currently experiencing dangerous levels of cutbacks in money and manpower, as well as an increasing amount of controversial missions that have nothing to do with what has historically been the sole task of military training—to fight and win wars. Peacekeeping and relief missions do not reflect the type of individual and unit combat skills and roles that are the ordinary focus of military training. Interestingly, the co-winner of the 1991 National Defense University's Chairman of the Joint Chiefs of Staff Strategy Essay Competition was Air Force Lt. Colonel Charles Dunlap, who wrote a science fiction story about the U.S. military's future. Heritage Features, The Next Military Mission: Social Work? North Canton Sun, Oct. 13, 1993 at 2. In his essay, Lt. Col. Dunlap creates a frightening scenario of a future battle with Iran:

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1. McDaniel, Don't Slash Defense Budget, USA TODAY, Feb. 9, 1993, at 10A.
expand the role of the military to include peacekeeping and relief missions, the military has been subjected to further cuts (or decreasing increases) in its budget and reductions in personnel.3

Recent news regarding the dangerously low levels of readiness in certain army divisions legitimizes the concerns raised by military leaders, as Bill Clinton and the Congress have made further cuts in the defense budget. Red McDaniel notes, "Moving hastily and recklessly

When Iranian armies started pouring into the lower Gulf states in 2010, the U.S. armed forces were ready to do anything but fight. People in the military no longer considered themselves warriors. Instead they perceived themselves as policemen, relief workers, educators, builders, health care providers, politicians—everything but war fighters. When these philanthropists met the Iranian 10th Armed Corps near Daharan during the Second Gulf War, they were brutally slaughtered by a military which had not forgotten what militaries were supposed to do or what war is really about.

Id. It is commonly understood that:

The sole purpose of military power is to deter aggression and ... fight to the death to defend U.S. lives and security interests. As the Gulf War clearly showed, the demise of the Soviet Union does not mean America no longer needs soldiers whose mission is to defeat an enemy as quickly and decisively as possible.

Id.

3. For example, as of January 31, 1995, the armed forces had approximately 100,000 fewer troops on active duty than the previous year. ARMY TIMES, Mar. 27, 1995 at 24. The Clinton Administration's goal is to have 700,000 fewer troops than 1988 by 1999. Id. The ultimate result of cutbacks is that the army, for instance, will be reduced to 10 divisions and less than 500,000 troops. ASSOCIATION OF THE UNITED STATES ARMY NEWS SPECIAL REPORT, The Future of the Army, 1994 at 1A.

In addition, according to General Gordon Sullivan, Army Chief of Staff, the amount devoted to research and development in the 1996 budget is $4 billion less than what is necessary annually to modernize equipment and weapons. Too Little Money in '96 Budget for Modernization, ARMY TIMES, Mar. 27, 1995 at 16. Defense spending as a share of the Gross Domestic Product has dropped to approximately 3% while social spending has increased to over 15% Supporting the Force: The Industrial Base and Defense Conversion, THE OFFICER, Dec., 1993 at 28-29.

Army landpower experts such as General Jack N. Merritt (ret.) and former Army Chief of Staff General Carl Vuono (ret.), agreed that the "administration must stop putting the Army in the position of having to choose between modernization and personnel." AUSA NEWS SPECIAL REPORT at 2A. Further, these experts also noted that "the decades-old habit of robbing Peter to pay Paul—taking money from operations and maintenance accounts ... to pay for peacekeeping operations in places such as Somalia—was sliding the service toward the 'Hollow Force' dilemma of the late 1970s." Id.

Already the military is being expected to have the capability to fight two major regional conflicts simultaneously. Id. at 3A. To further expand the military's role while attempting to dramatically reduce its resources seems a foolish idea. In light of this situation, the military professionals believe that the active-duty army should consist of at least 12 divisions and 500,000 soldiers in order to "meet peacekeeping and peacemaking requirements and also be able to fight and win the two major regional conflicts as called for in the 'Bottom-Up Review.'" Id. at 2A.
ignores all the lessons history has taught us about the steep price paid for raiding the defense budget in times of geopolitical transformation.54 Citing World War II, Korea, and Iran as examples, McDaniel further states that history's lesson boils down to one axiom: "Weakness invites aggression."55 Military officers will recall their military history lessons about the fate of Task Force Smith at the beginning of the Korean War. Due to the dramatic drawdown in force following World War II, Task Force Smith had to meet the Communists' tanks with anti-tank shells that literally bounced off the modern armor employed by the opposition's tanks. United States' soldiers might as well have been throwing rocks. In order to avoid another Task Force Smith, the military continues to fight for the funding necessary to modernize the force, train the troops, and implement new systems such as the Comanche helicopter, F-22 aircraft, and military satellite technology.

B. The Media

Like the military, the media plays a vitally important role in the functioning of America's democratic system. This function highlights the need for the media to conduct its activities in a responsible fashion. While media power has always been evident,6 the advent of modern printing and broadcasting methods has had an inevitable impact on the media's potency. Some assert that the media is actually a fourth branch of government with power even beyond that of the other three branches because of its extraordinary ability to reach masses of diverse people on such a large scale.7 The fact that the First Amendment arguably

4. McDaniel, supra note 1, at 10A.
5. Id. Former President Reagan, insisting that the Strategic Defense Initiative (SDI) or "Star Wars" is still needed in this volatile world, stated: "If the . . . administration in Washington thinks we are no longer at risk, they need to open their eyes and take a long, hard look at the world." Reagan Says That SDI is Still Needed, THE OFFICER, July, 1993 at 26.

Commenting upon President Clinton's actions in deterring a new Iraqi invasion of Kuwait, Jeanne Kirkpatrick, former U.S. ambassador to the United Nations, asserted that this "success depended on American military strength—which is steadily declining. I hope Clinton understands that continued reductions in American military power will undermine his credibility as quickly in the world as on the playground." Clinton's 'Successes' Suspect, THE MACON TELEGRAPH, Nov. 1, 1994, at 6A.

6. Martin Linsky notes that the media was originally considered to be a part of the government. Linsky, Impact: How the Press Affects Federal Policymaking 13-14 (1986). To illustrate this point, Linsky points to the fact that Thomas Jefferson and Alexander Hamilton created the National Gazette and the Gazette of the United States, respectively, to promulgate their philosophies. Id.

requires no accountability by the media to the people underscores the potential for unhealthy control and domination.\textsuperscript{5}

The argument rages on about just what role and how much power the mass media does have. Obviously, the media fulfills the vital function of encouraging public debate and checking government abuses.\textsuperscript{9} In a nation that was founded at least partially on the principle of freedom from oppressive or tyrannical government control, a strong argument exists that the media must have significant strength.\textsuperscript{10} On the other hand, the fact remains that the media is really the only entity that has the daily capacity to control on a large scale what citizens know and how a story is presented to them.\textsuperscript{11}

The general lack of a visible and explicit check on media power can result in abuse.\textsuperscript{12} Media entities with their own agendas can wield the

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\textbf{J.C. MERRILL, THE IMPERATIVE OF FREEDOM: A PHILOSOPHY OF JOURNALISTIC AUTONOMY} (1974). Merrill believes that "the concept of the whole press as being a 'fourth branch of government' is no more than a fine sounding myth." \textit{Id.} at 117.


10. \textit{J.A. BARRON, PUBLIC RIGHTS AND THE PRIVATE PRESS} (1981). According to Barron, "media power is not a curse but a blessing. The enduring foe . . . is the government. A powerful enemy merits a worthy foe . . . . The press should be powerful because the purpose of press power is to curb the rising power of government." \textit{Id.} at 183. However, Barron also warns that potential also exists for media abuse of power depending on the interpretation of the First Amendment—a situation that necessarily implicates the judiciary. \textit{Id.} at 184.

11. For example, Maxwell McCombs reports on a study done of presidential speeches over a ten year period in which he discovered that a mere eight percent of every broadcast constituted the actual speech of the president, while the rest of the broadcast was devoted to varying types of media "analysis." Maxwell E. McCombs, Explorers and Surveyors: Expanding Strategies for Agenda-Setting Research, 69 JOURNALISM Q. 813, 819 (1992).

