

# SECURITY REVIEWS OF MEDIA REPORTS ON MILITARY OPERATIONS: A RESPONSE TO PROFESSOR LEE

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Professor William E. Lee argued in a recent article in this journal that military security reviews of media reports as practiced during the Persian Gulf War and Operation Enduring Freedom were inconsistent with First Amendment freedoms.<sup>1</sup> In his article, Professor Lee conceded “the notion that the First Amendment right of access developed by the Supreme Court in the context of judicial proceedings does not transfer to wartime military operations.”<sup>2</sup> However, he drew the questionable conclusion that “[p]reventing access to places or government information is less harmful to free expression than government action that prevents or punishes publication of information the press has acquired.”<sup>3</sup> In making his argument, Professor Lee questioned the assertion of mine in a 1995 article that security reviews were an acceptable means for the military to control the release of sensitive information for national security purposes.<sup>4</sup>

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1. William E. Lee, “Security Review” and the First Amendment, 25 HARV. J. L. & PUB. POL’Y 743 (2002).

2. *Id.* at 744.

3. *Id.* at 745.

4. *Id.* at 755 (quoting Captain William A. Wilcox, Jr., *Media Coverage of Military*

Professor Lee was correct in his assertion that the military may limit media access to the battlefield. Although litigation on behalf of media organizations has not resulted in a definitive decision regarding media access to the battlefield,<sup>5</sup> there is a line of cases that establishes that the government may limit access to activities when there is a compelling interest to do so.<sup>6</sup> The cases addressing the government's control of information under certain compelling circumstances lead to the unavoidable conclusion that the military's press restrictions, such as security reviews, are constitutionally permissible. Further, conditioning media access to military operations on military security reviews is a longstanding tradition in combat journalism and an important tool for the military to use to ensure that the security of operations not be compromised. Certainly the military should apply this tool judiciously, so as not to interfere unduly with fair reporting of the news. However, to simply limit reporters' access to information or establish ground rules for reporting information about operations, as Professor Lee suggests,<sup>7</sup> and then to trust the media to follow those ground rules is, from both a public policy and an operational security standpoint, worse than the security reviews. Instead, the military must follow a consistent policy regarding handling of media during military operations, including security reviews as necessary, but allowing as much media access as possible under operational circumstances. Certainly there is a tension at times between the media's desire to report the news and the military's need to control sensitive information; nevertheless, in instances when that tension exists, the discretion of the commander in the field to determine how and when to control information must prevail.

#### I. CASE LAW ON MEDIA ACCESS

"Due to the reluctance of the press to sue the government during wartime," Professor Lee wrote, "judicial involvement in the relationship between the press and the military is highly unlikely."<sup>8</sup> However, the media have not shown such a reluctance to sue the military over access.<sup>9</sup> Rather, the abbreviated nature of recent

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*Operations: OPLAW Meets the First Amendment*, ARMY LAW., May 1995, at 42, 51 [hereinafter *OPLAW*].

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

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

7. Lee, *supra* note 1, at 763.

8. *Id.* at 745.

9. See e.g., *Flynt v. Weinberger*, 588 F. Supp. 57 (D.D.C. 1984); *Nation Magazine*, 762

international conflicts and the mootness doctrine have combined to limit judicial intervention in the media-military relationship. During the invasion of Grenada in 1983, for instance, the media were outraged after being kept off the island for two days following the initial invasion.<sup>10</sup> *Hustler* magazine publisher Larry Flynt took the military to court seeking a declaratory judgment and injunctive relief, but the case was dismissed as moot.<sup>11</sup> The district court further determined that the case did not meet the requirements of the “capable of repetition, yet evading review” exception to the mootness doctrine, because there was no “reasonable expectation” that the controversy would recur.<sup>12</sup> The court elaborated further that, even if the case were a live controversy, the court would not issue an injunction, because it would “limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest.”<sup>13</sup>

Because of press restrictions during the Persian Gulf War, members of the media brought an action against the military seeking declaratory judgment and injunctive relief.<sup>14</sup> *Nation Magazine* and others contended that pool reporting regulations violated the First Amendment by inhibiting newsgathering. In *Nation Magazine*, the district court determined that the plaintiffs met the “capable of repetition, yet evading review” test, and refused to dismiss the case as moot.<sup>15</sup> However, the conclusion of the war rendered moot any claims for injunctive relief.<sup>16</sup> The court also refused to grant a declaratory judgment, stating: “[s]ince the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation.”<sup>17</sup> Security review procedures were not challenged in the suit.