12. Jeane Kirkpatrick, former U.S. ambassador to the United Nations states:

\begin{quote}
I think that a kind of self-indulgence has arisen in our media along with the concentration of media power, and that the self-indulgence relates especially to the use of anonymous informants—"highly placed sources," "officials," "well-informed persons," "diplomats," "State Department Officials,"—all those anonymous categories of people whom we read quoted day in and day out. They are not accountable for the accuracy or inaccuracy of what they say either, but somehow the cumulative impact of the accounts of all these very self-interested, anonymous persons is very large, shaping the conception of political reality, which in turn shapes the responses of American voters.
\end{quote}

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power to affect public discourse on a particular issue.\textsuperscript{13} Jeane Kirkpatrick, former United States ambassador to the United Nations noted that “with the rise of electronic media, the possibility of deliberate manipulation of culture has been magnified ten zillion fold.”\textsuperscript{14} A recent survey of governmental policymakers reflects the sobering nature of the potential impact of that power.\textsuperscript{15} In that survey, 96% of those governmental officials interviewed said that the media has an effect on policymaking; over one-half believed that the influence exerted by the media was substantial.\textsuperscript{16} By extension, it follows that such influence affects not only the nature of the debate on public issues but also the outcome.\textsuperscript{17}

The natural result of this recognition is the inevitable complaints by various individuals and groups about bias among the dominant media culture. Several studies demonstrate that a large number of individuals, especially when they are part of a cognizable social group, are more

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\item \textsuperscript{13} See Owen M. Fiss, \textit{Why the State?}, DEMOCRACY AND THE MASS MEDIA (Judith Lichtenberg ed. 1990) at 142-43. Owen notes that, “Terror comes in many forms. The powers of the FCC and CBS differ ... but there is no reason to assume that one kind of power will be more inhibiting or limiting of public debate than the other.” Id. Further, Fiss asserts that “owners and managers of the media could use their power to protect themselves” and their supporters within the government. \textit{Id.} at 142.
\item \textsuperscript{14} \textit{AND THAT'S THE WAY IT IS(N'T): A REFERENCE GUIDE TO MEDIA BIAS}, xi (L. Brent Bozell III & Brent H. Baker, eds. 1990).
\item \textsuperscript{15} M. Linsky, \textit{supra} note 6, at 69.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{Id.} at 114.
\end{itemize}

By exercising control over the nation's agenda—picking and choosing which issues are fit for public debate, which news is "fit to print"—the news media can greatly influence the political direction of the country. They can ignore or ridicule some ideas and promote others. They can wreck a politician's career by taking a quote or two out of context or by spotlighting a weakness in his background. They can make winners look like losers and vice versa, knowing that, in the political world, appearance easily supplants reality.


I have never quite grasped the worry about the power of the press. After all, it speaks with a thousand voices, in constant dissonance. It has no power to arrest you, draft you, tax you, or even make you fill out a form, except a subscription form if you're agreeable. It is the power of government that has increased. Politicians have come to power in many countries and put press people in jail. I can't think of any place where the reverse has occurred.

\textit{Id.} at 61.
critical of media reporting. A Gallup study indicates that 53% of the respondents believe that the media "favors one side" of a story while 45% stated that the media is "politically biased [or motivated] in their reporting."19

The most curious offshoot of complaints about the media's veracity has been the rise of talk radio, a medium which is generally dominated by conservatives such as Rush Limbaugh, Michael Reagan, and G. Gordon Liddy. The extraordinary success of these individuals and the relative lack of similarly successful liberal commentators may indicate that the conservative citizens feel disenfranchised and silenced by what they perceive to be a liberal media that is out of touch with the average American. Limbaugh's book, *The Way Things Ought to Be*, with over 2.5 million copies in print, is the second best selling nonfiction book of all time behind Lee Iaccoca's book.20 The number of radio stations that carry his daily program has increased from 56 in 1988 to 622 by the end of 1993.21 The number of listeners per week increased from 260,000 in 1988 to 18 million by the end of 1993.22 These are numbers that merit analysis. Limbaugh himself states that "the press and the government are part of a Washington culture that's out of touch with reality, and has [sic] no idea how people in America really live."23 On the other hand, President Clinton has remarked that "[t]he Republicans and the far right in this country have their own media networks. We don't have anything like that."24

Still, conservatives, who do most of the complaining about media bias, contend that the rare conservative journalists openly profess their ideological philosophies and do not "pretend" to be objective reporters of the news—simply because most of them are commentators, not reporters. Meanwhile, conservatives contend, the general media establishment made up of large conglomerate print media like *The New York Times*, *The Washington Post*, *The Chicago Tribune*, *Time*, and *Newsweek*, as well as the network news organizations at CBS, ABC, NBC, and CNN, contain reporters who claim to be neutral and objective but actually are not.25 Conservatives assert that media bias is evident in the personal

21. Id.
22. Id.
23. Id. at 10.
25. Id.
editorial remarks made by reporters, the choice of stories that are aired or printed, the lack of commitment to truly presenting both sides to an issue, and rote acceptance without questioning of the liberal party line. Limbaugh cites two examples.\textsuperscript{23} L. Brent Bozell, III, director of the Media Research Center, states that "[t]he media by definition are biased. As study after study has shown, there is a strong liberal tilt."\textsuperscript{27} Despite these contentions, journalists themselves continue to proclaim objectivity.\textsuperscript{28} Ultimately, many would affirm Justice Frankfurter's statement

\textsuperscript{26} \textit{Id.} at 4, 16. Example number 1:
Take the homeless, for example. In May [1994], Sonya Ross of the Associated Press reported: "Government officials estimate that 7 million Americans are homeless, far more than the Census calculations of 600,000 people and far too many, they say, for current federal programs to help adequately." Folks, objective study after study (see Christopher Jencks' . . . book \textit{THE HOMELESS} . . .) has shown the Census Bureau figure is correct. But don't expect journalists to do their own digging on this.

\textit{Id.} at 16. Example number 2:
If the members of the mainstream media are so unaffected by their liberalism, then how do they explain their willingness to accept, without challenge, false information and statistics fed to them by left-wing interest groups . . . . Christina Hoff Summers catalogues in her . . . book, \textit{WHO STOLE FEMINISM?} the wholesale acceptance of statistics fed to the media by militant feminist advocacy groups—statistics that turn out to be utterly without foundation. The "study" that supposedly proved more women were beaten on Super Bowl Sunday than any other day, for example. Turned out to be a complete myth. Or the "report" that purported to prove that tens of thousands of women died each year from anorexia . . . . Another myth. Neither statistic turned out to have any basis in fact whatsoever, and yet, because they fit neatly into the world view of the left (that our society is evil, sexist, oppressive), they were repeated without independent confirmation and without skepticism.

\textit{Id.} at 4, 16. Meanwhile, proponents of the left would argue that Limbaugh is prone to make similar mistakes. For instance, one report by a self-proclaimed media watchdog group recently published a list of Limbaugh's mistakes. The list was widely circulated in the nation's newspapers, but in a twist that seems to support Limbaugh's argument, very few of these same papers chose to print Limbaugh's itemized response to those allegations. According to Limbaugh, he released a full-page substantive response to \textit{The Washington Post}, which had asked for his reaction, but the \textit{Post} only ran one sentence of that response.

\textit{Id.} at 7.

27. \textit{Id.} at 6. One such study is the Lichter Survey, conducted by Robert Lichter, Linda Lichter, and Stanley Rothman in 1986. Among other eyebrow raising facts, the Lichter Survey showed that the proportion of leading reporters and journalists who support a Democratic presidential candidate in any given year never drops below 80 percent. \textit{Id.} at 3.

28. \textit{Id.} at 4. Herbert J. Gans asserts in \textit{JOURNALISM REVIEW, Are U.S. Journalists Dangerously Liberal?}, that "[p]ersonal political beliefs are left at home, not only because journalists are trained to be objective and detached, but also because their credibility and their paychecks depend on their remaining detached." \textit{Id.}
that "freedom of the press . . . is not an end in itself but a means to the end of a free society."29

III. HISTORY OF THE MILITARY-JUDICIARY RELATIONSHIP

Generally, the relationship between the military and the federal courts has been harmonious. The courts have historically implemented a policy of considerable deference to the internal operating structure and decision making capacity of the armed forces. For example, in *Orloff v. Willoughby*,30 the Supreme Court noted that "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."31 The Court declared in *Gilligan v. Morgan*32 that "it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments, subject ALWAYS to civilian control of the Legislative and Executive Branches."33 Another case, *Goldman v. Weinberger*,34 resulted in declarations such as, "[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."35 One controversy involving the military and free speech provisions of the First Amendment, *Greer v. Spock*,36 resulted in the Court's comment: "One of the very purposes for which the Constitution was . . . established was to 'provide for the common defence'"37 and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function

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30. 345 U.S. 83 (1953). The Court concluded that a physician did not have a right to be commissioned. *Id.* at 90.
31. *Id.* at 94.
32. 413 U.S. 1 (1973). The Court considered the issue of whether a suit in a federal district court requesting an examination of the training, weapons and orders of a state's National Guard would violate Congress' constitutional power over the militia granted by Article I, Section 8, clause 16. *Id.* at 4.
33. *Id.* at 10 (emphasis in original).
34. 475 U.S. 503 (1986). The Court ruled that the First Amendment argument would not sustain a Jewish servicemember's challenge to the Air Force uniform regulation that prohibited the wearing of his yarmulke because the Air Force regulated evenhandedly. *Id.* at 510.
35. *Id.* at 510.
36. 424 U.S. 828 (1975). The Court upheld a Fort Dix regulation prohibiting political speeches, distributions of literature, or political demonstrations on post—leaving these matters to the discretion of the post commander. *Id.* at 840.
37. *Id.* at 837 (quoting U.S. Const. Preamble).
both explicit and indispensable.”