While cases specifically addressing media access to the battlefield have not been conclusive, commentators have argued that the media

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F. Supp. at 1558.

10. See Matthew J. Jacobs, Note, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 684-85 (1992).

11. *Flynt*, 588 F. Supp. at 59.

12. *Id.*

13. *Id.* at 60.

14. See *Nation Magazine*, 762 F. Supp. at 1558.

15. *Id.* at 1569.

16. *Id.* at 1569-70.

17. *Id.* at 1572.

have a constitutional right of access to the battlefield.<sup>18</sup> In support of this view they look to *Branzburg v. Hayes*,<sup>19</sup> in which the United States Supreme Court noted that “protection for seeking out the news” was critical to First Amendment freedom of the press.<sup>20</sup> Nevertheless, the Court held that a reporter could be compelled to reveal a confidential source to a grand jury, because the government has a compelling interest in investigating crimes.<sup>21</sup>

Whatever encouragement *Branzburg* may have provided to proponents of a right of access, however, was dampened in a series of cases involving media access to prisons and jails. In *Pell v. Procunier*<sup>22</sup> and *Saxbe v. Washington Post*,<sup>23</sup> the Court held that the Constitution does not require the government to grant press access to information not available to the public generally. In both cases, government regulations limiting reporters’ access to prisoners were upheld. In *Houchins v. KQED*,<sup>24</sup> the Court further determined that the First Amendment does not mandate a right of access to government information or sources of information, and that there is no constitutional right of access to county jails.<sup>25</sup>

A series of cases that considered press access to courtrooms followed the prison cases. Beginning with *Richmond Newspapers v. Virginia*,<sup>26</sup> the Court recognized a media right of access to criminal trials.<sup>27</sup> That right was no greater, however, than the general public’s right to attend criminal trials.<sup>28</sup> Further, the *Richmond Newspapers* Court recognized the need for open trials as a means of assuring that the government is conducting fair trials.<sup>29</sup> Therefore, closing trials to the media not only involves the right of a free press, but the Sixth Amendment right of the accused to a public trial.<sup>30</sup>

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

19. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

20. *Id.* at 681.

21. *Id.* at 700-01.

22. 417 U.S. 817 (1974).

23. 417 U.S. 843 (1974).

24. 438 U.S. 1 (1978).

25. *Id.* at 15-16.

26. 448 U.S. 555 (1980).

27. *Id.* at 580.

28. See *id.* at 572-73.

29. *Id.* at 571-72.

30. See *Id.*

Two years later, *Globe Newspaper Co. v. Superior Court*<sup>31</sup> solidified the Court's view that the First Amendment guaranteed a right of access to criminal trials because criminal trials historically had been public.<sup>32</sup> The Court has subsequently upheld the right of access of the media to criminal trials in other cases.<sup>33</sup> Critics of military press restrictions cite this line of cases in arguing that a right of access to the battlefield exists.<sup>34</sup>

However, *Globe Newspaper* established a three-part test to determine whether the media is entitled to access to a government activity. First, for a right of access to exist, the activity must have been open historically.<sup>35</sup> Second, media access must play a significant role in the function of the government activity.<sup>36</sup> Finally, media access can be limited despite meeting the first two prongs of the test if a compelling government interest exists to limit access and these limits are narrowly tailored to meet that compelling interest.<sup>37</sup>

While *Globe Newspaper* found that access to criminal trials met all those tests, the Court would likely find that access to military operations does not. First, and most importantly, warfare does not involve a historical pattern of openness.<sup>38</sup> While reporters have at times enjoyed a great deal of freedom in covering warfare—such as during the Vietnam War<sup>39</sup>—the military has frequently imposed strict limitations on press access to the battlefield, including security reviews of media reports, when the need arose.<sup>40</sup> Since the Civil War—the first major American conflict covered by large numbers of war correspondents—field commanders have employed means of regulating the press, including censorship and sometimes expulsion from the forward line of troops.<sup>41</sup> The military historically has determined when there is a need to limit access and what means must

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31. 457 U.S. 596 (1982).

32. *See id.* at 605.

33. *See, e.g.,* *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

34. *See* Kenealey, *supra* note 18, at 287; Roger W. Pincus, Comment, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813 (1987).

35. *See Globe Newspaper*, 457 U.S. at 605.

36. *See id.* at 606.

37. *See id.* at 606-07.

38. For a detailed discussion of controls the military has historically placed on the media, see Paul G. Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada and "Off-the-Record Wars,"* 73 GEO. L. J. 931 (1985).