In *Rostker v. Goldberg*, the Supreme Court reversed the district court’s opinion, which held that the Selective Service’s exclusivity with respect to males was unconstitutional, by saying that the lower court was “quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of CONGRESS’ evaluation of that evidence.” Further, the Court noted that “[t]his is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”

Declaring that the congressional constitutional power to raise and support armies is “broad and sweeping,” the Court concluded that “the lack of competence on the part of the courts is marked” with respect to this area.

The federal courts have not, however, completely removed themselves from issues involving military affairs. Even in *Rostker*, where the Supreme Court ultimately decided to accord the ordinary deference, then Justice Rehnquist, writing the majority opinion, still stated that the Court should not ignore the Constitution just because a particular case happened to involve the military. On the other hand, he noted that the Constitution explicitly limits the Judiciary’s role with respect to the military. The Chief Justice’s statement demonstrates that the Court will not go so far as to pass altogether on considering all cases concerning the military and declare them to be political questions, as some have occasionally suggested.

The lower federal courts have been more bold in disregarding the deference ordinarily afforded the military by the Supreme Court. The district courts and courts of appeals have even intervened in military policies regarding the qualifications of its personnel—an area left virtually untouched by the Supreme Court, which rightfully recognizes its inability to determine the fitness of a particular individual to serve in the military. For example, due to pressure from interest groups, lower courts sought to open the door for the eventual introduction of

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39. 453 U.S. 57 (1981). The Selective Service Act did not violate the Fifth Amendment with respect to the Act’s provisions excluding females. *Id.* at 78-79.
40. *Id.* at 82-83.
41. *Id.* at 64-65.
42. *Id.* at 65 (quoting United States v. O’Brien, 391 U.S. 367, 377 (1968)).
44. *Id.* at 67.
45. *Id.*
homosexuals into open service. Thus, the future of the military-judiciary relationship appears muddled for now, especially in light of the potentially growing liberalism on the Supreme Court with the recent additions of Justices Ginsburg and Breyer.

IV. HISTORY OF THE MILITARY-MEDIA RELATIONSHIP

The tension between the military and the media exists due to the very nature of both. Military operations rely on secrecy and surprise as two fundamental tenets of successful warfare. Sun Tzu, the ancient Chinese warrior/strategist/philosopher, asserted that the “formation and procedure used by the military should not be divulged beforehand.” He also urged commanders to “[a]ttack when they [the enemy] are unprepared, make your move when they do not expect it.” United States military officers still learn that surprise is an important principle of war.

A free press, on the other hand, generally pursues the goal of informing the public about ALL of the news—attempting to ferret out any efforts to maintain secrecy. Occasionally, the media is able to practice some self discipline and yield to the interests of the greater good that would be served by postponing or cancelling a report about events of a sensitive nature. Unfortunately, however, this sort of self restraint has become increasingly rare in the face of high ratings pressure.

A. The Civil War

Some tension between the media and the military became evident during the Civil War, due in large measure to the nature of the conflict—an internal bitter struggle. Because the nation broke apart for the duration of hostilities, the ordinary standard operating procedures inside and outside of the military descended into chaos. Efforts to restrict the press were largely nonexistent and when it was tried, it was ineffective. The press generally had free reign in access to battlefields. Photographers plied their new trade by snapping gruesome pictures of the dead left behind. According to Joseph J. Mathews:

46. See, e.g., Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993). For a critical analysis of that decision, see Neff, Steffan v. Aspin: A Court's Unfortunate Reading of Reasonableness Out of the Military's Sensible Ban on Homosexuals, 45 MERCER L. REV. 1123 (1994). Since the original decision by a three judge panel at the D.C. Court of Appeals, the court reheard the case en banc. The earlier decision was reversed, and Steffan did not receive a commission or reinstatement to the Naval Academy.
48. Id. at 54.
The war found the North American press unhampered by any legal or traditional restrictions on military news. . . . Not until February 1862, when with congressional authorization the President placed all telegraph lines under military supervision, were measures of any genuine effectiveness adopted. Even then there was no prepublication control of information sent by couriers or by the mail. 49

B. Spanish-American War

The freedom enjoyed by the press during the Civil War continued mostly unabated during the Spanish-American War. Not only did press members join the troops on the front lines and report sensational details of the battles, they also published troop movements and locations. 50 The limited efforts to control publications of sensitive military operations failed. 51 In addition, as M.L. Stein notes, the health, welfare and safety of members of the media often depended upon the good graces of the soldiers themselves, who occasionally offered parts of their rations to feed the starving reporters unable to procure food from the understocked commissaries. 52 This relationship probably served as the most effective restraint against the media, many of whom owed the soldiers their lives and would be less likely to print anything that might harm their protectors and providers.

C. World War I

The American press ran into its first major reporting restrictions in the First World War, and both the American military and European governments imposed the restrictions. 53 Battlefield access was particularly rare in the beginning, and news reports were highly censored. 54 In fact, all news correspondents in Europe were required to be accredited, a status which was revoked if a particular reporter violated

51. Id.
52. Id. at 46.
53. See Short & Pope, History and Scope of the Press' Right of Access to Foreign Battlefields, 41 NAVLR 1, 3 n.11 (1993); Stein, supra note 50, at 63-64; and Mathews, supra note 49, at 159. According to both Stein and Mathews, some reporters were arrested as spies. Id.
publication rules or accreditation standards. As the war progressed, however, these tight restrictions on reporters loosened to the point that some of them were permitted to accompany troops into the trenches and into battle, and the government also decreased frontline censorship. Ultimately, the United States government issued domestic regulations of censorship which were voluntarily followed by the press. These regulations requested, but did not command, that the press maintain secrecy regarding military movements, locations, troop numbers, and port embarkation or debarkation locations. At the same time, Congress refused to implement into the Espionage Act of 1917 a provision which would have given the President the power to censure publication of information relating to national security.

D. World War II

The freedoms of access and publication the press began to enjoy in the latter stages of World War I carried over into World War II, perhaps the greatest example of a trusting media-military partnership in the history of the United States. Each side compromised and made concessions that led to peaceful coexistence. For the media's part, reporters voluntarily submitted to censorship measures of the government. The government, after establishing an Office of Censorship, a Code of Wartime Practices, which requested the newspapers to self-censor sensitive information, and continuing a practice of media accreditation, allowed

55. See Short & Pope, supra note 53, at 3 n.12; and Cassell, Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars," 73 GEO. L.J. 931, 937 (1985). According to Cassell, in order to receive accreditation, a reporter was required to appear personally before the Secretary of War; swear to report truthfully and refrain from reporting anything which might assist the enemy; submit a handwritten resume and statement of his intentions in Europe; remit a $1,000 fee to the Army and post a $10,000 bond which guaranteed good behavior; and wear a green armband with a red "C." Id.
56. Short & Pope, supra note 53, at 3; and STEIN, supra note 50, at 73.
57. Short & Pope, supra note 53, at 3.
reporters almost unlimited freedom of movement (even to the front lines) and access to soldiers and military leaders. These measures proved extremely effective and did not dramatically hamper news reporting efforts. The media did an excellent job in helping to galvanize public support for the war effort. Meanwhile, the military was able to effectively safeguard vital secrets like D-Day, the atomic bomb, and the breaking of Japanese communication codes.

E. Korean War

At the inception of the Korean War, the friendly relationship between the military and the press that existed during World War II continued. The media began by voluntarily censoring its own publications rather than submitting to compulsory government censorship. Gradually, military leadership became disenchanted with the stories printed and aired to the public, fearing that the media divulged important sensitive military information. As a result, military commanders like General MacArthur expelled reporters and increased censorship. According to one reporter, these censorship measures meant a “you-write-what-you-like-and-we’ll-shoot-you-if-we-don’t-like-it” system. For the first time, significant hostility began to develop between the military and the press, a situation which would later dramatically complicate American efforts in Vietnam.

F. Vietnam War

The Vietnam War marked perhaps the greatest liberalization of media restrictions by the military. The media received unencumbered battlefield access, no domestic censorship, voluntary censorship in Vietnam, and looser accreditation standards. In return, the media had to agree that it would not reveal highly sensitive military information such as troop location and movement. Interestingly, the real

66. Id.
67. KNIGHTLY, supra note 60, at 337.
68. Homonoff, supra note 65, at 379.
69. Id.
media battle occurred as the younger reporters began responding to personal beliefs in opposition to the war effort. Reports became increasingly cynical, and military officials as well as older reporters who recalled the "good old days" of World War II cooperation urged these younger reporters to become "part of the team." Tensions continued to rise on both sides, as the media responded to increasing pressures at home and fueled the fire with negative stories and disturbing pictures reflecting distrust of the military and the government. The government did not help matters by painting a falsely rosy picture of the war. Each side bore some responsibility for the deterioration of the relationship.

G. Grenada Invasion

The military, believing after Vietnam that the media was merely another obstacle to the successful conclusion of military campaigns, decided to severely restrict and in fact prohibit press access to the battlefield during the invasion of Grenada. Several members of the press, upon learning of the invasion, attempted to bypass these Pentagon regulations to reach the island and were thwarted and detained. The entire operation, which only took two days, had occurred in secrecy before the media learned of it. After the military secured the island and ensured that it was safe, the Department of Defense allowed in several journalists with a military escort for a few hours. It would be almost a week before reporters were allowed to enter the island unescorted. President Reagan justified the press limitations on the basis of secrecy and safety. Out of these restrictive media policies arose litigation that accomplished nothing in the way of establishing a firm policy.

70. See, e.g., Knightly, supra note 60, at 382; D. Minor, THE INFORMATION WAR 6, 11 (1970).
71. Cross & Griffin, supra note 64, at 1003.
72. Id. at 1004; Cassell, supra note 55, at 943.
73. Cassell, supra note 55, at 944. Contrary to some hysterical reports, the detained reporters enjoyed a pleasant day eating sweet rolls and drinking coffee in the officers' wardroom. They had attempted to board a helicopter that was to be a part of the raid. H.N. Schwarzkopf, IT DOESN'T TAKE A HERO 297-98 (1992).
74. Cassell, supra note 55, at 944.
75. Id.; Cross & Griffin, supra note 64, at 1005.
76. Frenzick, supra note 63, at 323 n.56.
77. Flynt v. Weinberger, 762 F.2d 134 (D.C. Cir. 1985). Flynt sued the Secretary of Defense in an attempt to overturn the restrictive access policy implemented by the military in Grenada. Flynt sought declarative and injunctive relief for alleged violations of the press' First Amendment right to gather news. Id. at 135. After the district court denied relief, the court of appeals affirmed, stating that the action was moot and refusing to comment on the merits of the plaintiff's position. Id.
H. The Sidle Commission

After Grenada, the Pentagon appointed retired General Winant K. Sidle, who had served as head of the military information office in Saigon during the Vietnam War, to lead a commission to study journalists' access, per the media's request. Some of the Sidle Commission's recommendations included conducting public relations planning simultaneously with operations planning; establishing the largest possible pools of reporters to witness operations; fostering an environment encouraging voluntary media compliance with military press regulations; allowing the Secretary of Defense to decide whether to create a pool of accredited reporters; providing communications facilities and transportation to the media when possible; and implementing educational programs to foster an understanding environment. The media agreed to follow these guidelines, which were generally received favorably.

I. Panama Invasion

In 1989, the military and media attempted to test the new policy promulgated by the Sidle Commission during the invasion of Panama that was engineered to oust Manuel Noriega from power. Press pools arrived soon after the fighting commenced but were unable to gain access to the areas of operation until one day after the hostilities began. The military, therefore, had not completely adhered to the Commission's standards, exhibiting the reluctance born of having been burned by the press in Vietnam.

J. The Persian Gulf War

During the Persian Gulf War, the military followed the Sidle Commission regulations, albeit not in the manner envisioned by the Commission. For instance, the armed forces never disbanded the press pools, despite the Commission's intention that the pools would be a temporary measure utilized only in the beginning of operations. Media members never went unescorted and many stories were censored. During the conflict, the media rarely outwardly protested the

78. Cassell, supra note 55, at 945.
79. Id. at 946.
80. Id.
81. Frenznick, supra note 63, at 325.
83. Id.
manner of the implementation of the guidelines. An overwhelming majority of the American public, perhaps feeling guilty about the treatment received by Vietnam veterans, rallied around the troops and the war effort. Thus, the media became careful about criticizing military leaders, and most citizens agreed with the premise of strict media restrictions in the theater of operations. Ironically, most individuals now began questioning the integrity of the media rather than the military, which was rightfully receiving high confidence marks in public opinion polls. The media contributed to this phenomenon by airing press conferences depicting highly efficient and professional leadership in the military and a corresponding ignorance among journalists. In their zealous attempts to get ratings and juicy stories, reporters became pawns of both sides.

The United States, seizing the high ground of morality in conjunction with Coalition forces, won an overwhelming victory in this arena. Negative press stories about the Coalition from an Iraqi perspective proved patently false and ridiculous, as U.S. military leaders easily demonstrated. Meanwhile the media, which attempted to take great measures in establishing a policy of “neutrality,” unwittingly played into the U.S. military’s hands by airing these apparently favorable stories about Iraq that any sensible journalist should have recognized as being suspicious and implausible. Although these propaganda tactics by Saddam Hussein appeared to be a rational ploy in light of the publicized hostility between the press and the military, the Iraqis failed to

84. But see Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991). Plaintiffs claimed that the pooling regulations unconstitutionally hampered their ability to gather news by restricting access to the battlefield. Id. at 1561. The court declined to grant injunctive or declaratory relief because claims were moot. Id. at 1575.

85. According to Gallup polls during this period, the media received high confidence ratings from only 34.5% and 28% for television and newspaper reporters, respectively. G. Gallup & F. Newport, M.D., Confidence in Major U.S. Institutions at Alltime Low, GALLUP POLL MONTHLY, Oct. 1991 at 36-37. On the other hand, high confidence ratings for the military reached an almost unprecedented peak of 77%, making the military the institution having the highest level of public confidence. Id. at 37.

86. General H. Norman Schwarzkopf was determined not to repeat the problems encountered by “stonewalling” the media during the Grenada invasion. SCHWARZKOPF, supra note 73, at 398. General Schwarzkopf also notes that the U.S. Central Command interceded on behalf of the American press after the Saudis requested that all reporters leave. Id. at 399.

He also effectively applied lessons he learned from Vietnam and vowed to follow four rules when dealing with the media: (1) Do not be intimidated by the media—military leaders knew much more about what was happening than the media did; (2) No rule says that all questions must be answered, especially if; (3) Answering a question might help the enemy, and perhaps most importantly; (4) Do not lie to the American people. Id.

87. Id. at 400.
effectively execute this policy—perhaps because they underestimated the resolve and intelligence of the American public.88

In addition, U.S. commanders used the media to its military strategic advantage. U.S. Central Command, knowing that the Iraqis were blind and deaf from the Coalition’s successful efforts to knock out command and control systems in Baghdad, manipulated an ignorant media into providing the enemy with false information. Since the Iraqis were receiving their only military information from the American media, American leaders maneuvered reporters to the Kuwait border to cover a supposed Marine landing that was intended to be a decoy all along.89 Meanwhile, American army divisions completed an “end run” around the Iraqi troops in the West and cut them off from Baghdad.

Ironically, the conflict in Iraq was a crowning achievement for media technology as well as military technology. Satellite hook-ups enabled the American public to view live the incredible pictures of devastating Coalition airpower, precision bombing of strategic military targets, and the extraordinary scud-busting exploits of the Patriot missiles.90 CNN’s ratings skyrocketed, as Americans stayed home from work to view extended live coverage from both sides of a war for the first time ever.91 Military generals and political leaders became media darlings; Schwarzkopf, Powell, and Cheney replaced Oprah, Donahue, and Geraldo as the most watched television personalities.92

Meanwhile, the media privately chafed at the restrictions placed upon them, unable to express outward resentment due to the military’s popularity with the public. Later, Howell Raines of The New York Times

88. For example, consider two such occasions. In one, Iraq claimed that the United States had killed thousands of civilians by bombing a baby milk plant. The media’s seizure of this story and somber portrayal of Iraqi “workers” with white lab coats on that said in English, “Baby Milk Plant, Iraq” made the press look ridiculous. U.S. military leaders easily countered this “story” with evidence that this so-called milk plant was indeed a military installation.