39. *See* Jacobs, *supra* note 10, at 683-84.

40. *See generally* Cassell, *supra* note 38, at 933-41.

41. *See id.* at 935.

be used.<sup>42</sup> Past practices have included total denials of access, credentials for reporters, censorship, and, more recently, pool reporting.<sup>43</sup> In addition, the power of military commanders to exclude members of the public when they believe the exclusion is necessary for mission efficiency has long been recognized—even in peacetime.<sup>44</sup>

Second, while some news coverage of warfare is warranted to make the public aware of a conflict, the media's role in warfare is not as significant as it is in the justice system. A lack of battlefield coverage does not implicate other constitutional protections, such as an accused's right to Due Process, as does a lack of coverage of criminal trials. Arguably, some level of press coverage is necessary to keep the nation informed. Access to the battlefield would not be necessary, however, to meet that need.

Finally, there is a compelling government interest in controlling access to military operations. The most important reasons to control media access are to ensure operations security and to maintain the advantage of surprise. However, in making its case for press controls, the military might also point to logistical problems in dealing with numerous reporters without some controls in place to determine their identities, or even to possible negative effects on troop morale.

Some commentators have argued that the military's system of prepublication reviews employed during the Persian Gulf War and during Operation Enduring Freedom violated the constitutional prohibition against prior restraints of news.<sup>45</sup> However, the system, as employed during these armed conflicts, was constitutionally sound.

The prior restraints doctrine arose from the seminal case of *Near v. Minnesota*.<sup>46</sup> The *Near* Court struck down a Minnesota statute that provided for the abatement, as a nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical."<sup>47</sup> Minnesota could hardly have had a set of facts that better matched the conduct addressed by that statute. State officials had shut down a newspaper known as *The Saturday Press*, an unquestionably reckless

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42. *See id.* at 933-41.

43. *See id.*; *see also* Kenealey, *supra* note 18, at 287.

44. *See* Greer v. Spock, 424 U.S. 828 (1976).

45. *See, e.g.*, Jacobs, *supra* note 10, at 675.

46. 283 U.S. 697 (1931).

47. *Id.* at 701-02.

newspaper that attacked local politicians and “Jew gangsters.”<sup>48</sup> However, the fact that freedom of the press “may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct,” the Court held. “Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.”<sup>49</sup> However, Chief Justice Hughes observed that the right to publish was not unlimited. “No one would question,” he wrote, “but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops.”<sup>50</sup>

Prepublication security reviews of media reports, however, do not constitute the kind of prior restraints prohibited by *Near*. During the Gulf War, the news organizations agreed to security reviews as a condition on participating in a pool system of reporting. As I asserted in my 1995 article, the military may lawfully request the news media to agree to a system of prepublication review as a condition on access to the battlefield. The military has no legal authority to prevent an article from being published. Indeed, in an age of global electronic communications, such an effort would be impossible. Rather, in the event a reporter released compromising information, the military would have no remedy until after the fact.

## II. THE ROLE OF SECURITY REVIEWS IN PROTECTING THE MILITARY MISSION

Professor Lee took issue with my 1995 assertion that if “a news organization flouted the agreement and published without a security review, that would be in effect a breach of contract, and the military’s recourse would be to deny future access.”<sup>51</sup> The statement was made in the context of illustrating why security reviews do not constitute a prior restraint under *Near*.<sup>52</sup> My point was that the security review arrangement was analogous to an agreement that a reporter

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48. FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 44-49 (1981).

49. *Near*, 283 U.S. at 720.

50. *Id.* at 716. The Court further examined the doctrine in the “Pentagon Papers” case, *New York Times v. United States*, 403 U.S. 713 (1971) (per curiam). The Nixon administration had sought to enjoin publication of materials pertaining to the United States’ involvement in the Vietnam War. *See id.* at 714. The Court reiterated its belief that the government “carries a heavy burden of showing justification for the imposition of such a restraint.” *Id.*

51. Lee, *supra* note 1, at 758.

52. OPLAW, *supra* note 4, at 51.

occasionally will make under which he or she agrees that, in exchange for certain information or an interview with a source, the reporter will allow the source to read the story before it is published.<sup>53</sup> Prior restraint is not implicated, because the reporter has agreed to the condition to get some information to which that reporter would not otherwise have access. Further, even if security reviews were considered prior restraints, the prior restraint doctrine still provides an exception for publication of "national security" information that would cause "irreparable damage to our Nation or its people."<sup>54</sup> Any court considering the issue would likely uphold a reasonable security review system, regardless of whether the news media had consented to the reviews. As I asserted in my 1995 article, however, a court might view a security review system more critically if it unnecessarily delayed routine stories.