Another situation involved some negative reports about the capabilities of the Patriot Missile. These speculations stemmed largely from the media’s liberal bias. The Patriots were one of the earliest systems designed by President Reagan’s Star Wars program, which received considerable criticism in the media. Ironically, the media contributed to the refutation of their cynicism with the stark footage of the Patriots’ effectiveness.

89. Richard H. Sinnreich, The Changing Face of Battlefield Reporting, ARMY, November 1994, at 30, 34. As Sinnreich notes: “The resulting tactical surprise contributed materially to one of the quickest and cheapest offensive campaigns in the history of warfare. In the process, the divorce of the military from the media became complete. To deceive the enemy, the press itself... was deliberately deceived.” Id.

90. Id.
91. Id.
92. Id.
lamented that in the Persian Gulf War, "We lost . . . . The military managed us completely."\(^{93}\) Another reporter noted that "[t]he Persian Gulf was the media's Cannae, and the press played Varro to Schwarzkopf's Hannibal."\(^{94}\) Statements such as these demonstrate the state of competition that exists between the media and the military—a competition that continues today and for the foreseeable future.

**K. The Current Situation**

After the Gulf War, the media demanded that the military map out new regulations for news coverage from battlefields in the future. The Department of Defense met with some members of the media in 1992 to create guidelines.\(^{95}\) The guidelines sought to allow a more independent operating structure for reporters covering military operations by cutting down on press pools, prohibiting military escorts from interfering with news reports, and offering reporters extended access to soldiers.\(^{96}\)

The successful results of the Persian Gulf War, at least from the military perspective, actually underscored the notion that the media must not only be controlled for defensive purposes, but that it may also now be used as an offensive weapon. In the profession of arms, military commanders can, will, and should exploit any potential weapons, including the media. From the current state of affairs between the military and the media, future clashes appear inevitable "between two equally vital (and stubborn) public institutions."\(^{97}\)

**V. STATUS OF MEDIA'S ABILITY TO GATHER NEWS**

**A. General**

While the broad language of the First Amendment appears to allow unrestricted news reporting,\(^{98}\) the courts have not interpreted it this way. Instead, this clause has generally been read as prohibiting prior restraint upon the publication of news or opinions.\(^{99}\) As time passed,
the Supreme Court addressed specifically the media's right to gather news and began to place some limitations on it. The defining case of this area is *Branzburg v. Hayes.* While noting that protecting the ability to gather news is important to maintaining freedom of the press, the Court nevertheless stated that "the First Amendment does not invalidate every incidental burdening of the press." Further, the press does not have the right to publish anything it desires. The conclusion reached by the Court in considering newsgathering was that the press has no "constitutional right of special access to information not available to the public generally."

A pair of cases, *Pell v. Procunier* and *Saxbe v. Washington Post,* candidly discussed the constitutional protections afforded newsgathering activities. These cases involved press access to prison inmates, in which the Court held that the press had no First Amendment right to receive greater access to these individuals than ordinary citizens. The Court noted that "[t]he proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally ... finds no support in the words of the Constitution or in any decision of this Court." As these cases suggest, the media's considerable right to gather and report news is not absolute.

B. National Security or Military Context

The rights of media newsgathering activities in military operations remain ambiguous and largely unsettled by the judiciary. The two most recent challenges by the press to the military's authority to restrict media access ended in the courts' refusal to comment on the merits of the case due to the problem of mootness. The latest Department of Defense (DOD) guidelines do not suggest whether or not the military has the right to review news stories for national security reasons before they are published or aired. Two early Supreme Court cases suggest that prior restraints or access restrictions imposed by the military in times

deeded contrary to the public welfare." *Id.* at 462.

100. 408 U.S. 666 (1972).
101. *Branzburg,* 408 U.S. at 682.
102. *Id.* at 683.
103. *Id.* at 684.
106. *Pell,* 417 U.S. at 834; *Saxbe,* 417 U.S. at 849.
of war for security purposes would be appropriate. These decisions, combined with the preexisting limitations on newsgathering imposed by the Supreme Court in Branzburg, Pell, and Saxbe, hint that the press has available very little legal recourse to protest military regulations of the media. One federal court allowed the Department of Defense to prevent publication of an article on how to make a hydrogen bomb. This decision appears to confirm the main military argument that it should have broad enough powers to restrain publication of any information that might be harmful to national security or soldiers' safety. Such interests arguably outweigh the media's reliance on the guarantees of the First Amendment and the importance of an informed citizenry. Thus, even under a strict scrutiny analysis by the courts, the military could meet the considerable burden of showing that it has a compelling interest in preventing such publications in order to safeguard the security of the nation. Such a decision becomes a question of fact determined on a case by case basis. Certainly, ordinary citizens would not commonly have access to battlefields upon which American soldiers are waging wars. As a result, journalists cannot claim a significant right to such access.

VI. JUDICIAL ROLE IN MILITARY/MEDIA CONFLICT

A. Separation of Powers

1. Constitutional Structure. Essentially, the issue is one involving the foundation of the Constitution—the separation of powers. The Constitution clearly delineates this separation of powers, leaving the raising and supporting of armies and navies to the Congress and tapping the president as the Commander-in-Chief. The only power the judiciary has in relation to the military is incidental—interpretation of the Constitution. This power can emerge when actions of the military somehow affect constitutional rights. Problems arise when two fundamental constitutional principles conflict, as they often do in media-
military relations. Which one should yield? Justice Blackmun commented on this conflict by noting that the First Amendment is merely one provision of the Constitution and not necessarily deserving of superior status. Assuming that what Justice Blackmun said is true, then the principle of the separation of powers requires deference on the part of the courts when considering acts by the military.

The Founding Fathers envisioned, and indeed established, a limited government designed to protect fundamental God-given rights such as life and property. One of the purposes of a central federal government is to protect these essential natural rights from threats both inside and outside the nation. The body empowered to implement this role is the Legislature, and to a lesser extent, the Executive. The Judiciary is designed to act as a counter-majoritarian influence on these bodies when they themselves trample on explicit fundamental individual rights as expressed in the Constitution. No branch of government should seek to usurp the authority of another and is prevented from doing so by the structure of the Constitution. Unfortunately, the Judiciary has overstepped its bounds, especially beginning in the past half-century with the Warren Court.

2. Judicial Restraint. The analysis in favor of judicial restraint, which has been generally discarded and disregarded today, is based on sound principles of logic and reason utilized by the Founding Fathers in the establishment of this Republic. These principles intellectually oppose the visceral appeals to emotion relied upon by the advocates of activism. Justice Frankfurter provided perhaps the most eloquent and brilliant defense of judicial restraint in his dissenting opinion in West Virginia State Board of Education v. Barnette. In Barnette, Justice

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113. New York Times Co. v. United States, 403 U.S. 713, 748 (1971) (Burger, C.J., dissenting). Chief Justice Burger points out that "[o]nly those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy." Id.

Clearly, many liberals who formerly viewed the First Amendment as an absolute do not currently apply such a principle when it comes to unpopular or politically incorrect viewpoints, such as the current pro-life protests.

114. 403 U.S. at 761 (Blackmun, J., dissenting). "I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court." Id.

115. Actually, a strong argument can be made that it was the decision by Justice Marshall in Marbury v. Madison, 5 U.S. 137 (1803), that paved the way for the current wave of judicial activism. While the topic of judicial review goes beyond the scope of this Comment, it is interesting to note that prior to the Warren Court, the Supreme Court was generally fairly "judicious" in its use of this power.

116. 319 U.S. 624 (1943) (Frankfurter, J., dissenting).
Frankfurter noted that "[b]efore a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution." Justice Frankfurter's prophetic concern was that judges were beginning to interpret the Constitution according to their personal feelings and thoughts about a case rather than focusing upon what the Constitution actually says.

3. Application of Restraint to Military Functions. While military technology and strategy might have changed drastically since the adoption of the Constitution, the fact remains that military success depends upon people—officers, noncommissioned officers and well-trained soldiers, sailors, airmen, and marines always determine the outcome of battle. Technology changes, but people do not. As a result, even proponents of a "living and breathing" Constitution that is changeable with the times must admit that constitutional provisions regarding the governing of the military and its actions are just as appropriate and applicable today as they were in 1789. Understanding that military power has become more lethal, it is even more important that the judiciary respect the autonomy of the military and afford the proper deference in decisions made by military leaders regarding the armed forces and their operations—actions that affect the security of the nation.

B. Political Question Doctrine

The principle of deference, however, does not necessarily imply that the judiciary should not "suit up" for the game in these situations; it only asserts that judges should generally remain "on the sidelines." Of course, some military actions should never come before the courts because they are political questions that judges have no authority to

117. Id. at 666 (emphasis added). I would be remiss if I did not point out some other nuggets from this opinion by Justice Frankfurter. For instance, he noted: "As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard." Id. at 647. Further, he stated:

[The comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which a reasonable justification can be offered.

Id. at 649. Finally, Justice Frankfurter remarked: "[T]o deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." Id. at 662.
consider. In fact, probably most military activities, decisions, and policies would fall under the auspices of the political question doctrine.

The Supreme Court expressly established the potential parameters of a political question in *Baker v. Carr.* In *Baker*, the Court noted that cases involving political issues or the protection of political rights do not necessarily qualify as nonjusticiable political questions. Justice Brennan commented that such an assertion "is little more than a play on words." He also stated that when deciding whether a case is a political question, the Court should ponder "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination [as] dominant considerations." Additionally, he declared that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." The Court specifically outlined characteristics that would make an issue into a political question. Such aspects include an explicit constitutional delegation of an issue to an alternate branch of government, a shortage of standards workable or ascertainable by the courts, an inability to determine without policy decisions earmarked conclusively for judgment outside of the judiciary, the impossibility of the judiciary's independent efforts to resolve a question without respecting the other branches of government, an extraordinary need to respect the political decision of a different branch, or the possibility of inconsistency and embarrassment as a result of conflicting proclamations from different departments of government.

Application of the political question standard promulgated in *Baker* can be troublesome, however, especially when the Court's exercise of jurisdiction falls under the auspices of foreign affairs and duration of hostilities—a category that includes military operations. The Court noted in a 1986 case that the political question doctrine forbids judicial

118. 369 U.S. 186 (1962). The petitioners sued the Tennessee Secretary of State, Attorney General, and state election officials and sought to have a 1901 reapportionment act declared unconstitutional for being violative of equal protection. The lower federal courts found that remedy in this case did not belong with the courts, but the Supreme Court held that the district court had jurisdiction over the matter, petitioners raised a justiciable cause of action, and the petitioners had standing to bring the case before the Court. *Id.* at 197-98.


120. *Id.*

121. *Id.* at 210 (quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939)).

122. *Id.*

123. *Id.* at 217.

124. *Id.*
review of any "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." While noting that the judiciary ordinarily is unable to reach decisions regarding national policies with other countries, the Court also cited Baker for the proposition that courts do have authority to interpret treaties and executive agreements, as well as the task of interpreting congressional legislation as a matter of course. The Court finally concluded that despite the fact that the controversy involved an international treaty with "political overtones," it could not avoid its role of interpreting statutes and ruled the case to be justiciable.

When the military is implicated, the question becomes even more problematic. One lower federal court refused to consider a case involving an assertion by an inductee into the armed forces that President Nixon's decision to mine harbors and bomb targets in North Vietnam was an impermissible escalation of the war in contravention of explicit congressional authorization. In that case, the Second Circuit Court of Appeals stated that "[j]udges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation" would constitute an escalation of war or a changing tactical decision made within a grander scheme of strategy. The same court reached an identical conclusion in a subsequent case with a similar issue—the bombing of Cambodia. The court noted that whether a particular military action was within the province of the decision-making powers of the Commander-in-Chief was exactly the kind of factual question "involving military and diplomatic expertise not vested in the judiciary, which make the issue political and thus beyond the competence of that court or this court to determine."

The analysis of the political question doctrine in relation to the military differs, however, when the challenge to military action is not related to its institutional functioning, internal policy making, or personnel decisions. Media challenges to the military's press regulations

125. Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 230 (1986). This case addressed an international treaty that resulted in the Secretary of Commerce's refusal to certify the petitioner as having violated the treaty. Id. at 223.
126. Id. at 230.
127. Id.
129. Id. at 1155.
131. Id. at 1310.
would fall into this classification. The Court in Baker acknowledged that if a party could rely upon a constitutional provision that qualifies as a judicially enforceable right, the courts should consider the case to be justiciable and outside the realm of the political question doctrine. By disputing the legitimacy of press regulations by the military, the media does not raise issues which impact upon the internal operating structure of the military, its personnel, or its strategy decisions. The media certainly can assert a judicially enforceable right, namely the First Amendment guarantees of a free press. This is an area which obviously does not move beyond traditional spheres of judicial expertise.

On the other hand, the judiciary does not have the authority to establish the specific guidelines that the military ought to follow. Instead, the courts are limited to determining if the standard press regulations the military implements are overbroad and violative of the media's First Amendment rights. Courts may require, if they choose, that the military abandon far reaching and unspecific regulations that do not appear to exist for any other purpose than to penalize the press. The judiciary would extend too far, however, if it were to endeavor to review specifically tailored restrictions for the press in the battlefield areas or other restricted zones of military operations. If the military is able to implement a policy that demonstrates that it is narrowly tailored, fact specific, and precisely designed for strategic purposes, the judiciary should be powerless to strike down such a regulation even if it severely restricts media activity. The reason for these distinctions lie in the nature of the regulations. Specific restrictions that are drawn in order to protect the integrity, secrecy, and ultimate success of specific types of military operations lie within the unique realm of strategic military decisions which the courts have no business in questioning. As long as the regulations on their face are not designed merely as punitive measures against the press or as an intentional destruction of constitutional rights, the judiciary should leave them undisturbed. And let us be realistic; most military policies are implemented because military officials believe them to be in the best interest of accomplishing the essential and dangerous mission given to the armed forces. Whether or not it is good policy for the military to be highly restrictive of the press is another question altogether.

C. Media Perspective

The media would argue that the powerful First Amendment guarantees are just the sort of issue the courts should address when those

rights are impacted by military action. The First Amendment was
enacted in order to prevent tyranny by a central government over the
people, and vague notions of security are insufficient to abridge that
right. Secrecy within government operations is anathema to a democra-
v. United States, the job of the media is to "serve the governed, not
the governors." This responsibility extends to the duty of preventing
the government "from deceiving the people and sending them off to
distant lands to die of foreign fevers and foreign shot and shell." The
media thus serves as a "watchdog" of sorts over executive powers
that carry much autonomy in the realm of foreign affairs. This media
function is essential in a democratic system. It is a duty recognized
by the Founding Fathers as being of the highest significance.

While recognizing the importance of maintaining secrecy of some
degree of foreign affairs, the media would ask the courts to intervene
to prohibit prior restraints against the publication of such stories, relying
on the traditional tactic of punishing those who disclose unauthorized or
damaging information. Prior restraints, however, are permissible,
albeit in a very narrow scope of situations.

Essentially, First Amendment guarantees of a free press are so
fundamental to the Constitution that any abridgement of that freedom
requires the government to establish a compelling interest for its actions.
Under strict scrutiny, that is an extremely formidable burden to meet
and should not be satisfied by falling back on a general classification of
national security. Journalists would in fact persuasively argue that
national security often will be better served by ensuring that constitu-

official's action for libel based on criticism of his performance).
134. 403 U.S. 713 (1971).
135. Id. at 717.
136. Id.
137. According to James Madison:
[T]he great and essential rights of the people are secured against legislative as
well as against executive ambition. They are secured, not by laws paramount to
prerogative, but by constitutions paramount to laws. This security of the freedom
of the press requires that it should be exempt not only from previous restraint by
the Executive, ... but from legislative restraint also.
Near v. Minnesota, 283 U.S. 697, 715 (1931) (quoting Report on the Virginia Resolutions,
139. See Near v. Minnesota, 283 U.S. 697 (1931). "The objection has been made that
the principle as to immunity from previous restraint is stated too broadly, if every such
restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to
previous restraint is not absolutely unlimited." Id. at 714.
tional rights are not steamrolled by an inattentive (at best) or tyrannical (at worst) government.

D. Military Perspective

On the other hand, the military relies on the fact that its power to wage war per congressional declaration is "the power to wage war successfully."\(^{140}\) This power requires confidentiality and secrecy. Any breach is likely to lead to serious casualties at the least, and a threat to the existence of the nation at the extreme.\(^{141}\) As the Supreme Court noted in *Schenck v. United States*,\(^{142}\) "[w]hen a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."\(^{143}\) This power to prevent damage to national interests as a result of publication of information dangerous to national security issues arises from specific constitutional measures granting power to Congress to make laws necessary for operation of the military and to the president as Commander-in-Chief and architect of foreign affairs.\(^{144}\)

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141. President Washington, upon refusing to relinquish papers in his possession regarding the negotiation of the Jay Treaty noted:

The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.