Arguing against the military's security review system, however, Professor Lee suggested that the government's withholding information or access to certain areas "is less harmful to free expression than government action that prevents or punishes publication of information the press has acquired."<sup>55</sup> He noted that during the Persian Gulf War security reviews were at times "used to suppress embarrassing information . . . such as a report about Navy pilots viewing pornographic films before leaving on missions" rather than to police purely operational security information.<sup>56</sup> Military spokesmen have conceded that some military commanders were overzealous in slowing publication of stories at times or suggesting changes that did not involve security concerns; however, those were exceptions that did not reflect official policy.<sup>57</sup> Part of the thrust of my 1995 article was cautionary toward the military to use prudence in exercising its control over information.<sup>58</sup> "Operational security," I noted in 1995, "normally should be the only reason for blocking

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53. Consider, for instance, if an opportunity for an exclusive interview with a recluse writer such as J.D. Salinger or Thomas Pynchon, or billionaire Howard Hughes before his death, were conditioned on the subject's prior review of a reporter's article. Although a reporter would not normally agree to such a condition, the situation could make it almost irresistible.

54. *New York Times*, 403 U.S. at 730 (Stewart, J., concurring).

55. Lee, *supra* note 1, at 745.

56. *Id.* at 758-59.

57. See Jacobs, *supra* note 10, at 688.

58. Others within the military were also counseling prudence. See, e.g., Richard F. Machamer Jr., *Avoiding a Military-Media War in the Next Armed Conflict*, MIL. REV., Apr. 1993, at 43.

media access to an operation or to information.”<sup>59</sup> I noted further that, in a more prolonged conflict, “[c]ontinued strict press restrictions might have marred the public’s perception of war efforts and could have led to Congress imposing less flexible media relations rules.”<sup>60</sup> I noted that even during the relatively short duration of the Persian Gulf War, several members of Congress initiated inquiries into the press pool and security review procedures followed by the military.<sup>61</sup>

Arguing against security reviews, Professor Lee proposed instead a system under which reporters would be given ground rules prior to allowing press access to military operations, including “types of information that, if published, would harm operational security.”<sup>62</sup> Then, he argued, “the press should be left alone.”<sup>63</sup> This argument, while understandably attractive to journalists, ignores the complexities of operational security. As then-Defense Secretary Richard Cheney noted during the early hours of the Persian Gulf ground campaign, “[e]ven the most innocent-sounding information could be used directly against the men and women whose lives are on the line carrying out these operations.”<sup>64</sup> During a sensitive phase of an operation, a commander cannot allow information to flow uncontrolled to the public. Security reviews, while they should be used sparingly, are one of the tools that a field commander must have to ensure that the security of his or her operations are not compromised. Otherwise, if a military press liaison were to make a simple mistake and let reporters see or hear some information that could compromise the military mission or unnecessarily risk lives, there would be no final safety net—no way to catch and correct that error—before the information was disseminated.

Further, while on-the-spot reporting may be somewhat compromised by security reviews, Professor Lee ignored the media’s role as the initial chroniclers of history. Reporters are witnesses to the military’s conduct of war. Even if restricted in the daily reports they file, they arguably still positively affect the way our forces conduct themselves in that, if only after the fact, they can expose strategic or

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59. *OPLAW*, *supra* note 4, at 42.

60. *Id.*

61. *Id.* at 42 n.7 (citing Debra Gersch, *Senate to Begin Hearings on Media Access to War News*, EDITOR & PUBLISHER, Feb. 16, 1991, at 11).

62. Lee, *supra* note 1, at 763.

63. *Id.*

64. Richard L. Berke, *News From the Gulf Is Good and Cheney’s Press Curbs are Loosened*, N.Y. TIMES, Feb. 25, 1991, at A17.

logistical mistakes, poor troop morale or leadership, or even war crimes. Concern about how a military campaign will appear in history may ensure that the United States military conducts itself in a manner its nation would endorse.