New York Times Co. v. United States, 403 U.S. 713, 757 (1971) (Burger, J., dissenting) (quoting 1 J. Richardson, Messages and Papers of the Presidents 194-95 (1896)).

142. 249 U.S. 47 (1919). The Court affirmed the convictions of defendants who had violated the Espionage Act of 1917, 40 Stat. 217, 219. *Id. at 52.* The defendants had printed and distributed a newsletter to new military recruits that encouraged them to disregard the draft and leave the armed forces. *Id. at 49.* While acknowledging that the defendants' actions would probably be protected by the Constitution in any other time, Justice Holmes noted that such activities would not be protected in time of war. *Id. at 52.* He stated:

[The character of every act depends upon the circumstances in which it was done . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

*Id.* (emphasis added).

143. *Schenck*, 249 U.S. at 52 (emphasis added).

144. *See supra* notes 111-12.
in the realm of military operations and the media, prior restraints on the publication of sensitive military information is the only course of action that will protect the operation and safety of the soldiers. Punishing offending journalists after the fact is a little bit like closing the barn doors after the horses have escaped. Reticence on the part of military leaders in allowing the media some freedom is understandable in light of frequent irresponsibility on the part of the press in exhibiting restraint.

While the First Amendment rights of the press are no doubt vital to a democratic society, they are by no means absolute.145 “Liberty of speech, and of the press, is not an absolute right.”146 In addition, “[t]here is no constitutional right to publish a fact merely because it is true.”147 Courts should approach these questions with the ordinary amount of deference generally attributed to the military. While the government should have to meet the burden of establishing the facts necessary to permit prior restraints and other media restrictions, courts should presume that they are legitimate. Military officials are in a far better position to assess potential security and safety risks to an armed operation than can a panel of judges sitting safely in the comfort of their courtroom. The presumption should exist that since military officers take an oath to “protect and preserve” the Constitution, they will be loathe to blatantly violate it. Granted, some officers may overstep their bounds and make unsound judgments. These overreactions, however, can generally be traced to an attitude held by many soldiers that the media is not on their side and would betray them for a story. Unfortunately, ever since the Vietnam War, this attitude is understandable and legitimate. Ironically, the period which exhibited the loosest regulations of the media was also the worst example of irresponsibility and dishonesty demonstrated by the military and the government in American history. Knowing the war was going badly and that they were losing public support as a result of highly negative news stories, military leaders fabricated body counts, and politicians refused to allow the military to wage war in the fashion that would produce victory, due largely to political pressures at home.

E. The Problem of Mootness

Whenever these controversies arise between the military and the press, one factor virtually always comes into play—mootness. The

146. Id. at 708.
147. Id.
nature of war and other military operations is generally one of remark-
able swiftness. The same cannot be said for our legal system. By the
time a particular case winds its way through the courts, the issues have
already ceased to be live controversies reviewable by the judiciary. In
Murphy v. Hunt,148 the Supreme Court defined a case as moot when
the issues “presented are no longer live or the parties lack a legally
cognizable interest in the outcome.”149 Obviously, most battles and
many wars, especially with today's technology, have long concluded by
the time the case sees the light of day in a courtroom. The particular
media member(s) no longer have an interest in that specific scenario.

Potentially, the mootness problem could be overcome if the issue
involved is “capable of repetition, yet evading review.”150 This doctrine
applies if two prerequisites exist. The first condition is that the
contested action must have been too brief to be completely litigated prior
to its conclusion; the second one is that a “reasonable expectation” must
exist that the party bringing the action could be “subjected to the same
action again.”151 While military actions will frequently satisfy the first
prong of the test, the second one is likely to be rare.

Although general regulations of the press by the military are likely to
carry over at least partially from conflict to conflict, and many of
the same media members are likely to be covering the stories again,
application of the regulations will change depending upon the character
of the contest. Because technology changes so quickly and necessarily
alters how the military will prosecute each battle and each war, the
same scenarios are unlikely to repeat. Further, military strategy and
utilization of military power change depending upon the opposition. All
of these factors indicate the extreme logistical difficulties the courts have
in considering these types of disputes, even in the rare cases when the
judiciary has the authority to do so.

F. Judicial Deference

Extreme deference, therefore, appears to best serve the interests of the
nation and its people. The courts, in a litany of cases, have recognized
this principle of judicial deference—even when it comes to competing
constitutional rights of the individual. In Goldman v. Weinberger,152
the Supreme Court noted that “[o]ur review of military regulations

149. Id. at 481.
150. Southern Pacific Terminal v. Interstate Commerce Comm'n, 219 U.S. 498, 515
(1911).
152. 475 U.S. 503 (1986).
challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.\footnote{153} The Court noted in 
\textit{Parker v. Levy}\footnote{154} that “for reasons dictating a different application of First Amendment principles in the military context, . . . we think that ‘the weighty countervailing policies,’ which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context.”\footnote{155}

\section*{VII. Possibility of Partnership?}

If the courts are the improper place to resolve the difficulties between the military and the media, where does that leave the dilemma?

\subsection*{A. Media Self-Restraint?}

Many would prefer that the media “rejoin the team” and abandon the “neutrality at all costs” stance the press has taken to an extreme, especially since the Vietnam War. While no one would suggest that the media relinquish objectivity, much of the hostility between reporters and soldiers would diminish if the latter could feel confident that they will not have their backs stabbed by self-serving journalists. Military officials would feel more comfortable if they knew that the media gave them the benefit of the doubt and trusted their judgment when they request that the press sit on a story temporarily for national security purposes. During World War II, journalists generally assiduously adhered to principles of self restraint, knowing that the military would entrust them with the information they needed to know as a result of their cooperation. At that time, reporters viewed themselves as “auxiliaries of the armed forces” in a conflict that had sweeping public support.\footnote{156}

Today, unfortunately, many journalists in the United States apparently have adopted the attitude that they are neutral observers and reporters first and foremost. The fact that they happen to be American appears to be of little or no importance. They seem to place the American public’s right to know at the pinnacle of the hierarchy of morality. Certainly, such a principle is absolutely essential in our system, and an effective democratic government cannot exist without an informed citizenry. The problem is that the media’s zeal in pursuing

\footnotesize{\begin{itemize}
  \item \textit{Id.} at 507.
  \item \textit{Id.} at 733 (1974).
  \item \textit{Id.} at 760 (quoting Broadrick v. Oklahoma, \textit{413 U.S.} 601, 611 (1973)).
  \item Sinnreich, \textit{supra} note 89, at 32.
\end{itemize}}
and publishing a story at all costs in order to meet a deadline or receive a Pulitzer can result in the ultimate cost—the deaths of countless brave American soldiers. This point cannot be overstated. If parents could be asked ahead of time whether they would rather find out this week that their son is dead or wait until next week, or next year, or the next decade and discover that he was still alive, the answer would be easy. For some reason, however, the American media does not appear to be cognizant of this basic principle.

An example of a journalist who understood and practiced the concept of partial objectivity (as opposed to neutrality) was the late Mark Watson, a press corps legend who was the military correspondent for the *Baltimore Sun* and had originally started as a youthful reporter for the *Stars and Stripes* during the First World War. Lt. Col. (ret.) Richard P. Taffe related a fascinating anecdote about Watson in a recent military publication. Taffe tells how Watson was riding with a busload of fellow journalists on a high-level press trip to Panama. The bus began by taking a roundabout route from Southern Command headquarters to Albrook Air Force Base, but an inexperienced lieutenant ordered the driver to take a more direct route—right past two open hangars containing top secret U-2 aircraft. "Watson stood up and proclaimed: 'Gentlemen, that was not a U-2 we just saw, the United States doesn't have any U-2s in Panama.'" Taffe went on to comment that "[n]ot a word of that incident ever appeared in print or on the air. I wonder if that could happen with today's press corps."

The answer to Taffe's rumination is probably not, in light of the comments made and various actions by some of the leading members of the media today. For example, at a 1987 conference at Columbia University, famous "60 Minutes" anchor Mike Wallace stated that he would unhesitatingly accompany enemy troops into battle against American soldiers in the name of press neutrality.

After the Vietnam War, Boston University professor John Corry characterized the prevalent and pervasive attitude among the press favoring neutrality as the "neutrality principle." Corry noted that the press "passed a turning point in journalism . . . . The old journa-
tic ideal of objectivity has given way to a more porous standard... according to [which] reporters may—indeed should—stand midway between two opposing sides, even when one of the two sides is their own." 164

The most recent example of the "neutrality principle" put into practice was during the Persian Gulf War. At that time, Peter Arnett was caught inside Iraq at the inception of Operation Desert Storm. While his initial reports seemed independent and objective, Iraqi leaders were able to exert control over the content and timing of CNN's broadcast and manipulated the unwitting reporter into serving Iraqi interests.165 Fortunately, the American public did not take this Iraqi bait, and Arnett and CNN received enormous criticism for what Americans believed to be borderline treason.166 Perhaps this experience will teach the media a lesson in the future. In fact, not only did Saddam Hussein underestimate the resolve and awareness of the American public, the United States media also miscalculated the intelligence of the people.

Another factor hindering the prospects of future exhibitions of self restraint by the media is the amount of liberal bias that exists in news reporting today. The evidence for this situation is exhibited as much by what is not aired or printed as what is. For example, the press rarely if ever reports positive news about big corporations, pro-life organizations, opponents of homosexuality, religion, etc. In fact, proponents of conservative philosophies are frequently portrayed as uncaring, racist, sexist, bigoted homophobes. The mainstream media is simply out of touch with the vast majority of American citizens who generally hold conservative viewpoints. The recent election results overwhelmingly demonstrate this fact. The most comprehensive survey of both broadcast and print journalists showed that the percentage of journalists who support Democratic candidates in elections is never less than 80%.167 Other results from that survey show that Fidel Castro received a more favorable rating than Ronald Reagan among Columbia University Journalism graduates, 71% of whom thought that American society is "alienating" and 50% of whom think that American institutions need to be overhauled; 68% of all journalists believe that the government ought to reduce the income gap—in other words, they favor socialism; 57% believe that America uses resources immorally; and 56% believe that the

164. Id.
165. Id.
166. Id.
cause of poverty can be traced to American exploitation of Third World nations.\textsuperscript{168}

When reporting about social issues, the press often trivializes religion as a tool of the "radical right," promotes alternative lifestyles as healthy and normal, generally portrays pro-life individuals as extremists and pro-choice supporters as reasonable and logical despite the fact that a vast number of Americans oppose abortion for legitimate moral and religious reasons, and adopts left wing positions and statistics without question—no matter how ridiculous.

The result of all of this bias is that the media is predisposed to disliking the military, an American institution known for its general adherence to traditional conservative values like family, patriotism, responsibility in conjunction with freedom, discipline, and judgment based only upon merit. The media delights in discovering and overplaying scandal whenever it occurs in the military—often creating one when it is not readily apparent. This atmosphere is perhaps an understandable leftover from the 1960s, and many journalists today are products of that era who refuse to relinquish their distrust of the military. Unfortunately, as the Lichter study demonstrated, even today's journalism students have bought into this liberal orthodoxy, so the trend does not appear to be likely to end anytime soon.

B. Peaceful Coexistence?

Perhaps the responsibility for mending the fences between the two sides should lie largely with the military, an institution which should recognize the necessity to win the battle for public opinion. Because the military continues to enjoy the confidence of the people to a much larger extent than the press, it should capitalize on this opportunity to rehabilitate the media to the extent that the military needs the media to galvanize public support behind any armed conflict. Winning wars requires more than defeating the other side's army on the battlefield; it also requires the ability to effectively communicate military, diplomatic, economic, social and cultural messages as well.\textsuperscript{169} Public opinion, both domestically and worldwide, is needed in order to effectively prosecute a war. This lesson was truly reflected in the events of the Persian Gulf War, where American leaders explicitly outlined the who, what, why, when, and how of the war to the American public, thereby fostering an environment of trust and understanding. Intelligent use of the Reserve Forces legitimized the war effort to the average citizen, who undoubtedly

\textsuperscript{168} Id.

\textsuperscript{169} Noyes, supra note 157, at 31.
knew at least one family member, friend, or neighbor who contributed to the military effort in this way. The principle of the citizen-soldier went a long way toward winning the favor of the American people, who would not stand for early media attempts to hype war protests reminiscent of the Vietnam era.

Harry F. Noyes contends that military efforts to unduly burden the press are counterproductive to the military's ultimate goal. He claims that the media needs to see (although not interfere with) the battle in order to credibly communicate the results to the world. He asserts that the media functioned in the Persian Gulf exactly the way the Founding Fathers envisioned: The free flow and competition for information illuminated the truth for people worldwide; "truth's superior merits revealed which facts and ideas to believe; and the diversity of news and views convinced most people the news flow was free and trustworthy." Media restrictions, he states, could have ultimately undermined the credibility of the positive news coming from the theater of operations if it were not for highly skilled and articulate military leaders who spoke directly with the American people. The fact that the media was able to cover stories military officials did not want them to cover—even when those stories proved to ultimately be false—lent even more credibility to the favorable stories, and Saddam Hussein's was unable to paint himself as a sympathetic figure. An independent media verified the veracity of military claims of precision hits on Iraqi military installations and destruction of military targets. The independent media played an important role in supporting American claims about the minute numbers of Iraqi citizens' deaths at the Amiriya incident in comparison with inflated Iraqi estimates. Further, the media was able to verify that the target hit in that situation was in fact a military bunker, contrary to Iraq's claims. Noyes claims that if some U.S. officers had had their way, the media would have been forced not to report from inside Iraq. If that had been the case, the world would not have learned from "objective" sources about the accuracy of reports of overwhelming battlefield victories, Hussein's mistreatment of his country's own citizens, the murders and rapes that took place in Kuwait at the hands

170. Id.
171. Id. at 33.
172. Id.
173. Id. at 33-34.
174. Id. at 34.
175. Id.
176. Iraq actually claimed victory at its crushing defeat in the Battle of Khafji!
of Iraqi soldiers, the repulsion of scud missile attacks in Israel by Patriot Missiles, and the significant role of non-American Coalition forces—a fact which eased the concerns of Americans who feared that our soldiers had to do all of the fighting.\textsuperscript{177}

The fact that all of these claims of the American military were corroborated by independent media sources known for their skepticism and bias gave the armed forces extraordinary credibility and helped win an overwhelming victory in the battle for public support. By restricting access too extensively, the military runs the risk of emasculating on site press to the point that editors and commentators sitting in the United States who know far less than these reporters are able to edit and censor news to match up favorably with their own agendas.\textsuperscript{178} Noyes concludes his insightful article with the statement that “[t]he Gulf War confirms the primacy of public opinion in war fighting and the media's critical influence on that opinion. If the media can do so much good when we are trying to thwart them, what might they do for America with our full cooperation?”\textsuperscript{179}

While many of Noyes' opinions contain a great deal of merit, he overlooks the fact that the media does not voluntarily present diverse viewpoints unless presented with inescapable proof. Even then, as was the case with certain military weapons systems that clearly performed well in the war, the media still attempted to disparage them as duds. Amazingly, some journalists attempted to downplay the effectiveness of the Patriot Missile even after all of America saw its dramatic and breathtaking accomplishments over the skies of Israel and Saudi Arabia. How soon they must think we forget. The Patriot was an unmitigated success and showed that "Star Wars" is not such a farfetched idea after all. Thus, the competition for ideas is not quite as ideal as Noyes might believe.

In addition, one of the lessons of Vietnam was that loose press restrictions do not necessarily result in truth or admirable conduct by either institution, especially in light of the liberal media bias discussed earlier. Clearly, the goals of the military and today's media almost always conflict. Secrecy, surprise, and unrestricted access to information are mutually exclusive.

\textsuperscript{177} Noyes, supra note 157, at 34.  
\textsuperscript{178} Id. at 38.  
\textsuperscript{179} Id.
VIII. CONCLUSION

The complex nature of the relationship between the military, judiciary, and the media does not lend itself to an easy resolution. Issues such as separation of powers, judicial restraint, the public's right to know the activities of its government, the media's First Amendment rights, and the importance of secrecy and autonomy in successful military operations often appear to be mutually exclusive unresolvable controversies. It is difficult to conceive of an externally imposed solution that would best balance all of the competing interests. The optimal resolution perhaps lies in the expectations of responsibility we should demand of individuals and institutions alike in a democracy. These institutions must all exhibit some self restraint and discipline when their interests collide. The media must recognize that it cannot continue to adhere to the “neutrality principle.” The results of the Gulf War should demonstrate to the media that they “will be treated as [either] allies or adversaries.”

The best approach would be a reestablishment of a partially objective standard in the tradition of Ernie Pyle. With the lesson that information has now become a weapon as powerful as any other, we cannot expect military officers to keep that arrow in the quiver. If they do, the opposition will not. Ultimately the media must acknowledge that “[o]n tomorrow's battlefields, there will be no place for neutrals.”

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180. Sinnreich, supra note 89, at 34.
181. Id.