### III. A PRUDENT APPROACH TO MILITARY/MEDIA RELATIONS

During the Persian Gulf War, perhaps in part as a result of the military's strict media controls, some reporters chose to avoid military press restrictions by striking out on their own.<sup>65</sup> Then, on January 21, 1991, the empty vehicle of CBS newsman Bob Simon, producer Peter Bluff, cameraman Roberto Alvarez, and soundman Juan Caldera was found near the Saudi-Kuwaiti border, with footprints in the sand toward the border of Kuwait.<sup>66</sup> The Iraqis captured and imprisoned Simon and his party for more than six weeks. Simon later said the Iraqis had fed him only one meal a day of bread and thin soup, had beaten him, and had accused him of being a spy. "I think I'll cover wars again," he told a press conference, "but it'll never be the same . . . a certain childlike sense of invulnerability, it's gone and I'll never get it back."<sup>67</sup> Other journalists as well opted to avoid military press restrictions,<sup>68</sup> and at one point as many as twenty-eight were thought to be missing.

Certainly, no one among the military or the media wishes to see the horrors of Mr. Simon's experience repeated. Although a combat zone is an inherently dangerous place, reporters who adhere to the ground rules can expect a modicum of protection that those who strike out on their own cannot. Arguably, the military has a duty to protect members of the press working within their areas of operation.<sup>69</sup> If media representatives do not operate within established procedures, however, their protection becomes problematic. Further, the presence of uncredentialed civilians roaming freely within a combat zone poses a security problem for field commanders, who may find it difficult to determine whether they are legitimate reporters or spies.<sup>70</sup>

As Professor Lee noted, journalists have voiced serious concerns

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65. Richard Zoglin, *Jumping Out of the Pool*, TIME, Feb. 18, 1991, at 39.

66. Debra Gersch, *Press Pools on the Verge of Collapse?*, EDITOR & PUBLISHER, Feb. 2, 1991, at 7.

67. Debra Gersch, *Missing in Iraq*, EDITOR & PUBLISHER, Mar. 9, 1991, at 8.

68. *Id.* at 7.

69. See, e.g., Melissa Wells-Petry, *Reporters as the Guardians of Freedom*, MIL. REV., Feb. 1993, at 31.

70. OPLAW, *supra* note 4, at 51.

over the military's means of regulating the media during military operations.<sup>71</sup> "Media relations during the Persian Gulf War," I noted in my 1995 article, "perhaps were not the resounding success that the military public affairs sector has proclaimed."<sup>72</sup> Although the news coverage at the time was largely supportive of Gulf War efforts, a longer conflict with more casualties might have been more problematic for public relations officers. Media representatives were sharply critical about restrictions imposed by the military during the Gulf War.<sup>73</sup> "[V]ery little, if any, individual initiative and original reporting" would result from such restrictions, argued the trade journal *Editor & Publisher*. "The American people will be the losers."<sup>74</sup>

The military today and members of the news media suffer a strained relationship. The roots of the rift between the military and the news media are difficult to ascertain. Some of the military's perception of the news media grew out of the Vietnam War, in which the press encountered few restrictions. Some commentators have blamed the loss of the war on unflattering coverage by the news media<sup>75</sup> or have argued that negative press contributed to the public's diminishing perception of the war. "When AP correspondent Peter Arnett compared the use of tear gas by South Vietnamese forces to the employment of mustard gas in World War I, for example, or when *New York Times* reporter Harrison Salisbury relayed enemy propaganda on the cruelty of American bombing in North Vietnam," wrote William M. Hammond, "they may or may not have given assistance to the enemy, but they assuredly reinforced the arguments of those members of the official community who sought to restrict press reporting of the war."<sup>76</sup> Some reporters<sup>77</sup> were even perceived as being aligned with the antiwar movement. In response, the media pointed to a growing mistrust of the military because of what they perceived as exaggerations of success during the early years of the

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71. Lee, *supra* note 1, at 746.

72. *OPLAW*, *supra* note 4, at 42.

73. Machamer, *supra* note 58, at 51.

74. Editorial, *Pentagon Rules*, *EDITOR & PUBLISHER*, Jan. 12, 1991, at 4.

75. For discussions on whether the news media "lost" the Vietnam War, see WILLIAM J. MALL, *TO KILL A MESSENGER* (1970); *contra* GLENN MACDONALD, *REPORT OR DISTORT* (1973); WILLIAM C. WESTMORELAND, *A SOLDIER REPORTS* 420 (1976).

76. WILLIAM M. HAMMOND, *PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1968-1973* 6 (1996).

77. *Id.* at 357.

war.<sup>78</sup>

Further contributing to military officials' frustration with the news media during wartime is widespread inexperience among war correspondents. As I discussed in my 1995 article, reporters who cover Congress, executive agencies, and the judiciary do so on a long-term basis, and consequently develop an understanding of the institutions they cover.<sup>79</sup> However, because the United States is not always at war, there is no corps of permanent war correspondents. When the nation goes to war, reporters are taken off other beats, and many have little or no experience covering military matters. "Most of the almost 1,500-member U.S. press corps I saw during Desert Storm couldn't tell a tank from a turtle," wrote columnist David Hackworth.<sup>80</sup> As a result, busy officers assigned to brief reporters on the war had to spend additional time answering rudimentary questions to ensure that information was understood.

Conversely, media representatives, to some extent, may share a public perception that the military, and particularly the officer corps, has a vested interest in promoting war. Because American officers' status and pay are based on rank, and wartime is perceived as the best time to advance in rank, there is a longstanding belief that some officers may desire war to improve their own fortunes.<sup>81</sup> In addition to this common misperception, the military has at times appeared overzealous in its efforts to promote its own war efforts, which zeal has further engendered media distrust.<sup>82</sup>

Nevertheless, the media and the military have a symbiotic relationship. The press depends on military access to report the news. Because of this, representatives of the news media will continue to push for as much access to military events as possible. Military leaders, on the other hand, must realize that the media will be a substantial part of every war effort. As I asserted in 1995, public support for military operations is critical to sustain an extended war effort. Thus, "the existing chill in media relations must be thawed to ensure that the military will be able to tell its story."<sup>83</sup>

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78. WILLIAM M. HAMMOND, PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1962-1968 320 (1988).

79. *OPLAW*, *supra* note 4, at 44.

80. David H. Hackworth, *Learning How to Cover a War*, NEWSWEEK, Dec. 21, 1992, at 32.

81. Cf. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274-80 (Richard D. Heffner ed., Penguin Books 1956).

82. See HAMMOND, *supra* note 78, at 320.

83. *OPLAW*, *supra* note 4, at 42.

Because of the need to maintain a healthy relationship between the news media and the military, I cautioned in 1995 that the military should not be inflexible regarding media access. Though I concluded that security reviews, along with other constraints on media access, were constitutionally permissible, I also urged that “the military generally should limit media access only when there is a compelling interest in so doing.”<sup>84</sup> This, I urged, should usually be limited to situations involving operations security. Finally, I urged that the military adhere to the general framework established by the “Sidle Panel” recommendations, which were prompted by media dissatisfaction with the Grenada invasion and included input from representatives from journalism schools, the media, and the military.<sup>85</sup>

The Panel’s recommendations can be summarized as follows:

1. Plan media relations efforts concurrently with operational planning.
2. If pools are necessary, include the maximum number of reporters, and maintain pools for the minimum duration.
3. Generally, call for voluntary compliance of the media with press restrictions.
4. Plan for sufficient equipment and qualified personnel to meet media relations needs.
5. Make communications facilities available to the media as soon as practicable.
6. Make theatre transportation available to the media.
7. Promote media-military understanding through meetings and educational programs.<sup>86</sup>

While the Sidle Panel provided the most coherent rules to date for addressing media-military relations, I also urged in my 1995 article that military lawyers advise commanders to refrain from placing unnecessary restrictions on the press.<sup>87</sup>

#### IV. CONCLUSION

Professor Lee was correct in his assertion that “American

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84. *Id.* at 51.

85. Cassell, *supra* note 38, at 946.

86. *Id.*

87. *OPLAW*, *supra* note 4, at 52.

journalists naturally are averse to government review of news stories.”<sup>88</sup> It is doubtless true as well that, at times during the press coverage of the Gulf War, overzealous military officers unnecessarily delayed the release of some stories, exceeded operational security concerns during security reviews, and “veered into image control.”<sup>89</sup> Nevertheless, the security review is a legal and necessary tool that ensures that the military can focus on the primary purpose of a military engagement—to fight an enemy. The press perceives its role as producing as much relevant news about a conflict as possible; the military, however, has an intense security concern that must take precedence on the battlefield. Nevertheless, the military must exercise its security powers wisely. Press reporting can have a major impact on the United States’ war efforts. While military leaders must be vigilant in ensuring that security information stay secure, they must be equally vigilant in ensuring that the media be able to tell its story. As I noted in 1995, the military’s treatment of the media can become a part of the story, and unnecessary press restrictions can make a difficult situation appear even worse than it is.<sup>90</sup>

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88. Lee, *supra* note 1, at 759.

89. *Id.*

90. *OPLAW*, *supra* note 4, at 53.